

A Guide to the Sex Discrimination Act 1975

1 Introduction

1.1 The Sex Discrimination Act 1975 (as amended), referred to in this guide as the ‘Act’, which applies to the whole of Great Britain but not to Northern Ireland, makes sex discrimination generally unlawful in employment, training and related matters (where discrimination against married persons is also dealt with), in education, in the provision of goods, facilities and services, and in the disposal and management of premises. The Act gives individuals a right of direct access to the civil courts and industrial tribunals for legal remedies for unlawful discrimination. Northern Ireland has similar provisions.

The Equal Opportunities Commission

1.2 The Act establishes an Equal Opportunities Commission to help enforce the legislation and to promote equality of opportunity between the sexes generally. The Commission has a general responsibility for advising the Government on the working of the Act and the Equal pay Act 1970 (as amended), referred to in this guide as the ‘Equal Pay Act’, and it is also a principal source of information and advice for the general public about the Acts. The Commission has discretion, where there are special considerations, to assist individuals who consider that they may have been discriminated against. The Commission’s powers and functions are explained in greater detail at the end of this guide (chapter 11).

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The structure of the guide

1.3 The emphasis in the chapters which follow is on the provision of the Act which are likely to be of particular interest and importance to those on whom it imposes obligations or confers rights.

1.4 The following chapters of the guide fall into three parts. The first part explains what it is that the Act makes unlawful; chapter 2 deals with the definitions of discrimination; chapter 3 explains the provisions relating to discrimination in employment, training and related matters; chapter 4 covers discrimination in education; and chapter 5, discrimination in the provision of goods, facilities and services and premises. Chapter 6 outlines the provision of the Act which make unlawful certain types of conduct which, though not themselves discriminatory, produce or might result in, discrimination; and chapter 7 deals with the general exceptions to the provisions described in chapters 3 to 6. The second part (chapters 8-10) explains how the requirements not to discriminate are enforced: chapter 8 describes the structure of the enforcement provisions and chapters 9 and 10 deal with legal proceedings in individual cases before tribunals and courts. The third part - chapter 11 - explains in detail the role of the Equal Opportunities Commission.

1.5 This guide does not have the force of law; only the Act has that, and authoritative interpretations of the Act can be provided only by the courts and industrial tribunals.

How to use the guide

1.6 If you have turned to the guide because you feel you have suffered unlawful sex discrimination or because the Act places particular obligations on you, for instance if you are an employer, you should read the next paragraph carefully; it tells you how to make the most of the guide.*

1.7 The Act is a coherent whole, made up less of independent sections (though of course, there are some) than of provisions whose meaning and significance depend on other provisions. This means that if you want to find out how the Act deals with a particular kind of discrimination, eg against a contract worker, you should consult not

only the paragraph which, as indicated in the table of contents, deals specifically with that kind of discrimination (in this case, paragraph 3.21) and the parts of the guide referred to in that paragraph, but also the introduction to the chapter to which that paragraph belongs (ie paragraph 3.1). That introduction points to other parts of the guide which deal with other provisions in the Act which may have a bearing on the discrimination in question.

1.8 If the guide does not contain the answer to **your** question and you do not know where to turn for advice, you can get in touch with the Commission at the address given in paragraph 1.2. If your question is about the employment provisions of the Act you can also get in touch with the Advisory, Conciliation and Arbitration Service at the addresses given in paragraphs 9.16 and 9.17.

2 Definitions of Discrimination

2.1 This chapter explains the meaning of the term discrimination in the Sex Discrimination Act. The definitions - there are more than one - are set out in Part I of the Act. It should be borne in mind in reading the guide, that discrimination, as defined in Part I is not in itself unlawful. Therefore, by themselves, the provisions of Part 1 do not make anything unlawful; it is the provisions of Parts II and III of the Act (described in chapters 3-5) when read with the definitions in Part I which actually make particular types of discrimination unlawful.

ss.2(1),
3(2),4(3)

2.2 The Act applies equally to discrimination against women and discrimination against men, and references in this guide to the rights of a woman to equal treatment with men are to be understood as including also the rights of a man to equal treatment with women.

Sex discrimination

2.3 The Act defines two kinds of sex discrimination, generally referred to as - **direct** and **indirect**.

s.1(1)(a)

2.4 Direct sex discrimination arises where someone treats a woman, on the ground of her sex, less favourably than they treat, or would treat, a man. In considering whether a particular kind of treatment of a woman constitutes direct sex discrimination it is necessary to enquire:

- (a) whether it was less favourable than the treatment which was (or would be) accorded to a man; and, if so,
- (b) whether the less favourable treatment was on the ground of her sex ie whether the woman would not have been so treated but for the fact that she was a woman.

In deciding where treatment was 'on the ground of sex', the motive behind the treatment is irrelevant. An action can be discrimination even if done with apparently good intentions, eg 'chivalry'. The question is simply whether the person's sex was the factor which determined whether he or she was treated in the less favourable way. This is an issue of fact for the court or tribunal to decide. Sometimes a complainant will be able to show that an employer, for example, clearly expressed an intention to treat the complainant less favourably because of his or her sex, but evidence of this kind is not essential. Courts and tribunals will look at all the evidence and can draw inferences about the true ground for a respondent's actions.

s.1(1)(b)

2.5 Indirect sex discrimination consists of treatment which may be equal in a formal sense as between the sexes but is in practice discriminatory in its effect on one sex. Indirect sex discrimination arises where a person applies to a woman a condition or requirement with which she much comply in order to qualify for, or obtain, some benefit or avoid some detriment, and where the condition or requirement satisfies all the follow criteria:

- (a) it is applied, or would be applied, equally to men and to women;
- (b) it is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it;
- (c) it is to the detriment of the woman in question because she cannot comply with it; and
- (d) it cannot be shown by the person applying it to be objectively justifiable irrespective of the sex of the person to whom it is applied.

A requirement will be objectively justified if it can be shown that the requirement:

- (i) is to achieve a legitimate objective, eg a genuine business objective;

- (ii) is necessary to achieve that objective; and
- (iii) is an appropriate way to achieve the objective, weighing the degree of disadvantage to women (or men) against the benefit gained by achieving the objective.

For example, if an employer were to apply a requirement that all clerks employed should be six feet tall, it would seem that a woman who was refused a job as a clerk because of her height would be able to make out a case of indirect sex discrimination, since all the criteria (a) to (d) would be satisfied. It is very hard to imagine how a height requirement might be justified for clerical work. On the other hand, if a woman was turned down for a job as a technologist because she did not possess a technical qualification which the employer required for all people in that post, she might well fail in her complaint. While she could show criteria (a) and (c) were satisfied, and possibly also (b) depending on the circumstances, the employer might be able to show that the requirement was objectively justified.

2.6 Deciding whether one group is ‘considerably smaller’ than the other when applying criterion (b) above is a matter of factual judgement for the court or tribunal. A more difficult question can be sometimes be identifying the appropriate group, or ‘pool’, of people for calculating the proportions of men and women who do and do not comply with the requirement. This will depend on the circumstances of the particular case but the Court of Appeal has indicated that it should be the group to which the requirement is in fact applied eg relevant employees rather than theoretical applicants.

Comparisons in sex discrimination cases

s.5(3)

2.7 In establishing whether a woman has been less favourably treated than a man, her circumstances must be compared with those of a man in the same or not materially different circumstances.

To take an example, a woman who claims she has been discriminated against by being refused a loan will have to compare her treatment with that of a man of comparable financial standing.

Discrimination against married persons in the employment field

2.8 The Act also defines direct and indirect discrimination against

married persons in, **and only in**, the employment field.

s.3(1)(a)

2.9 Direct discrimination against a married person arises where, in circumstances relevant for the purposes of any provision in Part II of the Act, ie in the employment field, a person treats a married person of either sex, on the ground of his or her marital status, less favourably than that person treats or would treat an unmarried person of the same sex. This definition would encompass, for example, a specific bar on employing married people.

s.3(1)(b)

Indirect discrimination against a married person arises where a person applies to a married person in the employment field a condition or requirement which the married person has to comply with in order to qualify for, or obtain, some benefit or avoid some detriment, and where the condition or requirement satisfies all of the following criteria:

- (a) it is applied, or would be applied, equally to a married person and to an unmarried person of the same sex;
- (b) it is such that the proportion of married persons who can comply with it is considerably smaller than the proportion of unmarried persons of the same sex who can comply with it;
- (c) it is to the detriment of the married person in question because he or she cannot comply with it; and
- (d) it cannot be shown by the person applying it to be objectively justifiable irrespective of the marital status of the person to whom it is applied.

2.10 What is said in paragraphs 2.4, 2.5 and 2.6 on the definitions of direct and indirect sex discrimination applies similarly to the definitions of direct and indirect discrimination against married persons in the employment field.

Comparisons in cases of discrimination against married persons

s.5(3)

2.11 The guidance in paragraph 2.7 on comparisons in cases of direct and indirect sex discrimination also applies to comparisons in cases of direct and indirect discrimination against married persons. In addition, in any comparison of the treatment which is accorded to married persons with the treatment which is, or would be, accorded to

unmarried persons, or in any comparison of the ability of married and unmarried persons to comply with a condition or requirement, the married and the unmarried persons to be compared must be of the same sex.

Victimisation

s.4(1)

2.12 The Act also defines as discrimination the victimisation of a person because he or she has, for example, asserted his or her rights under the Act or the Equal Pay Act or sections 62-65 of the Pensions Act 1995. Victimisation arises where, in any of the situations to which the Act applies, someone (or in the words of the Act, the discriminator) treats other person of either sex (or in the works of the Act, the person victimised) less favourably than they treat, or would treat, other persons on the ground that the person victimised has done (or intends to do, or is suspected of having done or intending to do) any of the following:

- (a) brought proceedings against the discriminator or anyone else under the Act, the Equal Pay Act or sections 62-65 of the Pensions Act 1995;
- (b) given evidence of information in connection with proceedings brought under the statutory provisions mentioned above by another person against the discriminator or anyone else;
- (c) otherwise done anything under, or be reference to the statutory provisions mentioned above in relation to the discriminator or anyone else, eg by giving evidence or information to the Equal Opportunities Commission during the course of a formal investigation; or
- (d) alleged that the discriminator or anyone else has committed an act which (whether or not this is expressly stated) would constitute a contravention of the Act or give rise to a claim under the Equal Pay Act, or under sections 62-65 of the Pensions Act 1995.

s.4(2)

However, where the reason for the person receiving less favourable treatment is because he or she has made an allegation, which was false and was not made in good faith, this will not be victimisation for the purposes of the Act.

Sexual harassment

2.13 Sexual harassment at work may amount to unlawful sex discrimination under the Act. For further advice see the Department of Education and Employment's publication Sexual Harassment in the Workplace - A guide for employers (PL923) together with the

accompanying fact sheet for employees Sexual Harassment in the Workplace - the facts employees should know (PL924). Copies can be obtained from Cambertown Limited, Goldthorpe Industrial Estate, Goldthorpe, Rotherham S63 9BL. The Equal Opportunities Commission (see paragraph 1.2 for address) is also a useful source of information and advice on policies and procedures to combat sexual harassment in the workplace. More general advice may be sought from the Advisory, Conciliation and Arbitration Service - see paragraphs 9.16 and 9.17 for addresses.

2.14 Sexual harassment may also be a criminal offence under the Criminal Justice and Public Order Act 1996 (as amended). This can result in a heavy fine, imprisonment or both.

3 Discrimination in the employment field

3.1 This chapter describes how the Act deals with discrimination in the employment field. Throughout this chapter (except in the situations described in paragraphs 3.12-3.14), 'discrimination' means not only sex discrimination and discrimination by way of victimisation, but also discrimination against married persons (see chapter 2). Descriptions of other acts which are made unlawful in the employment field, eg discriminatory advertisements, are given in chapter 6, and general exceptions are described in chapter 7. The exceptions for certain kinds of 'positive action' to counter the effects of past discrimination (see paragraphs 7.10-7.19) are likely to be particularly relevant in the situations to which the employment provisions apply. Complaints by individuals about discrimination in the employment field are dealt with by industrial tribunals (see chapters 8 and 9).

3.2 Chapter 5 describes the provisions of the Act which deal with discrimination in the provision of goods, facilities and services, and premises. Although any particular act which is in some way related to employment may not be subject to the provisions described in this chapter, it may be covered by the provisions described in chapter 5.

s.56A

3.3 The Act enables the Equal Opportunities Commission to issue codes of practice containing practical guidance for the elimination of discrimination, and/or the promotion of equality of opportunity between men and women, in the employment field. A failure by someone to observe any provision of such a code does not of itself render them

liable to any legal proceedings but, where relevant, the codes will be taken into account in any proceedings before an industrial tribunal under the Act (see paragraph 9.13). The Equal Opportunities Commission has issued such a code, which may be obtained from them, (see paragraph 1.2 for address). The Equal Opportunities Commission has also published guidance in support of the Equal Pay Act. The Code of Practice on Equal Pay aims to provide practical guidance and to recommend good practice to those with responsibility for, or interest in, the pay arrangements within a particular organisation. This code is available for the Commission.

Discrimination by employers

Scope of employment covered

s.6,s.82(1)

3.4 It is unlawful for employers to discriminate in relation to employment by them in Great Britain. ‘Employment’ is defined as employment under a contract of service or apprenticeship or a contract personally to execute any work or labour. This definition includes self-employed persons who contract to do work personally.

s.10

3.5 Excluded from the Act is employment which is wholly or mainly outside Great Britain, except that employment on a ship registered at a port of registry in Great Britain, or on an aircraft or hovercraft registered in the United Kingdom and operated by someone who has their principal place of business, or is ordinarily resident, in Great Britain, is treated as being at an establishment in Great Britain unless the employment is **wholly** outside Great Britain. ‘Great Britain’ is defined as including United Kingdom territorial waters off the coast of Great Britain. Thus employment on a British ship is subject to the Act if the ship is at any time in those territorial waters. The Sex Discrimination and Equal Pay (Offshore Employment) Order 1987 extended the operation of the Act to employment concerned with the exploration of the sea bed or subsoil or the exploitation of their natural resources, in an area of the Norwegian port of the Frigg Gasfield where the employer is a British company or has a place of business in Great Britain. (This Act enables Orders to be made under subsection 5 in foreign sectors of the Continental Shelf.) Further such extensions can be made by future Orders.

s.82(1)

Discrimination in recruitment

s.6(1)

3.6 There are three ways in which it is unlawful for an employer to

discriminate when recruiting employees:

- s.8(3), (4)
- (a) in the arrangements the employer makes for deciding who should be offered the job eg in the criteria given to a personnel officer or to an employment agency;
 - (b) in relation to any terms offered, eg in relation to pay, pensions or holidays. If an employer offers a job on terms which, if they were applied in practice, would be in breach of the Equal Pay Act, the offer is unlawful under the Act; and
 - (c) by refusing or deliberately omitting to offer a person employment, eg by rejecting an applicant or by deliberately avoiding consideration of an application.

Discrimination in the treatment of present employees

s.6(2)

3.7 It is unlawful for employers to discriminate in the way they afford an employee access, or by refusing or deliberately omitting to afford access, to opportunities for promotion, transfer or training or to any other benefits, facilities or services. This covers the arrangements made for selection for promotion, transfer or training as well as the actual selection itself. It is also unlawful for an employer to discriminate by dismissing employees or by treating them unfavourably in any other way.

3.8 A person who is dismissed may have a right not to be unfairly dismissed under the Employment Rights Act 1996. A guide to the unfair dismissal provisions of that Act may be obtained from any local office of the Employment Services.

s.6(7)

3.9 Where an employee suffers discrimination in the provision of benefits, facilities or services by his or her employer in circumstances where the employer provides benefits, facilities or services of that description to the public as well as to employees, that employee's recourse is under the provisions of the Act, described in chapter 5 unless:

- (a) the provision to the public differs in a material respect from the provisions to employees, eg where a building society provides mortgages to its employees at a lower rate of interest than to the public;
- (b) the provision is regulated by an employee's contract of employment; or

- (c) the provision relates to training (including any form of education or instruction).

Exceptions

3.10 The exceptions to the requirement that employers must not discriminate against their employees or against potential employees are described in the following paragraphs and in paragraph 7.15 ('positive action' by employers).

s.2(2) **3.11** It is not unlawful under the Act for an employer to discriminate by affording special treatment to women in connection with pregnancy or childbirth.

3.12 It is not unlawful for an employer to discriminate against a woman (or man) in selection to membership of, or rights under, an occupational pension scheme if the discrimination is of a kind falling within one of the exceptions to the equal treatment rights conferred by sections 62-64 of the Pensions Act 1995. The 1995 Act obliges pension schemes to contain a rule in relation to both equal access and equal treatment for men and women. These provisions are enforceable against the trustees of the scheme. However, discrimination by an employer in relation to pensions is covered by the Sex Discrimination Act and the Equal Pay Act* .

Genuine occupational qualification

s.7(1) **3.13** Sex discrimination (but not discrimination against married persons or victimisation) by an employer in recruiting for a job, or in providing opportunities for promotion or transfer to, or training for a job is not unlawful where a person's sex is a **genuine occupational qualification** (GOQ) for the job. The eight grounds on which it may be claimed that a person's sex is a GOQ for a particular job are set out in detail in the Act and are explained below. The GOQ is not an automatic exception for general categories of jobs: in every case it will be necessary for the employer to show, if the exception is to be claimed, that the criteria set out apply to the particular job in question.

* Before 1 January 1996 when these provisions of the Pensions Act came into force, there was an exception in the Sex Discrimination Act for discrimination by an employer in relation to provision for employees' death or retirement (excluding the setting of compulsory retirement ages). However, the exception had been made largely obsolete by directly enforceable rights under European Community law.

3.14 A person's sex is a GOQ for a job only:

- s.7(2)(a) (a) Where the essential nature of the job calls for a man (or woman) for reasons of physiology (**excluding** physical strength or stamina) - an example might be modelling clothes - or in dramatic performances or other entertainment for reasons of authenticity, so that in either case the essential nature of the job would be materially different if carried out by a person of the other sex.
- s.7(2)(b) (b) Where considerations of decency or privacy require the job to be held by a man (or woman), either because it is likely to involve physical contact between the jobholder and men (or women) in circumstances where they might reasonably object to the jobholder being of the opposite sex; or because the jobholder is likely to work in the presence of people who are in a state of undress or are using sanitary facilities and who might reasonably object to the presence of a person of the opposite sex to themselves. It might be claimed, for example, that being a man was a GOQ by virtue of this provision for a job as a men's changing-room attendant.
- s.7(2)(ba), s.1, SDA 1986 (c) Where the job is likely to involve the jobholder working or living in a private home and there could be reasonable objection to someone of the other sex having the degree of physical or social contact with a person living in the home, or the degree of knowledge of intimate details of such a person's life which the job is likely to entail. Examples of such posts could be nursing work; companion to an old lady; doing personal laundry in the home for a member of the household.
- s.7(2)(c) (d) Where the nature or location of the establishment makes it impracticable for the jobholder to live in premises other than those provided by the employer, eg if the job is on a ship or on a remote site, and the only available premises for persons doing that kind of job do not provide both separate sleeping accommodation for each sex, and sanitary facilities which can be used by one sex in privacy from the other. In such a case, the employer may discriminate by choosing for the job only persons of the same sex as those who are already living, or who normally live, in those premises. However, the exception **does not** apply if the employer could reasonably be expected sleeping accommodation and separate or private sanitary facilities, or to provide other premises, for a jobholder of the opposite sex.

- s.7(2)(d) (e) Where the job is in a single-sex hospital, prison or other establishment for people requiring special care, supervision or attention and the essential character of that establishment is such that it is reasonable to restrict the job to a person of the same sex as those for whom the establishment exists. The exception also applies to a single-sex part of a mixed establishment. A single-sex institution which exceptionally admits persons of the other sex will still be covered by the exception. However, the exception does not necessarily apply to all jobs in a single-sex establishment of the kind described. It will need to be shown in relation to any particular job that the character of the establishment requires that job to be held by a man (or by a woman).
- s.7(2)(e) (f) Where the holder of the job provides individuals with personal services promoting their welfare or education, or similar personal services, and those services can most effectively be provided by a man (or a woman). For example, some women might respond best to help offered by a female rape counsellor.
- s.7(2)(g) (g) Where the job involves work outside the United Kingdom in a country whose laws or customs are such that the job can only be done, or can only be done effectively, by a man (or by a woman). For example, a job might involve driving a car in a country where women are forbidden to drive.
- s.7(2)(h) (h) Where the job is one of two which are to be held by a married couple

s.7(3), (4) **3.15** In many cases, a job will not consist entirely of work falling within one of the GOQ criteria described above, but will contain some duties to which one of the criteria applies. For example, an assistant in a shop selling women's clothes may sometimes need to assist customers in the changing-room, and this might be a task to which the 'decency and privacy' GOQ (paragraph 3.14(b)) would apply. The GOQ exception will apply to the whole of such a job, unless the employer already has employees of the appropriate sex who are capable of carrying out the duties to which the GOQ would apply, whom it would be reasonable to employ on those duties, and whose numbers are sufficient to meet the employer's likely requirements without undue inconvenience. This will mean that, in the case of the clothes shop example, if there were a number of jobs for sales assistants, the GOQ could not necessarily be

claimed successfully in respect of all of them on the grounds that any of them might need to undertake changing-room duties from time to time. It would only be lawful for the employer to ensure that there were enough female assistants to cover those changing-room duties which were likely to arise, after which the requirement not to discriminate would apply to access to the remaining jobs.

Communal accommodation

s.46

3.16 Special provisions relating to persons who provide communal accommodation, eg residential accommodation of a kind which involves shared sleeping accommodation which for reasons of privacy should not be used by both sexes at the same time, and other benefits which can only be provided to those using such accommodation (eg a residential training course at a hostel with dormitory accommodation) are described in paragraph 7.6-7.9.

Other exceptions

3.17 Other exceptions applying to employers are described in paragraphs 3.36-3.44, and in chapter 7 which deals with general exceptions to the Act.

Relationship between the Sex Discrimination Act and the Equal Pay Act 1970

3.18 Rights will be gained under **either** the Sex Discrimination Act or the Equal Pay Act. The purpose of the Equal Pay Act is to eliminate discrimination between women and men in pay and other terms and conditions of their contracts of employment such as piecework, output and bonus payments, pensions, holidays and sick leave.

The Equal Pay Act provided for equal pay by giving a woman the right to equality in the terms of her contract of employment when she is employed:

- on like work - that is, work of the same or a broadly similar nature to that of a man;
- on work rated as equivalent - that is, in a job which a job evaluation study of part or all of her employer's workforce has shown to have an equal value to that of a man's;
- on work of equal value - that is, in a job which is equal in value to that of a man's in terms of the demands made on her under such headings as effort, skill and decision-making.

For further details, see the Department for Education and Employment's guide to the Equal Pay Act which is freely available from Jobcentres and Unemployment Benefit Offices, as well as the Code of Practice on Equal Pay, which is available from the Equal Opportunities Commission.

3.19 The two Acts are complementary. All complaints of discrimination in the circumstances covered by the Equal Pay Act are dealt with under that Act. All complaints of discrimination about access to jobs and matters not included in a contract of employment and about contractual matters (other than those relating to the payment of money) in situations not covered by the Equal Pay Act, are dealt with under the Sex Discrimination Act. However, it will not be necessary for the individual to be certain which of the two Acts is relevant - an industrial tribunal will decide a case whichever Act is relevant when all the facts are available.

Note:

- (1) An exemption for employment in private households was repealed in 1986 but a new Genuine Occupational Qualification allows sex discrimination (but not marriage discrimination) to a limited extent in such circumstances, see para 3.11(c) above.
- (2) Section 1 of the Sex Discrimination Act 1986 repealed the exemptions for:
 - (i) firms with five or fewer employers. This means that it is unlawful for even the smallest employer to discriminate against anyone either directly or indirectly on the grounds of sex or of being married.
 - (ii) partnerships of five or fewer partners. This means that partnerships will have to treat fellow partners or anyone seeking to become a partner equally irrespective of their sex or of being married.

3.20 The distinction between the two Acts:

Sex Discrimination Act

- (a) If the less favourable treatment relates to a matter which is not included in a contract (either expressly or by virtue of the Equal Pay Act).
- (b) If the less favourable treatment relates to a matter (other than the payment of money) in a contract, and the comparison is with workers who are **not** doing the same or broadly similar work, work which is rated as equivalent under a job evaluation study or

work of equal value.

- (c) If the complaint relates to a matter (other than the payment of money) which is regulated by an employee's contract of employment, but is based on an allegation that an employee of the other sex **would** be treated more favourably in similar circumstances, ie it does not relate to the **actual** treatment of an existing employee of the other sex.

Equal Pay Act

- (a) If the less favourable treatment relates to the payment of money which is regulated by a contract of employment.
- (b) If the employee is treated less favourably than an employee of the other sex, who is doing work of equivalent value under the Equal Pay Act (see paragraph 3.18), and the less favourable treatment relates to some matter which is regulated by their contracts of employment.

Discrimination against contract workers

s.9(1). (2)

3.21 It is unlawful for a person (the principal) who contracts with another person for the services of a worker (the contract worker) employed by that other person to discriminate against a woman (or a man) contract worker in the terms on which the principal allows her to do the work in question; by not allowing her to do the work or to continue to do it; in the way she is afforded access to any benefits, facilities or services or by refusing or deliberately omitting to afford her access to them; or by treating her unfavourably in any other way. Where the manner in which the principal provides certain benefits, facilities or services to contract workers does not differ in a material respect from the way the principal provides them to the public or a section of the public; the recourse of a contract worker who suffers discrimination is under the provisions of the Act described in chapter 5 and complaints would be dealt with by the courts (see chapters 8 and 10), **not** by industrial tribunals. It is not unlawful for a principal to refuse to allow a contract worker to do work or to continue to do it where, if it were work to be done by an employee, the GOQ exception would apply to the job (see paragraphs 3.13-3.17).

s.9(4)

Discrimination against partners

s.11(1)

3.22 It is unlawful for a firm to discriminate in the arrangements it makes for the selection of new partners, in affording a partner access to

s.11(2)
s.11(3)
s.11(4)

benefits, facilities or services, in expelling a partner or in treating the partner unfavourably in any other way. These provisions apply similarly to persons proposing to form themselves into a partnership. They do not apply, however, to a position as partner where, if it were employment, the GOQ would apply to the job (see paragraphs 3.13-3.17). Neither do they apply to provision made in relation to death or retirement except in the conditions governing expulsion from the firm.

Discrimination by trade unions, employers' organisations, etc

s.12(2), (3)

3.23 It is unlawful for any of the bodies listed below to discriminate in the terms on which it admits a person to membership; by refusing or deliberately omitting to accept an application for membership; in the way it affords a member access to any benefits, facilities or services or by refusing or deliberately omitting to afford access to them; by depriving a person of membership; by varying the terms on which that person is a member; or by treating that person unfavourably in any other way.

s.12(1)

The bodies are:

- (a) an organisation of workers;
- (b) an organisation of employers; and
- (c) an organisation whose members carry on a particular profession or trade for the purpose of which the organisation exists.

s.12(4)

3.24 These requirements do not apply to provision made in relation to the death or retirement from work of a member. There is also an exception to permit certain kinds of 'positive action' by trade unions, etc (see paragraphs 7.17-7.20).

Discrimination by qualifying bodies

s.13(1)

3.25 The Act applies to an authority or body which can confer an authorisation or qualification without which, as a matter of law or of practice, a person is unable, or would find it difficult, to carry on a particular profession (including any vocation or occupation) or trade (including any business). This has been held to include a political party in relation to candidacy for election as a Member of Parliament. It is

s.13(3), (4)

unlawful for such a body to discriminate in the terms on which it is prepared to confer, renew or extend the authorisation or qualification; by refusing or deliberately omitting to grant an application for the authorisation or qualification, or by withdrawing it or varying the terms

on which it is held. ‘Authorisation or qualification’ includes recognition, registration, enrolment, approval and certification, other than those to which the education provisions of the Act (see chapter 4) apply.

s.19(2) **3.26** These provisions do not apply to an authorisation or qualification, eg ordination, which, for the purposes of an organised religion, is limited to one sex so as to comply with the doctrines of the religion or to avoid offending the religious susceptibilities of a significant number of its followers (see also paragraph 3.42).

s.63(2) **3.27** Complaints about discrimination by qualifying bodies will be dealt with by industrial tribunals unless the complaint relates to a decision in respect of which there is a statutory right of appeal. In such cases, only the statutory appeal procedure may be used.

3.28 The Act places a duty on certain qualifying bodies to have regard, in exercising their functions, to unlawful discrimination by persons seeking the authorisation or qualification they can confer. The relevant provisions of the Act is described in detail in paragraph 8.6.

Discrimination in vocational training

s.14
Employment
Act 1989

3.29 It is unlawful for any person who provides, or makes arrangements for facilities for vocational training to discriminate in any of the following ways against a woman (or man) seeking or undergoing such training; in the terms on which the training or facilities are offered; in access to the training or facilities; by terminating her training; or by any other detrimental treatment during training. (Before 1990 this provision applied only to designated providers of training).

s.82(1) **3.30** The training to which this Part of the Act applies includes any form of vocational education or instruction. There is an exception to permit certain kinds of ‘positive action’ (see paragraphs 7.11-7.15).

Discrimination by employment agencies

s.15(1) **3.31** It is unlawful for an employment agency to discriminate against a person in the terms on which it offers to provide its services, by refusing or deliberately omitting to provide them, or in the way it provides them.

s.82(1) **3.32** An employment agency is defined as an organisation (or person)

s.15(3) which, whether or not for profit, provides services for the purpose of finding employment for workers or supplying employers with workers. The agencies covered by the definition include commercial agencies, the Employment Service, university appointments boards, voluntary bodies and local education authorities' careers services. The services of an employment agency include acting as the agent of an employer or worker, giving guidance on careers and providing other services related to employment.

s.15(4) **3.33** Where it is not unlawful for an employer to discriminate in filling in a job eg because the GOQ exception applies to it, it is correspondingly not unlawful for an employment agency to discriminate in the selection of persons to submit to a vacancy for such a job.

s.15(5) **3.34** Where an agency has the employer's assurance that a vacancy is covered by one of the exceptions and this turns out to be the case, the agency has a defence if it can prove that it acted in reliance on a statement by the employer that the agency's action would not be unlawful and that it was reasonable for it to rely on that statement. It is a summary offence, punishable by a fine not exceeding level 5 on the standard scale, knowingly or recklessly to make such a statement which in a material respect is false or misleading.

s.15(6) **Discrimination by the Secretary of State**

s.16 **3.35** It is unlawful for the Secretary of State to discriminate in the provision of facilities or services under section 2 of the Employment and Training Act 1973. This covers the Secretary of State's duty (carried out through bodies such as the Employment Service and Training and Enterprise Councils) to make arrangements to assist people to train, find and retain employment and to assist employers to find employees. This section does not apply where the case is covered by another provision of the Act, ie where the Secretary of State is providing vocational training (see paragraphs 3.29 and 3.30) or acting as an employment agency (see paragraphs 3.31 and 3.32).

Special employment cases

Application to the Crown

s.85(1) **3.36** All the provisions described in this chapter apply to acts done by
s.85(2) or for the purposes of, a Minister of the Crown or government
ss.85A, 85B department, or on behalf of the Crown by statutory bodies or office-

holders, in the same way as they apply to acts done by a private person. They also apply, in the same way as they apply to employment by a private person, to service (i) for the purposes of a Minister of the Crown or a government department, or (ii) on behalf of the Crown for the purposes of a statutory body or office-holder, or (iii) on the staff of the House of Commons or the House of Lords.

The Armed Forces

3.37 The reference in the above paragraph applies also to acts which relate to the armed forces. Similarly, that paragraph applies to service for the purposes of a Minister of the Crown or government department including service in the armed forces.

s.85(4)

3.38 The application of the Act to the armed forces is subject to the proviso that any act done for the purpose of ensuring the combat effectiveness of any of the armed services is lawful.

The Police

s.17

3.39 Service with the police is covered by the employment provisions of the Act, subject to adaptations to take account of the position of constable as an independent office-holder. In addition, the Act provides that police regulations (under the Police Act 1964 and the Police (Scotland) Act 1967) shall not treat men and women officers differently, except in specified respects, for example, the provision of uniforms and equipment.

The Prison Service

s.18(1)

s.18(2)

3.40 The employment provisions of the Act apply to the prison service, but there is an exception allowing different height requirements for men and women prison officers. The Prison Act 1952 is amended to allow for the appointment of a man as a governor of a women's prison, or vice-versa.

Midwives

s.20

3.41 It is unlawful for employers to discriminate in selecting midwives, or in affording access to opportunities for promotion, transfer or training as a midwife, ie men can be midwives.

Ministers of religion etc

s.19(1)

3.42 The employment provisions of the Act do not apply to employment for purposes of an organised religion where the

employment is restricted to one sex so as to comply with the doctrines of the religion or to avoid offending the religious susceptibilities of a significant number of its followers.

Underground mining

s.21

3.43 The Mines and Quarries Act 1954 was changed by the Employment Act 1989 to allow women to compete on equal terms with men for all jobs below ground in mines, including the required period of employment during a ‘sandwich’ education course. Previously, women were barred from employment in jobs which involved spending a significant proportion of time below ground at a working mine. Further advice on health and safety legislation and hours of work can be obtained from the Health and Safety Executive’s Information Centre at Broad Lane, Sheffield S3 7HQ. Telephone 0114 2892000.

Public appointments

s.86

3.44 Where Ministers of the Crown or government departments make appointments to offices or posts which do not constitute employment for the purposes of the Act, they are under a general obligation not to act in a way which would constitute unlawful discrimination if the offices or posts were in fact such employment. Further advice on public appointments can be found in the Office of the Commissioner for Public Appointments (OCPA) publication *Guidance on Appointments to Executive Non-Departmental Public Bodies and NHS Bodies*. The guide can be obtained from OCPA at Horse Guards Road, London SW1P 3AL. Telephone 0171 270 5792.

4 Discrimination in education

4.1 This chapter describes how the Act deals with discrimination in education. Throughout this chapter ‘discrimination’ means both sex discrimination and victimisation but not discrimination against married persons (see chapter 2). Descriptions of other acts which are made unlawful in the education field, eg discriminatory advertisements, are given in chapter 6, and general exceptions are described in chapter 7. Complaints by individuals about discrimination by education bodies may be made to a county court or, in Scotland, to a sheriff court (see chapters 8 and 10), but complaints relating to the public sector of education have first to be referred to the appropriate Education Minister (see paragraphs 4.16 and 4.17). The education provisions of the Act do not deal with employment, etc, in the education field, eg as a teacher;

this is dealt with by the employment provisions (see chapter 3).

Discrimination by bodies in charge of educational establishments

s.22

4.2 It is unlawful for the responsible body for an educational establishment (see paragraphs 4.3 and 4.4) to discriminate:

- (a) as regards terms of admission to the establishment;
- (b) by refusing or deliberately omitting to accept an application for admission;
- (c) in the way it affords a pupil whom it has admitted to the establishment access to any benefits, facilities or services, or by refusing or deliberately omitting to afford such access; or
- (d) by excluding such a pupil from the establishment or treating such a pupil unfavourably in any other way.

4.3 The categories of educational establishment (and the corresponding responsible bodies) in England and Wales to which the requirements described in the preceding paragraph apply are listed below:

- * (1) educational establishments maintained by a local education authority (the authority or the governors of the establishment, as the case may be);
- (2) independent schools which are not special schools (proprietors);
- (3) special schools, eg for handicapped children with special educational needs, which are not maintained by a local education authority (proprietors);
- * (4) grant-maintained schools (governing bodies);
- * (5) institutions in the further education sector (governing bodies);
- (6) universities (governing bodies);
- (7) institutions, other than universities, in the higher education sector (governing bodies); and
- (8) certain other establishments providing full or part time education which are designated in an order made by or on behalf of the Secretary of State (governing bodies).

s.28

The Secretary of State has made an order designating certain establishments.

Detailed information as to the bodies which have been designated may be obtained from the appropriate address given in paragraph 4.16 or from the Equal Opportunities Commission.

s.22

4.4 In Scotland the categories of educational establishments (and the corresponding responsible bodies) to which the requirements described in paragraph 4.2 apply are as follows:

- * (1) educational establishments which are managed by education authorities (education authorities);
- * (2) grant-aided schools, central institutions and colleges of education (managers of the establishments);
- (3) self governing schools (boards of management);
- (4) universities (governing bodies);
- (5) independent schools (proprietors);
- * (6) colleges of further education (boards of management);
- * (7) designated higher education institutions (governing bodies); and
- (8) other establishments providing full time or part time school education or further education (managers).

s.35(3)

4.5 An establishment which provides education or training, but which does not fall into one or other of the categories set out in paragraphs 4.3 or 4.4, may be within the scope of the employment provisions of the Act (see chapter 3) or of section 29 (provision to the public of goods, facilities and services (see chapter 5).

Other discrimination in education

s.23

4.6 It is unlawful for a local education authority in England and Wales, or an education authority in Scotland, to discriminate in the performance of those of its functions under the Education Acts 1962 to 1996 or the Education (Scotland) Act 1980 which do not fall within the scope of the provision described in paragraph 4.2. Examples of these functions in the case of local education authorities are the award of discretionary grants under section 2 of the Education Act 1962 and the provision, or securing the availability of, sufficient schools under section 14 of the Education Act 1996.

s.23(a)

4.7 It is unlawful for the Funding Agency for Schools, the Schools Funding Council for Wales, the Further or Higher Education Funding Councils for England or for Wales, the Scottish Higher Education Funding Council and the Teacher Training Agency to do any act which

*The categories marked with an asterisk comprise establishments broadly in the public sector of education. The significance of this is explained in paragraphs 4.9, 4.10, 4.16, 4.17 and 10.4

constitutes sex discrimination in carrying out their functions under the Education Acts.

s.15(2) **4.8** Local education authorities in England and Wales and education authorities in Scotland are also required not to discriminate in the performance of their functions under section 8 of the Employment and Training Act 1973. Complaints must be made to industrial tribunals (see chapters 8 and 9).

General duty in the public sector of education

s.25(1) **4.9** In addition to the specific obligations described in paragraphs 4.2 and 4.7, the Act imposes a general duty on responsible bodies for certain types of educational establishments, most of which are in the public sector, to ensure that facilities for education provided by them, and any ancillary benefits, are provided without sex discrimination. For the purposes of this general duty the types of establishments and responsible bodies are those marked with an asterisk in paragraphs 4.3 and 4.4. This general duty also applies to the Funding Agency for Schools, the Schools Funding Council for Wales, the Further or Higher Education Funding Councils for England or for Wales and the Teacher Training Agency.

s.25(6)

Enforcement of general duty

s.25(2), (3) **4.10** The general duty is enforceable in England by the Secretary of State for Education and Employment or, in the case of Welsh schools, by the Secretary of State for Wales, by means of the powers conferred on them by sections 496 and 497 of the Education Act 1996; and in Scotland by the Secretary of State for Scotland by means of the powers in section 71 of the Education (Scotland) Act 1962. These powers are also available to the Education Ministers to deal with discrimination by public sector establishments under the provisions described in paragraphs 4.2 and 4.7. (In relation to a Further Education Corporation or Further Education Funding Council, the reference to section 497 of the 1996 Act should be read as reference to section 57(3) of the Further and Higher Education Act 1992.)

Exceptions

Exception for single-sex establishments and boarding accommodation

s.26(1) **4.11** Single-sex educational establishments are excluded from the

s.26(3) requirements of the Act which render unlawful discrimination in admissions. Single-sex establishments are defined as those which restrict admission to pupils or students of one sex (disregarding any pupils of the opposite sex whose admission is exceptional, or alternatively whose numbers are comparatively small and whose admission is confined to particular courses or classes.) However, in the case of a girls' school, for example, which admits a few boys to the infant classes, the exception does not permit discrimination in the treatment of the boys and girls who have been admitted to the infant classes.

s.26(2) **4.12** Admissions to single-sex boarding accommodation in co-educational school are also excluded from the requirements of the Act: a co-educational school (and the exception relates only to schools, not to other educational institutions) which has boarding provision only for pupils of one sex is exempted so far as its boarding facilities are concerned. No such specific exception is made for establishments which provide boarding for both sexes, although for the purpose of deciding whether a school has boarding provision only for pupils of one sex, boarders of the other sex whose numbers are comparatively small will be disregarded. However, there is a general exception from the requirements of the Act as regards admissions to communal accommodation (see paragraphs 7.6-7.9).

Single-sex establishments turning co-educational

s.27 **4.13** It is open to single-sex establishments (or co-educational establishments with single-sex boarding facilities) which want to move towards full co-education over a period of time to apply for a transitional exemption order. In the case of public sector establishments, the application may be made to the appropriate Education Minister^{*}; in the case of private sector establishments, to the Equal Opportunities Commission. The order will authorise the establishment to discriminate as regards admissions during a specified period.

Educational charities

ss.78, 79 **4.14** Acts done to give effect to a charitable provision conferring benefits on one sex only are excepted from the scope of the Act (see paragraph 7.2). Special provision is made to enable educational trusts whose benefits are so confined to apply (if the trustees so wish) to the

^{*} The addresses to which applications may be sent are given in paragraph 4.16

appropriate Education Minister* for a scheme permitting the trust to offer its benefits to both sexes.

Exception for physical training or education

s.28

4.15 The education provisions do not apply to further education (or in England and Wales, higher education) courses in physical education or training.

Special enforcement arrangements for the public sector of education

s.66(5)

4.16 There are special arrangements for the enforcement of the provisions described in paragraphs 4.2 and 4.7 against establishments and bodies in the public sector of education, ie those marked with an asterisk in paragraphs 4.3 and 4.4. Although complaints of sex discrimination under the education provisions will be heard in the county courts or, in Scotland, the sheriff courts (see chapters 8 and 10), a complaint in respect of a public sector body must in the first place be notified to the appropriate Education Minister.

Complaints concerning bodies in England should be sent to:

The Parliamentary Under-Secretary of State
Department for Education and Employment
Sanctuary Buildings
Great Smith Street
LONDON
SW1P 3BT

Complaints concerning bodies in Wales should be sent to:

The Secretary for Welsh Education
Welsh Office Education Department
Phase II
Ty-Glas Road
Llanishen
Cardiff
CF4 5PL

Complaints concerning bodies in Scotland should be sent to:

* The addresses to which applications may be sent are given in paragraph 4.16

The Secretary
Scottish Office Education and Industry Department
Victoria Quay
Edinburgh
EH6 6QQ

Advice as to whether a particular establishment or body falls within the public sector may also be obtained from these addresses. The Education Minister will have the complaints investigated and, where appropriate, deal with the matter complained of under the powers mentioned in paragraph 4.10 above.

4.17 A complaint in respect of body subject to the Education Minister's powers can be brought before the courts in the normal way two months after the complaint has been notified by the complainant to the appropriate Education Minister, or before the end of the two months if the Minister informs the complainant that no further time is needed for official consideration (see paragraph 10.4). If the Education Minister has not reached a conclusion in two months the Minister may continue consideration of the complaint and notify the decision as soon as possible. This does not prejudice the complainant's right to bring proceedings in the courts.

5 Discrimination in the provision of goods, facilities, services or premises

5.1 This Chapter describes how the Act deals with discrimination in the provision of goods, facilities or services and in the disposal and management of premises. Throughout this chapter 'discrimination' means both sex discrimination and victimisation, but not discrimination against married persons (see chapter 2). Descriptions of other acts which are made unlawful in the goods, facilities, services and premises fields, eg discriminatory advertisements, are given in chapter 6, and general exceptions are described in chapter 7. Complaints by individuals about such discrimination may be made to a county court or, in Scotland, to a sheriff court (see chapters 8 and 10).

For reasons of clarity, the general practice in this guide of avoiding references in the text to sections of the Act by number has not been followed in this chapter.

Discrimination in the provision of goods, facilities or services (section 29)

s.29(1) **5.2** The Act makes it unlawful for anyone who is concerned with the provision of goods, facilities or services to the public or a section of the public to discriminate by refusing or deliberately omitting to provide them, or as regards their quality or the manner in which or the terms on which they are provided. Discrimination of this kind is unlawful whether the goods, facilities or services are provided for payment or free of charge.

s.29(2) The following are examples of the facilities and services to which this provision applies:

- (a) access to and use of any place which members of the public or a section of the public are permitted to enter;
- (b) accommodation in an hotel, boarding-house or other similar establishment;
- (c) facilities by way of banking or insurance or for grants, loans, credit or finance;
- (d) facilities for education, instruction or training;
- (e) facilities for entertainment, recreation or refreshment;
- (f) facilities for transport or travel; and
- (g) the services of any profession or trade, or any local or public authority

Section 29 applies only to discrimination by persons who are concerned with the provision of goods, facilities or services to the public or a section of the public. Thus the section does not apply where the transaction is one of a purely private and personal nature, for example, the provision of entertainment, refreshment or recreation to the members of genuinely private clubs.

s.29(3) **5.3** A person who provides goods, facilities or services which are designed for one sex, eg clothes, is not required to provide the corresponding goods, services or facilities designed for the other sex. This applies also in relation to skills which are normally exercised in a different way for men and women, eg hairdressing.

Territorial extent of section 29

s.36(1) **5.4** Generally speaking, goods, facilities and services are within or outside the scope of the Act according to whether they are provided

within or outside Great Britain, defined here as including United Kingdom territorial waters off the coast of Great Britain. The following are exceptions to, or modifications of, this general rule:

- (a) Facilities by way of banking or insurance or for grants, loans, credit or finance are outside the scope of the Act if they are for a purpose to be carried out outside Great Britain, or in connection with risks arising wholly or mainly outside Great Britain, even though the facilities may have been provided in Great Britain.
- s.36(2) (b) On the other hand, discrimination in this country as regards the provision of facilities for travel abroad is unlawful even though some or most of the facilities relate, by definition, to travel outside Great Britain.
- s.36(3) (c) Where British ships, aircraft or hovercraft are concerned, it is unlawful to discriminate, irrespective of whether they are within or outside territorial waters, in the provision of goods, facilities or services, including facilities for travel abroad.
- s.36(4) (d) In some instances, the application of section 29 to the provision of goods, services or facilities outside Great Britain may result in a conflict with the laws of another country. The Act provides that where this is the case, the laws of the other country are to prevail.

Exceptions from section 29

5.5 The following exceptions apply in the case of section 29 of the Act. There are further exceptions which apply not only in the case of section 29 but also in the case of section 30 (discrimination in the disposal of premises). These are described in paragraphs 5.13-5.15.

Establishments for persons requiring special care, supervision or attention

- s.35(1)(a) **5.6** It is not unlawful to restrict facilities or services to one sex where they are provided at, or in a part of, an establishment for persons requiring special care, supervision or attention, for example, a hospital or hospital ward, or a resettlement unit.

Places used for religious purposes

- s.35(1)(b) **5.7** It is not unlawful to restrict facilities or services to one sex where

they are provided at a place which is used for the purposes of an organised religion and the restriction of the facilities or services to one sex is required so as to comply with the doctrines of the religion or to avoid offending the religious susceptibilities of a significant number of the followers of the religion.

Propriety and privacy

s.35(1)(c) **5.8** The Act permits facilities and services to be restricted to one sex in certain situations where it is reasonable to do so in order to preserve decency and privacy. Thus where facilities or services are provided for, or are likely to be used by, two or more persons at the same time, it is not unlawful to restrict them to one sex if the nature of the facilities and services is such or the users are such that male users are likely to suffer serious embarrassment if women are present, or vice versa, or if the users are likely to be undressed. It is not unlawful for the provider of facilities or services to restrict them to one sex if physical contact is likely between the user and another person, eg the provider, and the other person might reasonably object if the user were of the opposite sex.

Political parties

s.33 **5.9** Section 29 does not affect any special provision for women only (or men only) in the constitution, organisation or administration of a political party or anything done to give effect to such special provisions, but see paragraph 3.25 above.

Discrimination in the disposal or management of premises (section 30)

s.30(1) **5.10** The Act makes it unlawful for a person who has power to dispose of premises to discriminate in the terms on which are offered the premises for disposal, in rejecting or accepting applications for the premises, or in the treatment of individuals in relation to lists of people in need of that kind of premises.

s.30(3) **5.11** But the discrimination described in paragraph 5.10 is not unlawful if the person with power to dispose of the premises in question owns an estate or interest in them and occupies them, provided that no estate agent is used to dispose of the premises and provided that no advertisement is published in connection with the disposal.

s.30(2) **5.12** Similarly, it is unlawful for a person who manages premises,

whether or not he or she owns them or has power to dispose of them, to discriminate in the treatment of occupiers of the premises in relation either to benefits or facilities on the one hand or to eviction or any other form of detriment on the other. 'Premises' includes land, houses, flats and business premises, but not accommodation of the kind provided in an hotel; such accommodation is covered by section 29 (see paragraph 5.2).

Exceptions from sections 29 and 30

5.12 The following exceptions apply in the case of sections 29 and 30.

Small dwellings

s.32

5.14 It is not unlawful to discriminate in the provision of disposal of accommodation or premises when the person providing or disposing, or his or her near relative lives and intends to continue living on the premises, and shares accommodation (other than storage accommodation or means of access) with other persons living there, who are not members of that household, and where the premises are small.*

Voluntary bodies

s.34

5.14 A non profit-making body, which was not set up by statute may lawfully restrict its membership, and the benefits, facilities and services it provides to members, to one sex. Moreover, whether or not membership is so restricted, if the main object of such a body is to confer benefits on one sex, it is not unlawful for the body to do anything which is necessary to give effect to that object.

Avoidance of overlap with employment and education provisions

s.35(3)

5.16 Provision is made to ensure that discrimination which is unlawful (or would be unlawful were it not for an exception) under the employment or education provisions is not unlawful as well, (or instead) under section 29 or 30.

* For the purposes of the Act, a person is a near relative of another if that person is the wife or husband, parent or child, grandparent or brother or sister (including, for example half-sister, step-sister and sister-in-law). Small premises are, in the case of premises comprising residential accommodation for one or more households, those in which there is not normally residential accommodation for more than three households (including that of the person providing the accommodation or of a near relative of his or hers); in any other case, small premises are those in which there is not normally residential accommodation for more than six persons (not counting the members of the household of the person providing the accommodation or of a near relative of his or hers).

Discrimination in granting consent for assignment or subletting (section 31)

s.31

5.17 Discrimination by a tenant in respect of the assignment or sub-letting of his or her tenancy to another person is unlawful under section 30 (see paragraph 5.10). Where the tenant requires the consent or licence of the landlord to assignment or subletting to another person, it is unlawful for consent or licence to be granted or withheld by the landlord in a way which is discriminatory against the prospective assignee or sublessee. There is a similar exception for small premises to that described in paragraph 5.14 above.

Discrimination by, or in relation to, barristers (section 35A)*

s.35(A)1

5.18 Section 64(1) of the Courts and Legal Services Act 1990 extend the scope of the Act to cover discrimination by, or in relation to, barristers. The effect of this is that there are three ways in which it is unlawful for a barrister or a barrister's clerk to discriminate when offering a pupillage or tenancy:

- (a) in the arrangements which are made for deciding who should be offered a pupillage or tenancy;
- (b) in respect of any terms on which the pupillage or tenancy is offered, eg in relation to rent or charges; or
- (c) by refusing or deliberately omitting to offer a person a pupillage or tenancy.

s.35(A)2

5.19 It is unlawful for a barrister or barrister's clerk to discriminate against a pupil or tenant in the chambers in question. It is also unlawful to discriminate in any opportunities for training or gaining experience or any other benefits, facilities or services which are either afforded or denied or by terminating the pupillage, or by subjecting him or her to any pressure to leave the chambers, or to any other unfavourable treatment.

s.35(A)3

5.20 Finally, it is unlawful for any person to discriminate against a woman in relation to the giving, withholding or acceptance of instructions to a barrister, ie someone cannot select a barrister to represent them on the ground of sex.

Application to the Crown

* These provisions do not apply in Scotland.

s.85(1)

5.21 In general, the provisions described in this chapter apply to acts done by or for the purposes of a Minister of the Crown or government department, or on behalf of the Crown by a statutory body or office-holder, in the same way as they apply to acts done by a private person. However, section 85(5) allows the Ministry of Defence to restrict admission to the cadet forces on the ground of sex.

s.85(5)

6 Other unlawful acts and related matters

6.1 Paragraphs 6.3-6.8 describe certain provisions of Part IV of the Act. These extend the provisions of the Act described in chapters 3, 4 and 5 so as to make unlawful conduct which, though not itself unlawful discrimination, is designed to produce, or might result in, unlawful discrimination. Legal proceedings for contraventions of these provisions may be brought **only** by the Equal Opportunities Commission (see paragraphs 11.21-11.24) and complaints by individuals about such contraventions should therefore be made to the Commission at the address given in paragraph 1.2.

6.2 Paragraphs 6.9-6.11 describe the other provisions of Part IV which deal with aiding a person to discriminate and with the liability of principals and agents, and employers and employees; and paragraphs 6.12-6.15 describe two provisions (in Parts V and VII) which deal respectively with indirect access to benefits and discriminatory terms in contracts.

Discriminatory practices

s.37

6.3 The provisions which make indirect discrimination unlawful (see chapters 2-5) are complemented by a provision which deals with discriminatory practices. This provision makes it unlawful to apply a requirement or condition which results in an act of unlawful indirect discrimination or would be likely to do so but for the fact that there are no women (or men) currently in the group to which it is applied. The kind of practice against which this provision is directed to one which embodies a condition or requirement which has to be complied with before some benefit can be obtained, and which would amount to indirect discrimination if it were applied to a woman seeking the benefit. However, the condition or requirement may be so effective a deterrent to women applying for the benefit that no woman every applies. Consequently, no woman is ever refused the benefit so no unlawful indirect discrimination occurs. The Act makes practices embodying

such conditions or requirements unlawful even though, as explained, there has, in fact, been no act of unlawful indirect discrimination.

Discriminatory advertisements

s.38(1) **6.4** The Act makes it unlawful for a person to publish, or place for
s.38(2) publication, an advertisement which indicates, or might reasonably be taken to indicate, an intention to do an act which is, or might be, unlawful discrimination. However, it is not unlawful to publish, or place for publication, an advertisement which might be taken to indicate an intention to do an unlawful act where the act itself would not in fact be unlawful, eg because it came within an exception. For example, employers seeking persons for a job to which the genuine occupational qualification exception applies will not be acting unlawfully if the advertisement specifies that, for example, only men will be considered.

s.38(3) **6.5** A job advertisement which uses a job description with a sexual connotation, eg ‘waiter’, ‘salesgirl’ or ‘stewardess’, is taken to indicate an intention to discriminate unless the advertisement contains an indication to the contrary. This does not mean that such words may not lawfully be used in job advertisements; what it does mean is that, where they are used, the advertisement must make it clear that no discrimination is intended, eg by using job descriptions applying to both sexes (‘waiter’ or waitress’) or by saying specifically that the job is open to both men and women.

s.38(4) **6.6** There will be cases where it is difficult for a publisher or advertisements to know whether or not a particular advertisement is unlawful. The advertisement might, for example, appear discriminatory, but the publisher may not know whether the discrimination in question would in fact be unlawful. If the publisher can show that in publishing the advertisement:

(a) he or she relied on a statement by the person placing it to the effect that it was not unlawful because the act indicated in the advertisement would not in fact be unlawful, eg by virtue of an exception; and

(b) it was reasonable for the publisher to rely on that statement, then the publisher is not subject to any liability should the advertisement in fact provide unlawful. It is an offence, punishable on summary conviction with a fine not exceeding level 5 on the standard scale, for anyone placing an advertisement

s.38(5)

knowingly or recklessly to make a materially false or mis-leading statement to the publisher as to its lawfulness.

Instructions to discriminate

s.39

6.7 The Act makes it unlawful for someone who has authority over, or influence with, another person, eg an employer over an employee or a company with one of its subsidiaries or a person with an agent, to instruct that person to do an act of unlawful discrimination, or to procure or attempt to procure the doing of such an act by that person.

Pressure to discriminate

s.40

6.8 It is unlawful for someone to bring pressure to bear on another person to do an act of unlawful discrimination. Bringing pressure to bear means providing or offering any benefit, or subjecting to, or threatening, any detriment. An offer or a threat includes one which is not made directly to the person concerned but is made in such a way that she or he is likely to get to know of it.

Aiding unlawful acts

s.42(1)

6.9 A person who knowingly aids or assists in an act rendered unlawful by the Act, ie including acts of unlawful discrimination and acts of the kind described in paragraph 6.3-6.8, is treated as having himself committed an act of the same description so that both the aider and the person aided are liable for the act. However, a person is not treated as having aided another if he or she relied on a statement by the other person, upon which it was reasonable to rely, that a provision of the Act prevented the conduct in question from being unlawful. It is an offence, punishable on summary conviction with a fine up to level 5 on the standard scale, for a person acting unlawfully, knowingly or recklessly to make a materially false or misleading statement to a collaborator as to the lawfulness of the conduct in which they are collaborating.

s.42(3)

s.42(4)

Liability of employers and principals

s.4(2)

s.41(1)

s.42(2)

6.10 A person (a 'principal') is liable for any act done with his or her authority (whether express or implied, and whether given before or after the act) by the principal's agent; and employers are liable for any act done, with or without their knowledge or approval, by employees in the course of employment. In these situations the agent or employee is treated as having aided the principal or employer. In other words, the principal and the agent, and/or the employer and the employee, are both liable for the unlawful act.

s.41(3) **6.11** The Act provides a defence to an employer who would otherwise be liable for unlawful act by an employee, if the employer can prove that he or she took such steps as were reasonably practicable to prevent the employee from committing the unlawful act in question or unlawful acts of that kind.

Indirect access to benefits

s.50(1) **6.12** Certain provisions of the Act make it unlawful for a person to discriminate in the way in which he or she ‘affords access’ or ‘facilitates access’, to particular benefits, facilities or services*. Thus it would be unlawful for an employer to discriminate not only is selecting employees for an internal training course but also in nominating them for an outside training course run by another person.

s.50(2) **6.13** Conversely, where there are lawful exceptions regarding access to a person to discriminate in facilitating access to benefits, facilities or services provided by another, the exception is also available to the employer or provider. To continue with the training example, where it would not be unlawful, because of an exception (such as positive action) for an employer to discriminate in nominating employees for an outside training course, the exception would also be available to the person actually providing the training to the employer’s nominees.

Discriminatory terms in contracts

s.77(1) **6.14** In general, a term in a contract the inclusion of which constitutes a contravention of the Act, or which is in furtherance of, or provides for such a contravention, is void and unenforceable. However, where the victim of the discrimination is a party to the contract, the term is not void, but it is unenforceable against him or her. The Act provides that any person with an interest in a contract which contains such a discriminator term, ie one which is not void but is unenforceable, may seek an order from a county or sheriff court revising the contract so as to remove or modify the term.

s.77(5) **6.15** A term in a contract is unenforceable by the person in whose favour it would otherwise operate where the term purports to exclude or limit any provision of the Act or the Equal Pay Act. However, there is an exception from this provision in respect of:

s.77(4)

* These provisions are described in paragraphs 3.6, 3.22-3.24, 3.29-3.30, 4.2 and 5.12.

- (a) a contract settling a county or sheriff court case under the Act; and
- (b) a contract settling an industrial tribunal case under either the Act or the Equal Pay Act where the contract has been made with the assistance of a conciliation officer or where the conditions regulating compromise contracts under the Act are satisfied.

The conditions regulating compromise contracts are as follows:

- (a) the contract must be in writing;
- (b) it must relate to the complaint in question;
- (c) the person complaining must have received independent legal advice from a qualified lawyer;
- (d) the legal advice must be covered by insurance against loss arising to the person complaining, from the advice;
- (e) the contract must identify the adviser; and
- (f) the contract must state that the conditions regulating compromise contracts have been satisfied.

A contract under (a) or (b) can only relate to the complaint(s) in question. Therefore it cannot affect a person's right to complain about other actual or potential contraventions of the Act or the Equal Pay Act. For example, if a woman made a complaint that her employer had discriminated against her in selecting employees for a training course, and if one of the terms of the contract (made with the assistance of a conciliation officer) settling the complaint was that the woman agreed not to complain about future decisions under the employer's selection procedure, that term could not be enforced against her.

Collective agreements

6.16 Terms in collective agreements (whether or not legally enforceable) and rules made by employers' organisations, trade unions and qualifying bodies are void in so far as they provide for the doing of acts which would contravene the Act or the Equal Pay Act 1970.

7 General exceptions

7.1 In addition to the exceptions described in chapters 3, 4 and 5, which apply respectively to the employment, education and goods, facilities and services, and premises provisions of the Act, there are a

number of exceptions in Part V of the Act which apply in relation to all the provisions of the Act which make discrimination and associated conduct unlawful.

Charities

s.43

7.2 Where a charitable instrument contains a provision for conferring benefits on members of one sex only (disregarding any benefits to members of the other sex which are exceptional or insignificant), nothing in the Act renders unlawful anything done to give effect to that provision. (On the special provisions relating to single-sex educational charities, see paragraph 4.14, and on voluntary bodies, see paragraph 5.15).

Sport

s.44

7.3 There is a general exception for acts relating to participation as a competitor in certain sporting events which are confined to one sex. The sports to which the exception applies are those in which physical strength, stamina or physique are important, so that the average woman would be at a disadvantage in competition with the average man.

Insurance, etc

s.45

7.4 A person does not commit an unlawful act by treating a person in a discriminatory way in relation to life insurance, accident insurance or other similar matters involving the assessment of risk where the discriminatory treatment;

- (a) was determined by reference to actuarial or other data which was obtained from a source on which it was reasonable to rely; and
- (b) the discriminatory treatment was reasonable having regard to the data and to any other relevant factors.

Acts done under statutory authority

s.51

7.5 There is a general exception from the employment and vocational training provisions of the Act, and other related provisions for acts which are necessary in order to comply with the requirements of a provision concerning the protection of women as regards pregnancy, maternity or other circumstances, specifically affecting women, and which is in a statute passed before the Act or in an instrument made or approved by or under such a statute. There is also a general exception from the provisions of the Act relating to education (other than vocational

training), goods, facilities and services, and premises, for acts which are necessary to comply with the requirements of any provision of a statute passed before the Act or of an instrument made or approved by or under such a statute. This could apply for instance in the case of a single-sex college establishment under an old statute.

Discrimination in public entertainment licences

s.5 of SDA
1986*

7.5a Licensing authorities cannot impose, in licences for public entertainment, conditions which require unlawful discrimination in employment.

Communal accommodation

s.46(1), (2)

7.6 The Act contains a general exception for discrimination in the provision of communal accommodation. For these purposes, communal accommodation is defined as residential accommodation which:

- (a) includes dormitories or shared sleeping accommodation which, for reasons of privacy or decency, should be used by one sex only (even though it may also include some sleeping accommodation which is not shared); or
- (b) should be used by one sex only because of the nature of the sanitary facilities serving the accommodation.

s.46(3)

7.7 It is not unlawful to discriminate as regards admission to communal accommodation provided that the accommodation is managed in such a way that men and women are treated as fairly and equitably as circumstances permit. It will be for a court or tribunal to

s.46(4)

decide whether any particular accommodation is communal accommodation within the meaning of this exception and whether it is managed in such a way that the exception applies. In deciding the latter issue, however, the court or tribunal will take account of whether and how far it is reasonable to expect the accommodation to be altered or extended, or additional accommodation to be provided so as to cater

Note:

Since the SDA 1986, training organisations no longer have to obtain Ministerial designation before running single-sex training courses to help women (or men) enter occupations in which they are under-represented or return to the labour market after a spell of domestic responsibilities. In addition such training courses can now be run by any person and not just 'training bodies'. However, training must still comply with the criteria of section 47 of the SDA.

more equally for the sexes, and also the frequency of the respective demands or needs of the sexes for the accommodation.

s.46(5)

7.8 There are circumstances in which a benefit, facility or service is provided only to a person using particular accommodation, eg treatment at a health farm. Where the accommodation is communal and where, because of the exception described in the above paragraph, it is not unlawful to discriminate in making the accommodation available, it is also not unlawful to discriminate in providing the benefit, facility or service to which the accommodation is ancillary. This exception applies, however, only if the benefit, facility or service in question cannot properly and effectively be provided except to persons using the accommodation.

s.46(6)

7.9 Where the provision on a discriminatory basis of communal accommodation, or of benefits, facilities and services which can only be provided to persons using communal accommodation, falls within the scope of the employment provisions of the Act, ie those described in chapter 3, the exception described in paragraph 7.7 can only be claimed if the person providing the accommodation makes such arrangements as are reasonably practicable to compensate those members of the sex to whom the accommodation has been refused. Similarly, the exception described in paragraph 7.8 may only be claimed if corresponding arrangements for compensation for the refusal of the benefits, facilities or services have been made.

Positive action

7.10 The Act does **not** permit ‘reverse discrimination’: for example, it is unlawful to discriminate in favour of women in recruitment or promotion on the ground that women have in the past suffered from adverse discrimination and should be given the chance to ‘catch up’. However, the Act does permit certain forms of positive action as explained below.

s.47(1)

7.11 Where it reasonably appears to any person that at any time within the preceding 12 months there were no members of one sex engaged in particular work in Great Britain, or that the number of persons of that sex engaged in such work was comparatively small, it is lawful for that person to discriminate in limiting access to training for such work to that sex, or in encouraging members of that sex to take advantage of opportunities for doing that work.

s.47(2) **7.12** Where it reasonably appears to a person that the test for particular work being done by no, or comparatively few, members of one sex at any time within the previous 12 months is met for a particular areas within Great Britain, although not for Great Britain as a whole, the person may lawfully discriminate by affording members of the minority sex who appear likely to take that work in that area, access to facilities for relevant training, or encouraging persons of that sex to take advantage of opportunities in the area for doing that work.

s.47(3) **7.13** It is not unlawful to discriminate in connection with affording access to training to people who in the reasonable view of the person discriminating are in special need of it because of the period for which they have been discharging domestic or family responsibilities to the exclusion of regular full time employment, for example, women who have given up work to bring up a family and now wish to return.

s.47(4) **7.14** Paragraphs 7.11 to 7.13 do not apply to actions by an employer in relation to employees or recruiting employees.

s.48(1) **7.15** Where particular work for an employer is done exclusively by men (or women), or the number of persons of one sex (the ‘minority sex’) doing that work is small compared to those of the other sex doing it (or if this has been the case at any time during the previous 12 months), it is lawful for an employer to provide access to facilities for training for that work to employees of the minority sex only. Employers may also lawfully take steps to encourage members of the minority sex to take advantage of opportunities for doing that work. This exception does not, however, make it lawful for employers to discriminate at the point of selection for such work in order to achieve a balance between the sexes.

7.16 There are a number exceptions which allow an organisation of the kind described in paragraph 3.23, ie a trade union, an employers’ or professional organisation, etc, to take positive action to ensure that members of both sexes are fully represented at various levels in the organisation.

s.48(3) **7.17** Where at any time over the previous 12 months no persons, or only comparatively few persons, of one sex have been members of an organisation of the kind described in paragraph 3.23, special action by

the organisation to encourage persons of that sex to become members is not unlawful.

s.48(2)

7.18 Where no member, or only comparatively few members, of one sex have held a post of any kind in the kind of organisation described in paragraph 3.23 at any time during the previous 12 months, any action by the organisation to encourage members of the minority sex to take advantage of opportunities for holding such posts, or to afford members of that sex only, access to facilities for training which will help to fit them for holding such posts, is not unlawful. This enables a trade union, for example, most of whose shop stewards are men, to run campaigns or courses directed at encouraging its women members to become shop stewards, or providing women members only with the necessary skills to undertake such work. However, it would not enable the union to discriminate in favour of women when actually appointing shop stewards, or to reserve a certain proportion of such posts for women.

s.49(1)

7.19 A further special provision deals with bodies, eg executive councils, committees or conferences, which form part of organisations of the kind described in paragraph 3.23 and which are wholly or mainly elected. Where in the opinion of the organisation special steps are needed to ensure that the membership of such an elected body contains a reasonable number of women (or of men), it may either reserve an appropriate number of seats on the body or create extra seats (by election or co-option or otherwise) for persons of the under-represented sex in order to ensure that a reasonable minimum number of persons of that sex are members. It is not, however, lawful for the organisation to attempt to achieve this objective by other means, such as giving only women the right to vote for certain members of an elected body.

s.49(1)

8 Introduction to enforcement

8.1 This chapter explains the structure of the enforcement provisions of the Act, which are described in detail in the following chapter. It also describes the help which is available to individuals who consider they may have suffered unlawful discrimination.

Structure of the enforcement provisions

8.2 Broadly speaking, the Act combines the right of individual access to legal remedies with the strategic functions of the Equal Opportunities

Commission, which has powers to enforce the law in the public interest. The Act also places a duty on certain of the qualifying bodies mentioned in paragraph 3.25 to have regard in exercising their functions to any unlawful discrimination by persons seeking the authorisation or qualification they can confer.

Individuals' right to institute legal proceedings

8.3 Individuals who consider they have been the victims of conduct which the Act makes unlawful (other than discriminatory practices or advertising, or pressure or instructions to discriminate) have a right to institute proceedings in a county or sheriff court or an industrial tribunal. Whether a court or tribunal is appropriate depends on which provision of the Act apply:

s.63 (a) Complaints in the employment field, ie complaints of discrimination which is made unlawful by the provisions of the Act described in chapter 3, or of conduct of the type of discrimination described in paragraphs 6.9-6.11, may be made to industrial tribunals. For further details and information about the remedies available from tribunals, see chapter 9.

s.66 (b) Complaints in all other fields, ie complaints of discrimination which is made unlawful by the provisions described in chapters 4 and 5, or of conduct of the type of discrimination described in paragraphs 6.9-6.11, may be made in England and Wales to the county courts and, in Scotland, to the sheriff courts. For further details and information about the remedies available from the courts, see chapter 10.

s.66(5) **8.4** County or sheriff court proceedings in respect of discrimination by responsible bodies for educational establishments in the public sector may not be instituted unless the complainant has notified the complaint to the appropriate Education Minister and the latter has had time to consider the matter. (This procedure is explained in paragraphs 4.16 and 4.17).

The role of the Equal Opportunities Commission in enforcement

8.5 The functions of the Equal Opportunities Commission in enforcing the Act may be summarised as follows (they are explained in more detail in chapter 11):

- ss.57, 67 (a) For the purpose of carrying out its duties, the Commission may conduct formal investigations into any matter, and where it discovers conduct which contravenes the Act or the Equal Pay Act it is empowered to issue a non-discrimination notice.
- s.71 (b) The Commission is empowered to institute legal proceedings in respect of persistent discrimination.
- s.72 (c) The commission has the sole right to institute legal proceedings in respect of discriminatory practices and advertisements, and instructions and pressure to discriminate.
- s.75 (d) The Commission also has powers to assist individual complainants in cases where special considerations justify the assistance.

The duty of certain qualifying bodies

s.13(2) **8.6** Where a qualifying body is required by law to satisfy itself as to the good character of an applicant for the authorisation or qualification it can confer, it must have regard, in deciding whether or not to issue, renew or extend the authorisation or qualification, to any evidence tending to show that the applicant, or any of his or her past or present employees or agents, has practised unlawful discrimination in connection with the carrying on of any profession or trade. Discrimination by persons who require such authorisations or qualifications to carry on their profession or trade may therefore be drawn to the attention of the appropriate qualifying body. For example, an allegation against a person in the consumer credit or hire business (for which a licence from the Director General of Fair Trading will be required) may be referred to the Director General, who is required (in some cases both by the Act and by the Consumer Credit Act 1974) to have regard to evidence of discrimination when considering the fitness of that person to hold a licence under the Consumer Credit Act.

Help for aggrieved persons - the questions procedure

s.74(1) **8.7** There is provision in the Act to assist people who consider that they may have been discriminated against to decide whether to institute proceedings and, if they do, to formulate and present the case in the most effective manner. Standard forms SD74 are available:

- (a) on which the aggrieved person may put questions to the person

- or persons he or she considers responsible (the ‘respondent’) for the particular treatment about the reasons for the treatment or about any other matter which may be relevant; and
- (b) on which the respondent can reply.

The forms, and guidance on how to use them, may be obtained, free of charge, from the Equal Opportunities Commission or from any local office of the Employment Services.

8.8 The exchange of questions and answers will focus attention on what would have to be shown in order to prove unlawful discrimination, but the main purpose is to establish as far as possible both the facts of the grievance and, in particular, the reasons why the respondent took the action complained of. In some cases the exchange of information may show the complaint to be groundless, or based on a misunderstanding. In others it may result in a settlement so that legal proceedings are unnecessary. Where proceedings are instituted, it should help to simplify them by identifying in advance what is agreed and what is in dispute.

8.74(2)

8.9 The questions and replies are (subject to the normal rules relating to the admissibility of evidence, and provided the questions have been put within the prescribed time - see paragraph 8.11) admissible in evidence in court or tribunal proceedings under the Act. If proceedings are instituted, it will be open to the court or tribunal, if it thinks it just and equitable to do so, to regard a failure or refusal to reply or an evasive or equivocal answer on the part of the respondent as evidence that the respondent has committed the unlawful act in question.

8.10 For the purposes of the questions procedure, the exchange of questions and answers between the parties does not have to be conducted on the prescribed forms; it may be done by other means, eg by letter. There are, however, certain practical advantages in using the forms because the questions and answers they contain are designed to make it easier for both parties to focus on the relevant issues, ie whether there has been discrimination which is unlawful under the Act.

Period within which the questions procedure may be used

8.11 In order to be admissible under the Act as evidence, ie able to be used in court as evidence, the questions of the aggrieved person must have been served on the respondent within the period specified in an Order made by the Secretary of State. The Order specifies different

rules for cases brought in a county or sheriff court on the one hand and in industrial tribunals on the other.

(i) **Court cases**

- If the questions were sent to the respondent **before** proceedings in court have begun, they must have been sent to the respondent within a period of **six months** beginning when the discriminatory act complained of was committed or **eight months** where the discriminatory act is committed by certain public sector educational bodies (see paragraphs 4.16 and 4.17).
- If the questions were sent **after** proceedings in court have begun, they must have been sent within whatever period is specified by the court **and** the court must have given leave for the questions to be sent.

(ii) **Industrial tribunal cases**

- If the questions were sent **before** the complaint was presented to the tribunal, they must have been sent within a period of **three months** beginning when the discriminatory act complained of was committed.
- If the questions were sent **after** the complaint was presented to the tribunal they must have been sent **either** within a period of **21 days** beginning with the day on which the complaint was presented to the tribunal **or** within some later period specified by the tribunal. Leave of the tribunal is required in the latter cases.

Legal advice and assistance and legal aid

Legal advice and assistance

8.12 Under the Legal Aid Acts a person whose income and capital are within certain limits may obtain legal advice and assistance from a solicitor, at a reduced cost. Under this scheme the solicitor will discuss the matter and give advice, write letters, draw up documents, collect evidence and generally look after the client's interests (including applying for full legal aid for court proceedings). This scheme is available irrespective of whether legal proceedings would be instituted in a county or sheriff court or in an industrial tribunal.

Legal aid

8.13 The Legal Aid Acts also provide for legal aid for proceedings in

county or sheriff courts (but not in industrial tribunals) for persons whose income and capital are within rather higher limits than those set for the legal advice and assistance scheme.

8.14 A person who wishes to obtain legal advice and assistance or legal aid should consult a solicitor. This may be arranged either direct, through the local Citizens Advice Bureau, or by writing to:

England and Wales Legal Aid Board
85 Grays Inn Road
London
WC1X 8AA

Scotland Scottish Legal Aid Board
44 Drumsheugh Gardens
Edinburgh
EH3 7SW

9 Individual enforcement in the employment field

s.63

9.1 All complaints relating to discrimination which is made unlawful by Part II of the Act, ie discrimination in the employment field, (see chapter 3) are dealt with by industrial tribunals. This applies also to acts treated as being unlawful under Part II by the provisions dealing with aiding unlawful acts and the liability of employers and principals (see paragraphs 6.9-6.11). (However, tribunals will not determine those complaints relating to the granting of authorisations or qualifications by qualifying bodies where there is already a statutory procedure for appeal (see paragraphs 3.25-3.28).

Industrial tribunals

9.2 Industrial tribunals sit in different parts of the country, as required. Each tribunal has a legally qualified chairman and two lay members who have knowledge or experience of industry or commerce. Application forms on which to make complaints to tribunals, and booklet ITL1 giving further information about the tribunals and their procedures, may be obtained from any local office of the Employment Service, which can also provide basic information about the employment provisions of the Act. More detailed enquiries about these provisions may be referred to the appropriate regional office of the Advisory, Conciliation and Arbitration Service, for advice (their

addresses are given in paragraphs 9.16 and 9.17).

Legal advice and assistance

9.3 The legal advice and assistance scheme under the Legal Aid Acts is available to assist persons who consider that they have been discriminated against in relation to a matter within the jurisdiction of an industrial tribunal (see paragraph 8.12). The legal aid scheme, however, is not available for tribunal proceedings (see paragraph 8.13).

Time limit on complaints

s.76(1)
s.76(5)

9.4 An individual might make any complaint to an industrial tribunal within three months of the date of the act complained of. However, a tribunal has discretion to consider a complaint which is out of time if, in all the circumstances of the case, it considers it just and equitable to do so.

s.76(6)

9.5 For the purposes of determining when the three month period expires, the Act specifies certain rules:

- (a) a deliberate omission to be treated as an act done at the time when the person in question decided upon the omission. The Act explains how this time is to be determined in the absence of evidence.
- (b) An act extending over a period is treated as having been done at the end of that period.
- (c) Where the unlawful act arises from the inclusion of a term in a contract the act is treated as extending throughout the duration of the contract.

(The rules also apply for the purpose of determining when the six month period expires for bringing complaints under the non-employment provisions of the Act (see paragraph 10.4).

Making a complaint

9.6 A complaint is made by submitting an originating application in writing to an industrial tribunal, giving details of the two parties and the grounds on which relief is sought. Form IT1 (see paragraph 9.2) may be used for this purpose. A copy of the application is sent to the respondent. In addition, the tribunal will send a copy of the application form to a conciliation officer of the Advisory, Conciliation and Arbitration Service, and will send copies of the respondent's reply to

the complainant and the conciliation officer.

Conciliation

s.64(1)

9.7 Where an application to a tribunal is made, conciliation officers have a duty to consider whether they are able to help the parties to reach a settlement without the need for a tribunal hearing. They will try to promote a settlement if asked to do so by the two parties concerned, or on their own initiative if they consider they could act with a reasonable prospect of success. Where appropriate they may encourage other procedures available for the settlement of grievances. Conciliation officers can act either after a complaint has been referred to them by a tribunal, or at the request of either or both the parties where a complaint of discrimination could be made, but before such a complaint has in fact been made. The Act provides that any information communicated to a conciliation officer in the course of their duties is not to be divulged to a tribunal without the consent of the person who communicated it.

s.64(2)

s.64(3)

s.64(4)

9.8 Conciliation officers can be contacted through the Regional Director of the Advisory, Conciliation and Arbitration Service (at the addresses given in paragraphs 9.16 and 9.17).

Tribunal hearing

9.9 If a complaint is not resolved by conciliation or withdrawn for any other reason, it will proceed to tribunal hearing. At the hearing, complainants and respondents may put their case in person or be represented by anyone those choose, eg a solicitor, a representative of a trade union or an employers' organisation or, exceptionally, by the Equal Opportunities Commission (see paragraph 11.26).

Burden of proof

9.10 In a complaint of **direct** discrimination against a woman (or against a married person), or of victimisation, the burden of proof is on the complainant. However, courts and tribunals are prepared in some circumstances to infer that less favourable treatment was on the ground of sex. The effect in a case involving direct discrimination is that the complainant has first to provide sufficient evidence to show that she has been treated less favourably than a man (or an unmarried person of the same sex) was or would have been treated, in circumstances suggesting that the reason for the treatment was her sex (or marital status). In a case involving victimisation, the complainant has to show that she has been treated less favourably than another person in circumstances

suggesting that the reason for the treatment was the fact that she had acted in one of the ways described in paragraph 2.12 above, such as complaining under the Equal Pay Act. In either case, it is then for the respondent to seek to counter this evidence.

9.11 As regards **indirect** discrimination against a woman (or against a married person) the burden of proof is split between the parties. The complainant has, in the first instance, to produce evidence to show that the respondent applied a condition or requirement to him or her which the respondent would apply equally to a man (or to an unmarried person of the same sex), with which the complainant to her detriment, failed to comply, and which is such that a considerably smaller proportion of women (or married persons) than of men (or unmarried persons of the same sex) can comply with it. The respondent can seek to counter this evidence. He or she may also claim objective justification, ie that the condition or requirement was objectively justifiable irrespective of sex (or marital status). The burden is on the respondent to produce evidence of objective justification.

9.12 In a case involving direct or indirect discrimination or victimisation, where the respondent does not dispute the alleged discrimination but claims that it is not covered by the Act, eg because an exception applies, it is for the respondent to show that this is so. Having heard all the evidence made available at the hearing, the tribunal will decide the case on the balance of probabilities.

Relevant of codes of practice in tribunal hearings

s.56A(10)

9.13 In any tribunal proceedings under the Act or the Equal Pay Act the Code of Practice for the elimination of discrimination on the grounds of sex and marriage and the promotion of equality of opportunity in employment issued by the Equal Opportunities Commission under section 56A (see paragraph 11.28) and the Code of Practice on Equal Pay issued by the Equal Opportunities Commission (see paragraph 3.3) are admissible in evidence. If the tribunal considers a provision in either of the codes to be relevant to any question arising in the proceedings it will take the codes into account in determining the question.

Remedies

s.65(1)

9.14 Where a tribunal decides in favour of the complainant, it may award such of the following remedies as it considers just and equitable:

*

- (a) an order declaring the rights of the parties;
- (b) an order requiring the respondent to pay the complainant compensation. The amount of compensation will correspond to the damages which a county or sheriff court could have awarded if the complaint had been one which could have been dealt with by a court under the Act. The compensation may consist of damages for any expenses, and other losses sustained by the complainant which is substantially able to be precisely calculated, eg loss of earnings, and also of damages for any loss which cannot be precisely calculated, eg damages for prospective loss of earnings or for injured feelings. There is no statutory maximum on the amount of damages which may be awarded and the tribunal may award interest on the compensation; or

s.65(2)

- (c) a recommendation that the respondent take a particular course of action. If a tribunal makes a recommendation, it is required to specify the period within which the action recommended has to be taken. There is no limit on action which may be recommended other than that it has to be 'for the purpose of obviating or reducing the adverse effect on the complainant' of the discriminatory act which is the subject of the complaint, and that it must appear to the tribunal to be practicable. Thus, for example, in one set of circumstances a tribunal might recommend that an employer should promote the complainant by a given date. In another, a tribunal might recommend only that the complainant be considered for promotion by a given date. If, without reasonable justification, the respondent fails to comply with a recommendation, the tribunal may increase any compensation previously awarded or award compensation if none was previously awarded.

s.65(3)

Appeals

9.15 There is a right of appeal, on a point of law, against a decision of an industrial tribunal. Appeals are considered by the Employment

*Note:

As regards compensation for a dismissal which constitutes both unlawful discrimination under the Sex Discrimination Act (and/or the Race Relations Act 1976) and unfair dismissal under the Employment Rights Act 1996, additional remedies are available under the Employment Rights Act 1996 in respect of the unfair dismissal element. The industrial tribunal may not, however, award compensation for the **same** loss under more than one of the Acts. (See the guide, Unfairly Dismissed, published by the Department of Trade and Industry.)

Tribunal and thence, with leave on a point of law to the Court of Appeal and, ultimately, the House of Lords.

Enquiries about employment provisions

9.16 Enquiries about the employment provisions of the Act may be made to the Advisory, Conciliation and Arbitration Service.

Enquiries in England should be addressed to the Director, Advisory, Conciliation and Arbitration Service, at any one of the following addresses:

London, Eastern and Southern areas

Clifton House
83-117 Euston Road
London NW1 2RB
Tel: 0171 396 5100

39 King Street
Thetford
Norfolk
IP23 1AU
Tel: 01842 750 343

Suites 3-5
Business Centre
1-7 Commercial Road
Paddock Wood
Kent
TN12 6EN
Tel: 01892 837 273

North West region

Boulton House
17-21 Chorlton Street
Manchester
M1 3HY
Tel: 0161 228 3222

Cressington House
249 St Mary's Road
Garston
Liverpool
L19 0NF
Tel: 0151 427 8881

Northern region

Commerce House
St Alban's Place
Leeds

Westgate House
Westgate Street
Newcastle upon Tyne

LS2 8HH
Tel: 0113 243 1371

NE1 1TJ
Tel: 0191 261 2191

Midlands region

Leonard House
310-323 Bradford Street
Birmingham
B5 6ET
Tel: 0121 622 5050

Anderson House
Clifton Avenue
Nottingham
NG5 1AW
Tel: 0115 969 3355

South and West regions

Regent House
27a Regent Street
Clifton
Bristol
BS8 4HR
Tel: 0117 974 4066

Westminster House
Fleet Road
Fleet
Hants
GU13 8PD
Tel: 01252 811 868

Head Office

Brandon House
180 Borough High Street
London
SE1 1LW

9.17 Enquiries in Scotland and Wales about the employment provisions of the Act should be addressed to:

The Director
Advisory, Conciliation and Arbitration Office for Scotland
Franborough House
123-157 Bothwell Street
Glasgow
G2 7JR
Tel: 0141 204 2677

The Director
Advisor, Conciliation and Arbitration Office for Wales
3 Purbeck House
Lambourne Crescent

Llanishen
Cardiff
CF4 5GJ
Tel: 01222 761 126

9.18 Enquiries may also be made to the Equal Opportunities Commission at the address given in paragraph 1.2.

10 Individual enforcement in non-employment cases

s.66

10.1 All complaints relating to discrimination which is made unlawful by Part III of the Act, ie discrimination in the fields of education, goods, facilities and services, and premises, (see chapters 5 and 6) are dealt with by way of civil proceedings, in England and Wales, in the county courts and, in Scotland, in the sheriff courts. This applies also to acts treated as being unlawful under Part III by the provisions dealing with aiding unlawful acts and the liability of employers and principals (see paragraphs 6.9-6.11). There is a special procedure for the enforcement of the education provisions in respect of the public sector of education. This procedure is described in paragraphs 4.16 and 4.17.

County and sheriff courts

10.2 There are some 242 county courts in England and Wales and some 49 sheriff courts in Scotland, located in the cities and other major centres of population. These courts have jurisdiction to deal with cases under Part III of the Act. The appropriate court is usually the court for the district in which either:

- (a) the respondent resides or carries on business; or
- (b) the unlawful discrimination in question wholly or in part occurred.

Legal advice and assistance and legal aid

10.3 The legal advice and assistance scheme under the Legal Aid Acts is available to assist persons who consider they may have been discriminated against in relation to a matter within the jurisdiction of a county or sheriff court (see paragraph 8.12). The legal aid scheme is available for county or sheriff court proceedings (see paragraph 8.13).

Time limit on claims

s.76(2)

10.4 An individual may complain to a county or sheriff court within

s.76(5) six months of the date of the act complained of*. (In the case of a complaint against a responsible body for a public sector educational establishment, the period is eight months from the date of the act complained of (see paragraphs 4.16 and 4.17).) However, a court has discretion to consider a complaint out of time if, in all the circumstances of the case, it considers it just and equitable to do so.

Making a claim

s.66(5A) **10.5** Proceedings are instituted in England and Wales by sending to the office of the appropriate county court a request for a summons, giving details of the parties and two copies of particulars of the claim, (the particulars of the claim is a simple statement of the nature of the complaint and the relief sought), together with the prescribed fee. In Scotland there is a similar procedure. After instituting proceedings in a county court the complainant must immediately write to the Equal Opportunities Commission giving notice of the claim and must also send a copy of the letter to the court office. It is advisable to use the recorded delivery service for sending letter to the Commission and the copy to the court office. In the case of proceedings must send the Commission as soon as possible and by recorded delivery, a copy of the summons or initial writ initiating the action.

10.6 Before instituting proceedings in a county or sheriff court, it is advisable to consult a solicitor or seek advice from a Citizens Advice Bureau. The costs of the party who wins a county or sheriff court action usually have to be paid by the party who loses.

Assessors

s.66(6), (7) **10.7** It is open to the judges in county court proceedings or, in Scotland, sheriffs, on their own initiative or on the application of a party to the proceedings, to appoint assessors to assist in the determination of the case. It may be helpful, for example, in a case involving an allegation of discrimination in the life assurance field for the court to be assisted by an actuary sitting as an assessor.

Burden of proof

10.8 The burden of proof in proceedings relating to direct or indirect sex discrimination or victimisation before a county or sheriff court is the same as in corresponding proceedings before an industrial tribunal (see

* On the rules for determining when an act was committed, see paragraph 9.5.

paragraphs 9.10-9.12).

Remedies

s.66(2)

10.9 Where a county or sheriff court finds in favour of the complainant, it may award any of the following remedies:

- (a) an order declaring the rights of the parties;
- (b) an injunction or order* ; and
- (c) damages.

s.66(4)

An award under (c) may consist of damages for any expenses or other loss sustained by the claimant for which it is possible to make substantially precise calculations, eg for loss of earnings, and also any damages for any loss which cannot be precisely calculated, eg for injured feelings.

s.66(3)

10.10 Where the tribunal has found for the complainant in a case involving indirect discrimination on the ground of sex, it shall not award compensation if the respondent proves that the indirect discrimination did not involve an intention to treat the complainant less favourably on the ground of sex. (This rule does not apply to compensation in tribunals, covered in chapter 9.)

s.77(5)

10.11 The county or sheriff court also has power in appropriate cases to remove or modify a discriminatory term in a contract. For further information, see paragraphs 6.14 and 6.15.

Appeals

10.2 There is a right of appeal to the Court of Appeal against a decision of a county court, and to the Court of Session against a decision of a sheriff court. In either case, if leave is granted, a further appeal can be made to the House of Lords.

11 The Equal Opportunities Commission

11.1 The enforcement role of the Equal Opportunities Commission has been referred to in chapter 8. The Commission's responsibilities, however, extend beyond enforcement into the area of promoting

* An injunction (from a county court) or order (from a sheriff court) in this context is an order by the court to a particular person or body to do or not to do or to cease doing specified acts.

equality of opportunity between the sexes generally.

Duties of the Commission

s.53(1)

11.2 The duties of the Equal Opportunities Commission are:

- a) to work toward the elimination of discrimination;
- (b) to promote equality of opportunity between men and women generally; and
- (c) to keep under review the working of the Act and the Equal Pay Act and, when required by the Secretary of State or when it otherwise thinks it necessary to draw up and submit to the Secretary of State proposals for amending them.

s.55

In addition, the Commission has a specific duty, in pursuance of the general duties at (a) and (b) above, to keep under review, in consultation with the Health and Safety Commission, those provisions in legislation dealing with health and safety at work which require different treatment for men and women, eg regarding hours of work.

Formal investigations

s.57(1)

11.3 The Commission may, on its own initiative, conduct formal investigations, and it must conduct them if required to do so by the Secretary of State. Formal investigations can be carried out for any purpose connected with the Commission's duties.

Terms of reference

s.58(1), (2)

11.4 For every formal investigation there must be terms of reference, and a number of requirements must be fulfilled before the Commission can embark on an investigation. There is no restriction (other than that implied in the Commission's duties) as to what matters the terms of reference of a formal investigation may include, and there is a power to revise the terms of reference. Unless the terms of reference confine the investigation to the activities of named persons (in which case those persons must be given notice of the holding of the investigation), the Commission is required to give 'general notice' of the holding of the investigation, eg by taking space in a newspaper. Where the investigation is confined by its terms of reference to the activities of named persons and the Commission purposes to enquire into whether such a person has committed an unlawful act, the Commission is required to inform the person of its belief that he or she may have

s.58(3)

s.58(3A)

committed an unlawful act, and of its proposal to investigate may have committed an unlawful act, and of its proposals to investigate the act; and it must offer that person the opportunity of making oral and/or written representations. A person who takes this opportunity has the right to be represented by counsel or a solicitor or some other suitable person.

Power to require production of information

s.59(1)

11.5 The Act empowers the Commission in certain circumstances to serve on any person a notice requiring him or her for the purposes of the investigation, to produce relevant information either in the form of documents or by giving oral evidence. However, information may not be required unless either:

s.59(2)

- (a) service of the notice has been authorised by the Secretary of State; or
- (b) the terms of reference of the investigation state that a person named in them (not necessarily the person required to produce the information) may have contravened, or may be contravening, any provision of the Act or of the Equal Pay Act, and confine the investigation to those matters.

s.69

These limitations do not apply, however, in the case of a formal investigation the purpose of which, as stated in its terms of reference, is to monitor compliance with a non_discrimination notice, provided such an investigation is mounted within five years of the notice becoming final*. In such a case the power to require the production of information lasts for two years or until the five year period expires, whichever is later. Someone cannot be required by notice to produce any evidence which they could not be required to give in evidence in civil proceedings in the High Court or, in Scotland, the Court of Session. Moreover, a notice cannot require their attendance at any place unless the necessary expenses to and from that place have been paid or tendered to him or her.

s.59(3)

s.59(4), (5)

11.6 Where a person fails to comply with a notice requiring the production of information, or where the Commission has reasonable cause to believe that he or she intends not to comply with it, the Commission can apply to a county or sheriff court for an order requiring compliance.

* For an explanation of the term 'final', see paragraph 11.4.

s.59(6) **11.7** It is an offence, punishable on summary conviction with a maximum fine of level 5 on the standard scale, for a person in receipt of a notice requiring that person to produce information wilfully to alter, suppress, conceal or destroy a document covered by the notice, or in complying with the notice, knowingly or recklessly to make a false statement.

Reports and recommendations

s.60(1) **11.8** Following (or during) a formal investigation, the Commission may recommend to any person changes in practices or procedures for the purpose of promoting equality of opportunity between the sexes. It is also open to the Commission to make recommendations to the Secretary of State for changes in the law. In the case of an investigation which the Secretary of State has instigated, the Commission is required to present to him or her a report of its findings and the Secretary of State will publish the report. In all other cases, of an investigation which the Secretary of State has instigated, the Commission is required to present to him or her a report of its findings and the Secretary of State will publish the report. In all other cases, the Commission must prepare a report and publish it or make it (or a copy) available for inspection by the public. Copies of reports of formal investigations will be available at the Commission's office.

s.60(3)

s.60(2), (4)

s.61(3) **11.9** In preparing a report for publication or public inspection, the Commission is required to have regard to the need to exclude material which it considers might prejudicially affect the private affairs or business interest or those reported on.

Non-discrimination notices

s.67(1) **11.10** If, in the course of a formal investigation, the Commission becomes satisfied that a contravention of the Act or the Equal Pay Act has occurred, it is empowered to serve a non-discrimination notice on the person concerned. A non-discrimination notice requires the person on whom it is served not to contravene specified provisions of the Act or the Equal Pay Act. In addition to this primary requirement, the notice:

s.67(2)

- (a) will require the recipient, where compliance with the primary requirement involves changes in practices (or any other change), to inform the Commission when he or she has made those

changes and what they are, and also to take reasonable steps to make the changes known to persons concerned, eg to employees; and

s.67(3) (b) may require specified information to be furnished to the Commission so that compliance with the notice can be monitored, and it may specify how and when the information should be supplied.

s.67(4) However, the recipient's liability to provide information under (b) cannot extend beyond a period of five years beginning when the notice becomes final.

s.67(5) **11.11** The Commission may not serve a notice on a person unless it has first notified him or her that, for specified reasons, it is contemplating doing so, offered him or her an opportunity to make written and/or oral representations within a specified period of not less than 28 days, and taken into account any representations so made.

Appeals against non-discrimination notices

s.68 **11.12** The recipient of a non-discrimination notice has a right of appeal against any requirement of the notice on the grounds that the requirement is unreasonable, either because it is based on an incorrect finding or fact or for any other reason.

s.68(1) **11.13** An appeal may be brought not later than six weeks after the serving of the notice. Where the primary requirement of the notice (see paragraph 11.10) is for compliance with the employment provisions of

s.68(2) the Act or the Equal Pay Act, the appeal against that requirement or against any additional requirement in the notice must be made to an industrial tribunal. In any other case, the appeal must be made to a county or sheriff court. Where a court or tribunal considers that an appeal against a requirement in a non-discrimination notice is well-founded, it will quash the requirement altogether or substitute a different requirement.

s.82(4) **11.4** A non-discrimination notice (or a court or tribunal finding) becomes final (see paragraphs 11.5, 11.10 and 11.15-11.20) when an appeal against it is dismissed, withdrawn or abandoned, or when the time for appeal against it expires without an appeal having been brought.

Register of non-discrimination notices

s.70(1) **11.15** Non-discrimination notices which have become final are entered
in a register of non-discrimination notices, which the Commission is
s.70(2) required to maintain. The register is kept at the Commission's offices at
the address given in paragraph 1.2. On payment of such fee as the
Commission may determine, a person is entitled to inspect the register
and to obtain copies of any entry.

Significance of a non-discrimination notice

s.71 **11.16** The significance of a non-discrimination notice is that, when final,
it renders the recipient liable for the next five years, should the recipient
persist in committing unlawful acts, to proceedings by the Equal
Opportunities Commission for an injunction or order.
Paragraphs 11.18-11.20 below describe these proceedings.

s.67(7) **11.17** Failure to comply with a requirement of a non-discrimination
notice which has become final to furnish information to the Commission
or other persons (see paragraph 11.10) renders the recipient of the
notice liable to proceedings by the Commission for a court order
requiring compliance.

Persistent discrimination

s.71(1) **11.18** The Commission has certain powers to deal with persistent
discrimination. These powers are available to deal with the situation in
which a person on whom a non-discrimination notice has been served
or against whom a court or tribunal finding has been made (provided
that the notice or finding became final within the previous five years)
seem to the Commission likely, unless restrained, to contravene the Act
or the Equal Pay Act. (This procedure does not apply, however, in the
case of discriminatory advertisements or pressure or instructions to
discriminate.) In this situation, the Commission may seek any injunction
or order from a court and the court, if it thinks the application well-
founded, may grant the injunction or order.

Preliminary action in employment cases

s.71(2) **11.19** Where the Commission institutes proceedings for an injunction or
order in respect of persistent discrimination, it may not allege in those
proceedings that the person concerned has already contravened any of
s.73(1) the employment provisions of the Act, or the Equal Pay Act, unless
there is, or the Commission has obtained, a finding to this effect by an
industrial tribunal, and the finding has become final. The Act makes
provision enabling the Commission, where it intends to institute

proceedings for an injunction or order, to seek a finding from an industrial tribunal. If the Commission does so, the tribunal may treat the matter as a complaint by the individual concerned, except that it may not make an award of compensation.

s.73(3)

11.20 A finding by an industrial tribunal which has become final must be treated as conclusive by a county or sheriff court in proceedings by the Equal Opportunities Commission for an injunction or order, or in any other proceedings before an industrial tribunal.

Special enforcement arrangements in relation to discriminatory practices and advertisements, and pressure and instructions to discriminate

11.21 In addition to its general powers and functions in relation to the enforcement of the Act and the Equal Pay Act, the Equal Opportunities Commission has special powers and functions in relation to discriminatory practices and advertisements, and pressure and instructions to discriminate (see paragraphs 6.3-6.8). Legal proceedings for contraventions of those provisions may be instituted only by the Commission.

Discriminatory practices

s.37(3)

11.22 The Commission's powers to deal with discriminatory practices are the same as its powers to deal with any discrimination under Part II or III of the Act (see chapters 3-5), or with any contraventions of the Equal Pay Act, ie by way of formal investigation and the non-discrimination notice procedure and/or the persistent discrimination procedure (see paragraphs 11.3-11.20).

Discriminatory advertisements, and pressure and instructions to discriminate

s.72(1), (2)

11.23 The formal investigation and non-discrimination notice procedures (but not the persistent discrimination procedure) are available to the Commission to deal with discriminatory advertisements, and pressure and instructions to discriminate. The Commission also has special powers to institute legal proceedings for such contraventions of the Act. These proceedings may be:

- (a) an application for a decision whether the alleged contravention occurred; or

- (b) in order to prevent a further contravention, an application to a county or sheriff court for an injunction or order.

(Unless the persistent discrimination procedure, these powers are available whether or not the person concerned is the subject of a non-discrimination notice or a court or tribunal finding.)

s.72(3) **11.24** An application under (a) must be made to an industrial tribunal where the alleged contravention relates to an employment provision and in any other case to a county or sheriff court.

s.72(5) The provisions of the Act described in paragraphs 11.19 and 11.20, relating to preliminary action in employment cases, apply to applications under (b) to county or sheriff courts.

Assistance by the Commission

11.25 As indicated in chapters 8-10, aggrieved individuals have the right of direct access to courts or industrial tribunals for redress in respect of complaints under the Act. It is open to them to seek professional help and advice on their complaints in the normal way; for example, an individual may be assisted or represented by his or her trade union in making a complaint to an industrial tribunal and in any ensuing proceedings. In the case of complaints within the jurisdiction of the county or sheriff courts, individuals are advised to seek the advice and assistance of a solicitor. (On the availability of legal advice and assistance and legal aid, see paragraphs 8.12-8.14.) The Act also makes special provision to assist aggrieved persons to decide whether or not to institute proceedings and, if they do, to present their complaints in the most effective way (see paragraphs 8.7-8.11).

s.75(1) **11.26** The Act also gives the Equal Opportunities Commission discretion to assist an individual who is an actual or prospective complainant. However, the Commission may assist an individual only:

- (i) where the case raises a question of principle;
- (ii) where it is unreasonable, having regard to the complexity of the case or the position of the individual vis-à-vis the other party, to expect the individual to deal with the case unaided; or

s.75(2) (iii) where some other special consideration applies. In such exceptional cases, the assistance which the Commission may afford includes giving advice, seeking a settlement and arranging

for legal advice or assistance or representation. (The Commission has, however, no special position before a court or tribunal in relation to any proceedings in which it is assisting an individual.)

s.75(3) Legal costs incurred by the Commission will be charged to any costs (but not to any damages) payable to the complainant.

Provision of information and advice by the Commission

s.53(1)
s.56 **11.27** The Commission has the general responsibility of advising the Government on the working of the Act and the Equal Pay Act. The Commission is required to publish an annual report which must include a general survey of developments during that year as regards matters which are within the ambit of the Commission's duties (see paragraph 11.2). In its reports the Commission may be expected to draw attention to significant cases which have come before the courts or industrial tribunals, and also to the more important findings and recommendations arising in connection with its own formal investigations. Thus, the Commission will become a principal source of information about the Act and the Equal Pay Act. Indeed, the Commission has produced a range of booklets and leaflets on the legislation as well as a Code of Practice (see next paragraph).

Codes of practice

s.56A(1) **11.28** The Act provides that the Commission may issue codes of practice containing such guidance as it thinks fit for either or both of the following purposes:

- (a) the elimination of discrimination in the field of employment; and
- (b) the promotion of equality of opportunity in that field between men and women.

In 1985, the Commission issued such a Code of Practice. In 1997, it issued a Code of Practice on Equal Pay. Please see paragraph 9.13 for the relevance of the codes to legal proceedings under the Act before an industrial tribunal.

If you have a question about the Act which is not answered in this guide, you should get in touch with the Commission at the address given in paragraph 1.2. If your question is about the employment provisions of the Act, you can also get in touch with the Advisory,

Conciliation and Arbitration Service at the addresses given in paragraphs 9.16 and 9.17.

PL955 (Rev 1)

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