

The *draft* Employment Equality (Sexual Orientation) Regulations 2003

EXPLANATORY NOTES

INTRODUCTION

1. These explanatory notes relate to the draft Employment Equality (Sexual Orientation) Regulations 2003 (“the Regulations”). They have been prepared by the Department of Trade and Industry in order to assist the reader in understanding the Regulations, and to help inform debate and comment on them. They do not form part of the Regulations.
2. The notes should be read in conjunction with the Regulations and are not meant to be a comprehensive description of them. So where the whole or part of a regulation does not seem to require any explanation or comment, a short description of it is all that will be given.
3. **A number of specific questions arise out of the Regulations. These have been highlighted, and we would welcome your views/comments on them. We would be grateful for any other comments you might care to make on the Regulations too. For details of how to respond to this consultation, please see our document *Equality and Diversity: the Way Ahead* and our website at www.dti.gov.uk/er/equality. These Regulations have been published in draft, and the detailed drafting may be subject to alteration.**
4. The Regulations implement the UK’s obligations in relation to discrimination on grounds of sexual orientation under Council Directive 2000/78/EC (“the Directive”), which establishes a general framework for equal treatment in the field of employment. The sexual orientation aspects of the Directive are to be implemented by Member States by 2 December 2003.
5. The Regulations are made under section 2(2) of the European Communities Act 1972, as they implement Community obligations and matters arising out of or related to those obligations. The Secretary of State is designated under the European Communities (Designation) (No. 3) Order 2002 for the purposes of s.2(2) in matters relating to discrimination.
6. The Regulations are broadly similar in structure and form to the Sex Discrimination Act 1975 (SDA) and the Race Relations Act 1976 (RRA). Some provisions are also similar to those in the Disability Discrimination Act 1995 (DDA).

PART I

DISCRIMINATION TO WHICH THE REGULATIONS APPLY

Regulation 1

Citation, commencement and extent

7. Regulation 1 provides for the Regulations to come into force on 1 December 2003 – one day before the deadline for implementation laid down in the Directive. This gives employers and others as much time as possible in which to prepare for the coming into force of the Regulations.
8. It also provides that the Regulations do not extend to Northern Ireland. This means that the Regulations form part of the law of Great Britain only. The Regulations may, nevertheless, apply in some situations occurring outside Great Britain: see regulation 9. Separate provision will be made for Northern Ireland.

Regulation 2

Interpretation

9. Regulation 2 defines various terms that are used throughout the Regulations. In particular –
 - “sexual orientation” is defined as being an orientation towards persons of the same sex (this covers gay men and lesbians); the opposite sex (this covers straight men and women); or both sexes (this covers bisexual men and women). It does not extend to sexual practices and preferences (e.g. sado-masochism and paedophilia).
 - “employment” is defined in similar terms to those used in the SDA, RRA and DDA.
10. Regulation 2 also makes it clear that the term “discrimination” is to be construed in accordance with regulation 3 or 4; and “harassment” in accordance with regulation 5.

Regulation 3

Discrimination on grounds of sexual orientation

11. Regulation 3 defines direct and indirect discrimination on grounds of sexual orientation for the purposes of the Regulations.
12. *Direct discrimination* occurs where, because of B’s sexual orientation, A treats B less favourably than he treats or would treat other persons. This definition is similar to that used in s.1 of the SDA and s.1 of the RRA.
13. Direct discrimination “*on grounds of sexual orientation*” can also include discrimination based on A’s perception of B’s sexual orientation, whether the

perception is right or wrong. This means that people will be able to bring a claim even if the discrimination was based on (incorrect) assumptions about their sexual orientation. Nor will they be required to disclose their sexual orientation in bringing a claim – it will be sufficient that they have suffered a disadvantage because of the assumptions made about their orientation.

14. In addition, direct discrimination “*on grounds of sexual orientation*” covers discrimination against a person by reason of the sexual orientation of someone else – for example, a person who is discriminated against because they associate with gay friends, or because they refuse to carry out an employer’s instruction to discriminate against gay men. The wording of regulation 3 is consistent in this regard with that in s.1 of the RRA.

15. *Indirect discrimination* is defined in similar terms to those used in the Directive, as it is in the draft Race Relations Act 1976 (Amendment) Regulations. Indirect discrimination is taken to occur where –

- A applies to B a provision, criterion or practice which A applies equally to other persons; and
- that provision, criterion or practice puts persons of B’s sexual orientation at a particular disadvantage; and
- B suffers that disadvantage.

If B can show that he suffers in this way, then the provision, criterion or practice is indirectly discriminatory unless A can show that it is justified.

Regulation 4

Discrimination by way of victimisation

16. Regulation 4 makes it clear that A discriminates against B for the purposes of the Regulations if he treats B less favourably than he treats or would treat other persons by virtue of something done by B under or in connection with the Regulations. This is discrimination by way of victimisation. Thus, A ‘victimises’ B if he treats him less favourably than others because B has brought or given evidence in proceedings under the Regulations, or because B has alleged that A or another person has contravened the Regulations. So, for example, A victimises B if he sacks him because he gave evidence on behalf of C in proceedings in which C alleged that A had discriminated against her because she was a lesbian.

17. Regulation 4 does not apply, however, if B makes allegations which he knows are false. In those circumstances he is not ‘victimised’ if, for example, A takes disciplinary proceedings against him.

18. This regulation is similar to s.4 of the SDA and s.2 of the RRA.

Regulation 5

Discrimination by way of harassment

19. Regulation 5 defines harassment for the purposes of the Regulations as an unlawful act distinct from direct and indirect discrimination. Harassment is defined in broad terms using the wording of the Directive. It takes place if A's conduct is intended either to violate B's dignity or to create an offensive environment for him. Harassment also takes place if, taking into account all the circumstances, A's conduct "should reasonably be considered" as having violated B's dignity or created such an environment for him. This reflects the judgment of the Employment Appeal Tribunal in the case of *Driskel v Peninsula Business Services Ltd* [2000] IRLR 151 (which concerned the approach to be followed by tribunals when considering whether alleged harassment amounted to sex discrimination). Therefore, an over-sensitive complainant who takes offence unreasonably at a perfectly innocent comment would probably not be considered as having been harassed.

**PART II
DISCRIMINATION IN THE EMPLOYMENT FIELD**

Regulation 6

Applicants and employees

20. Regulation 6 makes it unlawful for employers to discriminate against, or harass, job applicants and employees in a wide variety of circumstances, starting with the arrangements they make for determining to whom they should offer employment and finishing with dismissal. Regulation 6 is similar to s.6 of the SDA, s.4 of the RRA and s.4 of the DDA.

Regulation 7

Exception for genuine occupational requirement

21. Regulation 7 allows an employer, when recruiting for a post, to treat job applicants differently on grounds of sexual orientation if possessing a particular sexual orientation is a genuine occupational requirement ("GOR") for that post.
22. An employer may also rely on this exception when promoting, transferring or training persons for a post where a GOR applies in respect of that post.
23. This regulation follows the wording of Article 4.1 of the Directive, as do the draft Race Relations Act 1976 (Amendment) Regulations.

Regulation 8

Contract workers

24. Regulation 8 covers contract workers whose employer contracts to supply their services to another person or business (“the principal”). It is unlawful for the principal to discriminate against, or harass, a contract worker.
25. However, this regulation does allow a principal to treat contract workers differently on grounds of sexual orientation if they are required to do work for which a particular sexual orientation is a GOR.
26. Regulation 8 is similar to s.9 of the SDA and s.7 of the RRA.

Regulation 9

Meaning of employment in Great Britain

27. The SDA, RRA and the DDA do not cover employment wholly outside Great Britain. We are considering whether to follow this approach in the Regulations. The main alternatives appear to be – to cover employees working wholly outside Great Britain in particular situations only; to cover such employees where the employment relationship has a sufficiently close link to Great Britain; or to have no provision dealing with the territorial limits of the Regulations.
28. While we would not expect these alternatives to have widely different effects on the number of people covered by the Regulations, **we would welcome views on this and the practical implications of covering employment wholly outside Great Britain.**

Regulation 10

Office-holders, post-holders etc

29. Some workers are not technically employees because they do not have a contract of employment or a contract for services, but their position may be similar to that of employees. They may, for example, provide services under the direction of another in return for remuneration, though the degree of day-to-day control varies depending on the nature of the work. Some of these types of workers can be described as “office-holders” and can include, for example, company directors and the chairs/members of some independent public bodies. Existing anti-discrimination legislation on race, sex and disability already provides some office-holders and holders of other posts with some rights and protection. Under s.76 of the RRA appointments made or recommended by a Minister or government department are covered. Under s.86 of the SDA and s.66 of the DDA appointments made by a Minister or a government department are covered to the extent of the appointments process only.

30. We are looking at the practical issues involved in covering in the Regulations offices and posts which meet the criteria referred to above. **We would welcome your views about this.** In framing your comments/views you might like to bear in mind that the DTI is currently conducting a review of employment status, considering the application of other employment rights to workers such as this (see discussion document at <http://www2.dti.gov.uk/er/individual/statusdiscuss.pdf>).

Regulation 11

Police

31. Regulation 11 ensures that members of all police forces (including forces such as the British Transport Police, the Ministry of Defence Police, the Royal Parks Constabulary and the United Kingdom Atomic Energy Authority Constabulary) enjoy the same protection from discrimination and harassment as employees under regulation 6. The chief officer or chief constable of the force in question is treated as the employer of members of that force (except in relation to acts done by the police authority, in which case the authority itself is treated as the employer).
32. Regulation 11 also ensures that members of the National Criminal Intelligence Service and the National Crime Squad enjoy the same protection from discrimination and harassment as employees under regulation 6.
33. This regulation is similar to s.17 of the SDA.

Regulation 12

Barristers

34. Regulation 12 makes it unlawful for barristers and their clerks to discriminate against, or harass, pupils and tenants (and applicants for pupillages and tenancies) in their chambers in a wide variety of circumstances. The circumstances that are covered range from the arrangements that barristers and their clerks make for determining to whom they should offer pupillages and tenancies, to the circumstances in which a pupillage or tenancy is brought to an end.
35. In addition, regulation 12 makes it unlawful for a person instructing a barrister to discriminate against any person by subjecting him to a detriment or harassment.
36. This regulation, which does not apply in Scotland, is similar to s.35A of the SDA and s.26A of the RRA.

Regulation 13

Advocates

37. Regulation 13 prohibits discrimination and harassment by or against advocates in Scotland in the same way as regulation 12 prohibits discrimination and harassment by or against barristers in England and Wales. It only applies in Scotland, and is similar to s.35B of the SDA and s.26B of the RRA.

Regulation 14

Partnerships

38. Regulation 14 makes it unlawful for a firm to discriminate against, or harass, a partner or an applicant for a partnership in the firm in a wide variety of circumstances. The circumstances that are covered range from the arrangements that firms make for determining to whom they should offer a partnership, to the circumstances in which a partnership is brought to an end.

39. However, this regulation does allow a firm to refuse to offer a partnership to a person on grounds of sexual orientation where the position in question is one for which a particular sexual orientation is a GOR.

40. This regulation applies to limited liability partnerships and their members in the same way as it applies to firms and their partners. It is similar to s.10 of the RRA.

Regulation 15

Trade organisations

41. Regulation 15 makes it unlawful for a trade organisation (such as a trades union or a professional body) to discriminate against, or to harass, a member (or an applicant for membership) of that organisation in a variety of circumstances. The circumstances that are covered range from a refusal to admit an applicant to membership to the circumstances in which a member may be deprived of membership.

42. This regulation is similar to s.12 of the SDA, s.11 of the RRA and s.13 of the DDA.

Regulation 16

Qualifications bodies

43. Regulation 16 makes it unlawful for a body which confers professional or trade qualifications on people to discriminate against a person by refusing to confer, or in the terms on which it confers, such a qualification on him, or by withdrawing (or varying the terms of) such a qualification which he holds.

44. This regulation also makes it unlawful for such a body to harass the holder of, or an applicant for, a professional or trade qualification conferred by it.
45. Regulation 16 is similar to s.13 of the SDA and s.12 of the RRA.

Regulation 17

Pension schemes

46. It would be unlawful for an employer to discriminate in making contributions to a pension scheme under regulation 6(2)(a), because this would effectively be part of the “terms of employment”. **We would welcome your comments on whether it would also be appropriate to have a provision here making it unlawful for a trustee or manager of a pension scheme to discriminate against an employee who is a member of the scheme.**

Regulation 18

Insurance services

47. It would be unlawful for an employer to discriminate in making contributions to an employee's insurance scheme for benefits related to, say, retirement or ill-health under regulation 6(2)(a), in the same way as it would be for pension contributions (see regulation 17 above). **We would welcome your comments on whether it would also be appropriate to have a provision here making it unlawful for a provider of such insurance services to discriminate against an employee who receives them.**

Regulation 19

Providers of vocational training

48. Regulation 19 makes it unlawful for a person who provides training to help fit people for employment to discriminate against them in relation to such training. This regulation also makes it unlawful for such a person to harass a person to whom he is providing such training or who has applied to him for such training.
49. However, it does allow such a person to refuse to offer training to a person on grounds of sexual orientation where the employment for which the training is to be undertaken is employment for which a particular sexual orientation is a GOR.
50. Regulation 19 does not apply to anything done that is already covered by Regulations 6(1) or (3) (employers) or 23(1) or (2) (further or higher education institutions), or to anything done by a local education authority.
51. Regulation 19 is similar to s.14 of the SDA and s.13 of the RRA.

Regulation 20

Employment agencies, careers guidance etc

52. Regulation 20 makes it unlawful for an employment agency to discriminate against a person in the way it provides (or refuses to provide) its services. It also makes it unlawful for such an agency to harass a person.
53. However, the prohibition on discrimination does not apply if the employment in relation to which the agency's services are provided is employment for which a particular sexual orientation is a GOR. Moreover, an agency can defend a claim under this regulation by showing that it relied, and that it was reasonable for it to rely, on a statement from an employer that a particular sexual orientation was a GOR for a particular employment. It is, however, a criminal offence for employers to provide an employment agency with a statement which they know to be false.
54. Regulation 20 is similar to s.15 of the SDA and s.14 of the RRA.

Regulation 21

Arrangements under the Employment and Training Act 1973 etc

55. Regulation 21 makes it unlawful for the Secretary of State to discriminate against, or to harass, a person in the provision of facilities or services under s.2 of the ETA.
56. Section 2 of the ETA 1973 requires the Secretary of State –

“to make such arrangements as he considers appropriate for the purpose of assisting persons to select, train for, obtain and retain employment suitable for their ages and capacities or of assisting persons to obtain suitable employees.”

Under this section the Secretary of State may make arrangements for providing temporary employment for the unemployed, and may make grants or loans to persons who provide facilities in pursuance of such arrangements.

57. Regulation 21 also makes it unlawful for Scottish Enterprise and Highlands and Islands Enterprise to discriminate against, or to harass, a person in the provision of facilities or services to him under such arrangements as are mentioned in s.2(3) of the Enterprise and New Towns (Scotland) Act 1990. These arrangements are analogous to those which the Secretary of State is required to make under s.2 of the ETA.
58. Regulation 21 does not apply in a case where regulation 19 (providers of vocational training) applies, or where the Secretary of State is acting as an employment agency under regulation 20 (employment agencies, careers guidance etc.).

Regulation 22

Part II relationships which have come to an end

59. In limited circumstances, regulation 22 makes it unlawful for an employer, or any other person covered by Part II, to discriminate against another person (e.g. a former employee) after the working relationship between them has ended. Regulation 22 makes an act of discrimination or harassment unlawful in these circumstances only if it can be said that that act is closely linked to the former relationship. For example, an employer who refuses, on grounds of sexual orientation, to provide a reference to a former employee would be acting unlawfully under regulation 22.
60. This regulation does not itself lay down any time limit for bringing a complaint under it, but by virtue of regulation 38 any complaint must normally be presented to a tribunal within 3 months of the alleged act. The further removed the alleged act of discrimination is from the former working relationship, in both time and context, the less likely it is that a person will be able to establish the necessary close connection back to the relationship.

PART III

DISCRIMINATION IN THE VOCATIONAL TRAINING FIELD

Regulation 23

Bodies in charge of institutions of further and higher education

61. Regulation 23 makes it unlawful for institutions (including universities) which provide further or higher education to discriminate against, or harass, their students or persons who have applied to be students. The table attached to the regulation sets out which body is considered to be responsible for acts of discrimination and harassment by each type of institution.
62. Regulation 23(3) provides an exception so that an education institution can restrict access to a course if it relates to employment to which a GOR would apply under regulation 7, and the student would not meet that requirement.

Regulation 24

Part III relationships which have come to an end

63. In limited circumstances, regulation 24 makes it unlawful for institutions covered by Part III to discriminate against their former students. Regulation 24 makes an act of discrimination or harassment unlawful in these circumstances only if it can be said that that act is closely linked to the relationship that formerly existed between them. For example, an institution which refuses, on grounds of sexual orientation, to provide a reference to a former student would be acting unlawfully under regulation 24.
64. This regulation does not itself lay down any time limit for bringing a complaint under it, but by virtue of regulation 38 any complaint must normally

be presented to a county or sheriff court within 6 months of the alleged act. The further removed the alleged act of discrimination is from the former relationship between the institution and the student, in both time and context, the less likely it is that a person will be able to establish the necessary close connection back to the relationship.

Regulation 25

Extent of Part III

65. **We would welcome your views on whether it would be appropriate for the Regulations to cover vocational training carried on wholly outside Great Britain; and, if it would, in what circumstances.** The options for covering vocational training appear to be the same as the options for covering employment wholly outside Great Britain – as to which, see regulation 9 above.

**PART IV
OTHER UNLAWFUL ACTS**

Regulation 26

Liability of employers and principals

66. Regulation 26 provides that an employer is vicariously liable for the acts of his employees, whether or not he knew or approved of them. However, the employer may argue, as a defence under regulation 26(3), that he took reasonable steps to prevent his employee's act.
67. This regulation also makes a person such as an employer liable for acts done by any other person on his behalf (i.e. acting as his agent).
68. Regulation 26 is similar to s.41 of the SDA and s.32 of the RRA.

Regulation 27

Aiding unlawful acts

69. By virtue of regulation 27, a person who knowingly helps someone to do an act that is unlawful under the Regulations is himself treated as having done that act.
70. Regulation 27(2) applies this rule to employees and agents. So, a person who discriminates against or harasses someone contrary to the Regulations is treated as aiding his employer, or the person for whom he acts as agent (i.e. his principal), to do such an act if the employer or principal would be liable for his acts under regulation 26. In other words, the person doing the act, as well as his employer or principal, acts unlawfully.

71. Under regulation 27(3) a person is not considered as knowingly aiding an unlawful act of discrimination if he reasonably relies on a statement that the act would be lawful. Under regulation 27(4) it is a criminal offence to knowingly or recklessly make a misleading statement in this context, punishable by a fine.

72. Regulation 27 is similar to s.42 of the SDA and s.33 of the RRA.

PART V GENERAL EXCEPTIONS FROM PARTS II TO IV

Regulation 28

Exception for national security

73. Regulation 28 provides that the Regulations do not render unlawful any act which is done to safeguard national security. It is similar to s.52(1) of the SDA.

Regulation 29

Exception for benefits dependent on marital status

74. Regulation 29 provides that the Regulations do not render unlawful the granting of benefits by reference to criteria based on marital status. So, for example, if survivor benefits in an occupational pension scheme are only available to the widow(er) of a deceased employee, this will not be discrimination on grounds of sexual orientation under the Regulations.

Regulation 30

Exceptions for positive action

75. Regulation 30 permits positive action in certain circumstances, and is similar to ss.37 and 38 RRA. In contrast to the RRA, however, the positive action does not require evidence showing under-representation, because of the difficulties in collecting statistics about sexual orientation. Rather, the positive action should “prevent or compensate for disadvantages linked to sexual orientation” among the relevant section of people to whom the positive action relates. This follows the wording of Article 7.1 of the Directive. The disadvantage may be that persons of a particular sexual orientation are under-represented, or it may be that there is evidence of widespread harassment or homophobic attitudes, for example.

PART VI ENFORCEMENT

Regulation 31

Restriction of proceedings for breach of Regulations

76. Regulation 31 ensures that if a person wishes to complain of discrimination or harassment under the Regulations, they may only do so in the appropriate court or tribunal (see regulations 32 and 35) and not in the course of any other proceedings. It is similar to s.62 of the SDA and s.53 of the RRA.

Regulation 32

Jurisdiction of employment tribunals

77. Regulation 32 provides that complaints under Part II of the Regulations (discrimination in the employment field) should be brought in employment tribunals. The usual tribunal rules of procedure apply to a complaint brought under these Regulations. Regulation 32 does not apply to qualifications bodies covered by regulation 16, if there a statutory appeal already available against that body's decision.

78. Regulation 32 is similar to s.63 of the SDA and s.54 of the RRA.

Regulation 33

Burden of proof: employment tribunals

79. Regulation 33 makes provision concerning the burden of proof which applies to complaints brought in employment tribunals. Once the person making the complaint has made out a *prima facie* case – in other words, where the tribunal could consider that discrimination or harassment has taken place – it is for the respondent to the complaint (e.g. the employer) to prove that he did not commit the act of discrimination or harassment. This regulation is similar to s.63A of the SDA.

Regulation 34

Remedies on complaints in employment tribunals

80. Regulation 34 sets out the remedies which are available for a complaint brought in an employment tribunal. The tribunal may make a declaration or recommendation, or may order compensation for damages. No limit is set on the amount of compensation, and interest on the sum may also be ordered.

81. Under regulation 34(2), in cases of unintentional indirect discrimination, the tribunal can only award compensation if (a) it has made a declaration or recommendation (or both) and (b) it considers it just and equitable to award compensation. In any case where a recommendation is made but not complied

with, the tribunal can award compensation, or increase any award already made.

82. Regulation 34 is similar to s.65 of the SDA and s.56 of the RRA.

Regulation 35

Claims under Part III

83. Regulation 35 provides that complaints under Part III of the Regulations (vocational training) should be brought in a county court, in England and Wales, or a sheriff court in Scotland. The usual court rules of procedure apply to complaints brought under these Regulations, in the same way as any other claim in tort (in England and Wales) or in reparation (in Scotland) for breach of statutory duty.

84. By virtue of regulation 35(4), complaints of discrimination or harassment against institutions of further and higher education under regulation 23 must also be notified to the Secretary of State for Education and Skills.

85. Regulation 35 is similar to s.66 of the SDA and s.57 of the RRA.

Regulation 36

Burden of proof: county and sheriff courts

86. Regulation 36 makes provision concerning the burden of proof which applies to complaints brought in a county or sheriff court. It operates in the same way as regulation 33 does in relation to employment tribunals. It is similar to s.66A of the SDA.

Regulation 37

Help for persons in obtaining information etc

87. Regulation 37 permits a complainant or potential complainant, if they wish, to serve a questionnaire on the (potential) respondent (e.g. their employer) in order to obtain information relating to their complaint. The complainant may serve the questionnaire before presenting a complaint to a court or tribunal, and in more limited circumstances once a complaint has been presented to a court or tribunal. Paragraphs (3) and (4) of the regulation set out the time limits which apply.

88. Suggested forms for questions and replies are set out in Schedules 1 and 2 to the Regulations, respectively, but complainants and respondents are not required to follow these. If the respondent does not reply within 8 weeks, or if their replies are inadequate in the view of the court or tribunal, the court or tribunal may draw adverse inferences, including an inference that discrimination did take place, if appropriate.

89. Regulation 37 is similar to s.74 of the SDA and the Sex Discrimination (Question and Replies) Order 1975 (SI 1975/2048).

Regulation 38

Period within which proceedings to be brought

90. Regulation 38 lays down the time limits for bringing a complaint under the Regulations. A complaint to an employment tribunal must be presented within 3 months of the alleged act, and a complaint to a county or sheriff court within 6 months, though a court or tribunal has a discretion to accept a late complaint if it would be “just and equitable” to do so.

91. Paragraph (4) of regulation 38 sets out how these time limits operate in relation to contracts, extended acts and omissions.

92. This regulation is similar to s.76 of the SDA and s.68 of the RRA.

**PART VII
SUPPLEMENTAL**

Regulation 39

Validity of contracts, collective agreements and rules of undertakings

93. Regulation 39 gives effect to Schedule 3, which makes provision concerning contracts, collective agreements and rules of undertakings (see below).

Regulation 40

Application to the Crown etc

94. Regulation 40(1) provides that the Regulations apply to acts by government Ministers and departments, and to acts of other Crown bodies. Regulation 40(2) applies the Regulations’ employment provisions to staff working for such departments and bodies, and to members of the Armed Forces.

95. Paragraphs (4) and (5) of regulation 40 make provision regarding the Crown Proceedings Act 1947, which concerns proceedings to which the Crown is a party.

96. Paragraphs (6) to (10) of regulation 40 make special provision relating to complaints by members of the Armed Forces, who are required to submit a complaint under the internal service redress procedures before presenting a complaint to an employment tribunal.

97. Regulation 40 is similar to s.85 of the SDA and s.75 of the RRA.

Regulation 41

Application to House of Commons staff

98. Regulation 41 provides that the Regulations apply to House of Commons staff in the same way as they apply to any other employee.

Regulation 42

Application to House of Lords staff

99. Regulation 42 provides that the Regulations apply to House of Lords staff in the same way as they apply to any other employee.

Regulation 43

Amendments to legislation

100. Regulation 43 gives effect to Schedule 4, which makes various amendments to legislation in consequence of the Regulations (see below).

SCHEDULES

Schedule 1

Questionnaire of person aggrieved

101. Schedule 1 sets out a suggested format for the questionnaire which may be used under regulation 37. This includes a warning to the respondent that a court or tribunal may draw adverse inferences from a failure to reply or an inadequate reply. This is similar to the format set out in the Sex Discrimination (Question and Replies) Order 1975 (SI 1975/2048) and the equivalent orders made under the RRA and DDA.

Schedule 2

Reply by respondent

102. Schedule 2 sets out a suggested format for the reply to a questionnaire under regulation 37. This is similar to the format set out in the Sex Discrimination (Question and Replies) Order 1975 (SI 1975/2048) and the equivalent orders made under the RRA and DDA.

Schedule 3

Validity of contracts, collective agreements and rules of undertakings

103. Schedule 3 contains detailed provisions relating to terms of contracts, collective agreements, and rules of undertakings which are discriminatory. The provisions are similar to s.77 SDA and s.6 of the Sex Discrimination Act 1986.

104. Under paragraph 1, a term of a contract which makes the contract itself unlawful under the Regulations, or which provides for an unlawful act, is void. Paragraph 2 makes clear that this does not apply where the term provides for discrimination against a party to the contract. The term is merely unenforceable against that party, and he or she may choose to rely on the term if it also has some benefits for them. Under paragraphs 11 and 12, a county or sheriff court has the power to modify or remove such a discriminatory term.
105. A term which seeks to limit the effect of these Regulations is unenforceable under paragraph 3. However, paragraphs 4 to 10 contain special provisions relating to compromise agreements to settle complaints brought under the Regulations, and the safeguards which they must meet to be valid.
106. Paragraph 13 applies the above provisions on contract terms to collective agreements, and to rules made by employers, trade organisations or qualifications bodies. Paragraphs 14 to 16 set out the circumstances in which an individual may bring a complaint about such an agreement or rule (e.g. if he or she believes the rule may affect them in the future). Under paragraphs 17 and 18 a tribunal may declare a discriminatory term or rule to be void, but the rights of certain persons under the agreement or rule may also be preserved.

Schedule 4

Amendments to legislation

107. Schedule 4 makes a number of amendments to primary and secondary legislation, as follows below. These are consistent with references to provisions of the SDA, RRA and DDA in the relevant legislation.
108. Section 18 of the Employment Tribunals Act 1996 is amended so that its conciliation provisions also apply in relation to complaints brought in employment tribunals under these Regulations. Accordingly, an ACAS conciliation officer will be able to act in such a case.
109. Section 21 of the Employment Tribunals Act 1996 is amended so that the Employment Appeal Tribunal has jurisdiction to hear appeals relating to complaints under these Regulations.
110. Section 126 of the Employment Rights Act 1996 is amended so that, where an act is both unfair dismissal and discrimination or harassment under these Regulations, compensation cannot be awarded twice for the same loss.
111. Regulation 1(2)(b) of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 is amended so that those provisions apply to calculating interest on awards of compensation made in relation to complaints brought under these Regulations.
112. Schedule 3 of the Employment Act 2002 is amended so that the adjustment of awards under s.31 of that Act also applies to complaints made under these

Regulations. This means that a tribunal may reduce or increase the amount of compensation it awards, in cases where the employer or employee has not followed the statutory procedure for making an internal complaint, as set out in Schedule 2 of the 2002 Act. The relevant provisions of the 2002 Act have not yet been brought into force.

113. Schedule 4 of the Employment Act 2002 is amended so that, under s.32 of that Act, an employee wishing to complain under these Regulations must first submit a statement of grievance to their employer. The relevant procedure is set out in Schedule 2 of the 2002 Act, which has not yet been brought into force.

114. Schedule 5 of the Employment Act 2002 is amended so that the provisions of s.38 of that Act, also apply to cases brought under these Regulations. This means that, where an employer has failed to give a statement of employment particulars to the employee, the tribunal must make an award of compensation to the employee for this, separate from its consideration of the complaint of discrimination.

Department of Trade and Industry
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