

EXPLANATORY NOTES

INTRODUCTION

These explanatory notes relate to the draft Race Relations Act 1976 (Amendment) Regulations 2002 ("the 2002 Regs"). They have been prepared by the Home Office to assist the reader in understanding the 2002 Regs and to help inform debate on them. They do not form part of the 2002 Regs and have not been endorsed by Parliament.

The notes need to be read in conjunction with the 2002 Regs. They are not, and are not meant to be, a comprehensive description of the 2002 Regs. So, where a section or part of a section does not seem to require any explanation or comment, none is given.

BACKGROUND

Council Directive 2000/43/EC: "The Race Directive" was adopted under Article 13 of the EC Treaty by the UK and other European member states in 2000. It lays down an anti-discrimination principle of equal treatment between persons irrespective of racial or ethnic origins. The Race Directive has to be implemented by 19 July 2003.

The Government consulted on the proposals for implementation in the document *Towards Equality and Diversity*, published in December 2001.

The draft regulations seek to implement the Race Directive and will therefore amend the Race Relations Act 1976.

OVERALL APPROACH AND SUMMARY

The main purposes of the regulations are to:

- introduce a revised definition of indirect discrimination and a new definition of harassment to the Race Relations Act 1976, and to shift the burden of proof.
- remove exceptions to the 1976 Act that are contrary to the principle of equal treatment.

COMMENTARY

Citation, commencement, extent

Regulation 1 cites the title of the draft regulations and states that references in the draft regulations to "the 1976 Act" mean the Race Relations Act 1976, as amended by the Race Relations (Amendment) Act 2000.

The regulations extend only to Great Britain: England, Scotland and Wales. Northern Ireland has delegated responsibility to implement the Race Directive and will prepare separate legislation.

Transitional provisions

Regulation 2 makes transitional provision to ensure that the new burden of proof will apply in proceedings which are taking place at the commencement date. Cases in which the proceedings were determined before the commencement date will be unaffected.

Racial discrimination

Regulation 3 amends **section 1** of the 1976 Act by inserting two new subsections. The new **subsection (1A)** introduces the new definition of indirect discrimination. At present, indirect discrimination occurs where a person applies a requirement or condition which is apparently neutral but which does, or would, in fact put people of a particular racial or ethnic origin at a disadvantage when compared to others, and which cannot be justified on grounds other than racial grounds. The new definition will cover formal requirements, conditions and provisions, as well as informal practices, thus widening the circumstances where indirect discrimination may be deemed to have occurred, although it is currently to be restricted to the grounds of race or ethnic or national origins.

The new **subsection (1B)** sets out the provisions of the 1976 Act which are affected by the Race Directive and which will be subject to the changes required by the Directive.

Discrimination by way of harassment

Regulation 4 introduces a new definition of harassment which will apply in relation to the provisions referred to in **section 1(1B)** where the grounds for harassment are those of race or ethnic or national origins.

Section 2A(1)(a) introduces the new definition. Harassment is defined as being unwanted conduct which is intended to, or which creates the effect of violating a person's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment for that person. This definition of harassment will be adopted across other equality areas and is in keeping with the concept that has been developed through case law.

Section 2A(1)(b) stipulates that unwanted conduct has the effect indicated above where it should reasonably be considered as having violated someone's dignity or created a hostile environment for them. Tribunals should therefore employ a test of reasonableness, taking into account the views of the person being harassed and the motives of the alleged perpetrator.

Harassment by employers

Regulation 5 - section 4 of the 1976 Act is amended to bring the new concept of harassment within the scope of the field of employment, and to restrict the scope of a provision which is contrary to the principle of equal treatment.

The new **section 4(2A)** prohibits employers from harassing their employees or prospective employees.

The draft legislation also amends the exception in **section 4(3)** of the 1976 Act which allows employers to discriminate when they are employing someone to work in a private household. The revised **section 4(3)** prohibits discrimination in employment in a private household on grounds of race or ethnic or national origins. Acts of discrimination on grounds of colour or nationality will continue to be exempted from the provisions of the 1976 Act.

The new **section 4A** clarifies the meaning of certain forms of dismissal from employment, as referred to in the new subsection. This includes the termination of employment and constructive dismissal.

Exception for genuine occupational requirements

Regulation 6 introduces the new concept of the genuine occupational requirement, as an exception to the provisions which deal with unlawful discrimination by employers. It replaces the existing exception (which gives examples of "genuine occupational qualifications") in relation to the provisions referred to in the new **section 1(1B)** where the alleged grounds of discrimination are those of race or ethnic or national origins. The new exception will apply where, having regard to the nature of the employment, or the context in which it is carried out, being of a particular race or particular ethnic or national origins is a genuine and determining requirement and where that requirement is applied in a proportionate manner.

Regulation 7 ensures that the existing exception for "genuine occupational requirements" will continue to apply in relation to the areas of the 1976 Act, and the grounds of discrimination (i.e. colour and nationality) where the Directive does not apply.

Other harassment in employment etc

Regulation 8 amends **section 7** of the 1976 Act so as to ensure that the new exception for genuine occupational requirements applies in relation to the employment of contract workers in the same way as the existing exception for genuine occupational requirements. The draft regulation also inserts a new **subsection (3A)** in section 7 so as to make it unlawful for a principal to subject a contract worker to harassment (as newly defined in the regulations).

Regulation 9 amends **section 10** of the 1976 Act so as to remove the exception (from the provisions which make it unlawful for a partnership to discriminate) for partnerships of less than six partners. It makes it unlawful (**new subsection (1B)**) for any partnership to subject to harassment (as newly defined) a partner or a person who

has applied for partnership. It also clarifies the meaning of expulsion from a partnership in certain circumstances.

Regulation 10 amends **section 11** of the 1976 Act, which deals with discrimination by trade unions or similar organisations, so as to make it unlawful for such an organisation to subject its members, or applicants for membership, to harassment (as newly defined).

Regulation 11 amends **section 12** of the 1976 Act, which is concerned with unlawful discrimination by "a qualifying body" (that is an authority or body which confers professional or trade authorisations or qualifications) to subject to harassment (as newly defined) a person who holds an authorisation or qualification which it has conferred or a person who applies for such an authorisation or qualification. It also ensures that the new concept of the "genuine occupational requirement" will apply to partnerships in cases involving discrimination on grounds of race or ethnic or national origins.

Regulation 12 amends **section 13** of the 1976 Act, which makes it unlawful for providers of vocational training to discriminate unlawfully, so as to make it unlawful for such a provider to subject to harassment (as newly defined) a trainee or a person who has applied for training. It also ensures that this provision does not apply where harassment in providing such training etc is already covered by the provisions dealing with harassment by employers or education bodies or authorities.

Regulation 13, which amends **section 14** of the 1976 Act, prohibits employment agencies from subjecting their clients to harassment (as newly defined).

The draft regulation also prohibit local education authorities from harassing persons in the course of providing careers services under section 10 of the Employment Training Act 1973.

Regulation 14 amends **section 15(1)** of the 1976 Act so as to make it unlawful for a person to be subjected to harassment (as newly defined) in the course of providing career guidance services under section 2 of the Employment and Training Act 1973.

Discrimination or harassment after relationship has ended

Regulation 15 introduces, in the form of a new **section 15A** of the 1976 Act, provisions dealing with "relationships which have come to an end", to comply with the Directive's provisions in this respect.

The new **section 15A** establishes that any relationship that occurs in the fields of employment, education or the provision of goods and services, during the course of which an act of discrimination or harassment directed by one party towards another party would have been unlawful.

The new **section 15A(3)** stipulates that it will be unlawful to discriminate against, another party to the relationship on grounds of race or ethnic or national origins, or harass that party, once such a relationship has ended. This will affect circumstances such as the provision of references or access to facilities that are offered to other ex-employees.

Discrimination in other fields

Regulation 16 amends **section 17** of the 1976 Act, which covers discrimination by educational establishments, by making it unlawful for such an establishment to subject to harassment (as newly defined) a pupil of the establishment or a person who applies to be a pupil.

Regulation 17 amends **sections 18, 18A, 18B and 18D** of the 1976 Act which deal with educational bodies to the extent that their activities do not fall under **section 17** of the Act. This draft regulation will make it unlawful for such bodies to subject persons to harassment (as newly defined) in the course of providing them with vocational training or guidance.

Public authorities

Regulation 18 amends **section 19B** of the 1976 Act so as to make it unlawful for public authorities which are within the scope of the Directive to subject a person to harassment (as newly defined) in the course of carrying out their functions.

Harassment in the provision of goods and services

Regulation 19 amends **section 20** of the 1976 Act, which is concerned with providers of goods, facilities or services, so as to make it unlawful for a provider to subject to harassment (as newly defined) a person to whom he provides those goods, facilities or services, or a person who is seeking to obtain them.

Regulation 20 amends **section 21** of the 1976 Act, which is concerned with disposal or management of premises. Paragraph (a) restricts the scope of the exception in section 21 for resident landlords to the extent required by the Directive (i.e. so that it does not apply to discrimination on grounds of race or ethnic or national origins). Paragraph (b) makes it unlawful for a person to subject another person to harassment (as newly defined) in the course of disposing or managing of premises.

Section 21 (3) specifies that a person who owns a property and who lives there will have to abide by the provisions of the Act when disposing of the premises, although this will only apply in respect of discrimination on grounds of race or ethnic or national origins.

Regulation 21 amends **section 22 (1) (c)** of the 1976 Act to ensure that discrimination on grounds on race or ethnic or national origins that occurs in the disposal or management of small dwellings (as defined by the Act) will no longer be permissible. This is to comply with the Directive's requirement that provisions contrary to the principle of equal treatment (as defined in the Directive) are abolished.

Regulation 22 amends **section 24** of the 1976 Act (which is concerned with the giving of a licence or consent to disposal of premises) so as to prevent a landlord from harassing, on grounds of race or ethnic or national origins, a person who has applied for a licence or consent for the disposal of premises.

Paragraph (b) of the draft regulation ensures that the amendments to the revised provisions of **section 24** apply only in relation to discrimination on grounds of race or ethnic or national origins or harassment.

Regulation 23 amends **sections 26A and 27A** of the 1976 Act, which are concerned with discrimination by or in relation to barristers or (in Scotland) advocates. The draft regulation makes it unlawful for any person to subject another person to harassment (as newly defined) in relation to the giving, withholding, or acceptance of instructions to a barrister. It also makes it unlawful for a barrister or a barrister's clerk to subject to such harassment a pupil or tenant in chambers, or an applicant for a pupillage or tenancy. Similar provision is made in respect of advocates and pupils or applicants for pupillage.

Regulation 24 which amends **section 28** of the 1976 Act makes a consequential amendment to the definition of "discriminatory practice" to take account of the new definition of indirect discrimination. The revised definition only applies of course to discrimination on grounds of race or ethnic or national origins.

Regulation 25 amends the exception in **section 34** of the 1976 Act which permits charities to employ staff for certain support roles on the basis of race or ethnic or national origins and nationality (but not colour). This will allow charities to continue to be able to discriminate on grounds of nationality but they will not now be able to discriminate in relation to grounds of race or ethnic or national origins. It is envisaged that charities will continue to be able to employ staff by relying on the Act's genuine occupational requirement provisions, which will apply to discrimination on ground of race or ethnic or national origins.

The effect of the amendment made by this draft regulation extends to the exception in **section 34(3)** which permits charities to target provision of goods and services to particular groups on grounds of racial, ethnic or national origins or nationality. This will allow charities to continue to be able to discriminate on grounds of nationality but they will not be able to discriminate on grounds of colour or race or ethnic or national origins. It is envisaged that charities will be able to rely on the Act's positive action provisions if their activities are conducted in order to compensate for disadvantage.

This will apply to discrimination in relation to grounds of race or ethnic or national origins.

Regulation 26 amends the headings to **sections 30 and 31** so as to take account of the fact that those sections now apply also in relation to harassment (as newly defined).

Regulation 27 amends the exception in **section 41** of the 1976 Act for acts done under statutory authority. Acts of discrimination that are committed on grounds of race or ethnic or national origins in pursuance of other legislation, or to comply with a condition or requirement imposed by a Minister in pursuance of other legislation, will no longer be exempt from the provisions of the Act.

Barristers: Jurisdiction of employment tribunals

Regulation 28 amends **section 54 (1)(a)** to include discrimination or harassment by or against barristers or advocates amongst the matters that fall to be considered by an employment tribunal, although this will only apply in relation to discrimination on grounds of race or ethnic or national origins. This will bring barristers etc and advocates into line with the provisions for employers and employees generally.

Burden of proof

Regulation 29 inserts a new **section 54A** after section 54 of the 1976 Act which deals with the change in the burden of proof in proceedings in employment tribunals.

The new **section 54A(1)** explains that this section relates to cases of discrimination on grounds of race or ethnic or national origins which fall within Part II, or sections 26A or 27A, or Part IV as it applies to those provisions.

The new **section 54A(2)** enables the complainant to establish a prima facie case before the tribunal and places the onus on the respondent to prove that he did not commit an act of unlawful discrimination or harassment.

Section 54A(2) specifies that a prima facie case can be made in respect of an act of unlawful discrimination or harassment that occurs in the field of employment or in discrimination by or against barristers or advocates. However, this will only apply in relation to discrimination on grounds of race or ethnic or national origins.

Regulation 30 makes a consequential amendment to **section 57** (which deals with claims to the County and Sheriff Courts) to take account of the transfer of jurisdiction over complaints relating to barristers and advocates to the employment tribunals.

Regulation 31 inserts a new **section 57A** after section 57 of the 1976 Act which deals with the change in the burden of proof in the County and Sheriff Courts.

The new **section 57A(1)** explains that this section relates to cases of discrimination on grounds of race or ethnic or national origins which fall within provisions of the 1976 Act dealing with education and the supply of goods, services and facilities, or Part IV as it applies to those provisions. The new **section 57A(2)** allows the claimant to establish a prima facie case before the court and places the onus on the respondent to prove that he did not commit an act of unlawful discrimination or harassment.

The new **section 57A(2)** specifies that a prima facie case can be made in respect of an act of discrimination or harassment which occurs in the field of education or goods, services and facilities. However, this will only apply in relation to discrimination on grounds of race or ethnic or national origins.

Period within which respondent must reply

Regulation 32 amends **section 65** of the 1976 Act so as to ensure that a respondent to a case of discrimination which is brought on grounds of race or ethnic or national origins will have to respond to the preliminary questions put to him (by the person aggrieved) within eight weeks of being served with the questions, and provides for a variation in that time limit by the Secretary of State or a court or tribunal.

Definitions

Regulation 33 inserts in the definitions section of the 1976 Act references to the meaning of "social protection" and "social advantage" (they are to have the same meaning as in the Directive).

Home Office
22 October 2002

02/1371