

(See also EOC publications including ‘Equality at Work’. Equal Opportunities - a Guide for Employers’ and 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 (1985). The EOC has established an organisation called ‘Equality Exchange’, whose members receive information about and attend meetings relating to the furtherance of equal opportunities.

Cross-reference. See EQUAL PAY (19) for the rules against sex discrimination in matters relating to contractual terms of employment. See Sex Discrimination II for enforcement and remedies.

44.1 Discrimination on grounds of sex or marital status is made unlawful by the Sex Discrimination Act 1975 (SDA). Only the provisions of the Act relating to employment are considered below. Although they are worded in terms of sex discrimination against women, they should be read as applying equally to the treatment of men (with the exception of the special treatment afforded to women in connection with pregnancy or childbirth). [SDA s 2]. The provisions of SDA are similar to those relating to RACIAL DISCRIMINATION (37) in the Race Relations Act 1976, and readers should refer to decisions under that Act as well as SDA.

44.2 MEANING OF DISCRIMINATION

Discrimination may take place in three ways: direct discrimination, indirect discrimination and victimisation: cf. 37.2 RACIAL DISCRIMINATION

In deciding whether discrimination has taken place the position of the person allegedly discriminated against will be compared with that of a person of similar skill and qualification: like must be compared with like. [SDA s 5(3)]. This means, for example, that it is not directly discriminatory to have different retirement ages for different jobs (*Bullock v Alice Ottley School* [1993] 1CR 138). See also *McConomy v Croft Inns Ltd* [1992] IRLR 561.

The intention or motive of the alleged discriminator is irrelevant. (*R v Birmingham City Council, Ex parte Equal Opportunities Commission* [1989] IRLR 173; *James v Eastleigh Borough Council* [1990] 1CR 554).

44.3 Direct discrimination

This occurs where a woman is treated less favourably than a man, or a married person is treated less favourably than a single person. [SDA ss 1(1)(a), 3(1)(a); cf. 37.3 RACIAL DISCRIMINATION]. In order to establish that discrimination has taken place, it is not sufficient to show that certain treatment is different, it must be shown to be less favourable. Further, it is the treatment itself rather than its consequences which must be different and less favourable. (*Balgobin and another v Tower Hamlets London Borough Council* [1987] ICR 829). However, where a local education authority provided more places for boys than for girls in selective schools, the House of Lords held that it was not necessary for the complainant to show that selective education was ‘better’ than non-selective education. It was enough that, by denying the girls the same opportunity as the boys, the council was depriving them of a choice which was valued by them, or at least by their parents, and which is a choice obviously valued, on reasonable grounds, by many others. (*R v Birmingham City Council, Ex parte Equal Opportunities Commission* [1989] IRLR 173). The test of direct discrimination is whether or not the applicant should have received the same treatment but for her sex. Thus it was direct discrimination to make free entry to a swimming pool dependent upon state pensionable age. (*James v Eastleigh Borough Council* [1990] ICR 554).

Unfavourable treatment of a woman because she is pregnant may amount to sex discrimination. In *Hayes v Malleable Working Men's and Institute* [1985] ICR 703, the Employment Appeal Tribunal held that the correct approach was to ask whether pregnancy was capable of being matched by analogous circumstances applying to a man and if so, whether they were closely enough matched to enable a fair comparison to be made between the treatment accorded to a woman in the one situation and a man in the other. Hence it was possible for a woman treated unfavourably because of her pregnancy to complain of sex discrimination even though it was not possible for a man to find himself in precisely the same circumstances.

Subsequently, it has been argued that the fact that a man cannot become pregnant means that any unfavourable treatment of a woman which is pregnancy related must necessarily amount to direct sex discrimination. In *Dekker v Stichting VJV-Centrum Plus* [1992] ICR 325 the ECJ held that there was direct discrimination where the principal reason for refusing to recruit a woman was her pregnancy, in that her absence on maternity leave would have adverse financial consequences for the employer. However, in a further decision (*Hertz v Aldi Marked K/S* [1992] ICR 332) the ECJ held that a woman dismissed because of an illness which was connected with childbirth was not discriminated against on grounds of sex if a man who was as ill would have been treated in the same way.

The true application of SDA to pregnancy cases has been considered by the English courts in *Webb v EMO Air Cargo UK Ltd*, The House of Lords ([1993] ICR 175) has indicated a provisional view that the approach in *Hayes* is correct and that to establish sex discrimination it must be possible to say that a hypothetical man would have been treated less favourably. Hence, an employer who dismissed a woman because she would not be available for work at a particular time, and who would have dismissed a man who was not available at that time, was not guilty of direct discrimination even though the reason for the woman's non-availability was her pregnancy. The House of Lords took the view that this approach was consistent with *Dekker* and *Hertz*, but decided to refer the question to the ECJ, whose decision is currently awaited. If the ECJ decides that the facts of *Webb* constitute direct discrimination under the *Equal Treatment Directive*, the House of Lords will then have to consider whether SDA can be interpreted consistently with the Directive, or whether only those employees who can rely directly upon the Directive can take advantage of the ECJ's approach (see 29.3 EUROPEAN COMMUNITY LAW).

For the correct approach to identifying the hypothetical male comparator, see *Shomer v B&R Residential Lettings Ltd* [1992] IRLR 317, *Leeds Private Hospital Ltd v Parkin* [1992] ICR 571 and *Brook v Haringey London Borough Council* [1992] IRLR 478.

44.4 Indirect discrimination

This occurs if an employer applies a requirement or condition to a woman or to a married person which he also applies to a man or an unmarried person but which is such that:

- (a) the proportion of women or married persons who are able to comply with it is considerably smaller than the proportion of men or unmarried persons: and
- (b) he cannot show it to be justifiable irrespective of the sex or marital status of the person to whom it is applied: and
- (e) which is to her, or that person's, detriment because she or he cannot comply with it.

[SDA ss 1(1)(b), 3(1)(b): cf. 37.4 RACIAL DISCRIMINATION].

If an employer imposes a requirement that employees of his should be able to lift heavy weights, such a requirement would be discriminatory if applied to typists but probably not if applied to

warehouse man. Similarly . a requirement that applicants should be six feet tall may be discriminatory depending on the circumstances. In each case the question will be: is that requirement justifiable in considering the duties to be performed?

In *Price v Civil Service Commission and the Society of Civil and Public Servants* [1978] ICR 27, the Employment Appeal Tribunal held that the maximum age limit of 28 for appointment as an Executive Officer in the Civil Service was discriminatory, as in practice it was harder for women to comply with than men since women in their twenties are commonly fully occupied with child bearing.

The case was remitted to an industrial tribunal on the question whether the condition could be justified irrespective of its discriminatory effect and in *Price v Civil Service Commission and Civil Service National Whitley Council (Staff Side) (No 2)* [1978] IRLR 3 an industrial tribunal held that it was not justifiable. Note that a condition may be justified even though the employer has not produced detailed evidence to show that there was no other way of achieving his object. (*Cobb v Secretary of State for Employment* [1989] ICR 508).

An industrial tribunal in *Clarke and Powell v Eley (IMI Kynoch) Ltd* [1983] ICR 165 held, on the evidence before it, that the selection of part-time workers for redundancy before full-time workers irrespective of length of service constituted unlawful indirect discrimination. The requirement or condition that an employee had to work full-time before being considered for redundancy on the basis of 'last in, first out' was one with which a considerably smaller proportion of women than men could comply. It allowed one applicant's claim and dismissed the other claim. The EAT allowed the unsuccessful employee's appeal and dismissed the employer's appeal against the decision in relation to the other employee. ([1983] ICR 165). However, subsequently, different tribunals reached different conclusions upon whether a requirement that employees work full time is discriminatory. In *Home Office v Holmes* [1984] ICR 678 at p 681E, it was held discriminatory: in *Kidd v DRG (UK) Ltd* [1985] ICR 405, in the absence of evidence, it was not. In *Kidd*, the EAT emphasised that each case turns on its own facts, and that it no longer has to be assumed without evidence that women are the providers of home care to young children. However, it is likely that after the decision of the European Court of Justice in *Bilka-Kaufhaus GmbH v Weber von Hartz* [1987] ICR 110 (see 19.10 EQUAL PAY), industrial tribunals and courts will be more ready to hold that a requirement that an employee work full-time is discriminatory, subject to the question of justification (see below: and see *R v Secretary of State for Employment. Ex parte Equal Opportunities Commission* [1992] ICR 341).

In determining the appropriate 'pool' for comparing the proportions of men and women who can comply with a requirement, the risk of a definition incorporating an element of discrimination must be avoided. There is a *prima facie* case of discrimination if in practice many more women than men are adversely affected by the requirement. (*R v Secretary of State for Education Ex parte Schaffter* [1987] IRLR 53). See also *Pearse v City of Bradford Metropolitan Council* [1988] IRLR 379.

It may be difficult to determine the appropriate pool in indirect sex discrimination cases. In considering a requirement applied to a woman teacher, the Northern Ireland Court of Appeal held that the industrial tribunal was correct in considering the 'pool' of women teachers rather than women generally. (*Briggs v North Eastern Education and Library Board* [1990] IRLR 181). However, in *Greater Manchester Police Authority v Lea* [1990] IRLR 372. the EAT held that the industrial tribunal had not erred in accepting that the economically active population was an appropriate pool of persons for the purpose of determining the proportion of men and women who could comply with a condition of not being in receipt of an occupational pension. In *Jones v University of Manchester* [1993] ICR 474 the Court of Appeal, following its earlier decision in *Jones v Chief Adjudication Officer* [1990] IRLR 533. held that the appropriate pool consisted of all those persons who could satisfy all the relevant criteria apart from the allegedly discriminatory requirement. Hence, it was wrong for the tribunal in that case to confine the pool to *mature* graduates with the relevant experience, merely because the applicant was such a person.

A condition with which no woman can comply infringes SDA s 1(1)(b)(i) (*Greencroft Social Club and Institute v Mullen* [1985] ICR 796).

The fact that a woman does not wish to comply with a condition does not mean she 'cannot' do so. Therefore in *Turner v The Labour Party and another* [1987] IRLR 101 a condition that a member of a pension scheme only acquired certain rights if he or she died leaving a spouse was not discriminatory against a divorcee with no intention of remarrying. See also *Robinson v Gordons Pharmacy Ltd*. IDS Brief 449, p 4.

The burden of proof is on an employer who wishes to satisfy the tribunal that the decisions which he took were objectively justified for economic, administrative or other reasons. (*Rainey v Greater Glasgow Health Board* [1987] ICR 129, an equal pay case in which the House of Lords held that the same principles are applicable to SDA: see 19.10 EQUAL PAY). In considering whether a requirement or condition is justifiable, industrial tribunals, applying an objective test, have to balance the discriminatory effect of the requirement or condition against the reasonable needs of the person who applied the condition (see *Hampson v Department of Education and Science* [1989] ICR 179, overturned on different grounds in the House of Lords: [1990] ICR 511). This is called the principle of proportionality. (*Cobb v Secretary of State for Employment* [1989] ICR 508) It requires the tribunal to consider both the quantitative and the qualitative effect of the discrimination, that is, how many women will suffer in consequence of it, and how seriously they will suffer (*Jones v University of Manchester*, above). See also *Commission of the EC v Belgium* [1991] IRLR 393.

A number of the questions raised by a requirement to work full-time were considered in *Clymo v Wandsworth London Borough Council* [1989] ICR 250, where the employer refused to allow the employee to change to a job-sharing arrangement. The EAT held that the employer, having merely declined to provide an advantage not proffered to any employees in that grade, had not 'subjected' the employee to anything, and that there was no 'detriment'. It also suggested that to insist on full-time working does not amount to a 'requirement or condition where a job by its very nature requires full-time attendance. However, doubt is cast upon *Clymo* by the decision of the Northern Ireland Court of Appeal in *Briggs*, above.

44.5 **Victimisation**

If an employer treats any person less favourably than others because that person threatens to bring proceedings, to give evidence or information, to take any action or make any allegation concerning the employer with reference to SDA or the Equal Pay Act 1970, or has already done any of those things, then the employer is guilty of discrimination by victimisation. [SDA s 4(1): cf. 37.5 RACIAL DISCRIMINATION]. If, however, the allegation made against the employer is false and not made in good faith, any unfavourable treatment of that person by reason of the false allegation will not be considered discriminatory. [SDA s 4(2)]. But there is no victimisation where the reason for the unfavourable treatment is the disruptive way in which complaints are made rather than the complaints as such (*Re York Truck Equipment Ltd*, IDS Brief 439, p 10).

44.6 **DISCRIMINATION IN EMPLOYMENT**

SDA forbids discrimination at every stage of employment: advertising vacancies, engagement of employees, promotion and other opportunities, dismissal. A person discriminated against by being dismissed does not have to have been employed for a qualifying period before being entitled to bring a claim, unlike other claims for unfair dismissal (cf. 54.11 UNFAIR DISMISSAL –I).

Employment has a wider definition in the *Sex Discrimination Act 1975* than it does in some other employment protection legislation. It is defined in Sec 82(1) as

‘employment under a contract of service or of apprenticeship, or a contract personally to execute any work or labour...’

In *Mirror Group Newspapers Ltd v Gunning* [1986] ICR 145, the Court of Appeal held that *Sec 82(1)* referred to a contract, the dominant purpose of which was the execution of personal work or services.

(Cf. 37.8 RACIAL DISCRIMINATION.)

44.7 Advertising

An advertisement must not show any intention to discriminate unlawfully. [*SDA s 38*]. Both the publisher and the advertiser, who cause a discriminatory advertisement to be printed are guilty of an unlawful act. [*SDA s 38(1): cf.37. 10 RACIAL DISCRIMINATION*].

‘Advertisement’ is defined by *Sec 82(1)* as including ‘every form of advertisement, whether to the public or not, and whether in a newspaper or other publication, by television or radio, by display of notices, signs, labels, showcards or goods, by distribution of samples. circulars, catalogues, price lists or other material, by exhibition of pictures, models or films’, or in any similar way. References to the publishing of advertisements will be interpreted accordingly.

The advertisement is not unlawful if the intended act which it indicates would not in fact be unlawful. [*SDA s 38(2)*] Thus, for example, an advertisement inviting men only to apply for a sales post in Oman may not be unlawful because the work is to be carried out in a country whose laws or customs are such that the duties could not, or could not effectively be performed by a woman. Being a man is a genuine occupational qualification for that job (sec 44.13 below). [*SDA s 7(2)(g)*].

Use of a job description with a sexual connotation such as waiter’ ‘salesgirl’ ‘postman’ or ‘stewardess’ will be taken to indicate an intention to discriminate unless the advertisement contains an indication to the contrary . [*SDA s 38(3)*]. Therefore, either a new word such as ‘salesperson’ will have to be used or the advertiser will have to insert a disclaimer such as applications are invited from men and women’.

The publisher of a discriminatory ,advertisement may escape liability if he proves

- (i) that the advertisement was published in reliance on a statement made to him by the person who caused it to be published to the effect that the advertisement was not in breach of the *Sex Discrimination Act 1975*: and
- (ii) that it was reasonable for him to rely on the statement. [*SDA s 38(4)*].

An advertiser who knowingly or recklessly makes a statement regarding the legality of the advertisement which is in a material respect false or misleading commits an offence and is liable on conviction in a magistrates court to a fine not exceeding level 5 on the standard scale. [*SDA s .38(5)*; and see 1 .11 INTRODUCTION]. Thus, for example. an advertiser who falsely assures a publisher that the people of Outer Monrovia would not accept women salespeople is guilty of a criminal offence, and the publisher of such an advertisement is guilty of an unlawful act unless he can establish that it was reasonable for him to rely upon that assurance.

44.8 Engagement

An employer may not discriminate directly or indirectly

- (a) in the arrangements he makes for the purpose of determining who should be offered employment: or
- (h) in the terms on which he offers employment: or
- (c) by refusing or deliberately omitting to offer employment.

[SDA s 6(1); cf. 37.11 RACIAL DISCRIMINATION].

Thus, if an employer offers a woman three weeks' holiday whereas a man doing the same job is entitled to five weeks, he is guilty of discrimination under the *Sex Discrimination Act 1975*. Also, the woman's contract will be modified by the *Equal Pay Act 1970* to give her the same holiday entitlement as that of the man (see *EQUAL PAY (19)*).

In *Saunders v Richmond-upon-Thames London Borough Council [1978] ICR 75*, it was assumed that questions asked at an interview constituted 'arrangement' within the meaning of (a) above. Whether or not the questions were unlawful was held to be a question of fact to be determined in each case. In *Brennan v JH Dewhurst Ltd [1984] ICR 52*, the arrangements made for interviewing applicants were operated so as to discriminate against women, and were therefore unlawful.

44.9 Opportunities

Once a woman is in a job, her employer may not discriminate against her in the way he affords her access to opportunities for promotion, transfer, training or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford her access to them. [SDA s 6(2)(a); cf. 37.12L RACIAL DISCRIMINATION].

References in the Act to the granting of access to benefits, facilities or services are not limited to those provided by one person (who might be an employer), but include any means by which it is in that person's power to facilitate access to benefits, facilities or services provided by any other person ('the actual provider'). [SDA s 50(1)]. Thus, if there are two companies within a group, A and B, and employees are employed by B, but are afforded training facilities by A, both A and B may be liable for discriminatory training by A.

44.10 Dismissal

A dismissal on the grounds of an employee's sex or marital status is unlawful under *SDA s 6(2)(b)* as well as being unfair within the meaning of the *Employment Protection (Consolidation) Act 1978* (see UNFAIR DISMISSAL. — II (55)).

Section 2(3) of the *Sex Discrimination Act 1986* provides for an extended definition of 'dismissal'. It provides that employees or partners whose employment or partnership comes to an end (and is not immediately renewed on the same terms) on the expiration of a certain period or the occurrence of a certain event are dismissed. So too are employees or partners who terminate their employment or partnership by acceptance of their employer's or fellow partners' repudiatory breach of contract.

The dismissal of a woman based on an assumption that men are more likely than women to be primary supporters of their spouses and children can amount to unlawful discrimination. (*Skyrail Oceanic Ltd v Coleman [1981] ICR 864*).

44.11 **Subjection to any other detriment**

Other detrimental measures taken by an employer on the grounds of sex such as demotion or withdrawal of privileges are unlawful under the Sex Discrimination Act 1975. Requiring only male supervisors to carry out dirty work was held to be an unlawful detriment in *Ministry of Defence v Jeremiah* [1980] 1CR 13.

Sexual harassment does not, of itself, constitute a breach of SDA. However, the Scottish Court of Session has held, in effect, that sexual harassment which affects a woman's working conditions is contrary to SDA. (*Porcelli v Strathclyde Regional Council* [1986] ICR 564). See also *Bracebridge Engineering Ltd v Darby* [1990] IRLR 3, and the EC *Recommendation on the Dignity of Men and Women at Work* (see 20.1 and 20.6 EUROPEAN COMMUNITY LAW).

Discriminatory action taken by an employer to ensure the health and safety of his employees will not be considered unlawful if it is taken in compliance with his statutory obligations. (*Page v Freight Hire (Tank Haulage) Ltd* [1981] ICR 299),

Cf. 37.13 RACIAL DISCRIMINATION.

44.12 **Pensions**

If an employer wishes to contract out of the state pension scheme he must give men and women equal access to pension benefits in his occupational pension scheme. [Equal Pay Act 1970, s 6(1A)(a); and see 44.20 below: see also 42.3 RETIREMENT].

44.13 **WHERE SEX IS A GENUINE OCCUPATIONAL QUALIFICATION**

If an employer can establish that being a man is a genuine occupational qualification for a job he may discriminate lawfully in certain respects. He may discriminate in advertisements, interviewing procedures, and in offers for the post: also in refusing opportunities for promotion, training or transfer to that post. If, however, an employer takes on a woman to do a certain job, he cannot then offer her less favourable terms than those offered to a man, or dismiss her or discriminate against her in any other way, on the grounds that being a man is a genuine occupational qualification for the job. [SDA s 7(1)].

Being a man is a genuine occupational qualification for a job in the following circumstances.

- (a) Where the essential nature of the job calls for a man for reasons of physiology (excluding physical strength or stamina) or, in dramatic performances or other entertainment, for reasons of authenticity, so that the essential nature of the job would be materially different if carried out by a woman.

Thus, a woman may not be discriminated against in jobs requiring physical strength and stamina provided that she is capable of performing those duties. However, employers may discriminate in seeking male models or actors.

- (b) Where the job needs to be held by a man to preserve decency or privacy because
 - (i) it is likely to involve physical contact with men in circumstances where they might reasonably object to its being carried out by woman: or
 - (ii) the holder of the job is likely to do his work in circumstances where men might reasonably object to the presence of a woman because they are in a state of undress or are using sanitary facilities.

If an employer required his employees to work stripped to the waist to establish that he was justified in refusing to offer employment to women, a court hearing a complaint against him would, it is thought, decide whether that requirement was necessary for the performance of the task, or mere whim on the part of the employer.

The *Sex Discrimination Act 1986 section 1(2)* provides for the addition of the following to the exception in the case of a job which needs to be held by a man to preserve decency or privacy:

‘the job is likely to involve the holder of the job doing his work, or living, in a private home and needs to be held by a man because objection might reasonably be taken to allowing a woman -

- (i) the degree of physical or social contact with a person living in the home: or
- (ii) the knowledge of intimate details of such a person’s life

which is likely, because of the nature or circumstances of the job or of the home, to be allowed to, or available to, the holder of the job.’

- (c) Where the nature or location of the establishment makes it impracticable for the holder of the job to live elsewhere than in premises provided by the employer and
 - (i) the only such premises which are available for persons holding that kind of job are lived in, or normally lived in, by men and are not equipped with separate sleeping accommodation for women and sanitary facilities which could be used by women in privacy from men: and
 - (ii) it is not reasonable to expect the employer either to equip these premises with such accommodation and facilities or to provide other premises for women.

(See e.g. . *Sisley v Britannia Security Systems Ltd [1983] 1CR 628.*)

- (d) Where the nature of the establishment, or the part of it within which the work is done, requires the job to be held by a man because
 - (i) it is, or is part of, a hospital, prison or other establishment for persons requiring special care, supervision or attention, and
 - (ii) those persons are all men (disregarding any woman whose presence is exceptional), and
 - (iii) it is reasonable, having regard to the essential character of the establishment or that part, that the job should not be held by a woman.
- (e) 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.

- (f) Where the job needs to be held by a man because it is likely to involve the performance of duties outside the United Kingdom in a country whose laws or customs are such that the duties could not, or could not effectively, be performed by a woman.
- (g) Where the job is one of two to be held by a married couple.

[SDA s 7(2) as amended by Employment Act 1989, s 3(2)].

These exceptions apply even where only some of the duties of the job fall within the above provisions. [SDA s 7(3)].

However, where an employer already has male employees who are capable of carrying out the duties of a vacant post, and whom it would be reasonable to employ on those duties and whose numbers are sufficient to meet his likely requirements in respect of those duties without undue inconvenience, then he may not discriminate by filling the vacancy with another man, even if the vacancy falls within (a) to (f) above. [SDA s 7(4)]. (See e.g. *Etam PLC v Rowan* [1989] IRLR 150.)

44.14 EXCEPTIONS

Discrimination in training

Positive discrimination in favour of women or men, in affording access to training and encouragement to apply for particular work, is permitted to employers if at any time within the twelve months immediately preceding the doing of the act there were no persons of the sex in question among those doing that work or the number of persons of that sex doing the work was comparatively small. [SDA s 48(1)(2): cf. 37.14(h) RACIAL DISCRIMINATION].

Other persons or bodies may also discriminate in favour of women or men in similar circumstances. [SDA s 47. originally applicable to training bodies but extended by Sex Discrimination Act 1986. s 4 so as to apply to any person].

Positive discrimination is also permitted to encourage membership of and postholding in trade unions and employers organisations where there are no or proportionally few postholders or members of that sex. (SDA s' 49).

EA 1989, s 8 provides that the Secretary of State may by order make special provision for vocational training for lone parents. Where such an order is made, discrimination in favour of lone parents in accordance with the order will not be regarded as unlawful.

44.15 Communal accommodation

If an employer provides communal accommodation for his employees, he may discriminate in its provision if the accommodation is managed in a way which is as fair as possible to men and women. [SDA s 46(3)]. In deciding whether an employer has made fair provision, account is taken of

- (a) whether and how far it is reasonable to expect that the accommodation should be altered or extended, or that further alternative accommodation should be provided: and
- (b) the frequency of the demand or need for use of the accommodation by men as compared with women.

[SDA s 46(4)].

If, for example, a company provided a holiday home for its employees but the sleeping arrangements were only suitable for men, then provided that it was only used occasionally and it was impractical to modify it for the use of the women or to build additional accommodation for them, such discrimination may be lawful.

Benefits dependent on communal accommodation . Discrimination on the grounds of sex is lawful in respect of the provision of any benefit, facility or service if

- (i) the benefit, facility or service cannot be properly and effectively provided except for those using communal accommodation: and
- (ii) in the relevant circumstances a woman could lawfully be refused the use of the accommodation under the rules above.

[SDA s 46(5)].

Therefore, if a firm ran a residential training course in Northern Scotland and accommodation could only be provided for men and it was fair so to do, failure to 'make the course available to women would not be discrimination.

Arrangements to compensate for detriment. It should be noted that sex discrimination is only permitted in the above circumstances where such arrangements are as reasonably practicable have been made to compensate for any detriment caused by the discrimination. [SDA s 46(6)]. For example, training courses run by the ABC Company for a few days in the North of Scotland are not as available to women employees because of the unsuitability of the accommodation the company will not have a defence against a claim alleging discrimination unless it can show either that an alternative course had been provided or that having been considered carefully, it was thought with good reason not to be practicable to provide it.

44.16 **Discrimination in compliance with the law**

An employer is not guilty of in unlawful act if he discriminates in order to comply with a statute passed before the *Sex Discrimination Act 1975*, or a statutory instrument made or approved (whether before or after the passing of the SDA) by or under an Act passed before the SDA, if such provision is one concerning the protection of women. [SDA s 51 as substituted by EA 1989 s 3(3)]. Thus, discrimination in order to comply with college statutes enacted under a statute prior to SDA was considered lawful in *Hugh-Jones v St John's College, Cambridge [1979] ICR 848*. Many such statutory requirements have been or will be removed as a result of EA 1989.

44.17 **Discrimination to safeguard national security**

Discrimination for the purpose of safeguarding national security is lawful. [SDA 52(1)]. Before the passing of the *Sex Discrimination (Amendment) Order 1988 (SI 1988 No 249)*, a certificate signed by, or on behalf of, a Minister of the Crown and certifying that an act specified in the certificate was done for the purpose of safeguarding national security was conclusive evidence that it was done for that purpose. [SDA s 52(2)].

SDA s 52(2) was amended by *SI 1988 No 249* so that it no longer applies to discrimination in employment and related areas. This followed the decision of the European Court of Justice in *Johnston v Chief Constable of the Royal Ulster Constabulary [1987] ICR 83* whereby a provision in a Northern Ireland Order, similar to the unamended SDA s 52(2). was held to be contrary to Article 6 of the Equal Treatment Directive No 76/207. (See 20.6 EUROPEAN COMMUNITY LAW.)

44.18 **Provision of benefits and services**

An employer whose business consists of or includes the provision of benefits, facilities or services to the public may as a matter of *employment law* discriminate against a woman employee in the provision of those benefits or services to her unless

- (a) that provision to the public differs in a material respect from the provision of those benefits by the employer to his employees.
- (b) their provision is regulated by the woman's contract of employment, or
- (c) the benefits, facilities or services relate to training.

[*SDA s 6(7); cf. 37.14(c) RACIAL DISCRIMINATION*].

Thus, if an employer operates a public sports stadium, and prevents women from using a particular facility at the stadium, a female would-be user who happens to be an employee of that employer will not be able to complain to an industrial tribunal. However, the employer will be liable to an action by that employee in the county court under the provisions of SDA s 29 (discrimination in provision of goods, facilities or services).

44.19 **Pay**

Offering or paying a woman less remuneration than a man is not an act of unlawful discrimination [*SDA s 6(5) (6)*]. but if she is engaged on like work or on work rated as equivalent to that of a man or on work of equal value to that of a man, her contract is modified by the *Equal Pay Act 1970* so that she is able to claim pay equal to that of the man (see EQUAL PAY (19)).

44.20 **Retirement and employment—related benefits**

Since the *Sex Discrimination Act 1986*, s 2(1) came into force. it has been contrary to *SDA 1975* to apply different compulsory retiring ages to men and women.

SDA s 6(4), as amended by *SDA 1986*, excludes from the ambit of the relevant provisions of the legislation provision n to death or retirement except in so far as those statutory provisions render it unlawful a person to discriminate against a woman -

- (a) in such of the terms on which he offers her employment as to make provision in relation to the way in which he will afford her access to opportunities for promotion, transfer or training or as provide for her dismissal or demotion; or
- (b) in the way he affords her access to opportunities for promotion, transfer or training or by refusing or deliberately omitting to afford her access to any such opportunities; or
- (c) by dismissing her or subjecting her to any detriment which results in her dismissal or consists in or involves her demotion.

Social Security Act 1989, 5 Sch 14 provides for the scope of unlawful discrimination in relation to provision for death or retirement to be extended to embrace discrimination by a person against a woman -

- (d) in such of the terms on which he offers her employment as make provision in relation to the way in which he will afford her access to any benefit facilities or services under an occupational pension scheme: or
- (e) in the way in which he affords her access to any such benefits, facilities or services; or
- (f) by refusing or deliberately omitting to afford her access to any such benefits, facilities or services: or
- (g) by subjecting her to any detriment in connection with any such scheme.

if the act of discrimination relates to a matter in respect of which an occupational pension scheme has to comply with the principle of 'equal treatment under *SSA 1989 Sch. [proposed new SDA s 6(4B)]*. That principle is set out in *SSA 1989 5 Sch 2*. It includes a bar upon indirect discrimination where the relevant requirement or condition cannot be justified irrespective of sex and (*by proposed new SDA s 6(4C)*) a bar on discrimination based on marital status. It will apply only to employment-related benefit schemes as defined by *SSA 1989, 5 Sch. 7*. This will include schemes for benefits payable in money or money's worth in respect of matters which include termination of service, retirement, death, sickness, industrial injury, unemployment or expenses connected with children or other dependants.

The relevant provisions of *SSA 1989* are to be brought into force by statutory instrument. Originally the Government's intention was to do this with effect from 1st January 1993, but implementation has been delayed pending clarification of the effect of the ECJ's decision in *Barber v Guardian Royal Exchange Assurance Group Ltd [1990] ICR 616 (see 19.17 Equal Pay)*.

Despite the restrictions imposed by *SDA s 6(4)*, there has proved to be considerable scope for challenging unequal provision in respect of pensions through direct reliance upon *Article 119* of the Treaty of Rome; see generally 19.9 and 19.17 EQUAL PAY and EUROPEAN COMMUNITY L,W (20).

If an employer wishes to contract out of the state pension scheme he must in any event show that membership of his occupational pension scheme is available to women on the same terms as to men. [*Social Security Pensions Act 1975, s 53*].

44.21 EMPLOYEES TO WHOM THE ACT DOES NOT APPLY

(a) Employees working outside Britain

The SDA does not apply to employees who do their work wholly or mainly outside Great Britain, [*SDA ss 6(1), 10(1)*]. However, the Act does apply to)

- (i) employment on board a ship registered at a port of registry in Great Britain; or
- (ii) employment on aircraft or hovercraft registered in the United Kingdom and operated by a person who has his principal place of business, or is ordinarily resident, in Great Britain,

unless the employee does his work wholly outside Great Britain. [*SDA s 10(2)*]. By Order, Great Britain may be deemed to include the continental shelf, including foreign sectors of the continental shelf in relation to employment concerned with the exploration or exploitation of a cross-boundary petroleum field. (*SDA s 10(5)*). The Sex Discrimination

and Equal Pay (Offshore Employment) Order 1987 (SI 1987 No 930) has been made pursuant to this power.

(Cf. 37.9, 37.14(a) RACIAL DISCRIMINATION.)

(b) **Police officers**

Discrimination in height requirements and uniform or uniform allowances is lawful in the employment of police constables. [*SDA s 17(2)13*].

(c) **Prison officers**

Discrimination is lawful between male and female prison officers as to requirements relating to height. [*SDA s 18(1)*]. Men may now be governors of women's prisons. [*SDA s 18(2)*].

(d) **Ministers of religion**

The Act does not apply to employment for purposes of an organised religion where the employment 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. [*SDA s 19(1)*].

44.22 **NON-EMPLOYERS COVERED BY THE EMPLOYMENT RULES**

Users of contract workers

The person to whom an employer supplies labour (the principal) may not discriminate against a woman who is a contract worker

- (a) in the terms on which he allows her to do that work; or
- (b) by not allowing her to do it or continue to do it; or
- (c) in the way he affords her access to any benefits, facilities or services or by refusing or deliberately omitting to afford her access to them (not being those which are supplied to the public at large unless, in relation to these, the woman is treated less favourably than other contract workers); or
- (d) by subjecting her to any other detriment.

[*SDA s 9(2)*; cf.37.16 RACIAL DISCRIMINATION]

The exceptions available to employers relating to genuine occupational qualifications apply equally to principals. [*SDA s 9(3)*].

44.23 **Partnerships**

It is unlawful for a partnership to discriminate against a woman in relation to a position as a partner in the firm

- (a) in the arrangements they make for the purpose of determining who should be offered that position; or

- (b) in the terms on which they offer her that position; or
- (c) by refusing or deliberately omitting to offer her that position; or
- (d) in a case where the woman already holds that position
 - (i) in the way they afford her access to any benefits, facilities or service or by refusing or deliberately omitting to)afford her access to them; or
 - (u) by expelling her from that position, or subjecting her to any other detriment.

[SDA s 11(1) as amended by Sex Discrimination Act 1986 which abolished an exception applying to partnerships of five or fewer partners; cf. 37.15(a) RACIAL DISCRIMINATION].

These provisions also apply to persons proposing to form themselves into partnership. *[SDA s 11(2)]*. However, the clauses relating to arrangements made for the purpose of determining who should be offered the position, and to refusing or deliberately omitting to offer a woman that position, do not apply where being a man is a genuine occupational qualification for the partnership.*[SDA s 11(3)]*.

44.24 **Trade unions and employers' organisations**

Trade unions and employers' organisations may not discriminate against women in selecting their membership, in dispensing benefits or in subjecting members to any detriment, including expulsion. *[SDA s 12; cf. 37.15(b) RACIAL DISCRIMINATION]*.

44.25 **Bodies conferring qualifications etc.**

It is unlawful for an authority or body which can confer an authorisation or qualification which is needed for, or facilitates, engagement in a particular profession or trade to discriminate against a woman

- (a) in the terms on which it is prepared to confer on her that authorisation or qualification; or
- (b) by refusing on deliberately omitting to grant her application for it; or
- (c) by withdrawing it from her or varying the terms on which she holds it.

[SDA s 13(1); cf. 37.15(c) RACIAL DISCRIMINATION].

In *British Judo Association v Petty* [1981] ICR 660, it was held that SDA s 13 was to be widely construed so as to render unlawful a discriminatory restriction in a judo referee's certificate, since the certificate would in fact facilitate the holder's trade or profession.

Where the qualifying body must consider an applicants character, if there is evidence to show that an applicant has practised unlawful discrimination in connection with the carrying on of any profession on trade, that must be taken into account in considering his character. *[SDA s 13(2)]*.

44.26 **Persons concerned with provision of vocational training**

It is unlawful, in the case of a woman seeking or undergoing training which would help fit her for any employment, for any persons who provides, or makes arrangements for the provision of, facilities for such training to discriminate against her

- (a) in the terms on which that person affords her access to any training course or other facilities concerned with such training, or
- (b) by refusing or deliberately omitting to afford her such access, or
- (c) by terminating her training, or
- (d) by subjecting her to any detriment during the course of her training.

[SDA s 14; EA 1989, s 7(1); cf. 37. 15(d) RACIAL DISCRIMINATION].

These provisions apply to persons concerned with the provision of vocational training. They' do not apply to the provision of training by employers to their employees to whom *SDA s 6(1) and (2)* apply to prohibit *inter alia* discrimination in access to training.

44.27 **Employment agencies**

It is unlawful for an employment agencies to discriminate against a woman

- (a) in the terms on which the agency offers to provide any of its services, or
- (b) by refusing or deliberately omitting to provide any of its services: or
- (c) in the way' it provides any of its services.

[SDA s 15; cf. 37.15(e) RACIAL DISCRIMINATION].

These provisions apply to guidance on careers and any other services related to employment. [SDA s 15(3)]. If, however, the employer could lawfully refuse to offer the job to a woman, discrimination in relation to that job by an employment agency is lawful, (SDA s' /5(4)].

An employment agency may escape liability if it proves

- (i) that it acted in reliance on a statement made to it by the employer to the effect that he could lawfully refuse to offer a woman employment; and
- (ii) that it was reasonable for it to rely on the statement.

[SDA s 77(1)].

If for example, an employment agency relied on the statement of an employer who had been guilty of discrimination in the past, to the knowledge of the employment agency, it may be difficult for that agency to establish that it had acted reasonably in relying upon that statement.

A person who knowingly or recklessly' makes such a statement which in a material respect is false or misleading commits an offence and is liable on summary conviction to a fine not exceeding level 5 on the standard scale. [SDA s 15(6); and see 1.11 INTRODUCTION].

It is also unlawful for the Secretary of State to discriminate in the provision of facilities or services under the *Employment and Training Act 1973* s 2. [SDA s 16].

44.28 PERSONS RESPONSIBLE

Anything done by a person in the course of his employment shall be treated for the purposes of the Act as done by his employer as well as by him, whether or not it was done with the employer's knowledge or approval. [SDA s 41(1); cf. 37.21 RACIAL DISCRIMINATION; and see VICARIOUS LIABILITY (57)]. See *e.g. Bracebridge Engineering Ltd v Darby* [1990] IRLR 3. However, it is a defence for an employer to prove that he took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of his employment acts of that description. [SDA s 41(3)]. See *Balgobin and another v Tower Hamlets London Borough Council* [1987] ICR 829).

Anything done by a person as agent for another person with the authority of that person shall be treated as done by the principal as well as the agent. [SDA s 41(2)].

44.29 OTHER UNLAWFUL ACTS

Knowingly to aid another person in unlawful discrimination is itself an unlawful act. (*See Greater London Council v Farrer* [1980] ICR 267; cf. 37.22 RACIAL DISCRIMINATION.) [SDA s 42(2)].

A person does not knowingly aid another to do an unlawful act if

- (a) he acts in reliance on a statement made to him by that other person that, by reason of any provision of the Act, the act which he aids would not be unlawful: and
- (b) it is reasonable for him to rely on the statement.

[SDA s 42(3)].

Knowingly to make a false statement is an offence punishable by a fine not exceeding level 5 on the standard scale. [SDA s 42(4); and see 1 10 INTRODUCTION; cf. 37.23 RACIAL DISCRIMINATION]. Thus, if an employer falsely assures his employee that a certain act is lawful, he is guilty of a criminal offence.

It is unlawful to give instructions to discriminate to a person over whom one has authority or to a person who normally acts in accordance with one's wishes, [SDA s 39: cf. 37. 18 RACIAL DISCRIMINATION]. Therefore, if a father, whose son normally acts in accordance with his wishes, orders him to discriminate in his business, the father acts unlawfully.

Direct or indirect pressure to induce or attempt to induce a person to discriminate is unlawful. [SDA s 40; cf. 37.19 RACIAL DISCRIMINATION]. Such inducements may include offering either benefits or detriments.

44.30 EFFECT OF THE ACT ON CONTRACTS

A term of a contract is void where

- (a) its inclusion renders the making of the contract unlawful by virtue of the Act;
- (b) it is included in furtherance of an act rendered unlawful by the Act;
- (c) it provides for the doing of an act which would be rendered unlawful by the Act.

[SDA s 77(1)].

Thus, a term in a contract for the provision of a discriminatory training programme would be rendered void by Sec 77(1). A term in a contract for an advertisement which provided for the inclusion of a discriminatory expression would similarly be made void.

A term which constitutes (or is in furtherance of or provides for) unlawful discrimination against a party to a contract is not made void, but is unenforceable against that party. [SDA s 77(2)]. For example, a term in a contract with a woman which states that she cannot use a smoking room normally reserved for men is not enforceable in a court of law. A party to the contract may apply to a county court in England and Wales or a sheriff court in Scotland which may remove or modify the discriminatory term, provided that all persons affected have been notified of the application. [SDA s 77(5)].

By SDA 1986, s 6 as amended by *TURERA s 32*, SDA s 77 is made to apply to any term of a COLLECTIVE AGREEMENT (8) (even if not intended to be legally enforceable) or to any rule made by an employer for application to his employees or to applicants for employment. Sec 77 is also applied to any rule made by an organisation of workers, an organisation of employers, or an organisation whose members carry on a particular profession or trade for whose purposes it exists, for application to its members and prospective members. It also applies to any rule made by an authority or body which can confer an authorisation or qualification needed for, or facilitating, engagement in a particular profession or trade, for application to those who have received or seek to receive such authorisation or qualification. Persons who are (as the case may be) employees, members or the recipients of authorisations or qualifications, or who are genuinely and actively seeking to become such, and who have reason to believe that the offending term or rule may at some future time have effect in relation to them may complain to an industrial tribunal, if the tribunal finds the complaint well-founded, it will declare the term or rule void.

(See also *EQUALPAY (19)*.)

Local authorities may not insert clauses into their contracts obliging the other party to comply with the discrimination legislation, because these are 'non-commercial matters', [*Local Government Act 1988, s 1 7*]. (See *R v Islington London Borough Council, Ex parte Building Employers Confederation [1989] IRLR 382*.)

44.31 NO CONTRACTING OUT

A term in a contract which purports to exclude or limit any provision of the Act is unenforceable by any person in whose favour the term would operate. [SDA s 77(3)]. The inclusion of such a clause in a contract of employment would have no effect, leaving the employee free, despite its inclusion, to bring a complaint under the Act against the employer.

An agreement to compromise or 'settle a complaint of sex discrimination is only binding upon the complainant if one of two conditions is satisfied, and it is essential to ensure that the appropriate

steps are taken, or else the employee will still in the future be able to take her claim to the tribunal. One case in which a settlement will be binding is where it has been reached with the assistance of a conciliation officer (see 2.3 **ADVISORY CONCILIATION AND ARBITRATION SERVICE**). The other is where the statutory requirements for a valid compromise contract are satisfied, the most important of which is that the employee should have had independent legal advice (see 27.16 **INDUSTRIAL TRIBUNALS**). [SDA s 77(4) as amended by TURERA 6 Sch. I].

45 Sex Discrimination — II: Enforcement and Remedies

45.1 No legal action may be taken against an employer for a breach of any provision of the *Sex Discrimination Act 1975 (SDA)*, except where such an action is expressly provided for by the Act. The only means of direct enforcement open to an individual for discrimination in relation to employment, is by application to an industrial tribunal (see 43.2 below). The Equal Opportunities Commission (EOC) has additional powers to hold formal investigations (see 45.9 below), issue non-discrimination notices (see 43.10 below) and may apply for an injunction in certain cases (see 45.11-45.12 below). Where *SDA* does not confer the rights granted by EEC Directive 76/207 ('the Equal Treatment Directive'), individuals may rely upon the Equal Treatment Directive in claims against state authorities (see 36.6 PUBLIC SECTOR EMPLOYEES and 44.20 SEX DISCRIMINATION -I).

The provisions of *SDA* are similar to those relating to RACIAL DISCRIMINATION (37) in the *Race Relations Act 1976*, and readers should refer to decisions under that Act as well as *SDA*.

45.2 APPLICATIONS TO AN INDUSTRIAL TRIBUNAL

A person ('the complainant') may present a complaint to an industrial tribunal that another person has committed an act of discrimination against him or her which is unlawful by virtue of *SDA Part II* (the provisions relating to employment). By virtue of *SDA* s 41 or s 42, the discriminator or employer of the discriminator will *also* be treated as having committed the discrimination (see 44.28 SEX DISCRIMINATION - I). [*SDA* s 63(1)]. Although the Act does not mention the 'burden of proof, in practice it is the complainant who must prove his or her case. (*Oxford v Department of Health and Social Security* [1977] ICR 884).

However, industrial tribunals are entitled to draw an inference of sex discrimination from primary facts which indicate that there has been some discrimination, and if a complainant shows that he or she has been treated differently from other employees, it is for the respondent to establish that the discrimination was not on the ground of sex. (*Moberly v Commonwealth Hall (University of London)* (1977) IRLR 176). The application of this principle is illustrated by two recent Court of Appeal judgments. In *Baker v Cornwall County Council* [1990] ICR 452 the Court of Appeal warned that, where an employer gives as a reason for the selection of an employee the desire to have someone who will 'fit in', this is often a signal of discrimination, and the tribunal should be prepared to draw that inference unless it was satisfied that there was some other, innocent explanation. The Northern Ireland Court of Appeal in *Dornan v Belfast City Council* [1990] IRLR 179 held that a *prima facie* case of sex discrimination is made out where (a) it is established that the unsuccessful candidate is better qualified than the successful candidate, and (b) the unsuccessful candidate is a woman and the successful candidate is a man. Once a *prima facie* case of discrimination has been made out, the evidential burden is shifted to the employer to disprove such discrimination by providing a clear and specific explanation to the satisfaction of the tribunal. A draft EC directive on the burden of proof set out at [1988] 3 CMLR 272, was vetoed by the UK Government and has not been revived. Cf. 37.27 RACIAL DISCRIMINATION.

45.3 Time limit

A complaint must be presented to a tribunal before the end of the period of three months beginning when the act complained of was done. [*SDA* s 76(1); cf. 37.27 RACIAL DISCRIMINATION].

For the purposes of deciding when an act was done, in calculating the time limit

- (a) where the inclusion of any term in any contract renders the making of the contract an unlawful act, that act shall be treated as extending throughout the duration of the contract: and
- (b) any act extending over a period shall be treated as done at the end of that period (for tin example. see *Calder v James Finlay Corporation Ltd* [1989] ICR 157); and
- (c) a deliberate omission shall be treated as done when the person in question decided upon it.

[SDA s 76(6)].

If the cause for complaint is an omission rather than an act, the omission will be considered to have been decided upon when a person does something inconsistent with the omitted act or when the period within which he would reasonably have done the act has expired.

A tribunal may nevertheless consider any such complaint or application which is out of time if, in till the circumstances of the case, it considers that it is just and equitable to do so. [SDA s 76L5][. One possible ground for doing so is that the complainant was unaware of his or her rights.

In *Stevens v Bexlev Health Authority* [1989] ICR 224 the EAT appeared to consider that the statutory time limits were not applicable to claims brought directly under European law, but more recent decisions have shown that view to be incorrect (see 19.17 EQUAL PAY. and 20.2 EUROPEAN COMMUNITY LAW).

45.4 Questionnaires and disclosure

With a view to helping a person who considers that he (or she) may have been discriminated against in contravention of *SDA* to decide whether to institute proceedings and, if he does so, to formulate and present his case in the most effective manner, such a person (whether the applicant or potential applicant may serve, on the person against whom he has a complaint, a questionnaire in the form prescribed by the *Sex Discrimination (Questions and Replies) Order 1975 (SI 1975 No 2048), 1 Sch. [SDA s 74]. (Cf .37.32 RACIAL DISCRIMINATION.)* Such forms may be obtained from the EOC. A questionnaire is only admissible in evidence before an industrial tribunal if it is served on the person (or company questioned within the following time limits:

- (a) where it has been served before a complaint has been presented to a tribunal, within the period of three months beginning when the act complained of was done;
- (b) where it is served when a complaint has been presented to a tribunal, either within the period of 21 days beginning with the day on which the complaint was presented or later within a period specified by a direction of a tribunal.

SDA s 74(2)(a); SI 1975 No 2048, Article 5.

The form for the reply is set out in *SI 1975 No 2048, 2 Sch.* If the questionnaire is admissible as evidence before the tribunal, so too is any reply. If it appears to the tribunal that the respondent deliberately, and without reasonable excuse, omitted to reply within a reasonable period or that his reply is evasive or equivocal, the tribunal may draw any inference from that fact that it considers just and equitable to draw, including an inference that he committed an unlawful act. [SDA s 74(2)1(b)].

An employer may be asked by which criteria he chose an employee for a particular post, but he is not obliged to answer an unreasonable question such as the name and address of a successful applicant for a post. (*Oxford v Department of Health and Social Security* [1977] ICR 884). He may also be asked for the numbers of men and women in particular posts and in the workforce as a whole and, if the case is one of failure to select for appointment or promotion, the breakdown by sex of applicants at the various stages of the selection process. For the power of an industrial tribunal to order the disclosure of documents which are relevant to the proceedings, see 27.7 INDUSTRIAL TRIBUNALS, and cf. 37.27 RACIAL DISCRIMINATION.

45.5 **Conciliation**

When a complaint has been presented to an industrial tribunal, the conciliation officer must endeavour to promote a settlement of the complaint if

- (a) he is requested to do so both by the complainant and the respondent; or
- (b) in the absence of requests by the complainant and the respondent, he considers that he could act with a reasonable prospect of success.

[SDA s 64(1)]. His services may also be sought by a prospective party before the presentation of a complaint. [SDA s 64(2)].

Information given to the conciliation officer in the performance of his duties is not admissible in evidence before the tribunal except with the consent of the giver of the information. [SDA s 64(3)]. Thus, frequently a conciliation officer will contact the employer to investigate the possibility of the removal of the cause of complaint. An employer is not obliged to give the conciliation officer information. See also ADVISORY CONCILIATION AND ARBITRATION SERVICE (2). For the validity of settlements, see 45.14 below.

45.6 **Restriction of publicity**

EPCA 9 Sh 1 (5A) as inserted by TURERA s 40 allows Regulations to be made including provision for the restriction of publicity in certain cases. although no such Regulations have yet been made.

Where a case involves allegations of the commission of sexual offences, provision may be made for securing that the registration or other making available of documents or decisions shall be so effected as to prevent the identification of any person affected by or making the allegation. A sexual offence means an offence of rape and related offences, and certain other offences including indecent assault, under-age intercourse, incest and buggery.

Where a case involves allegations of sexual misconduct, provision may be made for an industrial tribunal to make a restricted reporting order having effect until its decision is promulgated (unless revoked earlier). Sexual misconduct means the commission of a sexual offence, sexual harassment, or other adverse conduct related to sex (whether in its character or in its having reference to the sex or sexual orientation of the person at whom it is directed). A restricted reporting order is one prohibiting the publication in Great Britain, in a written publication available to the public, of matter likely to lead members of the public to identify a person as one who is affected by or is the person making the allegation, or the inclusion of such matter in programmes for reception in Great Britain. Contravention of a restricted reporting order will be a criminal offence carrying a fine not exceeding level 5 on the standard scale (see 1.10 INTRODUCTION).

Similar provision may be made in relation to appeals to the EAT against the making of, or a refusal to make, a restricted reporting order, and appeals against interlocutory decisions in proceedings

where a restricted reporting order is in force [EPCA 11 Sch. 18A, inserted by TURERA s 41]. Again, no Regulations have yet been made.

45.7 Tribunal orders

Where an industrial tribunal finds that a complaint presented to it is well-founded, it may make such of the following orders as it considers just an equitable.

- (a) An order declaring the rights of the complainant and the respondent in relation to the act to which the complaint relates. [SDA s 65(1) (a)]. Such a declaration may state, for example, that the complainant is entitled to certain training facilities or should be considered for a certain position.
- (b) An order requiring the respondent to pay to the compensation of an amount corresponding to any damages he could have been ordered by a county court to pay to the complainant. [SDA s 65(1)(b)]. Once a tribunal has decided to award compensation under Sec. 65(1)(b), the amount must be computed on the basis of what damages would be recoverable in a county court, and not on the basis of what the tribunal thinks is just and equitable. (*Hurley v Mustoe (No 2) [1983] ICR 422*). If the complainant was barred from applying for a particular benefit, the tribunal must in assessing compensation consider the percentage chance that her application would have succeeded (*Calder v James Finlay Corporation Ltd [1989] ICR 157*).
- (c) A recommendation that the respondent take, within a specified period, action appearing to the tribunal to be practicable for the purpose of obviating or reducing the adverse effect on the complainant of any act of discrimination to which the complaint relates. [SDA s (1)(c)].

The amount of compensation awarded may include a sum for injury to feelings which results from the knowledge that it was an act of sex discrimination which brought about the employer's action. (SDA s 66(4); *Skyrail Oceanic Ltd v Coleman [1981] ICR 864*). See also *Wileman v Minilec Engineering Ltd ICR 318S*; *Murray v Powertech (Scotland) Ltd [1992] IRLR 257*.

As a matter of English law, the amount of compensation awarded may not exceed the amount for the time being specified in EPCA s 75(1) as amended which is at present £11,000. [SDA s 65(2); Unfair Dismissal (Increase of Compensation Limit) Order 1993 (SI 1993 No 1348)].

However, the position is different where the applicant is entitled to rely directly upon the Equal Treatment Directive (see 45.1 above). In *Marshall v Southampton and South West Hampshire Regional Health Authority (No 2m) [1993] IRLR 445* the ECJ held that it was inconsistent with EC law for there to be a limit on compensation which bore no relation to the loss actually suffered. The ECJ further held that EC law required the tribunal to have the power to award interest. It is anticipated that the Government will take steps to bring the SDA into line with EC law in these respects, particularly because applicant's who cannot rely directly upon the Directive may be able to sue the Government for the loss caused by its failure to implement the Directive correctly (*Francovich v Italian Republic [1992] IRLR 84*; and see 20.2 EUROPEAN COMMUNITY LAW).

No compensation will be awarded in respect of an act of indirect discrimination (see 44.4 SEX DISCRIMINATION - I) if the respondent proves that the discriminatory requirement or condition was not applied with the intention of treating the applicant unfavourably on the ground of her sex or marital status, as the case may be. [SDA c 66(3)].

If without reasonable justification, the respondent to a complaint fails to comply with a recommendation made by an industrial tribunal that he take certain action under (c) above then, if it thinks it just and equitable to do so

- (i) the tribunal may, subject to the limit in Sec 65(2), increase the amount of compensation required to be paid to the complainant in respect of the complaint by an order made under Sec 65(1) (b); or
- (ii) if an order for compensation could have been made, but was not, the tribunal may make such an order.

[SDA s 65 (3)(a) (b)]. (Cf. 37.27 RACIAL DISCRIMINATION.)

45.8 THE EQUAL OPPORTUNITIES COMMISSION

The *Sex Discrimination Act 1975*, s 53 and 3 Schedule establishes the EOC which has the following duties

- (a) to work towards 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 *Sex Discrimination Act* and the *Equal Pay Act 1970* and when it is so required by the Secretary of State or otherwise thinks it necessary, to draw up and submit to the Secretary of State proposals for amending these Acts.

The EOC also has a duty to keep under review statutory provisions relating to health and safety at work which require men and women to be treated differently, to prepare reports on such matters and to prepare an annual report. [SDA ss 55, 56].

The EOC has the power to issue codes of practice, giving practical guidance. [SDA s 56A]. It has issued a code of practice 'for the elimination of sex and marriage discrimination and the promotion of equality of opportunity in employment'. A breach of the Code does not in itself render a person liable to proceedings, but any relevant provision of the Code may be taken into account by an industrial tribunal. [SDA s 56A(10)].

For inquiries, copies of the Code, leaflets etc. the address of the EOC is Overseas House, Quay Street, Manchester M3 3HN, tel. 061-833 9244.

In R v Secretary of State for Employment ex p Equal Opportunities Commission [1993] ICR 251 the majority of the Court of Appeal considered that the EOC had *locus standi* to challenge in judicial review proceedings a refusal by the Secretary of State to accept that English law was sexually discriminatory in certain respects but the court also held (again by a majority) that the proper forum for the challenge in question was the industrial tribunal. The decision is under appeal.

45.9 Formal investigations

Apart from these general duties, the EOC may if it thinks fit, and shall if required by the Secretary of State for Employment, conduct a formal investigation for any purpose connected with the carrying out of its duties. [SDA s 57(1)]. The EOC or the Secretary of State for Employment must draw up terms of reference [SDA s 58(2)]. General notice of the holding of the investigation must be

given unless the terms of reference are confined to the activities of named persons, in which case those persons must be given notice in the prescribed manner. [SDA s 58(3); *Sex Discrimination (Formal Investigations) Regulations 1975 (SI 1975 No 1993)*].

If the EOC proposes, in the course of such a ‘named person’ investigation, to investigate acts made unlawful by the SDA which it believes such a person may have done, then it must inform that person accordingly. He will then have the opportunity to make oral or written representations, and to have legal or other representation if he makes oral representations. (SDA s 58(3A)).

Information. For the purposes of a formal investigation, the EOC may issue notice requiring the production of written information or documents or the attendance of witnesses for examination. A notice requesting information may only be issued where

- (a) an investigation is being made into compliance with a non-discrimination notice [SDA s 69; and see 45.10 below]; or
- (b) service of the notice was authorised by or on behalf of the Secretary of State [SDA s 59(2)(a)]; or
- (c) the terms of reference of the investigation show that the EOC believes that a person may have been or may be
 - (i) carrying out unlawful discriminatory acts;
 - (ii) applying discriminatory practices prohibited by Sec 37;
 - (iii) issuing discriminatory advertisements, or issuing instructions to discriminate or pressurising others to discriminate (i.e. breach Sections 38, 39 or 40);
 - (iv) acting in breach of a term modified or included by virtue of an equality clause (see 19.4 EQUAL PAY).

[SDA s 59(2)(b)].

Such a notice cannot compel a person to disclose information or give evidence if he could not be compelled to do so in civil proceedings. [SDA s 59(3)(a)]. Thus, communications with a solicitor relating to advice or discussions about the EOC’s action would be privileged. The Act also states that necessary travelling expenses of persons required by notice to attend the EOC must be offered to them. [SDA s 59(3) (b)]. If a person fails to comply with a lawful notice or the EOC has reasonable cause to suspect that he intends not to comply with it, the EOC may apply to a county court for an order requiring him to comply with it. Witnesses who fail to attend may be fined up to £400. [SDA s 59(4); County Courts Act 1984, s 55(1)(2)]. The EOC may have reasonable cause to believe that a person does not intend to comply with the order if he expresses his intention of non-compliance and also if he neglects to respond to requests which are proved to have been sent to him.

If a person is convicted in a magistrates court of

- (A) willfully altering, suppressing, concealing or destroying a document required to be produced; or
- (B) knowingly or recklessly making any statement which is false in a material particular,

he may be fined an amount not exceeding level 5 on the ‘standard scale. [SDA s 59(6); and see 1.11 INTRODUCTION].

EOC's report. The EOC may, as a result of its investigation, make recommendations to any person for changes in their procedures and to the Secretary of State for changes in the law or for other changes. [SDA s 60(1)] Sec 60 provides that the report of such an investigation (other than one required by the Secretary of State) and its recommendations must be either published or made available for inspection.

No information given to the EOC in connection with a formal investigation is to be disclosed by the EOC or by Its past or present Commissioners or employees except

- (a) on the order of any court; or
- (b) with the informant's consent; or
- (c) in the form of a summary or other general statement published by the EOC, which does not identify the informant or any other person to whom the information relates; or
- (d) in a report of an investigation published by the EOC under *SDA s 60*; or
- (e) to the Commissioner, additional Commissioners or employees of the EOC, or, so far as may be necessary for the proper performance of the functions of the EOC, to other persons; or
- (f) for the purpose of any civil proceedings under the *Sex Discrimination Act 1975* to which the EOC is a party, or any criminal proceedings.

[SDA .c 61(1)].

Contravention of these rules is made an offence punishable on summary conviction with a fine not exceeding level 5 on the standard scale. [SDA s 61(2); and see 1.10 INTRODUCTION]. The EOC is under a general duty when preparing a report for publication or inspection to exclude, so far as is consistent with its duties and the object of the report, any matter which relates to the private affairs of any individual or the business interests of any person where the publication of that matter might in the opinion of the EOC prejudicially affect that individual or person. [SDA s 61(3)].

45.10 **Non-discrimination notices**

The EOC may issue a non-discrimination notice If during the course of a formal investigation, it is satisfied that a person has committed or is committing

- (a) an unlawful discriminatory act;
- (b) a discriminatory practice;
- (c) a breach of the provisions relating to advertising, instructions to discriminate or pressure to discriminate; or
- (d) a breach of a term modified or included by virtue of an equality clause.

The non- discrimination notice may require the person

- (A) not to commit any such acts; and

- (B) where compliance involves changes in any of his practices or other arrangements
 - (i) to inform the EOC that he has effected those changes and what those changes are; and
 - (iii) to take such steps as may be reasonably required by the notice for the purpose of affording that information to other persons affected by those practices or arrangements.

[SDA s 67(2); cf. 37.29 RACIAL DISCRIMINATION].

The notice may require the person to supply information to show that the requirements of the EOC have been complied with. The time within which the notice must be complied with will be a date not later than five years from the date on which the notice became final. [SDA s 67(4)]. A non-discrimination notice or a finding by a court or tribunal becomes final when an appeal against the notice or finding is dismissed, withdrawn or abandoned or when the time for appealing expires without an appeal having been brought. An appeal against a non-discrimination notice will be taken to be dismissed if, notwithstanding that a requirement of the notice is quashed on appeal, a direction varying it is given under *Sec 68* (see below). (SDA s 82(4)).

The EOC may not issue a non-discrimination notice unless it has informed the relevant person of its intention and of the grounds of the notice, offered him an opportunity of making representations within a period of not less than 28 days specified in the notice and taken account of representations made by him. [SDA s 67(5)]. Thus, for example, a company issuing an advertisement for male shop managers will be warned by the EOC of its intention of issuing a notice on the ground that it is contravening *Sec 38*. If the company then expresses its regret at having contravened the section and submits its proposed non-discriminatory advertisement, a notice may not be issued. If, however, it makes no such proposals, a notice will probably be issued which should then be complied with. If it is not, the EOC may apply to a county court for the issue of an injunction (see 45.11 below) against the employer.

It is therefore in the best interests of employers that

- (i) they ensure that they are not in contravention of any of the provisions of the Act;
- (ii) if they are in breach of any of the provisions and receive a notification of a proposal to issue a notice, they remedy the discrimination;
- (iii) If a notice has been issued which they do not wish to challenge, they comply with it as soon as possible.

Appeal. If a person has any objection to a non-discrimination notice he may appeal against any requirement of the notice. Such an appeal must be lodged within six weeks of the service of the notice. The appeal must be made to an industrial tribunal or to a county court depending upon whether the acts to which the requirement relates are within the jurisdiction of the former or the latter [SDA s 68 (1)]. The jurisdiction of industrial tribunals is set out in SDA s 63. The *Industrial Tribunals (Non-discrimination Notices Appeals) Regulations 1977 (SI 1977 No 1094)* regulate the procedure to be adopted upon the hearing of such appeals. For further procedural guidance, see *Commission for Racial Equality v Amari Plastics Ltd [1981] ICR 767, approved at [1982] ICR 304.*

When the court or tribunal considers a requirement in a non-discrimination notice in respect of which an appeal is brought, to be unreasonable because it is based on an incorrect finding of fact or for any other reason, the court or tribunal will quash the requirement. [SDA s 68(2)]. In addition to

quashing the requirement, it may direct that a requirement be substituted in the terms specified in the direction. [SDA s 68(3)]. There is no appeal from such a direction. [SDA s 68(4)]. In appropriate circumstances application may be made to quash a non-discrimination notice under Order 53 of the Rules of the Supreme Court (judicial review).

Register of non-discrimination notices. A register is to be kept of non- discrimination notices which have become final. [SDA s 70]. The register is available for inspection and for copying. The EOC has to give general notice of the place or places where, and the times when, the register or a copy of it may be inspected. [SDA s 70(4)].

The EOC may, in certain circumstances, 'serve notices to investigate a person's compliance with a non-discrimination notice, without the consent of the Secretary of State. [SDA s 69].

45.11 **INJUNCTIONS**

Persistent discrimination

The EOC has certain powers to apply to the county court for an injunction where a person has been served with a non-discrimination notice or where a court or tribunal has found under SDA s 63 (complaints relating to employment) *or Equal Pay Act 1970, s 2* that he has done an unlawful discriminatory act or an act in breach of a term modified or included by virtue of an equality clause (see 19.4 EQUAL PAY). If within five years of the notice or of the court or tribunal finding becoming final, it appears to the EOC that unless restrained the person is likely to do an unlawful discriminatory act, breach an equality clause term or carry on a discriminatory practice made unlawful by SDA s 37, the EOU may apply for an injunction to restrain him from doing so. If satisfied that the application is well-founded, the court may grant the injunction in the terms applied for or on more limited terms, [SDA s 71(1)]. Cf. 37.30 RACIAL DISCRIMINATION.

45.12 **Advertisements and instructions or pressure to discriminate**

Only the EOC may bring proceedings for breach of the provisions relating to advertisements and instructions or pressure to discriminate. It may take

- (a) an application to an industrial tribunal or a county court for a decision whether the alleged contravention occurred; and/or
- (b) an application to a county court for an injunction restraining continuance of 1 such unlawful act's.

[SDA s 72(1)(2)(4); cf. 37.31 RACIAL DISCRIMINATION].

In all proceedings for an injunction, the EOC may not allege that a person has done an unlawful act which is within the jurisdiction of the industrial tribunal, unless a finding of an industrial tribunal relating to that act has become final (see above). [SDA s 72(5)].

Additionally, in employment cases the EOC may, before applying for an injunction under Sec 71 (1) or 72(4), present a complain to an industrial tribunal that a person has done an act within the jurisdiction of the tribunal and, if the tribunal considers that the complaint is well-founded, they

- (i) shall make a finding to that effect; and, if they think it just and equitable to do so, may

- (ii) make an order under Sec 65(1)(a) declaring the rights of the employer or person of whom the complaint is made, and the victim or the employee; and/or
- (iii) make a recommendation under Sec 65(1)(c) that the employer (or person of whom complaint is made) take certain action within a specified period

[SDA s 73(1)].

Applications by the EOC under Sec 73(1) to an industrial tribunal must be made before the end of the period of six months beginning when the act complained of was done. [SDA s 70(4)]. Late applications may be considered if the tribunal considers that in all the circumstances it is just and equitable to do so. [SDA s 70(5)].

Similarly, application may be made to a county court or to an industrial tribunal within six months of the alleged act of discrimination within its jurisdiction, for a decision whether the alleged contravention occurred. [SDA ss 72(2), 76(3)].

Applications by the EOC under SDA s 72(4) to a county court for an injunction must be made before the end of the period of five years beginning with the original discriminatory act. [SDA s 76(3)]. A court may nevertheless consider any such complaint, claim or application which is out of time if, in all the circumstances of the case, it considers it just and equitable to do so, [SDA s 76(5)].

45.13 **ASSISTANCE FOR PERSONS DISCRIMINATED AGAINST**

The EOC may give assistance to claimants or prospective claimants (although not to respondents) if their case is of some complexity or raises a question of principle. That assistance may include obtaining or attempting to obtain a settlement, giving or arranging for the giving of advice or assistance, or representation by solicitor or counsel. The cost of this assistance constitutes a first charge for the benefit of the EOC on an award of costs made by the tribunal, or any settlement whereby the respondent agrees to contribute to the complainant's costs, [SDA s 75].

45.14 **SETTLEMENT OF CLAIM**

With one exception, an agreement settling a complaint relating to sex discrimination in employment or relating to Equal Pay Act 1970, s 2 (see 19.11 EQUAL PAY) must be made with the assistance of a conciliation officer if it is to be enforceable by the respondent. [SDA s 77(4)]. Thus, if an employer agrees to a compromise a complaint of discrimination brought against him, and in doing so pays a sum of money, unless the conciliation officer has assisted in reaching the agreement the applicant may pursue his or her claim despite the settlement. Cf. 37.33 RACIAL DISCRIMINATION.

The exception is that a compromise contract will be binding if certain statutory requirements are satisfied, including a requirement that the applicant has received qualified legal advice [SDA s 77(4)(aa) as inserted by TURERA 6 Sch 1; and see 27.16 INDUSTRIAL TRIBUNALS].