

The Legal Framework – Sex Discrimination

Most of this information is from the Equal Opportunities Commission. For more information see their website: www.eoc.org.uk

The Sex Discrimination Act 1975 (SDA) prohibits sex discrimination against individuals in the areas of employment, education, and the provision of goods, facilities and services and in the disposal or management of premises. It also prohibits discrimination in employment against married people. It is not unlawful to discriminate against someone because they are not married*. Victimisation because someone has tried to exercise their rights under the SDA or Equal Pay Act is prohibited. **In addition, regulations relating to sexual harassment, pregnancy and maternity leave, and after the working relationship has ended have been included in this guidance note.**

** Please note that new legislation will soon come into effect (December 2005) relating to Civil Partnerships (this relates to same sex relationships). In essence this is equivalent to marriage.*

The SDA applies to women and men of any age, including children.

Discriminatory advertisements are unlawful but only the Equal Opportunities Commission can take action against advertisers.

There are some general exceptions to when sex discrimination is unlawful. The main exceptions are:

- When a charity is providing a benefit to one sex only, in accordance with its charitable instrument.
- When people are competing in a sport in which the average woman is at a disadvantage to the average man because of physical strength, stamina or physique.
- In insurance where the discriminatory treatment reasonably relates to actuarial or other data.

The SDA applies to England, Wales and Scotland.

What is sex discrimination?

The SDA prohibits direct and indirect sex discrimination. There are special provisions about discrimination on the grounds of gender reassignment. Part I of the SDA describes the forms of discrimination to which the SDA applies.

Direct sex discrimination

This is where a woman (or man) is treated less favourably than a person of the opposite sex in comparable circumstances is, or would be, because of her (or his) sex. Types of direct sex discrimination include sexual harassment and treating a woman adversely because she is pregnant.

Indirect sex discrimination (as amended by the Employment, Equality (Sex Discrimination) Regulations 2005)

This means that an organisation must not have selection criteria, policies, employment rules or any other practices which although they are applied to all employees, have the effect of disadvantaging people of a particular sex unless the practice can be justified. Indirect discrimination is unlawful whether it is intentional or not.

Discrimination on grounds of gender reassignment

There are special provisions prohibiting discrimination on the grounds of gender reassignment in the employment field with certain exceptions. There are no express provisions prohibiting

discrimination on grounds of gender reassignment in the other fields covered by the SDA. However, there is a good argument that the general definition of sex discrimination prohibits this, although there is not yet any legal authority on this point.

Discrimination on grounds of sexual orientation

Please refer to the Sexuality pages on Clusterweb for details.

Discrimination on the grounds of pregnancy or maternity leave (as introduced by the Employment, Equality (Sex Discrimination) Regulations 2005)

There are special provisions prohibiting discrimination on the grounds of pregnancy or maternity leave.

Discrimination in the employment field

In general, it is unlawful for an employer to discriminate directly or indirectly on grounds of sex or marriage in:

- Recruitment (although sex discrimination will be lawful if one of the defined genuine occupational requirements applies e.g. the job needs to be held by a man to preserve privacy and decency, or a role in a performance needs to be held by a woman for reasons of authenticity).
- Treatment at work (but note that claims relating to discrimination in contractual pay and benefits are brought under the Equal Pay Act).
- Dismissal.

From the 19 July 2003, the SDA was amended to make it clear that discrimination against ex-employees is covered by the SDA where the discrimination complained of is related to the previous employment. Prior to the amendment being made, the House of Lords had held that the SDA (and the other discrimination legislation) did prohibit discrimination against ex-employees. Employees (and potential employees) have rights under the SDA whatever their length of employment and whatever hours they work.

The SDA applies even if some of the work is to be done outside Great Britain. It will not apply if the work is to be done wholly outside Great Britain.

The SDA also protects people who are not "employees" in the sense required for some other employment rights, such as the right not to be unfairly dismissed. It protects people engaged under a contract personally to execute work or labour. Contract workers whose labour is supplied by their employer to another person (the principal) are protected against discrimination by the principal. Special provisions apply the SDA to police officers, who are office holders rather than employees.

There are special provisions prohibiting discrimination

- by firms against partners or potential partners
- by trade unions and employers' organisations against members or potential members
- by authorities or bodies in conferring authorisations or qualifications needed for or facilitating engagement in a particular profession or trade
- by people providing vocational training
- by employment agencies
- by or in relation to barristers or advocates.

Part II of the SDA contains the provisions relating to discrimination in the employment field, except for the provisions about barristers, which are in Part III.

Discrimination in education

Co-educational schools, colleges and universities must not discriminate directly or indirectly on grounds of sex in the way they treat or admit students. Single sex schools may restrict their intake to boys or girls (with very limited exceptional admissions of pupils of the opposite sex).

Single sex schools which intend to change to co-educational admission, can get approval for a limited exemption from the SDA during the transitional phase.

Local education authorities must not discriminate in carrying out their functions under the Education Acts.

Part III of the SDA contains the provisions relating to discrimination in education.

Discrimination in the provision of goods, facilities and services and premises

With a few exceptions, it is unlawful to discriminate directly or indirectly on grounds of sex in the provision of goods, facilities or services to the public, or a section of the public or in the disposal or management of premises. The main exceptions include:

- Discrimination by non-profit making voluntary bodies in restricting their membership to one sex or providing benefits to one sex only in accordance with their main object.
- Discrimination in the provision of facilities or services to avoid serious embarrassment to users which would be caused by the presence of members of the opposite sex.

Part III contains the provisions relating to discrimination in the provision of goods, facilities and services and premises.

Sexual Harassment (as introduced by the Employment, Equality (Sex Discrimination) Regulations 2005)

It is unlawful to subject someone to sexual harassment. This is unwanted conduct on the grounds of the person's sex and/or unwanted verbal, non verbal, physical conduct of a sexual nature that has the purpose or effect of violating their dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the victim.

After the working relationship has ended (as introduced by the Employment, Equality (Sex Discrimination) Regulations 2005)

It is unlawful to discriminate or harass someone in certain circumstances after the working relationship has ended.

Is positive discrimination lawful?

In general, positive discrimination to favour one sex is not lawful. There are limited exceptions allowing discrimination in training, or encouragement to apply for particular work in which members of the relevant sex are under-represented. These lawful exceptions are often referred to as positive action.

The positive action provisions are contained in Part V of the SDA.

How can an individual enforce their rights under the SDA?

Employment related claims are brought in the employment tribunal. Other claims are brought in a county court in England and Wales or in a sheriff court in Scotland. Strict time limits apply: 3 months (less one day) from the act of discrimination for employment tribunal claims and 6 months (less one day) for other claims. Special provisions apply to claims about discrimination in the state education sector.

What remedies are there for unlawful discrimination?

Possible remedies include:

- A declaration that unlawful discrimination has occurred.
- Compensation for financial loss, injury to feelings and injury to health with interest.
- In employment tribunals, a recommendation that the employer take action which will reduce the effect of discrimination on the complainant.
- In a county court in England and Wales, or sheriff court in Scotland, an order that the discriminator stop the discrimination.