

2005 No. 426

SEX DISCRIMINATION

**Employment Equality (Sex Discrimination) Regulations
(Northern Ireland) 2005**

Made - - - - - *19th September 2005*

Coming into operation - - - - - *5th October 2005*

The Office of the First Minister and deputy First Minister, being a Department designated for the purposes of section 2(2) of the European Communities Act 1972(a) in relation to discrimination(b), in exercise of the powers conferred on it by that section, and of every other power enabling it in that behalf, hereby makes the following Regulations:

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the Employment Equality (Sex Discrimination) Regulations (Northern Ireland) 2005 and shall come into operation on 5th October 2005.

(2) The Interpretation Act (Northern Ireland) 1954(c) shall apply to these Regulations as it applies to an Act of the Assembly.

(3) In these Regulations, “the 1976 Order” means the Sex Discrimination (Northern Ireland) Order 1976(d) and “the 1970 Act” means the Equal Pay Act (Northern Ireland) 1970(e).

Transitional provisions

2.—(1) The amendment made to Article 74 of the 1976 Order by regulation 29 shall not apply in the case of a question served on a respondent before 5th October 2005.

(2) In paragraph (1), “question” and “respondent” shall be construed in accordance with Article 74 of the 1976 Order.

Amendments to the 1976 Order interpretation provisions

3.—(1) Article 2 (Interpretation) of the 1976 Order is amended as follows.

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

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

(3) After the definition of “grant-aided” insert—

(a) 1972 c. 68

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

(c) 1954 c. 33 (N.I.)

(d) S.I. 1976/1042 (N.I. 15)

(e) 1970 c. 32

“references to subjecting a person to harassment, and to acts of harassment, shall be construed in accordance with Article 6A;”.

(4) After the definition of “upper limit of compulsory school age” insert—

““vocational training”

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

- (i) vocational training, advanced vocational training and retraining, and
- (ii) vocational guidance, and

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

(5) In paragraph (7)(b) (references to sex discrimination), for “Article 3 or 4” substitute “Article 3,4 or 5A”.

Indirect discrimination

4.—(1) In Article 3(2) of the 1976 Order(a) for sub-paragraph (b) (definition of indirect discrimination) substitute—

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

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

(2) In Article 5(1) of the 1976 Order(b), for sub-paragraph (b) (definition of indirect discrimination against married people) substitute—

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

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

Discrimination on the ground of pregnancy or maternity leave

5. In the 1976 Order, after Article 5 (Direct and indirect discrimination against married persons in employment field), insert—

“Discrimination on the ground of pregnancy or maternity leave

5A—(1) In any circumstances relevant for the purposes of a provision to which this paragraph applies, a person discriminates against a woman if—

- (a) at a time in a protected period, and on the ground of the woman’s pregnancy, the person treats her less favourably than he would treat her had she not become pregnant; or

(a) Article 3 was substituted by regulation 2 of the Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations (Northern Ireland) 2001 (S.R. 2001 No. 282)
(b) Article 5 was substituted by regulation 3 of the Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations (Northern Ireland) 2001 (S.R. 2001 No. 282)

- (b) on the ground that the woman is exercising or seeking to exercise, or has exercised or sought to exercise, a statutory right to maternity leave, the person treats her less favourably than he would treat her if she were neither exercising nor seeking to exercise, and had neither exercised nor sought to exercise, such a right.

(2) In any circumstances relevant for the purposes of a provision to which this paragraph applies, a person discriminates against a woman if, on the ground that Article 104(1) of the Employment Rights (Northern Ireland) Order 1996^(a) (compulsory maternity leave) has to be complied with in respect of the woman, he treats her less favourably than he would treat her if that provision did not have to be complied with in respect of her.

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

- (a) in relation to a woman a protected period begins each time she becomes pregnant, and the protected period associated with any particular pregnancy of hers ends in accordance with the following rules—
 - (i) if she is entitled to ordinary but not additional maternity leave in connection with the pregnancy, the protected period ends at the end of her period of ordinary maternity leave connected with the pregnancy or, if earlier, when she returns to work after the end of her pregnancy;
 - (ii) if she is entitled to ordinary and additional maternity leave in connection with the pregnancy, the protected period ends at the end of her period of additional maternity leave connected with the pregnancy or, if earlier, when she returns to work after the end of her pregnancy;
 - (iii) if she is not entitled to ordinary maternity leave in respect of the pregnancy, the protected period ends at the end of the 2 weeks beginning with the end of the pregnancy;
- (b) where a person's treatment of a woman is on grounds of illness suffered by the woman as a consequence of a pregnancy of hers, that treatment is to be taken to be on the ground of the pregnancy;
- (c) a "statutory right to maternity leave" means a right conferred by Article 103(1) or 105(1) of the Employment Rights (Northern Ireland) Order 1996 (ordinary and additional maternity leave).

(4) In paragraph 3 "ordinary maternity leave" and "additional maternity leave" shall be construed in accordance with Articles 103 and 105 of the Employment Rights (Northern Ireland) Order 1996.

(5) Paragraphs (1) and (2) apply to—

- (a) any provision of Part III, and
- (b) any provision of Part IV, so far as it applies to vocational training."

Harassment and sexual harassment

6. In the 1976 Order, after Article 6 (Discrimination by way of victimisation) insert—

"Harassment, including sexual harassment

6A—(1) For the purposes of this Order, a person subjects a woman to harassment if—

- (a) on the ground of her sex, he engages in unwanted conduct that has the purpose or effect—
 - (i) of violating her dignity, or
 - (ii) of creating an intimidating, hostile, degrading, humiliating or offensive environment for her,

^(a) S.I. 1996/1919 (N.I. 16); Part IX was substituted by Article 9 of and Schedule 4, Part 1 to the Employment Relations (Northern Ireland) Order 1999 (S.I. 1999/2790 (N.I. 9))

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

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

(3) For the purposes of this Order, a person (“A”) subjects another person (“B”) to harassment if —

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

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

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

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

Applicants and employees

7.—(1) In the heading to Part III of the 1976 Order, for “DISCRIMINATION IN THE EMPLOYMENT FIELD”, substitute “EMPLOYMENT FIELD”.

(2) Article 8 of the 1976 Order (Discrimination against applicants and employees) is amended as follows.

(3) In the heading, for the words “Discrimination against applicants and employees”, substitute the words “Applicants and employees”.

(4) After paragraph (2), insert—

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

- (a) a woman whom he employs, or
- (b) a woman who has applied to him for employment.”.

Terms and conditions of employment during maternity leave

8. In the 1976 Order, after Article 8 (Discrimination against applicants and employees) insert—

“Exception relating to terms and conditions during maternity leave

8A—(1) Subject to paragraphs (2) and (5), Article 8(1)(b) and (2) does not make it unlawful to deprive a woman who is on ordinary maternity leave of any benefit from the terms and conditions of her employment relating to remuneration.

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

(3) Subject to paragraphs (4) and (5), Article 8(1)(b) and (2) does not make it unlawful to deprive a woman who is on additional maternity leave of any benefit from the terms of her employment.

(4) Paragraph (3) does not apply to—

- (a) benefit by way of maternity-related remuneration,
- (b) the benefit of her employer’s implied obligation to her of trust and confidence, or
- (c) any benefit of terms and conditions in respect of—
 - (i) notice of the termination by her employer of her contract of employment,
 - (ii) compensation in the event of redundancy,
 - (iii) disciplinary or grievance procedures, or
 - (iv) membership of a pension scheme.

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

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

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

(7) In this Article—

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

“on additional maternity leave” means absent from work in exercise of the right conferred by Article 105(1) of the Employment Rights (Northern Ireland) Order 1996;

“on ordinary maternity leave” means absent from work in exercise of the right conferred by Article 103(1) of that Order (ordinary maternity leave), or in consequence of the prohibition in Article 104(1) of that Order (compulsory maternity leave);

“remuneration” means benefits—

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

Persons with statutory powers to select employees for others

9. For Article 9 of the 1976 Order there shall be substituted—

“Persons with statutory power to select employees for others

9.—(1) It is unlawful for a person who is empowered by virtue of a statutory provision to select or nominate another person for employment by a third person to discriminate against a person—

- (a) by refusing or deliberately omitting to select or nominate him for employment, or

- (b) where candidates are selected or nominated in order of preference, by selecting or nominating him lower in order than any other who is selected or nominated.

(2) It is unlawful for a person who is empowered by virtue of a statutory provision to select or nominate another person for employment by a third person to subject that other to harassment.”.

Genuine occupational qualifications

10. In Article 10B of the 1976 Order(a) (supplementary exceptions relating to gender reassignment), after paragraph (3), insert—

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

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

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

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

Contract workers

11.—(1) Article 12 of the 1976 Order (Discrimination against contract workers) is amended as follows.

(2) In the heading, for the words “Discrimination against contract workers”, substitute the words “Contract workers”.

(3) In paragraph (1), after “work”, insert “at an establishment in Northern Ireland,”.

(4) After paragraph (2) insert—

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

Territorial extent

12.—(1) Article 13 of the 1976 Order (Meaning of employment at an establishment in Northern Ireland), is amended as follows.

(2) For paragraph (1), substitute—

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

- (a) the employee does his work wholly or partly in Northern Ireland, or
- (b) the employee does his work wholly outside Northern Ireland and paragraph (1A) applies.

(1A) This paragraph applies if—

- (a) the employer has a place of business at an establishment in Northern Ireland,
- (b) the work is for the purposes of the business carried on at that establishment, and

(a) Article 10B was inserted by regulation 4 of the Sex Discrimination (Gender Reassignment) Regulations (Northern Ireland) 1999 (S.R. 1999 No. 311)

(b) 2004 c. 7

- (c) the employee is ordinarily resident in Northern Ireland—
 - (i) at the time when he applies for or is offered the employment, or
 - (ii) at any time during the course of the employment.”.
- (3) In paragraph 2(b), after “ship”, insert “, only if the ship is”.
- (4) In paragraph 2(b), after the word “hovercraft”, insert “, only if the aircraft or hovercraft is”.
- (5) For paragraphs (5) to (7) substitute—

“(5) In relation to employment concerned with exploration of the sea bed or subsoil or the exploitation of their natural resources, the Office of the First Minister and deputy First Minister(a) may by order provide that paragraph (1) shall have effect as if—

 - (a) the reference to Northern Ireland in each of sub-paragraphs (a) and (b) of paragraph (1), and
 - (b) each of the references to Northern Ireland in paragraphs (1A) and (2),

included any area for the time being designated under section 1(7) of the Continental Shelf Act 1964, in which the law of Northern Ireland applies.

(6) An order under paragraph (5) may provide that, in relation to employment to which the order applies, this Part and section 1 of the Equal Pay Act are to have effect with such modifications as are specified in the order.

(7) The Office of the First Minister and deputy First Minister shall not make an order under paragraph (5) unless a draft of the order has been approved by resolution of the Assembly.

(8) Paragraphs (1) to (4) or, where an order under paragraph (5) is in operation, those paragraphs as modified by the order, apply for the purposes of determining whether contract work, within the meaning given by Article 12, is at an establishment in Northern Ireland, but so apply with the following modifications—

 - (a) a reference to employment is to be read as a reference to work to which Article 12 applies, and
 - (b) “employee” and “employer” shall be read (respectively) as “contract worker” and “principal” with “contract worker” and “principal” having the meaning given by Article 12.”.

Office holders

13.—(1) In the 1976 Order, after Article 13 (Meaning of employment at establishment in Northern Ireland), insert—

“Discrimination against office holders etc.

Offices and posts to which Article 13B applies

- 13A—(1) Subject to paragraphs (2) and (3), Article 13B applies to an office or post if—
- (a) the office or post is one—
 - (i) to which persons are appointed to discharge functions personally under the direction of another person, and
 - (ii) in respect of which they are entitled to remuneration,
 - (b) the office or post is one to which appointments are made by a Minister of the Crown, a Northern Ireland Minister, the Assembly or a government department, or

(a) The Department of Manpower Services was renamed the Department of Economic Development: *see* Article 3 of the Departments (No. 2) (Northern Ireland) Order 1982 (S.I. 1982/846 (N.I. 11)); the functions of the Department of Economic Development under the Sex Discrimination (Northern Ireland) Order 1976 were transferred to the Office of the First Minister and deputy First Minister: *see* Article 4 of and Part 1 of Schedule 2 to the Departments (Transfer and Assignment of Functions) Order (Northern Ireland) 1999 (S.R. 1999 No. 481)

- (c) the office or post is one to which appointments are made on the recommendation of, or subject to the approval of, a person referred to in sub-paragraph (b).
- (2) Article 13B does not apply to an office or post if Article 8 (Applicants and employees), Article 12 (Contract workers), or Article 14 (Partnerships)—
- (a) applies in relation to an appointment to the office or post, or
 - (b) would apply in relation to an appointment to an office or post but for the operation of any other provision of this Order.
- (3) Article 13B does not apply to—
- (a) any office of the House of Commons held by a member of it,
 - (b) a life peerage within the meaning of the Life Peerages Act 1958(a), or any office of the House of Lords held by a member of it,
 - (c) any office of the Assembly held by a member of it,
 - (d) any office of a district council held by a member of it,
 - (e) any office of a political party.
- (4) For the purposes of paragraph (1)(a), the holder of an office or post—
- (a) is to be regarded as discharging her functions under the direction of another person if that other person is entitled to direct her as to when and where she discharges those functions;
 - (b) is not to be regarded as entitled to remuneration merely because she is entitled to payments—
 - (i) in respect of expenses incurred by her in carrying out the functions of the office or post, or
 - (ii) by way of compensation for the loss of income or benefits she would or might have received from any person had she not been carrying out the functions of the office or post.
- (5) In this Article and Article 13B, appointment to an office or post does not include election to an office or post.

Office holders

13B—(1) It is unlawful for a relevant person, in relation to an appointment to an office or post to which this Article applies, to discriminate against a woman—

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

(2) It is unlawful, in relation to an appointment to an office or post to which this Article applies and which is an office or post referred to in Article 13A(1)(c), for a relevant person on whose recommendation, or subject to whose approval, appointments to the office or post are made, to discriminate against a woman—

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

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

- (a) in the terms of the appointment,

(a) 1958 c. 21

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

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

- (a) who has been appointed to the office or post,
- (b) who is seeking or being considered for appointment to the office or post, or
- (c) who, in relation to appointment to the office or post, is seeking or being considered for a recommendation or approval referred to in Article 13A(1)(c).

(5) Paragraphs (1) and (3) do not apply to any act in relation to an office or post where, if holding the office or post constituted employment, that act would be lawful by virtue of Article 10 (Exception where sex is a genuine occupational qualification), 10A (Corresponding exception relating to gender reassignment), 10B (Supplementary exceptions relating to gender reassignment) or Article 21 (Ministers of religion etc.).

(6) Paragraph (2) does not apply to any act in relation to an office or post where, if holding the office or post constituted employment, it would be lawful by virtue of Article 10, 10A, 10B or 21 to refuse to offer the person such employment.

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

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

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

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

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

- (a) in a case relating to an appointment to an office or post, the person with power to make that appointment;
- (b) in a case relating to the making of a recommendation or the giving of an approval in relation to an appointment, a person or body referred to in section 13A(1)(b) with power to make that recommendation or (as the case may be) to give that approval;
- (c) in a case relating to a term of an appointment, the person with power to determine that term;
- (d) in a case relating to a working condition afforded in relation to an appointment—
 - (i) the person with power to determine that working condition, or
 - (ii) where there is no such person, the person with power to make the appointment;

- (e) in a case relating to the termination of an appointment, the person with power to terminate the appointment;
 - (f) in a case relating to the subjection of a person to any other detriment or to harassment, any person or body falling within one or more of sub-paragraphs (a) to (e) in relation to such cases as are there mentioned.
- (10) In paragraph 9(d) “working condition” includes any opportunity for promotion, a transfer, training or receiving any other benefit.
- (11) In this Article—
- (a) references to “making a recommendation” include references to making a negative recommendation;
 - (b) references to “refusal” include references to deliberate omission;
 - (c) “benefits” includes facilities and services”.
- (2) In the 1976 Order, Article 83 (Government appointments outside Article 8) is repealed.

Partnerships

- 14.—**(1) Article 14 of the 1976 Order (Partnerships), is amended as follows.
- (2) After paragraph (2) insert—
- “(2A) It is unlawful for a firm, in relation to a position as partner in the firm, to subject to harassment a woman who holds or has applied for that position.”.
- (3) Omit paragraph (4) (which restricts the prohibition on discrimination in relation to death and retirement benefits).
- (4) In Article 4 of the Sex Discrimination (Northern Ireland) Order 1988(a), omit paragraph (3).

Trade unions

- 15.—**(1) Article 15 of the 1976 Order (Trade unions etc), is amended as follows.
- (2) After paragraph (3), insert—
- “(3A) It is unlawful for an organisation to which this Article applies, in relation to membership of that organisation, to subject to harassment a woman who—
- (a) is a member of the organisation, or
 - (b) has applied for membership of the organisation.”.
- (3) Omit paragraph (4) (which restricts the prohibition on discrimination in relation to death and retirement benefits).

Qualifying bodies

- 16.—**(1) Article 16 of the 1976 Order (Qualifying bodies) is amended as follows.
- (2) After paragraph (1), insert—
- “(1A) It is unlawful for a body to which this Article applies, in relation to an authorisation or qualification of a kind mentioned in paragraph (1), to subject to harassment a woman who holds or applies for such an authorisation or qualification.”.
- (3) After paragraph (4), insert—
- “(5) Paragraph (1A) does not apply to harassment which is rendered unlawful by Article 24 or 25.”.

(a) S.I. 1988/1303 (N.I. 13)

Vocational training

17.—(1) In Article 17 of the 1976 Order (Persons concerned with the provision of vocational training), for paragraph (1), substitute—

“(1) It is unlawful, in the case of a woman seeking or receiving vocational training, for any person who provides, or makes arrangements for the provision of, facilities for vocational training to discriminate against her—

- (a) in the arrangements that person makes for the purpose of selecting people to receive vocational training,
- (b) in the terms on which that person affords her access to any vocational training or facilities concerned with vocational training,
- (c) by refusing or deliberately omitting to afford her such access,
- (d) by terminating her vocational training, or
- (e) by subjecting her to any detriment during the course of her vocational training.

(1A) It is unlawful for a provider of vocational training, in relation to such training, to subject to harassment a woman—

- (a) to whom he is providing such training, or
- (b) who has asked him to provide such training.

(1B) In this Article “vocational training”, in relation to a woman, includes (if it would not otherwise do so) any training which would help fit her for any employment.”.

(2) In Article 53A of the 1976 Order^(a) (Construction of references to vocational training), for the words “the following provisions, namely Articles 52, 52A and”, substitute the word “Article”.

Employment agencies

18.—(1) Article 18 of the 1976 Order (Employment agencies) is amended as follows.

(2) After paragraph (1), insert—

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

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

Ministers of religion etc.

19.—(1) For Article 21 of the 1976 Order (Ministers of religion etc) substitute—

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

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

(2) Nothing in Article 16 shall make it unlawful to apply a requirement in relation to an authorisation or qualification (as defined in that Article) where—

^(a) Article 53A was inserted by Article 5 of the Employment (Miscellaneous Provisions) (Northern Ireland) Order 1990 (S.I.1990/246 (N.I. 2)) and amended by Article 105(1) and Schedule 3 to the Fair Employment and Treatment (Northern Ireland) Order 1998 (S.I.1998/3162 (N.I. 21))

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

(3) This paragraph applies to—

- (a) a requirement to be of a particular sex,
- (b) a requirement not to be undergoing or to have undergone gender reassignment,
- (c) a requirement relating to not being married or to not being a civil partner,
- (d) a requirement, applied in relation to a person who is married, or is a civil partner, that relates—
 - (i) to the person, or the person’s spouse or civil partner, not having a living former spouse or a living former civil partner, or
 - (ii) to how the person, or the person’s spouse or civil partner, has at any time ceased to be married or ceased to be a civil partner.”.

(2) Regulation 5 of the Sex Discrimination (Gender Reassignment) Regulations (Northern Ireland) 1999(a) is revoked.

Relationships which have come to an end: Part III of 1976 Order

20. In Article 22A of the 1976 Order(b) (Relationships which have come to an end), after paragraph (3), insert—

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

Educational establishments

21.—(1) In the heading to Article 24 of the 1976 Order, for the words “Discrimination by bodies in charge of educational establishments” substitute the words “Bodies in charge of educational establishments”.

(2) The existing provisions of Article 24 (including the table) shall become paragraph (1) of the Article.

(3) After the paragraph (1) so formed, insert—

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

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

(4) In paragraphs (2) and (3), “institution of further or higher education” means an establishment falling within column 1 of paragraph 1A, 3 or 5 of the table in paragraph (1).”.

(4) In Article 27 of the 1976 Order (Exception for single sex establishments)—

- (a) in paragraph (1), for “Articles 24(a) and (b)”, substitute “Articles 24(1)(a) and (b)”;

(a) SR 1999 No. 311

(b) Article 22A was inserted by regulation 2 of the Sex Discrimination Order 1976 (Amendment) Regulations (Northern Ireland) 2004 (SR 2004 No. 172)

(b) in paragraph (2), for “Articles 24(a) and (b), substitute “Articles 24(1)(a) and (b), and for “Articles 24(c)(i)”, substitute “Articles 24(1)(c)(i)”.

(5) In Article 28 of the 1976 Order (Exception for single-sex establishments turning co-educational), in paragraph (1), for “Article 24”, substitute “Article 24(1)”.

Exception for physical training

22. In the 1976 Order—

- (a) Article 29 (Exception for physical training) is repealed, and
- (b) in Article 36 (Further exceptions from Articles 30(1) and 31), in the table, for “Articles 27, 28 and 29”, substitute “Articles 27 and 28”.

Relationships which have come to an end: Part IV of 1976 Order

23. In Article 36A of the 1976 Order(a) (Relationships which have come to an end), after paragraph (3), insert—

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

Equality Commission for Northern Ireland

24.—(1) In Article 54 of the 1976 Order (Establishment and duties of Commission), in paragraph (1) after sub-paragraph (a), insert—

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

(2) In Article 56A of the 1976 Order(b) (Codes of practice), in paragraph (1), after sub-paragraph (a), insert—

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

(3) In Article 59 of the 1976 Order (Power to obtain information), in paragraph (2)(b)(i), for “discriminatory acts” substitute “acts of discrimination or harassment”.

Jurisdiction of industrial tribunals

25. In Article 63(1) of the 1976 Order (Jurisdiction of industrial tribunals) after the word “discrimination” in both places where it occurs, insert the words “or harassment”.

Burden of proof: industrial tribunals

26. In Article 63A(2) of the 1976 Order(c)(Burden of proof: industrial tribunals) after the word “discrimination” in both places where it occurs, insert the words “or harassment”.

Enforcement of claims under Part IV of 1976 Order

27.—(1) Article 66 of the 1976 Order (Claims under Part IV), is amended as follows.

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

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

(a) Article 36A was inserted by regulation 3 of the Sex Discrimination Order 1976 (Amendment) Regulations (Northern Ireland) 2004 (SR 2004 No.172)

(b) Article 56A was inserted by Article 7 of the Sex Discrimination (Northern Ireland) Order 1988 (SI 1998/1303 (N.I. 13))

(c) Article 63A was inserted by regulation 4 of the Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations (Northern Ireland) 2001 (SR 2001 No. 282)

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

Burden of proof: county court

28.—(1) Article 66A of the 1976 Order(a) (Burden of proof: county court), is amended as follows.

(2) In paragraph (2)(a), after “discrimination” insert “or harassment”.

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

Period within which respondent must reply

29.—(1) Article 74 of the 1976 Order (Help for aggrieved persons in obtaining information etc.) is amended as follows.

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

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

(4) After paragraph (2) insert—

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

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

(i) any provision of Part III, or

(ii) any provision of Part IV, so far as it applies to vocational training;

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

Cadet forces

30. In Article 82 of the 1976 Order (Application to Crown), omit paragraph (6) (which makes an exception for discrimination in respect of admission to various cadet forces).

Amendments to the Equal Pay Act (Northern Ireland) 1970: office holders

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

(2) In section 1 (Requirement of equal treatment for men and women in same employment), after subsection (7) insert—

“(7A) This section applies to —

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

(b) any office or post to which appointments are made by (or on the recommendation of or subject to the approval of) a Minister of the Crown, a Northern Ireland Minister, the Assembly or a government department,

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

(7B) For the purposes of subsection (7A) the holder of an office or post—

(a) Article 66A was inserted by regulation 5 of the Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations (Northern Ireland) 2001 (SR 2001 No. 282)

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

(7C) For the purposes of subsection (7A)—

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

(3) After section 1 insert—

“Meaning of “political office” in section 1(7C)(a)

1A. The following are political offices for the purposes of section 1(7C)(a)—

- (a) any office of the House of Commons held by a member of it,
- (b) a life peerage within the meaning of the Life Peerages Act 1958(a), or any office of the House of Lords held by a member of it,
- (c) any office of the Assembly held by a member of it,
- (d) any office of a district council held by a member of it, or
- (e) any office of a political party.”.

(4) In section 2, after subsection (5), insert—

“(5A) In this section “employer”, in relation to the holder of an office or post to which section 1 above applies by virtue of subsection (7A) of that section, shall be construed in accordance with that subsection.”.

(5) In section 6A(2)(b), for “subsections (9) to (12)”, substitute “subsections (7A) to (12)”.

Amendments to Equal Pay Act (Northern Ireland) 1970: pregnancy and maternity leave

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

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

“(d) where—

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

(a) 1958 c 21

(b) Section 1 was amended by regulation 2(1) of the Equal Pay (Amendment) Regulations (Northern Ireland) 1984 (S.R. 1984 No. 16)

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

- (e) if (apart from the equality clause) the terms of the woman's contract as to—
- (i) pay (including pay by way of bonus) in respect of times before she begins to be on statutory maternity leave,
 - (ii) pay by way of bonus in respect of times when she is absent from work in consequence of the prohibition in Article 104(1) of the Employment Rights (Northern Ireland) Order 1996^(a) (compulsory maternity leave), or
 - (iii) pay by way of bonus in respect of times after she returns to work following her having been on statutory maternity leave,

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

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

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

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

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

- (a) “maternity-related pay”, in relation to a woman, means pay (including pay by way of bonus) to which she is entitled as a result of being pregnant or in respect of times when she is on statutory maternity leave, except that it does not include any statutory maternity pay to which she is entitled;
- (b) “statutory maternity leave period”, in relation to a woman, means the period during which she is on statutory maternity leave;
- (c) an increase in an amount is taken into account in a calculation if in the calculation the amount as increased is substituted for the unincreased amount.

(5B) For the purposes of subsections (2)(d) to (f) and (5A), “on statutory maternity leave” means absent from work—

- (a) in exercise of the right conferred by Article 103(1) or 105(1) of the Employment Rights (Northern Ireland) Order 1996 (ordinary or additional maternity leave), or
- (b) in consequence of the prohibition in Article 104(1) of that Order (compulsory maternity leave).”

(5) In section 6, after subsection (1) insert—

“(1AA) Subsection (1)(b) does not affect the operation of an equality clause falling within section 1(2)(d), (e) or (f).”

(a) S.I. 1996/1919 (N.I. 16); Part IX was substituted by Article 9 of and Schedule 4, Part 1 to the Employment Relations (Northern Ireland) Order 1999 (S.I. 1999/2790 (N.I. 9))

Sealed with the Official Seal of the Office of the First Minister and deputy First Minister on 19th
September 2005



Laurene McAlpine
A senior officer of the
Office of the First Minister and deputy First Minister

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations, which are made under section 2(2)(a) and (b) of the European Communities Act 1972 and come into operation on 5th October 2005, implement, in Northern Ireland, Council Directive 2002/73/EC of 23 September 2002 (“the Directive”) and include provision for matters arising out of or relating to such implementation. The Directive is concerned with the principle of equal treatment of men and women as regards access to employment, vocational training and promotion, and working conditions.

The Directive necessitates amendment of the Sex Discrimination Order (Northern Ireland) 1976 (“the 1976 Order”), in particular to reflect the provisions of the Directive which deal with the definition of indirect discrimination, harassment, and genuine occupational requirements, and also necessitates amendments to the 1976 Order making it clear that discrimination on the grounds of pregnancy and maternity leave is unlawful sex discrimination.

Regulation 3 makes certain amendments to the interpretation provisions of the 1976 Order. It also makes a consequential amendment.

Regulation 4 sets out a revised definition of indirect discrimination, on grounds of sex, in those areas with which the Directive is concerned. It also applies the amended definition to indirect discrimination against married persons.

Regulation 5 sets out a definition of discrimination on the grounds of pregnancy and maternity leave.

Regulation 6 sets out a definition of harassment, including sexual harassment, on the grounds of a person’s sex, or on the grounds of gender reassignment, which will apply in the areas with which the Directive is concerned. It also provides that a person may not be treated less favourably because of their submission to or rejection of conduct amounting to harassment.

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

Regulation 8 sets out the extent to which it is discriminatory to deprive a woman of the benefit of her terms and conditions of employment during maternity leave. These provisions do not apply to pay (the payment of money regulated by the contract of employment) as this is dealt with in the Equal Pay Act (Northern Ireland) 1970 – see regulation 32.

Regulation 9 makes it unlawful for persons with statutory power to select employees for others to subject a person to harassment.

Regulation 10 modifies the genuine occupational qualification exception which allows gender reassignment discrimination in cases where the jobholder is liable to be called upon to perform intimate physical searches pursuant to statutory powers.

Regulation 11 makes it unlawful for a principal to subject a contract worker to harassment.

Regulation 12 contains an expanded definition of “work at an establishment in Northern Ireland”.

Regulation 13 extends the 1976 Order to office holders.

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

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

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

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

Regulation 18 makes it unlawful for employment agencies to subject persons to harassment.

Regulation 19 replaces Article 21 of the 1976 Order which permits certain discrimination in relation to employment and qualifications for purposes of an organised religion where the discrimination is necessary for limited religious reasons.

Regulations 20 and 23 provide that, where there has been a relationship in which certain acts of discrimination, or harassment, would have been unlawful, it is also unlawful to subject a person to harassment after that relationship has ended. Regulation 20 applies to relationships which are governed by Part III of the 1976 Order (for example, an employment relationship), and regulation 23 applies to relationships to which certain provisions of Part IV of the 1976 Order apply.

Regulation 21 makes it unlawful for institutions of further and higher education to discriminate in respect of selection arrangements and to subject persons to harassment.

Regulation 22 removes the exception allowing discrimination in physical education training courses.

Regulation 24 makes it the duty of the Equality Commission for Northern Ireland (ECNI) to work towards the elimination of harassment (in addition to its existing duty in respect of discrimination), adds harassment to the matters which can be the subject of a code of practice and adds harassment to the matters in respect of which the ECNI can require information for the purposes of a formal investigation.

Regulation 25 adds harassment to the claims which may be presented to an industrial tribunal.

Regulation 26 ensures that the burden of proof in harassment claims heard in the industrial tribunal is the same as that for discrimination claims heard there.

Regulation 27 adds harassment to the claims which may be presented to a county court.

Regulation 28 ensures that the burden of proof in harassment claims heard in the county court is the same as that for discrimination claims heard there, in areas with which the Directive is concerned.

Regulation 29 ensures that, in certain cases, respondents must reply to a claimant's preliminary questions within eight weeks of being served with them.

Regulation 30 removes the exception allowing discrimination in admission to cadet forces.

Regulation 31 extends the Equal Pay Act (Northern Ireland) 1970 to office-holders.

Regulation 32 amends the Equal Pay Act (Northern Ireland) 1970 to set out the extent to which it is discriminatory to pay a woman less than she would otherwise have been paid due to pregnancy or maternity leave.

A Regulatory Impact Assessment of the effect these Regulations will have on business costs has been placed in the Library of the Northern Ireland Assembly. A copy may be obtained from : Equality and Rights Division, Office of the First Minister and deputy First Minister, Room E3.18, Castle Buildings, Stormont, Belfast BT4 3SR, or on the Department's website at www.ofmdfmi.gov.uk/sex-discrimination-and-equal-pay.htm