

EQUALITY ACT 2006

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 4: Public Functions

Section 83: Prohibition of discrimination

274. *Section 83* inserts a new *section 21A* into Part III of the SDA. New section 21A will make it unlawful for a public authority to discriminate or commit acts of harassment on grounds of sex when carrying out its functions. In practice this will mean that Ministers, local authorities, the police, other governmental organisations and private bodies which have functions of a public nature are not permitted to discriminate or harass on the grounds of a person's sex when exercising their public functions. This prohibition of sex discrimination in public functions ("the prohibition") will bring the SDA into line with section 19B of the RRA. The Disability Discrimination Act 2005 also similarly extends the DDA by inserting a new section 21B into the DDA.
275. An individual who has been discriminated against contrary to new section 21A will be able to bring proceedings in a county court (or a sheriff court in Scotland) in accordance with section 66 of the SDA.
276. *New subsection 21A(4)* and the table of exceptions in *subsection (9)* set out the functions and actions which are excluded from the general prohibition. The new subsection (4) includes a provision that none of these exceptions permits anything prohibited by European Community law on discrimination. *New subsection 21A(3)* excludes the Houses of Parliament and the intelligence services from the requirement not to discriminate.
277. The exempted functions and actions in new subsection 21A(4) and the Table of Exceptions in new subsection 21A(9) include:
- acts related to the preparation and making of primary and secondary legislation made by a Minister of the Crown, the Scottish Ministers, the National Assembly for Wales, the Privy Council or the General Synod of the Church of England;
 - acts which are necessary to comply with a statutory requirement;
 - judicial functions and acts done on behalf of or on the instructions of a person exercising a judicial function – for example, complying with a court order;
 - decisions related to criminal proceedings, where a decision has been taken not to prosecute;
 - services only required by one sex, services more beneficially provided on a single-sex basis and acts done to compensate for disadvantage related to sex; and
 - the Charity Commissioners for England and Wales (or, in Scotland, the holder of the Office of Scottish Charity Regulator) when they are exercising their functions

*These notes refer to the Equality Act 2006 (c.3)
which received Royal Assent on 16 February 2006*

in relation to such charities which, under existing exemptions in section 43 of the SDA, are allowed to discriminate on grounds of sex.

278. The exceptions for services that are provided separately (items 8 to 12 in the Table of Exceptions at new subsection 21A(9)) allow public authorities to provide services only to one sex, or to provide separate or different services for men and women when the circumstances or need are such that it would not be reasonably practicable to do otherwise.
279. New section 21A also contains provisions to prevent there being any overlap between the new provision and the existing provisions of the SDA.
280. An order-making power in new *subsection 21A(5)* allows the Secretary of State to make additional exemptions after consultation with the CEHR and subject to affirmative resolution of each House of Parliament. (The consultation will be with the EOC until the CEHR takes on responsibility for sex discrimination issues and thereafter with the CEHR.)
281. *New subsections 21A(6), (7) and (8)* introduce changes to the enforcement provisions in section 66 of the SDA to ensure that proceedings brought under new section 21A will not prejudice the outcome of a related criminal investigation or criminal proceeding. They also amend the questionnaire procedure in section 74 of the SDA, so that a court will not be able to draw inferences from a failure to respond to a questionnaire if that was necessary to avoid prejudice to a criminal investigation or criminal proceedings.

Section 84: General duty to promote equality, &c.

282. *Section 84* amends the SDA by inserting into that Act *new section 76A*. The effect of this provision is to impose on public authorities a duty to promote equality of opportunity that is similar to the duty imposed by section 71 of the RRA (as substituted by section 2 of the Race Relations (Amendment) Act 2000 (RRAA)) and the duty imposed by section 3 of the Disability Discrimination Act 2005 which inserts new section 49A into the DDA.
283. *Newssubsection 76A(1)* imposes a general duty on public authorities when carrying out their public functions, either as employers or service providers, to have due regard to the need to eliminate unlawful discrimination and harassment, and to promote equality of opportunity between men and women. This general duty will be enforceable through judicial review, rather than creating a cause of action for individuals in private law.
284. *Newssubsection 76A(2)* extends the definition of a public authority to include any person to the extent that he has functions of a public nature. This would include, for example, a private security firm contracted to provide a public function, for instance, to run a prison. It is only the public functions of private companies that are covered. Core public bodies like government departments, local authorities, the police and other governmental bodies are all public authorities. This subsection also confirms that the duty on public authorities to eliminate unlawful discrimination also covers contravention of the Equal Pay Act 1970.
285. *Newssubsection 76A(3)* excludes certain bodies from the definition of public authority, in particular the Houses of Parliament, Scottish Parliament, General Synod of the Church of England and the intelligence services. There is also a power for the Secretary of State, after consulting the Commission, to extend this list of bodies by order (subject to the negative resolution procedure).
286. *Subsection 76A(4)* exempts certain functions from the scope of the general duty: functions in connection with proceedings in the Houses of Parliament and the Scottish Parliament (though not the Scottish Parliamentary Corporate Body) and the exercise of judicial and related functions. There is also a power for the Secretary of State, after consulting the Commission, to extend this list of functions by order, also subject to the negative resolution procedure.

287. *Newsubsection 76A(5)* confirms that the general duty to promote equality of opportunity between men and women does not override any exception or limitation in law which permits sex discrimination.

Section 85: Specific duties

288. *Section 85* inserts new *sections 76B* and *76C* into the SDA.
289. *Newsection 76B* empowers the Secretary of State to impose by order, specific duties on public authorities, other than certain Scottish bodies, to ensure the better performance by them of the general duty in new section 76A(1). This order will be subject to the negative resolution procedure. The Secretary of State is obliged to consult the Commission before making such an order. The provision does not confer rights on individuals to complain about a failure by a public authority to comply with a specific duty.
290. In respect of specific duties being imposed in Wales, *newsubsection 76B(3)* confirms that the Secretary of State must (i) consult the National Assembly for Wales before imposing specific duties on any person exercising functions in relation to Wales; and (ii) gain the consent of the National Assembly for Wales before imposing specific duties on a person all of whose functions are public functions in relation to Wales.
291. *Newsection 76C* includes provisions empowering Scottish Ministers to set specific duties in respect of certain Scottish bodies, to ensure the better performance by them of the general duty. In the case of cross-border public authorities (within the meaning of section 88(5) of the Scotland Act 1998), the Secretary of State may impose, by order, duties in respect of the functions which are not Scottish functions (i.e. those which are not devolved), and the Scottish Ministers may impose, by order, duties in respect of their Scottish functions (i.e. those which are devolved). *New section 76C(6)* also requires that, before placing cross-border public authorities under specific duties, the Secretary of State must consult Scottish Ministers. Similarly, *newsection 76C(7)* requires that, before placing cross-border public authorities under specific duties, the Scottish Ministers must consult the Secretary of State.
292. *Newsection 76D* sets out the framework for the enforcement of specific duties imposed by order under 76B(1) or 76C. The Commission may serve a compliance notice on a public authority where it is satisfied that the authority is not complying with any specific duty. A compliance notice will require the public authority to (i) comply with the duty and (ii) inform the Commission within 28 days (beginning with the date on which the notice is given), of action it intends to comply with the duty. The notice could also require the public authority to provide the CEHR with information additionally specified in the notice in order to verify that the duty has or is being complied with. This new section also enables the Commission to apply to a county court for an order to require the public authority to comply with the notice, if the Commission thinks that the public authority has not done so.

Section 86: Codes of practice

293. *Section 86* inserts a new section 76E into the SDA
294. *New Section 76E* gives the Commission the power to draw up and issue a code of practice about performance of both the general duty in section 84 and the specific duties to be imposed by section 85. There is also a requirement for the Secretary of State to consult Scottish Ministers and the National Assembly for Wales before approving a draft code or commencing a code. Recognising that codes of practice on the gender duty will go beyond the employment field, provision is made in this section for a code of practice on the gender duty to be admissible in evidence in relevant proceedings before all courts and tribunals.

295. In respect of sections 84 and 85 (which introduce new sections 76A to 76D into the SDA), before the CEHR becomes operational, any requirement for the Secretary of State to consult the Commission will mean a requirement to consult the EOC. The EOC will also have responsibility for enforcing the general duty and the specific duties to be imposed by secondary legislation. During this interim period, the EOC will additionally be responsible for preparing and issuing codes of practice under new section 76E in relation to the general duty and the specific duties. The procedural requirements applying to codes of practice prepared under section 56A of the SDA are to apply with the adjustment made by section 86 to the issuing of codes whilst the EOC is responsible for issuing the codes of practice on the gender duty.

Section 87: National Security

296. *Section 87* inserts a new section 66B into the SDA.
297. *New Section 66B* allows for county and sheriff court rules to make provision permitting a court to take various forms of action which are considered expedient in the interests of national security. This is equivalent to section 67A of the RRA which was introduced by the RRAA. The power in section 66B will allow rules to be made to allow the court, when considering proceedings brought under this part of the SDA:
- to exclude the claimant, the claimant's representatives or any assessors from part or all of the proceedings;
 - to permit the claimant or representative to make a statement prior to the part of the proceedings from which they are excluded; and
 - to keep part or all of the reasons for a decision secret.
298. Where the claimant or representatives are excluded from part or all of proceedings under such rules, *new section 66B(2)* allows the Attorney General or Advocate General for Scotland to appoint a special advocate to represent the interests of the claimant.

Section 88: General duty: exceptions

299. *Section 88* makes a minor consequential amendment to the DDA.
300. Section 49C(4) of the DDA permits any or all of subsections (a) to (d) of the general duty to promote equality for disabled people to be disapplied from prescribed acts. This amendment would ensure that, should it be necessary to disapply subsections (e) or (f) of the duty, this could also be done – for example, to clarify the situation where there was doubt as to whether an act was covered or not, or to exclude particular types of act from those duties where there would be good policy reasons as to why they should not be covered.

Section 89: National Security

301. *Section 89* inserts a new section 59A into the DDA that is analogous to new section 66B of the SDA, inserted by section 87.

Section 90: National Security

302. *Section 90* makes an amendment to the equivalent provision in the RRA to ensure that a special advocate may be appointed where either the claimant or the representatives or both are excluded. As currently drafted, the RRA provision only allows for the appointment of a special advocate where both the claimant and the representatives are excluded.