

EXPLANATORY MEMORANDUM TO
THE EQUALITY ACT 2010 (AMENDMENT) ORDER 2010

2010 No. 2622

1. This explanatory memorandum has been prepared by the Government Equalities Office and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Purpose of the instrument**

2.1 The purpose of this Order is to amend section 76 of the Equality Act 2010 (“the Act”) to enable it to function as it was intended. Section 76, together with sections 70 and 71 of the Act, are part of Chapter 3 of Part 5 of the Act governing equality of terms at work and collectively were intended to replicate the effect of section 6(6) of the Sex Discrimination Act 1975 (“the 1975 Act”). That provision operated so as to prevent a sex discrimination claim from being brought with respect to benefits consisting of the payment of money which was regulated by a contract of employment. Claims for discrimination arising out of such terms were to be brought exclusively under the Equal Pay Act 1970 (“the 1970 Act”) which governed all discrimination claims concerning contractual pay. The same exclusion in section 6(6) of the 1975 Act applied to claims for discrimination on grounds of pregnancy and maternity.

2.2 Chapter 3 of Part 5 of the Act adopts a slightly different structure from the 1970 Act and the 1975 Act in this respect and makes separate provision for sex equality claims and claims under a maternity equality clause, but the substantive effect of the provisions is the same. Sections 70 and 71 of the Act replicate the effect of section 6(6) of the 1975 Act in relation to claims for sex discrimination relating to contractual pay (subject to the limited new exception in section 71(2) for claims of direct sex discrimination relating to contractual pay). Section 76 was intended to replicate the effect of section 6(6) of the 1975 Act in relation to claims for pregnancy and maternity discrimination. However, as currently drafted, section 76(1) only excludes such claims where there would be a claim under a maternity equality clause or rule. This leaves open the possibility of a claim for pregnancy and maternity discrimination being brought in relation to contractual pay where a maternity equality clause or rule has no effect. This was not the effect of section 6(6) of the 1975 Act and was not the intended effect of section 76. In order to correct this, Article 2 of this Order ensures that section 76 will have the same effect as section 6(6) of the 1975 Act in excluding claims for pregnancy and maternity discrimination where they relate to contractual pay.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This Order will come into force on 30 October, after it has been laid before Parliament, thereby breaching the 21 day rule. The reason for this is that as soon as the failure of section 76 to replicate the effect of section 6(6) of the 1975 Act became apparent, it was clear that there was a risk of employers being subject to claims of pregnancy and maternity discrimination in relation to the period between 1 October 2010 and the coming into force of this Order in situations where this has never been possible and in which it was not intended by Parliament to be possible when enacting Chapter 3 of Part 5 of the Act. Those situations include a failure by employers to pay contractual bonuses outside the circumstances expressly provided for in section 74 of the Act (previously set out in section 1(2)(d)-(f) of the 1970 Act) and a failure by employers to pay full contractual pay during maternity leave where there is no entitlement to receive it.

3.2 It is doubtful whether such claims could succeed on the basis of the wording of section 76 alone, due to the limited scope of the rights protected by section 74 in relation to contractual pay, the detailed legislative scheme applicable to statutory maternity pay and the fact that nothing in the Act expressly treats a failure to pay full contractual pay during maternity leave, or bonuses not covered by section 74, as unfavourable treatment. However, it was considered necessary to put this beyond doubt by bringing an Order amending section 76 into force as soon as possible. The effect of the Order is to restore the legal position to what it was before 1 October 2010 in accordance with the policy intention behind this Part of the Act.

4. Legislative Context

4.1 This Order amends the Act which received Royal Assent on 8 April 2010. The Act replaces and consolidates previous discrimination legislation, including the 1970 Act, the 1975 Act and a series of instruments made in order to implement European Union law in the field of discrimination.

4.2 The majority of the Act, including Chapter 3 of Part 5, of which section 76 is part, was brought into force on 1 October 2010 by the Equality Act 2010 (Commencement No.4, Savings, Consequential, Transitional, Transitory and Incidental Provisions and Revocation) Order 2010 (S.I. 2010/2317).

4.3 The Order is made under section 2(2) of the European Communities Act 1972, as the amendment to section 76 of the Act relates to the obligation in Article 11 of Directive 92/85/EEC¹ (the Pregnant Workers Directive) to accord a woman on maternity leave a right to a payment or adequate allowance and the obligation in Article 4 of Directive

¹ Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391) (O.J. L348, 28.11.92, p.1).

2006/54/EC² (the Recast Directive) to prohibit discrimination in employment on grounds of sex, including discrimination on grounds of maternity.

5. Territorial Extent and Application

This Order applies to England and Wales and Scotland.

6. European Convention on Human Rights

The Parliamentary Under Secretary of State for Equalities and Criminal Information has made the following statement regarding Human Rights:

In my view the provisions of the Equality Act 2010 (Amendment) Order 2010 are compatible with the Convention rights.

7. Policy background

The Order gives effect to the policy intention of ensuring the continuation of the legal position under section 6(6) of the 1975 Act to ensure that employers are not open to claims for pregnancy and maternity discrimination in circumstances where they have properly complied with their statutory or contractual obligations governing maternity-related pay. In order to remove any risk of such an unfair and excessive burden falling on employers, the amendment to section 76 of the Act ensures that no claims can be made for pregnancy and maternity discrimination relating to contractual pay other than in the clearly defined and well-recognised circumstances previously contained in section 1(2) of the 1970 Act and now set out in section 74 of the Act.

8. Consultation outcome

No specific consultation was undertaken on this Order. However, a wide-ranging consultation was carried out in June 2007 – “A Framework for a Fairer Future: Proposals for a Single Equality Bill for Great Britain”, which proposed the harmonisation and simplification of existing equality legislation. This was followed in June and July 2008 by two Command Papers (Framework for a Fairer Future – the Equality Bill, Cm 7341; the Equality Bill – Government response to the consultation, Cm 7533). It is clear from these documents that the overall intention of the particular provisions concerning equality of terms would be to replicate the existing legal framework with some clarification in particular areas.

² Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (O.J. L204, 26.7.2006, p.23)

9. Guidance

No guidance has been specifically published alongside this Order as it is a largely technical instrument seeking to give effect to the intended policy of replicating the effect of section 6(6) of the 1975 Act. However, the Equality and Human Rights Commission has produced a draft Statutory Code on Equal Pay which has been laid before Parliament.

10. Impact

The impact of this particular Order on business, charities or voluntary bodies is considered to be negligible. It restores the legal position to what it was before 1 October 2010 in line with the policy intention as expressed in Chapter 3 of Part 5 of the Act, thereby removing any possibility of claims which had never been envisaged. The final Impact Assessment for the Act as a whole estimated that one-off costs in year one for all sectors would amount to £241m to £283m, with benefits amounting in year one to £102m to £134m – the main reason for the “gap” between costs and benefits being the one-off costs of familiarisation with the new law. Thereafter, the final Impact Assessment estimates recurring costs per year as £19m to £70m; and recurring benefits as £99m to £131m, including as a result of simplification.

11. Regulating small business

The legislation applies to small business.

12. Monitoring & review

The Government Equalities Office is developing a project to establish an evaluation framework for the Act as a whole, including establishing a “before/after” baseline against which to measure change. This will enable relevant data to start to be collected. It is intended to complete a full evaluation 4-5 years following enactment.

13. Contact

David Ware at the Government Equalities Office (tel. 0303 444 3027 or email david.ware@geo.gsi.gov.uk) can answer any queries regarding the instrument.