

CODE OF PRACTICE



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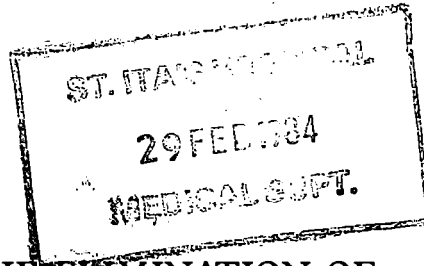
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ACTICE



FOR THE ELIMINATION OF
SEX AND MARITAL STATUS DISCRIMINATION
AND THE PROMOTION OF

Equality of Opportunity in Employment



**EMPLOYMENT
EQUALITY
AGENCY**

36 Upper Mount Street
Dublin 2

Telephone (01) 605966

First Published 1983

Equality of Opportunity

Equal Pay

Positive Action

Legal Background

CODE OF PRACTICE

FOREWORD

The Employment Equality Agency was established in October, 1977. The members decided that a Code of Practice for the elimination of sex discrimination and the promotion of equal opportunity in the work-place would be of assistance to everyone concerned with the application of anti-discrimination legislation in employment.

By the time the first term of office of Agency members came to an end in October, 1982 most of the Code now published had been prepared. The Agency records its thanks to all the members who contributed advice regarding the Code's format and contents. The Agency is also most grateful for the helpful comments received in respect of the preliminary drafts.

The Code shows that there is a close link between equal opportunity and good employment practice and that achievement of an objective to eliminate discrimination in employment depends not only on the removal of overtly unlawful practices but also on an understanding and acceptance of the need for positive measures.

The Agency expects that publication of the Code will increase the awareness of employers, workers, trade unions, employment agencies and the public generally regarding the rights and duties spelled out by legislation and that use of this Code will encourage the growth and implementation of equal opportunity policies. The Agency hopes that developments and progress in this area will lead to the need for revision and expansion of this first Code of Practice published by the Employment Equality Agency.

Sylvia Meehan
Chairperson
Employment Equality Agency

CONTENTS

	Page
	7 - 9
Introduction	
Part I: Guidance on Equality of Opportunity	11
Recruitment and Selection	11
Qualifications and Requirements	11
Internal & External Advertising of Job Vacancies	12
Dealing with Applications	13
Career Development	14
Sex as an Occupational Qualification	16
Conditions of Employment	17
Dismissal	18
Trade Unions, Employer Bodies, Professional & Trade Organisations	19
Collective Agreements	19
Employment Agencies	20
Protective Legislation	21
Part II: Equal Pay for like work — ensuring Equal Treatment in Terms and Conditions	23
Equal Pay Entitlement	23
Equal Pay Clause	23
Definition of Remuneration	23
Like Work	24
Same work/similar work	24
Equal Value	25
Balancing of Skill, Mental and Physical Effort	25
Exceptions to the Equal Pay Entitlement	26
Retrospective Pay	27
Dismissal	27
Redress	27
Part III: Positive Action	29
Personnel Policies	29
Working Arrangements	30
Appendices	
Legal	31
Background	31
Employment Equality Act, 1977	31
Anti-Discrimination (Pay) Act, 1974	35

INTRODUCTION

- 1.1 This Code of Practice is issued by the Employment Equality Agency and has been drawn up by the Agency under Section 37 of the Employment Equality Act, 1977. The Code does not impose any legal obligations on either employers or employees and failure to observe the Code does not by itself render anyone liable to proceedings. The purpose of the Code is to provide guidelines and advice for employers, workers, trade unions and employment agencies to help them to eliminate unlawful discrimination and to avoid its recurrence. It is intended that the Code should assist in the following ways:
- by explaining what measures are unlawful under the Acts;
 - by providing a basis for considering changes in company policies and collective agreements;
 - by recommending positive measures which should be implemented to promote genuine equality of opportunity and equal pay for equal work.
- 1.2 The Employment Equality Agency recommends the establishment of local trade union/management working parties to review existing employment policies and practices and to design joint programmes for the achievement of equal opportunities in the workplace. The Agency would advise on the steps involved in setting up such projects.
- 1.3 The Oireachtas has enacted legislation which prohibits discrimination in employment based on sex or marital status. Such laws are intended to accord with Ireland's obligations under European Law. Under the Anti-Discrimination (Pay) Act, 1974 and the Employment Equality Act, 1977 (hereafter referred to as "the Acts"), the following practices, terms and conditions of employment have become unlawful in the employment relationship:
- (a) **Direct discrimination**, where a person is treated less favourably than a person of the other sex or of a different marital status but of the same sex is treated, or would be treated, in the same circumstances.
 - (b) **Indirect discrimination**, where a person is obliged to comply with a condition of employment which is not essential to the job but with which a substantially greater proportion of persons of the other sex or of a different marital status is able to comply.
 - (c) **Unequal pay**, where a person is not paid the same remuneration or given the same consideration, whether in cash or in kind as a person of the other sex who is employed by the same employer (or an associated employer), in the same place and on like work.
 - (d) **Victimisation**, where a person is penalised for opposing any of the above forms of discrimination, or for bringing proceedings under the Acts, or

for giving evidence in such proceedings brought by someone else, or for giving notice of an intention to do any of these things.

- 1.4 All the above actions and practices are unlawful and can be challenged in proceedings before Equality Officers, the Labour Court and, in certain circumstances, the civil courts, subject to the following paragraph.
- 1.5 The Employment Equality Act does not apply where the employment in question is:
- (a) in the Defence Forces;
 - (b) in the Garda Síochána;
 - (c) in the prison service; and
 - (d) in a private residence, or by a close relative.

However, workers doing like work in all these occupations are entitled to equal pay.

- 1.6 Employees wishing to raise issues concerning alleged discrimination should do so through the procedures established in any company/union agreement applying to their situation. Advice on possible discriminatory practices may be sought directly from the Employment Equality Agency. Employees pursuing allegations of sex discrimination should, however, bear in mind the six months time limit for making references to the Labour Court under the 1977 Act. It is recommended that company/union procedural agreements should make explicit provision for the handling of complaints of sex discrimination.
- 1.7 The main responsibility at law for ensuring employment equality and equal pay rests with employers. They should, therefore, study this Code of Practice carefully, and should satisfy themselves regularly that their personnel policies and practices comply with the provisions of the law. They should also study how best they can implement the positive measures which are recommended in the Code to eliminate discrimination, to promote equality of opportunity and equal pay in employment. It is, however, also of great importance that trade unions should be fully aware of their role as organisations which influence employment patterns and conditions of employment. They are equally bound by the Acts in ensuring that their representatives and members do not discriminate on grounds of sex or marital status in the admission or treatment of members. The guidance in this Code applies to employment agencies in their role as employers. Additionally, employment agencies should note that they also have a responsibility as providers of job applicants and should take care to ensure that they do not act unlawfully on grounds of sex marital status by directly or indirectly discriminating when referring job applicants to employers.

- 1.8 The Employment Equality Agency will, on request, give advice to employers and trade unions and employers' organisations on the drawing up and implementation of employment equality programmes. It is pointed out that such a programme, if properly drawn up and implemented in good faith, can be useful as a defence in cases of alleged discrimination. Management should, therefore, take the initiative in devising such programmes.
- 1.9 Genuine employment equality should be seen as a necessary and beneficial aspect of progressive management and sensible industrial relations. This will be achieved only when there is real commitment to its attainment by all persons concerned. This Code is intended as an aid to assist all parties in achieving this goal.

1.10 IT IS RECOMMENDED THAT

Companies should draw up an employment equality programme in consultation with the recognised trade unions in the enterprise. The absence of trade union organisation in any enterprise should not inhibit the employer in discussing and agreeing an equality programme with the employees. Such a programme should comprise a commitment by the employer to equal pay and to employment policies which do not discriminate on the grounds of sex or marital status and which do not indirectly impede equality of opportunity. The programme should be consistent with this Code, and should be widely publicised within the company. Responsibility for implementing the programme should be given to a specified senior member of management, assisted by a working group on which management and unions are represented.

PART I:

GUIDANCE ON EQUAL OPPORTUNITY PRACTICE

2. RECRUITMENT AND SELECTION

- 2.1 Under the Employment Equality Act it is unlawful for an employer to discriminate against an employee or a prospective employee in relation to access to employment on the grounds of sex or marital status. Such discrimination is unlawful whether it is direct or indirect (see paragraph 1.1 above). It is also unlawful to classify a post by reference to sex. Employers are advised to change all "sexually connotated" job titles in **all** company documentation (not just in advertisements) as a basic precaution against mistakes. The only permissible exception is where in very rare circumstances the sex of the person is an occupational qualification for that post. (See paragraph 7 below). Employers are advised to take particular care with the language used in (a) job descriptions and (b) staff handbooks.

3. QUALIFICATIONS AND REQUIREMENTS

- 3.1 Sometimes indirect discrimination, while unintended, results from an unwarranted reliance upon qualifications and requirements which are not strictly relevant to the job.
- 3.2 The Labour Court has already found that the following practices can be discriminatory:
- (a) the imposition of maximum age limits;
 - (b) the setting of minimum height requirements;
 - (c) a requirement that persons be prepared to be mobile throughout the country;
 - (d) the restriction of an applicant pool to the output of a particular training school or to those qualifying in a particular year;
 - (e) the refusal of employment on grounds of pregnancy.
- 3.3 The Employment Equality Act permits, in very limited conditions, the imposition of sex as a genuine occupational qualification. These conditions are explained below (see paragraph 7).
- 3.4 IT IS RECOMMENDED THAT
- (a) Employees and Trade Unions should immediately scrutinise current entry qualification/requirements and arrange for their review on a regular basis.

- (b) In reviewing these policies, it should be borne in mind that the eventual discriminatory effect of a job requirement may not always be obvious at the outset. Such requirements must be justifiable in terms of the job to be done and each applicant must be assessed in the light of his or her personal capacity to carry out a given job.
- (c) Employers should consult with the recognised trade unions in the enterprise to ensure that non-essential qualifications or requirements are not retained merely because they have been traditionally applied. Where there is no trade union, consultations should take place with representatives of the employees.

4. INTERNAL AND EXTERNAL ADVERTISING OF JOB VACANCIES

- 4.1 It is very important that an employer should not discriminate whether intentionally or otherwise, in the use of sources and methods of recruitment. Job advertising should be carried out in such a way as to encourage applications from suitable candidates of both sexes.
- 4.2 Advertisements for job vacancies must not indicate or be reasonably understood as indicating an intention to discriminate on the grounds of sex or marital status. Even if the employer does not actually intend to discriminate, it is still necessary to ensure that the advertisement could not be reasonably understood by others as indicating such an intention.
- 4.3 It is important that advertisements should avoid presenting a job as being typically "men's work" or "women's work", whether expressly or by implication. The overall impression given by an advertisement, including the use of any photographs or illustrations, is as important as any specific statements made.
- 4.4 In particular, employers must bear the following points in mind:
 - (a) job descriptions sometimes lead people to believe that members of one sex only are being sought; examples include "foreman", "stewardess", "draughtsman", "matron", etc. Such descriptions where they might be thought to refer to one sex only must always be accompanied by an explicit and prominent statement that members of both sexes can apply and will be considered on an equal footing. A suggested statement of this kind would be: "Applications are invited from both men and women". Where there is, or could be any doubt about the job description, this statement should always be added;
 - (b) where equivalent masculine and feminine job titles exist, e.g. waiter/waitress, the best solution is to use both;
 - (c) even where the actual job title has no distinctly masculine or feminine form, e.g. camera operator, mechanical engineer, fitter, bus driver, etc., it is still necessary to make sure that advertisements cannot be *understood* as indicating an intention to discriminate. Thus, if an advertisement refers to a job previously held to be either "men's work" or "women's work"

or previously carried on exclusively by either men or women, the law requires that it should be made clear somewhere in the text that both sexes can apply;

- (d) even where in practice only men or only women are likely at present to be qualified for a certain job, advertisements still cannot lawfully imply that the employer is looking for applications from one sex only;
- (e) where an employer indicates in an advertisement that a position is open to both women and men, but actually intends to discriminate unlawfully, the advertisement could result in a criminal prosecution, quite apart from any proceedings which may be brought by any person alleging discrimination;
- (f) advertisements should be placed in publications that are likely to reach both sexes. They should never be placed exclusively in publications which are known to be read largely by members of one sex only.

4.5 Where an employer relies on recruitment means other than public advertising, it is still necessary to ensure that these do not exclude or reduce by a significant proportion the number of applicants of a particular sex or marital status.

4.6 IT IS RECOMMENDED THAT

- (a) Where an employer deals directly with single-sex schools for recruitment purposes, the employer should ensure that school-leavers of both sexes are approached.
- (b) Recruitment solely or primarily by word of mouth in a workforce of predominantly one sex should be avoided.
- (c) Where applicants are supplied mainly or wholly through trade unions and only members of one sex tend to come forward, employers and trade unions have a legal duty to agree on an alternative, non-discriminatory approach.

5. DEALING WITH APPLICATIONS

- 5.1 Employers should ensure that all persons who handle job applications in any form or capacity, or who give information on job vacancies (including, for example, telephonists, receptionists, line managers, etc.) do not state or imply that members of one sex or a particular marital status will be favoured for a job. All such persons should be made fully familiar with the requirements of the Acts and the provisions of this Code.
- 5.2 In selecting candidates for employment, it is unlawful to discriminate on the grounds of sex or marital status. Both the criteria applied and the arrangements made in the handling of applications must be non-discriminatory.
- 5.3 Application forms should be simple and clear, and should not require the giving of unnecessary or irrelevant information, particularly concerning the per-

sonal circumstances of the applicant. Recourse to questions relating to the family status of the applicant should be avoided on application forms and in the conduct of interviews as they may be taken as evidence of an intention to discriminate.

- 5.4 Where selections are made on the basis of interviews with applicants, it is important to ensure that these are not conducted so as to favour persons of one sex or of a particular marital status.
- 5.5 Where selection tests are carried out, these should relate directly to the actual requirements of the job. The content of such tests should not include matters likely to favour persons of one sex above another.
- 5.6 **IT IS RECOMMENDED THAT**
 - (a) Where possible, interview boards should not be comprised of persons of one sex only, and all persons who conduct or participate in interviews should always be carefully trained in the avoidance of discrimination.
 - (b) Where practicable, records of interviews should be kept showing clearly why applicants were or were not selected.
 - (c) Questions should refer to the requirements of the job. Care should be taken that questions relating to marriage plans, family planning intentions, children etc., should not be asked where they could be construed as indicating bias against women. Where it is necessary to assess whether personal circumstances will affect performance of the job (e.g. where the job involves unsocial hours, extensive travel) relevant questions where they are deemed absolutely necessary, should be asked equally of male and female applicants, and the answers should be evaluated on the same basis for each.
 - (d) In all cases an interviewer should explain why a particular question is being asked if its relevance might not be immediately obvious.

6. CAREER DEVELOPMENT

PROMOTION, TRANSFER AND TRAINING

- 6.1 It is unlawful under the Employment Equality Act to discriminate on the grounds of sex or marital status in relation to training, transfers or promotion. In particular:
 - (a) an employer must offer the same opportunities for counselling, training (whether on or off the job) and job experience to all employees, regardless of sex or marital status;
 - (b) an employer must give equal access to opportunities for promotion;
 - (c) rules which restrict or preclude transfers between certain jobs should be examined and changed if they are found to be actually discriminatory. Such rules might result in employees of one sex being concentrated in sections from which transfers are traditionally restricted without real justification.

- 6.2 Some criteria or requirements used in selection for promotions may in practice lead to indirect discrimination. These could in certain circumstances include the following:
- (a) the requirement of unbroken service;
 - (b) the imposition of age limits;
 - (c) promotion on the basis of length of service alone.
- 6.3 It is particularly important that seniority should be calculated in a non-discriminatory way. Where it is based on the employee's length of service, this should take into account service prior to any periods of absence necessitated by child-care responsibilities.
- 6.4 Where an employer discriminated against employees on the grounds of sex or marital status before the Acts came into force, the employer must ensure that this previous discrimination does not continue to affect the employees to their detriment.
- In particular:
- (a) employees who were previously compelled to resign on marriage should, if they are re-employed, have all qualifications and service (including subsequent temporary service) taken into account;
 - (b) training and promotion previously refused on a discriminatory basis to an employee should as a rule be provided even if some of the normal requirements for selection for such training or promotion have technically ceased to apply since the original request.
- 6.5 Training is an important part of career development, and employers should ensure that it is available equally to all persons.
- 6.6 Where no persons, or an insignificant number of persons of one sex have been engaged during the previous twelve months in a particular type, form or category of work, the Employment Equality Act, 1977 provides that an employer may provide relevant training exclusively for persons of that sex. Employers are advised that while this provision allows them to encourage *applications* from the under-represented sex (this encouragement can be explicit in advertising, whether internal or external), it does not, however, allow employers to discriminate in actually selecting persons for that work. (See also Part III on Positive Action).
- 6.7 Access to training must not be refused by employers because of an employee's domestic responsibilities, or because of assumptions about future domestic responsibilities or career plans.
- 6.8 Where staff are released for residential training courses they should be informed well in advance, so that child-care and other arrangements can be made. Wherever possible, employers should seek to provide child-care facilities for residential courses.

6.9 IT IS RECOMMENDED THAT

Employers should have clear promotion and career development procedures, and should ensure that these are well publicised among employees. (See also Part III on Positive Action.)

7. SEX AS AN OCCUPATIONAL QUALIFICATION FOR CERTAIN JOBS

- 7.1 Under the Employment Equality Act an employer can, in very limited circumstances, select a person for appointment, training or promotion on the grounds of his or her sex where sex is an occupational qualification for the job. However, an employer must in such cases be able to show that sex is a genuine and bona fide occupational qualification in an objective sense. It is not enough to show that the employer thinks that sex ought to be an occupational qualification.
- 7.2 There are very few jobs the essential nature of which only one sex can perform. The few circumstances where sex could be a genuine and bona fide occupational qualification include the situation where for purposes of authenticity the essential nature of the job requires that it is performed by persons of a particular sex, for example an actor or a model.
- 7.3 It must be emphasised that jobs for which the sex of a person is an occupational qualification are very rare. The following cases are examples of where sex is **not** an occupational qualification:
 - (a) the refusal to recruit an individual because of the preference or prejudices of co-workers, clients or customers;
 - (b) the refusal to recruit an individual based on a stereotyped characterisation of the sexes — for example, that men are less capable of assembling intricate equipment, or that women are less capable of an aggressive sales approach or strong leadership; each applicant irrespective of sex must be considered on the basis of individual capacities and merit. *Physical strength* and *stamina* are **not** genuine occupational qualifications;
 - (c) the refusal to recruit a woman because of her sex, based on assumptions of the comparative employment characteristics of women in general — for example, that the turnover rate among women is higher than among men;
 - (d) the refusal to recruit an individual of one sex because traditionally only members of the other sex have performed the work, as a matter of custom rather than of real necessity;
 - (e) the refusal to hire an individual of one sex because that might require the provision of separate facilities (e.g. sanitary facilities).
- 7.5 Publishers are encouraged by the Employment Equality Agency to ask employers for a written statement of their grounds for claiming exemption from the Employment Equality Act in respect of any advertisement submitted for publication.

- 7.6 In some instances a genuine occupational qualification will apply where some duties only are covered. A restriction upon access to a job would not be justified where there are *sufficient existing employees* to carry out the duties concerned without undue inconvenience.

7.7 **IT IS RECOMMENDED THAT:**

Jobs where the sex of a person has been an occupational qualification should be examined if the post becomes vacant to see whether the qualification still applies, as circumstances may have changed to render it inapplicable.

8. CONDITIONS OF EMPLOYMENT

- 8.1 It is unlawful for employers to discriminate on the grounds of sex or marital status, directly or indirectly, in the terms on which employment is offered or in affording access to facilities or services which are provided to employees. In particular, employers must provide the same working conditions and the same treatment in relation to overtime, shift work, short time, transfers and redundancies where the circumstances in which persons or classes of persons are or would be employed are not materially different.
- 8.2 Under the Employment Equality Act every contract of employment is deemed to contain a clause which stipulates that the employee is entitled to the same contractual terms as a person of the opposite sex who is doing work which is not materially different. Any term in a contract of employment which purports to apply conditions less favourable than those enjoyed by other persons is automatically treated as modified so as not to be less favourable. Trade unions have a very important part to play in monitoring employment standards and should be involved in any review of established procedures which may be in breach of an equality clause.
- 8.3 In a few circumstances special treatment of a particular kind may be desirable to ensure the elimination of discrimination in the wider field.

For example:

- (a) the Employment Equality Act allows an employer to provide special treatment to facilitate women in connection with pregnancy or childbirth, and debars consequential claims from other workers. Employers should also note the Maternity (Protection of Employees) Act, 1981;
- (b) the attention of employers and trade unions should be directed to the recommendations in the Government report on Child Care Facilities for Working Parents* concerning the adjustments of working schedules, rostering, shift-work and part-time work. Employers should be prepared to provide or arrange for training necessitated by the consequences of an absence from the workforce due to domestic or family responsibilities;
- (d) employers, employers' organisations and trade unions should ensure that no discrimination on the grounds of sex or marital status results from

*Report of the Working Party on Child Care Facilities for Working Parents, Pl. 1117, Government Publications Sales Office, Dublin 1983.

the terms and conditions afforded to temporary or part-time workers. The conditions or facilities should not be such that persons of one sex or marital status can only avail of temporary or part-time work and are barred from taking up full time employment when the opportunity arises.

- 8.4 The conditions of employment which have traditionally been observed were developed, in some cases, to suit the needs of a predominantly single-sex workforce. Where it is reasonable to do so, employers should be prepared to change these conditions, or to apply them flexibly, if they do not fully meet the requirements of persons of the other sex. For example, employers should be prepared to consider introducing flexible working hours to facilitate persons with domestic or family responsibilities, unless the genuine requirements of the undertaking would not allow it.

8.5 **IT IS RECOMMENDED THAT:**

Employers should consult regularly with employees of both sexes and their representatives to ensure that the conditions of employment being applied do not cause unnecessary problems for persons of one sex or a particular marital status.

9. **DISMISSAL**

- 9.1 Under the Employment Equality Act it is unlawful to dismiss an employee on the grounds of sex or marital status. Where such a dismissal takes place, the Labour Court may order the reinstatement or re-engagement of the employee, or may award compensation. A case alleging unlawful dismissal in such circumstances can also be taken either before a Rights Commissioner or before the Employment Appeals Tribunal under the Unfair Dismissals Act, 1977, but a dismissed employee cannot accept redress under both Acts.
- 9.2 It is also unlawful to dismiss an employee for any other stated reason, if the real reason is the employee's sex or marital status, or if the employee's sex or marital status was a major factor leading to the decision to dismiss.
- 9.3 Where an employer dismisses a person because of the latter's sex, and claims that the dismissal occurred because sex is an occupational qualification for the job, the employer will have to show why the employee was appointed in the first place and demonstrate that the genuine nature or requirements of the job have changed significantly since the original appointment.
- 9.4 Dismissal on grounds of family responsibilities, including pregnancy, may be discriminatory unless the responsibilities of the job clearly and objectively hinder or prevent adequate work performance. In the case of a pregnant worker, dismissal will be deemed to be unfair unless the employee was unable to do her work adequately and her employer has no other suitable job for her or she turns down such an alternative job offer.
- 9.5 Where the members of any workforce are subject to dismissal on the grounds of redundancy the selection criteria, whether determined by negotiated agree-

ment or solely by management, must not be applied on a discriminatory basis. For example a "last-in, first out" arrangement may be discriminatory if members of one sex were in the past discriminated against in relation to recruitment, selection, promotion or transfer leaving most members of that sex with shorter service. Similarly, the selection of part-time, as distinct from full time, workers for redundancy purposes may, as a consequence of past discrimination, prove to have a disproportionate effect on women. In such cases alternative arrangements must be worked out with the trade union or employee representatives.

- 9.6 Discriminatory assumptions should not form the criteria in selection for redundancy or in a decision regarding dismissal.
- 9.7 Where an employer dismisses an employee for opposing unlawful discrimination under the Acts, or for bringing proceedings under the Acts, or for giving evidence in such proceedings brought by someone else, the employer commits a criminal offence and is liable to be fined; the employer may also be ordered to reinstate, re-engage or compensate the employee.
- 9.8 In relation to dismissals/redundancies etc., employers attention is drawn to the provisions of
 - The Unfair Dismissals Act, 1977
 - The Redundancy Payments Acts
 - The Protection of Employees Act, 1977.

10 **TRADE UNIONS, EMPLOYER BODIES, PROFESSIONAL & TRADE ORGANISATIONS**

Trade unions, professional and other bodies must observe a statutory duty to represent fairly all members regardless of their sex. It is unlawful for such organisation to discriminate against a person *either* in the terms in which it is prepared to admit a person to membership *or* in the way in which it affords a member access to voting rights and any other benefits, facilities or services *or* by refusing to afford a member the opportunity to carry on a profession.

11 **COLLECTIVE AGREEMENTS**

- 11.1 The terms and conditions of employment of most employees in this country are settled by collective agreements. It is therefore of great importance that non-discriminatory agreements are concluded, and employers, employers' organisations and trade unions should conduct collective bargaining in such a way as to avoid any resulting discrimination.
- 11.2 Under the Act any clause in a collective agreement which is discriminatory is deemed to be void.

11.3 IT IS RECOMMENDED THAT

Where a collective agreement concerning terms and conditions of employment is negotiated,

- (a) all negotiators are made fully aware of the requirements of the Acts and of this Code;
- (b) the likely consequences of all terms agreed, including those relating to job requirements, remuneration (including pension benefits), conditions of employment, redundancies and so forth, are analysed so as to ensure that they are not likely to result in direct or indirect discrimination;
- (c) an express clause is inserted stating that the agreement aims to promote equality of opportunity and to eliminate discrimination based on sex or marital status;
- (d) negotiators should take care with the language used in the agreements and should delete all "sexually connotated" job titles or references from existing collective agreements.

12. EMPLOYMENT AGENCIES:

12.1 Apart from their role as employers, employment agencies including those operated by the State, perform an important role in relation to employment equality. Under the Employment Equality Act they have a duty not to cause or assist in discrimination on the grounds of sex or marital status in the services they provide and in the manner they provide them. Services so provided include guidance on careers and any service related to employment.

12.2 Where an employer claims an exemption from the requirements of the Employment Equality Act — for example, where the sex of a person is cited as an occupational qualification for the job in question — an employment agency should insist on a statement in writing from the employer setting out the reasons in detail. If there is any doubt regarding the classification of a job as one covered by a genuine occupational qualification the Employment Equality Agency should be contacted for advice.

12.3 It is a criminal offence for an employer to obtain the services of an employment agency by making a statement claiming exemption under the Employment Equality Act if the employer knows that the statement is false or misleading.

12.4 IT IS RECOMMENDED THAT:

- (a) Employment agencies should ensure that all their recruitment advertisements are fully compatible with the Act and with this Code (particularly paragraphs 3 & 4);
- (b) Placement staff should be adequately trained in the avoidance of discrimination in their dealing with clients and job seekers;
- (c) Placement staff should where necessary draw the attention of employers to the requirements of the Act and of this Code;

- (d) Agencies should where necessary refuse to carry out instructions from employers which are likely to lead to discrimination;
- (e) Agencies should always draw the attention of job seekers to their rights under the Acts and should display copies of this Code in their offices;
- (f) The in-house or internal display of job vacancies or recruitment literature should not be discriminatory;
- (g) Employment agencies should avoid the use of symbols or any other indicators for discrimination on the grounds of sex or marital status in their records and coding systems.

13. **PROTECTIVE LEGISLATION:**

13.1 Under the Employment Equality Act, nothing done by an employer in order to comply with protective legislation i.e.

- the Conditions of Employment Act, 1936
- the Shops (Conditions of Employment) Act, 1938
- the Factories Act, 1955 and
- the Mines and Quarries Act, 1965

shall amount to discrimination. Notwithstanding the obligation to conform with the required standards, the above Acts should not be used as an excuse to discriminate or deny women opportunities for employment.

13.2 **IT IS RECOMMENDED THAT**

Restrictions on weight lifting for women should be overcome where possible, for example, by the use of mechanical aids or by teamwork in manual lifting.

PART II

EQUAL PAY FOR LIKE WORK — ENSURING EQUAL TREATMENT IN TERMS AND CONDITIONS

14. EQUAL PAY ENTITLEMENT:

14.1 The Anti-Discrimination (Pay) Act, 1974 confers an entitlement to equal pay on men and women who are

- working in the same employment or for an associated employer
- engaged on like work
- working in the same place, i.e., city, town or locality.

Two employers are associated if they are both companies and one is a subsidiary of the other, or if both are subsidiaries of the same company. In the case of an associated employer the equal pay provision applies only where both employers have the same terms and conditions of employment.

14.2 EQUAL PAY CLAUSE

Where a woman is employed on like work with a man her terms and conditions of employment will automatically include a term entitling her to the same pay as the man. This applies even where there is no formal contract of employment or where there is no explicit mention of the right to equal pay in an employee's contract of employment. There is no element of discretion involved. A worker cannot contract out of this entitlement to equal pay nor can the entitlement be waived by agreement between the employer and the trade union representing the employee. The European Court of Justice has adjudged that an equal pay entitlement operates between an employee and his or her immediate predecessor in the same job.

14.3 DEFINITION OF REMUNERATION:

"Remuneration" for the purposes of equal pay includes payment in cash or in kind, whether received directly or indirectly in respect of employment. While the full extent of remuneration has not yet been determined it has been established in cases brought before the Labour Court and the European Court of Justice that equal pay includes the following:

- (1) all benefits enjoyed by employees which arise out of the employment relationship, including bonus payments for equal levels of output, marriage gratuities and preferential loans;

- (2) pension benefits, or allowances based on the wage or salary received by an employee; e.g. travel and subsistence rates, preferential insurance cover;
- (3) contributions to a pension scheme made by the employer in the name of the employee (but not benefits or contributions under compulsory State schemes);
- (4) non-pension benefits made available on retirement, such as free travel, goods or services, where these are granted by the former employer;
- (5) benefits made available to dependents or relatives of the employee, whether in cash or in any other form.

14.4 **LIKE WORK:**

Two persons will be regarded as doing like work

- (a) where both perform the same work under the same or similar conditions, or where each is in every respect interchangeable with the other in relation to the work, or
- (b) where the work performed by one is of a similar nature to that performed by the other and any differences between the work performed by each occur only infrequently or are of small importance in relation to the work as a whole or
- (c) where the work performed by one is equal in value to that performed by the other in terms of the demands it makes in relation to such matters as skill, physical or mental effort, responsibility and working conditions.

An employer cannot avoid equal pay by using different job descriptions or by imposing different work responsibilities as between jobs done by men and those done by women if these differences are not reflected in the actual work done. What matters is not the description of the job, but how it is carried out in practice. It is the actual work performed by a person which must be assessed and not the work which an employee might be capable of or liable to perform. The time at which the work is performed, e.g. night or daytime, should be disregarded in considering whether people are doing like work. Employers are also reminded that any attempt to classify or segregate men and women in different jobs or grades, so as to avoid comparability, is unlawful.

14.5 **SAME WORK/SIMILAR WORK**

It is expected that equal pay for males and females who are carrying out the same or similar work is now common practice, most cases having been resolved through local negotiation with recourse to the Labour Court.

IT IS RECOMMENDED THAT

Employers and unions review pay rates to ensure that individuals who are engaged on the same work or similar work are in receipt of equal pay.

14.6 EQUAL VALUE

Job Evaluation

Job Evaluation means the comparison of jobs by the use of formal and systematic procedures, i.e., procedures set down on paper and adhered to as distinct from rule of thumb methods — to provide the basis for a grading and pay structure. Job evaluation exercises represent one of the methods used to establish work of equal value. A job evaluation exercise is not required under the Act but the results of such exercises may be taken into account in reaching a decision on claims of work of equal value. Care should be taken to ensure that female skills are not undervalued in any scheme of job evaluation:

“A job evaluation cannot be expected to result in an even spread of sexes throughout the grades and the average woman’s pay being equal to that of the average man, where women have been recruited in the past to the less skilled and less demanding jobs and not to the skilled or craft jobs. At the same time, job evaluation should not give a spurious objectivity to the status quo. A commitment to a fair job evaluation may require that some traditional assumptions are changed, regarding the value attributed to work predominantly carried out by women.”*

14.7 IT IS RECOMMENDED THAT:

- (a) To establish whether differences exist in the pay of men and women employed on jobs which appear to require equal skill, effort and responsibility and which are performed under similar working conditions, employees should have recourse to representative channels to establish what pay and conditions actually apply in their employment and how women’s pay compares with that of their male counterparts.
- (b) Employer and trade unions should agree appropriate arrangements to enable employees to establish the facts on men’s and women’s wages, hours and conditions, the content of the jobs held by men and women and the male/female distribution across the grades within the workforce.
- (c) Where a job evaluation scheme is contemplated, in progress or completed, the basis of the scheme should be explained to the workforce. Individual employees should not only be entitled to see their job description/ranking and how it was worked out, but should also be allowed this information in respect of other workers whose work is similar.

14.8 BALANCING OF SKILL AND MENTAL AND PHYSICAL EFFORT

In equal value claims the work of the claimant and the comparator must be examined in terms of the demands it makes in relation to skill, physical or mental effort, responsibility and working conditions. This allows a wide range of job comparisons to be made. Care should be taken in balancing the various

**Job Evaluation Schemes free of Sex Bias*, Equal Opportunities Commission, Manchester, United Kingdom (1981)

job components to ensure that a fair and just evaluation is given to each factor, e.g., the physical effort required in heavy work may be matched by digital dexterity in another job. Labour Court decisions have established that the strenuous nature of a job may only make a difference where there is a high level of physical effort frequently involved.

IT IS RECOMMENDED THAT:

In determining work of equal value it is important when making job comparisons to carefully balance the level of skill and mental and physical effort required.

14.9 PLACE

The Act defines place as including a city, town or locality and thereby, allows equal pay claims to be taken between the company/organisation's employees working in different locations. Comparisons may be drawn between men and women employed in different establishments owned by the same employer. Among the factors which may be considered in determining the scope of place in relation to separate establishments within a highly integrated and centrally controlled organisation are the coverage of all employees by a collective agreement and a standard personnel policy. The Labour Court have accepted cases where a distance of up to 18 miles separated the claimant and the comparator.

14.10 EXCEPTIONS TO THE EQUAL PAY ENTITLEMENT

There may be reasons other than sex for paying different rates to employees performing like work. Such differences in pay, which are in fact shown to be based on some factor other than sex, are not prohibited by the Act. No specific indication is given in the Act of what these grounds might be. The following grounds have been accepted by the Labour Court as being grounds other than sex:

- Payments resulting from incremental progression or service allowances;
- Payment of a premium over and above basic rate for more onerous attendance liability, e.g., night shift work;
- retention on compassionate grounds of a rate paid for a former position;
- a "personal" rate for a former position in "red circle" cases, i.e. where an employee is paid more because his/her work is currently over-valued and the rate has been determined as a personal one which will not be applied to any other employee either male or female who subsequently takes up the job;
- a grading structure which is proven not to have adverse effects on women employees.

Any system of payments based on grounds other than sex must be applied equally to employees of both sexes.

14.11 RETROSPECTIVE PAY

Where a person succeeds in establishing a claim to equal pay, employers are liable for paying arrears of pay for a maximum period of three years from the date of lodgement of the claim with the Labour Court.

14.12 DISMISSAL

An employer is prohibited by law from dismissing any employee for filing an equal pay claim or participating in any equal pay proceedings. The Act provides for substantial fines where a court of law convicts an employer of dismissing an employee on any of these grounds. The employer may also be ordered to re-instate, re-engage or compensate the employee.

14.13 REDRESS

The implementation of the Act is primarily in the hands of employers but when a dispute arises either party may refer it to an Equality Officer for investigation and recommendation. The recommendations of Equality Officers are in themselves not binding on the parties to the dispute. Either party may appeal to the Labour Court against the recommendation. The Court will then issue a determination which is binding on both parties.

PART III

15. POSITIVE ACTION

15.1 The Employment Equality Legislation is designed to afford rights to individuals. It will not, however, adequately eliminate all forms of discrimination as between men and women in the labour market unless parallel measures are taken to counteract or compensate for the impact of existing employment structures on individual behaviour or to redress the effects of previous unequal opportunities.

15.2 It should be noted that the Employment Equality Act allows an employer, where there have been few or no persons of one sex in a particular type of work for the previous twelve months, to provide specific training for the minority sex and to encourage and motivate persons of that sex to take advantage of opportunities for doing such work (Section 15). Also, under Section 16 of the Act, special treatment (that is more favourable treatment) may lawfully be afforded to women in connection with pregnancy or childbirth.

15.3 PERSONNEL POLICIES

In order to achieve equal opportunities in practice and develop the full potential of staff, both male and female, employers are urged to introduce positive action policies which go beyond the scope of the legislation. Central to the adoption of such policies is the design of a programme which would identify the organisation's requirements, develop employees career aspirations and equip workers with the necessary skills for advancement within the organisation.

15.4 In promoting or developing positive action programmes, employers may wish to consider the following actions:

- instituting agreed procedures for employee access to information on conditions of service and manpower plans, including data on numbers employed analysed according to grade, department, location, age and sex;
- encouraging applications from the hitherto under-represented sex where certain types of work have been done for a long time predominantly or solely by either men or women;
- review and modify, where necessary, personnel policies in regard to recruitment, mobility, training, career advancement by having better information available to candidates regarding equal opportunities at all levels;
- promote integration in all sectors and occupations and at all levels of the occupational hierarchy, e.g. by opening up jobs and training courses hitherto almost entirely the preserve of either men or women.

- actively encouraging women to engage in further training with a view to improving their prospects for promotion or their access to skilled manual jobs, especially those involving new technologies;
- ensure a more balanced representation of women at various levels of responsibility by positively encouraging them to apply for upper level and management posts.

15.5 IT IS RECOMMENDED THAT

Organisations should draw up an equal opportunity programme in consultation with the recognised trade unions in the enterprise which would:

- define its staffing needs;
- define the career paths and options open to all employees;
- define sources to meet the need;
- define skills/knowledge and qualifications necessary for each job category;
- state what action the organisation is willing to take to aid the promotion/transfer of employees to different job categories.

15.6 WORKING ARRANGEMENTS

There are other forms of positive action which are recommended in the sphere of the re-organisation of working arrangements. These could be of assistance to both employer and employee in providing continuity of (a) employment to working parents and (b) the benefit of valuable experience or skills to the employer.

IT IS RECOMMENDED THAT

Employers might consider jointly with their employees whether:

- certain jobs can be carried out on a part-time, work sharing or flexi-time basis;
- more flexibility can be provided in the granting of special leave and short periods of leave on personal grounds for domestic responsibilities e.g. children's health reasons, and to inform staff that such provisions apply to parents of both sexes;
- child-care facilities might be availed of locally or whether it would be feasible to establish crèche and nursery facilities on the premises or combine with other employers to provide them;
- the statutory maternity leave provisions could be enhanced or extended to meet the needs of working parents.

These arrangements may enable both men and women to find fulfilment in their chosen job while combining satisfactorily their career and their family life.

APPENDICES — LEGAL BACKGROUND

EMPLOYMENT EQUALITY ACT, 1977

This Appendix gives a summary guidance only of the Act and should not be regarded as a definitive legal interpretation. The abbreviations S.2, S.3 etc., refer to the relevant provisions of the statute.

The Employment Equality Act, 1977 provides for equal treatment of workers — whether men or women, married or single — in access to employment, training, in opportunities for promotion and working conditions.

Who is covered by the Act?

The Act applies to all workers except

- (a) those in employments which are specifically excluded, viz. the Defence Forces, the Garda Síochána, the Prison Services or in a private residence or by a close relative or
- (b) where the sex of the worker or prospective worker is an occupational qualification for the job. The Act does not, however, provide any blanket exceptions: in every case it will be necessary for the employer to show that the criteria detailed in the Act apply to the job in question.

The Act does not apply where there are statutory restrictions on the employment of women.

Pregnancy or Childbirth

Special treatment (i.e. more favourable treatment — lighter work or time off during working hours) may lawfully be afforded to women in connection with pregnancy or child-birth.

Definition of Employer

“Employer” in relation to an employee is defined in the Act as the person by whom the employee is or was employed under a contract of employment (a civil servant is deemed to be employed by the State or Government and an officer of a local authority within the meaning of the Local Government Act, 1941 as being employed by the local authority etc.). (S.1)

Direct Sex Discrimination

This arises where a person of one sex is treated less favourably on grounds of sex, than a person of the other sex would be treated in the same or not materially different circumstances. (S.2 (a))

Indirect Sex Discrimination

This arises where a person of one sex is obliged to comply with a requirement or condition of employment which is not essential for the job but with which a substantially greater proportion of persons of the other sex are able to comply e.g. a minimum height requirement might bar more women than men. (S.2 (c))

Direct Marital Discrimination

This arises where a person is treated less favourably than another person of the same sex but of a different marital status. For example, a married woman cannot be treated less favourably than a single woman; neither can a single woman be treated less favourably than a married woman. A marriage bar in employment is an example of such discrimination. (S.2 (b))

Indirect Marital Discrimination

This arises where a married woman is required to comply with a requirement or condition of employment which is not essential for the job and the proportion of single women able to comply is substantially greater, or conversely, where a single woman is required to comply with such a non-essential requirement or condition and the proportion of married women able to comply is substantially greater. (S.2 (c))

Discrimination by way of Victimisation

This arises where a person is penalised or treated less favourably (e.g. dismissed or victimised by retaliation) than other persons because she/he has taken action in pursuit of her/his rights under this Act or the equal pay legislation. For example, brought proceedings, given evidence of information in a case under the Acts or gave notice that they intended to do any of these things. (S.2 (d))

Discrimination in recruitment

There are three ways by which it is unlawful for an employer to discriminate on grounds of sex or marital status when recruiting employees:

by refusing or deliberately omitting to offer a person a job or specifying entry requirements for one person or class not specified for other persons or classes; (S.3 (3) (a))

in the arrangements he makes for deciding who should be offered a job — for example, the criteria used for selection, interview procedures, the instructions given to an employment agency or advertising a job in a place where only one sex would have the opportunity of seeing the advertisement. (S.3 (3) (b))

in the terms on which he offers the job (for instance, in respect of pay or holidays) where the circumstances in which persons or classes would be employed are not materially different. (S.3 (4))

Discrimination in the Treatment of Present Employees

It is unlawful for an employer to discriminate in the following ways:

by having discriminatory rules or instructions or operating practices which would be in breach of any provision of the Act; (S.3 (2))

by dismissals, disciplinary measures or any other disadvantages in working conditions and treatment to which employees may be subjected, for example, redundancies, lay-offs, shift work, short time working; (S.3 (4))

in the provision of training — on or off the job — work counselling and work experience; (S.3 (5))

in the opportunities afforded for promotion; (S.3 (6))

in regrading or the classification of jobs. (S.3 (7))

Discrimination by Trade Unions and Employers' Organisations

It is unlawful for an organisation of workers such as a trade union or a staff organisation, an employers' organisation or any body which controls entry to or the carrying on of a profession, to discriminate on grounds of sex or marital status in regard to admission to membership, or to benefits that are provided for members. (S.5)

Discrimination by Employment Agencies

It is unlawful for an employment agency to discriminate on grounds of sex or marital status (S.7 (1))

(a) in the terms on which it offers to provide any of its services

(b) by refusing or deliberately omitting to provide them

(c) in the way in which they provide any of them.

Services covered by the Act include guidance on careers. (S.7 (2))

Section 7 (1) will not apply where the service concerned involves a job which an employer could lawfully refuse to offer to the person in question. (S.7 (3))

An employment agency is protected against liability under this Section of the Act if it provides a service in good faith in reliance on a statement of an employer to the effect that such service does not conflict with the Act (e.g. the filling of a vacancy for a job which is excluded from the scope of the Act). (S.7 (4))

Discriminatory Advertisements

It is unlawful to publish or display or cause to be published or displayed a job advertisement which indicates an intention to discriminate or be reasonably interpreted as intending to discriminate unlawfully. (S.8 (1))

An advertisement which uses a job description with a sexual connotation (for example, "waiter", "sales girl") or describes a job which has traditionally been associated with a particular sex will be deemed to discriminate unless the advertisement states that the job is open to men and women or uses descriptions applying to both sexes (e.g. waiter or waitress). (S.8 (2))

An advertiser who knowingly makes a false statement to secure the publication of a discriminatory advertisement shall be guilty of an offence and will be liable on summary conviction to a fine not exceeding £200. (S.8 (3))

Pressure to Discriminate

It is unlawful for a person to procure or attempt to procure another person to carry out an unlawful discrimination. An example of such situation might be an instruction to a person to discriminate given by someone in authority or any offer, benefit, inducement or threat with a view to procuring discrimination. The provision also renders unlawful, any instruction by a trade union to its members to obstruct any *bona fide* arrangements introduced by an employer to comply with the requirements of the laws. (S.9)

Positive Action for Training

This section of the Act allows for positive action by persons to overcome the effects of past discrimination. It allows for the provision of courses of special training and encouragement for persons of one sex to fit them for particular work or to take advantage of opportunities for doing that work where it can be shown that during the previous twelve months there were not persons of that sex or comparatively few doing that work. (S.15)

Advice on the promotion of equality of opportunity in employment is available from the Employment Equality Agency.

Sex as an Occupational Qualification

It is lawful to treat sex as an occupational qualification for a post in the following cases —

- (a) where, on grounds of physiology (excluding physical strength or stamina) or on grounds of authenticity for the purpose of a form of entertainment, the nature of the post requires a member of a particular sex because otherwise the nature of the post would be materially different if carried out by a member of the other sex,
- (b) where the duties of a post involve personal services and it is necessary to have persons of both sexes engaged in such duties,
- (c) where because of the nature of the employment it is necessary to provide sleeping and sanitary accommodation for employees on a communal basis and it would be unreasonable to expect the provision of separate such accommodation or impracticable for an employer so to provide,
- (d) where it is necessary that the post should be held by a member of a particular sex because it is likely to involve the performance of duties outside the State in a place where the laws or customs are such that the duties can only be performed by a member of that sex. (S.17).

ANTI-DISCRIMINATION (PAY) ACT, 1974

This Appendix gives a summary guidance only of the Act and should not be regarded as a definitive legal interpretation. The abbreviations S.2, S.1, etc., refer to the relevant provisions of the Statute.

The Anti-Discrimination (Pay) Act, 1974 provides for a man and woman to be equally treated as regards pay where they are employed on like work in the same place by the same employer (or by an associated employer where the employees of both employers have the same terms and conditions of employment).

The Act does not prevent the payment of different rates of remuneration provided that the reason for the differentiation is not on grounds of the sex of the employee e.g. service pay. (S.2 (3))

Interpretation

Definition of Remuneration

Remuneration is defined in the Act as including any consideration whether in cash or in kind which an employee receives directly or indirectly from the employer. This means that a woman and a man employed on like work must be paid not only the same rates of basic pay but also the same overtime rates, bonuses, holiday and sick pay etc. (S.1)

Definition of "Place" of employment

In seeking equal pay women employed by a particular employer can only make comparisons with male employees of the same employer or of an associated employer in an establishment in the same city, town or locality. (S.1)

Definition of Associated Employers

Two employers are taken to be associated if one is a body corporate of which the other (whether directly or indirectly) has control or if both are bodies corporate of which a third person, directly or indirectly, has control. (S.2 (2))

Like Work

Two persons will be regarded as doing like work

- (a) where both perform the same work under the same or similar conditions, or where each is in every respect interchangeable with the other in relation to the work, (S.3 (a)) or
- (b) where the work performed by one is of a similar nature to that performed by the other and any differences between the work performed or the conditions under which it is performed by each occur only infrequently or are of small importance in relation to the work as a whole, (S.3 (b)) or

- (c) where the work performed by one is equal in value to that performed by the other in terms of the demands it makes in relation to such matters as skill, physical or mental effort, responsibility and working conditions. (S.3 (c))

Implied Right to Equal Pay

Where a contract of employment does not exist or where under a contract of employment there is no explicit mention of the right to equal pay for like work this Section of the Act provides that the terms and conditions of a person's employment shall include an implied term giving her the right to equal pay for like work. (S.4)

Retrospective Pay

This Section provides that the right to equal pay will apply retrospectively and claims for such entitlement can be so pursued. (S.8 (5))

However, in any claim made or in any proceedings brought by persons to establish their entitlement under the Act they shall not be entitled to arrears of remuneration in respect of a time earlier than three years before the date on which the disputed claim was referred to an Equality Officer for investigation.

Dismissal because of equal pay claim

It is an offence for an employer to dismiss a person solely or mainly for the reason that the person sought equal pay or engaged in any lawful action or threatened action for redress under the Act or gave evidence in any equal pay proceedings. (S.9 (1) & S.10 (1))

EMPLOYMENT EQUALITY AGENCY

36 Upper Mount Street
Dublin 2

Telephone (01) 605966