THE UNIVERSITY OF SURREY

WOMEN'S EMPLOYMENT, SEX DISCRIMINATION, 
AND THE LAW: LEGAL AND ADMINISTRATIVE 
REMEDIES IN GREAT BRITAIN, WITH 
SOME REFERENCE TO THE 
UNITED STATES 

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BY 

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This research comprises an examination of the Equal Pay Act 1970 and the Sex Discrimination Act 1975 with respect both to the core concepts which lie at the heart of the statutes, and the process of implementation of the law. The study examines both the emergence of the statutory provisions, and their implementation in the period through 1981. The law is examined in the context of the material factors which constitute women's position in the labour force, and an attempt is made to evaluate the fit between the legal concepts and the material reality. Underlying the research is the broader question of how the use of law itself defines or limits a particular problem. Some American material is included for comparison.

The first part of the study examines the emergence of the legislation and the way in which this process shapes the concepts embodied in the law. The study reveals some critical problems in the core concepts of the legislation and a disjuncture between the material reality of the female labour force, and the approach to defining discrimination and equality. While the concepts are grounded in the formalistic and abstracted approach of the law to the individual legal subject, it cannot be surmised that this fact in itself delimits the capacity of the law to
effect social change, since it is not clear that the concepts are incapable of reform. Indeed, recent amendments to the law suggest that some change is possible, although the degree of change may be limited.

The second part of the study points to the way in which the choice of enforcement and implementation procedures affect the impact of the legislation. An empirical study of the industrial tribunal adjudication process points to some procedural problems which potentially restrict the ability of the individual complainant to prove her case and obtain relief. An examination of the powers of the Equal Opportunities Commission (EOC), and the EOC's record, indicates both a serious weakness in the statutory authority with regard to the Commission's ability to secure compliance, and an overly cautious approach by the Commission to the use of its existing powers. A study of the remedy provisions of the legislation points to the limitations of the individual remedy approach, and the need to amend the remedy provisions better to reflect the public policies of securing compliance with the law and compensation for the victims.

The study reveals the nexus between the substantive concepts of the law and the enforcement procedures. It suggests that changes in both areas must be made if the law is more adequately to address the economic disadvantage of women workers.
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CHAPTER ONE

THE RESEARCH PROBLEM: RESEARCH OBJECTIVES
THEORETICAL PERSPECTIVES, AND
METHODOLOGICAL CONSIDERATIONS

In recent years there has been a spate of literature dealing with women in the workplace, from economists, historians and sociologists, and a burgeoning interest in the general question of sex/gender as a category of social stratification. This interest has been paralleled in the public sphere by increasing attention to women, particularly working women, as the object of legislative and judicial policy-making. This in turn has focused scholarly attention on the content and impact of laws establishing or reconstituting employment rights for women. The purpose of this study is to provide a critical examination of the content and procedures of two British statutes, which in a broad sense attempt to provide for greater equality between the sexes in the workplace, and in so doing to assess the potential effects of the laws.

In 1970, the British Parliament enacted the
Equal Pay Act (EqPA), the first piece of anti-discrimination legislation to address the situation of women in employment since the Sex Disqualification (Removal) Act of 1919 removed legal barriers to women's entry into the learned professions. The statute which was to come into operation at the end of 1975, addressed direct discrimination of wages, salaries, and other matters covered by the contract of employment, such as shift work allowances, fringe benefits, and sick pay schemes.

During the five years between the passage of the EqPA and the date of its implementation, a vigorous campaign for a broader anti-discrimination law resulted in the enactment of the Sex Discrimination Act of 1975 (SDA). With regard to the position of women workers, the SDA complemented the EqPA by regulating discrimination in the non-contractual aspects of employment, such as access to jobs, training, and promotion, and in the terms and conditions of employment. The SDA established an Equal Opportunities Commission with a statutory duty to enforce both pieces of legislation, which came into effect simultaneously on 29th December 1975.

It is these two statutes and the structures and processes established to implement them which are the subject of this inquiry. At an early stage of the research the influence of American ideas and institutions on the British approach to discrimination legislation became clear, but a fully-fledged comparative study was not possible because of constraints of time. The
American legislation nevertheless provides a secondary focus in the study, and references to the American laws are used to illuminate the content and operation of the British legislation.

Specifically the research is designed to examine the genesis of the core concepts that lie at the heart of the statutes, both substantive and procedural, and to evaluate the system of implementation through an empirical investigation of the processes of complaint adjudication, and administrative enforcement. Such a study could be undertaken in a number of ways, and from a variety of theoretical perspectives. The purpose of this introductory chapter is to specify in more detail the central objects of enquiry, the methods and sources of data, and the theoretical perspectives which underlie both the choice of subject matter for the research, and the particular approach adopted.

I. Research Objectives and Theoretical Perspectives

Since the legislation came into effect it has been the focus of considerable criticism and comment, although there has been no complete study of the legislation incorporating both a critical examination of its provisions and a detailed empirical study of the process of enforcement. Since the statutory provisions define the basic parameters of the legislation, and the process of implementation affects both legal meaning and social
impact, both stages of analysis appear to be essential to an understanding of the legislation. The purpose of this study is to take a first step towards remedying the omission in the literature. In social policy terms, the purpose is to identify the relative strengths and weaknesses in the legislation. In so doing, I hope the study may make a tentative contribution to the debate on the relationship of legal reform to social change.

The question of the relationship of law to social change is one of the recurrent themes of the history of legal thought (Friedman, 1972, p. 19). As intervention through legislation has become an increasingly common feature of modern life, it has acquired an urgent practical and political significance as well as an academic and intellectual one. Despite the pervasiveness of legal reform, as a route to social and economic change, and despite the large and ever-increasing literature on the relationship of legal to social change, there is no agreement as to a theoretical framework for studying legislation, and no dominant sociological paradigm. In this respect, the area of enquiry perhaps mirrors the sub-discipline of the sociology of law itself, which "bears very little resemblance to a systematic collection of knowledge" (Beirne, 1977, p. 5).

The divergent approaches which characterize the sociology of law can be grouped in terms of two major paradigms: one is defined by "the master paradigms bequeathed by the respective epistemologies of Durkheim
and Weber" (Beirne, 1977, p. 43) and results in a positivist approach to law; the second eschews positivism in favour of a materialist analysis of the social production of law and of law as a mode of reproduction of the social order. These categories are not monolithic and each comprises a diversity of approaches; nevertheless the simplification is useful as an initial categorization of the field, with respect to the different approaches taken to the law-society problematic.

Within the first category there has been a pronounced orientation towards empirical studies which lack any explicit theoretical framework (Campbell, 1972, p. 5), although Hunt (1982, p. 74) notes some recent developments to the contrary. Within the empiricist studies of law, the problem is not so much the lack of an explicit theoretical framework but the presence of an unacknowledged, implicit, theoretical position (Hunt, 1976, p. 29). The issue is not one of "theory" versus "empiricism," but rather one of which theoretical assumptions are operating as a paradigm for analysis.

Much of the work on equal employment opportunity legislation, the vast bulk of which is concerned with the American legislation, exemplifies the problems of an overly empiricist approach. Much of the work appears in legal journals and law reviews, where the emphasis is on legal practice, definitional disputes and problems of appellate interpretation. Other works attempt to
evaluate the impact of a specific law on progress towards certain stated objectives, or monitor implementation through a case-by-case approach which mirrors the legal process. The narrow focus of such studies constitutes both their main strength and their most serious failing. Empirically derived analyses of particular laws provide a wealth of information on specific problems in legal implementation which may be of considerable significance at the policy level, but they frequently do so without sufficient attention to important theoretical questions. Concentrating on instrumental effect, for example, may result in a failure to examine the symbolic or ideological effects which Gusfield (1963) and Carson (1974) have demonstrated as an important dimension in the analysis of legislation.

The problem with much of the American literature may be summarized as a tendency to share the same set of conceptual operating assumptions as the law itself, a defect which is grounded in a positivist epistemology which treats legal rules as non-problematic social facts. Within the second paradigm, which problematizes law itself, and in broad terms addresses the nature of legal regulation in capitalist social formations (Beirne and Quinney, 1982, p. 6) there has been little attention paid to the problem of analysing discrimination law. In terms of empirical research, the materialist studies appear to be concentrated in two particular areas of interest with regard to the nature of legal regulation:
criminal law, and the regulation of the economic relations of labour and capital. Beirne and Quinney (1982, p. 4) point out that in both these areas there has been an unfortunate tendency to conceive of law simply as a state apparatus that mechanically reflects the interests of economically dominant classes. Legislation which appears contrary to those interests is then explained in terms of its functional contribution to the long-term stability of the social formation.

Anti-discrimination legislation poses exactly this kind of problem. In one of the few works adopting a Marxian perspective for an examination of the British anti-discrimination law, Gregory (1979, p. 150) concludes that the legislation "is on the statute book in order to protect, not threaten, the fundamental structures of capitalist society." Gregory's argument might be more convincing if it rested on some empirical demonstration of its validity, rather than proceeding a priori. Gregory asserts that the legislation was enacted because "the state" "had to" intervene, but that it "dared not" intervene effectively; but these assertions are not grounded in an analysis of the events that preceded enactment of the legislation, nor in an examination of the policy debates that took place, nor indeed in anything other than some general theoretical considerations about the role of law in bourgeois society.

The deficiencies of the study described above should not be taken as indicating that a materialist
approach to the study of anti-discrimination law is necessarily inappropriate nor doomed to failure. Historical materialism is concerned to identify the material conditions for the production of ideology, and to assess its relation to other social and political forces (Matthews, 1979, p. 110). As a method, it thus requires attention to historical and structural factors. Attention to these factors, in the context of an analysis of the substance of the legislation is thus a starting point for this study.

Kingdom (1981, p. 109) points to the importance of such factors in her discussion of models of law. She points to the necessity of avoiding the traditional, philosophical conception of rights as axiomatic, as inalienable possessions owned by virtue of principles that transcend prevailing legal and social conditions. Rights are not axiomatic, but emergent, constructed and defined in the process of political struggle. Thus, an analysis of the discrimination legislation must include an examination of the nature of the emergent rights embodied in the legislation, not only in terms of the statute's substantive provisions, but also through an examination of the historical process of definition and the choices that are implicit in it. Thompson (1975; 1978) also emphasizes the role of historical analysis in developing an understanding of the law.

The choice of a materialist paradigm necessarily has implications in terms of the factors seen to be
essential to the analysis. In concrete terms, it necessitates an analysis of the structural and ideological constituents of the position of women in the labour force; a study of the emergence of the legislation focusing on the factors which have influenced the emergent definitions at the heart of anti-discrimination legislation, and on the 'fit' between legal definitions of a problem and the actuality of the underlying phenomenon; and a study of structural and procedural factors in the system of enforcement and adjudication.

The study of implementation is important for a number of reasons. First, the process of case-by-case adjudication depends upon facts as the building blocks of law. Thus, the way in which judicial decision-makers interpret facts is of prime importance to the question of the transformative potential of a particular piece of legislation, as well as to an understanding of the procedures associated with the adjudication of particular cases. Second, the choice of certain kinds of enforcement structures rather than others crucially affects the process of implementation, and the likely effect of the legislation on the area of putative regulation.

Together, an emergence study and an implementation study should constitute a conceptual analysis and critique, focusing on the relationship of legal definitions and solutions to both the stated objective of the legislation, and to the social/economic context from which the legal/
legislative definition emerges. It should also provide a means of examining the way in which substance and procedure operate to give meaning to law, by focusing on the inter-relatedness of conceptual and procedural factors. Procedural choices are thus reinstated as a central concern in an examination of legislation not only because some choices will facilitate enforcement and others hinder it but because in this process the meaning of the law is constantly defined and re-defined.

Combining an emergence and implementation study in this way makes possible an analysis at two distinct levels of conceptualization: the identification of issues which might be addressed in the short-term through amendments to the law and changes in procedural practices; and secondly, an examination of the features of anti-discrimination legislation as presently constituted which appear less susceptible to amendment or change, since they represent core values within juridical and liberal ideology.

II. Comparing British and American Legislation

The main object of enquiry for this research is the British anti-discrimination legislation. However, at an early stage of the research, the influence of American models of anti-discrimination policy became clear. For this reason I decided that the study would benefit from explicit comparisons between the British and American
provisions and procedures. However, because of the restraints of time and resources, this study is not a true example of a fully comparative study. My study of the American legislation was less detailed and more limited in scope than the study of the British legislation; and as such the uses to which it may legitimately be put are more limited than if a full comparative study had been possible. Since the study is not a fully comparative one, but one which incorporates a selective use of the American material, some discussion of the limitations is in order.

There is an immediate similarity between the legislation of the two countries in terms of basic concepts and structures for enforcement. The fact that patterns of women's employment are very similar in each, and that their economic and industrial structures are comparable, facilitates the use of comparative material. Nevertheless, it would be easy to overstate the similarities, both as to the legislation itself, and with regard to external factors. Some of the differences between the two countries which are relevant to a comparative examination of the legislation are described briefly here.

First, the legal systems of the two countries are only superficially similar. Despite their sharing of the Anglo-American common-law tradition, there are some significant differences between the two, particularly with regard to the degree of judicial activism and
innovation that the courts think appropriate to their role. This difference reflects in part the fact that the American system of government is not the classic "separation of powers" that textbooks sometimes describe, but in fact a sharing of powers (Neustadt, 1967). Although it is not possible to present a detailed comparison here, it should at least be noted that the Federal judiciary in the United States, and the Supreme Court in particular has historically taken a more explicitly interventionist and policy-making role than the British judiciary, and at least since the historic decision in *Brown v. Board of Education*,¹ a relatively progressive approach to the issues of civil rights and discrimination laws (Chayes, 1970; Chambliss and Seidman, 1971, ch. 9). The concept of indirect discrimination for example, is a judicially created one in the United States, whereas in Britain it is part of the statutory definition. This difference in approach goes beyond the anti-discrimination laws and reflects a more general difference in approach to the judicial role. It also reflects judicial differences of approach with respect to statutory interpretation, and to the admission as evidence of social scientific and statistical material (Hepple, 1983, p. 74).

Bureaucratic styles and structure are also different in the two countries, a fact of some importance when considering the roles of their respective administrative enforcement agencies. The incorporation of labour and
management interests into the system of administrative enforcement of discrimination legislation is not a feature of the American system, as it is in the British. Furthermore, the United States has a more openly "politicized" bureaucracy than Great Britain (Meehan, 1980, p. 8), which has implications for the operation and staffing of the enforcement agencies and their connections to interest and advocacy groups.

Lastly, there are real differences in the operation of policy networks between the two countries, a fact which also has implications for the implementation of law. It is possible in the United States to identify a national group of action-oriented civil rights litigation organizations which have played a considerable role in developing a litigation strategy on something other than an ad hoc or random basis. By contrast, comparable British groups are few in number and lack the resources of their American counterparts.

These considerable differences between the two systems have given rise to the question of whether concepts borrowed from the United States can successfully be transplanted into the British legal, political, and administrative context, because of what Walker (1969) referred to as the "diffusion of innovation." Unfortunately, a more detailed examination of this question is outside the scope of this study. I introduce the issue here in the manner of a caveat. Despite the interesting
possibilities of a full and detailed comparative study, the constraints of time and resources that a solo researcher inevitably faces, led me to settle for a more limited examination and incorporation of the American material than such a study would require. Thus, I have incorporated references to the American legislation where appropriate to illuminate the British approach or to illustrate alternatives to the ideas and structures incorporated in the British statutes.

In making these detailed references I am aware that a partial study of the American legislation may be misleading, if it is taken to imply that American procedures may be transplanted unproblematically, or at all, into the quite different legal and political institutions of the United Kingdom. Hence, the caveat issued here. The comparisons thus point up the limitations of a particular approach to an aspect of anti-discrimination law, without implying that such a limitation is inherent in the nature of the legal form, rather than a characteristic of a particular piece of legislation, or a particular legal system.

In order to set the stage for this later incorporation of American material, which appears at the point of discussion of appropriate issues in the British legislation rather than in separate chapters of its own, it will be helpful here to describe briefly the American statutes which provide the basis for comparison. Such a
description must of necessity be something of a simplifica-
tion, but it will suffice to provide the context for the 
later introduction of American references.

Public policy governing employment discrimination 
in the United States consists of a diverse collection of 
Federal, State and local statutes and regulations, some 
broad and comprehensive in scope, others more specific. 
In Federal policy, a basic distinction exists between 
regulations which derive their authority from Congressional 
enactment, and those established by presidential fiat, 
through the issuance of an Executive Order.

Congressional action on employment discrimination 
dates from the enactment of the 1963 Equal Pay Act, passed 
as an amendment to the Fair Labor Standards Act (FLSA) 
of 1938. The first federal equal pay bill was introduced 
in Congress in 1945, but failed to get the support necessary 
for passage. Similar bills were introduced in every 
session of Congress thereafter, but it was not until 1962 
that hearings were again held on equal pay proposals. 
The 1963 Act prohibited the payment of unequal wages for 
equal work, on the grounds of sex, with respect to workers 
covered by the FLSA, and assigned responsibility for 
enforcement to the Wage and Hour Division of the Depart-
ment of Labor. In 1978, this responsibility was trans-
ferred to the Equal Employment Opportunities Commission 
(EEOC), established as the major enforcement agency for 
the 1964 Civil Rights Act.
Title VII of the 1964 Civil Rights Act is a comprehensive statute which prohibits a broad range of discriminatory employment practices. Advocates of women's rights had long realized the need for a legal defence against the problem of sex discrimination, in employment and elsewhere. Originally, however, the 1964 Act covered discrimination on the grounds of race, colour, national origin and religion, but not sex. Ironically, the inclusion of women as a protected class under the Act was initiated in an amendment by a Congressman opposed to the whole endeavour of civil rights legislation. Despite its origin, the amendment received enthusiastic support from Congresswomen, and ultimately received majority support in both the House of Representatives and the Senate.

It is Title VII which is of primary concern here. It was Title VII which established in the federal system the idea of enforcement through an administrative agency which provided a model for British policy-makers (see chapters six and eight below); and it is in Title VII litigation that the difference between American and British judicial approaches to remedy is best observed. (See chapter nine below.) Title VII provides in pertinent part that it is unlawful:

... to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to ... compensation, terms, conditions or privileges of employment, because of ... race, colour, religion, sex, or national origin: or
to limit, segregate, or classify (employees) . . . in any way which would deprive any individual of employment opportunities or otherwise adversely affect (his) status as an employee, because of . . . race, colour, religion, sex or national origin.

Other federal and state statutes provide additional avenues for the legal redress of race and sex discrimination, but they are of considerably less significance in terms of the overall litigative effort than Title VII. In addition to the federal statutes, Executive Orders prohibit discrimination by federal contractors, and are enforced by a separate agency, the Office of Federal Contract Compliance. Finally, the Constitution itself provides legal remedies for race and sex discrimination, where state action is involved in the denial of equal protection of the laws, in violation of the Fourteenth Amendment.

In terms of employment discrimination the Equal Pay Act and Title VII account for by far the largest numbers of actionable claims of sex discrimination. I have in the main limited my introduction of American material to these two statutes and the structures and processes through which they are enforced. I have not provided an analysis of the emergence of the American legislation, nor a detailed empirical investigation of the judicial decision-making process. In a truly comparative study such enterprises would have been necessary to mirror the study of the British legislation. The work here is more limited in scope. It is thus not
possible to draw from it the conclusions that a more complete study would allow; nevertheless, the comparative material, although illustrative only, casts a light on the British experience that would otherwise be unavailable.

III. Research Methods and Sources of Data

The nature of the phenomenon under investigation necessarily dictates a certain range of research methods. Having defined the research objectives in terms of an examination of the emergence of key legal concepts, both substantive and procedural, and of the structures and processes through which the concepts are given meaning through implementation, certain methodological choices and sources of data are logically implied.

A study of the central concepts of legislation, and an analysis of the implementation and interpretation of these concepts through judicial and quasi-judicial structures, necessitates a close examination of legislative and judicial language. Consequently, the primary research method for this study was documentary, with documents themselves constituting a phenomenon for investigation in their own right, rather than appearing only as a resource for access to an underlying reality (Phillipson, 1972, p. 81).

The research mode is primarily qualitative, exploratory, and descriptive. Consequently a search for causality must necessarily be a limited one. However,
a conjectural approach to causality is appropriate as a "tentative, qualified, and subsidiary" task of qualitative analysis (Lofland, 1971, p. 62). With this caveat in mind, I have not hesitated to point tentatively to causes and consequences in the processes which are the subject of investigation.

Where quantitative data appear, I have used it descriptively. Official statistics provide a source of information, for example, on the major characteristics of women's labour force participation, and on complaints to the tribunals and their outcome. I have also used statistics on the representation of parties at tribunal hearings, derived from a sample of tribunal decisions. In this latter case I have suggested conclusions that might be drawn from the data, but again with a caveat regarding the tentative nature of the conclusions that can appropriately be drawn.

Overall, the research methods reflect a concern with the "context of discovery" rather than "the context of validation" (Rudner, 1966; Phillipson, 1972), with the explication and interpretation of legal meaning, and its relationship to the material world which is the subject of legal regulation. Specifically, the study is based on information derived from a range of sources consonant with achieving the objectives of examining both the emergence and the implementation of the legislation, in the context of an analysis of women's position in the labour market.
a) **Women's position in the labour market**

The analysis of women's position in the labour market relies on official statistics to provide an account of recent trends in women's labour force participation, earnings, and occupational distribution. The analysis is also based upon a discussion and critique of selected literature.

b) **The emergence of the legislation**

The method of investigation for this section was documentary. There are three main sources of data: official reports, other sources of primary data, and secondary studies. The official reports include Hansard, reports of official committees, and government publications. Other sources of primary information mainly comprise reports of the views and proceedings of various pressure groups. Reliance on documentary sources for a reconstruction of historical events will of necessity always involve the problem that the explanation offered will be a partial one. The problem is mitigated to some extent when, as here, the reports are properly sources of data in themselves, subjects of analysis, rather than recreations of shadowy events that may be obscured by the words of an official explanation. The focus in this section is on the historical emergence of the policy response, and the key concepts of the legislation. In
this context, documentary methods appear to provide an accessible, and an appropriate, source of information.

c) The system of enforcement

The study of implementation focuses on the first five years of full implementation of the two statutes, i.e. on the period from 1976-1981. The study relies primarily upon documentary sources of data, supplemented with some interview material.

Official reports and the statutes themselves constitute the major source of information for the overview of the enforcement system.

Documentary information in the form of a sample of tribunal decisions provides the data for a study of tribunal adjudication, and for a discussion of legal remedies. Access to these decisions was facilitated by the statutory requirement that the decisions of Industrial Tribunals be written, and that written record be publicly available. A complete register of all Industrial Tribunal decisions involving claims of sex discrimination or unequal pay is available at the headquarters of the EOC, and this register was used as a sampling frame.

The sample covers the years 1977-1981. Tribunal decisions for the first year of implementation were excluded from the sample on the basis that the first year might be expected to provide some aberrational results,
purely because of the newness of the statutes, and the absence of precedential guidelines from the appellate courts.

The decisions so chosen provided the basis for an empirical investigation of tribunal adjudication through a study of the criteria employed in the determination of complaints, the arguments adduced, evidentiary issues, and the implications of the allocation of the burden of proof. The written decisions also provide information on the composition of the tribunal and the representation of the parties.

The objective in this section of the research was not to provide a study of the way in which tribunal proceedings are conducted, but of quasi-judicial decision-making. Whereas a reliance on documentary methods would be inappropriate and inadequate for the former, it is apposite for the latter, and provides an invaluable insight into both the legal reasoning with which tribunals explain and justify their decisions and the configurations of facts which appear important to them in applying the laws. It should be noted that tribunal decisions are not generally reported, and are not considered precedent. An analysis of case outcomes does not, therefore, constitute an authoritative guide to the law. Rather it reflects the ways in which specific tribunals, speaking through their chairmen, record the legal and factual grounds which justify a particular outcome.
A third source of documentary data were the reported decisions of the Employment Appeals Tribunal, and the higher appellate courts for the period 1976-1981. Unlike the decisions of the tribunal, these decisions do have precedential value. I have therefore used them differently from the tribunal decisions in the sample, as reflecting the prevailing legal definition of the statutory provisions.

Documentary analysis also provided the basis for an evaluation of the role of the EOC. Official reports and the legislation itself provide information on the powers of the EOC, and the reasons underlying the choice of this form of administrative enforcement. The Annual Reports of the EOC constituted a source of data on the agency itself, its activities and priorities, and the way in which the organizational role is perceived and presented to the public. This data was supplemented with material obtained in in-depth interviews with the EOC's legal counsel.

Interviews provided the major source of non-documentary information. During the early stages of the research I interviewed a small number of complainants, plus lawyers and trade union officials interested in the implementation of the legislation. A small sample of complainants was chosen from those registering complaints with the London Industrial Tribunal in a nine-month period in 1979. Trade union officials and lawyers were approached on the basis of personal contacts and recommendations, one interview often
leading to a suggestion of other individuals interested in the operation of the legislation. The information gained from these two sets of interviews does not appear as a research finding, but was used exclusively in the early stages to promote and clarify the researcher's understanding of the dimensions of the legislation and the nature of the implementation process. A small number of tribunal hearings was observed during the same period, for the same purpose.

(cont'd.)
d) The American Legislation

The study of the American legislation relies on the same mix of research methods and data sources as the British legislation. The primary source of information was documentary: the Congressional Record, official committee reports, commission and agency reports, and court decisions. Interviews with EEOC personnel, complainants, and lawyers supplemented this data.

IV. Anti-Discrimination Laws: The Literature

In the first part of this chapter I referred in general terms to certain categories into which the literature on law and social change and theories of legislation might be divided. In this section I discuss in more detail some of the literature which deals specifically with British anti-discrimination legislation.

The literature on the American legislation is voluminous. I have found some of these studies illuminating and helpful, but since they tend to be partial studies, dealing only with particular aspects of the legislation, I have referred to them at the appropriate point in the following chapters, rather than reviewing them here.

Although fewer in number than the works on the American legislation, studies of, and comments on, the British legislation also tend in the main to be partial studies. These works tend to agree on the fact that
the effect of the legislation to date has been limited, but proffer different sets of reasons for this fact, and differ in the degree to which they see the defects as remediable. Where a study deals only with a particular aspect of the legislation or the enforcement procedures, I have generally discussed it at the appropriate place in the text, rather than discussing it here. However, in order to give a flavour of the different approaches, I have discussed here three articles which evaluate the legislation from different perspectives (Coote and Campbell, 1982; Seear, 1980; Snell et al., 1981) before proceeding to a brief discussion of two longer works in this area (Chiplin and Sloane, 1982; Creighton, 1979). The work of Gregory (1979) has been discussed in the first part of this chapter. For that reason I do not include it here.

Coote and Campbell (1982) provide an overview of the campaign for equality legislation, and of the effects of the law, in their historical account of feminist struggles from the late 1960s onwards. They conclude on the basis of statistics about the wage gap and occupational segregation that the effect has been "feeble" and assert that some of the reasons for the lack of effect can be found in the laws themselves, and others in the methods of enforcement (Coote and Campbell, 1982, p. 104). They see the problem as serious "internal weaknesses" in the laws, coupled with an implementation machinery that is "not designed to give women positive help in obtaining
justice—rather the contrary" (Coote and Campbell, 1982, p. 117). These weaknesses apparently derive from the fact that the "well-meaning liberals" responsible for the legislation had as a priority not the closing of loopholes and the establishment of the strongest possible means of enforcement, but the avoidance of "anything approaching a showdown with the entrenched powers of the CBI and the TUC" (Coote and Campbell, 1982, p. 115). They also assert that patterns of male and female employment are too deeply entrenched to be disturbed more than superficially by the legislation alone.

The problem with Coote and Campbell's analysis is that although apparently far ranging, most of their assertions are sui generis and lack a grounding in a detailed investigation or the implementation process.

Nancy Seear (1982) also provides an overview of the main provisions of the legislation and the process of implementation. She too concludes that the effect of the legislation has been limited, but points to the general economic climate, existing organizational structures and practices, attitudes about the nature of men's work and women's work, and ignorance of the legislation, as the factors inhibiting the operation of the law (Seear, 1982, p. 274). Her prognosis is more optimistic than that of Coote and Campbell (1982) in that she implies that the existing legislation modified only in detail
can be made to work, if a greater use is made of the existing powers of enforcement, and if more attention is paid to working out joint union-management policies at the company level (Seear, 1982, p. 276).

A second study pointing to the need for a greater use of the existing enforcement powers is that of Snell et al., (1981), which draws upon research into the effects of the statutes on the employment practices of twenty-six organizations. The researchers found some organizations clearly in breach of their legal obligations, and fully half of them had borderline situations. Only nine of the twenty-six had proceeded to full implementation of their legal obligations; by contrast fourteen had taken action prior to the date of implementation to reduce their obligations under the statute. This research confirms, by looking at practices within organizations, the conclusions drawn from the persistence of the wage gap and occupational segregation by other writers, that the effect of the legislation has been limited.

The precise relationship between the wage gap and the existence of a high degree of occupational segregation on the one hand, and the limitations of the law, on the other, is not one which is commonly addressed in the British literature. Rather, it is generally taken for granted that the continuing discrepancies between men and women workers with regard to these indices illustrate the failure of the legislation. The work
of Chiplin and Sloane (1982, p. 20) is an exception to this trend, in that they focus explicitly on the issues that arise in measuring discrimination in terms of the wage gap. Using studies from both the United States and Britain as a source of data, Chiplin and Sloane (1982, p. 1) argue that discrimination in earnings is in the order of ten per cent, or approximately one-quarter of the total wage gap between men and women. Chiplin and Sloane (1982, p. 20) note that whatever measure of discrimination is used, whether the wage gap, or, for example, following Lazear (1978) the growth of income over the working life of the individual, even the most favorable studies still leave a substantial gap between male and female earnings.

Although Chiplin and Sloane's analysis of quantitative measures of discrimination is illuminating, their study otherwise founders upon an incomplete understanding of the phenomenon of sex discrimination. They assert in the conclusion that if discrimination against women were removed overnight, the improvement in average female earnings would be substantial, but that they would still, in all probability be only about eighty per cent of male earnings, since discrimination is less significant than factors "deep rooted in social attitudes and behaviour, and which may themselves have economic causes" (Chiplin and Sloane, 1982, p. 129). Such an assertion implies a peculiarly narrow definition of discrimination, as is further demonstrated by an example that Chiplin and
Sloane use to illustrate their point. A crucial issue, they assert, is the effect of family responsibilities on lowering the value of the services which women supply; so, they continue, if there was a complete reversal of roles between the sexes, average male earnings would be less than women's "not because of any discrimination practised by women, but simply from the value of the services supplied to the labour market" (Chiplin and Sloane, 1982, p. 129). There are two problems with this analysis. First, the assumption is that discrimination is practised by men, rather than by employers or trade unions. While the individuals who fill these categories may be predominantly male, it is an arguable point whether they discriminate only as individuals with discriminatory attitudes as Chiplin and Sloane seem to imply or because of institutionalized practices and policies which, in much of the American discrimination literature, appears at least as important as discriminatory attitudes (Feagin and Feagin, 1978). Second, and even more importantly, Chiplin and Sloane's analysis uncritically postulates 'value' as an objective category. It is again arguable whether women's responsibility for domestic and familial matters results in lower earnings because it lowers the value of their services, through interrupted labour force participation and part-time work, or whether these characteristics are negatively assessed because of their association with women. If the latter, then Chiplin
and Sloane's formulation becomes tautological; they use the assumptions of a profoundly discriminatory system to explain away discrimination rather than analyzing whether it is possible or practicable to change the state of affairs, or how to do so.

Apart from Chiplin and Sloane's work, which focuses only tangentially on the legislation qua law, the only major study of the British sex discrimination legislation is Creighton's (1979) analysis. Creighton provides an historical account of the legal remedies for sex discrimination, both common law and statutory, an analysis of the main provisions of both the EqPA and the SDA, and an examination of the enforcement procedures established by the legislation. Creighton's study provides an interesting account of the development of legal remedies, and of the emergence of the legislation. The study is overall a useful one, providing a comprehensive overview of the legislation, and of some of the problems, substantive and procedural, that limit its effectiveness. In particular, Creighton points to the limitations of the definition of equal pay embodied in the legislation, the procedural difficulties from the present allocation of the burden of proof, the restrictions on the EOC's enforcement powers, and the inadequacy of the remedies provided in the law.

The present study differs from Creighton's work in three ways. First, although I agree with many of Creighton's conclusions concerning problems in
implementation, I feel that they are inadequately grounded in empirical investigation. My study provides an empirical basis for confirmation of problems associated with the burden of proof, the provision of remedies, and the operation of administrative enforcement. Second, Creighton's analysis lacks an explicit theoretical framework, and proceeds without considering the role of law itself as a particular approach to defining problems and finding solutions to them. Thus, the study explicates the meaning of discrimination in terms of the legal provisions of the statute, and the interpretation of the courts, but fails fully to provide a sociological analysis of the use of these concepts in law, or of their relation to the material subjects to which they relate.

Third, Creighton's study focuses exclusively on the British legislation. Because of the influence of American policy approaches on the British legislation, this study by contrast introduces some material on the American legislation and its enforcement, for purposes of comparison.

Thus, while Creighton's study provides a historical account and a thorough explication of the legal provisions, my research attempts to provide an account which is more explicitly sociological in its analysis of the relationship between the legislation and the characteristics of women's employment in the contemporary labour force, and which provides a more detailed study of the implementation system.
This discussion of the literature is necessarily brief, because of the small number of complete studies of the legislation. There are, however, numerous works which address various aspects of the legislation. I have drawn on these studies gratefully, if not uncritically, and discussed or cited them in the text where appropriate. With all its failings I nevertheless hope that this study too will shed some light on the nature and operation of anti-discrimination legislation, and that its omissions and inadequacies will prompt further investigation into this important area of public policy.

The structure of the study is as follows. In chapter two I examine the main characteristics of women in the work force and the factors which may be adduced as explanations for the primary indices of disadvantage—low pay and a high degree of occupational segregation. This chapter thus provides an essential background for chapters three and four, which examine the emergence of the legislation, and for chapter five, which provides a critical examination of the core concepts of equality and discrimination. Part I of this dissertation thus constitutes an emergence study of the legislation, which details the historical factors which contributed to the specific form of the legislation, and its central concepts, and which examines the fit between the legal definitions of the problem, and the actuality of gender inequality and disadvantage in the labour force.
In Part II the emphasis shifts to an empirical study of the main features of the system of enforcement. Chapter six provides an overview of the enforcement system, and examines the factors which influenced the choice of particular structures and processes. Chapters seven, eight and nine are concerned respectively with empirical investigation of the industrial tribunal system, administrative enforcement, and legal remedies. Chapter ten provides an illustration of the inter-relationship of substance and procedure in law, through a discussion of tribunal decision-making in two substantive areas of the Equal Pay Act. Finally, chapter eleven summarizes the conclusions that the study points to, and makes some recommendations both for policy changes, and for future studies.
NOTES

1 In Brown v. Board of Education, 347 U.S. 483 (1954) the Supreme Court reversed its earlier ruling in Plessy v. Ferguson, 163 U.S. 537 (1896), to hold that "separate but equal" school systems for black and white violated the Equal Protection clauses.

2 See also Meehan, (1980) and Hepple (1983) for a discussion of some of the problems associated with transplanting the concepts and structure of American anti-discrimination legislation.

3 It should be noted that unlike the British SDA, Title VII encompasses wage and compensation issues which in Britain are only actionable under the EqPA. It is thus an inclusive statute for employment discrimination purposes. It was amended in 1978 to make clear that the statutory definition of sex discrimination includes discrimination on the grounds of pregnancy. Title VII also prohibits other kinds of discrimination, and not just sex discrimination, as its terms make clear.

4 For details of the sample, see Appendix A.

5 Chiplin and Sloane's analysis here appears to be based on the assumptions of human capital theory. This approach has been attacked by, for example, Bluestone (1977, p. 337), who notes that individuals who suffer from low wages have a considerable amount of human capital. Hartnett (1978) makes a similar point when she notes that women tend to have more qualifications than needed for the job, and more education than men in the same job. See also Amsden (1980) for further comments on human capital theory.
PART I
CHAPTER TWO

WOMEN IN THE LABOUR FORCE

In recent years, there has been a spate of literature dealing with women in the workforce, from economists, historians and sociologists, and a growing interest in the general question of sex/gender as a category of social stratification. It is not at all surprising that working women have become the object of so much attention. In the period since 1945, there have been some striking changes in women's participation in the paid labour force, and the question of women's employment rights has been a frequent matter of public debate. Co-existent with the dramatic changes in the size and composition of the female labour force has been the persistence of inequality in the workplace. This paradox lies at the heart of much of the literature on working women, and must, of course, constitute a major objective of enquiry in any study of anti-discrimination or equal employment opportunity legislation.

I. The Increase in Women's Labour Force Participation

Perhaps the most remarkable change in the labour force of Britain in the period since the end of the Second World
War, has been the entry of women into paid work, in unprecedented numbers.

Figures produced by the Department of Employment (DE) show that nearly all of the increase in the working population of Britain between the early 1950's and early 1970's can be attributed to the increase in women's participation in the labour force.

**Table 1**

*Increase in the working population of Great Britain, by sex, 1951 and 1971*

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Working Pop. (000s)</th>
<th>Men</th>
<th>Women</th>
<th>Women as % of Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1951</td>
<td>23,239</td>
<td>17,798</td>
<td>7,441</td>
<td>32%</td>
</tr>
<tr>
<td>1971</td>
<td>4,827</td>
<td>15,867</td>
<td>8,960</td>
<td>36%</td>
</tr>
</tbody>
</table>

*Index 1951 = 100*

100.6 100.4 120.4

(Source: D.E. Gazette, and OME Report on Equal Pay)

Figures for 1980 show that women now constitute approximately 42% of the total British workforce (EOC, 1982).

This considerable increase in women's participation has been achieved through a growth in the number and proportion of married women working outside the home, a trend which has substantially altered the composition of the female workforce, and, indeed, that of the working population as a whole. The following tables illustrate this increase in the proportion of married women working, and show how, in the
thirty years from 1950, rates of participation for married and single women have converged.

Table 2.
% of women in the British labour force, by marital status, selected years.

<table>
<thead>
<tr>
<th></th>
<th>All women</th>
<th>Married</th>
<th>Single</th>
</tr>
</thead>
<tbody>
<tr>
<td>1951</td>
<td>34.7</td>
<td>21.7</td>
<td>55.0</td>
</tr>
<tr>
<td>1961</td>
<td>37.4</td>
<td>29.4</td>
<td>50.6</td>
</tr>
<tr>
<td>1966</td>
<td>42.2</td>
<td>38.1</td>
<td>49.2</td>
</tr>
<tr>
<td>1971</td>
<td>42.9</td>
<td>42.2</td>
<td>43.7</td>
</tr>
</tbody>
</table>

(Source: British Labour Statistics, Historical Abstracts, and Census of Population)

In 1981, the DE estimated that the economic activity rate of married women around 51.3%, and projections for the future suggest that this trend will continue, with married women constituting the largest single factor in the growth of the labour force. An effect of this increase in participation by married women has been a simultaneous rise in the number of mothers who work outside the home. One effect of the presence of young children is to increase the likelihood of part-time employment. In Britain, four out of five part-time workers are women, working less than thirty hours per week. Of women who work part-time, about 90% are likely to be married, and about 60% will have dependent children. (EOC, 1982).

To summarize then, the employment statistics show that at present, women constitute something in excess of 40% of the labour force, with married women accounting for most of the increase that has occurred since 1950. This increase in
the labour force participation of women, particularly married women, requires some explanation.

As Oppenheimer (1967) points out, most attempts to explain changes in the pattern and magnitude of female employment have looked either at influences on the supply of female labour, or at changes in demand for women workers, or at some interaction between the two. Influences on female labour supply include demographic changes, and changes in conditions of domestic work within the home. Demand side explanations emphasize the post-war economic expansion as creating new job opportunities for women.

The 1950's and 1960's were generally a period of industrial expansion and rapid capital accumulation. In such a period capital must call upon supplementary reserves of labour to meet its needs. Such reserves have historically included former agricultural workers, immigrants, and as the experience of the two world wars indicates, women. The increase in the demand for labour in the post-war period was not, however, an undifferentiated phenomenon; some sectors of the economy were growing much more rapidly than others, some were in decline. The area of greatest expansion was the tertiary sector, which was by this time already established as a prime source of employment for women. There was an increase in the numbers of jobs traditionally associated with women, and an expansion of the market into fresh areas of goods and services. This latter process often involved the transferral of work previously performed
primarily by women in non-market settings into an area of paid employment.

That demand increased in areas traditionally thought of as 'women's work', paid or unpaid, would not of itself explain all of the increase in women's employment. Women have also increased their proportionate representation in certain occupations in which men had traditionally been employed -- in banking for example. In such an instance, there are at least hypothetically, other sources of labour that could be called upon, but Oppenheimer (1967, p. 255) points out:

... shortages of male labour cannot always be made up from the ranks of unemployed males. The shortages are frequently in areas where the characteristics of the average unemployed person... preclude their utilization.

Unemployed men are not of course the only alternative. Labour shortages in specific areas could be met by recourse to migrant workers, for example. However, apart from any problems in suitability for particular jobs, stemming from such factors as language difficulties, immigration has been limited in the period under consideration for political reasons.

Thus many of the factors underlying the increased demand for labour also point to the likelihood that women would be seen as suitable workers to meet this demand. The literature of this period, both official and sociological, reflects this view of the needs of the economy and of women as potentially valuable, economically active members of
This literature emphasizes the potential contribution of married women in particular since single women were already participating in the labour force at approximately the same rate as men. If women were to provide the necessary increase in the size of the labour force, it could only be achieved through the increased participation of married women.

In terms of the increase in the supply of women workers, demographic influences are of obvious importance. The basic demographic changes that have occurred during the twentieth century that are relevant to this discussion can be summarized as a longer life expectancy, a male/female sex ratio that has moved closer to unity, more marriages, a younger average age of marriage, and a smaller average family size. These changes have affected the supply of single women, and has made married women's participation in the labour force more feasible, since child-bearing and rearing is normally compressed into a fairly narrow band of years within the female life cycle.

That an interaction between supply and demand factors should account for women's increased labour force participation is logically appealing. That it is also an accurate representation of the situation, at least as regards older married women entering the workforce, may be substantiated by reference to Valerie Oppenheimer's work (1967) on this subject which provides a partial empirical test of this hypothesis. She analyses the effects of
demographic changes and notes the importance of these on the numbers of single women available for employment. She also posits three different indicators of demand for female labour, and shows that in the period 1940 to 1960 demand rose, whichever indicator was used. From an examination of the interaction of these demand and supply influences she concludes:

...the evidence...indicates that the best explanation for the great increases in the work rates of older married women is that while the demand for female labour has been rising, the supply of the traditionally more preferred type of female labour [i.e. single young women] was declining. In response to this declining supply, demand re-adjusted itself so that workers who used to be discriminated against are now acceptable... (Oppenheimer, 1967, p. 259)

In addition to the narrowly economic factors examined by Oppenheimer, it is also useful to consider the motivational factors which may have encouraged married women to enter the labour force, rather than assuming that this may be explained in terms of an automatic response to changes in the labour force, or changes in the female life-cycle. In this context, it would be useful to look at wages and material expectations in this period, and also at ideological transitions in the representations of women's roles.

Various studies of married women workers have examined the reasons women give for being in paid employment. Chafe (1972, p. 190) cites a study of American women war workers who gave 'economic need' and the desire to assist with family support as the main reason for wishing to continue on
the job in peacetime. In this context, the post-war inflation was probably important in shaping women's attitudes to paid employment. Rising expectations also played a part. A *New York Times* article in 1951 found that 'economic need' had come to encompass increased amounts of consumer goods and services. A study by the National Manpower Council of families earning between $6,000 and $10,000 indicated that many middle-class wives were working outside the home in order to obtain a higher standard of living for their families. (Chafe, 1972, p. 190).

The ongoing impact of inflation and rising expectations continued to influence the impetus to paid employment for married women. During the 1950's the greatest growth in the female labour force in the United States took place among women from families with moderate incomes. Chafe notes that such women were obviously not just working for 'bread and rent money' and cites a 1965 study which showed that two-earner families spent 45% more on gifts and recreation, 95% more on restaurant meals for husband and wife, and 23% more on household equipment than single-earner families (Chafe, 1972, p. 219).

Other studies from this period show that even where financial need was cited as a major reason for undertaking paid employment, women were also likely to mention such intangible benefits as companionship, and a sense of independence and achievement, as motivations.
Studies by British social scientists also pointed to the isolation of housewives, the desire for company and financial independence, as motivations for working outside the home. In 1957, Viola Klein carried out a survey of working wives. Three out of four of the married women workers in her sample gave 'money' as the biggest incentive for taking a job, but that this was not the only incentive was indicated by the frequency with which other factors were mentioned. In fact, just over one-half of the women who cite financial necessity as the main incentive stated that they would still like a job even if family income were larger. Klein's study also pointed to rising expectations as to standard of living as the basis for many women's labour force participation; interviewees tended to mention working for 'extras' such as a car, better clothes, holidays. Klein noted:

To the extent to which these and similar items of expenditure become part of people's normal standard of living, the 'subsidiary income' contributed by a wife's earnings fulfills a need even in a society such as ours in which primary poverty has practically vanished (Klein, 1957, p. 1965, p. 89).

As the economic crisis has deepened in the Western world, with the persistence of high rates of inflation, the financial pressure on wives to take outside employment has increased. Living standards for many families have been maintained only through increased labour, as American statistics on trends in family income illustrate. During the 1970's, incomes of families with more than one wage earner showed a relative increase in the region of 6%.
average, wives in paid employment contributed approximately 25% of family income in 1978; this proportion rises to 38% for women in full-time employment (Currie, 1980, p. 14). Statistics of this kind would tend to indicate that women are no longer entering the labour force to raise living standards but to maintain them. Currie et al. 1980, p.13) note in this context that:

What has happened in fact is an increase in what Marxists have termed the rate of exploitation. The need for two incomes in most contemporary working families means that three jobs are now being done for the price of one--two in the paid labour force, one unpaid in the home.

Currie's statistics describe the contribution to family income of working wives in the United States. Studies of family income in Britain point to the same conclusion. Data from the family expenditure Survey indicate that on average, wives' earnings at the end of the 1970's comprised 25% of family income, with one in three wives contributing between one-third and one-half of total family income (Land, Sept. 1981, p. 15).

As to the ideological transitions which have accompanied the entry of married women into paid work, Chafe (1972) suggests that in the immediate post-war period, the impact of inflation and the idea that wives were working to help their families helped legitimise the employment of married women. Certainly, since the war there have been some quite complex transformations in the ideology of women's appropriate position in society.
Immediately following the end of the war, women were exhorted to vacate the jobs they had held and return to the home. There was a decline in women's employment at this point but it was only very temporary. As women's labor force participation continued to rise in the 1950's, concern over the low birth-rate, and the quality of child-care surfaced in official and sociological publications, in such a way as to re-assert the importance of women's domestic role, and the possibly undesirable effects of married women's employment. (Chafe, 1977, p. 94). Thus, it would seem that there was a gap between what women were actually doing (entering the labour force in ever-increasing numbers) and the ideological representations of women's proper role as reflected in academic and government publications which emphasized women's role as wives and mothers.

In fact, the situation was more complex than this. Examining publications which deal with women workers points to an ongoing process during the 50's and '60's through which a particular kind of work role for women was legitimised, so that a 'dual role' as wife/mother and paid worker is promulgated, as not only tolerable but as bringing positive advantages to the economy, to families and to individuals. The 'dual role' of combining work and family responsibilities occurred at a time when the demand for female labour was high, and could not be met without recourse to married women. The literature of the period
reflects this need. Klein (1965, p. 82), for example, noted:

With single women being employed today at nearly the same rate as men, married women are the only untapped labour reserve in our society. It would therefore seem imperative to investigate the conditions under which this reserve can be drawn upon.

The particular form that the 'dual role' ideology took enabled married women to enter the labour force without overt challenges to prevailing ideas about the distribution of sex roles or the structure of the family. Thus women were encouraged to think of a life cycle in which work preceded child bearing and rearing, after which time, these responsibilities having been discharged, a return to paid employment would be both feasible and desirable. Part-time work was advocated as another 'solution' to the competing demands of work and family roles.

This new conception of women's appropriate role in society did not emerge fully-fledged in the 1950's. Rather, it should be seen as the site of considerable ideological struggle and resistance, in a process which is still ongoing. Debates over the desirability and propriety of married women's employment have historically provided some of the context for initiatives towards extending employment rights for women and continue to do so in a period of job scarcity. It should be noted that even at the height of the demand for women's labour, the primary emphasis in the 'dual role' approach is the structuring of women's lives to take into account the possibly conflicting demands of child care
and paid work, rather than on a restructuring of the work environment. Such an approach thereby justifies and reinforces the tendency to lower pay and lesser opportunities for women, by seeing them as the natural result of women's domestic responsibilities, rather than as the outcome of specific employment practices and assumptions.

To summarize, the literature shows a process during the 1950's and '60's in which both economic factors on both the supply-side and demand-side were conducive to the increasing participation of married women in paid employment, in which ideological transitions served to legitimate this increasing involvement whilst retaining a sense of the primacy of women's domestic responsibilities. However, while women have been increasingly incorporated into the labour force, their participation as a group is sharply differentiated from that of men with regard to earnings and occupational distribution. Women workers remain concentrated in a narrow range of occupations characterized more often than not by low pay and low status.

**Women's Wages and the Earnings Gap**

The wide gap between male and female earnings has remained fairly constant, and has even shown signs of widening slightly in recent years, despite the introduction of the Equal Pay and Sex Discrimination Acts. Tables 3 and 4 illustrate recent trends in male and female earnings, and show the degree of variation in the male-female differential according to sector of employment.
### Table 3.
**Women's average gross weekly earnings as a % of men's, by broad occupational grouping, selected years 1954-1968.**

<table>
<thead>
<tr>
<th>Year</th>
<th>Manual workers (all industries)</th>
<th>Administrative, technical clerical (private sector)</th>
<th>National/local government *</th>
</tr>
</thead>
<tbody>
<tr>
<td>1954</td>
<td>52.9</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1956</td>
<td>51.8</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1958</td>
<td>52.2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1960</td>
<td>50.0</td>
<td>53.1</td>
<td>65.1</td>
</tr>
<tr>
<td>1962</td>
<td>50.7</td>
<td>53.7</td>
<td>64.4</td>
</tr>
<tr>
<td>1964</td>
<td>49.4</td>
<td>53.5</td>
<td>64.9</td>
</tr>
<tr>
<td>1966</td>
<td>49.6</td>
<td>53.4</td>
<td>63.8</td>
</tr>
<tr>
<td>1968</td>
<td>49.1</td>
<td>52.9</td>
<td>69.9</td>
</tr>
</tbody>
</table>

(* This category includes administrative, technical and clerical workers in national and local government and the NHS, and teachers employed by local education authorities)  
(Source: Data recalculated from British Labour Statistics, 1970).

In assessing the relative differentials between men and women workers in the three broad categories shown above, it should be remembered that in 1953, equal pay for equal work was achieved in the teaching profession, and in 1955 the non-manual grades of the Civil Service were granted the right, in principle, to equal pay, with adjustments to be made in seven installments, the last in 1961. Despite the passage of the EqPA and its implementation from 1976 onwards, this differential between occupational sectors, as well as between men and women, has remained.
Table 4.
Women’s average gross weekly earnings as a % of men’s, by sector, selected years 1970-1980.

<table>
<thead>
<tr>
<th></th>
<th>All men and women</th>
<th>Non-manual</th>
<th>Manual</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Public</td>
<td>Private</td>
<td>Public</td>
</tr>
<tr>
<td>1970</td>
<td>65.9</td>
<td>48.1</td>
<td>59.5</td>
</tr>
<tr>
<td>1974</td>
<td>64.4</td>
<td>51.4</td>
<td>65.1</td>
</tr>
<tr>
<td>1976</td>
<td>72.1</td>
<td>56.8</td>
<td>66.6</td>
</tr>
<tr>
<td>1978</td>
<td>70.3</td>
<td>57.6</td>
<td>65.9</td>
</tr>
<tr>
<td>1980</td>
<td>69.3</td>
<td>57.8</td>
<td>64.9</td>
</tr>
</tbody>
</table>


In seeking to explain the earnings differential, it is necessary to note the effect of hours of work. The fact that women on full-time schedules tend to work less overtime than men, for a number of reasons, contributes to the earnings gap. Table 5 shows the differential between male and female earnings, calculated on the basis of hourly, rather than weekly or annual, earnings, and excluding the effects of overtime. Using these calculations, the earning gap is narrower than that which is based on a comparison of actual earnings over a given period of time.
Table 5. Women's hourly earnings as a % of men's, excluding the effect of overtime, for full-time workers, selected years.

<table>
<thead>
<tr>
<th></th>
<th>All Workers</th>
<th>Non-manual</th>
<th>Manual</th>
</tr>
</thead>
<tbody>
<tr>
<td>1975</td>
<td>73.0</td>
<td>63.6</td>
<td>68.9</td>
</tr>
<tr>
<td>1976</td>
<td>76.3</td>
<td>66.0</td>
<td>71.8</td>
</tr>
<tr>
<td>1978</td>
<td>75.1</td>
<td>64.4</td>
<td>73.0</td>
</tr>
<tr>
<td>1980</td>
<td>74.7</td>
<td>64.2</td>
<td>72.0</td>
</tr>
</tbody>
</table>


A more significant explanation of the differential is the tendency of women workers to be concentrated in lower-paying occupations than men. The EOC wryly points out that "one of the major causes of the low level of women's pay is that they work in low-paid occupations, though it is unclear which factor is the cause of the other." (EOC, 1979, p. 81).

The Sexual Structure of Occupations

The distribution of women across particular occupations is extremely uneven, since certain industries and occupations have traditionally constituted "women's work": textile and clothing industries, retailing, clerical work, personal service work, nursing, and schoolteaching, for example. This phenomenon of occupational segregation may be defined in terms of two distinct but not discrete features, horizontal and vertical segregation.

a) Horizontal Segregation

Horizontal segregation refers to the distribution of workers that results in a concentration of women in certain
sectors and occupations, men in others, out of proportion to their overall participation in the labour force. One measure of horizontal segregation is the degree to which a group of workers are concentrated in a relatively small number of occupational categories. Another measure can be devised by examining the sex ratio of individual occupations. In Britain, a recent study showed that three-quarters of all women workers were in the service sector, and of these women, 59% were employed in only three service industries. 1980 statistics show 54.6% of all female manual workers employed in catering, cleaning, hairdressing, and other personal services. Of non-manual women workers, 54.5% are employed in clerical and related fields, and another 25.1% may be accounted for in the fields of education, welfare and health (EOC, 1982, Appendix 7; 3b).

Other studies have indicated that while the sexual structure of individual occupations has changed over time, the overall degree of segregation is little changed. In fact, some areas show evidence of a trend towards greater concentration rather than less. Using data from the British population censuses between the years 1901 and 1971, Hakim (1978) attempts to evaluate the magnitude of change in degree of occupational segregation that has occurred in this period. Her findings illustrate the complexity of the subject, and the need for specificity rather than broad generalizations. There is some evidence of increased concentration:
In 1911 the proportion of women in clerical occupations, shop assistant and sales work was broadly comparable to their contribution to the labour force as a whole; by 1971 these occupations had become typically feminine. About three quarters of all clerical workers were women in 1971 compared to only 21% in 1911 (Hakim, 1978, p.1267).

Furthermore, the proportion of occupations in which women comprise 70% or more of the workforce increased slightly from 9% in 1901 to 12% in 1971. However, by looking at the percentage of women working in occupations that were dominated to varying degrees by workers of one sex, Hakim finds some decline in the degree of horizontal segregation in the period 1901-1961, a trend which was reversed from 1961-1971. A further measure of concentration shows a gradual decline in the degree of female over-representation, defined with reference to women as a percentage of the total labour force. She concludes:

In sum, there has been some degree of change in horizontal occupational segregation since the turn of the century, although the decline is not as marked as might be expected. But the pattern in 1961-1971 decade is unclear; the indicators show contradictory developments with both some increase and some decrease in occupational segregation (Hakim, 1978, p. 1266).

The one area in which women have most noticeably increased their participation in traditionally male-dominated employment has been that of the higher professional occupations. In the legal profession, for example, there has been a small but gradual increase in the number of women. In Britain, women were only 2% of practising solicitors in 1967/8. This had increased to 6.5% by 1977. The proportion of female barristers increased from
3.2% in 1955 to 8.7% in 1978 (EOC, March, 1978, pp. 14, 19). Although comparatively small numbers of women are involved in these changes, the high status of the professions concerned, and the potentially high rewards they offer, can lead to an exaggeration of the progress towards employment equality for women that such inroads represent. Hakim's (1978) study is concerned primarily with change over a long period. The contemporary figures make clear that whatever the marginal changes have been, the broad picture of a high degree of occupational segregation remains the same, with over 60% of British working women concentrated in ten occupations. At the top of this list is clerical work which accounts for 17.5% of women workers, followed by retailing, typing and secretarial work, cleaning, nursing, teaching, food service, clothing and textile work. By comparison, male workers are not concentrated in this way in a relatively small number of occupations, but perform a wide range of jobs, in all sectors of the economy (New Earnings Survey, 1981, Part E).

b. Vertical Segregation and Skill Labelling

Vertical segregation refers to the disproportionate distribution of workers within an occupation. There is a tendency for women to be concentrated in the lower levels of the organizational hierarchy. In industrial settings the job categories in which women are over-represented are most likely to be designated semi-skilled or unskilled, and in
the professions women also tend to be concentrated at the low-paying end of the scale.

This tendency for the proportion of women to diminish at the higher levels of income, status and responsibility is notable even in occupations where women are numerically predominant. The case of school-teaching provides a good example. In Britain, women in the teaching profession have received equal pay for equal work since 1963, and yet the average male teaching salary is higher than the average for women teachers because of the much greater proportion of men in the upper salary bands.

Table 6.

<table>
<thead>
<tr>
<th>Scale 1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>Senior Teacher</th>
<th>2nd. Deputy Master/ Mistress</th>
<th>Head Teacher</th>
</tr>
</thead>
<tbody>
<tr>
<td>Primary</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Men</td>
<td>13.3</td>
<td>30.9</td>
<td>9.4</td>
<td>0.2</td>
<td>-</td>
<td>0.4</td>
</tr>
<tr>
<td>Women</td>
<td>37.5</td>
<td>42.6</td>
<td>5.0</td>
<td>0.1</td>
<td>-</td>
<td>0.2</td>
</tr>
<tr>
<td>Total</td>
<td>31.9</td>
<td>39.9</td>
<td>6.0</td>
<td>0.1</td>
<td>-</td>
<td>0.3</td>
</tr>
<tr>
<td>Secondary</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Men</td>
<td>22.7</td>
<td>26.1</td>
<td>24.2</td>
<td>15.6</td>
<td>3.4</td>
<td>0.8</td>
</tr>
<tr>
<td>Women</td>
<td>41.7</td>
<td>30.5</td>
<td>16.9</td>
<td>5.5</td>
<td>0.9</td>
<td>1.8</td>
</tr>
<tr>
<td>Total</td>
<td>30.8</td>
<td>28.0</td>
<td>21.0</td>
<td>11.2</td>
<td>2.3</td>
<td>1.3</td>
</tr>
</tbody>
</table>


Vertical segregation also affects women in manual work. Hakin (1978) notes a trend towards greater segregation in this sector, with men increasingly over-represented in
work designated "skilled," and women contributing an increasing share of work labelled "unskilled" and "semi-skilled," which is lower-paid and lower status. The degree of segregation is often very marked; for example, in Britain, 72% of packers, labellers and related workers are women, while 84% of warehousemen and storekeepers are men, and in the textile industry 85% of winders and reelers are women while 93.5% of dyers are men (Hakim, 1978). "Skill" is not of course, an objective category, and some recent studies have pointed to the part that sex bias has played in the establishment of skill hierarchies in various occupations and industries (see e.g, Phillips and Taylor, 1980). This whole question is a complex one, with far-reaching ramifications in terms of equal pay and anti-discrimination initiatives, particularly in the areas of access to jobs in the skill hierarchy, and of value comparisons of male and female jobs.

II. Economic Explanation's of Women's Labour Market Position

The changing labour force participation rate of women, and the persistence of a male-female earnings gap are both topics which have been the focus of enquiry for economists of quite divergent perspectives. Amsden (1980) presents the major perspectives as falling into three broad categories: the human capital school, the institutional school, and perspectives which derive from Marxist conceptions and methodology. Siltanen (1981) similarly
categories the main perspectives as: human capital theory, labour market dualism, and explanations focussed on the concepts of de-skilling and the reserve army. While the two categorizations are not identical, they point to the same broad divisions in the literature. One distinction which sets the first two categories apart from the third is the degree to which human capital theory, and dualist or institutional approaches rely on the operation of the labour market alone as the basis for their explanations of women's position in that market; by comparison what are rather imprecisely described as Marxist approaches have in general paid more attention to the operation of historical factors, and their effect on the labour market, and to the inter-relationship of the relations of production with other structural and ideological variables.

The purpose of this section of the chapter is to argue that pure economic explanations cannot adequately account for the particular position that women occupy in the labour market, and that social and historical factors must play a past in developing a complete analysis of their present position. To this end, the section begins with a brief overview and critique of the theories of human capital and labour market dualism before proceeding to a discussion of some of the factors which historically have contributed to the way in which women's paid labour is constructed and defined. In discussing the historical and social factors and their relation to the position of women in paid
employment, I have referred to some of the works which exemplify both Amsden's (1980) and Siltanen's (1981) third category, but I have avoided adopting any of these approaches as a theoretical framework. Rather than making an argument for one of a number of competing approaches within the general rubric of Marxist scholarship, I have attempted to use examples of the literature to illuminate the factors external to the labour market which are crucial to a complete understanding of women's position in the labour market. To do more than that is beyond the scope of the present work.

a) Human Capital Theory

The human capital approach to understanding women's position in the labour market is firmly located within the neoclassical economic paradigm. To state it very simply, the main thrust of human capital theory as an explanation of wage differentials is through reference to productivity. Wages are viewed as a return to investments in human capital via the direct relationship between human capital and productivity. The analysis proceeds from the notion of investments that individuals make in their productive capacity (their human capital) through, for example, education and training. These investments have costs, but also produce returns in the form of higher wages. The male-female wage differential can therefore be explained by reference to the differences in human capital investment that men and women make.
Characteristic of this perspective is the work of Jacob Mincer, (Mincer, 1962; Mincer and Polachek, 1974). Mincer and Polachek's 1974 article provides an example of the classic formulation of the human capital perspective. Productivity between men and women is said to differ for two reasons: first, women on average spend proportionately fewer years in the labour force than men; and second, when women are working, the jobs they choose provide them with fewer opportunities to gain skills through training. Thus, relative to men, women have a lower investment in human capital, and their lower wages merely reflect this fact. Thus, human capital theory proceeds upon the assumption that other things being equal, the economy is indifferent to gender.

Critics have attacked a number of unresolved issues in human capital analyses. Amsden (1980) points out that human capital theories do not address the question of the extent to which low levels of human capital are the cause or effect of women's perceived inferior economic position. Blau and Jusenius (1976) note that while human capital analysis may account for the tendency of women to be in "low-skill occupations, they do not account for their concentration in a small number of occupations at different levels of skill. Bluestone (1977) points out that many of those who suffer from low wages and unemployment have a considerable amount of human capital. Siltanen (1981) notes that as an explanation of inequality, human capital theory is flawed.
inasmuch as it does not admit the structural constraints on individual choice. Most importantly, perhaps, human capital theorists have not been able in this empirical work to account for all the variance in male/female earnings. Amsden (1980 p. 17) points out that even controlling for job experience, Mincer and Polachek (1974) were still unable to account for a 20% differential in male and female earnings. Siltanen (1981) also argues that most empirical analyses based on human capital theory do not succeed in explaining statistically all of the male-female wage differentials.

b) Labour Market Dualism

Theories of labour market dualism attempt to answer the question of why in some cases productivity characteristics, such as age and experience, are not related to job allocation or wages by focussing on the institutional characteristics of labour markets. Two of the most prominent analyses using variants of this approach are Doeringer and Piore's (1971) dual labour market theory, and the radical interpretation of labour market segmentation of Reich, Gordon and Edwards (1973).

Dual labour market theory conceptualizes the labour force as operating in two quite different labour markets. The primary labour market is characterized by jobs with relatively high wages, good working conditions, employment stability, and chances of advancement. By contrast, jobs in the secondary market tend to have low wages and fringe benefits, poor working conditions, high labour turnover, and

The primary market is characterized by skill specificity and on the job training. Certain jobs act as ports of entry for the primary labour market, but once access is gained, promotion and wages are then determined by the internal labour market. By contrast, secondary markets either lack internal labour market structures or have underdeveloped ones.

Where the traditional and radical versions of labour market dualism differ is over the incentive forces which operate to maintain dual structures. Doeringer and Piore (1971) viewed employers as having an incentive to create a dual labour market structure both in terms of maximising the return on training and investment, and for reasons of trade cycle flexibility, where the secondary market acts as a buffer for the primary (Siltanen 1981 p. 30). Reich et al (1973) see the incentive in terms of the control over the labour force which comes from encouraging the development of hierarchies which effectively divide the labour force.

It is the notion of a divided labour force which gives dual labour market theory its special application to the analysis of women's wage labour. The characteristics of workers in the secondary sector, such as high turnover and relatively high rates of absenteeism are ones which are frequently attributed to women workers. While such characteristics are frequently explained by women's priority
of home and family over work, dual labour market theory suggests that they may more accurately be explained by women's concentration in the secondary sector. As Siltanen (1981) points out, the implication of drawing the distinction between the characteristics of work and workers, and analysing the relationship between them, is that women's decisions about paid employment may be viewed less as a choice between work and family and more as a reflection of their structural position.

While initially appealing, in its recognition of the constraints that operate on individual choice, dual labour market theory has nevertheless failed to provide a convincing analysis of women's labour market position. Barron and Norris (1976), for example, specifically addressed the relationship between the sexual division of labour and the operation of dualism in the British labour market. They list the attributes likely to characterize secondary workers, and argue that the same characteristics distinguish women workers from men, in general terms. However, Barron and Norris do not advance beyond a characterization of female wage labour as the evidence for women's concentration in the secondary labour market. Beechey (1978) correctly points out that their analysis approaches the tautological.

Siltanen (1981, p. 32) points out that three general critiques can be advanced regarding the adequacy of a dual labour market explanation of women's position in the labour
force: that once created, job structures are viewed in fairly static terms, which appears to ignore the empirical evidence of changes in both markets; that the focus is almost exclusively on the role of employers in creating and maintaining a dual system, which incorrectly ignores the role of organized labour's practices and policies; and that the approach does not generally address the differences in male and female wage labour within the primary and secondary markets, and that when it does, it tends to rely on sexism as an explanatory factor.

Of these three criticisms, the third is from a sociological standpoint the most relevant since it points to the problem that labour market dualism and human capital theory share, which is a tendency to use certain aspects of women's labour market position as an explanation rather than as the phenomenon to be explained.

The major problem with economic theories of discrimination is that they fail to focus adequately on the specificity of women's position as workers, and are consequently not helpful for the explanation of sex discrimination itself. An approach which is more productive of such an explanation is one which concentrates historically and sociologically on the constituent factors of women's relative economic disadvantage.

III. The Constituent Factors of Women's Position in the Labour Force

To understand the characteristics features of women's position in the labour force - low pay and concentration in a few predominantly female occupations - it is necessary
briefly to examine the historical context in which this configuration has arisen.

Pay

The underpayment of women relative to men is not a recent phenomenon nor one confined to the industrialized economy. Research has shown that where women worked for wages in the pre-industrial economy they routinely received lower wages than men. Boulding (1976, p. 24) cites examples for the fifteenth century that illustrate this fact.

In 1422 the scholars of Toulouse paid women grape pickers half what they paid men who only had to carry the full baskets back to the college cellar. The monks of Paris did the same. Women construction workers who worked side by side with men in building the College of Toulouse were paid far less for the same labour.

Historical accounts of women's work in the seventeenth and eighteenth centuries point to the continuing existence of this practice, and to the difficulties encountered by single women or widows in earning a subsistent living. Clark (1969, p. 9) indicates that spinning became the chief reserve for married women who were losing their hold on other industries but that its return in money value was too low to render them independent of other means of support. Tilley and Scott (1978 p. 45) cite wages of five sous a day for women spinners in France at the end of the seventeenth century whereas male weavers earned double that amount. As these examples indicate, there was, even in the pre-industrial economy, a correlation between a sexual division of labour and relatively lower pay for women's work,
although even where men and women did the same work, the women still received less pay.

To explain this persistent differential is less easy than to describe it but some weight must be given to the fact that the family economy, rather than the individual wage-earner, constituted the basic economic unit of society. Within this unit it seems likely that differences in payment to men and women, or children and adults reflected what Barrett refers to as "ideological definitions of the basic element of food consumption." (Barrett, 1980, p. 183).

Assumptions that wages should reflect the relative costs of subsistence seem to account in part for the lower wages paid women and children during the early period of industrialization. Hartmann (1976) emphasizes that the effect of the tradition of lower wages for women was intensified by the fact that women were less well organized than men. She attributes men's superior organizational ability to their position as heads of households and heads of production units in the pre-industrial system, positions reinforced by the state and religion. As evidence of this superior ability she cites the guild system in which men's trades were better organized than women's, and also the evidence of the rise of male professions and the elimination of female ones during the sixteenth and seventeenth centuries (Hartman, 1976).

Whatever the particular explanation for the undervaluing of women's work, what is important to note is
that women entered the transition to the wage economy with their work already undervalued relative to men's. Certain factors in the nineteenth century transformation of the social and economic order served to reinforce the phenomenon, particularly the intensification of the sexual division of labour and the organization of wage work into skill categories which correlate not only with pay but with the gender composition of the work force. However, it cannot be too strongly emphasized that both the gender division of labour and the prevalence of the practice of paying women less than men pre-date the transition to capitalism, and are not explained by it, although the pre-capitalist and later forms may be differentiated.

The Sexual Division of Labour

The sexual division of labour must be conceptualized as an object to be explained through further analysis rather than as a key in itself to the understanding of gender divisions (Edholm, Harris and Young, 1977). Until recently it has been a common practice to accept women's domestic role as given, and to base analyses of women's role in paid employment upon that premise. This approach ignores the need to examine the constituent factors in the structure of sex inequality. Because some women fulfill the biological role of bearing children, and the social role of rearing them does not in itself explain why 'men's jobs' and 'women's jobs' should be rigidly differentiated.
introduction of machinery, as a significant strategy for the increase of relative surplus value. Thus, this detailed division of labour, with its attendant effect of 'de-skilling' the workforce, must be seen as essential to capital accumulation.

To assert that a differentiated labour force is created by the economic requirements of capital accumulation, is not however to explain the particular position that women occupy in such a labour force. In a recent and influential article, Hartmann (1979) argues that Marx's theory of the development of capitalism explains the existence of a hierarchy of labour in the workforce, but not the processes which assign certain groups rather than others to a place at the bottom of the hierarchy.

Marx's theory of the development of capitalism is a theory of the development of 'empty places'... Just as capital creates these places indifferent to the individuals who fill them, the categories of Marxist analysis... do not explain why particular people fill particular places. Marxist categories, like capital itself, are sex-blind. (Hartman, 1979, p. 14).

The form that the division of labour takes then must be understood through reference to specific historical social relations, including those of gender. If the theoretical tendency of 'pure' capitalism would have been towards a homogenization of labour, and the eradication of arbitrary status differences, as Marx argued, then explanations of occupational segregation by sex, and the inferior position of women in the workforce must be sought through an
examination of gender relations (albeit as mediated and transformed in the process of capitalist development). 5

Historical accounts of women's work in the seventeenth and eighteenth centuries point to the existence of a well developed sex-based division of labour in the pre-capitalist household. The labour needs of the household defined the work roles of all members, men, women, and children. Although the specific form the family economy took might differ, it was in all instances based on an interdependence of work and residence, of household labour needs, subsistence requirements, and family relationships (Tilley and Scott, 1978, p. 12). Jobs within the household were differentiated as to age and sex as well as training and skill. The sexual division of labour began at quite an early age. Amongst young children there was often no differentiation between the tasks of the two sexes, but as they grew older, girls learned to assist their mothers and boys their fathers. Tilley and Scott emphasize the dependency of single women, within this system, noting that most single women belonged to households either as daughters or servants, and that whatever their age, they were regarded as dependants of the household in which they lived and worked. Thus, the only way for a woman to achieve a measure of economic security and adult status was to marry (Tilley and Scott, 1978, ch. 2).

Both urban and rural wives would either share in the husband's occupation, performing specific tasks within the productive process, or would have occupations of their own. Although women were not admitted to independent status
within craft gilds, the fact that widows were often capable of carrying on the trade formerly practised by a husband points to a fairly fluid division of labour. As household production gradually became 'capitalized' in the course of the sixteenth and seventeenth centuries, women's ability to practise the craft of their husbands became increasingly constrained. Alice Clark describes the impact of this process:

Under family industry the wife of every master craftsman became free of his gild and could share his work. But as the crafts became capitalized many journeymen never qualified as masters. As the journeymen worked on their master's premises it naturally followed that their wives were not associated with them in their work, and that apprenticeship became the only entrance to their trades. (Clark, 1969, p. 195).

Girls were seldom if ever admitted as apprentices, except in those trades which were practised exclusively by women, such as millinery.

The sexual division of labour was thus well-established in the pre-industrial economy in the context of what Eisenstein refers to as the "patriarchal structuring of sexual reproduction and mothering" (1980, p. 16) i.e., within a productive family unit which was hierarchically ordered on the basis of sex.

In her study of women's work in the nineteenth century London, Alexander (1976) concludes that the sexual division of labour in the period she studied reflects an intensification and rigidification of the division of labour in the pre-capitalist household. This intensification may be explained by reference to a number of factors. As production
moved into factories and away from home, a greater separation of male and female work occurred than had been the case in earlier periods. Where different jobs were performed by different sexes in the same location, there was a greater possibility of some fluidity in the division of labour, which was lost in the process of industrialization.

A second element in the establishment of a more rigid sexual division of labour was the development of 'protective legislation' which applied only to women and children. Some recent interpretations of such legislation have emphasized a 'capital logic' perspective, central to which is a focus on capital's interest in the renewal of labour power, and the difficulties inherent in combining waged work with reproduction. McIntosh (1978, p. 262) writes, for instance:

In the nineteenth century, it was a matter of great concern to the bourgeoisie that industry was working its labourers so hard and paying them so little that it exhausted them before the next generation was produced. No individual firm would benefit by stopping this but the state under pressure from the 'Ten Hours' movement, as well as from elements of the bourgeoisie was able to restrict hours of work, especially of women and children. . .

This analysis implies a contradiction between capital's immediate interest in the exploitation of labour, and a longer term collective interest in both the daily and generational reproduction of labour-power. This contradiction arises in the separation of home and work-place and the spread of wage-labour, and historically was met with attempts to confirm women's special responsibilities in the domestic and reproductive sphere.
Other interpretations have stressed the role of male workers in initiatives designed to limit women's labour force participation. A number of positions may be distinguished. As noted above, even in the pre-industrial period the practice of paying women lower wages than men was well established, and this persisted in the transition to industrial capitalism. Women workers therefore represented a real threat to male jobs and higher wage rates as they could be used as a cheap source of labour. The reaction of male workers to this threat was to attempt to exclude women from jobs where they would compete with men. That male workers with their superior organizational ability should have chosen exclusion of women, rather than organization of women, as the way to defend their own position requires some further explanation. Hartmann (1976) sees this position as the direct result of patriarchy:

That male workers viewed the employment of women as a threat to their jobs is not surprising, given an economic system where competition among workers was characteristic. ... But why their response was to exclude women rather than organize them is explained not by capitalism but by patriarchal relations between men and women: men wanted to assure that women would continue to perform the appropriate tasks at home. (Hartmann, 1976, p. 29)

Humphries (1981) refers to this view as a 'patriarchy first' position. Men attempt to exclude women from participation in the labour force, not only because of the real threat of competition for jobs, and lowered wages, but also because of the threat to male authority in the home.
that wage-earning wives and children represented. Thus, Hartmann (1979, p. 15-16) states:

> While the problem of cheap competition could have been solved by organizing the wage-earning women and youths, the problem of disrupted family life could not be. Men reserved union protection for men and argued for protective labour laws for women and children.

Humphries takes issue with this interpretation since she feels it overstates the case for viewing the working-class family solely as an agent of social control and as a means to male exploitation of female labour power. Humphries (1981, p. 4) offers an alternative interpretation of the family as "an institution which sometimes united working men and women around common interests and promoted social obligation." She notes:

> ...the payment of wages sufficient to maintain a wife and children, which Hartmann sees as the material basis for working men's exploitation of their wives and daughters. ...could, alternatively, be seen as the (imperfectly realized) historically specific goal of working-class men and women struggling in a hostile environment for a better life.

Humphries attempts to put the debate over protective legislation on an empirical footing through a study of the Royal Commission on the Employment of Children in Mines. This Commission's report prompted the 1842 Mines Regulation Act, which for the first time "limited the exploitation of a class of workers on the basis of gender." By examining the statements of colliers and their wives, Humphries comes to the conclusion that:

> ...in the coal mining context it cannot be argued that the male hewer was afraid that female competition would create unemployment, reduce male wages, and lower the standard of living for all.
and that:

The other strand of the 'patriarchy first' argument which derives working men's support for protective legislation from their desire to secure and retain privileged access to privatized domestic production is inconsistent with the reality of collier life. (Humphries, 1981, p. 28)

Without further research of this kind into various employment contexts, it would be difficult to generalize from this one example. As Humphries points out, the coal-mining labour process in the 1840's was to a large extent one of family labour, and this factor must be taken into account when considering the wider applicability of her conclusions.

Whatever the particular motivation for the passage of protective legislation in specific historical instances one factor that should be examined in any account is the ideological representation of women's role which made feasible their distinctive treatment in law. 'Capital logic' interpretations of restrictions on women's participation in paid labour focus on capital's long-term need for the reproduction of labour power and hence on women as mothers. 'Patriarchy first' interpretations stress the way in which men benefit from the domestic labour of women and the maintenance of male authority in the home, and the emphasis is more on the oppression of women as wives. In either case, a complete analysis must include an examination of the ideological basis for a form of regulation which treated women (and children) in the labour force quite differently from men.
Although a thorough investigation of cultural representations of the role of women lies outside the scope of this discussion, reference must be made to the way in which the "familial ideology of the emergent bourgeoisie" (Barrett, 1981, p. 204) was mobilized in support of the legal regulation of women's work. Barrett points out that, at an ideological level, the nineteenth century bourgeoisie secured a hegemonic definition of family life as 'naturally' based on close kinship, and properly organized through a male breadwinner with financially dependent wife and children (Barrett, 1981, p. 204). Such a family structure was idealized as a haven of privacy beyond the public realm of commerce and industry (Zaretsky, 1976; Foreman, 1977).

The distinction between the 'private' world of the family, and the 'public' domain is an important ideological construct which has served to obscure the relationship of domestic and waged labour. By equating women with the private realm, and by obscuring the relationship of domestic and waged labour, the distinction has also served to fragment women's experience and has had a significant bearing on the question of which aspects of that experience are thought to be the proper object of legal regulation in particular contexts. Eisenstein (1980, p. 19) is right to emphasize that although the public/private distinction does not originate with bourgeois society, it is redefined by it:

This distinction is not a development of bourgeois society but rather is inherent in the formation of state society itself... The domain of the state has always signified public life and this is distinguished...
in part from the private realm by differentiating men and women. Bourgeois society has its own particular way of re-wiring this patriarchal reality; the separation and differentiation of men and women.

In the course of the nineteenth century, this differentiation came to take the form of relegating women to the private sphere of home and family, (Eisenstein, 1980) despite the fact that some women have always worked outside the home, out of economic necessity, if nothing else (Land, 1980, p. 60). This ideological representation was reflected in the notion of the "family wage" paid to a male breadwinner and sufficient to maintain not only the worker himself but his wife and children. Land (1980, p. 75) notes that wage bargaining is often still based on the implicit assumption that men need higher wages than women because they have families to support.

Furthermore, the public/private distinction has continued to affect women's position in paid employment, even as married women have been incorporated as a permanent feature of the labour force, with accompanying ideological transitions in the public perception of women's role. While it is now commonly accepted that women will combine marriage, motherhood, and paid employment,7 the ideological representation of the domestic sphere as women's responsibility puts women at a disadvantage in the labour force through the assumption that their primary interests lie elsewhere. In practical terms, the need for married women to cope with the material reality of the responsibilities of the dual role as presently constructed,
The concept of skill resonates for both employers and workers, having implications for the control of production as well as for income (Braverman, 1974, Edwards, 1979). Early craft-based unions, from which women were generally excluded, were self-regulating organizations, limiting access to the acquisition of skill as a way of controlling entry to the occupation, and thus defending wages and living standards. Access to skill was associated with access to political organization and occupational self-defence (Coote and Campbell, 1982, p. 53). As employers sought to reduce their dependance on well-organized and higher paid male workers, one strategy was to break down the work of skilled individuals into a series of simplified discrete tasks which could be performed by lower paid workers, male or female. This process reduced the cost of labour to the employer while weakening the control of the skilled worker over the process of production (Braverman, 1974). In response, skilled workers attempted to defend their control over production, and to prevent the undermining of their earning power. Part of this defence rested on the defence of existing skill categories, and their extension to new labour processes.

This defence of skill categories became an integral part of the wage bargaining process, and concerned as it is with the preservation of differentials, it is shaped by the balance of power between different groups of workers, and is consequently productive of labour hierarchies within the
working class (Campbell and Coote, 1982, p. 54). Phillips and Taylor (1980, p. 79) argue that the classification of women's jobs as unskilled, and men's as semi-skilled or skilled frequently bears little relation to the actual amount of training or ability required for them, noting, "Skill definitions are saturated with sexual bias. The work of women is often deemed inferior simply because it is women who do it. . . Far from being an objective economic fact, skill is often an ideological category imposed on certain types of work by virtue of the sex and power of the workers who perform it."

Phillips and Taylor argue that the coincidence of women's labour and unskilled labour in the economy is not to be understood solely as the result of discriminatory training programmes or the burden on women of domestic responsibilities. Rather, the definitions must be seen as emerging from the transformation of jobs under capitalism, as part of the process of struggle between capital and workers, in which the powers of the workers themselves becomes a key factor in shaping and defining the work. In this process

... craft has been increasingly identified with masculinity, with the claims of the breadwinner, with the degree of union strength. Skill has been increasingly defined against women - skilled work is work that women don't do. . . The perpetuation of sexual hierarchy has been inextricably interwoven with the struggles against the real subordination to capital, as claims to skilled status have come to rely more and more on the sex of the workers and less and less on the nature of the job (Phillips and Taylor, 1980, p. 86).
The importance of this seminal article is that it directs attention to the problematic elements of definitions previously taken for granted, definitions which are at the heart of the wage bargaining process, and which must be challenged if equal pay legislation is to have any effect.

The purpose of this chapter has been to produce an historical and sociological account of the position of women in the labour force. This enterprise is crucial to a critical examination of anti-discrimination legislation because of its attempt to identify the constituent factors of women's disadvantage as workers.

The discussion presented here reveals that the salient features of women's position in the labour market are: a long-standing sexual division of labour, which over time has changed somewhat with regard to the areas in which women are concentrated, but which, overall, displays considerable stability; a historical tendency for women's pay to be lower than that of men, and for jobs which are performed predominantly by women to be labelled as unskilled or semi-skilled, rather than as skilled work; and an ideological representation of women's role in the home and the labour force, which continues, despite transitions over time, to assert the private sphere as a primary focus for women, regardless of their involvement in paid employment. Thus, materially and ideologically women and men stand in very different relations to the sphere of paid employment.
The question then arises of the capacity of legislation to affect these seemingly well-established structures and practices, and the values and ideological assumptions that accompany them. It must be asked to what extent the anti-discrimination legislation is based on an analysis of women's position in the labour market that would enable it to provide appropriate remedies for the problem it postulates. Only by first defining the dimensions of the structural position of women as paid workers is it possible to initiate a critical inquiry into the adequacy and relevance of core concepts and substantive provisions in the public response.
1 See Klein (1965); Ministry of Labour Gazette September, 1962; National Manpower Council (1957) (American economy), for examples.

2 Klein (1965 asserts the same interaction of supply and demand that Oppenheimer tests empirically, to explain the movement of married women into the labour force in Britain in the same period.

3 In presenting a brief overview of these perspectives I have drawn heavily on the excellent collection of articles edited by Alice H. Amsden, The Economics of Women and Work (Penguin, 1980) and on her succinct introduction to the topic in that volume.

4 A more sophisticated version of the radical approach postulates the existence of three rather than two distinct labour markets. See Edwards, 1979, Contested Terrain.

5 It should be emphasized here that the argument is not that capitalism itself creates the economic oppression of women; rather it is that the process of development in Western industrial nations has given a specific form to a pre-existing gender inequality.

6 This is not to suggest that the ideology of the public/private split was the sole reason or motivating force behind the demand for the family wage. Rather, the notion of the family wage was consistent, with a number of material and ideological factors. See Land (1980).

7 For an illustration of the common acceptance of this model, see the results of a survey conducted by a popular women's magazine, Options (May 1982, pp. 96-99).
CHAPTER THREE
THE EQUAL PAY ACT

This chapter and the following one provide an account of the development of public policy in the area of employment discrimination, as the basis for an examination of the substantive and procedural provisions of the Equal Pay Act of 1970, (EqPA) and the Sex Discrimination Act of 1975 (SDA).

Since both the emergence of legislation and the operation of legislative process are areas of enquiry which have received considerable attention from political scientists and sociologists, it is necessary to clarify the objectives of this examination and delimit its boundaries. The main emphasis in research on the emergence of legislation has traditionally included an implicit reliance on the paradigms of interest group politics (Grace and Wilkinson, 1978, p. 135). Such studies of "decision-making" attempt to delineate the relative power of various groups of social actors and social groups. While it would be incorrect to imply a heterogeneity of theoretical and methodological perspectives among studies
as divergent as those of Dahl (1961), Bachrach and Baratz (1962) and Lukes (1974), it is fair to say that at a broad level of generalization they are all concerned with power in policy-making.

While the approach adopted in this chapter and the next one appears to share some characteristics of these studies in its laws on the legislative process, the emphasis is not on power as such but on the development of the content of the legislation. The intention is to examine the way in which the course of development of public policy affected the approach to the issues of equality and discrimination that are reflected in the statutory provisions. Statutory definitions are not established in an ideological or political vacuum; both what the law includes, and what it omits evolve in a process which extends beyond the policy debates. The objective here is to provide a brief outline of that process as a means to furthering an understanding of the parameters of the legislation.

The principle of equal pay for equal work for men and women is one that has long been accepted, but implementation of the principle is another matter, and one which has been altogether more problematic. The right to equal pay and the rights to other equalities in employment are correctly viewed as being related aspects of the same problem, and since the passage of laws addressing just this question, those charged with implementing and enforcing the legislation
have tended to regard the legislation as a unified whole. This should not however obscure the fact that equal pay and equal employment opportunity legislation derive from very different sources. Equality of pay as a wage issue has been around for a long time, although it is only comparatively recently that its proponents turned to legislation as a way of achieving their objective. The idea of legislation to define and protect the rights of minorities in employment is a more recent development, with roots in the civil rights rather than the labour movement. Thus, the concepts which underlie the current legislation derive initially from quite distinct traditions. For this reason I have chosen to delineate the development of each piece of legislation in a separate chapter, before moving on to consider in the concluding chapter of Part I the implications of the legislation as a whole.

There are two major underlying themes in the analysis that follows. One is the separation of equal pay issues from other equal rights issues. The second is the impact of industrial relations voluntarism on the approach to equal pay.

As early as 1887 the Annual Conference of the Trades Union Congress (TUC) put on record its support for equal pay for men and women for equal work. Male trade unionists' support was however more likely to derive from the fear of wage-cutting and loss of male jobs as from a commitment to equality for women. The demand for
equal pay for equal work co-existed for many years in the trade union movement with demands for a "family wage" which would enable a married man to support a family without a wife in the paid labour force (Land, 1980). It also co-existed with support for other policies and practices that were directly exclusionary of women, such as the marriage bar (Banks, 1981), and apprenticeship requirements (Hinton, 1973).

The early years of the twentieth century saw the removal of legal disabilities of women in the Sex Disqualification (Removal) Act, and the granting of the franchise. These years also witnessed a coalition of feminists and women trade unionists around a broad range of social and economic interests. This coalition fell apart over the issue of protective legislation (Banks, 1981). During these years women in the Civil Service waged an intense but unsuccessful campaign for equal pay. After 1945, this campaign intensified, and resulted in partial success in 1954. The achievement of equal pay for non-industrial civil servants was not accompanied however by action to remove other inequalities in employment such as the marriage bar.

During the 1960s the campaign for equal pay in private industry was transformed into a demand for a legislative initiative. This campaign was not linked to the demand for a broader equal opportunities bill until 1969-70.\(^1\)
The result of this focus historically, on equal pay in isolation from equal opportunities has been to intensify those tendencies in the equal pay legislation which require women to be 'like' men in order to qualify for legal remedy. Historically the preferred definition of equal pay has been for equal work, not for work of equal value. Even when the TUC adopted the latter, it was very willing to compromise over the definition to be adopted in law. Adopting a definition that requires that men and women be performing the same or similar work in order to qualify for equal pay ignores the reality of widespread segregation by sex. If the campaign for equal pay had historically been accompanied by a campaign for equality of opportunity, it might have been harder to ignore that reality.

The transformation from collective bargaining to legal intervention provides the second theme of the chapter. Since the major equal pay campaign until the mid-1950s was in the public sector, the Government was necessarily involved, as an employer. Thus, the campaign had a public focus, but did not involve a challenge to the prevailing 'voluntarism' of labour relations. In the 1960s, however, with equal pay in the public sector a reality, but little progress in the private sector, calls for legislation were more frequently heard, at a time when government intervention in industrial relations was gradually becoming more acceptable to the trade union
movement. However, legal intervention in employment questions has taken place in Britain within a framework which is heavily dependent on the older voluntaristic model, and which preserves some of its key factors. This fact has had important consequences for the approach to the enforcement of the equal pay and sex discrimination legislation in Britain.

Since the themes emerge from a historical examination of the equal pay issue, this chapter is arranged chronologically. The first section deals with the campaign for equal pay in the public sector, the second with the development of a policy of legislative intervention, and the third with the emergence of a specific piece of legislation, in the late 1960s. The final section examines the substantive provisions of the statute.

I. Equal Pay in the Public Sector

The public story of the struggle for equal pay is, at least until the mid 1950s, the story primarily of attempts to establish equal pay in the Civil Service and in the teaching profession. In 1900, the British labour force was highly segmented by sex (Hakim, 1978), and so, despite a certain amount of support for equal pay for equal work in the trade union movement, the issue was not generally one which was particularly salient for large numbers of workers in the early years of the twentieth century. Male trade unionists espoused the
principle of equal pay as a defence against the threat of undercutting by women workers; protective legislation and exclusionary apprenticeship practices also served to diminish the extent to which women might compete with men over jobs or wages. The equal pay issue did come to the fore in war-time, when large numbers of women entered the labour force to undertake jobs previously performed only by men. During both the first and second world wars, the trade union movement took up the issue of the rate for the job, with renewed fervour, at least in part as a guarantee against dilution, and public interest in the matter was evidenced in both cases by the appointment of commissions to consider the relationship of men's and women's pay. However, it was the question of pay in the Civil Service and in teaching which provided the most constant focus of equal pay activity.

From 1914, when the Royal Commission on the Civil Service cautiously approved the principle of equal pay, "... insofar as the character and conditions of the work performed by women in the Civil Service approximate(s) to identity with the character and conditions of the work performed by men," (Equal Pay Campaign Committee, 1949, p. 1), constant efforts were made inside and outside Parliament to establish "the rate for the job" in the public services. That the public sector should have been the most significant area of activity is not surprising, in light of the composition of its workforce, and then
prevailing views on the role of the government in the regulation of the wage relation. From before the beginning of the century, men and women in the Civil Service, and in teaching were engaged in undeniably similar work, for which they received different rates of remuneration. Arguments about the basic justice of equal pay for equal work could be easily applied in these public service occupations since the equality of the jobs performed was unambiguous. Supporters of the equal pay principle also stressed that the government could give a lead to industry in this matter by establishing the practice of equal pay for its own employees. The report of a War Cabinet Committee on the wages of men and women stated for example: "That the Government should support the application to industry of the principle of 'Equal Pay for Equal Work' by applying it with the least possible delay to their own establishments . . ." (Equal Pay Campaign Committee, 1949, p. 1). In all subsequent discussions of equal pay in the public services, it was this definition of equal pay for equal work that was adopted or assumed. Since men and women civil servants were frequently occupied on work that was the same or very similar, the adoption of this approach was not perceived as problematic.

Despite periodic pressure in Parliament, no action to implement equal pay in the public services was taken during the 1920s or '30s, the Government pleading the
difficult financial situation of the country. Finally in 1944, an amendment to the Education Bill which would give equal pay to male and female teachers, was passed by the House of Commons, despite the opposition of the Government. The following day the then Prime Minister announced that the government would not accept the verdict of the Commons. Regarding the matter as a vote of confidence in the Government, the Prime Minister threatened resignation if the offending clause were not withdrawn. The amendment was withdrawn, but 161 M.P.s then signed a motion asking for an enquiry into the whole question of the rate for the job in the public services. A month later, the Prime Minister announced the setting up of a Royal Commission on Equal Pay, to consider, among other things, "the existing relationship between the remuneration of men and women in the public services" (Cole, 1946, p. 1).

The Commission was asked to consider the implications of the introduction of equal pay, but was not given a brief to make specific recommendations. Nevertheless, its report implied that women in local government, the Civil Service and teaching should receive equal pay for equal work. The Commission undertook a factual survey of wage rates and differentials in a number of areas of employment. The report showed that in the non-industrial Civil Service, the maximum of the women's scale for each grade was generally 80% of the men's scale, despite the fact that the peace-time job structure (as of 1939)
was such that three-fifths of all jobs were in grades in which both men and women were employed. Women teachers in England and Wales also received about 80% of the comparable male rate. In local government services, sex-based differentials were the norm before January 1945, although there were a few exceptional councils where equal pay was established. In January 1945, national scales for local government salaries were agreed upon, providing for equal pay in the administrative, technical and professional divisions, but allowing a 20% male/female differential in the clerical divisions.

The Royal Commission's guarded support for equal pay was based upon the recognition that the work performed by men and women in the public services was often directly comparable. Concerning the Civil Service, the report noted that "... over a big field, men and women (are) doing identical jobs, doing them equally well, and doing them for unequal pay. The simplicity of these conditions is in no other sphere of employment exactly reproduced" (Report of the Royal Commission, 1946, para. 75). In the teaching profession, the Commission held that "... the work done by men and women is ... on the whole equal: 'parallel' in the one-sex schools, 'equivalent' in the mixed" (Report of the Royal Commission, 1946, para. 83).

The majority report thus conditioned its support for equal pay in the Civil Service and in teaching on
the fact that the jobs done by men and women were
demonstrably equal. It rejected the introduction of
equal pay in private industry on the basis that the jobs
of men and women industrial workers were not capable of
being compared in this way\(^2\) (Labour Research Department,
1946, p. 1).

Following publication of the Royal Commission's
report, the Government announced its acceptance of the
justice of the claim for equal pay but declined to apply
the principle because of the cost involved, and the
consequences for the national economy (Equal Pay Campaign
Committee, 1949, p. 3).

The Royal Commission's report had included
tentative estimates of the cost of introducing equal
pay in the non-industrial public sector, but, in light
of the government's continuing refusal to establish equal
pay for its own employees, some of the justifications
advanced for the maintenance of unequal rates for men and
women are perhaps more instructive than the estimates
themselves. This is not to deny that there were no
financial considerations, but to suggest that they were
at the very least, compounded by views about working
women which were decidedly inimicable to the achievement
of equality.

The Minutes of Evidence to the Royal Commission
show for example, the representative of the Treasury
advancing arguments for the maintenance of the status quo,
on the basis of the different needs of men and women. There was, apparently, no injustice in paying women as a class less than men as a class, because their need was less. To illustrate this point, the Treasury spokesman offered the following observation:

... there is no injustice in the rates of our pay to women ... employing the ordinary fair relativity basis, and bearing in mind our view ... that the rates of pay for women in the Civil Service are adequate in themselves, looked at in isolation— if one forgets the male rate—and are equally adequate viewed in relation to the men's rate, on our view that current rates enable women to maintain a standard of living at least as high as that of their male colleagues. ... (Minutes of Evidence, 1945, 1445-8).

Consequently, the Treasury argued, equal pay for men and women would lead to inequities:

... with a woman Civil Servant and a man Civil Servant on the same level, the woman can afford to take more expensive holidays than the man. She can go abroad. The man has to go and dig in his garden or perhaps snatch a week at Southend. (Minutes of Evidence, 1945, 1449).

Thus all male employees were presumed to be "breadwinners" and all women employees were presumed to be free of dependents and working only for their own support. A spurious version of a needs-based theory of wages formed the basis of the Treasury argument. To this justification, based on the idea of the family wage the Treasury added a rationale based on market forces. The Treasury did not feel:
... able to offer, in the shape of taxpayers money, a higher rate than the market rate outside, even though not offering it involves the paradox that women in the Civil Service doing exactly the same work as men are getting less. (Minutes of Evidence, 1945, 1463).

In teaching too the pay offered was that considered necessary to attract a sufficient number of suitable men and women into the profession, and so again market rates were at the root of the problem. In 1918 a Departmental Committee on teachers pay had stated that "... in existing circumstances a scale of salaries which is adequate for women teachers is not adequate for men" (Equal Pay Campaign Committee, 1949, p. 3).

The combination of a moral argument about women's lesser needs with references to the operation of market forces in the determination of private sector wages, was not likely to be repudiated overnight by decision-makers in the Treasury just because the Government, after 1946, paid lip-service to the justice of the principle of equal pay. When arguments of financial stringency and the national interest could be adduced as reasons for delay, no other justifications for the status quo were needed and no action need be taken. This situation might conceivably have continued indefinitely, instead of for a mere nine years, in the absence of a sustained campaign to translate acceptance of the principle into practice. This campaign was conducted inside and outside Parliament, by a variety of special interest and labour organizations,
operating under the auspices of two rival umbrella groups, the Equal Pay Campaign Committee, and the Equal Pay Co-ordinating Committee. The first of these was set up in 1944, specifically to work for equal pay in the public service occupations. It grew out of a group that had worked to persuade the government to give equal compensation for war injuries to male and female civilians. Groups represented on the committee included women's professional organizations, like the British Federation of Business and Professional Women, the Women's Engineering Society, and the British Federation of University Women; small women-only unions, like the Association of Assistant Mistresses in Secondary Schools and the National Association of Women Civil Servants; and specifically feminist groups, including the Fawcett Society, the Open Door Council, and the Women's Freedom League. The Equal Pay Campaign Committee was associated with an Advisory Council, consisting of women's and 'mixed' organizations. Both the National Union of Teachers (NUT) and the National Association of Local Government Officers (NALGO) were represented on the Advisory Council at different times (NUT 1947-1949, and NALGO 1949-1954) but in general support for the Campaign Committee from the labour movement was not forthcoming, the large public service unions being closely associated with the rival Equal Pay Co-ordinating Committee (Potter, 1958).

This organization developed from the Equal Pay
Committee of the Staff Side of the National Whitley Council. The original committee was expanded to include representatives of the NUT, NALGO, and the London County Council (LCC) Staff Association. The Staff Side representatives on the National Whitley Council had pressed the government consistently since the 1920s to implement equal pay. Expansion of this committee to include representatives of the large public sector unions outside the scope of the National Whitley Council meant that action for equal pay in the public sector could be co-ordinated through an organization which lay within the mainstream of the labour movement. The Campaign Committee on the other hand, led from its inception by a (Conservative) M.P., was explicitly non-partisan with regard to party politics, and had its roots in the tradition of equal rights feminism (Potter, 1958).

The two committees were divided over policy issues, with the Campaign Committee prepared to accept nothing less than the immediate implementation of equal pay, in full, whereas the Co-ordinating Committee was prepared to consider the implementation of equal pay by gradual stages. Potter (1957) notes that, in addition to their policy differences, the two organizations also suffered the "mutual suspicion of the large and small unions in the same field." Nevertheless, while the Government continued to stall over equal pay, the two organizations co-operated to a certain extent, and both campaigned for equal pay for equal work
rather than adopting the 1951 ILO definition of equal pay for work of equal value.

In the trade union movement, considerable support for equal pay for equal work co-existed with the reluctance of the TUC leadership to press the Labour Government on the issue. Support was particularly strong in the Civil Service unions who had been involved for nearly thirty years in attempts to secure recognition and application of the equal pay principle. The experience of the war years brought the issue of equal pay for equal work back into the limelight for the trade union movement as a whole, with widespread substitution of women workers in male jobs. Delegates to both the TUC Annual Conferences and the Women's Conferences, expressed their support through the passage of resolutions favourable to the principle of equal pay and critical of the Government’s delaying tactics. The National Women's Advisory Committee was a bastion of support for equal pay and urged the TUC leadership to act on the Conference resolutions forwarded to it. The attitudes of the General Council do not seem to have reflected the movement as a whole, as expressed through conference resolutions and debates. Thus, while avowing support for the principle of equal pay, the General Council urged the trade union movement to support the policy of the Labour Government which was to delay implementing equal pay, in the national interest.
Despite the Government's position, there was considerable support for equal pay for Government employees among Members of Parliament. Since the 1920s supporters of equal pay had been able to muster enough Members in agreement with them to pass resolutions in the House of Commons urging Government action on the question of equal pay for its own employees (Equal Pay Campaign Committee, 1949, pp. 2-3). This support came from members of all three major parties. In the elections of 1950, 1951, and 1955, the Equal Pay Campaign Committee sent questionnaires to all candidates asking them to state their position on equal pay. After the 1951 election, it was able to report that there were 121 M.P.s who had indicated that they were prepared to take "active steps" to pursue the implementation of the principle (Potter, 1958, pp. 55-56). Supporters of equal pay in the House of Commons used parliamentary tactics to put pressure on the Government and to publicize the equal pay issue. Questions in the House, helped to keep the issue "live," as did the practice of introducing the subject in general debates. On 16 May 1952, the House of Commons, without division, passed a motion in favour of equal pay. On "Equal Pay Day," equal pay supporters put down twenty-five questions for oral answer before they were informed that no more would be accepted, and introduced a private members' bill under the Ten Minute Rule; "A Bill to establish the principle of Equal Pay" (Potter, 1958, p. 57).
Those campaigning on behalf of equal pay for government employees could draw upon a number of arguments to support their case: basic ideas of fairness and justice, the implied recommendations of the Royal Commission, the Government's admission of the justice of the claim, and international example. Several groups who presented evidence to the Royal Commission made reference to the fact that equal pay for civil servants and teachers was already accepted practice in many countries, and this theme was continued in the subsequent campaign. International organizations had also pronounced in favour of equal pay. After the first World War, the Treaty of Versailles had included an equal pay provision, and international organizations set up in the wake of World War II, also contained declarations on the equal pay principle. In 1948 the British Government signed the United Nations Declaration of Human Rights, Article 23, of which contained a stipulation on equal pay. In 1951, the International Labour Organization issued Convention 100, with its support for equal pay for work of equal value. These international examples were used by equal pay activists to strengthen the moral case for their campaign and to undermine opponents statements about the lack of feasibility in recommending implementation. (See e.g., Burton, 1947, Cole, 1946).

Spokesmen for both Labour and Conservative Governments explained their refusal to consider implementing equal pay for their own employees by reference to the
strain such an act would impose on a delicate economic situation. This was the initial reason given for delay, after publication of the Royal Commissions report, and it was repeated consistently until 1953, on any occasion when the issue was raised. That there were severe problems in the post-war economy cannot be disputed. That this factor was the sole reason for the long delay is untenable as an explanation. Policy-making consists after all in more than the tailoring of demands to purely economic or financial constraints. What is feasible reflects political priorities as well as economic considerations. The reluctance of both Labour and Conservative Governments to act on the implementation of equal pay was as much a question of the low priority of the issue as of the costs involved.

Why the equal pay issue had low priority for the governments of the period may be explained by reference to the general factor of the lack of salience of women's rights as a political issue in the post-war period, and by specific weaknesses in the equal pay campaign which derived from this. The early feminist tradition expressed both through the suffrage movement and in early women's labour organizations never completely died, but during the 1930s, '40s and '50s its influence in public life was insignificant (Banks, 1981, ch. 11). Feminist issues like equal pay were kept alive by the consistent and dedicated efforts of women activists, inside and
outside the trade union movement, but the question of women's rights generally lacked mass appeal or the backing of a broad-based movement. Seear (1974, p. 124), notes that "... it was commonly suggested that only a small group of professional women were anxious to alter the existing distribution of jobs. The movement as a whole lacked mass support and had no political power base."

Despite women's contribution to the war effort, the prevailing idea of women's proper role in the immediate post-war period was as wives and mothers. The end of the war also saw the end of the child-care facilities that had existed to encourage women to join the labour force. The domestic ideology reasserted itself as evidenced in the premises and assumptions underlying the provisions of the new welfare state legislation (Allatt, 1979). At a period when basic ideas about family, employment, and the role of the state were expressed in terms of a traditional male breadwinner and female dependent, and when the cause of women's rights was espoused only by a small minority, it is not surprising that the question of equal pay for women in public service occupations was accorded low priority status by governments.

An important corollary of the ideological context was the ensuing weakness in the equal pay campaign. Despite a good deal of traditional interest group activity, there were limits to the amount of pressure that could be brought to bear on the Government. During the 1940s
the TUC General Council was reluctant to pursue the matter actively, again reflecting the low salience of women's issues in the trade union movement as a whole. Support for equal pay amongst public service workers was not of the kind to be translated into the traditional kinds of militant industrial action, a tradition which was at the time quite alien to the unions involved. The records of the Equal Pay Advisory Council show that on at least two occasions the Equal Pay Campaign Committee was asked to consider organizing a token strike for equal pay amongst women workers. The Campaign Committee asked the constituent groups for their opinion and the response was disappointing (Potter, 1958, p. 62). The women workers involved were not sufficiently organized or determined to bring off such an action successfully. Neither were the large mixed unions represented on the Equal Pay Co-ordinating Committee noted for their strike activity.

In this context, it is easy to see why the government was able to stall for so long over the public services claim even though the matter was a relatively clear one involving only equal pay for equal work for some of the Government's own employees. There was thus no problem of determining comparability and no need for legislation to bring about the desired objectives.

By 1954, however, the Government's position changed, and the Chancellor announced the beginning of negotiations about implementation. There are a couple of factors
which might explain this reversal. First, an examination of the reports of the TUC General Council before and after 1951 indicates that the leadership of the trade union movement attempted to exert more influence on the Government in the latter period than the former. Whereas the leadership had declined to do more than pass on Conference resolutions to a Labour Chancellor, and had excused itself from involvement on the grounds that wage bargaining was the province of individual unions, it took a more active role in the equal pay campaign after the Conservative victory in the 1951 elections. After 1951, the General Council met each year with the Chancellor, to urge progress towards implementation of equal pay, and, in March 1954, made clear that the TUC wanted to see equal pay applied not only to civil servants, teachers, and local government employees, but also to workers in government industrial establishments (Report of the NWAC 1954).

In addition to increased pressure from the TUC leadership, the Government faced an intensification of the equal pay campaign, culminating in "Equal Pay Day" in March 1954, when a mass meeting was held in Central Hall, two large petitions supporting equal pay were presented to Parliament, and a private members bill was introduced.

Finally, Potter (1958, p. 64), plausibly attributes the timing of the agreement to begin
implementation to ". . . the competition between the two major parties as the General Election of 1955 drew near." Newspaper coverage for the period substantiates this interpretation. In January 1954, the Labour Party issued "Challenge to Britain" in which it set out the priorities for a Labour Government, should one be elected. This document called for immediate implementation of equal pay in the public services. Later in the month, an article in the Manchester Guardian noted that this Labour commitment had "speeded the race" for the party credit of introducing equal pay (Guardian, Jan. 22, 1954). Two months later "Equal Pay Day" demonstrated the extent to which the equal pay issue enjoyed popular support and in May 1954, the Chancellor announced that the Government was prepared to accept some degree of equal pay in the current year, and that negotiations would be started with the Whitley Council. In January 1955, he announced that an agreement had been reached that would be put into effect retroactively from the first day of the year which would introduce equal pay for equal work in the non-industrial civil service by instalments over a period of seven years (Potter, 1958, p. 64).

II. Equal Pay in the Private Sector: The Move Towards Legislative Intervention

The effects of achieving equal pay in the non-industrial civil service, through the 1955 plan for
gradual implementation, were quite limited and in many ways fell short of what had been hoped for or predicted, by either supporters or opponents. Some supporters of equal pay had hoped that the Government would set an example to private employers by applying the principle of equal pay in its own establishments. Equal pay in the public sector was not limited to the non-industrial grades of the civil service: teachers and local government workers also achieved equal pay on the same broad terms, and the nationalized industries began to move in the same direction. Public bodies like the British Transport Commission also established schemes for gradual implementation. However, the Government expressly excluded industrial civil servants from the equal pay agreement on the grounds that it was necessary to adhere to the 'fair wage' principle and to pay them according to the general practice for the trades concerned. Outside the non-industrial public sector, the impact of the 1955 agreement seems to have been minimal, if relative wage differentials are examined. In 1960, for example, when progress towards equal pay in the public services was nearly complete, women in national or local government were earning on average 65.1% of men's weekly earnings, compared with a figure of 53.1% for women administrative, technical, and clerical workers in the private sector. For manual workers in all industries women's average weekly earnings were 50% of men's.

Creighton (1979, p. 126) notes:
there is no evidence that the introduction of equal pay in the public service has been used as the basis of claims for equality in the private sector. Many civil servants do not have equivalents in the private sector. Of those that do, most are either exclusively female preserves where comparability does not arise, or else they have professional or quasi-professional status where there is equal pay anyway.

Direct comparability was not however the only issue, although it is certainly the case that the definition of equal pay for equal work that formed the basis of the public sector limited its application in spheres of employment where occupational segregation by sex was common.

In March 1954, the TUC had indicated to the Chancellor that it would like to see equal pay extended to all government employees, but no attempt was made to use the achievements of 1955 as the basis of a further campaign to press for this objective. Both the Equal Pay Campaign Committee and the Equal Pay Co-ordinating Committee disbanded when the agreement for gradual implementation of equal pay for the non-industrial grades was reached. Parliamentary activity on equal pay also subsided. There are only two references to equal pay in the records of the House of Commons, in the period up to 1964, and both of these cases concern points of detail on the application of equal pay in the Civil Service. Creighton (1979, p. 127), attributes this lapse in activity to the fact that the campaign in the public services was:
... largely an attempt by the middle and professional classes to preserve their status and standards of living by securing themselves the same degree of equality of remuneration within the public service as they already enjoyed outside it.

Thus, when parity was achieved, there was no need of further action and the campaign fell apart. This diagnosis of middle class self interest directed towards limited objectives is plausible but only as a partial explanation. It is also necessary to consider prevailing attitudes towards the means of achieving equal pay to understand the apparent hiatus in the second half of the 1950s.

ILO Convention 100, published in 1951 in support of the principle of equal pay for work of equal value, identifies a number of paths to pay parity: national laws or regulations, legally established or recognized machinery for wage determination and collective bargaining between workers and employers (ILO, 1951). Historically, it is the last of these methods which has been preferred by governments and trade unions in Britain, and not until the 1960s was there any appreciable shift in opinion towards state intervention on equal pay.

Since equal pay was achieved in the public sector through the normal processes of negotiation, with the Government involved in the proceedings only as an employer, the question of whether legislation was an appropriate or desirable way of securing equal pay did not arise, and the discussions of the period make little
mention of the matter. The TUC came out in favour of a legislative solution to the problem of pay inequalities in 1963: earlier instances of support for legislation are scattered and represent what was very much a minority viewpoint.

The opposition of the TUC to legislation as a means of achieving equal pay derived from its traditional reliance on a system of free sectional collective bargaining, in which wage issues were decided between employers and the individual unions concerned, with a minimum of interference by any other party. Thus, the Royal Commission could state in its report that "not even organized labour wants equal pay by government action." Despite the legacy of voluntarism, there were some supporters of legislation in the labour movement. The 1944 annual Women's Conference passed a resolution calling on the TUC and the trade unions organizing women "... to press by legislation and trade union agreements" for recognition of the principle of equal pay. In evidence to the Royal Commission the President of the AEU, Jack Tanner, expressed a preference for a voluntary approach to equal pay, but implied that support for a Government initiative might be forthcoming if the voluntary approach failed:

(Chairman) ... do I understand that you would wish legislative action to be taken by the Government as regards industry and commerce?
(Tanner) No. I think I would prefer the Government to adopt equal pay as a principle which would be a lead to employers, and we would negotiate it through the ordinary machinery that exists in the industry. Failing the employers responding then we might look to the Government to do something about it. (Minutes of Evidence, 3 Aug. 1945, 3422).

Throughout the 1950s the TUC maintained that the route to equal pay lay in greater trade union organization amongst women workers, and the negotiation of equal pay through collective bargaining. The Report of the National Women's Advisory Council to the 1956 Annual Women's Conference reports the General Council as stating that the negotiation of equal pay in industry and in Government industrial establishments was "primarily the responsibility of the unions concerned" (NWAC, 1956, p. ?). However, at a meeting with the Minister of Labour in November 1961, members of the TUC Economic Committee urged the Government to ratify ILO Convention 100. They said that they recognized that such an action would entail the passage of legislation to ensure the full implementation of equal pay and to meet the Convention's criteria, but considered this necessary if progress were to be made. The Conservative Minister rejected their arguments on the grounds that legislation would represent a complete change of policy as equal pay had always been regarded as a matter for collective bargaining (Ministry of Labour, 28 Nov. 1961). Two years later, the need for legislation was formally recognized at the Annual Conference of the TUC, which
passed a resolution calling for the ratification of Convention 100, and for a legislative initiative to facilitate the achievement of equal pay within a specified period of time (TUC, Annual Conference Report, 1963).

This change in attitude was indicative of a broader change in the attitudes of trade unionists to state intervention in industrial relations. Between the mid-1940s and the mid-1960s there had been successive attempts by Labour and Conservative governments directly to influence the course of wages and salaries, and the legacy of voluntarism had therefore already been modified by the reality of government/labour relations in the post-war period.

In addition to this greater receptivity to the broad idea of legislative intervention, the equal pay issue appears to have been increasing in importance by the early 1960s at the same time that studies revealed the limited gains achieved through collective bargaining.

The increasing attention paid to the equal pay issue in the trade union movement must be seen as reflective of significant changes in the composition of the post-war labour force. Women accounted for nearly all the post-war growth in the labour force, and were concentrated in those occupations and industries which were the source of greatest growth in trade union membership. Women activists in the trade union movement had continued, throughout the 1950s, to battle with the TUC leadership on the question of
equal pay, and the chances of pressing the equal pay issue in the labour movement were probably better than they ever had been, with women entering the labour force in numbers that were unprecedented for the peacetime economy. At the same time, there was evidence from a TUC survey of 1960/61 that the traditional reliance on collective bargaining as a route to equal pay had resulted in little real progress (Workers Educational Association, 1972, p. 6).

The transition to support for legislative intervention in the trade union movement was of crucial importance, but the degree of transformation should not be over-stated. Legislative intervention in this and other employment issues was to take place within a specific framework, which guaranteed the representation of trade union and management interests through the incorporation of their personnel, in industrial relations machinery, and which enshrined the methods of voluntarism at the heart of the new system.

The movement towards legislation to establish equal pay through legislation received a boost when a Labour Government was elected in 1964. Banks (1981, p. 218) notes that:

... whether because of its sympathy for feminist ambitions or its democratic basis, there is little doubt that women's groups and auxiliaries had much more influence on the policy of the Labour Party than similar groups within the two other main parties.
The party's 1964 General Election manifesto contained a commitment to equal pay for equal work as part of a 'Charter of Rights' for employees. The Queens Speech in 1964 did not, however, contain any mention of equal pay, and the TUC General Council began almost immediately to press the Labour Government to fulfill its campaign promise (TUC, 1966, p. 6). The Government's initial response to the TUC's request that they move towards fulfilling their manifesto promise was that the full implementation of equal pay would be a "task of very great magnitude, involving important and complex economic and social issues" (TUC, 1965, p. 3). For the next four years there was a good deal of talk about these issues and very little progress towards equal pay. In addition to the complexity of the issue, a further reason for delay was to be found in the over-riding objectives of the prices and incomes policy. The government insisted that any progress on the equal pay issue must occur within the 'ceilings' set by the incomes policy. Despite the Labour Party's manifesto commitment to the introduction of equal pay spokesmen for the Government constantly referred to the problems of the nation's economic situation as an unfortunate but necessary reason to delay action on equal pay. Recourse was had to the time-honoured method of forestalling action, the establishment of committees and working parties to study the question in hand.
In April 1966, the Minister wrote to representatives of the TUC and the Confederation of British Industry (CBI) and invited them to meet with him to discuss the problems involved in implementing equal pay (TUC, 1967, p. 3). In July 1966, members of these organizations met with government representatives and agreed to set up a tripartite working party on equal pay. The committee was given a brief to discuss four problems that the Minister of Labour identified as particularly important: the definition of equal pay to be adopted, the method of implementation, the cost of introducing equal pay, and the timing of its introduction (TUC, 1967, p. 3).

By the end of 1967, the committee issued its recommendations. The conclusions reached by the group were that as far as definitions of equal pay were concerned, debate could be limited to those offered in the Treaty of Rome, and in Convention 100. The group expressed a preference for voluntary methods of achieving equal pay, subject to the TUC's call for certain minimum conditions being laid down, to ensure action. Ethel Chipchase, chairman (sic) of the NWAC explained

... we much prefer voluntary methods because something that is done voluntarily in collective bargaining between unions and employers is better than something that is imposed by legislation. On the other hand, we considered that there would need to be legislation to give the Government powers to bring into line employers who refuse to co-operate on a voluntary basis. (Report of the NWAC, 1968, p. 7.)
Although, at the request of the Minister, the actual report of this working party was not made public, it was widely known that there had been considerable disagreement between the representatives of the TUC and the CBI, particularly over the questions of the definition of equal pay and the appropriateness of legislation (TUC, 1968, p. 7). After completing its initial report, the working party was asked to undertake a further study of the cost implications for various sections of industry of the application of equal pay. The TUC agreed to accept the definition of equal pay for equal work as the basis for this study, but without prejudice to its stated preference for a definition based on equal value (TUC, 1968, p. 7). The working party made slow progress with this task, and in July 1968 the Secretary of State for Employment asked that the matter be treated with greater urgency.

During 1968, the campaign for equal pay intensified, and while the Government continued to insist that progress towards equal pay be made within the prices and incomes policy, a commitment was given in June 1968, to begin talks with both sides of industry to lead to the implementation of equal pay in not more than seven years. Since this was five years longer than the time scale advocated by the TUC, this commitment appeared to represent yet another mechanism for delay. One year later, however, Barbara Castle, as Secretary of State for Employment gave a firm commitment to introduce legislation in the next
Parliamentary session. It seems that the National Joint Action Campaign for Women's Rights (NJACWER) played a crucial role in convincing Mrs. Castle of the need for urgent action on equal pay (Lewenhak, 1977, pp. 286-7).

Evidence published in two reports in 1968, also lent weight to the claims of equal pay advocates, by illustrating just how disadvantaged women were in the labour force. The report of the Donovan Commission, although concerned primarily with an examination of trade unions and industrial relations, included statistics which demonstrated clearly how women were discriminated against in industry. A similar picture emerged from a report by the National Council of Labour Women (Labour Party, 1968). Banks (1981, p. 222) suggests that the fact that 1968 was both Human Rights Year and the fiftieth anniversary of the suffrage campaign also served to focus attention on equal rights for women as a political issue. Supporters of equal pay legislation could also point to international examples to strengthen their case for Government action. The United States had introduced federal equal pay legislation in 1963, and the various countries of the European Economic Community had a number of regulations designed to comply with the requirements of the Treaty of Rome's provisions on equal pay. With the leadership of both the Labour and Conservative parties committed to taking Britain into the EEC, this particular comparison carried considerable weight. It also serves to explain
the bipartisan nature of the support for equal pay legislation, despite a firm preference by the CBI for voluntary methods. The Labour Government, at the beginning of 1970 had to be approaching the end of its term of office, and election considerations doubtlessly blurred the lines of the incomes policy, and provided a spur to action on an issue which had widespread popular support.

A rather more Machiavellian suggestion is discussed by Blackman (1970, p. 114), who notes that:

... there has been some suggestion that the timing of the Equal Pay Bill could play an important part in soft-pedalling the demand, which was growing, in favour of a minimum wage for all workers.

Blackman asserts that the trade union movement in general and the TGWU in particular saw the minimum wage as the most important long-term solution to the problem of the low-paid workers, who had not benefited from the incomes policy in the way the Government had claimed they would. Women workers accounted for a large proportion of the low-paid. Blackman continues: "Legislation for equal pay it is argued will take care of this group to some extent in the next six years and so remove one of the planks from under the movement for the minimum wage (Blackman, 1970, p. 115). Certainly trade union disillusionment with the incomes policy was growing by the beginning of 1970, and this dissatisfaction was of greater significance, the closer the Government came to seeking
re-election. This view of the correlation between the demands to take action on low pay, and for equal pay, is given some credence by subsequent developments in incomes strategies. During the 1970s the format of the low pay strategy that was developed according to the National Board for Prices and Incomes guidelines arguably defused the radical potential of the coupling of low pay with women's pay. Segal (1982) argues that instead of mobilizing a strategy to deal with the symmetry of women and poverty, it ratified women's relative position, by comparing women's pay with that of other low-paid women, or concluding that the Equal Pay Act would solve the problem.

The long process which finally resulted in the introduction of equal pay legislation in 1970 is not just of historical interest. It shaped the attitudes of policy makers and the form and content of the legislation in a number of ways. First, the long history is almost entirely one of trade union involvement, and the issue in the 1960s continued to be seen as primarily a collective bargaining issue. The move towards legislation was something of a last resort, when voluntary methods failed. Second, although women activists in the trade union movement were a militant force for equal pay, the leadership historically was prepared to soft-pedal the issue in the interests of issues held to be more important. The Labour Government too, while supporting the principle, stalled for six years before introducing legislation. These attitudes
also indicate a relatively weak commitment to legislative intervention.

Finally, the long history of equal pay campaigns was conducted almost entirely in terms of the concept of equal pay for equal work. The original reason for trade union support of the principle was the protection of male rates of pay, an issue that only arose when men and women were employed on the same job. The campaign for equal pay in the Civil Service and teaching did not necessitate any broader approach than equal pay for equal work since men and women in these occupations were demonstrably engaged in the same work. Although the trade union movement adopted the ILO definition of equal pay for work of equal value at its 1963 Annual Conference, and argued for this definition in the tripartite committee, it does not appear to have pressed the issue forcefully on the Labour Government, agreeing for example, to work with the narrower definition alone for the purpose of estimating the cost of implementation. This historical supremacy of the equal pay for equal work definition facilitated the adoption of a similar, only slightly broader, approach in the statute.

The extra-Parliamentary history discussed above is important as it served to delimit the parameters of Parliamentary debate on the issue of equal pay legislation. In particular, the discussions which had taken place within the tripartite study group had served to identify the 'sticking points' of the representatives of both the TUC
and the CBI. The proposals that the government introduced incorporated a series of compromises brought to its attention before the Parliamentary debates in the meetings of the Committee. As such, the tenor of the debates and the fact that the legislation aroused little opposition should not serve to obscure the range of possible responses to the implementation of equal pay through legislation, nor the fact that some very real differences of opinion existed on questions of central importance.

III. Equal Pay: The Policy Debates in Parliament

Before the Government introduced its equal pay legislation in Parliament, both sides of industry had come to accept the principle of such legislation. The trade union movement had pressed for the introduction of such a statute, whereas the CBI continued to favour voluntary methods. Nevertheless, with the Conservative party as well as Labour eager to join the European Economic Community, and with the attendant need to comply with the Treaty of Rome with regard to equal pay, there was little serious opposition to the principle of legislation, and support for the legislation was forthcoming from all three major parties.

The question of equal pay did not appear in either of the Conservative Party's manifestoes, of 1964, or 1966, but in a document entitled 'Fair Shares for the Fair Sex' published in 1969, the party did pledge to discuss the
issue with trade unions and employers in the life of the next Conservative Government. Public opinion polls showed an overwhelming majority in favour of equal pay, and in this context it is not at all surprising to find expressions of support for equal pay legislation from all major parties once the Government had introduced its proposals in Parliament. Objections to the idea of equal pay were confined to speeches from the Conservative back-benches, and even in that quarter represented what was a minority viewpoint in the party. Turn out for the debates on the equal pay bill was poor; at both the Second and Third Readings, speakers commented on the sparse attendance in the House. The low turn out illustrates that if there were opponents of the legislation among the absentees they did not feel strongly enough about the issue to participate in the Parliamentary debates. The uncontroversial nature of the measure was also reflected in the small amount of press coverage it received; the passage of the bill through its Committee stage, for example, appears to have gone unremarked in the media.

At the Second Reading of the Bill, the Conservative Opposition expressed broad support for the proposals while detailing points of criticism that would receive further attention at the Committee stage. Speaking for the Opposition, Robert Carr outlined his party's major objections to specific provisions and omissions in the Bill. He listed "the silence of the Bill on the vital question of
equality of opportunity in employment," "the rigidity of the timing" for the introduction of equal pay, points of procedural detail, the powers of Ministerial intervention, in the interim period before implementation, the failure of the Bill to remove restrictions on night work for women, the Bill's omission of pensions, taxation and social services issues, the exclusion of the Armed Services from the scope of the Bill's coverage (H.C. Debs., 9 Feb. 1970, c.c. 935-940).

Our general criticism is that the content and spirit of the Bill seem to be based too much on the proposition that the principal enemy of equal pay is the employer. In fact, the main enemies to equality of employment opportunity and pay for women are convention and male prejudice, both conscious and subconscious. (H.E. Debs., 9 Feb. 1970, c. 940).

Objections to the legislation in its entirety from two Tory backbenchers represented an insignificant minority viewpoint which pointed to the ideological chasm between the corporate modern Conservatism of the Front Bench, as opposed to the entrenched laissez-faire imperatives of some of the party's backbenchers. Only two speakers expressed opposition to the idea of equal pay or the appropriateness of legislation to establish it. The way in which those attitudes was expressed illustrates the distance between these speakers and the prevailing attitudes of the Opposition front Bench on this issue. Ronald Bell, for example objected to the proposals on the grounds of injustice, expediency, and the
inappropriateness of a legislative solution. Bell outlined his objections in some detail, using arguments similar to those set out in the majority report of the Royal Commission, some twenty-five years earlier:

On the ground of injustice, at present there are no legal barriers to . . . limiting the opportunity or the level of remuneration that a woman can receive in any occupation. . . . Since there are no legal barriers, there is surely a presumption that the market mirrors the truth. (H.C. Debs., 9 Feb. 1970, c. 960).

Bell's arguments on the injustice of the legislation were based on assumptions that men's work is often "worth more" than that of women, and that "men carry, and must always carry, the main economic burden of the community." He predicted that the result of the bill would be the depression of the common rate of pay, leading to a system of massive family allowances (H.C. Debs., 9 Feb. 1970, c. 966). This argument is practically identical with those advanced by the opponents of equal pay in the 1930s and '40s. By 1970, it was, however, an isolated minority position. It serves nevertheless to highlight how far removed from that traditional position was the Opposition Front Bench. Robert Carr for example, addressing the question of the role of legislation, stated:

It is a legitimate function of the law to put on record the judgement of the community about what is fair and reasonable. It is also a useful and legitimate function of the law in practical terms, because law does form opinion and influence behaviour.

Whilst I strongly believe that pay and conditions of work should be negotiated by collective
bargaining and by personal negotiation where collective bargaining . . . does not apply, and that bargaining should be free of State intervention, it is right that the bargaining should take place within a framework of general rules laid down in a code of civil law. (H. C. Debs., 9 Feb. 1970, c. 932).

Similar views on the role of legislation were expressed by those speaking on behalf of the Government, Labour and Conservative backbenchers, and the spokesman for the Liberal party. Speaking for the Government, Barbara Castle, Secretary of State for Employment noted that although there was a role for government intervention in establishing equal pay, the extent to which law could be useful was limited: "Legislation cannot cover every possible development, and in any case it is no part of my job to make it unnecessary for women to join a trade union. . . . This bill does all the law can do" (H. C. Debs., 9 Feb. 1970, c. 929). In a similar vein Dr. M. Winstanley, speaking for the Liberal Party stated:

The purpose of the bill is to establish a climate or to change the climate rather as was the purpose of the Race Relations Bill. . . . It is necessary to change attitudes and to get men at long last to regard women as people too. . . . I accept that the law will not of itself achieve this kind of equality . . . but having the right law could do something. (H. C. Debs., 9 Feb. 1970, c. 992).

As Dr. Winstanley made explicit, the attitude towards the role of legislation expressed by speakers in Parliament was essentially the same as that which underlay support for legislation in the area of race discrimination.
A key characteristic of this approach appears to be a symbolic role of public policy as 'putting on record' a normative statement of what constitutes reasonable behaviour. It is expected that the role of law will be limited, either because the problem is to change attitudes, as in Dr. Winstanley's formulation, (and it is assumed that it is difficult to change attitudes) or, as implied by both the Conservative and Labour spokespersons, because some issues must be resolved by the 'normal' processes of collective bargaining. What is implied here is that other methods of achieving an objective are to be preferred over legal intervention, which is of necessity limited in its impact, in dealing in the difficult area of attitudes and opinions. This attitude is reflected particularly in the approach to enforcement of the legislation. (See Chapter 6 below.)

Since there was an apparent multi-party consensus on the appropriate role of legislation in this field, it is not surprising that the Parliamentary proceedings engendered so little opposition or debate. The bill was sent to Committee unopposed and without a division in the House.

In Committee, both the Conservative group and the Labour left attempted to introduce amendments to the bill, and the government accepted some criticisms from each side. However, the Bill which was returned to the House on Report, and which was given a Third Reading without
dissent, was little changed in essentials from the original proposals. The definition of equal pay, and the timetable for implementation remained the same as those set out in the Second Reading. The fact that there was no serious challenge on these issues reflects the fact that the Government proposals already represented a compromise position between those advocated by the TUC and the CBI. Amendments were made in Committee but these were largely concerned with the clarification of meaning, and the Government did not give way, either to the Opposition, or to its own backbenchers on any major points (H.C. Debs., 22 April 1970, c. c. 543-4, 23 April 1970, c. c. 717-752).

However, its position was sufficiently flexible to engender an attitude of mutual respect on both sides of the Committee. Speakers of all shades of Parliamentary opinion represented on the Committee paid tribute, at the Third Reading, to the way in which the Bill had passed through the House. Robert Carr stated that:

I should like to pay tribute to the Undersecretary (of State, for Employment) who has played a leading part in Committee and whose great care and constructive response to Amendments were so much appreciated. (H.C. Debs., 23 April 1970, c. 754).

Barbara Castle remarked:

We are all agreed that this has been a remarkable occasion in the sense that we had an exceptionally harmonious committee stage. There has been no blood and thunder, no great clashes, no filibustering, just constructive points, many of which we have met. (H.C. Debs., 23 April 1970, c. 770).
Harold Walker also remarked on the co-operative spirit of the Committee, stating:

... improvements (in the Bill) reflect the constructive efforts ... of both sides of the House and both sides of the Committee. Inevitably, at times sectional or political interests intruded in our discussions and perhaps divided us, but on the whole our work has been carried out in a general atmosphere of good will ... .

... there have been those ... who felt we were not going far enough nor fast enough ... but at the same time there have been some who would have preferred a less radical, slower moving set of proposals and ... this reinforces the view that we probably have the balance about right. (H.C. Debs., 23 April 1970, c. 753).

Renee Short who had proposed changes to strengthen the Bill, also spoke of the Committee in favourable terms:

... the Opposition ... Members on the Committee also played a great part and it was a real pleasure to be with them on that Committee. I hope that all Bills which go through the House will have such a pleasant and amicable passage. (H.C. Debs., 23 April 1970, c. 757).

That the proceedings appeared to be so harmonious should not obscure the fact that there were some real disagreements over the timing of implementation, and the definition of equal pay that was to be adopted. The latter in particular has had significant consequences for the subsequent impact of the Equal Pay Act. The issues of the timing of implementation, and the definition of equal pay, generated discussion in the Parliamentary proceedings, but resulted in few changes in the Labour Government's proposals. The fact that the Government had made a number of compromises prior to the introduction of its
proposals, should not however lead to the impression that there were no realistic or viable alternatives to the form that the proposals took.

a) The cost and timing of implementation

In the initial discussions between the TUC, the CBI and representatives of the Government, the question of the period necessary to introduce equal pay through legislation led to disagreement between the employers's representatives and the trades unionists. The CBI felt that a period of seven years would be necessary for industry to make an orderly adjustment to any equal pay legislation, whereas the TUC wanted full implementation in two years. The Government saw its own proposed timetable as a compromise between these two alternatives. At the Bill's Second Reading, Barbara Castle described the alternatives that had been put forward, and the Government's reason for choosing a period of five years for implementation:

... the TUC has urged me to make the period two years, while the CBI has argued ... that in view of the economic effect of equal pay on certain woman-intensive industries, I ought to allow a period of seven years. ... Seven years is too long for women to wait for this basic fact of justice. Besides, if we were to enter the Common Market, we would be expected to catch up more quickly than that with other members of the Community. (H.C. Debs., 9 Feb. 1970, c. 923-4).

The Government rejected the CBI's proposal that some firms
or industries be exempted from the proposed schedule for the introduction of equal pay:

We do not think it necessary . . . to exempt particular firms or industries from this timetable to give them a longer breathing space on the grounds that the cost to them will be higher. . . . It is important that the firms which have the most catching up to do should not be allowed to drag their feet to the detriment of firms which are facing up to their social obligations. (H.C. Debs., 9 Feb. 1970, c. 925).

Peter Walker pointed out that there were also technical reasons for rejecting the CBI's proposal:

We think that five years is sufficient time for any industry to make this adjustment. . . . But there is also the technical difficulty that, if particular industries or firms were to be exempted the Bill would have to lay down criteria for selecting them. . . . Even if we thought the time scale was inadequate, the technicalities . . . would forbid such a provision. (H.C. Debs., 9 Feb. 1970, c. 1031).

In answer to critics who felt that the five year period was too long the Minister resorted to an argument based on voluntarism:

... there is nothing to prevent any firm that can afford it from negotiating the earlier introduction of full equal pay— and nothing to prevent any union from pressing it as some already have. If the unions are prepared to give women higher priority in their wage claims, no-one will be more delighted than I. (H.C. Debs., 9 Feb. 1970, c. 926).

That such a course was unlikely was pointed out by Renee Short, whose prediction was borne out by progress towards equal pay in the period up to January 1976.7 Short pointed out that:
unless pressure is applied by the Government and a lead is given by the Government, employers will not readily move towards equal pay. They have been content until now to use women as cheap labour in industry and the trade unions have not applied sufficient pressure to compel them to reach equal pay. (H.C. Debs., 9 Feb. 1970, c. 988).

At the Report stage of the Bill, a further attempt was made by the advocates of early implementation, to make provision for mandatory progress towards equal pay, in stages, through the mechanism of Ministerial Orders. Renee Short put forward the arguments for this position in debate on Amendments 31 and 32. These Amendments were similar to ones proposed at the Committee stage, which "would have had the effect of bringing forward the operative date to 1972 from 1975." These Amendments were not carried in Committee, whereupon those Members advocating implementation before 1975, sought to establish increased powers for the Secretary of State to make Orders requiring progress in the interim period. Clause 8 of the Bill set out a timetable for such Orders to be made. Renee Short proposed instead that the Secretary of State should have the power to make these Orders "as and when she feels they are necessary instead of being tied to the timetable in the Clause," since "there is always the risk that some employers will not implement equal pay in the spirit intended by the House but will drag their feet and create difficulties and obstacles" (H.C. Debs., 23 April 1970, c. 747).

The Government spokesman in rejecting the proposed
Amendments set out the same arguments as had been heard in Committee:

We resisted the provision of an intermediate stage, because we took the view that employers in conjunction with the unions should have freedom in working out arrangements . . . which are suited to the circumstances of the particular industries and firms. This flexibility will be lost if an intermediate stage is laid down in the Bill as firm and mandatory. (H.C. Debs., 23 April, c. 749).

A second practical point which had to be considered in the Government's view was the ability of the industrial tribunals to cope with the additional workload engendered by the introduction of a mandatory intermediate stage (H.C. Debs., ibid.).

The Opposition shared the Government's concern to maintain flexibility in the implementation of equal pay, since "circumstances vary enormously throughout industry, and no one pretends that equal pay will not be very expensive and inflationary" (H.C. Debs., 23 April 1970, c. 750).

The Government's response to this criticism from the Left was to propose Amendment 33 to the Bill, which made provision for a Ministerial Order to be issued, to bring women's rates of pay up to 90% of men's rates by the end of 1973. This target of 90% was based upon the erroneous belief that "women's rates at present average about 80% of men's rates" and that therefore "raising the proportion to 90% seems to be a reasonable objective if any Order is needed by the end of 1973" (H.C. Debs.,
23 April 1970, c. 749). This Amendment became law, as Section Nine of the Equal Pay Act of 1970.

The question of the period of implementation was linked during the Parliamentary debates to that of the cost of introducing equal pay, although the financial and economic implications were discussed in a desultory fashion, in the absence of reliable or consistent estimates of what the costs would be. Cost seems to have appeared as a rationale for the timetable for implementation that the Government had chosen. The Conservative Front Bench seemed more concerned with the question of who should bear the cost of introducing equal pay than with estimates of overall costs, whereas the Government's other critics saw the cost issue as one that was fundamentally irrelevant to any discussion of the implementation of equal pay, except inasmuch as they indicated the magnitude of the problem.

The Government's estimate of the cost of introducing equal pay was an increase of £3½% in the national Bill for wages and salaries over the five year period it proposed for the phasing in of the legislation, "something we can certainly assimilate at a time of rising productivity" (H.C. Debs., 9 Feb. 1970, c. 927).

Robert Carr for the Opposition Front Bench mentioned the question of costs only in the context of some general remarks about the need for more accurate estimates than those that were then currently available, and the importance of achieving equal pay within the confines of a general
policy of wage restraint (H.C. Debs., 9 Feb. 1970, c. 933). This reflected the hope that the redistributive effects of an equal pay policy might be financed through the foregone or withheld wage claims of male workers, rather than through an absolute increase in labour costs to employers, a point of view which was, understandably, badly received by the TUC. Lena Jeger urged immediate implementation of the proposals for the Government's own employees, stating, "I do not care how much it would cost, because the bigger the cost, the bigger has been the forced subsidy which underpaid women have been giving to industry through the centuries," (H.C. Debs., 9 Feb 1970, c. 970), and in the same vein Dr. Shirley Summerskill said:

We have heard much about the cost of this Bill, but is not the cost an indication of how women have been exploited, of how they have subsidized their employers for so many years? The employers should be grateful that the increase is not retrospective. (H.C. Debs., 9 Feb. 1970, c. 978).

Phillip Holland (C. Carlton) remarked:

I take the view that the forecasts (of cost) are irrelevant because I believe them to be wholly unreliable. . . . Even if the forecasts were reasonably accurate I should still regard them as an argument for, rather than against, equality of pay . . . a substantial difference between men's and women's rates of pay for the same work must imply that employers and trade unionists alike have taken advantage of the weaker bargaining power of women employees. . . . (H.C. Debs., 9 Feb. 1970, c. 980).

The CBI arrived at an independent assessment of the likely costs of introducing equal pay, which they set at
between 5½% and 6½% of the total national wage and salary bill. The Government estimate was in the region of 3½%. It is not possible to account for the discrepancy since the CBI did not make public the basis for its investigation, nor the way in which it arrived at its figures. Speaking for the Government, at the close of the Bill's Second Reading, Peter Walker agreed that it was not possible to reach a thoroughly reliable accurate assessment of the future situation but he added, "Equally, I share the view . . . that . . . whatever its cost the principle of equal pay must be carried out. Cost is not an important deterrent" (H.C. Debs., 9 Feb. 1970, c. 1034).

In an article on the introduction of equal pay, the Economist noted that "Compared with the usual average wage increase, the price of equal pay does not look unreasonable" (Economist, 31 Jan. 1970). This judgement from a conservative and business-oriented journal goes some way to illuminating the lack of interest in the question of costs evidenced either by the Government or, more significantly, by the Conservative party. It is also worth noting, to set the issue in context, that the Government's estimates for the cost of introducing minimum wage legislation amounted to 10% of Gross National Product (H.C. Debs., 9 Feb. 1970, c. 1035).

The estimated impact on total labour costs of the introduction of equal pay depended in fact to a much greater extent on the definition of equal pay that
was to be used than on the time scale for implementation although, interestingly, the impact on costs of a broad definition was seldom the focus of discussion, which was limited, in any case to the opposing definitions of the Treaty of Rome and the ILO, and the particular compromise offered by the Government.

b) Defining equal pay

Equal pay historically has been defined in one of two ways, either with regard to equal work, or with regard to work of equal value. The first of these definitions is the one which the Treaty of Rome adopted and which the trade union movement had historically supported; it was this definition that was at the heart of the campaign for equal pay in the public sector. By the time of the tripartite discussions on equal pay, however, the trade union leadership had come to prefer the principle of equal pay for work of equal value.

Equal pay for work of equal value has received increasing attention since ILO Convention 100, 1951, which used this definition as the basis of its recommended approach to equal pay. Equal pay supporters in Britain expressed a preference for this definition as the one to be embodied in any legislative initiative, but were defeated in their efforts. Opposition to the definition focused, overtly, on the problems associated with establishing comparability.
In the debates that took place in Parliament on the definition of equal pay, surprisingly little was actually discussed. Debate was limited to what were seen as the two opposing definitions of the Treaty of Rome, and the ILO, but the ramifications of each were not thoroughly explored: there was no serious discussion of ways in which an equal value approach might be implemented, if that were the definition of preference. In fact, as in other issues to do with the proposed legislation, the Government saw its proposals as a compromise between competing alternatives, and displayed little inclination to make amendments. Some members of the Labour Party, and the spokesman for the Liberals expressed a desire to use the equal value approach, but they represented a minority group. The Conservatives seemed to accept the Government's approach to equal pay as a reasonable, one, and focused their criticisms on the continued existence of protective legislation for women, which they regarded as anomalous in the face of Government action to introduce equal pay.

During the Second Reading of the Bill, the Secretary of State for Employment gave an explanation of how the Government had chosen its approach to the question of defining equal pay:

When my predecessor in this job . . . started his discussions with both sides of industry on the implementation of equal pay . . . it seemed as if this problem of definition might prove insoluble.
The CBI was all in favour of the definition embodied in the Treaty of Rome: "Equal pay for the same work" but the TUC emphatically rejected this as inadequate. The TUC wanted the ILO Convention definition: "Equal pay for work of equal value" which the CBI rejected in turn as being far too open-ended and indefinite. . . .

"Equal pay for the same work" is so restrictive that it would merely impinge on those women, very much in the minority, who work side by side with men on identical work, while, equally, the ILO definition is far from satisfactory. . . . The phrase "Equal pay for work of equal value" is too abstract a concept to embody in legislation without further interpretation. . . .

The definitions that we have been offered so far have been too restrictive or too vague. . . . It is for this reason the Government decided that they must look at old definitions afresh. . . . (H.C. Debs., 9 Feb. 1970, c. 915-917).

The Minister explained that the aim of the Bill was "to eradicate discrimination in pay in specific identifiable situations." She proceeded to describe the three situations that the Bill would cover.

The first situation is where men and women are doing the same or "broadly similar" work, not only in the same establishment but in different establishments of the same employer where these are covered by common terms and conditions. The second is where they are doing jobs . . . which have been found to be equivalent under a scheme of job evaluation. The third is where their terms and conditions of employment are laid down in collective agreements, statutory wages orders or employers pay structures.

This three-pronged approach does all that can be done in legislation. . . . It gets away from abstractions . . . and brings equal pay out of the debating room and into recognisable situations . . . and into the black and white of pay agreements. (H.C. Debs., 9 Feb. 1970, c. 917).

Equality was to extend not only to wages, but to "terms and conditions of employment," " . . . women must get
equal treatment not only in rates of pay, but in sickness and holiday schemes, payments in kind, and any type of bonus rates" (H.C. Debs., 9 Feb. 1970, c. 921).

Some members of the Labour and Liberal parties would have preferred the legislation to use the equal value definition. Christopher Norwood, a Labour member and a longstanding equal pay activist, expressed disappointment over the approach embodied in the Government's proposals. His own Private Member's equal pay bill introduced in 1969, had called for "equal pay for equal work and for work of equal value" and he felt that a definition based on work that was the same or 'broadly similar' was "not sufficient" (H.C. Debs., 9 Feb. 1970, c. 1001). Dr. Michael Winstanley, a Liberal, referred to a conference on equal pay organized by the Liberal Women's Federation which had adopted the equal value approach in preference to any other, and stated that:

We believe that the only acceptable definition is the ILO definition. We believe that because of its effect on women's work and pay, and for economic reasons, the crux of the problem . . . is the existence of two almost entirely separate labour markets, one for men and one for women, with a small overlap area. . . . Improved job opportunity is more important for women than equal pay. . . . Equal pay for work of equal value does not in itself create new opportunities, but at least it does not increase the existing obstacles. (H.C. Debs., 9 Feb. 1970, c. 996).

Conservative Members spoke favourably of the approach to equal pay contained in the Conservative Party's 1947 "Industrial Charter," but appeared to be
I like our own definition in the "Industrial Charter"--one rate for the job provided that the services rendered and the results achieved by men and women are the same. . . . Most women would be very happy to be adjudged in the results achieved. . . . Payment by results formed 8.9% . . . of men's pay, and 12% . . . of women's pay. So we are quite used to having payment by results as quite a large component of our take-home pay.

Coming to the alternative definition of equal pay--equal pay for jobs of equal value--it is doubtful whether this definition could ever be properly implemented. . . . It is just not possible to have a total job evaluation of all jobs done in this country. . . . One therefore has to attempt to find some compromise solution. (H.C. Debs., 9 Feb. 1970, c. 1026).

Referring to the particular compromise proposed by the Government, Thatcher noted that "If it is not quite right doubtless it can be amended in Committee" (ibid.).

The Conservatives reserved the main thrust of their criticism for what they perceived as a contradiction in enacting an equal pay bill without removing the special protections offered to women by other pieces of legislation. Robert Carr, for example, for the Conservative Front Bench, criticised "the failure of the Bill to remove some of the present restrictions and inequalities affecting the employment of women." He continued:

. . . I have in mind particular Section 6 of the Factories Act regarding the control of night shift working. . . . We believe that changes should be made, perhaps not in this Bill but
concurrently, not only in the name of fairness . . . but also for the purpose of achieving the Bill's intentions. (H.C. Debs., 9 Feb. 1970, c. 939).

Similarly, Jill Knight, a Conservative backbencher, supported the view that if women wanted equality, then they could not at the same time demand special privileges. She quoted, approvingly, an article on equal pay from the February, 1970, magazine of the Suffragette Fellowship, which concluded that "It is little use for women to claim equal pay and equal opportunities if they also ask for privileges on hours of work and maternity leave, etc. . . . ." Knight agreed that:

It is only just, fair and right for women to adopt that attitude in their battles. I do not want to claim any special privileges. I want to be judged on an equal footing with a man in terms of my ability to do a job. (H.C. Debs., 9 Feb. 1970, c. 973).


During the Committee stage of the Bill, equal value, and job evaluation as a means to determining comparability, were discussed at length. Trade union M.P.s on the committee led by Renee Short, argued for an equal value definition of equal pay, but the Government and the Conservatives remained implacably opposed to the suggestion that the definition of equal pay should be
extended in this way. Objections were often couched in terms of the impracticable nature of the equal value approach, but other statements make clear that the opposition was one of substance, as well as procedural difficulty.

At one meeting of the Committee, Joan Quennell, a Conservative Member, expressed her disagreement with the wording of the Clause which set out the grounds for determining whether a woman would be eligible for pay equal to that of a male worker. She argued that the phrase "if, but only if" (employed on the same or similar work as a man) built into the Clause an inference that a woman's work was not likely to be equal to that of a man, and had "a rather offensive connotation." In answering this point, the Under-Secretary of State for Employment not only defended the Government's wording but made quite clear that it had explicitly rejected any extension of equal pay, beyond the limits it had set out in its proposals:

(the phrase) has been put in very deliberately indeed, and its purpose is to limit the scope of the reference to the circumstance in which a woman might be regarded as being employed on like work. . . . Without the words "but only if," it could be argued that there might be circumstances other than those described here in which a woman could be regarded as employed on like work such as if she was employed on work requiring the same degree of skill, or even work which was of a different nature. (Standing Committee H, Official Report, 10th March 1970).

Although some Labour members pressed the Government unsuccessfully on the equal value definition, they
spoke in favour of the Bill's approach at the Third Reading. Renee Short described the approach in the Government's bill at that point as being "broader and better" than the ILO definition "because it provides more leeway" (H.C. Debs., 23 Apr. 1970, c. 158). The Conservative spokesman also expressed agreement "... what is said in the Bill about broad comparability is on the whole right" (H.C. Debs., 23 Apr. 1970, c. 750).

Thus, the definition that the Government first put forward remained essentially unchanged and formed the basis for the Equal Pay Act that was passed in 1970, with an implementation date of 1976. The definition was later to be amended, in 1984, but for the first eight years of implementation, it was the 'like work' approach which provided the touchstone for the validity of equal pay claims under the Act.

IV. Substantive provisions of the Act

The main substantive provisions of the Equal Pay Act are contained in Section 1, which sets out the requirement of equal treatment for men and women in the same employment.

Under Section 1 (1), employers are required to give equal treatment to men and women, as regards terms and conditions of employment, for men and women employed on "like work," or on work "rated as equivalent." Where men and women are employed on like work, the statute
requires that "the terms and conditions of one sex are not in any respect less favourable than those of the other" (s. 1 [1] a). In situations where men and women are employed on work rated as equivalent, the requirement is for equal treatment as to terms and conditions whenever the terms and conditions of both are determined by the rating of their work. Section 1 specifically provides that its terms, and those of Section 2, apply equally to men and women.

Section 1 (2) provides that when a woman is employed in Great Britain it shall be a term of the contract that she shall be given equal treatment with men in the same employment. Section 1 (3) provides for an implied term of contract to operate where a woman is employed under a contract which does not satisfy the requirements of Section 1 (2).

Section 1 (4) defines 'like work.' The definition's essential elements are employment or work "of the same or a broadly similar nature," where differences, if any, "are not of practical importance in relation to terms and conditions of employment." The statute provides a guideline to the interpretation of this provision, stating that regard shall be had not only to the nature and extent of differences, but to the frequency with which they occur in practice.

Section 1 (5) covers equal pay in the context of job evaluation, providing that women are to be regarded
as employed on equivalent work with men if the jobs have been given on equal value in a job evaluation study, or would have been given an equal value but for the study's setting different values for men and women for the same demands made on them, under categories like effort, skill, or decision.

Section 2 (1) sets out the procedures for individual enforcement of the Act, through applications to industrial tribunals. Section 2 (5) provides for arrears of pay in a successful claim to be limited to a period of two years before the date on which proceedings were instituted. Section 2 (6) sets out a defence to an equal pay claim, providing for the employer to show that differences complained of are "genuinely due to a material difference (other than the difference of sex)."

Section 3 governs equal pay in the context of collective agreements and pay structures providing for reference to the Industrial Court (later the Central Arbitration Committee) of any collective agreement which "contains any provision applying specifically to men only or women only," (S. 3 [1]). The Court is then to amend the agreement, to extend to both men and women any provisions previously applying only to one sex, in such a way as to make the terms no less favourable for either sex than before the amendment (S. 3 [4]). Agreements can be referred by a party or by the Secretary of State, (S. 3 [1]).
Section 4 mirrors the provisions of Section 3, but applies them to wages regulation orders. Section 5 governs agricultural wage orders specifically. Section 6 sets out the exclusions from coverage of the Act for terms and conditions arising from the operation of protective legislation, for special treatment associated with maternity or childbirth, and for terms and conditions relating to marriage, death, or retirement.

The remaining sections govern a service pay and police pay (Sections 7 and 8 respectively) and progress towards implementation in the interim period before commencement of the Act (Sections 9 and 10).

Conclusion

Perhaps the most salient fact that emerges from an examination of the development of public policy in the area of equal pay for women is how little attention was paid to the question of how inequality in wages between men and women arises. Rather than proceeding from a critical analysis of the factors which constitute this particular example of gender inequality, public policy takes as its starting premise the fact that men and women, performing the same or similar jobs, are treated differently with regard to pay. To do the former would have required at least an understanding of the way in which, historically, "women's work" has been undervalued, and of the practices
which have sustained this process; an examination of the factors which build and sustain occupational segregation and an examination of the wage/hours nexus and the way in which it operates in the context of women's dual role. To proceed from such an examination points the way to a different kind of legislative intervention from that which constitutes the EqPA. Ultimately, the EqPA rejected the notion that women are different from men, that women's present position in the labour force is one that is specifically determined by their experience as a group, distinct from the experience of male workers as a group. The focus of the EqPA was narrow. For women who are 'like' men, in the workplace, it offered equal treatment in the workplace, with respect to the terms and conditions of employment. As such, the legislation took as given the categories of 'men' and 'women' as workers, and reconstituted women's 'rights' only to the extent that women could demonstrate their similarity to men.

Second, the legislation was passed as a response to the perceived failure of collective bargaining. Equal pay was defined primarily as an industrial relations issue, despite the title of the EqPA "An Act to prevent discrimination, as regards terms and conditions of employment, between men and women." Thus the interests of the TUC and CBI were weighted by the Government in deciding upon the major provisions of the Act, and the arbitration and grievance structures of the system of industrial
relations were incorporated into the Act, as the means of implementation. Since the legislation was only perceived to be necessary because of the failure of collective bargaining to achieve equal pay, the incorporation into the Act of an implementation system which guaranteed the representation of labour and management interests appears to place extraordinary, and perhaps misguided, faith in representatives of those groups to penetrate the industrial practices which so often denied women equal pay.

Although the EqPA did nothing to address the problem of the low wages associated with occupational segregation, it was hoped that a broader equal opportunity bill might provide something of a remedy. At the time of the passage of the EqPA there were calls for the statute to be supplemented with legislation to prohibit discrimination in employment, an intervention considered by feminists to be necessary if the pay legislation were not to be counter-productive. Such legislation would also further the goal of breaking down the pervasive pattern of sex segregation in employment, and would therefore in the long term minimize the impact of one of the constituent factors in women's pay inequality. The next chapter provides an account of the development of public policy in this area.
NOTES

1 This is not to suggest that there was no awareness of the need to link the campaign for equal pay to a demand for broader initiatives against discrimination, but only that the two were not operationalized together in a broad-based campaign until the late 1960s. For evidence of the concern of women trade unionists over equal opportunities see, for example, the Reports of the National Women's Advisory Committee of the TUC, 1947-8, 1954, 1963. Also see Lewenhak 1977, pp. 234-5.

2 The tendency to equate comparability with identicality persisted into the debates over the 1970 Equal Pay Act, and although modified in the Legislation the notion of comparing like with like remained the basis of the statute until the 1984 amendment allowing claims of equal pay for work of equal value.

3 This generalization is based upon a study of the Reports of the National Women's Advisory Committee, and the Reports and Agendas of the Annual Conference of the TUC, for the years 1945-1954.

4 See e.g., Report of the National Women's Committee 1948-9, 1951, 1954.

5 The TUC General Council's Economic Committee conveyed this response to the National Women's Advisory Committee. See e.g., Report of the NWAC, 1947-8. The TUC also affirmed its support for the Government's policy in its 1947 "Interim Report on the Economic Situation."

6 See Chapter Two, Table 3.
7See the discussion of progress during the interim period in the Office of Manpower Economics 1972 report on implementation (HMSO, 1972). Also see the study by Snell et al. (1981).

8This section focuses on the statute as enacted in 1970, and not on subsequent amendments to it that came into operation in 1984.
CHAPTER FOUR
THE SEX DISCRIMINATION ACT
The emergence of the legislation
The role of legislation
The concept of discrimination in the SDA
Statutory provisions

The Sex Discrimination Act, enacted a scant five years after the EqPA, came into operation on the same day as that statute, and was designed to complement it by addressing discrimination in the non-contractual aspects of employment as well as in other areas such as housing, education and the provision of credit. The SDA, however, appears to have emerged in a very different context from the equal pay legislation. The EqPA represented the legislative culmination of a struggle that had been waged continuously by groups of women workers, with the sometime support of some trade unionists, since the end of the 19th Century. Consequently, in defining wage equality, and implementing the equal pay principle through legislation, the statute drew on ideas and concepts which had been defined in prior
efforts to implement equal pay through collective bargaining, and through debates in the labour movement. By contrast, the SDA drew on no such long tradition of trade union struggle for equality in the workplace. The movement for legislation to positively aid women's campaigns for equality emerged simultaneously with the re-emergence of feminism as a broad social movement in the 1960's, and while the new women's movement could look back on a tradition of feminist struggles in the 19th and 20th centuries, which had included a campaign for formal equality before the law, and for the elimination of such practices as the marriage bar, the new movement and the campaign for sex discrimination legislation was in a very real sense discontinuous from these past efforts. Nevertheless, the equal rights tradition which had informed earlier campaigns made a significant contribution to the campaign for a sex discrimination bill, and this was the central notion of 'equal rights,' the idea that the way in which to remedy disadvantage was to require equal treatment, meaning in this context, identical treatment. This notion was at the heart of the opposition of some feminist groups to protect laws in the 1920's and 1930s. The notion that equality requires identical treatment is not of course limited to the feminist tradition. Rather, attacking the legal disabilities which faced women in the 19th and early 20th centuries, equal rights feminists drew upon and incorporated a central
concept of bourgeois law, and indeed bourgeois society, that of formal equality before the law.

This significant contribution to the definition offered by the SDA came undiluted from the earlier feminist tradition. It came also from the more visible influence on anti-discrimination legislation—prior state intervention to address racial discrimination. Race discrimination law provided a second set of independent influences on the emergence of the SDA, providing many of the central concepts through which anti-discrimination legislation was discussed and defined.

The concepts which were central to the approach to discrimination established by the Race Relations Act originated for the most part in the United States; they informed the passage of race discrimination legislation in the UK, and this prior experience of state intervention contributed in considerable measure to the way in which sex discrimination was perceived in Parliament. In 1964, in the United States, Title VII of the Civil Rights Act prohibited sex discrimination in employment, by adding gender discrimination, at the eleventh hour, to a bill designed primarily to address race discrimination. Thereafter, in the United States, the two forms of discrimination were addressed, under Title VII, in a unitary fashion, defined by the same concept of discrimination, enforced through the same structures and organizations, and subject to the same remedies. This American experience of implementing sex
discrimination under Title VII also provided a direct influence on the form and context of sex discrimination legislation in Britain.

In the first part of this Chapter, I examine the emergence of anti-discrimination legislation, from the initial attempts of private members to introduce legislation, through the proposals suggested by the Conservative and Labour parties, to the final form in which the Sex Discrimination Act reached the statute books in 1975. In the second part of the chapter the emphasis turns to the concept of discrimination that the legislation embodies and the assumptions about the role of legislation which underlay the public policy process.

I. The Emergence of the Legislation

The 1960's saw an upsurge of interest in and activity around the issue of equal pay, which culminated in Parliament in the passage of equal pay legislation in 1970. There were a number of influences operating at the time to make the issue a salient one: labour shortages leading to an increased demand for women workers, a large rise in women's labour force participation, and in their membership of trade unions, an increased interest in "women's issues" on the part of the major political parties, the publication of reports which clearly revealed the disadvantaged situation of women workers, the first stirrings of a new feminist movement, and a growing acceptance, by the labour movement and the government, of increasing state intervention in the
field of industrial relations. The interest that was awakened in women's issues was not concerned solely with the achievement of equal pay, but also with the broader question of equal rights. The passage of the Equal Pay Act served, however, to increase pressure for a more general anti-discrimination bill since there was nothing in the EqPA to prevent employers from segregating men's and women's jobs to evade its 'like work' provisions, or from refusing to hire or promote women. There was therefore a not unreasonable fear that in the absence of further legislation the EqPA might serve to restrict women's opportunities or lead to redundancies.

Although the influence of the emergent women's movement was not particularly significant prior to the passage of the EqPA, the years between 1970 and 1975 saw a mass campaign outside of Parliament in support of proposals for sex discrimination legislation. This support was undoubtedly influential, in terms of securing support inside Parliament for the legislation, and for transforming the issue of equal opportunities for women into a major issue of the early 1970's. The rapid growth of the women's movement in the 1970's ensured that women's issues received public attention. Baroness Seear, who introduced a private members bill in the House of Lords in 1972 noted that "with women's liberation on the scene, the movement for women's rights, though still in some circles opposed and derided, ceased to be ignored." (Seear, 1974, p. 125).
Certain events also served as catalysts for change. Racial discrimination emerged as a major political issue in the United States, and, to a lesser extent in Great Britain. The arguments which were heard in favor of a public policy approach to eradicating race discrimination were also applied to the case of sex discrimination. Through the prior example of legislation in the field of race discrimination, the validity of the idea of legislative intervention in this area was largely established. When in 1964 Title VII of the American Civil Rights Act prohibited sex discrimination in employment, to be followed in the first year of implementation by a flood of complaints, the feasibility of this approach to sex discrimination appeared to be proven, through the availability of an accessible foreign example.

However, the American influence, the example of the British Race Relations Act and the impact of the new women's movement, would not have crystallized into an effective campaign unless there was convincing evidence of widespread disadvantage to women, which was recognized as discrimination. While conditions of unequal pay and occupational segregation had changed little over the year, what did change in the 1960's and 70's was the degree of attention paid to these phenomena, and the way in which they were defined. What had been acceptable, if recognized at all, now became unacceptable, to some eyes at least. In this sense, support for anti-discrimination legislation only
reflected material trends that had been developing since 1945. As women's labour force participation had increased, and particularly as the percentage of married women working had risen, so, gradually, had attitudes towards women working. Since 1945, a process of redefinition of women's role had been in progress. Whereas in an earlier era married women were expected to be only wives and mothers, by the 1960's a process of redefinition was well under way, which legitimized a 'dual role' for women, although still giving primacy to women's familial roles; the participation of women, particularly married women, in the world of waged work was legitimated in a way that it had not been in earlier eras. With more women working than ever before, and cultural representations of women incorporating this fact, it may have been easier, in the 1960's to recognize the widespread inequities for what they were, and to attempt to address them in the public arena. This process was doubtless aided by the evicence that was uncovered in the late 1960's and early 1970's of the extent of discrimination—in the report of the Donovan Commission, (1968), Audrey Hunt's (1970) report for the Department of Employment and Productivity, and finally in the evidence presented to a House of Lords Select Committee established in 1972 to consider a private members bill introduced by Baroness Seear.

The first moves for a legislative remedy for sex discrimination came in 1968. Suggestions were made at the
time of the passage of the Race Relations Act that sex discrimination should be added to its provisions, and in the same year Joyce Butler attempted for the first time to introduce a bill to "establish an anti-discrimination board to examine and remove discrimination against women in employment, education, social and public life; and to provide for equal pay for work of equal value." During the second reading of the 1975 Sex Discrimination Bill, Joyce Butler explained how she had first come to introduce those proposals. She stated that the 1967 Christmas Day broadcast by the Queen had drawn attention to the position of women in society and stressed the need for changes to be made. In 1968, she tabled an Early Day Motion drawing attention to the broadcast, and sent copies to major women's organizations for their opinion on what should be done:

I then heard from a London bus conductress who had been refused training as a bus inspector because she had never been a bus driver, and . . . could not be a bus driver because her male colleagues opposed it. I realized the real weakness of the situation facing women in employment and saw a need for a special provision to give them redress against sex discrimination. As an immediate result, in May 1968, I introduced the first anti-discrimination Bill which made provisions for an anti-discrimination board to which women could refer (H.C. Debs., 26 March, 1975, c. 589)

Joyce Butler's initial bill was introduced four times under the Ten Minute Rule, with some amendments, but did not make any progress in the House. In December, 1971 William Hamilton introduced a bill very similar to those introduced by Joyce Butler in the previous three years (H.C. Debs, 1 Dec., 1971, c. 459).
The bill dealt with discrimination in employment, education and training, in advertisements, and in places of public resort. It provided that it should be unlawful for any employer to discriminate against women in hiring, terms and conditions of work, opportunities for training and promotion, or dismissal. Clause two of the bill exempted protective legislation from the scope of the bill. Employment discrimination was also addressed in clause six which made unlawful, discrimination by professional bodies and trade unions.

The bill was to be enforced through a board consisting of a chairman and not more than eleven other members appointed by the Home Secretary, which would be known as the Anti-Discrimination Board. The board would receive complaints of discrimination from those affected by it, or from their representatives if authorized in writing by the individual concerned. The board would then investigate the facts of the matter, and "use their best endeavours," where appropriate, to secure a settlement of the differences between them and an assurance that further discrimination would not occur. The board was given no specific powers to require the disclosure of information to assist it in these tasks. If the board determined that unlawful discrimination had occurred, it would be empowered to take legal proceedings against the offender. The right to hear proceedings under the bill, to determine damages for contravention of its provisions, and to issue injunctions,
was to be vested in the county courts and the High Court of Justice.

This bill was talked out at the Second Reading, and lost for that session. Immediately after the failure of this bill, a similar measure was introduced in the House of Lords, "to keep up the momentum" (Seear 1974, p. 128). The bill passed its Second Reading in the Lords in March 1972. Instead of the normal committee stage after the Second Reading, it was agreed, following the suggestion of Lord Shackleton, leader of the Labour Party in the Lords, to set up a special select committee to examine the bill (Seear, 1974, p. 128).²

Representatives of the press were admitted to the sittings of the committee, and their reporting of the committee sessions introduced a wide public to considerable evidence of widespread discrimination that was presented. No less important, according to Baroness Seear, was the fact that in the main, press discussion of the issues was rational and unemotional. "At least, it seemed, women's questions were ceasing to be good for a giggle and were handled like any other issue of social and political importance." (Seear, 1974, p. 129). At the conclusions of the hearings, every member of the select committee was in favour of the introduction of the legislation, testimony to the persuasive power of the evidence heard, since initially, some of the members had been undecided or opposed. After the unanimous favourable report from the Select Committee, a
new bill was drafted by a professional Parliamentary draftsman. Re-named the Sex Discrimination Bill, this proposal was presented to the House of Lords and passed all the necessary stages (Seear 1974, p. 129).

Meanwhile, William Hamilton re-introduced his private members bill in the House of Commons and this bill was also referred to a Select Committee. Again, the evidence presented was incontrovertible, and the Commons Committee also recommended the introduction of legislation (Special Report from the Select Committee on the Anti-Discrimination [No. 2] Bill, H.C. Papers 1972-3 No. 333).

In May 1973, the Conservative Government announced that they were in the process of drawing up their proposals for legislation to prohibit sex discrimination in employment. A consultative document setting out these proposals was published in September, 1973, (Equal Opportunities for Men and Women: Government Proposals for Legislation).

Before the Heath Government could give effect to these proposals, a new Labour administration came to power in the General Election of February 1974. In September 1974 the Labour Government published a White Paper setting out its own proposals for legislation (Equality for Women, Cmnd. 5724, 1974). These proposals formed the basis for debate, inside and outside Parliament, on the scope of the proposed legislation, the definition of discrimination that the law should embody, and the means of enforcement that should be adopted. When the Bill was introduced in the House of
Commons in March 1975, the proposals had been modified to include a concept of 'indirect discrimination' and to allow for some measure of 'positive' discrimination. The bill received support from all parliamentary parties, although amendments were suggested by both Conservatives and some of the Labour's own backbenchers. In the main, the Government resisted amendments from any source, and the bill that became law in November 1975 was essentially the one introduced by the Government six months earlier.

As may be seen from the brief account of the chronology of the emergence of the legislation, the seven years between 1968 and 1975 constitute a period in which there was an accelerating process of support for sex discrimination legislation. During this period, sex discrimination emerged as a political issue worthy of public intervention.

However, it would be easy to exaggerate the degree of consensus that emerged during this period, merely by recounting the bare outlines of the process by which a bill was put on the statute books. There were real disagreements about the role of legislation, the scope that legislation should cover, the definition of discrimination that the legislation should embody and the structure for enforcement that should be established.

II. The Sex Discrimination Act: The Policy Debates

The Role of Legislation

By the time the SDA became law at the end of 1975, there was little opposition in Parliament to the idea of
legislation as an appropriate intervention in the field of sex discrimination. Outside Parliament, the legislation had the support of a wide range of women's organizations, and the TUC, and media coverage of the proposals had been generally responsible.

As late as 1972 the Conservative Government had opposed the use of legislation to address sex discrimination. Discussing the private Member's Bill, introduced by William Hamilton, Richard Sharples, Secretary of State for the Home Office stated that:

We support the objective of the removal of discrimination against women in every field. . . but we do not think that legislation, and particularly the Bill now before the House is the right way of bringing this about (H.C. Debs, 28 Jan., 1972, c. 1826).

However, by September, 1973 the same administration had published its own proposals for legislation, which although limited in scope, and lacking in enforcement powers, showed a new acceptance by the Conservative Party of the idea of legislative intervention, even if this acceptance came only as a result of the clear trend of support for the legislation inside Parliament, and amongst the public.

By the time that the Labour Government's proposals were debated in Parliament, there was a remarkable concensus between the two major parties as to the role of legislation, although there were disagreements over particular facets of Labour's bill.

In his initial remarks on the Bill at its second reading in the House of Commons Roy Jenkins, the bill's
sponsor, set out quite explicitly his views on the role of legislation in the area of discrimination:

... I should like to explain ... both the proper role and the inevitable limits of legislation of this kind. There are two types of inequality which particularly affect the female half of the population: first, the less favourable treatment of women than men because they are women; secondly the handicaps which result from the past unfair treatment of women. The first of these disadvantages is amenable to anti-discrimination legislation of the sort that we are proposing. The second requires positive action to compensate for the handicaps inherited from past discrimination (H.C. Debs, March 26, 1975, c. 512-513).

This statement is interesting for two related reasons. First, it is explicitly concerned with equality of opportunity rather than equality of outcome, as is made clear by the rejection of legal intervention to compensate for prior unequal treatment. Second, this view of the proper limit of the role of legislation presupposes a particular definition of discrimination, one which extends to removing negative barriers, but not to positive action to remedy or compensate for past disadvantage.

In this statement the influence of the American equal employment opportunity legislation lies below the surface of the Home Secretary's remarks. Whilst American ideas on the nature of discrimination appear to have had considerable influence on the thinking of those concerned with the introduction of British legislation, it is apparent from this remark, that the Government's view was that the American model of affirmative action to remedy past discrimination should not form part of the British approach; the limits of law were set at the prohibition of less
favourable treatment. Implicit in this remark was a distinction between the social concept of discrimination and the more limited one which the law could properly address.

This approach is predicated on a view of disadvantage and inequality which attributes blame for these phenomena to prejudicial attitudes: a conception of a material element in the sources of women's inequality is lacking. The view that it is mistaken attitudes that are the problem then dictates a couple of seemingly logical consequences which affect the scope and form of possible legislation. The argument runs that the role of law is necessarily limited when attitudes are at issue, because the law cannot force people to think in a particular way, and that a process of graduation and conciliation will, for the same reason, achieve the best result in the end. Thus, the Home Secretary asserted:

It would be foolish to pretend that this or any Bill can be anything but a beginning to an attack on sex discrimination. ... which is the most resilient of all forms of discrimination. The Bill is a necessary precondition for an effective equal opportunity policy but it is not a sufficient condition. ... It must be accompanied by a profound shift in attitudes and actions. ... which the Bill can assist but which it will not in itself assure.

(H.C. Debs, March 26, 1975, c. 525)

To emphasize the concern with attitudes is not to assert that the policy-makers were oblivious to the need to also change practices. Indeed, in its White Paper, "Equality for Women," the Labour Government asserted that the objectives of the proposed legislation were "To eliminate anti-social practices; to provide remedies for the victim of unfair discrimination; and indirectly to change the
prejudiced attitudes expressed in discrimination" (Equality for Women, 1974, p. 11). The point is rather that the idea of 'prejudiced attitudes' permeates thinking on both race and sex discrimination, and tends to set up a paradigm in which the need to change attitudes dictates a particular approach to the possibilities inherent in law, and to the means chosen for securing compliance.

Ian Gilmour, speaking for the Opposition Front Bench, expressed a similar view of the role of legislation in ending discrimination. Because sex discrimination was largely a question of discriminatory attitudes, then the law could go some way, but not all of the way to changing those attitudes:

Although the law cannot by itself create new attitudes and a different atmosphere, it can help to achieve those objectives. . . While social attitudes cannot be overturned by legal coercion, they can be shifted gradually as more women take their rightful place in a non-discriminatory society. . . Legislation is necessary because it affects the climate of opinion (H.C. Debs., March 26, 1975, c. 527).

These statements reflect the same approach to the function of public policy that supported intervention in the area of race discrimination. The Race Relations Board's concept of the role of public policy in addressing discrimination was explicitly echoed by the Labour Party Study Group, which conducted a detailed examination of discrimination against women. In its 1972 report the group argued for "comprehensive legislation against unfair discrimination on the grounds of sex" as "the necessary precondition for an effective strategy to promote equality
of opportunity, treatment and status for women." The group drew upon the first Annual Report of the Race Relations Board to support its arguments in favour of legislation. An anti-discrimination law, the group asserted, would be "an unequivocal declaration of public policy, which would give support to those people who did not wish to discriminate but felt pressured by peers to do so." The law would also provide redress to the victims of discrimination, thus providing for "the peaceful and orderly adjustment of grievances and the release of tension," and it would reduce prejudice by "discouraging the behavior in which prejudice finds expression." (Labour Party, 1972, p. 18).

Such a view of the role of law tends to have particular consequences for the approach to enforcement that is chosen. Historically, in both the U.S. and the U.K., civil proceedings have been preferred over criminal sanctions, and considerable emphasis is placed on compliance through conciliation rather than coercion.⁴

This bipartisan, consensual view of the role of law met with little opposition, except from some predictable hostility from a few conservative backbenchers, opposed in principle to legislative intervention in the area of either sex or race discrimination. Enoch Powell, for example, stated that the bill would introduce "suspicion, discord, doubt and anxiety," into the relations of employer and employee:

Where before there was a perfectly natural relationship founded upon common sense and on an understanding that
the opportunities were adapted to the different propensities and skills which were on offer, in place of that there will be introduced discord and envy. (H.C. Debs, March 26, 1975, c. 543)

Ronald Bell saw the Bill as having the purpose of "regulating the minds and judgements of the citizens of a free society and telling them they may not exercise their judgments." Such regulations could not be countenanced, since "equality is a question of fact. It cannot be created by legislation." Bell continued:

There are no legal impediments to women doing what they want or becoming what they wish. All the talk about women's rights is wholly misleading, misconceived and beside the point. . .for 56 years there have been no legal restrictions upon what women could do. There are no legal rights which can be given them (H.C. Debs, March 26, 1975, c. 588).

However, attitudes like those of Powell and Bell were rare, if strongly held, and did not disturb the all-party concensus on the appropriateness of legislation, and the role it could legitimately be expected to fulfill.

**The Concept of Discrimination in the SDA**

The definition of discrimination in the SDA hinges on the idea of less favourable treatment, on the grounds of sex or marital status, and includes the concept of indirect as well as direct discrimination.

Introducing the bill at the Second Reading in the House of Commons, the Home Secretary explained why a concept of indirect discrimination was necessary:

Although it will be possible in many instances to infer a discriminatory motive from the fact that a person of one sex is treated less favourably than persons of the other sex, it is essential not to confuse motive with effect. . .we have come to realise that the Bill would
be too narrow if it were confined to direct and intentional discrimination. It will apply...also to a practice which, regardless of motive, is discriminatory in its effect on persons of one sex and cannot be shown to be justifiable (H.C. Debs, March 26, 1975, c. 513).

The Home Secretary went on to explain the concept through the example of a minimum height requirement, unrelated to the needs of a particular job, but with which fewer women than men could comply. Such a requirement would come within the scope of the proposed legislation.

An employer should be required to stop carrying on a practice which is unjustifiable and has a discriminatory effect even if the intention is not that it should be discriminatory. (Ibid. c. 514).

The inclusion of 'unintentional discrimination' in the statutory definition represented a change in thinking from that indicated in the Labour Governments White Paper of September 1974. The Home Secretary attributed this change to the criticisms made of the White Paper by women's and other organizations.

The concept of 'indirect discrimination,' where the key element is discriminatory impact rather than intent, derives from the decision of the U.S. Supreme Court in the landmark case of Griggs v. Duke Power Co., 401 U.S. 424 (1971). In that case the Supreme Court held that facially neutral employment policies that disparately affect a protected class constitute discrimination under Title VII, although the statute itself did not expressly address the issue of indirect discrimination. The Court held that absence of intent to discriminate is irrelevant since "good intent or
absence of discriminatory intent does not redeem employment procedures. . . that operate as 'built-in headwinds' for minority groups and are unrelated to job capacity (Griggs, 401, U.S. at 432). The decision in this case had a direct effect on British thinking about race discrimination (Pollack, 1974, Birdman, 1976). When the Sex Discrimination bill was under consideration by a standing committee, a government spokesman explained the addition of the indirect discrimination concept by explicit reference to Griggs.

A second development in the concept of discrimination in the government's proposals was to make some allowance in the Bill for the idea of affirmative action, albeit on terms which limited its application to training opportunities rather than employment opportunities. Thus, the Minister explained:

...we have made provisions to allow "positive" or affirmative" action to help women to compete for employment opportunities on genuinely equal terms with men. . .this does not amount to "reverse discrimination" where . . .a woman is preferred for a job over a qualified man because women have traditionally been excluded from that sort of job (H.C. Debs, 26 March, 1975, c. 514).

The Minister acknowledges the contradiction between formal legal equality, and the concept of affirmative action, but noted:

...we should not be so blindly loyal to the principle of formal legal equality as to ignore the actual and practical inequalities between the sexes, still less to prohibit positive action to help men and women compete on genuinely equal terms and to overcome an undesirable historical link. (ibid).
According to this argument, formal legal equality may be breached in the interests of 'genuine' equality, but there are strict limits to the inroads that can be allowed. Affirmative action of the kind associated with the American equal employment opportunity legislation, in which not only training opportunities but jobs could be made available to members of historically disadvantaged groups, was to be eschewed.

In incorporating the concept of indirect discrimination, but neglecting the idea of affirmative action which had also been legitimized by the American Supreme Court, there was a very selective borrowing from the United States. Both the borrowing and selectivity are consistent themes in British anti-discrimination law, not only with regard to the definition of discrimination, but also with regard to systems of enforcement.

The debates in Parliament reflected a considerable diversity of opinion over the meaning of equality and the concept of discrimination. The spokesman for the Conservative Front Bench opposed the inclusion of the concept of indirect discrimination, stating,

...the concept of "unintentional discrimination"...seems to be confused and confusing...it is surely difficult enough to legislate in the arena of sensitive human relationships where intent is provable, but to obfuscate an already difficult subject by introducing this concept is regrettable and wrong (H.C. Debs, March 26, 1975, c. 533).

The Conservatives also took issue with the Government over the question of protective legislation, which the
Government intended to keep intact, alongside the Sex Discrimination Act. The Conservative Government, in its sex discrimination proposals, had announced its intention of repealing the statutory restrictions on women's employment that governed hours of work, overtime, and nightwork, in respect of women age eighteen and over. There was considerable criticism of this proposal on the ground that repeal would leave working women open to undue pressure to work overtime, and night shifts. In debating the Sex Discrimination Bill, the Conservatives reiterated the view that the continued existence of protective legislation was incompatible with the introduction of sex discrimination legislation, and should be repealed. Ian Gilmour argued that:

There can be no justification in today's conditions and in a Bill seeking to end discrimination for the Government's continuing restrictions under the Factories Act of 1961 and associated legislation, relating to hours of employment... or... relating to working with moving machinery... If women are prepared to do the job, they should be allowed to do it. What used to be discrimination in favour of women has become discrimination against them... (H.C. Debs March 26, 1975, c. 534).

Michael Alison, a Conservative backbencher argued that the Bill's provision for maintaining protective legislation in the context of equal pay could make the employment of women a "net liability" and "not the asset it should be and that it has been in the past" (H.C. Debs, March 26, 1975, c. 602).

The significance of these comments is that they reveal the view that equality demands identity of treatment. This
approach was not limited to the Conservative Party, but engendered considerable debate, and disagreement within the Labour movement. Ian Gilmour, for example, was able to support his argument by reference to an article from Labour weekly, authored by a Labour candidate. The prevailing view of trade unionists was however that women should continue to be protected by special legislation until more progress towards equality had been achieved, and it was this view that prevailed with the Government. Millie Miller (L. Ilford North) addressed this issue in her response to the bill:

Women working in industry are not prepared to give up protective legislation until they are satisfied with the more important changes that are necessary in employment protection. Many of the protections which apply to working women might well apply to working men to the benefit of our society" (H.C. Debs, March 26, 1975, c. 546).

The Government did not waver in its intent to retain the protective legislation, but neither did it have a view of equality which would encompass the issue of special needs. Protective legislation, although retained, was viewed as necessary but anomalous, and the newly established EOC was given a watching brief, to study, and make recommendations, as to the future prospects of protective laws.

While the Conservative view seemed to be that the definition of discrimination that formed the basis for the Bill was too broad, other speakers, from the Labour back benches indicated that they would have preferred a broader
perspective. Jack Ashley, (L. Stoke on Trent, South) noted that:

...there is no point in providing employment opportunities if women are unable to take advantage of them. The Government should request every employer of more than 10 workers to provide special child-minding facilities because if a woman is tied to her home with children she will not be able to use all the rights in the world (H. D. Debs, March 26, 1975, c. 543).

The fact that formal equality of opportunity would avail women little without other accompanying social reforms had not escaped attention outside of Parliament. The Working Women's Charter Organization, for example, called for the rate for the job, and a national minimum wage; equal opportunity in employment, in education and training; removal of all legal and bureaucratic barriers to equality, in, for example, tenancies, mortgages and taxation; an improvement in the provision of free local authority nursery places; flexible extended hours to suit the needs of working mothers, an increase in family allowances; the extension of family planning clinics supply free contraception; and free abortion to be readily available (London Newsletter No. 4, date unknown). In such an approach, equal employment opportunity was one important objective in an extensive social agenda for the overall improvement of women's positions as workers and mothers. The original four demands of the Women's Liberation Movement called for equal pay, equal education and job opportunities, free contraception and abortion on demand, and free twenty-four hour child-care (Coote and Campbell, 1982, p. 24). In 1975 were added the
demands for "financial and legal independence" and "an end to all discrimination against lesbians, and a women's right to define her own sexuality" (Ibid., p. 26).

Instead of an answer to the demands of the feminists and women trade unionists for comprehensive social and political reform, the Bill presented in Parliament by the Labour Government offered formal equality in employment, education, housing and the provision of goods and services. Introducing the Bill, the Home Secretary acknowledged the impact of domestic responsibilities on women's lives, but dismissed in one sentence those who criticized the bill for failing to address this problem:

...extra demands are made on women because, in general, they carry more than their fair share of the practical responsibilities of looking after a home, children, aged relatives, and need, for example, special help to meet the demands of child rearing. But these are not problems to be tackled in a Bill which is concerned with discrimination and it would be misconceived to criticize the Bill for failing to deal with a wide range of problems which are to some extent inherent in our society. (H.C. Debs, March 26, 1975, c. 513)

Dr. Shirley Summerskill, Undersecretary of State at the Home Office, reiterated that the Bill could not attempt "to tackle the problem of women's role in society, and subjects like facilities for child care, family law and the special problems facing the one parent family." (Ibid., c. 616) However, she held out the hope that once the SDA became law, "matters like this will be affected by the influence and the propaganda that this legislation will generate." (Ibid.)
In addition to making no effort to encourage practices which would facilitate the participation of women with domestic responsibilities in the labour force, the Bill also exempted from its scope some important areas of legislation which reinforced a view of women as primarily wives and mothers, as 'dependents' rather than 'breadwinners.' For example, a number of organizations recommended to the Government that it should be illegal to discriminate on the grounds of marital status as well as sex. The House of Lords Select Committee had also recommended this course of action. Since the Government itself discriminated against large numbers of women, solely on the basis of marital status, in taxation and social security matters, this course of action was potentially problematic. The Government dealt with the issue by exempting social security and taxation matters from the Bill, and including a limited provision on marital status. Roy Jenkins explained:

Marital status is . . . particularly important for the . . . arrangements relating to family support in the social security and taxation fields. The White Paper made it clear that the Bill could not deal with social security, pensions, or taxation matters. They are governed by their own legislation, and that is firmly the case. But those aspects of marital status which are properly within the scope of a Sex Discrimination Bill have been deal with.

The Minister noted that the Bill proposed to make it unlawful to operate a marriage bar, and to treat a married man more favourably than a married woman, but that

To go further would bring into an already fairly complicated Bill many other complications relating to trifling matters, which are not directly relevant, which would not be justified and which would not ease
the passage of the Bill (H.C. Debs, March 26, 1975, c. 515).

The exemption of social security and taxation matters from the scope of the Bill, and the narrow definition of the marital status clause provoked some criticism during the Second Reading. Leaving aside criticism from the Tory Front Bench, which cannot be taken as more than debating points in the light of subsequent Conservative policies, dissatisfaction over these clauses stemmed from anti-discrimination activists who wished to see a more elaborated concept of marital discrimination, and who wanted to see the Government's own discriminatory practices in the fields of social security, welfare, and taxation brought within the purview of the new law. Jo Richardson (L. Barking) pointed out that the Bill offered no protection to unmarried people treated less favourably than married people, and gave as an example the different eligibility of single and married women for maternity benefits:

There is no valid justification for not paying maternity benefit to an unmarried woman who becomes pregnant. The law must be extended to protect single women from unfair discrimination of this type (H.C. Debs, March 26, 1975, c. 554).

Maureen Colquhoun (L. Northampton N) pointed out that...

Marital status is mentioned but not parental or single status or that a woman can be considered as the principal breadwinner with financial responsibility for dependents (H.C. Debs, March 26, 1975, c. 600).

She suggested that the clause dealing with marital discrimination be amended in such a way that it would "have
more relevance to life as it is lived by women in a real world." (Ibid.)

Janet Fookes (C. Plymouth, Drake) voiced concern over the exemption of social security and related affairs from the Bill, and over the reasons offered by the Government for their omission:

I am not convinced by the argument that some things can be taken care of by other Ministers and other Acts of Parliament. . .I suspect that the reason is quite different. There is a very great deal of money involved in these other departments and I believe there is a reluctance to take it on board in case the financial repercussions are proved to be more than might be thought at first sight (H. C. Debs, March 26, 1975, c. 548).

Lynda Walker (C. Wallasey) also pointed to the problem of eligibility for maternity benefit of unmarried women, and suggested that the marital discrimination clause be amended to take care of this discrepancy. Both Labour and Conservative women backbenchers voiced criticisms over existing discriminatory practices in the system of taxation, and pensions. The Liberal spokesman also addressed these points:

The Bill properly requires an end to commercial and industrial discrimination on the grounds of sex. But while fiscal administration. . .remains outside the scope of this legislation. . .the Government in the form of the Department of Health and Social Security and the Treasury will top the league of discriminators (H. C. Debs., March 26, 1975, c. 550)

Outside Parliament, the National Women's Liberation Conference, held in Manchester in April 1975, passed a resolution stating that:

The Women's Liberation Movement protests against the term 'Sex Discrimination Bill' being used for what is
only a limited equal opportunities Bill. We demand of the Government a comprehensive sex discrimination Bill so that women are no longer defined as dependents; and a Bill that provides for no less than genuine equality of treatment under law for both sexes (Coote and Campbell 1982, p. 103)

Certainly the bill before Parliament could not provide for genuine 'equality of treatment under the law,' while exempting Government legislation from its provisions. Nevertheless, despite the criticisms made of it, the proposed legislation received enthusiastic support, even from those critical of some of its shortcomings. The proposals went further than the private members bill, by expanding the definition of discrimination to include indirect discrimination, and were much more encompassing in scope than the Conservative government proposals, which in addition to a lack of enforcement powers, and a large number of excepted situations, were limited to the area of employment alone.

Despite some criticisms from both Left and Right, the proposals had a fairly easy journey through Parliament. Criticisms were made, and minor amendments agreed to, but the Bill that became law as the SDA was in all essential respects unchanged from its initial form.

III. Statutory Provisions of the Sex Discrimination Act

The definition of discrimination is contained in Part 1 of the Act, and includes two approaches to discrimination. Direct discrimination occurs when a woman is treated "less favourably" than a man would be treated "on the grounds of her sex." [1(1)(a)] Indirect discrimination occurs when a
requirement is applied equally to men and women, but its effect is discriminatory. A discriminatory impact may arise where the requirement is "such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it," and where the requirement cannot be shown to be justifiable irrespective of the sex of the person to which it applies, and where the requirement is detrimental to the woman who cannot comply with it. If treatment between individuals varies according to marital status, then men and women of the same marital status must be compared for the purpose of determining whether less favourable treatment has occurred.

The provisions for defining discrimination apply equally to men as well as to women [1(2)(1)]. Specific exceptions are made for special treatment "afforded to women in connection with pregnancy and childbirth" [1(2)(2)].

Discrimination on the grounds of marital status is expressly forbidden by the Act, and again discrimination may be either direct or indirect. As with discrimination on the grounds of sex, direct discrimination occurs when a married person of either sex is treated less favourably than an unmarried person and indirect discrimination occurs when the three-part test is met. It should be emphasized that the concept of marital status discrimination in the Act is formulated expressly in terms of the rights of the married not to be treated less favourably than the unmarried.
Part II of the Act sets out what constitutes unlawful discrimination in employment. It is unlawful to discriminate in the arrangements made for determining who should be offered employment, in terms on which employment is offered, by omitting or refusing to make an offer of employment (section 6(1)). It is unlawful to discriminate in access to opportunities, transfer or training, or in dismissal. (Section 6(2)). Private households or employers with less than 5 employees are exempt from these requirements. Section 7 defines those situations in which being a man might constitute a "genuine occupational qualification" for a job, and where, therefore the provisions of the SDA would not apply. Section 8 sets out the revisions of the EqPA that were included in the SDA. The remaining sections are concerned with the coverage of the statute, as regards organizations like trades unions and vocational training bodies, with the specific application of the Act to the police force, the prison service, the midwifery profession, and religious organizations, and with an amendment to the 1954 Mines and Quarries Act.

Part VI of the SDA establishes the EOC, and sets out its powers and responsibilities (see Chapter 8), Part VII sets out the enforcement procedures for individual actions (see chapters 6 and 7).

To summarize then, the Act makes unlawful both direct and indirect discrimination on the grounds of sex and (married) marital status. It defines the employment
situations to which such prohibitions apply, the exceptions to the Act, and the enforcement procedures for implementation. However, in many respects the Act is as much defined by its omissions as by its provisions. Women are granted equality of opportunity in a formalistic sense, but their treatment under the SDA is at odds with their treatment under other statutes which are specifically exempted from the Act's coverage. More importantly, women are granted equality of opportunity to the extent that they can approximate their condition to that of men. In a formal sense, the Act is a neutral one which can apply to either sex: essentially then it is a sex discrimination law which applies only to "ungendered" individuals, i.e., to those aspects of the individual where men and women can be said to be alike. The Act bypasses the questions that arise from acknowledging that in some real senses men and women are not alike by concentrating on formal equality, and requiring them to be alike to come within the scope of the law's protection. The question of the conceptual adequacy of the SDA's substantive provisions is examined more closely in Chapter 5, which focusses on the appropriateness of the concepts embodied in both the SDA and the EqPA in the context of women's structural position in society.

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1 Banks (1981, p. 153), notes the poverty of scholarship on the feminist movement between 1920 and 1960, and asserts that with research it is only no beginning to be possible to
explore and understand the causes of the apparent break in continuity.

2 This account differs from that given by Creighton, (1979) which states that the suggestion for referral to Select Committee came from the Government. I have chosen to follow Baroness Seear's account on the basis of her close connection with the events in question.


4 Despite some broad similarities, there are also quite considerable differences between the United States and the United Kingdom approaches to enforcement. See Chapter 6 for a discussion of enforcement issues generally, and Chapters 8 and 9 for specific differences in the British and American approaches to administrative enforcement and the question of remedy.

5 The British legislation in its approach to indirect discrimination, speaks of practices which have a discriminatory effect, and are not "justifiable". The American courts look instead to whether the practice is a "business necessity" or whether selection criteria are "job-related". It appears from the Parliamentary debates that one of the main reasons for the change to the concept of justifiability was a fear that courts might interpret a test of necessity as making unlawful certain seniority rules with a disparate impact on one sex. See, Standing Committee on the Sex Discrimination Bill, Official Report, April 24 1975, cc 70-71. See Chapter 5 below for a further discussion of the justifiability test.

6 See Chapters 6, 8 and 9 below.
CHAPTER FIVE
A CRITICAL EXAMINATION OF THE CENTRAL CONCEPTS
OF THE DISCRIMINATION LEGISLATION

The purpose of this chapter is to provide a critical analysis of the central concepts of the anti-discrimination legislation, by examining some of the assumptions that lie beneath the statutory approach to equality and discrimination. The focus is on the legal concepts and their relevance to women's position in the labour force.

The distinctive features of women's employment, as described in Chapter Two, are a high degree of occupational segregation by sex, and average earnings which are lower than those of men. These characteristics appear to arise not only from workplace attitudes and practices, but also from the nexus between domestic labour and wage labour which is a feature distinguishing women's and men's employment. Before proceeding to an examination of the enforcement and implementation of the statutes in Part II of this study, it is useful to consider the extent to which the core provisions recognize and address these characteristics of women's employment.
The SDA prohibits four kinds of discrimination: direct sex discrimination, indirect sex discrimination, marital discrimination, both direct and indirect, and victimization. The EqPA as originally enacted aimed in general terms at bringing into force the policy of equal pay for equal work. While the SDA is a complex statutory scheme, drafted in detail, the EqPA is in some respects "only an outline". (Phillips, J. in National Coal Board v. Sherwin [1978] ICR 700, 703-4 (EAT)). Despite this difference the two statutes together provide a single comprehensive code addressing sex discrimination in employment, as the tribunals and courts have recognized. Thus in Shields v. E. Coomes (Holdings) Ltd. [1978] ICR 1159, 1178, Bridge, L.J. stated "what is abundantly clear is that both Acts should be construed and applied as a harmonious whole and in such a way that the broad principles which underlie the scheme of legislation are not frustrated by a narrow interpretation or restrictive application of particular provisions."

The focus of analysis in the first part of this chapter are the broad principles and major provisions of the statutory scheme, as interpreted by the appellate courts and tribunals. 1

I. **MAJOR PROVISIONS OF THE STATUTORY SCHEME**

**The Equal Pay Act**

The short title to the 1970 Act states its objective
as being "to prevent discrimination, as regards terms and conditions of employment, between men and women". To achieve this objective, the Act uses the notion of an "equality clause". The terms of a contract under which a woman is employed at an establishment in Great Britain is deemed to include such a clause under 5.1(1) of the Act. The effect of the equality clause is set forth at 3.1(2). Prior to the amendment of the section in 1983, the equality clause provided that a woman employed on like work with a man in the same employment, or employed on work rated by a job evaluation scheme as equivalent to that of a man in the same employment, is entitled to contractual terms which are not less favourable than his. The EqPA extends to contractual terms other than pay, although it is wage claims which have been the main focus of attention under the statute.

Under the original statutory scheme, a woman had a right to equal pay only if she could show that she was on like work or on work rated as equivalent to that of a man in the same employment.²

In seeking to establish like or equivalent work, a complainant must point to a male comparator. The statute left open the question of whether there was a requirement of contemporaneity between the complainant and the comparable male. In Macarthys Ltd. v. Smith, the Court of Appeal held that as a matter of English law, a woman was not entitled to compare her job with that of a male predecessor [1979] ICR 785, 793. Lord Denning dissented. The Court agreed
however that Article 119 of the EEC Treaty raised the same issue, and referred the question to the European Court of Justice. That court held that under community law, the concept of equal work may not be restricted by a requirement of contemporaneity. The Court of Appeal then applied this determination, holding that a woman can compare her pay with that of a man employed on equal work prior to her employment. *Macarthys Ltd. v. Smith* [1980] ICR 672, 692-4.

A second issue relating to the question of the male comparator is whether the concept of direct discrimination includes the possibility of comparison with a hypothetical male. In *Macarthys*, the European Court of Justice held that such a comparison could not be made as it would be "indirect and disguised discrimination", the identification of which would require "comparative studies of entire branches of industry". (Id. at 690-1, judgment of the ECJ, paras. 14-15). Pannick (1985, p. 97) suggests however that the notion of the hypothetical male is central to the concept of direct discrimination in the SDA which defines discrimination as treating the complainant, on grounds of her sex less favourably than one treats, or would treat a man. Pannick argues that as the EqPA and SDA form an interlocking code, the 1970 Act could perhaps be interpreted to include the concept of the hypothetical male in its approach to direct discrimination.

There are two stages to the inquiry of whether a woman is entitled to equal pay with a man doing like or equivalent work. First, the complainant must show that she is employed
on work which is of "the same or broadly similar nature" to that of a man under section 1(4) or that the work is rated as equivalent under section 1(5). The assessment of like work is concerned with the jobs compared between "the things done and the frequency with which they are done". *Shields v. E. Coomes (Holdings) Ltd* [1978] ICR 1159, 1174, per Orr, L.J. Although apparently simple, the drafting of section 1(4) has led to some anomalies. If the woman complainant cannot show like work, she has no legal remedy even if the difference in pay between her and the comparable male is much greater than the difference in duties would appear to justify. As the EAT stated in *Electrolux Limited v. Hutchinson*, [1977] ICR 252, 259, "a case is either within or without the Act: there is no half-way house". It is also possible that a woman paid less than the male comparable may not be entitled under the EqPA to equal pay, if her job involves greater skill than the man's because she would not be able to meet the statutory requirement of demonstrating like work. This possibility was suggested by the EAT in *Waddington v. Leicester Council for Voluntary Service* [1977] ICR 266, 268, in which a woman social worker sought equal pay with a male social worker whom she supervised. The EAT noted that although the woman was, not unnaturally, perturbed at being paid less than her subordinate, there were differences between the work performed by the two, as illustrated by the fact that the woman was the man's supervisor. The EAT remanded the case to the industrial tribunal for recon-
sideration in accordance with the law. To countenance a disparity in pay where the woman's job involves greater skill or responsibility than the man's is clearly contrary to the purpose of the Act, and appears to depend on an overly narrow and formalistic reading of the statute.

If a woman proves that she is employed on like work, or work rated as equivalent, she is entitled to equal pay unless the employer can show that the variation is due to a material factor other than sex under Section 1(3). The onus of establishing the defence is on the employer, with the burden of proof being the ordinary civil standard of balance of probabilities.  

The questions of the kinds of factor on which an employer might rely in attempting to establish a section 1(3) defence raises the issue of the nature of the concept of discrimination that underlies the Act. Unlike the SDA which specifies that it covers both direct and indirect discrimination, the EqPA is silent on this issue. However, in Clay Cross (Quarry Services) Ltd v. Fletcher [1979] ICR 1, the Court of Appeal decided a case involving a section 1(3) defence in such a way as to indicate that the defence cannot be established where the employers pay policy indirectly discriminates against women. Clay Cross involved an employer's contention that setting wages according to market forces constitutes a defence under section 1 (3). The Court of Appeal's reasoning in this case can only be read as approving the application
of the concept of indirect discrimination to claims under the
EqPA although the matter was not directly at issue. (See dis-
cussion at [1979] ICR 1,5,7,9,12). The question of whether
the EqPA prohibits indirect discrimination was raised and
addressed more directly in Jenkins v. Kingsgate (Clothing Pro-

In Jenkins, the employer paid full time workers a higher
rate per hour than part-time employees. This practice had
a disproportionate adverse impact on women, since an over-
whelming proportion of part time workers, in industry gener-
ally, and in that firm specifically, were female. The employer
contended that the difference in the number of hours worked
was a material difference other than sex. The industrial
tribunal accepted the employer's argument and dismissed
the case.

Mrs. Jenkins appealed to the EAT, relying on Article
119 rather than the EqPA, as earlier decisions of the EAT
seemed to foreclose the possibility of success under the
domestic legislation. (For example, the EAT had found that
part-time work constituted a genuine material difference under
S 1(3) in Handley v. Mono [1979] ICR 143 and Durrant v.
North Yorkshire AHA [1979] IRLR 401). The EAT referred
the case to the ECJ for a determination of whether Article
119 of the EEC Treaty would prohibit this kind of discrimina-
tion. The decision of the ECJ appeared to suggest that the
employer could defend his pay policy unless the motive was
to discriminate [1981] ICR 592, 613, Judgment of the ECJ,
para. 15)
The EAT concluded however that domestic legislation could confer greater rights on employers than EEC law, and held that regardless of Article 119, the EqPA prohibits indirect discrimination ([1981] ICR 715, 723-7). The EAT stated two reasons for its conclusion. First, the language of the statute suggests that it is concerned with the effects of discrimination. Second, the EqPA is part of a larger code addressing sex discrimination, and should therefore be interpreted consistently with the SDA, which expressly prohibits indirect discrimination. Thus, the EAT concluded, a pay policy or practice which indirectly discriminates against women will not satisfy section 1(3), irrespective of whether the employer intends to discriminate. In Jenkins, since the industrial tribunal had not considered the claim in terms of indirect discrimination, the EAT remitted the case for a consideration of the justifiability of the pay policy, whether it was in fact reasonably necessary in order to reduce absenteeism and obtain maximum utilisation of plant, as the employer suggested. ([1981] IRLR 388). The concept of justifiability is the test used in the SDA to assess whether there is a legitimate reason for the employer to maintain a neutral practice which indirectly discriminates against women. The question thus arises of what if any is the difference in the defences available to the employer found to be discriminating indirectly under the EqPA as opposed to the SDA. The EqPA sets up the defence of "material dif-
ference other than sex, but in *Jenkins*, the EAT appear to incorporate the SDA's test of justifiability when the issue is one of indirect discrimination. The interpretation of the concept of justifiability is discussed in more detail below.

Thus, as construed by the EAT, the EqPA prohibits both direct and indirect discrimination in contractual terms of employment, subject to the necessary demonstration of comparability by the complainant, and the defences available to the respondent. The SDA also prohibits both direct and indirect discrimination, although in the later statute, the concepts are derived from explicit statutory provisions rather than from judicial construction as in the case of the EqPA.

*The Sex Discrimination Act.*

Under the SDA, a person directly discriminates against a woman if they treat her less favourably on the ground of her sex than they treat, or would treat a man. The complainant must therefore demonstrate two things, the less favourable treatment itself, and the reason for it. The statute gives little guidance on the issue of who is a comparable man for the purpose of less favourable treatment, stating only that the comparison must be such that "the relevant circumstances in the one case are the same, or not materially different, in the other" (Section 5 (3)). Stated simply, like must be compared with like. The Court of Appeal has stated that, in showing that the less favourable treatment was because of
sex, it is sufficient to show that sex was a substantial or important element; it is not necessary to show that sex was the sole factor. Owen and Briggs v. James [1982] ICR 618, 623, 625-6, decided under the Race Relations Act of 1976.

In applying and interpreting the concepts of direct discrimination, the EAT has expressly recognized the dangers inherent in relying for guidance on what appear to be natural or instinctive feelings. Thus, in Peake v. Automotive Products Ltd [1977], ICR 450, the EAT stated "no guidance can be got from instinctive feelings; rather the reverse" and explained that:

... preconceived ideas of what is fit are at best an uncertain guide and the only sure course is to follow the words of the Act in accordance with what appears to be its policy. Occasionally, no doubt it will produce odd results, but they are the price which will have to be paid for such a sweeping reform. (Ibid. at 483, 489)

Peake concerned an employer's practice of allowing women factory workers to leave five minutes earlier than men, to avoid their being jostled in the end-of-the-day rush. The EAT found that this policy violated the SDA, and its decision was appealed to the Court of Appeal.

The Court of Appeal did not unfortunately, unlike the EAT, adopt an approach consistent with the words or the policy of the statute. Lord Denning held that "it would be very wrong ... if this statute were thought to obliterate the differences between men and women or to do away with chivalry and courtesy which we expect mankind to give woman-
kind" ([1977] ICR 968, 973). Lord Justice Shaw similarly concluded that the statute was not designed to abolish "every instinct of chivalry and consideration on the part of men for the opposite sex". (Ibid. at 975). The Court of Appeal overturned the EAT's finding of discrimination and held that different treatment did not violate the statute when based on "sensible arrangements", "the interest of safety", or when the maxim de minimis non curat lex should apply.

This approach judicially read into the statute a principle of broad exemptions quite at odds with the statutory language and purpose. If followed to its logical conclusion, such an approach could render the statute essentially meaningless. Fortunately, for the continued viability of the SDA after Peake, subsequent decisions of the Court of Appeal suggest that the earlier approach has been renounced. In Ministry of Defence v. Jeremiah [1980] ICR 13, 25, Lord Denning admitted that he thought on reflection that the only sound ground for the decision in Peake was the de minimis rule. While Lord Justice Brandon declined to comment on whether the Court of Appeal had been correct in Peake, the opinion of the third judge, Brightman, LJ, suggests that he was in agreement with Lord Denning, although he did not expressly consider Peake. In Gill v. El Vino Co. Ltd., [1983] PB 425, the Court of Appeal also cast doubt on the validity of the de minimis argument. In Gill, the Court of Appeal held that a wine bar unlawfully discriminated
against women by refusing to serve them unless they were seated at a table, while men could be served either seated, or standing at the bar. The Court of Appeal held that the de minimis argument had no application to circumstances such as these. In Gill, the judges adopted an approach similar to that of the EAT in Peake. Lord Justice Eversleigh, for example, emphasized that the correct way to analyse the issues was "to take the simple words of the statute and try to apply them" (Ibid. at 429).

The concept of direct discrimination has raised however a number of complex questions which are not easily resolved by resort to the "simple words of the statute". The question of discrimination against pregnant women for example is one where the words of the statute, simply applied, have led to a bizarre result. In Turley v. Allders Department Stores 1980 IRLR 4, the EAT held that dismissal of a woman employee on the grounds of pregnancy was not sex discrimination, since sex discrimination involves the unequal treatment of like and like. Since there is no male equivalent of a pregnant woman, pregnancy discrimination could not constitute sex discrimination.

The EAT in Turley correctly assumed that the less favourable treatment of the woman complainant was on the ground of her sex. In finding that there was no direct discrimination however, the EAT concentrated on the second part of the test if whether the treatment was less favor-
able than that which was or would have been accorded a comparable man. The EAT argued that "you must compare like with like, and you cannot [because] there is no masculine equivalent [of pregnancy] (Ibid. at 70). The EAT failed to consider section 5(3) which requires the court to determine the "relevant circumstances", and whether they could be "the same or not materially different" in the case of a man. If the EAT had treated these issues as the questions of fact which they undoubtedly are, rather than deciding that dismissal for pregnancy was not sex discrimination as a matter of law, the EAT might have reached a different conclusion. If pregnancy is viewed as a medical condition which necessitates a leave of absence, then the issue becomes one of whether a male employee with a medical condition requiring a leave would also be dismissed. If the answer is in the negative, then there is a violation of the statute. 6

A similar analytical confusion to that appearing in Turley is found in Schmidt v. Austicks Bookshops Ltd. [1978] ICR 85, a case involving the validity under the SDA of an employers dress code which required women employees working in contact with the public to wear overalls, and skirts rather than trousers. Similar male employees were of course permitted to wear trousers, and did not have to wear overalls. A woman refusing to comply with the policy forbidding female employees to wear trousers was dismissed. The EAT held that there was no sex discrimination because
... there was no comparable restriction which would be applied to men, equivalent to that applied to the women preventing them from wearing trousers, which could make it possible to lead to the conclusion that the women were being treated less favourably than the men. (Ibid. at 87-88)

The EAT further explained that when rules governing employees' appearance are at issue, a better approach than a garment by garment comparison is "to say that there were in force rules . . . which applied to men and also applied to women, although obviously, women and men being different, the rules in the two cases were not the same" (Ibid.) The EAT's decision in Schmidt completely ignores the fact that women employees were prohibited from adopting a style of dress which is, in contemporary society, completely in accordance with normal standards, whereas men suffered no similar restriction.

As in Turley, the EAT again in Schmidt misconstrued the "relevant circumstances" in determining whether there had been less favourable treatment.

Direct discrimination includes less favorable treatment of individual women based upon stereotypes about women as a group. In Skyrail Oceanic v. Coleman [1981], ICR 864, the Court of Appeal held that it was unlawful discrimination for an employer to dismiss a woman employee on the assumption that her husband, and not she, was the family breadwinner. This approach is consistent with the statements made in Equality for Women that it would "not generally be permis-
sible" under the proposed law "to seek to justify discrimination on grounds of sex . . . on the basis of assumptions or evidence about the general differences between the sexes" (1974, paras 16, 71). The statute as enacted however contains a major exception to the principle that individuals are to be treated with reference to their own qualities and characteristics, and not those commonly associated with persons of their own sex, in section 45 which deals with insurance. Section 45 states that it is not unlawful to practice sex discrimination in relation to an annuity, life insurance policy, accident insurance policy or similar matter involving the assessment of risk, if two tests can be met. First, the difference in treatment must be based on actuarial or other data, from a source on which it is reasonable to rely, and secondly, the treatment itself must be reasonable, with regard to the data, and to any other relevant factors.

This statutory exception violates the widely accepted principle of anti-discrimination laws that people are to be treated without reference to assumptions about the group to which they belong. The arguments of insurers that actuarial data are factually correct does nothing to mitigate the problem. As the United States Supreme Court stated when confronted with the question of whether a discriminatory insurance scheme violated Title VII "(e)ven a true generalisation about the class is an insufficient reason for disqualifying
an individual to whom the generalization does not apply"
Los Angeles Department of Water and Power v., Manhart. 435
U.S. 702, 708 (1978). Further, as the Supreme Court pointed
out in Manhart, actuarial studies could undoubtedly identify
differences in life expectancy based on variables other than
sex, including race or national origin, but the Race Relations
Act of 1976 does not make the same exception for discrimina-
tion in insurance as the SDA. As Pannick (1985, p. 195) ob-
serves; the existence of the Section 45 exception in the SDA
undoubtedly owes much to the lobbying powers of the insurance
industry in 1975. It is decidedly anomalous that the
 provision should remain in a statute which prohibits direct
discrimination against women, including that based on stereo-
types.

Initially, the Sex Discrimination Bill of 1975 proposed
to make unlawful only direct discrimination, the concept
of discrimination that was at the heart of the Race Relations
of the bill however, the definition of discrimination was
amended to include indirect discrimination. This concept
is derived from the decision of the U.S. Supreme Court in
not explicitly prohibit indirect discrimination. The con-
cept was developed judicially through the Supreme Court's
liberal construction of Title VII's prohibition against dis-
crimination "because of" membership in a statutorily pro-
tected class. In Griggs, the Supreme Court explained that Title VII prohibits not only direct intentional discrimination, but also "practices that are fair in form but discriminatory in operation" (Ibid. at 431). The court argued that Title VII required "the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate incidiously to discriminate on the basis of racial or other permissible classification." In deciding whether a challenged practice is discriminatory, the Court in Griggs stated "the touchstone is business necessity" (Ibid.) The issue before the court in Griggs was the alleged discriminatory effect of the employer's requirement of a high school diploma or the passing of a standardized general intelligence test as a condition of employment. The court found that the requirements operated to disqualify black applicants at a substantially higher rate than white applicants, and that neither requirement was significantly related to successful job performance. Thus, the court held there was a violation of Title VII.

The decision in Griggs thus established three elements for a showing of indirect discrimination or disparate impact: a favourably neutral employment practice, with a substantial discriminatory impact, which is not a business necessity. The test of business necessity is also referred to as a test of job-relatedness. (See Griggs at 426.)

The U.S. Supreme Court applied the disparate impact
theory of discrimination to a sex discrimination suit, in Dothard v. Rawlinson 433 U.S. 321 (1976) and in so doing, discussed in greater detail than in Griggs the concept of job-relatedness. In Dothard, a woman applicant for a position as a prison guard was refused employment because she could not meet the minimum weight requirement. She challenged the requirement under Title VII. The Alabama Board of Corrections defended it on the basis of job-relatedness, arguing that the minimum height and weight requirements had a relationship to physical strength, which was essential to effective job performance.

Relying on Griggs, the Supreme Court in Dothard noted that there must be a "manifest relationship" between the challenged practice or requirement and the employment in question, and that the survive must be "necessary to safe and efficient job performance" 433 U.S. at 329 n. 14. If the employer can demonstrate job relatedness to the satisfaction of the court, the plaintiff may still prevail if he or she can demonstrate that other, non-discriminatory requirements would equally serve the employer's legitimate interests (Ibid.). Thus, the court held that if the employer's job-related quality, physical strength, were bona fide, they could, instead of using minimum height and weight requirements, have adopted and validated a test for applicants that measured strength directly. Such a test, fairly administered, said the Court, would have served the employer's legitimate purpose, at the
same time as complying with Title VII (Ibid. at 332). Consequently, the Court held that the challenged requirements violated Title VII under the disparate impact theory of discrimination.

In British discrimination law, the concept of indirect discrimination was created by statute rather than by judicial interpretation. The SDA defines the concept in some detail but in terminology ambiguous enough that its effective use "still depends on sympathetic judicial interpretation" (Pannick, 1985, p. 40). The American model was not adopted without some changes however, and where American courts have looked to a defence of business necessity or job-relatedness, the British statute speaks of "justifiability".

The basic statutory provisions are set out in Section 1(1)(b) of the SDA. This section establishes that a person may be liable for indirect sex discrimination even if there was no intent to treat the complainant unfavorably on the ground of sex. There are four elements to the concept of indirect discrimination: there must be a requirement or condition applied equally to men and women which has a disparate impact on women, which is unjustifiable, irrespective of sex, and which imposes a detriment on the complainant.

What constitutes a 'requirement or condition' is not at all clear, although the appellate courts have given some guidance. In Steel v. Union of Post Office Workers
[1975] ICR 181, 188, the EAT, referring to Griggs, suggested that Section 1(1)(b) is concerned with "a practice" that has a disparate impact on women, and is unjustifiable. In Price v. Civil Service Commission [1978] ICR 27, 30, the EAT emphasized that "it is necessary to define with some precision the requirement or condition which is called in question". Price and Steel provide examples of two different kinds of facially neutral practice which may be challenged as indirectly discriminatory. In Price, the challenged practice, a rule that job applicants had to be under 28 years old, had a disparate impact on women due to existing social conditions under which it is common for women to interrupt their careers during their 20's to bear and rear children. In Steel, the challenge was to a seniority rule which had a disparate impact on women who, before the passage of the SDA in 1975, were not eligible for the status necessary to achieve seniority. Steel demonstrated that the indirect discrimination provisions of the statute may provide a means of challenging the continuing effects of directly discriminatory acts which occurred prior to the introduction of the 1975 Act or which might otherwise be time-barred (Pannick, 1985, p. 43, n. 62) 8.

In order to establish the disparate impact on women of a challenged requirement, the complaint must show that it is "such that the proportion of women who can comply with it
is considerably smaller than the proportion of men who can comply with it" (S.1 (1)(b)(i)). The EAT, in Price adopted a relatively liberal and common-sense approach to the interpretation of this provision. In that case, the EAT held that whether a person "can comply" with a requirement depends not on whether it is theoretically possible for her to do so, but whether she can do so in practice. Price [1978] ICR 27, 31. The EAT, in determining whether a smaller proportion of women than men could comply with the challenged age requirement took into account the "current usual behavior of women" leaving aside "behavior and responses which are unusual or extreme" (Ibid.). Thus, the EAT rejected the argument that women could comply with the condition as easily as men, since they are not obliged to bear or rear children.9

Another issue raised by this part of the statutory provision is the question of what constitutes the relevant pool of men and women for the purposes of determining whether there is a disparate impact on men and women as members of their respective groups. In Price, the EAT stated that the relevant pool of men and women may be less than the total population and probably consisted of "qualified men and qualified women" [1975] ICR 27, 32.10

Once the question of the appropriate pool of men and women is decided, the tribunal must decide whether a "considerably smaller" proportion of women than men can comply with the challenged condition. The statute itself provides no guidance
as to what magnitude of disparity is contemplated in this subsection. Pannick (1985, p. 46) suggests that Parliament presumably meant to exclude cases where the disparity was of no statistical significance. The U.S. Supreme Court has spoken of a "substantial" and a "significant" discriminatory impact in Griggs and Dothard respectively. In both countries, it appears that the precise magnitude of variance required will be determined on a case by case basis. (See Pannick, 1985, p. 46; Schlei and Grossman, 1983, p. 98-99).

Disparate impact analysis raises the issue of whether the employer may successfully defend against allegations of indirect discrimination by pointing out that as a whole, it appointment criteria or employment practices do not result in discrimination against the group in question. In the United States this argument is referred to as the "bottom line" approach and was decided by the U.S. Supreme Court in Connecticut v. Teal. In Teal, black plaintiffs challenged the employers requirement of passing a written examination for promotion to a particular job, showing that the examination excluded black applicants disproportionately. The employer argued that the court should consider not just the written examination, but the entire promotion process which reflected no such disparate impact. A 5-4 majority of the Supreme Court rejected this argument and concluded that the written examination requirement violated Title VII because of its disparate impact on black applicants. The EAT was faced with
a similar argument in *Price* where a response to a female complainant's challenge to its age requirement, the Civil Service Commission argued that, despite the requirement, a higher number of female applicants than male applicants were appointed to the job. The EAT said this was not significant, since the issue was whether the specific requirement is "more disadvantageous to women than men" ([Price [1978] ICR at 30). As the foregoing discussion illustrates there are some basic similarities between the American and the British concepts of indirect discrimination, as they apply to the facially neutral employment practice, or requirement or condition, and in terms of the issue of what constitutes a showing of disparate impact. The third element in the British statutory scheme, however, the question of justifiability, makes a significant point of departure from the American model which speaks in terms of business necessity and job-relatedness.

During the Parliamentary debates on the SDA, attempts were made to replace the word "justifiable" by the word "necessary" in clause l(l)(b)(ii). These attempts to amend the bill were defeated in the Standing Committee and in the House of Lords (Standing Committee B, 24 April 1975, cc-79-80, H.L. Debs. 14 July 1979, C.1020). (See discussion in Chapter 4, note.) Under the SDA as enacted, therefore, if the complainant establishes that the challenged requirement has a separate impact on women, the burden shifts to the respondent to "justify" the practice. Notwithstanding the statutory lan-
guage of justifiability, the EAT in Steel interpreted the requirement as imposing a strict test on the employer to show that the practice was necessary, not merely convenient. The EAT said that for this purpose it was relevant to determine whether the employer could find some other non-discriminatory method of achieving its objective. The EAT stated expressly that it had looked to Griggs for assistance, and the opinion in Steel demonstrates that the EAT found the concept of business necessity useful.

The EAT remitted Steel to an industrial tribunal which held that the challenged practice of allocating postal walks by seniority was not justifiable because of the pre-1975 discrimination against women which had placed them in a disadvantaged position as to seniority. In Price, the EAT also remitted the case to an industrial tribunal, which applied the strict test to find the challenged age requirement unjustifiable, as there were other non-discriminatory methods available for the employer to achieve the stated objective of a balanced career structure within the Civil Service (Pannick, 1985, p. 49).

Unfortunately, the strict test set out by the EAT in Steel and Price has been rendered less stringent in some later cases. In Singh v. Rowntree Mackintosh Ltd., the (Scotland) EAT held that an employer does not need to show that the requirement or condition is "absolutely essential", rather the test is one of "necessity" so long as the term is "applied reasonably and with common sense" ([1979] ICR 554). Singh
involved an appeal from the decision of an industrial tribunal, in a case brought under the 1976 Race Relations Act that it was justifiable for the employer to prohibit employees in a confectionary factory from wearing beards, despite the disparate impact on Sikhs. Using the less stringent test, the EAT upheld the industrial tribunal's decision. In a similar case the Court of Appeal refused leave to appeal a decision of the EAT, stating that the justifiability of a chocolate manufacturers rule that employees be clean-shaven was a question of fact that the industrial tribunal had decided to favour of the employer. *Pansesar v. Nestle Co. Ltd.* [1980] ICR 144.11

The impact of these later decisions of the EAT and Court of Appeals is twofold: the initially quite stringent test of justifiability as set out in *Steel* is weakened, effectively lessening the burden on the employer of defending the challenged practice, while at the same time this complex issue is to be treated as a question of fact within the discretion of individual industrial tribunal.

Thus, with precedents such as *Singh* and *Panesar*, which have upheld clearly discriminatory practices on the flimsiest of justifications, the potential effectiveness of the concept of indirect discrimination is weakened. The Court of Appeals' refusal to review an industrial tribunal's determination of justifiability appears to give considerable discretion to the
tribunals, which is likely to hinder the development of uniform criteria on this complex and significant issue.\textsuperscript{12} As Hepple (1983, p. 83) points out, the problem is ultimately that the Court of Appeal expects the tribunal members to be able to conduct a process of fact evaluation in an area where there is neither a social consensus nor a consensus among tribunal members. As Browne-Wilkinson J noted, "there is no generally accepted view as to the comparative importance of eliminating discriminatory practices on the one hand, as against, for example, the profitability of the business on the other" Clarke v. Eley (IMI) Kynoch Ltd. [1982] IRLR 482, 487 (EAT).

If the complainant proves that a requirement or condition has a disparate impact on women, and the respondent fails to justify it, the complainant must show that the practice was to her detriment because she cannot comply with it, in order to meet the final element of section 1(1)(b)(iii).

The statutory language of this final element is vague and somewhat ambiguous. During the debates on the enactment of the statute, a spokesman for the government explained that

(cont'd.)
the language was necessary because there must be a particu-
lar victim of indirect discrimination (H.C. Debs, 18 June
1975, cc 1498-2). The EAT has adopted a liberal and common
sense approach to the construction of the two parts of this
subsection, compliance and detriment. In Steel the EAT held
that it is irrelevant that the complainant might or would have
been able to comply at an earlier date, stating that the time
to consider whether there is a detriment is that "at which the
requirement or condition has to be fulfilled" [1978] (ICR 181,
186). Similarly, the failure to consider an applicant on
fair terms constitutes a detriment, the complainant is not
required to show "but for" the challenged requirement she
would have been appointed or promoted (Lustgarten, 1980, p. 51).

The concept of indirect discrimination is an extremely
important one, as it moves anti-discrimination law forward
from a view of discrimination which looks only at motives.
Nevertheless, as the foregoing discussion demonstrates, the
concept is also a complex one and much hinges on the inter-
pretation of the concept of justifiability. If this concept
is given too liberal a construction, then the potential effec-
tiveness of the indirect discrimination provisions of the SDA
will be significantly undermined.

In addition to direct and indirect discrimination,
the SDA also prohibits marital discrimination and victimiza-
tion.
Marital discrimination is defined in section 3 of the Act and includes both direct and indirect discrimination on the basis of marital status. The concepts of direct and indirect discrimination are defined in the same way in the context of marital discrimination as they are in the broader context of sex discrimination generally. While the proponents of the legislation were undoubtedly concerned about the effects of marital discrimination, the provisions as enacted are seriously flawed, in that the statute only prohibits discrimination against married persons, not single ones. Thus, a person denied a job because she is single or divorced would have no recourse under the marital discrimination provisions.

Finally, the statute makes it unlawful to discriminate by way of victimization, which is defined as treating someone less favourably because he or she has asserted a right under the EqPA or SDA, or has otherwise acted by reference to the provisions of those statutes.

The EqPA and the SDA together thus provide a complex and often ambiguous statutory framework for the implementation of anti-discrimination principles.

Both the Equal Pay Act (EqPA) and the Sex Discrimination Act (SDA) have been criticized for perceived limitations inherent in their provisions. The EOC, for example, proposed detailed amendments to the Acts in January 1981. Among other recommendations, the EOC suggested amending the scope of Section 1 of the EqPA to admit equal pay for work of equal value,
including a concept of indirect discrimination in the EqPA to correspond to the similar concept in the SDA, and facilitating collective enforcement through a broadening of the powers of the Central Arbitration Committee (CAC) and the EOC itself, (EOC, January 1981, pp. 5-6). With regard to the SDA, the EOC's recommendations included amending Section 1 to prohibit discrimination on the group s of family status, and amending Section 48 to facilitate affirmative action in training (EOC, January, 1981, pp. 4-5). Other proposals were concerned with amending the provisions on, for example, advertising and the burden of proof. Apart from the proposal regarding the definition of equal pay, the Government has taken no action to implement the proposals.

Useful though the EOC's proposed amendment would undoubtedly be in broadening the scope of the legislation, the primary focus in this chapter is not on the construction of a blueprint for specific changes. Rather, it is to examine the totality of the concepts of equality and discrimination that are at the heart of the legislation, and their consequences in terms of both of the legislation's capacity to address the material situation of women workers, and of its ideological ramifications.

Two of the most trenchant criticisms of the legislation have focused on the definition of equal pay, which requires a male comparator engaged in the same or broadly similar work, and on the absence of affirmative or positive action provisions, with the exception of the limited provision for
allowable positive action in training. Underlying these two characteristics of the legislation is a notion of equality which is essentially individualistic, which predicates equality upon the comparison of like with like, and which is procedural rather than substantive. This critique of the content of the statutes can be illuminated by considering some different ways of defining the nature of equality.

Rae (1981, p. 20) makes a useful distinction between "individual-regarding" and "bloc-regarding" equalities. The notion of individual-regarding equalities describes the situation in which there is one class of equals, and one relation of equality holds among all its members. The principle of "one person, one vote" falls within this category as do civil rights and civil liberties generally. By contrast the concept of bloc-regarding equalities posits a situation in which the subjects of equality are divided into two or more mutually exclusive categories. Bloc-regarding equality demands equality between these sub-classes (Rae, 1981, p. 29). This concept allows equality to be structured in such a way as to require changes that will equalize discrete groups.

The analytically-distinct concepts that Rae describes are often conflated in practice. The British discrimination legislation is a case in point. The predominant underlying tendency in the legislation is the assumption of one class of equals and one relation of equality. It is individual-regarding. Thus, discrimination occurs when "a woman" is
treated less favourably than "a man" or vice versa; thus the concept is substantively un-gendered. Although such a formulation is undoubtedly appropriate in equalizing civil rights between men and women, it is demonstrably of less relevance in the regulation of employment discrimination, because of the structural components to discrimination which operate against women as a group. Wolgast (1980, p. 21) arrives at a similar understanding when she asserts that the underlying assumption of "egalitarian reasoning", similarity between men and women, is inappropriate in some contexts since men and women "are not exactly alike, or there would not be problem in the first place."

To see beyond the limitations of the traditional liberal approach to equality, it is useful to return to Rae's notion of bloc-regarding equalities. A bloc-regarding equality would be based on the existing differentiation of men and women into distinct groups unequal in terms of the relationship of the group to the labour force. The concept of equal pay for work of equal value provides an example of such a bloc-regarding equality. It is based on the recognition that in a situation characterized by a high degree of occupational segregation by sex, equality of pay for women cannot be achieved through provisions that require comparison with a man doing identical or nearly identical work.

The issue of positive or affirmative action also provides an illustration of the different outcomes that are reached
depending upon whether a bloc- or individual-regarding notion of equality is adopted as a paradigm.

It is impossible to discuss any modern anti-discrimination legislation without considering the question of affirmative action, whether it is referred to by that name, or as positive action, or reverse discrimination. The first two descriptions tend to be used by proponents of the principle, whereas the latter is more frequently found in the literature of opposition. Whatever term is used the principle generally involves the reservation for members of a defined class of certain benefits, or the practice of treating membership in the class as a positive factor in the distribution of benefits. I have used the terms affirmative action and positive action interchangeably here, generally preferring the former in discussing the American experience and the latter in discussing British approaches.

The philosophical underpinning of affirmative action as an essential component of the anti-discrimination principle is a recognition that the continuing effects of past discrimination can perpetuate discrimination, if all that is provided as a remedy is a neutral prohibition on future discrimination. According to this viewpoint, the point of affirmative action programs is to remedy past discrimination by the provision of temporary beneficial measures aimed at groups which are, as a whole, disadvantaged vis-à-vis other groups in society.

Opponents of affirmative action reject this theoretical underpinning and emphasize both the unfairness of affirmative action, in terms of its impact on the groups who are not beneficiaries, and the practical problems that arise in determining the scope of eligibility. Whereas the proponents of affirma-
tive action emphasize group disadvantage, the opponents emphasize the importance of judging each person as an individual. These general assertions about the affirmative action debate can be illustrated by a brief discussion of the American case of Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

Bakke was a white male applicant for a place at the University of California's medical school at Davis who complained that the school's practice of setting aside sixteen places each year to be filled by minorities had discriminated against him. Bakke and his supporters thus viewed the school's "affirmative action" policy as one of "reverse discrimination". The case represented a confrontation between two conflicting definitions of equality and brought to the United States Supreme Court the issue of whether in the interest of group rights some individual members of the majority could be denied benefits to which they might otherwise have access. Supporting Bakke, the American Jewish Committee's amicus curiae brief argued

If an individual is denied admission to a state institution even though he is better qualified than others who have been accepted, and if the denial is due to the fact that he is not a member of a particular racial or ethnic group, his personal and individual right to be free from discrimination has been infringed. (Dreyfuss and Lawrence, 1979, p. 95).

The attorney for the University by contrast framed the issue as being one of
... whether a state university ... is free voluntarily, to take into account the fact that a qualified applicant is black, Chicano, Asian, or Native American in order to increase the number of qualified members of those minority groups trained for the educated professions ... professions from which minorities were long excluded because of generations of pervasive racial discrimination. (Ibid. p. 177)

This intractable dichotomy between individually-defined rights and collectively-defined rights is at the heart of the debate over affirmative action, and indeed is central to any understanding of anti-discrimination law.

Bakke raised before the U.S. Supreme Court the issue of the constitutionality of "benign" race conscious measures. In reaching a decision the Justices filed six separate opinions, which left many questions unanswered. Four Justices refused to consider the constitutional question and decided the issues on the basis of Title VI of the 1964 Civil Rights Act, but five justices, a majority of the court affirmed the constitutionality of race-conscious affirmative action.

The validity of voluntary affirmative action programs under Title VII of the Civil Rights Act was brought before the U.S. Supreme Court in United Steelworkers of America v. Webber 443 U.S. 193 (1979). In that case the Court held that Title VII, which makes it unlawful for an employer to discriminate on the grounds, inter alia, of race or sex, does not prohibit employers and unions from agreeing upon and implementing a
race-conscious affirmative action plan which reserves 50% of the places in an in-house training program for black employees.

In addition to voluntary affirmative action, American courts may order affirmative action relief, extending beyond individuals to classes of protected persons, as part of their broad discretion to fashion relief and bar future discrimination (Am. Jur 2nd, 1986, Job Discrimination, Section 2343).

The British legislation by contrast with the American law, rejects almost completely the concept of affirmative action. Sections 47-49 of the SDA permit but do not require some limited positive action with regard to training programs. Otherwise, Parliament explicitly rejected the extension of the concept to any area such as recruitment or promotion, where it might have had greater substantive effect. The refusal to incorporate positive action provisions is consistent with the individual-regarding and procedural approach which is the prevailing tendency in the legislation.

Nevertheless, it should be noted that there are some provisions in the statutes which are essentially bloc-regarding and thus the question then becomes one of explaining the shift between approaches for particular provisions. Provisions in the statutes which breach the notion of simple individual-regarding equalities include those prohibiting indirect discrimination and by judicial extension in the EqPA, exempting protective legislation from the coverage of the SDA, and exempting terms and conditions conferring special treatment on women by reason of child-
birth or related issues from the EqPA.

The retention of protective legislation occasioned some adverse comment from Conservatives during the Parliamentary debates on the EqPA and the SDA, but was not the focus for a serious political challenge. By contrast, however, the inclusion of positive action provisions would doubtless have provoked serious opposition, both inside Parliament and outside, not least because positive action in the sex discrimination legislation could have paved the way for similar provisions in subsequent race discrimination legislation.

This analysis is necessarily speculative. In the policy debates, the peg on which the rejection of affirmative action was hung was the notion of formal equality. While some positive action in training was seen as a move towards "genuine equality", affirmative action in terms of access to jobs would amount to "reverse discrimination". In the counter-position of "genuine equality" and "reverse discrimination," the dichotomy between bloc-regarding and individual-regarding equality, is clear. Equality of opportunity for individuals is equated with genuine equality, whereas benign gender-conscious measures with more substantive effect would constitute reverse discrimination. This view of the proper boundaries of discrimination law mirrors that of many American critics of affirmative action. Nathan Glazer (1975, p. 201) for example, attacks affirmative action in these terms:
Compensation for the past is a dangerous principle. It can be extended indefinitely and make for endless trouble. . . . When it is established that the full status of equality is extended to every individual. . . . one has done all that justice and equity call for and that is consistent with a harmonious multi-group society.

In this statement the ideological ramifications of individual-regarding equality clearly appear. Not only does this approach ignore inequalities between groups, it negates their validity.

As well as involving the distinction between bloc-regarding and individual-regarding equalities, the positive action debate also involves the distinction between procedural and substantive equality, or as Mayhew (1968) describes it, between "equal opportunity" and "fair shares" approaches. These two strands of analysis are in practice often related but are analytically distinct (Rae, 1981, ch. 4). By validating affirmative action in only a very range of circumstances, with respect to training the SDA forecloses the possibility of a substantive group-oriented approach to remedying past discrimination. It remains unlawful for an employer to give favourable treatment, other than in training, to women or racial minorities even where an employer voluntarily desires to do so to remedy the effects of past discrimination. The omission of any provision for affirmative action in the areas of hiring or promotion underlines the limited concept of equality which informs the major part of the statutory code.

It is not at all likely in the present political cli-
mate that proposals for the incorporation into the British legislation of an affirmative action approach would be viewed favourably by those with the power to make the decision. Governmental inaction in the face of the EOC's more modest proposals does not augur well for any attempt at strengthening the law.

Even assuming that this were not the case, the uncritical incorporation of an affirmative action approach into the SDA, would still leave major flaws in the way in which the legislation addresses the problem of gender inequality. The origins of the sex discrimination legislation lie in race discrimination law, in the United States and Britain. One of the assumptions behind the legislation is that the same general concepts are applicable to both forms of discrimination, thus ignoring and denying the specificity of each.

In many respects the sex/race analogy is an inadequate one in the context of employment discrimination law. The

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specificity of women's position in the labour force is not shared by minorities, regardless of sex. Thus, the assumption that the same concepts of discrimination will adequately address the experiences of both groups is based on a spurious notion of the similarity of the position these groups occupy, as groups, in the labour market. This assumed similarity derives from the understanding that both groups are the victims of discrimination, but in this context, discrimination appears as an abstract category, independent of the social practices which constitute the relations between races, or between men and women as gendered individuals.

It is important to emphasize that this distinction depends not just upon the fact that women are differentiated from men by physiology, but also, and most importantly, by the social relations of gender differentiation.

The discrimination legislation both recognizes this differentiation, in some of its provisions, and denies it by relying on abstractions which do not relate to women as gendered individuals. For instance, S. 2(1) of the SDA provides that clauses relating to sex discrimination against women are to be read as applying to women. Section 2 (2) provides that in applying subsection (1) no account shall be taken of special treatment afforded to women in connection with pregnancy or childbirth. These sections were the legal crux of the matter in Turley v. Allders Department Stores, 1980. IRLR 4,
in which a majority of the EAT held that dismissal for pregnancy did not constitute sex discrimination under the stat.

Sex discrimination, they reasoned, involves treating men and women unequally, simply because they are men and women. When a woman is pregnant she is no longer just a woman; she is a pregnant woman, for which there is no masculine equivalent. Like cannot therefore be compared with like. This reasoning parallels that of the U.S. Supreme Court in *Gilbert v. General Electric*, 425 U.S. 125 (1976) which held that an employee income protection plan that covered all temporary disabilities except pregnancy did not discriminate on the basis of sex, but only between pregnant persons and non-pregnant persons.

The point here is not however to focus on pregnancy as such, but to illustrate some of the contortions of logic that arise from a failure to appreciate that equality must sometimes recognize differences of an unalterable nature. However, failure to deal adequately with physiological difference is not the only problem in the statutes' approach to gender relations. The approach is fundamentally contradictory.

The legislation insists, for example, on a definition of equality which depends at bottom on the similarity of women and men, and yet specifically exempts from its coverage a whole range of policies and practices which negate the
notion of women as independent economic subjects. Thus fiscal and social policies continue to be predicated on an idealized image of the bread-winning husband and dependent wife/mother, which translates into specific practices in the tax and social security systems that discriminate against women. These practices are left intact under S. 51 of the SDA.

Thus, married men receive an additional tax allowance for their wife and this "reflects the assumption that it is a married woman's unpaid job to care for children and that if she cannot do so, her husband is entitled to financial assistance for someone else to perform the job. In contrast, a woman on her own, even if working is not considered by the courts as in need of an allowance for a substitute childminder," (O'Donovan, 1979, pp. 145-6). Similarly, in the social security system, Invalid Care Allowance is available to married men, single men and women, and more recently extended to friends) who are unable to work because of the need to provide constant care. However, this benefit is not payable to married women on the assumption that they will be at home and available to perform caring duties without need for compensation (Millar and Phillips, 1983, p. 420).

Given the prevailing stereotypes of women presented at all levels of society, e.g., the media and education, it is not expected to find the legal system reflecting these. Social reality is, however, more complex than these partial
representations of women as dependents, as primarily wives and mothers, would suggest. As more and more women enter the labour force, and as more and more married women simultaneously work inside the labour force and outside of it, it is not surprising either to find that discrimination laws also approach the issue of women's 'two roles' in contradictory fashion.

These observations demonstrate some of the ways in which women are not 'like' minorities for the purpose of discrimination law. The Race Relations Act does not have to exclude other legislation from its coverage, because the social security and tax systems do not discriminate against racial minorities as they do against women. The point of this argument is not only to suggest that these exemptions should be repealed, it is also to stress the different structural position of women as workers as compared with members of minority racial groups.

To return to the issue of affirmative action, the question then can be posed of whether the kinds of affirmative action plans developed in the context of ending discrimination against racial minorities can also address the problems faced by women in the labour force. Quota systems, preferential hiring and increased access to promotion and training, which are the main features of employment affirmative action plans, must go some way to improving the position of women
in the work force, as experience in the United States has shown.

Nevertheless, given the particular nature of women's relationship to the labour market, because of the nexus between waged labour and familial responsibilities, it is questionable whether such programmes, if fully implemented, could open up opportunities for women in the same way as they might for (male) minority members, absent some other changes concerning women's family role. Such changes were dismissed as falling outside the scope of a discrimination bill, when they were raised during the Parliamentary debates. This perspective is shared by some commentators. Chiplin and Sloane (1982, p. 122) for example, noting that it is an "uncontrovertable fact" that the majority of women get married, and that many raise children, argue "if this pattern is to change, it requires the fundamental review of attitudes well beyond the scope of any equal opportunity legislation."

Arguments of this kind are based upon the assumption that if women's family role impinges upon their ability to participate fully and equally with men in the labour force, then resolution of the problem must occur within the family. In this formulation the problem is one of private attitudes towards family responsibilities, that place the burden predominantly upon women. To regulate private attitudes towards domestic responsibilities is clearly outside the scope or
capacity of discrimination legislation. Such an argument implicitly accepts the limitations of the present definition of discrimination legislation and the notion that it must operate within the present (male) model of employment patterns and practices rather than seeking to change them.

The purpose of this chapter has been to delineate some of the ways in which the discrimination legislation appears to be conceptually inadequate, if intended as a serious response to women's present position of economic disadvantage. This critique is not intended to suggest that these inadequacies were consciously structured into the legislation to defeat its purpose. Like Lustgarten (1980, p. xiii), I view the errors as flowing from errors of perception and analysis, timidity, and the influence of constraints imposed by the normal workings of the legal system. To his list I would specifically add the conceptual confusions arising from the application of a sometimes inappropriate concept of equality.

Whether these misconceptions could be corrected requires an analysis of the feasibility of extending discrimination laws in the current political and economic climate. Such a speculative endeavour is beyond the remit of this research, although, intuitively, such a prospect seems unlikely. What appears to be clear, however, is that there is nothing inherent in the legal form itself that would prohibit a less abstracted or more substantive approach. Affirmative action,
in the United States has shown the possibility of modest steps in this direction, within the legal framework of a capitalist society.

Rae (1981, p. 15) points out that conceptualizing equality as either bloc-regarding describes only a "structural grammar" of equality and does not address the question of content. I have argued here that effective changes in the law must consistently construct equality upon a recognition of gender difference, where appropriate, rather than upon a spurious assumption of identicality. Thus, the content of an amended law should "gendered" to the degree that such a recognition of gender difference is necessary to effectuate equality of employment opportunity in its broadest sense. A change of this kind would necessitate a shift in the law from an essentially negative perspective, to one that included some elements of positive action.

Finally, the question that must be asked is whether the adjudicative form of dispute resolution is suited to the task of resolving disputes that arise under anti-discrimination law. If it is recognized that an individualistic approach to equality is flawed and that an emphasis on specific collectively-defined rights is more appropriate, then a major area of concern must be what form of arbitration is best adopted for the task of implementing that approach. The issue may simply be phrased as determining whether adjudication between private parties is an optimal or even adequate
means of resolving issues of bloc-regarding equality.

Polanyi (1951) has pointed to the "polycentric" nature of many tasks. Fuller (1978) adopts this concept in addressing directly the kinds of social tasks that can properly be assigned to courts or other adjudicative agencies, and what therefore are the limits of effective legal action. Fuller points out that legislative determinations often can only become fully effective if they are of such a nature that they are suited for judicial interpretation and enforcement, and argues that polycentric situations present special problems for such a process.

A polycentric situation is one that involves interacting points of influence, and will normally involve many affected parties and a somewhat fluid state of affairs (Fuller, 1978, p. 307). Thus, an adjudicative decision may have wide and unforeseen consequences affecting individuals other than the original parties. Fuller notes three possible consequences when an attempt is made to deal with an essentially polycentric problem through an adjudicative forum. First, the adjudicative solution may fail, with unexpected repercussions making the solution unworkable, so that it is ignored or withdrawn. Second, the arbitrator may ignore judicial properties in an effort to resolve the issues presented, and third, the arbitrator may reformulate the problem so as to make it amenable to solution through adjudicative procedures.

Polycentricity is not of course the only structural variable that may affect the limits of adjudication. Eisenberg
(1978, p. 424) suggests that the problem of multiple criteria cannot be ignored. Thus, the issue appears as one of analysing the structural properties of the issues presented for adjudication to determine their aptitude for adjudicative resolution. While one of the central problems of the present anti-discrimination legislation is its emphasis on individual rights, changes in the direction of a collective definition may not yield the desired effect if no attention is paid to the necessity of determining appropriate or effective means of enforcement.

This chapter has focused exclusively on the conceptual limitations of the legislation. This is not to suggest, however, that the legislation has no merit. Some women have received higher pay because of the Equal Pay Act. Others have successfully brought claims of sex discrimination. Furthermore, the principle of using legislation to provide for equal employment opportunity is now recognized, in a way that it was not, prior to the passage of the statutes. Thus, the terms of the debate have now shifted, and rather than arguing the need for legislation, and the propriety of a legislative solution, it is now possible to debate the content of an effective discrimination law.

Meanwhile, the law as it stands offers at least a partial solution to discrimination in the labour force. How that solution operates in effect depends upon the system of enforcement and implementation that the legislation establishes. This system is the subject of analysis for Part II of this study.
In discussing the appellate decisions, the analysis is directed primarily, at the years 1976-1981, the period covered in the empirical study of tribunal decision-making in Part II of this dissertation.

In 1982 the European Court of Justice held that the United Kingdom was in breach of EEC Directive 75/117 which guarantees equal pay for work of equal value without sex discrimination Commission of the European Communities v. United Kingdom [1982] ICR 578. The British Government then amended the 1970 Act to attempt to comply with Community Law. With effect from January 1, 1984, a woman can also claim equal pay for work of equal value with that of a man in the same employment. See Equal Pay Amendment, Regulations 1983, S.I. no. 1794.

The interpretation of these concepts, and the employer's defences under the EqPA is discussed in more detail in Chapter 10 below.

A number of problems have arisen in the application of Section 1(3). Court's and tribunals seem to have had some difficulty in understanding the kinds of factors which employers may legitimately rely on to establish a material difference other than sex. See Chapter 10 below.

It should be noted that the EAT in Scotland decided, contrary to the holding of Jenkins, that the 1970 Act did not reach indirect discrimination. Rainey v. Greater Glasgow Health Board, Eastern District [1984] IRLR 88, 89-90.

This was the approach taken by the author of the dissenting opinion in Turley Id.at 71; per Ms. P. Smith.


The EAT in Scotland held that a case of this kind involved issues of direct rather than indirect discrimination Record Production Chapel. SOGAT v. Turnbull 16 April 1984, unreported, cited in Pannick (1985) p. 34, n. 30

The House of Lords has approved the approach of the EAT in Price to the interpretation of the words "can comply" in a case brought under the Race Relations Act, Mandla v. Dowell Lee (1983) 2AC 548, 565-6.

This approach was upheld by the Court of Appeal in a race discrimination case, Perera v. Civil Service Commission (1983) ICR 428,437.
11 The Appellate Committee of the House of Lords confirmed that it is a question of fact in each case whether or not justification has been shown. Mandla v. Dowell Lee (1983) 2 AL 548, 566-7 per Lord Fraser.


13 See footnote 2.


15 For a more detailed examination of the language of the policy debates, see Chapter Four, below.

16 The position of minority women will of course be conditioned upon both the fact of being female, and upon being a member of a minority race or ethnic group.

17 The 1972 settlement between the EOC and AT & T, for example, included an agreement by the employer to upgrade 50,000 qualified women (10% in management), and to place over 6,000 women in "traditionally male" jobs. See also the account of affirmative action programs in ten public utility companies, U.S. Department of Labour, (1978), R. and D. Monograph 65.

18 See Chapter Four, above.
PART II
CHAPTER SIX
OVERVIEW OF THE ENFORCEMENT SYSTEM

In this part of the study, attention turns to the mechanisms through which the statutory provisions of the anti-discrimination legislation are given force and practical meaning. It is important to stress that the particular enforcement mechanisms that are chosen by policy makers are at least as important as the substantive concepts embodied in the law, in determining the particular perspective on discrimination that the legislation advances and legitimates. It should also be emphasized that the substantive concepts in the legal definition of discrimination, and the enforcement mechanisms associated with them cannot be viewed as having separate and independent existences. Rather, the legislator's underlying assumptions about the nature of sex discrimination and the role of law colour both the substantive concepts which are used to define the parameters of the problem, and the enforcement system established as the basis of remedy. Thus, an approach to discrimination which is essentially
formalistic, and which incorporates an overt assumption about the limits of law in challenging discrimination is consonant with an enforcement system which emphasizes individual rights, the provision of remedies coextensive with violations, and the processes of conciliation, persuasion, and education in preference to litigation.

In giving specific form to these notions of what constitutes appropriate measures for enforcement, policymakers drew upon a number of sources: the experience of government intervention under the 1964 and 1968 Race Relations Act; American models in the enforcement of anti-discrimination legislation; and the existing British mechanisms for the mediation of government intervention in industrial relations. This combination of factors has produced a system which is distinctively legal, in the sense of the law's specialized institutions and procedures, and in the law's unique power of compulsion to affect the relationship of private parties, but which is at the same time penetrated to a considerable extent by ideas and institutions which are uncommon in this distinctively legal environment, such as a preference for conciliation, the incorporation of lay persons as 'experts,' and the structural representation of interests other than the judicial.

In the particular form that anti-discrimination legislation takes, there is a further distinction between a traditional common law approach with its emphasis on
individual remedies for the violation of individual rights, and a public or administrative law approach which can be seen in the creation of a new quasi-governmental organization, fulfilling in part the role of a regulatory agency. Of the two perspectives, the common-law approach is predominant in the legislation: individual complaint is the primary form of access to remedy, and the actions of the regulatory agency are ultimately subject to the injunctive power of the courts for enforcement.

In this chapter, I briefly describe the system of enforcement for the Equal Pay and Sex Discrimination Acts, and examine the roots of the system, in the machinery of state intervention, in industrial relations, in race discrimination, and in the models of enforcement provided by the experience of the United States. The purpose here is to provide an overview, i.e., schematically rather than in depth, of the major concepts which inform the enforcement system; and to summarize its important features. Chapter 7 examines in more detail the structure of private enforcement focussing on individual complaints and the tribunal hearing. Chapter 8 provides an analysis of administrative enforcement by examining the role of the Equal Opportunities Commission (EOC). Finally, Chapter 9 concludes the analysis of the enforcement system by examining the issues associated with the question of remedy.

The Equal Pay Act established two procedures for enforcement, one individual and one collective. An
individual may apply to an industrial tribunal, for an award of entitlement to equal pay. Once a complaint is filed with the central office of the industrial tribunals, a copy will be forward to the Advisory Conciliation and Arbitration Service (ACAS), which has a statutory duty to attempt to reach a settlement between the parties, without recourse to a tribunal hearing. If no such settlement is reached, the complaint proceeds for a determination on the merits by an industrial tribunal. Where unequal pay results from discrimination between men and women in a collective agreement or pay structure, one of the parties to the agreement, but not an individual affected by it, may apply to the Central Arbitration Committee for a ruling on the removal of the discrimination.¹

Under the Sex Discrimination Act, individual enforcement in employment cases also lies through an application to an industrial tribunal, and is subject to the same possibility of intervention by ACAS. In addition to providing the individual enforcement, the SDA established the Equal Opportunities Commission (EOC) with a general duty to work towards the elimination of discrimination and to promote equality of opportunity between men and women. The EOC cannot pursue complaints on its own behalf,² but it may assist individuals to do so. The commission also has powers of investigation, which can result in the issuance of a non-discrimination notice, and ultimately the power to seek injunctive relief through the courts.
These structures derive from two main sources: first, British experience in establishing industrial relations machinery, and second, American experience with administrative enforcement in the area of race discrimination, and subsequent British experience in this area.

I. The Influence of Industrial Relations Structures and Concepts

Commentators have pointed out that, at least until the mid-1960's, the British industrial relations system, and the approach to industrial and labour relations law upon which it was predicated, was characterized by a high degree of informality and 'voluntarism' (Donovan, 1968; Brown, 1978; Anderman, 1979). By comparison with countries like the United States and West Germany, the British system was marked by a relative absence of legal intervention (Fox, 1979). Legislation tended to be limited to protecting the right to strike, and to ensuring a very basic 'floor of rights' for employees (Anderman, 1979), but the main feature of the system was a preference for voluntary collective bargaining between employers and unions as a way of settling labour issues.

After 1945, successive governments intervened more actively in the industrial sphere, but the policies pursued, and the special institutions developed, were not accompanied by powers of legal intervention, but rather, followed traditional boundaries, emphasizing a preference for
education, persuasion, and voluntary methods, even where modest sanctions were provided, as in the Factories Acts of 1959 and 1961 (Fox, 1979, p. 480).

A change began in the mid-1960's, however, when governments began a process of accelerated intervention in the field of industrial relations, resulting in the establishment of new kinds of machinery and enforcement structures, albeit ones established upon the voluntaristic premises of the earlier period. This intervention included a number of statutes designed to make good some of the deficiencies in the achievements of collective bargaining that Fox (1979, p. 482) refers to as measures designed to enlarge the floor of individual employment rights. This sequence of intervention began in 1963 with the Contract of Employment Act, which gave employees rights to minimum periods of notice and to a written statement of the particulars of employment.

The process of intervention was given a boost by the Donovan Commission$^3$ (1968), which made a series of recommendations on individual rights, advocating legal protection against unfair dismissal, and the creation of statutory machinery to adjudicate complaints. The statute which best characterizes this 'floor of rights' legislation is perhaps the 1975 Employment Protection Act (EPA), which extended the protection against unfair dismissal of earlier statutes, and guaranteed other statutory rights including guaranteed wages for workless days, the right to paid
maternity leave with subsequent re-instatement, an increase in the minimum required periods of notice, and the right to time off the job for trade union duties.

With the exception of the maternity leave provisions, these measures were designed to apply actually, or potentially, to all employees regardless of race or sex. However, the Equal Pay Act and the Sex Discrimination Act, together with the Race Relations Act of 1968 and 1976, should also be seen as an essential part of this 'floor of rights' legislation, although each is designed to apply specifically to only limited categories of persons. As with other examples of 'industrial' legislation, the statutes addressing equal pay, sex and race discrimination, emphasize conciliation rather than legal sanctions, and all of the statutes display common elements in their enforcement procedures. All the statutes also share the characteristic that legal intervention is tempered by the voluntaristic attitudes of the earlier era, and that the use of law in 'industrial relations,' under which category employment discrimination is subsumed through the legislative context, is viewed as a last resort should other more conciliatory methods fail. This view is expressed succinctly in the 1978 Annual Report of one of the industrial relations agencies, the Central Arbitration Committee (CAC):

There is in Great Britain a strong underlying feeling that the detailed process of the law, with inexorable logic rarely tempered by wider considerations, is not suitable for the day-to-day settlement of a wide range of disputes that arise, especially those involving
elements of bargaining. (CAC Annual Report 1978, p. 12)

Conciliation

Successive governments through the twentieth century have not only supported an emphasis on settling industrial disputes through conciliation and voluntary arbitration, but have also provided government conciliation machinery to facilitate this objective. In 1896, the Conciliation Act established conciliation and arbitration machinery in the Board of Trade. This machinery was transferred to the new Ministry of Labour in 1916, and subsequently to that ministry's successors. (ACAS, 1980, p. 24).

Until 1974, a variety of conciliation services were provided in the Department of Employment, but in that year the independent Conciliation and Arbitration Service was established on an administrative basis. The following year, this organization became the Advisory Conciliation and Arbitration Service (ACAS) and was established as a statutory body under the Employment Protection Act (EPA) of 1975.

ACAS has a general duty of promoting the improvement of industrial relations and encouraging the extension of collective bargaining. In addition to giving advice on industrial relations, issuing codes of practice, and assisting in the resolution of industrial disputes, ACAS has a responsibility to undertake individual conciliation work under a number of statutes including the EqPA and the SDA.
Under S. 64(1) of the SDA, where a complaint has been made under S. 63 of the SDA, or S 2(1) of the EqPA, a copy of the complaint will be sent to an ACAS conciliation officer, who has a duty "to endeavor to promote a settlement of the complaint without its being determined by an industrial tribunal." ACAS has similar responsibilities under other 'floor of rights' statutes, and cases brought under the EqPA and the SDA represent only a very small proportion of the organization's individual conciliation workload, with by far the largest number of complaints concerning unfair dismissal.

Arbitration

The provision of a standing national arbitration organization in the field of industrial relations dates back to the Industrial Courts Act of 1919. The EqPA as originally written gave the industrial court jurisdiction over equal pay disputes arising in the context of collective agreements, because Barbara Castle, then the Secretary of State, argued, "The industrial court is clearly the body best qualified to deal with disputes about collective agreements because of its considerable experience in this field." (H.C. Debs, 9 Feb., 1970, c. 920). The Industrial Court was replaced in 1971 by the Industrial Arbitration Board, which was itself replaced by the Central Arbitration Committee, which came into operation in 1976 and took over its predecessors' responsibilities, including jurisdiction over equal pay disputes in collective agreements. However,
as is the case with ACAS, responsibility for the EqPA has accounted for only a very small part of the workload of the CAC, particularly since 1979 when a Court of Appeals decision affectively narrowed the scope of the organization's jurisdiction by promulgating a very restrictive definition of its responsibilities under the EqPA. 4

**Industrial Tribunals**

The origins of the industrial tribunal system are to be found in the context of the development of a much broader judicial/administrative establishment, which started in the nineteenth century, when there was an increase in the volume of legislation produced, and a corresponding development in the adjudicatory and administrative machinery of government. By the first decade of the twentieth century, tribunals of various kinds were well established as a feature of the British political system, but the real proliferation of tribunals came after the Second World War, as governments took responsibility for intervention in more and more areas of social and economic life.

Industrial tribunals were initially established under Section 12 of the Industrial Training Act, 1964, to determine appeals by employers against the assessment of the industrial training levy. In 1963, the Council on Tribunals had been consulted by the Ministry of Labour on its proposals to establish "industrial levy appeals tribunals." The Council advised the establishment of standing tribunals
on a regional basis. The Ministry of Labour proposed to take as its model the Pensions Appeal Tribunal with the Lord Chancellor appointing a national President who would have responsibility for establishing individual tribunals as appeared necessary.

In 1964, the Ministry amended its proposals so that tribunals would now be established as 'all-purpose bodies, incorporating training levy appeals, redundancy payment appeals, and compensation disputes, under the same jurisdiction. The Council on Tribunals approved of this course of action on the ground that it would provide for economy of administration and make it easier to attract persons of high calibre to serve on the tribunals. Further, the proposed scope of decisions had in common the fact that they rested on an understanding of industrial conditions (Council on Tribunals, 1965).

Since 1964, the scope of the tribunal's jurisdiction has expanded enormously, and encompasses the EqPA and the employment provisions of the SDA, as well as responsibility under the 1975 EPA, the Race Relations Act of 1976, the Employment Protection (Consolidation) Act of 1978 and the Employment Act of 1980. In announcing the government's intention to use the industrial tribunal system for enforcement of the EqPA, the Secretary of State for Employment announced that the aim was "...to provide a means of redress which is speedy, informal, and accessible," and that in the industrial tribunals "...we have the ideal
machinery to hand," explaining that "It is ideal because the tribunals are experienced in dealing with employment matters, they include representatives of workers, and they sit at various centres scattered throughout the country." (H.C. Debs, 7 Feb., 1970, c. 920).

Since the 1970 EqPA gave the tribunals jurisdiction over equal pay cases, it appeared rational to legislators considering the proposals of the Sex Discrimination Bill, to extend their jurisdiction to other complaints of sex discrimination in employment. There was no opposition in Parliament to this aspect of the Government's proposals, although concern was expressed over the paucity of women members in the industrial tribunals.

Tribunals consist of a legally qualified chairperson, and two lay members, one drawn from each side of industry. The fact that these tribunals are quasi-legal rather than fully incorporated into the legal structure is emphasized not only by the incorporation of lay members as key personnel, but also by the fact that normal rules of civil procedure are relaxed for tribunal hearings.

Decisions of industrial tribunals are not reported, and do not constitute precedent. However, the 1975 EPA created the Employment Appeals Tribunal (EAT), which hears appeals from the industrial tribunals on questions of law, and constitutes a superior court of record. From the EAT, appeals may be taken to the Court of Appeal, and ultimately, to the House of Lords.
The Effect of the Industrial Relations Model of Enforcement

The concepts and structures borrowed from the enforcement of industrial legislation have the effect of defining the employment aspects of anti-discrimination as a particular aspect of 'industrial relations' rather than as instances of a phenomenon that must be construed in a much broader social context. As an aspect of 'industrial relations' the parameters of the problem are thus defined in a particular way, a way which focuses exclusively on the employment relationship to the exclusion of the social and economic factors which operate to produce 'discrimination.' Defining employment discrimination as a subset of industrial relations also has consequences for the interests that are legitimately seen as needing to be represented in the adjudication process, and thus for the composition of enforcement and conciliation agencies. Structurally, the major impact of the industrial relations model has been the contribution of enforcement structures and procedures which emphasize the redress of individual grievances through a system which normatively prefers conciliation to legal adjudication, and which in the initial procedural stages at least holds out the promise of informality and ease of access. 5

However, the industrial relations model for state intervention is not the only one that informs the enforcement procedures of the anti-discrimination legislation. A second major contribution came from ideas
about, and experience in, the enforcement of race relations legislation, which drew in turn upon American models of enforcement. The influence of these two strands is most visible in the idea of a central administrative agency with responsibility for ensuring compliance with the law, although it also added an independent impetus to the emphasis given to conciliation which is at the heart of the industrial relations model.

II. The Influence of Race Discrimination Legislation

In designing the EqPA, the Labour government was able to rely entirely on the existing industrial relations machinery for enforcement, since the Act was concerned with a phenomenon that was approached by legislators purely as an industrial relations issue. In designing the SDA, however, broader concerns were apparent, and other models provided exemplars for a system of enforcement. Directly and indirectly, the experience of the United States in implementing anti-discrimination legislation had considerable effect: directly, because since 1964, federal law had prohibited sex discrimination in employment under Title VII of the Civil Rights Act; and indirectly, because earlier American experiences in the enforcement of race discrimination legislation provided models for the British Race Relations Acts of 1965 and 1968, which in turn provided lessons to those concerned with establishing an enforcement system for the new sex discrimination legislation.
Early Policy Approaches to Race Discrimination

In the United States, early attempts to outlaw racial discrimination depended on criminal penalties. Racial discrimination was a criminal offense under many state statutes from the time of the Civil war, but such statutes fell into disuse because "prejudices penetrated the judicial system in the South, with the result that few prosecutions were brought, white judges interpreted the law in favour of white defendants, and predominantly white juries were unwilling to convict." (Bindman, 1978, p. 284).

The first proposals for race discrimination legislation in Britain also suggested the use of criminal penalties: a series of private members bills introduced in the 1950's, all provided for racial discrimination to be made a criminal offense. This approach persisted in the proposals which the Labour government introduced into Parliament in April 1965, the Labour party having pledged in its 1964 General Election manifesto to make race discrimination illegal.

However, by 1964, supporters of legislative intervention were suggesting alternative approaches to enforcement which was ultimately to prevail over the use of criminal penalties. These approaches too were based on American experience. In the United States after 1945, first in New York, then in some other states, and then in the federal system, a model of administrative enforcement of anti-discrimination law had developed and become the norm. Details of the enforcement machinery varied between
jurisdictions, but the basic approach established racial discrimination as a civil wrong, which could be remedied not in regular civil proceedings but through the intervention of special administrative agencies. An aggrieved individual would complain to a commission which had a duty to investigate complaints. If 'probable cause' were found, the commission would attempt to reach conciliation between the parties. If conciliation was impossible, then the commission could convene a public hearing, and, following a determination that discrimination had occurred, order an appropriate remedy. This model describes the basic approach to enforcement embodied in a number of state statutes and in the Federal Civil Rights Act of 1964, which established the Equal Employment Opportunities Commission as a first state in the discrimination complaints procedure.

American experience with administrative enforcement began to influence British thinking on the subject of race discrimination legislation, as early as the 1950's, although it was not until the introduction of a Government bill in 1965 that its practical impact was felt.

The Race Relations Acts and 1965 and 1968

In early 1964, the Labour NEC had asked both the Shadow Cabinet and the Society of Labour Lawyers to draft proposals for race discrimination legislation and although the former (in the shape of the Soskice Committee) recommended criminal penalties, (in the context of legislation dealing only with incitement and discrimination in public places) the latter
(the Martin Committee) advised the incorporation of the American practice of administrative enforcement (Hepple, 1968: 131). Subsequently, a new group which formed around some members of the Martin Committee (the Lester group) drafted proposals for the establishment of a Statutory Commission to deal with discrimination. The proposals aimed at achieving compliance without formal proceedings, but with the Commission having the back-up of the power of investigation, and the authority to enforce its decisions through the courts. (Hindell, 1969: 185; Hepple, 1968: 131-2).

Although the Government's bill as originally proposed established only criminal penalties, extensive lobbying by the Campaign Against Racial Discrimination (CARD), and the Lester group and associates, brought about a transition to a system in which race discrimination would constitute a civil offense, remediable through conciliation and administrative enforcement. This approach formed the basis of the 1965 Race Relations Act, (which did not include employment in its coverage) and the 1968 Act (which did extend to employment). Although based on American models, the British system of enforcement did however include some significant points of departure from these examplars.

The 1965 Race Relations Act established a Race Relations Board (RRB), which, in conjunction with local conciliation committees, was given exclusive authority to investigate complaints of discrimination; individuals had no
right of direct access to the courts. This technique of entrusting to an administrative agency the sole right to bring proceedings for breach of law was "almost without precedent" in British civil law. (Lester and Bindman, 1972, p. 290). In fashioning the RRB the policymakers had drawn on the idea of the American regulatory agency rather than the British civil law tradition. The new Board was not however given the wide range of powers possessed by its American counterparts, and lacked the authority to call witnesses to subpoena documents, to require answers to interrogatories or to issue orders. This lack of authority was a deliberate strategy chosen by legislators who preferred to emphasize the techniques of conciliation, and who regarded the grant of enforcement powers as inconsistent with the success of such techniques. The Board was not even given the authority to pursue legal action, should its attempts of conciliation fail. Rather, it was up to the Board to make appropriate referrals to the Attorney General for the institution of legal proceedings. So ineffective was this system of enforcement, that in the three years after the passage of the 1965 Act, no cases of racial discrimination reached the courts (Byrne and Lovenduski, 1978, p. 133).

In 1967, when there was already pressure afoot to amend and reform the 1965 RRA, the RRB and the National Committee for Commonwealth Immigrants commissioned a study of the working of anti-discrimination legislation in other
countries, especially the USA and Canada. The study was published as the Street Report, in November 1967, and made detailed proposals for the extension of legislation in accordance with the lessons to be learned from North American experience. Although this study was quite influential, a number of compromises were made in drafting the new proposals, with the result that there were major differences between the enforcement system that became law in the 1968 RRA and the North American experience as reflected in the Street Report (Lester and Bindman, 1972).

Dissatisfaction with the 1965 RRA resulted in the enactment of a new Race Relations Act in 1968. This Act expanded the coverage of its predecessor, but did little to improve upon the powers of enforcement, preferring instead to continue to encourage the process of persuasion and conciliation. However, the 1968 Act enlarged the scope of the conciliation process to include the securing of individual rights by the reconstituted Race Relations Board which could now, if conciliation failed, apply to the Courts for damages on behalf of the individual seeking relief. Other than the grant of authority to appear in legal proceedings, the Board was given no additional powers of enforcement, and individual claimants continued to be barred from direct access to the courts.

Thus, although American experience played a crucial role in developing the pattern for the enforcement of race discrimination legislation in Britain, the impact was
limited to the choice of civil over criminal proceedings, the emphasis on conciliation, and the idea of the statutory commission. It did not extend to the conferral on the RRB of the kinds of powers enjoyed by its American counterparts. Nevertheless, the notion that conciliation was a necessary part of enforcement, and the idea of the administrative agency were in themselves of considerable importance in the subsequent design of the enforcement machinery for the SDA. **The SDA: The Idea of Administrative Enforcement**

The first concrete attempts to enact sex discrimination legislation in Britain came with the introduction in Parliament of a series of private members bills between 1968 and 1973. With regard to the question of a structure for enforcement, these bills were in general agreement on the need to establish a statutory commission, an Anti-discrimination Board, to which complaints of sex discrimination could be referred. These proposals drew heavily on the experience of enforcing the 1905 and 1968 Race Relations Acts.

However, while stressing conciliation, and incorporating the idea of enforcement by an administrative agency, the private members bill also proposed to leave open the opportunity for individuals to institute legal proceedings on their own behalf, independently of the proposed Anti-Discrimination Board, since experience in implementing the 1968 RRA had illustrated the problems in a
system where a single agency had responsibility for sifting all complaints.

The idea of an Anti-Discrimination Board, and the powers that had been proposed for it, came under scrutiny when, in 1972-73, a Select Committee of the House of Commons met to consider the Anti-Discrimination (Number 2) Bill. The Committee agreed with the general notion of an Anti-Discrimination Board, with two important modifications. First, the Committee proposed that if attempts at conciliation failed, then the case should be referred either to an industrial tribunal, in an employment case, or back to the Anti-Discrimination Board itself — thus giving the Board a quasi-judicial function. Second, and equally significantly, the Committee recommended that in addition to investigating complaints, the Board should play a more positive and independent role in the investigation of discrimination in both the public and private sectors. A House of Lords Select Committee considering the proposals set out in Baroness Seear's bill reached broadly similar conclusions about the desirable scope and functions of an Anti-Discrimination Board. The Conservative government was unwilling to accept the Committee’s recommendations, especially with regard to the establishment of an organization that would have extensive powers to investigate discrimination on its own initiative.

In September 1973, however, the Conservative government produced a consultative document in which it set out its own
proposals for sex discrimination. The proposals covered discrimination in employment, but not education, housing or the provision of goods and services, and, for enforcement, relied on the system of industrial tribunal adjudication which was already in place in the provisions of the EqPA. The proposals included the ideal of an Equal Opportunities Commission, "with the power to conduct wider ranging inquiries into the relative positions and opportunities of men and women; to publish its findings in the form of reports to the Government, and to educate and persuade public opinion" (Equal Opportunities for Men and Women, 1973, paragraph 11). Since the organization was envisioned as having a purely advisory role, the whole burden of enforcement was to lie with the individual complainants.

In February, 1974, a General Election brought the Labour Party to power and in September 1974, a White Paper was published setting out the new Labour Government's proposals for sex discrimination legislation (Equality for Women, September, 1974). These proposals went further than those of the previous government in their coverage, which extended to issues besides employment, and in their approach to enforcement. This White Paper drew upon the Opposition Green Paper, Discrimination Against Women, published by the Labour Party in 1972.

In the White Paper the government advocated the establishment of an Equal Opportunities Commission which would have more extensive powers than those proposed by the
Conservatives. The Labour proposals represented an explicit compromise between reliance solely on individuals for enforcement, and on a system in which a state agency was solely responsible (as with the RRB). Under the first of these options it was felt that the impact of the legislation would be relatively slow, and random in its effects. However, drawing on the experience of implementing the Race Relations Act it was also felt that the option of channeling all complaints to a board or commission would lead to a preoccupation within the organization with individual complaints, to the detriment of a broader, more strategic approach. Consequently, the Labour proposal sought to maintain the right of direct access to courts or, in employment cases, tribunals, and combined this right with the establishment of a new commission with some significant powers of enforcement.

The Labour Government's Proposals For an Equal Opportunities Commission

The Labour Government, introducing the proposals of the White Paper in the House of Commons, explained their conception of the role of an administrative enforcement agency, stating:

The Government proposed to set up a powerful Equal Opportunities Commission with responsibility for enforcing the law in the public interest on behalf of the community as a whole. The commission will be able to represent individuals in suitable and significant cases but its main role will be strategic; to identify and deal with discriminatory practices by industries, firms or institutions (H.C. Debs 23 July 1974, c. 1297-8).
The powers proposed for the new Commission in the White paper included the authority to conduct investigations on its own initiative into any area covered by the legislation. Such investigations could either be broad-ranging or limited to a particular organization or establishment. If, as the result of such an investigation the Commission found evidence of illegal discrimination, it would have the authority to issue a 'non-discrimination' notice, ordering such discrimination to cease. Upon non-compliance with a non-discrimination notice, the Commission would have the authority to seek legally binding enforcement through the Courts. These proposals relating to the power to conduct investigations in the absence of an individual complaint drew upon, but were more extensive than, the authority to conduct investigations conferred on the Race Relations Board by the 1968 Race Relations Act. The Street report had recommended that the Board should be able to take the initiative in dealing with discriminatory practices, but the 1968 statute gave only a very qualified power to do so, a power which was ordinarily dependent on the existence of an identifiable victim. (1968 Race Relations Act, Section 17). In order to proceed in the absence of an individual complaint the Board had to have reason to suspect that there had been unlawful conduct during the prescribed preceding period. For conduct to be unlawful, it had, except in cases involving advertisements or incitements to discriminate, to affect a particular, identifiable victim. Thus, it was not
enough for the Board to suspect discrimination on the basis, for example, of the pattern of employment in a particular establishment, unless it also suspected that a particular victim had been discriminated against (Lester and Bindman, 1972, p. 317). The RRB's power to investigate in employment matters was further limited by the requirement that the Board refer the matter to the Secretary of State for Employment before carrying out an investigation. If the Secretary of State was satisfied that suitable voluntary industrial relations machinery existed to deal with the matter, it would be referred to that body for investigation. The investigative powers of the RRB under the 1968 Act showed how clearly the scales were tipped in favour of caution, persuasion, and conciliation, and how against a determined strategy for enforcement. 10

The Race Relations Board noted that the section 17 provisions afforded an "inadequate means" of securing full equality of opportunity because of the requirement that the Board suspect a specific act of discrimination had occurred when

...in many instances, a discriminatory situation may be maintained with few deliberate acts of discrimination, because individuals may simply not seek the opportunities because they have what they consider good reasons to expect rejection...Failure to identify an unlawful act or acts does not therefore, necessarily imply that the situation under investigation is not discriminatory (RRB, 1974 in EOC 1977: P7).

By contrast, the proposals in the 1974 White Paper did not limit investigations to those situations where a
suspected discriminatory act had occurred, but included those circumstances where there was suspicion of a pattern of possibly illegal conduct. As such, it represented a more forceful approach to enforcement in the public interest, particularly since, unlike the situation under the 1968 Act, no area covered by the legislation was to be exempt from the possibility of investigation.

Apart from the authority to conduct investigations on its own initiative, the Commission proposed in the White Paper was to have the right to institute legal proceedings in respect of discriminatory advertising, to conduct research in any field having a bearing upon sex discrimination, to review the operation of the legislation, and to advise the Government on any matters relating to the legislation. Whilst individuals were to retain the right of direct access to courts and tribunals, the Commission was to be empowered at its own discretion to support and advise individual complainants.

In March 1975, the Government introduced into Parliament its proposed legislations. As far as a system of enforcement was concerned, the proposals put before Parliament were essentially those authorized in the White Paper. The EOC's power to conduct inquiries on its own initiative was now formalized into a procedure for formal investigations and the Commission was given powers to require disclosures of information in the pursuit of such investigations. Introducing the bill at its Second Reading
the Home Secretary described the proposed system of enforcement in some detail:

...The Bill goes well beyond the previous Government's proposals, which would have given no enforcement role to the Equal Opportunities Commission, and which were, in general, somewhat lacking in teeth. Also, the Bill in some respects has strengthened what was proposed in the September White Paper.

We propose to set up an Equal Opportunities Commission. The Commission will be able, on its own initiative, to investigate discriminatory practices; for this purposes it will have powers to require the production of relevant information, and it will be empowered to deal with unlawful discriminatory practices by issuing "non-discrimination notices" which will require the cessation of these practices and will be enforceable by the courts by way of injunction (H.C. Debs., 26 March, 1975, c. 521).

The Commission was also to have the power to assist individual complainants, although the Minister noted that the Government intended that this power should be reserved for "important or significant" cases (ibid.). In addition to the power to assist individuals, the Commission was given direct power of enforcement in three areas where "the public interest role predominates." These areas included discriminatory advertising, discriminatory instruction, and cases involving pressure to discriminate. In such cases, the EOC was to be empowered to obtain a court order (Ibid., c. 522).

These proposals reflected not just the experience gained in implementing the Race Relations Acts, but also the example provided by an American regulatory agency, the Equal Employment Opportunities Commission (EEOC), established under Title VII of the 1964 Civil Rights Act. A member of
the EEOC had given evidence to the House of Lords Select Committee, and the general model of American anti-discrimination policy was familiar to at least some Members of Parliament. Some members, indeed, visited the United States in 1975 on a fact-finding mission concerned with the issue of race discrimination, and the Home Secretary paid a separate visit. However, as was the case with the enforcement machinery for the Race Relations Acts, the proposals in the SDA reflected some aspects of the American approach, but not all. The major contribution of American public policy was the concept of the statutory commission rather than the specific powers and authority of the EEOC. 11

Conclusion

The enforcement system is based on ideas and structures drawn from the system of industrial relations enforcement in Britain, and from the American approach to administrative enforcement of anti-discrimination laws, mediated through British experience with the idea of a central enforcement agency under the first two Race Relations Acts.

Of the two influences, it is the former that is the most significant, penetrating as it does all aspects of employment discrimination enforcement. The industrial relations model of enforcement has influenced the structure of enforcement, the approach, which emphasizes the conciliation of individual claims, and the composition of the institutions involved. The effect of this influence is to reinforce the notion that employment discrimination is
essentially an employment issue, and to de-emphasize the broader societal factors which perpetuate women's position of relative disadvantage. The influence of the American/race discrimination model is apparent in the establishment of the EOC, but here too the industrial relations model has been influential in determining the composition of the Commission.

The industrial relations model and the American race discrimination model have been overlaid upon a basic civil law approach to dispute resolution, the impact of which is most clearly seen in the appellate structure, the importance of precedent, and in the approach to the provision of remedies (See Chapter 9). The common-law influence is also manifest in the individualistic nature of the enforcement system, with industrial tribunal complaints as the primary forum for adjudication.

In borrowing from divergent sources, the legislation sets up two systems of enforcement, one individual and initially quasi-judicial, at the higher levels of appeal, fully judicial, and one administrative. The systems are not completely separate, but operationally, are so to a large extent. Individual access was preserved to prevent the problems of overloading that had occurred under the Race Relations Acts; but as it stands, the system presents problems of its own (see Chapter 7). The idea of administrative enforcement is one borrowed initially from the United States; but it is a partial borrowing with
significant differences in the powers available to the British and American agencies. Generally, the British system of administrative enforcement has emphasized conciliation and persuasion, but has not provided any significant enforcement powers (See Chapter 8).

In terms of remedies, the system operates firmly within a common-law tradition, but remedies are narrowly limited by statute (see Chapter 9).

Each of the remaining chapters focusses in more detail upon the operation of a particular aspect of the hybrid system of enforcement outlined here. Each aspect, be it tribunal adjudication, administrative enforcement, or available remedies, presents its own particular intricacies and problems. It is useful however in considering these factors in detail to remember the genesis of the system of implementation, its roots in divergent traditions, and the definition of equality and discrimination which is implied by the choice of enforcement procedures such as the ones detailed here.

The burden of bringing and proving the complaint is thus an individual one, and perhaps more significantly, the remedy is also limited to the individual. In such a system, change must of necessity be slow.

Such a system also implies a particular approach to the definition of discrimination, and, at the same time is sustained by such a definition. The limiting properties of the substantive definition and the system of implementation
are thus self-reinforcing. The approach to discrimination in the statutes is a highly individual one; the very language of the statutes emphasizes this orientation. More importantly, the debates which preceded passage of the Acts gave no hint of an understanding of discrimination as a collective or group phenomenon, a position which contrasts considerably with that of the United States. In this context, the preference for individual enforcement, and the relatively weak provisions for group remedies in the system of implementation are not surprising. The parameters of the implementation system are determined to a certain extent by the implicit definition of the problem at issue, as well as by the external models of enforcement available to public policymakers.
NOTES

1. This provision refers only to direct discrimination. See footnote 4 below.

2. Except with regard to discriminatory advertising, and situations involving pressure to discriminate.

3. The Donovan Commission was formally the Royal Commission on Trade Unions and Employers' Associations, set up in 1965 by the Labour Government under the chairmanship of Lord Donovan. It issued its report in June, 1968.

4. R. v. Central Arbitration Committee Ex Parte Hymac Ltd. (1979), IRLR 641. This case held that the CAC went beyond its powers in scrutinizing provisions in collective agreements that were indirectly discriminatory. (See Appendix C.)

5. It is perhaps ironic that the result of reliance on an industrial relations model should be an emphasis on individual remedies, rather than collective ones. However, this orientation derives from the procedures which developed in the context of the 'floor of rights' legislation and is properly within the mainstream of British industrial relations grievance machinery.

6. 42 U.S.C. s. 2000 e et seq. prohibits employment discrimination on the basis of race, colour, religion, national origin or sex.

7. The New York system is described in Sovern (1966) ch. 3. For other examples see Bumrosen (1965) (New Jersey); Mayhew (1968) (Massachusetts); Dyson and Dyson (1965) (Kansas).

8. The Commonwealth Sub-committee of the Labour NEC asked two experts, in 1952, to give advice on sponsoring race discrimination legislation. One, Dr. Kenneth Little, urged the establishment of administrative machinery similar to the American Fair Employment Practices Commission (Hindell, 1969, 184).

9. The experience of some American states with purely advisory commissions was not encouraging, and had already led to a questioning of the worth of commissions lacking enforcement powers, in both Britain and the United States. See e.g. Sovern (1966), p. 56, Hepple (1968) p. 135.

10. The system also demonstrates the bargaining power of industry, both unions and management, which was able to persuade the government, in passing the 1968 Act, to protect employment issues from outside intervention by mandating the use of existing voluntary industrial relations machinery. See discussion in Hepple (1968) p. 4-5.
The differences between the two commissions are discussed in more detail in Chapter 8 below.
CHAPTER SEVEN

INDIVIDUAL ENFORCEMENT: THE TRIBUNAL SYSTEM

Although the legislation makes some provision for collective enforcement, the main emphasis in the enforcement system is on the individual complaint. As such, the individual enforcement procedures deserve a prominent place in any study of the implementation or effects of the anti-discrimination legislation.

A concern with the question of implementation may focus either on the meaning of law as interpreted and administered, or on the processes and structures which mediate the transformation of a grievance through the various stages of legal enforcement to a successful or unsuccessful conclusion. In this chapter the focus is on a number of important structural and procedural issues which emerge from a study of the individual complaint process, from the initiation stage, through the process of possible conciliation, settlement, or withdrawal, to the tribunal hearing itself.
Far more complaints are initiated than ever reach a tribunal hearing, so it is necessary to consider the factors which may explain both the relatively low complaint rate under the legislation, and the relatively high drop-out rate. These issues are addressed in the first part of the chapter. Of the complaints that reach the stage of a tribunal hearing, only about one quarter succeed on the merits. In the second part of the chapter, I attempt to identify factors which may operate at the pre-hearing and hearing stages which may contribute to the low success rate, independently of the 'merits' of an individual case. To undertake this analysis is to recognize that the adjudication process involves more than the application of legal concepts to a fact situation, but also depends in part on the interplay of legal, procedural, structural and social factors within the context of judicial or quasi-judicial decision-making.

I. **COMPLAINTS AND THEIR DISPOSITION**

It is not possible to discuss the individual complaint process outside the context of the number of cases brought, and their disposition at various stages of the process.

The main features of the statistics on individual complaints under the anti-discrimination legislation are the relatively small number of complaints that are made each year, and the even smaller number that proceed to a successful resolution by an industrial tribunal.
Table 7 shows that although the overall trend has been an enormous decline in the number of complaints brought since the first year of implementation this decrease is nearly all accounted for by a fall in the number of equal pay applications, with complaints under the SDA remaining fairly constant. In 1977, women's average hourly earnings reached a peak of 75.5% of men's. Since that time, there has been no real improvement in the ratio of men's to women's earnings, and equal pay applications have declined steadily. The EOC notes that these figures indicate that "... the extent to which individual men and women see the Equal Pay Act as providing a remedy worth seeking has reached an all-time low." The figures may also indicate that the EqPA has had whatever effect it can be expected to have unless amendments are made to its present scope. Again, the EOC notes "... we remain of the view that women's relative earnings have reached a plateau and are unlikely to show any significant improvement so long as the law remains unaltered." In this context, it is worth noting
that Chiplin and Sloane's (1982) work suggests that limited as the impact of the EqPA on earnings appears to be, the reality may be even less encouraging. Chiplin and Sloane note the difficulty of isolating the effect of the EqPA on earnings from other influences and suggest that some of the improvement in the mid 1970s may owe as much to the existence of a flat-rate increase incomes policy as to the anti-discrimination legislation.

The low number of applications under the EqPA and SDA is emphasized by comparison with complaints arising under other pieces of employment legislation. Statistics produced by the Advisory, Conciliation, and Arbitration Service (ACAS) show the enormous difference between the numbers of complaints raised under the legislation regulating unfair dismissal, which comprise about 90% of the agency's individual conciliation workload, and the numbers of cases arising under the anti-discrimination legislation.

Table 8 illustrates that equal pay and sex discrimination work accounts for only a small percentage of the workload which reaches the first of the employment legislation enforcement agencies.
Complaints received by ACAS, by year and type.

<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Unfair Dismissal</td>
<td>38,224</td>
<td>39,289</td>
<td>39,033</td>
<td>41,925</td>
<td>42,949</td>
</tr>
<tr>
<td>Equal Pay</td>
<td>984</td>
<td>1024</td>
<td>241</td>
<td>81</td>
<td>96</td>
</tr>
<tr>
<td>Sex Discrim.</td>
<td>367</td>
<td>279</td>
<td>264</td>
<td>519</td>
<td>339</td>
</tr>
<tr>
<td>Race Discrim.</td>
<td>206*</td>
<td>507</td>
<td>558</td>
<td>463</td>
<td>503</td>
</tr>
</tbody>
</table>

*June-December only

(Source: Annual Reports of ACAS)

The EOC produces statistics which show the outcome of the cases on which action is completed in any given year. This information, summarized in Table 9, shows that each year somewhere between 50% and 75% of all applications will not proceed to a tribunal hearing for a disposition on the merits. For those that do proceed, the success rate is low.
Table 9.  

<table>
<thead>
<tr>
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<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Equal Pay Act</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total Cases Completed</td>
<td>1742</td>
<td>751</td>
<td>343</td>
<td>263</td>
<td>91</td>
<td>54</td>
</tr>
<tr>
<td>% of Which:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>proceeded to hearing</td>
<td>40.7%</td>
<td>48.3%</td>
<td>23.3%</td>
<td>29.7%</td>
<td>28.6%</td>
<td>50.0%</td>
</tr>
<tr>
<td>dismissed</td>
<td>28.5%</td>
<td>36.2%</td>
<td>16.3%</td>
<td>24.7%</td>
<td>24.2%</td>
<td>38.9%</td>
</tr>
<tr>
<td>upheld</td>
<td>12.2%</td>
<td>12.1%</td>
<td>7.0%</td>
<td>4.9%</td>
<td>4.4%</td>
<td>11.1%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Sex Discrimination Act</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total Cases Completed</td>
<td>243</td>
<td>299</td>
<td>171</td>
<td>178</td>
<td>180</td>
<td>256</td>
</tr>
<tr>
<td>% of Which:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>proceeded to hearing</td>
<td>49.0%</td>
<td>33.6%</td>
<td>39.2%</td>
<td>33.1%</td>
<td>38.3%</td>
<td>34.8%</td>
</tr>
<tr>
<td>dismissed</td>
<td>39.1%</td>
<td>26.2%</td>
<td>31.0%</td>
<td>25.3%</td>
<td>30.6%</td>
<td>28.5%</td>
</tr>
<tr>
<td>upheld</td>
<td>9.9%</td>
<td>7.4%</td>
<td>8.2%</td>
<td>7.9%</td>
<td>7.8%</td>
<td>6.3%</td>
</tr>
</tbody>
</table>

(Source: EOC 1982, p. 32)

The cases which do not proceed to a tribunal hearing are either withdrawn or settled prior to that stage of the adjudication process. Table 10 shows the withdrawal and conciliation rates.
Table 10.
Outcomes of applications to industrial tribunals, 1979-1981.

<table>
<thead>
<tr>
<th></th>
<th>1979</th>
<th>1980</th>
<th>1981</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Equal Pay Act</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total Cases</td>
<td>263</td>
<td>91</td>
<td>54</td>
</tr>
<tr>
<td>Conciliated settlements</td>
<td>29</td>
<td>10</td>
<td>9</td>
</tr>
<tr>
<td><strong>Withdrawals:</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Private Settlements</td>
<td>20</td>
<td>5</td>
<td>1</td>
</tr>
<tr>
<td>Unknown</td>
<td>136</td>
<td>50</td>
<td>17</td>
</tr>
<tr>
<td><strong>Hearings:</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Upheld</td>
<td>13</td>
<td>4</td>
<td>6</td>
</tr>
<tr>
<td>Dismissed</td>
<td>65</td>
<td>22</td>
<td>21</td>
</tr>
<tr>
<td><strong>Sex Discrimination Act</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total Cases</td>
<td>178</td>
<td>181</td>
<td>256</td>
</tr>
<tr>
<td>No. of Male Applicants</td>
<td>39</td>
<td>62</td>
<td>59</td>
</tr>
<tr>
<td>Conciliated settlements</td>
<td>46</td>
<td>46</td>
<td>53</td>
</tr>
<tr>
<td><strong>Withdrawals:</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Private Settlements</td>
<td>10</td>
<td>8</td>
<td>4</td>
</tr>
<tr>
<td>Unknown</td>
<td>63</td>
<td>57</td>
<td>110</td>
</tr>
<tr>
<td><strong>Hearings:</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Upheld</td>
<td>14</td>
<td>14</td>
<td>16</td>
</tr>
<tr>
<td>Dismissed</td>
<td>45</td>
<td>55</td>
<td>73</td>
</tr>
</tbody>
</table>

(Source: Annual Reports of the E.O.C., 1979-1981)

The low numbers of initial complaints, the high withdrawal rate, and the low success rate of cases heard by the tribunals all require some explanation.
A. The Number of Complaints

There are several possible explanatory factors which may lie behind the low complaint rate under the anti-discrimination legislation. First, it could perhaps be argued that the low complaint rate reflects an underlying situation in which there is no discrimination against women, where the problem which the legislation was supposedly enacted to remedy has been solved. However, official statistics show that the male/female earnings gap is still a fact of life, and most economists would concede that some of this difference is attributable to discrimination, although there is some disagreement over the exact proportion. Research into employers' attitudes and practices indicates that men and women workers are still subject to different treatment and expectations in the workplace. In a survey of 768 establishments with 11 or more workers, conducted under the auspices of the EOC and SSRC, 5% of all managers interviewed were prepared to admit to breaking the law in respect of the introduction of equal pay, and a further 2% were unable to say whether the laws was being broken or not (EOC Research Bulletin, 1981, p. 7). As to the SDA, "...the findings of the survey indicate that the Act had only a limited impact in all but a minority of establishments" (Ibid. p. 9). When asked whether there was an equal opportunities policy in operation at the establishment, 40% of managers in the survey said there was not. Although 60% replied in the affirmative, only 14% said that there was a
written equal opportunities policy, and a mere 3% were willing or able to produce a copy of such a policy (Ibid., p. 11).

There can be little doubt that the substantive inequality that the legislation purports to address continues to characterize women's relative position in the labour force. Explanations for the low complaint rate must therefore focus on other factors.

One possible explanation is that women do not perceive their work situation as discriminatory. In 1980, the Commission of the European Community published the results of a survey of women in paid employment in the nine countries, which suggests that the perception of discrimination is limited by the gender composition of the work environment in which the individual is employed. Respondents were asked to say, based on their own experience, whether it was an advantage or disadvantage to be a woman, with respect to eight possible areas of employment discrimination. On each of the eight factors, a majority of women in all countries thought that there was no discrimination at their place of employment; and of all the women interviewed, the British respondents felt the least disadvantaged on the ground of sex (European Commission, 1980, pp. 40, 45). The study demonstrated that the single most important explanatory variable affecting perception of discrimination was the gender composition of the working environment: "The feeling that discrimination does not
exist or that where it does exist it is in the women's favour, is the view predominantly of those who work in an all-female environment" (Ibid., p. 52). The authors go on to state:

...there are many women who work in an all-female environment and, because of this, have no experience of, and perhaps little understanding of what it is like to be in competition with men in a working environment. It is clear that when...the competitive atmosphere exists...awareness of discrimination is much more common (Ibid. p. 70).

In light of this finding, the statistics on occupational segregation (see Ch. 2, supra) are especially significant, and raise the question of the appropriateness of a remedy which relies on individuals to initiate complaints in a society where the work force is segregated by sex to such a high degree.

Where discrimination is perceived, it is plausible to suggest that women will attempt to use other means of redressing grievances rather than making an application to an industrial tribunal: formal or informal grievance procedures, for example, or seeking the help of a trade union. In such situations, it is, hypothetically, possible that the very existence of the anti-discrimination legislation will facilitate a successful resolution of the situation, where previously no action would have been taken. There is not however, any data available on alternative modes of dispute resolution in the workplace, their incidence and outcomes, or the 'halo effect' of the legislation.
Even assuming that no other remedies are available, individuals may still be reluctant, for a variety of reasons, to use the law, or may be ignorant of the availability of a legal remedy. Some of this reluctance may be attributed to a general cultural bias against litigation as a means of dispute resolution; the number of antidiscrimination complaints made in Britain is, for example, proportionately much lower than the number of similar complaints made each year in the United States, which has a reputation at least for being a more litigious society. Comparing Britain with the United States, Elaine Donnelly pointed to the much greater remedies available to successful complainants in the United States, and suggested that the remedies provided by the British system are so small as to discourage potential applicants from proceeding. Donnelly pointed out that in *Coleman v. Skyrail Oceanic*, (1981), IRLR (398), the Court of Appeals set damages for injury to feelings at £100. Although at least one industrial tribunal has doubled that sum to allow for inflation, the Court of Appeals decision sets a basic standard which may well lead potential applicants to conclude that there is nothing to be gained from bringing a complaint.¹

It has also been suggested that reluctance to bring a complaint may stem from fear of employer retaliation in situations where potential applicants continue to be employed by the alleged discriminator. Speaking from her
own experience as a lawyer for the EOC, Elaine Donnelly stated that an applicant needs to be "a very, very, brave woman" to bring a complaint against an employer for whom she is still working, since the clause that protects applicants against victimisation is often inadequate as a defence against employer retaliation. In the Annual Report for 1982, the EOC speculates that the high unemployment rate is exacerbating this deterrent effect (EOC 1983, p.1).

The European Commission's research on the perception of discrimination suggests that lack of knowledge of the law, or lack of confidence in its capacity to provide an effective remedy may be a significant factor in explaining the low complaint rate. In the course of the survey, 612 British women in employment were questioned about the existence of anti-discrimination legislation and their assessment of its effectiveness.

Question: Do you know if there are in Britain laws which allow women to demand equality of treatment with men at work? If yes, would you say they are applied in practice or not?

Only one in four of respondents answered positively that the laws exist and are applied in practice. 34% answered that the laws exist but are not applied in practice. 10% answered that no laws exist that provide for equality of treatment in the workplace, and 32% had insufficient knowledge to answer the question at all. Thus, four out of ten of all the women questioned either thought there were no anti-discrimination laws or did not know whether there were or not (European Commission, 1980,
p. 63). If the lack of knowledge exemplified by the respondents in this survey is widespread then it has significant implications for the enforcement of the equal pay and sex discrimination laws through a process of individual complaints. It should be noted that the survey was conducted at the end of 1979, three years after the implementation of the legislation. It is possible that knowledge of the legislation may have increased since that time, although with the decline in the numbers of cases brought it is equally plausible to suggest that knowledge of the laws or belief in their efficacy may have remained low. Further research in this area would be useful to confirm or modify the 1979 findings.

As to the perceived lack of efficacy of the legislation, it is possible that the low complaint rate itself generates a lack of confidence in the legislation, which in turn reduces the numbers of complaints made. Commenting in 1971 on the enforcement of the race discrimination legislation, the Race Relations Board warned of the development of the same kind of vicious circle in which "...lack of confidence in the Act may initially cause a reluctance to complain; this may result in less complaints being sustained, which will lead to a further decrease in confidence." (Race Relations Board, 1971, p.22) In its Fifth Annual Report, the EOC identifies the same problem:

There has been an increasing awareness of the difficulties facing many, if not the majority, of applicants in presenting individual complaints under the SDA...The Commission is concerned that the
problem...may have already sapped the resolve of many would-be complainants which the Commission believes may have contributed substantially to the reduction of the number of individual cases under the SDA. As the number reduces, so the level of practical awareness of the scope of the legislation is also likely to reduce, resulting in a vicious circle of decline in confidence in the effectiveness of the legislation (EOC 1981, p. 4).

The EOC points, amongst other things, to the difficult burden of proof an applicant under the SDA must meet. Other factors include the lack of assistance and representation which may discourage potential applicants at a very early stage of the proceedings. In discussing assistance granted under s. 75 of the SDA, the EOC notes that: "Several of the individuals assisted by the Commission would not have proceeded with their cases if the Commission had not supported them." (EOC, 1978, p. 8) Unfortunately, far more requests for assistance are received by the EOC than are granted. In 1981, for example, the Commission received 245 formal requests for assistance under s. 75, of which 143 were granted. (EOC, 1982, p. 33) The lack of assistance and representation appears to affect the withdrawal rate and the success rate of cases heard by industrial tribunals and is discussed in more detail below.

The foregoing discussion demonstrates that there are a number of procedural factors which may contribute to the low complaint rate under the anti-discrimination legislation: no perception of discrimination, no knowledge of legal remedies, a reluctance to use the law or a lack of confidence in its effectiveness, and lack of assistance to
pursue a complaint. In addition to these problems, however, is the more general question of the kind of remedy the law provides, the problem it defines, and the solution it offers. At the heart of the matter are two critical issues; the meaning of equality, as defined in the legislation and subsequent judicial interpretations of it, and the individualized nature of the solution that the legislation provides.

B. The Withdrawal Rate of Complaints

Since the introduction of the equal pay and sex discrimination legislation more applications have been dropped before reaching an industrial tribunal than have proceeded to a disposition on the merits. Unfortunately, it is not possible by inspecting the records at the Central Office of the Industrial Tribunals to determine exactly what happened to these cases which are described as 'withdrawn' or 'settled,' since no further details are given. There appears to be only one published study of the high withdrawal rate, and this is based on a relatively small number of cases (Gregory, 1981) This study focusses on the role of ACAS conciliation officers as playing a crucial role in the early stages of the proceedings. The EOC has also commissioned research on the role of the ACAS, the results of which are not yet available.

ACAS was established under the terms of the 1975 Employment Protection Act as a statutory body under the direction of the Council appointed by the Secretary of State
for Employment. ACAS has a "general duty to promote the improvement of industrial relations" (ACAS, 1977, p.5), in pursuit of which objective its officers are involved in arbitration and investigation, advisory work, and collective and individual conciliation. It is the agency's individual conciliation work that has led to conjecture about, and criticism of, its role in the implementation of the sex discrimination and equal pay legislation. Where individuals bring complaints of alleged infringements of their rights under the legislation to the notice of the industrial tribunals, the officers of ACAS are required by law to attempt to settle such complaints without the need for further proceedings:

...the law imposes on ACAS the duty of trying to settle the complaint without the need for a tribunal hearing where the conciliation officer is requested to do so by the parties concerned or where he considers that there is a reasonable prospect of success. (ACAS, 1982, p.30)

According to Gregory, the practical effect of this statutory obligation is that:

At a time when the individual most needs sympathetic advice and encouragement in pursuing her complaint she is instead approached by someone whose main task is to avert a tribunal hearing and who has no particular interest in whether or not she obtains her legal rights. (Gregory, 1981, p. 6)

In support of this accusation, Gregory points to examples of women being urged to accept derisory offers in settlement of their claims, of their being given misleading and inaccurate information, and of their not being informed about the possible assistance they might receive from the EOC (ibid. p. 7). A source within the EOC confirmed that
there are many instances where ACAS officers fail to inform individuals of the role or existence of the EOC (Donnelly interview 1982). Gregory also states that ACAS officers often made women feel that their complaints were trivial, and were sometimes unable to comprehend that an individual might be pursuing a complaint as a matter of principle.

The organization's own view of the process of conciliation is a more neutral one:

...the task of the conciliation officer is to assist (the parties) to reach a settlement by helping to clarify the issues and by drawing attention to the relevant legal provisions and case law. He does not act as an arbitrator on the merits of the case nor does he recommend a particular settlement. (ACAS, 1978, p. 29)

It is difficult to imagine the process by which a conciliation officer can 'draw attention' to the relevant legal provisions and precedents without at least implying a judgement about the merits of the case. What is particularly disturbing about the fact that the agency expects its staff to clarify issues by discussing the law, is that the conciliation officers charged with this responsibility are not legally trained or qualified. In 1981, Gregory found that between 25 and 30 officers were responsible for conciliating all equal pay and sex discrimination cases throughout the country. Their qualification for work in this area of complex legislation consisted of two weeks special training in addition to the three week course taken by all conciliation officers (Gregory, 1981, p. 7). In 1977, ACAS had 112 conciliation
officers specially trained in SDA matters. Of these, only 10 were women (EOC, March 1978, p. 27).

Conciliation in equal pay and sex discrimination cases accounts for only a very small part of ACAS's individual conciliation workload, as does intervention in complaints of racial discrimination, where the withdrawal rate is similarly high. Table 11 shows the withdrawal rates for complaints arising under the various statutory provisions with which ACAS is concerned.

Table 11.
Withdrawals as a % of total applications to ACAS, 1978-1981.

<table>
<thead>
<tr>
<th>Year</th>
<th>Unfair Dismissal</th>
<th>EQPA</th>
<th>SDA</th>
<th>Race Relations Act</th>
</tr>
</thead>
<tbody>
<tr>
<td>1978</td>
<td>23%</td>
<td>29%</td>
<td>36%</td>
<td>28%</td>
</tr>
<tr>
<td>1979</td>
<td>23%</td>
<td>42%</td>
<td>34%</td>
<td>37%</td>
</tr>
<tr>
<td>1980</td>
<td>22%</td>
<td>32%</td>
<td>47%</td>
<td>39%</td>
</tr>
<tr>
<td>1981</td>
<td>25%</td>
<td>23%*</td>
<td>43%</td>
<td>38%</td>
</tr>
</tbody>
</table>

*Adjusted total which excludes 651 cases forwarded to ACAS by the EOC as a result of the Electrolux investigation, all of which proceeded to a tribunal hearing.

(Source: Annual Reports of ACAS).

The variation that is found in the rate of withdrawal as between complaints arising under different statutory provisions, is also found in the conciliation rate. The Annual Report for 1981 notes that:

The...statistics of individual conciliation show that the outcome of conciliation in complaints to industrial tribunals varied widely as between complaints alleging unfair dismissal and other types of cases. A substantially higher proportion of conciliated settlements was achieved in unfair dismissal complaints...
(37 per cent) than in complaints arising under the anti-discrimination legislation (19 per cent in complaints of racial discrimination and eighteen per cent in complaints of discrimination on grounds of sex) (ACAS, 1982, p. 35).

Unfortunately, ACAS offers no suggestions as to why the chance of a conciliated settlement should be so much higher in unfair dismissal cases, and the likelihood of withdrawal so much lower. It should be noted that unfair dismissal complaints account for over 90% of ACAS's individual conciliation workload, whereas, in 1981, complaints under race or sex discrimination statutes (including equal pay) amounted to only 2% of the total (ACAS, 1981, pp. 32, 35). Leaving aside any suggestions of racism or sexism to account for the differential rate, it seems likely that there is an issue of institutional competence involved in the screening process, which, taken together with ACAS's statutory duty to avert further proceedings wherever possible, contributes to the higher withdrawal and lower conciliation rates in anti-discrimination cases.

From the admittedly small amount of information available, it appears that the problems that have been identified in the way in which ACAS performs its obligations under the EqPA and SDA may be divided into two categories: those arising from the very nature of the organization and its statutory function, and those which arise from the way in which the organizational objective is presently carried out. Problems in the second category--lack of qualifications, poor training, for example--could be
remedied by specific reforms: better and on-going training, the appointment of more women officers to deal with women's complaints, and perhaps most importantly, greater public accountability. At present, the organization does not publish details of the cases which it settles; information on the kinds of settlements agreed upon or the amount of compensation in a conciliated case would facilitate stricter scrutiny of ACAS's achievements.

If the agency were to act to facilitate adequate monetary compensation in cases where it appeared likely that an applicant could establish a prima facie case under the legislation, then some of the criticisms of its statutory function of averting further proceedings might be mitigated. However, there would still remain a contradiction between the imperative to settle individual complaints without further use of law and the implementation of legislated principle through the judicial decisions of tribunals and courts of appeal.

For ACAS, the imperative is to settle individual complaints; but an individual may want to pursue a case even where there is only a small chance of success at a tribunal hearing. The EOC recognizes the value of pursuing 'borderline' cases as a way of clarifying the law, setting precedent, and sometimes changing currently accepted interpretations of the legislative provisions. For the ACAS conciliation officer such goals are not likely to appear as valid considerations, nor ones which are legitimated with
respect to organizational objectives. The root of the problem appears to lie in the fact that ACAS is essentially a creature of the predominant industrial relations consensus which elevates conciliation and compromise, and implicitly denigrates legal intervention as a means of dispute resolution for employment issues. The question that must be asked is how relevant is the notion of such compromise in the context of an equal pay or sex discrimination complaint. The nature of the circumstances which give rise to such complaints, and the kinds of solution required, are essentially different from the kinds of conciliated compromise that might be appropriate and acceptable in other industrial relations matters.

C. The Low Success Rate of Complaints at Tribunal Hearings.

As Table 9 above shows, for cases that reach tribunal hearings, the likelihood of a successful outcome is low. This fact in itself may contribute both to the low initial complaint rate and the high withdrawal rate. A number of factors may be identified as contributing to the difficulties that applicants encounter.

Some applicants lack assistance in preparing the case, or in presenting it before a tribunal. This lack of aid intensifies the problems associated with meeting a difficult burden of proof, and persuading the tribunal of the inferences to be drawn from the facts presented. Decisions vary as between tribunals and suggest that some panels are
better qualified than others to adjudicate the facts of a
discrimination complaint in the light of established law.

These procedural problems are compounded by the fact
that the underlying premise of the enforcement procedures is
that of the tri-partite system of industrial relations.
Only the chairperson of the tribunal is legally qualified,
with the other members being drawn one from each side of
industry. The rationale for their presence is to provide
the industrial experience and expertise that is said to be
so crucial to the operation of an industrial tribunal.
Whether such experience is relevant to, or appropriate for,
the determination of a discrimination case is an open
question, particularly since such cases account for only a
small part of the tribunals workload, a factor which
militates against the development of competence in the
field. On the enforcement procedures, generally, Nandy
(1981) concludes that:

This machinery has to work in a context in which the
paramount desire is to avoid the undue intervention of
the law in industrial relations and more positively to
create an informal climate in which claims can be met
and disputes settled without excessive legalism.
(Nandy, 1981, p. 158)

The practical effect of this theoretical concern to
avoid 'excessive legalism,' in adjudicating an area of
complex and developing law, may be, however, to increase the
difficulties facing applicants.

The way in which this concern over excessive legalism
may translate into particular procedural difficulties for
tribunal applicants can best be demonstrated by examining
some significant aspects of the system of industrial tribunal adjudication.

II. THE SYSTEM OF INDUSTRIAL TRIBUNAL ADJUDICATION

For those complaints that proceed beyond conciliation or withdrawal to a formal disposition on the merits, the industrial tribunal hearing is the most significant stage of the proceedings. Only a small proportion of cases go to appeal; consequently, for the majority of applicants the tribunal's decision is final. The industrial tribunals were consciously chosen for the adjudication of equal pay and employment discrimination complaints as a more appropriate forum than the County Courts. The rationale for this choice lay in the special characteristics that tribunals are supposed to have -- informality, flexibility, and importantly, in the case of tribunals operating in the area of labour law, the benefit of the industrial experience of the lay members. This latter characteristic also reflects the prevailing industrial relations concensus, which seeks to minimize legal intervention in industrial matters. This choice of forum, and the special characteristics that tribunals are supposed to have, has a significant impact on the nature of dispute resolution under the anti-discrimination legislation.

The Composition of Industrial Tribunals.

Industrial tribunals are organized on a regional basis with a Central Office for England and Wales based in London, and a Central Office for the Scottish tribunals based in
Each of these organizations is headed by a national President appointed by the Lord Chancellor. Each tribunal is an independent judicial body consisting of two lay members, and a legally qualified chairperson. The lay members are drawn from panels appointed by the Secretary of State for Employment after consultation with employers' and workers' organizations. The legally qualified member is appointed by the Lord Chancellor, in England and Wales, and by the President in Scotland. Thus, in composition, the tribunals are firmly in the tradition of the tri-partite approach to industrial relations.

The chairperson must be a barrister or solicitor of at least seven years standing, and may be appointed on either a full-time or part-time basis. Full-time chairpersons are appointed to age 72 whereas part-time appointments are for a period of three years, with eligibility for reappointment. The vast majority of chairpersons are male, a fact which reflects both the general composition of the legal profession, and the requirements of seven years service. In 1977, 70 out of a total of 72 tribunal chairpersons were male. Out of a stratified random sample of 125 hearings covering a five year period from 1977-1981, (hereinafter 'the sample') only 14 were presided over by a chairwoman.

In 1977, women constituted only 6.5% of practising solicitors, and 8.2% of practising barristers. (EOC, March 1978, p. 14, 19). Although there has been a marked increase in the numbers of women entering the legal profession, it
may be expected that women will remain a relatively small minority for some years to come. The seven year rule further militates against the development of a pool of qualified women lawyers to fill industrial tribunal positions, as the EOC has pointed out, by penalizing women who have practised for less than seven years, and then withdrawn temporarily from the profession for childrearing purposes. The Commission recommends that the requirement should be reduced to four years professional experience, coupled with specialized training in the areas of the tribunals' jurisdiction, and that the Lord Chancellor's department should do more to publicize the fact that these posts are open to both men and women (Ibid).

Women also account for a relatively small proportion of lay members of tribunals, although there has been some increase in their numbers in recent years as the result of a deliberate policy. In a 1974 White Paper, the then Government stated: "The number of women appointed to the tribunals is being increased. The aim is to have sufficient women so that at least one person of each sex will normally be on a tribunal which is hearing a sex discrimination or equal pay case." Table 12 shows the composition of the lay membership of the tribunals.
Table 12.
Lay members of the Industrial Tribunals and Employment Appeal Tribunal.

<table>
<thead>
<tr>
<th></th>
<th>1972</th>
<th></th>
<th>1976</th>
<th></th>
<th>1977</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Total</td>
<td>Women</td>
<td>Total</td>
<td>Women</td>
<td>Total</td>
<td>Women</td>
</tr>
<tr>
<td>Industrial</td>
<td>1200</td>
<td>59</td>
<td>1141</td>
<td>2263</td>
<td>1769</td>
<td>487</td>
</tr>
<tr>
<td>tribunals</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Employment</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Appeals</td>
<td></td>
<td></td>
<td></td>
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<td></td>
<td></td>
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<tr>
<td>Tribunal</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>EAT not in</td>
<td>32</td>
<td>5</td>
<td>27</td>
<td>32</td>
<td>5</td>
<td>27</td>
</tr>
<tr>
<td>existence</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

(Source: EOC March 1978, Evidence to the Royal Commission on Legal Services, p. 27)

The aim of having at least one woman member at hearings of sex discrimination or equal pay complaints appears to have been realised to a considerable extent, although the sample indicates that 'at least one' woman member seems in practice to mean 'only one' woman member in the majority of cases. In the sample, only 12 out of 125 hearings were conducted by an all male tribunal. The vast majority, 99 hearings, were conducted by tribunals composed of 2 men and 1 woman. In all but 2 of these cases the woman present was one of the lay members. In just 12 hearings did the women members constitute a majority; these were all hearings presided over by a chairwoman. Thus the recommendation of the White Paper seems to have been realised, but only in the most minimal sense. Until women constitute a larger proportion of both the available chairpersons and the lay panels, this situation is unlikely to change.
In its evidence to the Royal Commission on Legal Services, the EOC recommended that pressure should be put on the nominating bodies for the lay panels (the TUC and CBI) "to propose as many women as possible." The Commission also made the more radical suggestion that the lay members should be chosen in consultation not only with the TUC and CBI, but also with leading women's organizations. (EOC, March, 1978, p. 32).

The present composition of the tribunals and the recommendations that the EOC has made raise a number of interesting issues. On a fundamental level, the implications of women's under-representation in the legal profession appear significant, given the fact that the current anti-discrimination measures depend largely upon legal institutions and the services of legal professionals for their enforcement. In its evidence to the Royal Commission on Legal Services, the EOC remarked:

...it is our impression that if the judiciary included a more substantial proportion of women it is likely that the courts would be able to command greater public confidence in those areas which particularly affect women...(including) Sex Discrimination Act cases where male tribunal members and chairmen may have preconceived notions, albeit unconscious, of women's work and women's role in society. (EOC, March 1978, p. 32).

There are two distinct threads to this argument. One is that more women should be appointed to the judiciary for essentially symbolic reasons, especially in those segments of the judicial establishment that are dealing directly in areas which particularly affect women. Further, it might
properly be regarded as a legitimate role of government to give a lead to the community generally in the matter of sex discrimination by actively seeking to appoint qualified women to highly visible positions of authority. The second thread of the argument is the implicit assumption that the appointment of more women will necessarily and of itself have a beneficial effect with the regard to the adjudication of matters of concern to women, and that is an assumption that requires further examination. It needs to be asked what purpose the appointment of more women will fulfill, beyond the symbolic and equitable concerns mentioned previously. If the aim is to improve the quality of adjudication and eliminate the operation of prejudicial stereotypes, then it seems unlikely that the fact of gender alone will be sufficient to achieve these objectives. What is more likely required is not merely the appointment of more women, but of more women with training in the complexities of discrimination law and the inferential problems it poses, and/or a background of experience in this area. The tribunal system attempts to provide for adjudication by people with some experience by including the lay members appointed after consultation with both sides of industry. The problem with this approach is that the lay members may be expected to some extent to represent an institutional perspective, either that of management or labor organization. Since the majority of equal pay or sex discrimination complaints allege discrimination arising from
management practices, sometimes, although infrequently, also
indicting a trade union, it appears unlikely that the
inclusion of more women, per se, without any consideration
of their qualifications other than sex, will automatically
improve the quality of adjudication in the discrimination
area. By providing for the inclusion of some lay members
who are not representatives of industry, the EOC's
recommendation for nominations from women's organizations
may be regarded as a step in the right direction. This
recommendation has not, however, been implemented.

There is no data available on the attitudes towards
their work of women tribunal members, nor on whether they
take a different approach from that of their male
colleagues. In the majority of cases tribunals appear to
reach unanimous decisions, so there is apparently no broad
distinction to be made between the women and men on their
approach to the interpretation of the law. In the sample,
only four decisions were non-unanimous; in three of these,
the two male members of the tribunal reached a majority
decision, with which the female lay member disagreed. In a
fifth case, the tribunal reached a unanimous decision, but
the woman on the tribunal disagreed with the male members'
views on some issues. The four non-unanimous decisions all
concerned the determination of what constitutes like work
for the purposes of the EqPA. In the three cases in which
the woman member disagreed with the men, the majority
dismissed the applicant's complaint, whereas the woman
member would have upheld it. In a 1979 complaint, for example, a woman accounts assistant claimed equal pay with male counterpart. The male majority dismissed the complaint in strong terms, calling it 'pretextual' and 'verging on the frivolous' and found that the difference in pay complained of was justified by the 'personal equation' as defined by the Employment Appeals Tribunal. The woman lay member, however, expressed herself as not satisfied with the respondent's justification for the differential and would have upheld the applicant's complaint (Sohoye v. John Wyeth Ltd). In the fourth case where there was a non-unanimous verdict, the two lay members, one male, one female, split from the male chairman to uphold an equal pay claim brought by four applicants against the British Steel Corporation in 1981.4

The high rate of unanimity raises questions about the process of tribunal decision-making, particularly the role of the chairperson. Each member of the tribunal is theoretically equal, but the nature of the task the tribunals perform raises a suspicion at least, that in practice it is the chairperson who plays a leading role in reaching and formulating the decision. The tribunals are, after all, adjudicating questions of law as well as fact, and in this they are bound by the precedents of the EAT and the higher courts of appeal. In such a situation a certain amount of deference to the legally qualified member would not seem unusual. The charges of 'excessive legalism' that
have in recent years been directed at the industrial tribunals might indicate amongst other things the dominant role of the chairperson. It is the chairperson who writes the decision of the tribunal on the basis of notes made during the hearing; these notes constitute the only record of the proceedings. The chairperson also tends to play a more active role in the development of the proceedings than other members, with regard to the questioning of witnesses and the elucidation of testimony.

If unanimity is at least in part a reflection of the dominant role of the chairperson, then there are further implications for the proposals to amend the tribunals. Bearing in mind the caveat that increasing the number of women on tribunals will not automatically improve the quality of adjudication, it nevertheless appears crucial to increase the proportion of hearings that are held under the guidance of chairwomen, so that women are better represented amongst the leading decision-makers at this important stage of an equal pay or sex discrimination complaint. At present, the recommendation that at least one woman be included in tribunals hearing discrimination cases means in the vast majority of cases that one of the lay members is a woman, and the data above shows that statistically the probability of lay members disagreeing with the chair is very small. Secondly, the possibility that proceedings are of necessity dominated by the one legally qualified member focusses attention again on the training and experience of
the lay members. Lay members may be capable of playing a more active part in the proceedings and in the process of decision-making if they receive specific training in discrimination law or were appointed from a background in discrimination or equal employment opportunity issues.

At present, the training of tribunal members is a haphazard affair. When asked whether tribunals had received any guidance or training in respect of the enforcement of the SDA, the Lord Chancellor's office replied in the negative:

...the interpretation and application of this, or any other law is a matter for the independent judgement of the Courts, and the Lord Chancellor (like other Ministers) must be careful not to do anything which could be construed as an attempt by the executive to guide or influence the decisions of the judiciary (EOC, March, 1978, p. 28).

As the EOC pointed out in its evidence to the Royal Commission on Legal Services, this reply is predicated on a misunderstanding of the purpose of such training. It is possible to contemplate training which would assist tribunal members in their understanding of discrimination law, on a general level, without in any way interfering with the independence of the judiciary with regard to adjudication. In its submission to the Royal Commission, the EOC argued that the provision of such training would not be an unprecedented departure, noting that conferences on sentencing policy have been available to judges for many years, and that in 1975 the Home Secretary announced the
establishment of a high level inquiry into the training of, and supply of, information to sentencers (EOC 1978, p. 28).

The objective of appointing lay members with some experience specifically in equal employment opportunity issues, rather than in the broader area of industrial relations, could be achieved in one of two ways: either by the appointment of members nominated by groups other than the TUC and the CBI, or by asking those organizations to nominate appointees with this kind of experience. The EOC has already proposed extending the power to nominate lay members beyond the traditional organizations but its suggestion has not been acted upon. However, in the area of race relations adjudication, the TUC and CBI were asked, following the passage of the 1976 Race Relations Act, to nominate members with experience in race relations in employment, either those who had served as members of the conciliation committees set up under the terms of the 1968 Act, or individuals who had in some other way gained actual experience of the issues involved. According to Lustgarten, (1980, p. 196), 69 such individuals had been appointed by May 1979, and Presidents of tribunals had been asked to assign someone from this pool of members to each hearing on a race discrimination complaint. Some change of this kind in the tribunals hearing equal pay and sex discrimination complaints seems particularly appropriate, in light of the fact that tribunal members are not likely to receive 'on the job' experience through the hearing of a large number of
cases. Equal pay and sex discrimination complaints together account for only a very small proportion of the tribunal's workload, a fact which militates against the individual members building up expertise through practice.

Ultimately, it may be true as some writers have suggested that industrial tribunals are not the most appropriate bodies to adjudicate discrimination cases. Certainly, as they are presently constituted, there appear to be grounds for recommending some changes in their composition.

A tribunal's lack of experience or training may be manifested in a misunderstanding of complex issues in inference or proof, or in a more basic difficulty in appreciating the reality of the kinds of situations which the law is mandated to address. At the level of the industrial tribunal system as a whole, the deficiencies of some tribunal members with respect to training in, and experience of the anti-discrimination legislation may explain some of the divergence that seems to exist between tribunals considering quite similar issues and situations.6

The questions that arise from an analysis of the composition of the industrial tribunals imply a whole range of related questions about the appropriateness of the industrial tribunals for the resolution of complaints of discrimination in employment on the grounds of sex (or race). The problems that may arise in tribunal adjudication of such complaints, because of the particular composition of
the tribunals, may be exacerbated by a lack of 'fit' between
the expectation that tribunals should proceed informally,
and the complexities of the legislation that they are
charged with implementing.

C. Tribunals, 'Legalism' and Legal Representation.

In 1958, The Report of the Franks Committee set out a
number of characteristics of tribunals which, in the
committee's opinion, made them desirable forums for certain
kinds of dispute resolution. The Committee asserted that in
a tribunal a hearing could be conducted with less formality
and a greater degree of flexibility than is possible in a
court of law, that tribunals are relatively free from
technicality, and that their members have the advantage of
experience and expertise in the substantive area of
jurisdiction. Tribunals were thus characterized as
desirable because of the qualities of 'openness, fairness
and impartiality,' which they were alleged to foster. As
J.A.G. Griffiths remarked in 1959, "this sounds well, even
if it smacks a little of Calvin Coolidge's preacher who was
against sin" (Griffiths 1959, p. 127). In recent years,
however, industrial tribunals have suffered some criticism
on the grounds that they have departed from this ideal and
succeeded to 'excessive legalism' in their approach to the
legislation which they adjudicate.

It should be noted at the outset of this discussion
that industrial tribunals are different in some important
respects from the tribunals which the Franks Committee
considered in the 1950's. The latter were concerned in the
main with adjudicating the relationship between an
individual and a government department or agency, and there
was some discussion in Committee whether the tribunals were
properly considered administrative or judicial structures.
The present jurisdiction of the industrial tribunals
involves a different kind of regulation, the resolution of
claims arising between private parties out of statutory
provisions. In performing this function the industrial
tribunals appear much closer to the ordinary courts of law
than did the tribunals considered by the Franks Committee,
such as the Pension Appeals Tribunals and the National
Insurance Tribunals. Thus, if industrial tribunal decision-
making is considered to have departed from the norm
established by the Franks Committee, it is in large part
because the industrial tribunals are in important respects
quite different from the tribunals that provided the initial
model of tribunal adjudication. Nevertheless, a number of
the assumptions that underlay the Franks Committee report
have remained to colour expectations about the functioning
of the industrial tribunal system. Particularly important
in this respect is the notion that the laws which tribunals
are asked to adjudicate are in some sense more amenable to
common-sense interpretation than other kinds of law. This
presumed quality of susceptibility to straightforward
application provides a rationale both for the informality of
tribunal proceedings and for the inclusion of lay members
with industrial experience. However, Phillips, J., one-time President of the EAT, argues that this assumption handicaps the tribunals since, "...they are enjoined to be informal, and to eschew technicalities and legalism, but are at the same time required to cope with an ever-increasing complexity of subject matter." (Phillips, 1978, p. 137).

There is a contradiction at the core of tribunal adjudication between what industrial tribunals are now actually required to do, and the assumptions which led to the initial assignment of responsibilities to them. Those assumptions have helped to foster the idea that in passing employment legislation, Parliament has created a body of law which can safely be administered in a discretionary and fact-based way, relatively free from the traditional legal fetters of judicial procedure and precedent. While the industrial tribunals are bound by precedent, they do retain procedural features which make them a good deal less formal than the county courts. The assumptions about the nature of tribunal adjudication together with the fact of procedural informality have made it possible for Parliament to ignore suggestions that applicants to tribunals should be eligible for legal aid for the preparation and representation of their complaint. This lack of aid appears to be reflected in the fairly small proportion of applicants who do have legal representation at the tribunal stage.

During the Parliamentary debates on the SDA, some members expressed their concern that no provision had been
made to grant free legal aid to tribunal applicants seeking to enforce their rights under an admittedly complex piece of legislation. During the Second Reading in the House of Commons, for example, Jack Ashley (L. Stoke on Trent) pointed to the desirability of legal aid for all applicants since "...at industrial and social security tribunals most of those who are not represented fail in their applications. The reason is that they lack expert guidance and representation" (H.C. Debs., 26 March 1975, c. 537). In reply, Shirley Summerskill, for the Government, stated that the Chancellor's Legal Aid Advisory Committee had recommended the extension of legal aid to all statutory tribunals (H.C. Debs., 26 March 1975, c. 615). However, during the Second Reading in the House of Lords, the government spokesman made clear that the government would not be following the Advisory Committee's recommendations, for reasons of financial expediency, noting that "...while the Lord Chancellor has considerable sympathy with the Advisory Committee's recommendations, and supports in principle the extension of legal aid to these tribunals, priority cannot be given to this in view of the urgent need to improve legal services generally" (H.L. Debs., 1 July 1975, c. 188).

The bill as passed into law made no provision for legal aid to cover the costs of legal representation at an industrial tribunal hearing. Thus, the fact that the tribunals allowed access to unrepresented individuals
together with the Government's desire to limit spending on unmet legal need, combined to defeat the possibility of legal aid at tribunals for those who would otherwise be unable to afford it. Statistics for 1977 show that in the entire jurisdiction of the industrial tribunals, one third of all applicants, and one half of all respondents were legally represented at the hearing of their case. In a further 16% of cases, applicants were represented by trade union officials (Industrial Tribunals Fact Sheet, 1978). The evidence suggests that despite the unavailability of legal aid, legal representation at tribunal hearings is increasing (Hawes and Smith 1981). However, the statistics also show that, in equal pay and sex discrimination cases, many applicants appear at tribunal hearings completely unrepresented, and only a minority have the help of a lawyer. This fact is of some significance since studies of other kinds of tribunals have indicated that represented individuals are more likely to be successful than the unrepresented (Frost and Howard, 1977, ch. 6). This effect may be expected to be even stronger in an area of law where interpretation depends increasingly on legal precedent, and where statistically, the respondent is more likely to be represented than the applicant.

The EOC publishes statistics which indicate the sources of assistance on which tribunal applicants rely, but these figures do not provide the important corollary information which is concerned with the kinds of representation and
assistance available to respondents. For this information, I have turned to the sample of 125 cases, previously referred to. Table 13 illustrates the representation of applicants, by year and type of representation.

Table 13.

Representation of EqPA and SDA applicants at industrial tribunal hearings, selected years, by type of representation.

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>EqPA</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Self</td>
<td>64 (34.2%)</td>
<td>13 (50.0%)</td>
<td>9 (33.3%)</td>
</tr>
<tr>
<td>Trade union</td>
<td>88 (47.1%)</td>
<td>4 (15.4%)</td>
<td>4 (14.8%)</td>
</tr>
<tr>
<td>Solicitor/counsel</td>
<td>31 (16.6%)</td>
<td>5 (19.2%)</td>
<td>8 (29.6%)</td>
</tr>
<tr>
<td><strong>SDA</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Self</td>
<td>25 (37.3%)</td>
<td>27 (39.1%)</td>
<td>31 (34.8%)</td>
</tr>
<tr>
<td>Trade union</td>
<td>22 (32.8%)</td>
<td>11 (15.9%)</td>
<td>16 (29.6%)</td>
</tr>
<tr>
<td>Solicitor/counsel</td>
<td>18 (26.8%)</td>
<td>17 (24.6%)</td>
<td>34 (38.2%)</td>
</tr>
<tr>
<td>Other</td>
<td>7 (10.4%)</td>
<td>9 (13.0%)</td>
<td>7 (7.8%)</td>
</tr>
</tbody>
</table>

Totals do not equal 100% since a residual category, representation not known, has been omitted.
(Source: Annual Reports of the EOC.)

The total numbers in the table above reflect the decline in the numbers of complaints received and processed each year, as detailed in the previous chapter. The small numbers make it difficult to draw firm conclusions from the data about trends in representation, but the overall picture seems clear. In both SDA and EqPA complaints, it appears that it is normal for about one-third of all applicants to
present their case to the tribunal without the assistance of any representative. Regardless of the informality, or freedom from technicality of tribunal hearings, this low level of representation would seem to disadvantage applicants in the face of the greater likelihood that respondents will be legally represented, which the sample seems to indicate, is indeed the case.

Using the sample, it has been possible to construct a picture of the pattern of representation as it applies to both sides in a dispute. The types of representation have been classified into three categories: no representation, i.e., representation by anyone other than a qualified lawyer or barrister, and legal representation. Interpreting these categories requires some caution. First, it is easier to say of an individual applicant that she acted for herself, than it is to say that of most respondents, leaving aside legal fictions about the personality of corporations. To speak of a corporate entity representing itself, for example, is open to a number of possible meanings. On a practical level I have treated the respondent as having no representation where the person handling the dispute for the company is a non-specialist in employment or legal matters. Thus, as far as respondents are concerned, the category of no representation is most likely to occur where the party is a small business or one-person operation.

In most cases where a larger firm is the respondent in an equal pay or sex discrimination complaint, the matter
is handled by individuals who were not directly concerned in
the incident which gave rise to the allegations, and who
have a certain expertise in industrial relations or legal
matters. The tribunal case may be handled by senior
management officials, for example, or staff from the
personnel department. In any case, where the handling of
the dispute has been passed out of the department of the
individual discriminator to a non-legal department within
the company, the respondent has been categorized as having
non-legal representation. The most usualy kind of this
category of representation arises from the internal
organization of the company. However, in some cases
companies have received assistance and representation from
outside sources, through employers organizations. These
cases have also been placed in the second category. The
third category, legal representation, is self-explanatory.

I have adopted this method of categorizing the
representation of respondents in an attempt to go beyond
formalistic labelling and to give a more accurate picture of
the resources available to each side than would be obtained
if all help originating from non-legal specialists within a
company were to be described as 'no representation.'
Although such a description may be true in a formal sense,
it serves to ignore and obscure the disparity in resources
available to an individual applicant acting for herself, and
a corporate entity acting on its own behalf with all the
expertise of management officials, and personnel and industrial relations specialists.

The sample shows a considerable disparity between applicants and respondents in the extent to which they rely on different kinds of representation.

Table 14.
Representation of applicants and respondents at randomly sampled hearings EqPA and SDA, 1977-1981.

<table>
<thead>
<tr>
<th>Applicant Representation</th>
<th>none</th>
<th>non-legal</th>
<th>legal</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>none</td>
<td>13</td>
<td>2</td>
<td>5</td>
<td>20</td>
</tr>
<tr>
<td>non-legal</td>
<td>14</td>
<td>15</td>
<td>9</td>
<td>38</td>
</tr>
<tr>
<td>legal</td>
<td>11</td>
<td>19</td>
<td>18</td>
<td>48</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>38</strong></td>
<td><strong>36</strong></td>
<td><strong>32</strong></td>
<td><strong>106</strong>*</td>
</tr>
</tbody>
</table>

*Total sample size is 125 decisions, but in 19, the representation was unknown for at least one of the parties. These cases have been omitted.

Table 14 shows that there were 25 cases in which the applicant had no representation but faced a respondent who had either non-legal or legal representation. By comparison, there were only 5 cases in which the respondent had no representation but faced a represented applicant. There were 46 cases, 43.3%, in which the parties were 'equal' in terms of representation: 13 in which neither side was represented, 15 in which both had non-legal representation, and 18 in which both parties were presented by a solicitor or counsel.
Respondents had legal representation in 42 cases, and applicants in 32. In 18 of these cases the parties were equally matched. Thus, there were 30 cases in which the respondent had legal representation, but the applicant did not, compared with only 14 in which the applicant had legal representation and the respondent did not. Thus, in the sample, there were twice as many cases where the respondent had legal representation and the applicant did not than vice versa.

Tables 15 and 16 break these figures down to show representation for equal pay cases and sex discrimination cases as separate totals.

**Table 15.**

Representation of applicants and respondents, SDA cases, sample 1977-1981.

<table>
<thead>
<tr>
<th>Applicant representation</th>
<th>none</th>
<th>non-legal</th>
<th>legal</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>none</td>
<td>9</td>
<td>--</td>
<td>5</td>
<td>14</td>
</tr>
<tr>
<td>non-legal</td>
<td>8</td>
<td>3</td>
<td>5</td>
<td>16</td>
</tr>
<tr>
<td>legal</td>
<td>8</td>
<td>7</td>
<td>8</td>
<td>23</td>
</tr>
<tr>
<td>Total</td>
<td>25</td>
<td>10</td>
<td>18</td>
<td>53*</td>
</tr>
</tbody>
</table>

* Total sample of SDA decisions = 65, including 12 where representation was not known, which are excluded from this table.

Out of a total of 53 SDA complaints there were 16 in which an unrepresented applicant faced a respondent with representation, either non-legal (8) or legal (8). There were only 5 cases in which an unrepresented respondent faced
a represented applicant. In 20 cases, the parties were 'equal' in the sense of having the same kind of representation: 9 in which both parties acted on their own behalf, 3 in which both had non-legal representation, and 8 in which both had legal representation. Respondents had legal representation in 23 cases and applicants in 18. In 8 of these cases both had legal representation, so there were 15 in which the respondent had legal representation but the applicant did not, compared with 10 in which the applicant had a legal representative and the respondent did not. Thus in the sample of SDA complaints the ratio of cases where respondent had legal representation and the applicant did not to cases where the applicant had legal representation and the respondent did not was 3:2.

Table 16.

Representation of applicants and respondents, EqPA cases, sample, 1977-1981.

<table>
<thead>
<tr>
<th>Applicant representation</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>none</td>
<td>6</td>
</tr>
<tr>
<td>non-legal</td>
<td>22</td>
</tr>
<tr>
<td>legal</td>
<td>25</td>
</tr>
<tr>
<td>Total</td>
<td>53*</td>
</tr>
</tbody>
</table>

*Total sample of EqPA cases is 60, including 7 where representation is not known, excluded from this table.

Out of the total of 53 cases, there were 9 in which the applicant had no representation and the respondent had
either legal or non-legal representation, but only 2 in which the applicant was represented and the respondent not. In 26 cases the parties were equally matched in the sense of falling within the same category of representation: 4 in which both parties were acting for themselves, 12 in which both had non-legal representation, and 10 in which both had legal representatives. Respondents had legal representation in 25 cases, and applicants in 14. In 10 of these cases both were legally represented. Thus, there were 15 cases in which a respondent had legal representation and the applicant did not, compared with only 4 in which the applicant was the only party with legal representation, a ratio of nearly 4:1.

Thus, the sample data shows that with regard to the question of representation at industrial tribunal hearings, there is a pattern not just of a fairly low level of legal representation for applicants but that this is coupled with a considerably higher level of representation for respondents. Further, by concentrating not just on the aggregates for applicants and respondents, but on the pattern of representation at each hearing, it is possible to show the proportion of hearings at which there is a disparity in representation between the parties. The extent of this disparity in the sample cases is summarized in Table 17.
Table 17.

Disparities in representation between applicants and respondents at tribunal hearings, sample, 1977-1981.

<table>
<thead>
<tr>
<th>Respondent represented/</th>
<th>Applicant represented/</th>
</tr>
</thead>
<tbody>
<tr>
<td>applicant_not</td>
<td>respondent_not</td>
</tr>
<tr>
<td>Total</td>
<td>25</td>
</tr>
<tr>
<td>SDA</td>
<td>16</td>
</tr>
<tr>
<td>EqPA</td>
<td>9</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Respondent represented/</th>
<th>Applicant represented/</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legally represented/</td>
<td>Legally represented/</td>
</tr>
<tr>
<td>applicant_not</td>
<td>applicant_not</td>
</tr>
<tr>
<td>Total</td>
<td>30</td>
</tr>
<tr>
<td>SDA</td>
<td>15</td>
</tr>
<tr>
<td>EqPA</td>
<td>15</td>
</tr>
</tbody>
</table>

The disparities in legal representation between applicants and respondents are greater for EqPA cases than for SDA complaints, with some of the difference being accounted for by a higher degree of non-legal representation of applicants in equal pay cases. In the early years of implementation of the EqPA, trade union representation accounted for a high proportion of complaints coming before the tribunals. 7

Although the data is drawn from a fairly small sample of complaints it suggests that the disparity in resources between the parties at anti-discrimination cases is considerable. Regardless of any possible direct effect on the outcome of complaints, this degree of disparity may affect an individual's initial willingness to bring a
complaint and her subsequent willingness to proceed with it beyond the early stages. However, studies of other tribunals have suggested that there is a correlation between representation and success rate (Frost and Howard, 1977), and some commentators have pointed to the quality of representation as being crucial in equal pay and sex discrimination cases (Coussins, 1976). Certainly the sample data points in this direction. Tables 18 and 19 present profiles of representation of the parties at hearings of successful and unsuccessful complaints.

Table 18.

Representation of parties to unsuccessful complaints.

EqPA and SDA, sample, 1977-1981.

<table>
<thead>
<tr>
<th>Applicant representation</th>
<th>none</th>
<th>non-legal</th>
<th>legal</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>none</td>
<td>14</td>
<td>2</td>
<td>3</td>
<td>19</td>
</tr>
<tr>
<td>non-legal</td>
<td>7</td>
<td>8</td>
<td>2</td>
<td>17</td>
</tr>
<tr>
<td>legal</td>
<td>9</td>
<td>15</td>
<td>12</td>
<td>36</td>
</tr>
<tr>
<td>Total</td>
<td>30</td>
<td>25</td>
<td>17</td>
<td>72</td>
</tr>
</tbody>
</table>

(Total sample size for unsuccessful complaints is 82, including 10 where representation is not known)
Table 19.

Representation of parties to successful complaints.
EqPA and SDA, sample, 1977-1981.

<table>
<thead>
<tr>
<th>Representation of respondent</th>
<th>none</th>
<th>non-legal</th>
<th>legal</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>none</td>
<td>2</td>
<td>--</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td>non-legal</td>
<td>4</td>
<td>6</td>
<td>7</td>
<td>17</td>
</tr>
<tr>
<td>legal</td>
<td>2</td>
<td>4</td>
<td>5</td>
<td>11</td>
</tr>
<tr>
<td>Total</td>
<td>8</td>
<td>10</td>
<td>14</td>
<td>32</td>
</tr>
</tbody>
</table>

(Total sample for successful complaints is 38, including 6 where representation is not known)

In the unsuccessful complaint, there were 16 in which the applicant had no representation but the respondent had either non-legal or legal representation. There were 5 cases where the respondent had no representation and the applicant had some. In the successful cases the comparable figures were six where the applicant had no representation and 2 where the respondent had no representation, the other party having representation of some kind. With regard to these figures there appears to be little difference between the successful and unsuccessful complaints. (Compare these figures with those for the total sample in Table 17).

However, when the basis for comparison between the two sets is the presence or absence of legal representation, there does appear to be a difference.
Out of the 72 unsuccessful cases there were 36 in which the respondent had a legal representative and 17 in which the applicant was so represented. There were 12 cases in which both parties had legal representation. Thus, there were 24 cases in which both parties had legal representation, but the applicant did not, compared with only 5 in which the positions were reversed. This is a ratio of nearly 5:1. By contrast, out of 32 successful complaints, there were 11 cases in which the defendant had legal representation but 14 in which the applicant did. Out of the three sets of complaints (total, unsuccessful and successful) this is the only one where the applicant had legal representation in a greater number of cases than the respondent. In 5 cases the parties both had legal representation, leaving 6 in which the respondent had legal representation and the applicant did not, but 9 where the applicant was the only party to have legal representation, i.e. a ratio of 2:3. Table 20 summarizes the difference between successful and unsuccessful complaints with regard to the legal representation of the parties.
Table 20.
Disparities in legal representation between applicants and respondents, EqPA and SDA, sample, 1977-1981.

<table>
<thead>
<tr>
<th></th>
<th>Respondent legal representation/ applicant not</th>
<th>Applicant legal representation/ respondent not</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>30</td>
<td>14</td>
</tr>
<tr>
<td>Unsuccessful</td>
<td>24</td>
<td>5</td>
</tr>
<tr>
<td>Successful</td>
<td>6</td>
<td>9</td>
</tr>
</tbody>
</table>

Although the numbers are small, this table seems to suggest that the presence or absence of legal representation for applicants may be directly related to their chance of obtaining a favourable outcome. The disposition of any complaint will depend on a number of factors of which the presence or quality of legal representation is only one variable. For this reason, some caution should be used when interpreting 'success rates' as a measure of the need for representation. Variations in the success rate between applicants with legal representation and those without may reflect only the merits of the case, for example, and the extent to which lawyers are selective about the kinds of cases they are prepared to take to tribunal hearings. Nevertheless, the data seems to provide some empirical foundation for the assertion that representation is important, and specifically, that it is legal representation that is most likely to have an affect on outcomes.

Other commentators have suggested, however, that lay advocates may be just as well equipped as lawyers to handle
successful tribunal hearings. Coussins (1976) notes that "It does not really matter who presents a case to a tribunal; a lawyer is not necessarily better than anyone else. What counts is whether a person knows the law and knows the ropes of tribunal procedure." The sample size in this study is too small to permit the drawing of any definite conclusions on the question of whether it is the presence of a qualified legal representative that makes the difference or whether it is the skill and training of a representative, legal or otherwise. What it does appear to show is that in this set of cases the availability of legal representation seems to have increased the chance of the applicant obtaining a successful resolution of her complaint. Whether the benefits of increased representation could be achieved through increasing the availability of legal aid, or by making more legal help available through the EOC, or by providing for the training of 'discrimination representatives' to act for applicants at tribunal hearings lies outside the scope of this study, although the possibilities suggest interesting directions for future research.

If it is to be assumed that the assistance of a trained legal representative will have some effect on the chance of success at the tribunal hearing, as the sample indicates, then there remains the question of how and why this effect is achieved. Coussins (1976) pointed to some areas in which lay representatives were observed to experience
difficulties, at hearings which formed part of a NCCL study of the first year of implementation of the legislation. Coussins pointed to difficulties in preparing proper supporting documentation and in eliciting evidence from witnesses. Elaine Donnelly of the EOC outlined in more detail why "without some kind of legal help, people have practically no hope of winning their case." She pointed to the difficult tasks involved in the preparation of the case, including knowing how to use circumstantial evidence in order to define what information is needed to make a strong argument. In order to obtain this evidence, a representative must know how to use a s. 74 questionnaire, must target the information wanted through discover, and must be able to pursue discovery, despite likely protestatations of confidentiality on the part of the respondent. At the hearing itself, the representative must present the applicant's case, and cross-examine skillfully to defeat or mitigate the arguments put forward by the other side. Most importantly, the representative must be able to draw the tribunal's attention to the inferences that can be drawn from the evidence. Donnelly sees this last task in particular as being specifically a lawyer's job, not just that of someone with experience in the area of industrial relations (Donnelly interview, July 1982).

The complexity of the tasks facing the representative, or the unrepresented applicant, will vary according to the nature of the complaint involved. Where there is a
complaint of sex discrimination in recruitment, for example, the job may be even harder than in a case for equal pay with a male co-worker, since the extent to which circumstantial evidence must be used may be greater, discovery problems harder to surmount, and the drawing of the proper inferences of discrimination crucial to the resolution of the issue. In any complaint, however, seemingly straightforward, an unrepresented applicant must deal with the fact that the respondent is very likely to have representation of some kind, that she stands a good chance of facing a respondent represented by a lawyer, and that the area of law which deals with employment discrimination is complex and subject to the precedent-setting decisions of the appellate hierarchy.

In the remainder of this chapter, I will focus in more detail on the problems of lack of representation and assistance, by a closer examination of the work involved in preparing a case for hearing, and by examining the issue of meeting the burden of proof, through the presentation of evidence.

III. PROCEDURAL ISSUES IN TRIBUNAL RESOLUTION OF COMPLAINTS

A. The Preparation of a Case for a Tribunal Hearing.

Some idea of the amount and complexity of the work involved in preparing a case for a tribunal hearing can be gleaned from a guide prepared by the EOC to assist applicants (How to Prepare your own case for an Industrial Tribunal, EOC, 1979). For example, the guide notes that,
having filed an originating application to the Central Office of the Industrial Tribunals, the applicant must then decide what to argue, and what evidence is needed to support the argument. This task involves "collecting all the facts together and fitting them into the legal framework." For help in determining the legal framework, the guide points the applicant to the Acts themselves, explanatory books on the legislation, and advice from the EOC. As to the Acts themselves as a source of guidance, members debating the provisions of the SDA in Parliament remarked on the complexity of the legislation. In the House of Lords, Baroness Fisher asked: "Can you picture any woman working a capstan lathe... trying to understand this Bill, and seeing whether she is being discriminated against? (H.L. Debs., 1 July, 1975 c. 156). The problem for the unrepresented applicant in understanding the legal framework lies not only in deciphering the unique prose of Parliamentary draftsmen, but also in comprehending the meanings that have subsequently been given to various sections by appellate courts, and then in applying that framework to her own particular circumstances. However useful an explanatory book may be, it cannot perform the crucial function of relating the law to a unique fact situation.

Further, it is a mistake to approach the problem as consisting of two discrete tasks, one concerned with the collection of facts, and one with fitting them into a legal framework. In any potential 'legal problem' the 'facts' and
the 'law' enjoy a complex inter-relationship which on the most simple level demands that the situation giving rise to the dispute be construed in the context of the search for legally significant facts. Thus, the applicant must ideally understand the parameters of the Parliamentary and judge-made law as a precondition for 'collecting all the facts.' Assuming for the moment that the applicant is able to do this, she is then presented with a second set of tasks, which are concerned with questions of evidence and proof.

The guide notes that there are five main ways of getting evidence: from documents in the applicant's possession, from witnesses, from documents in the possession of the respondent or a third party, from the s. 74 questionnaire in SDA cases, and from the respondent's written reply to the industrial tribunal (on form IT3), further details of which may be requested by the applicant. All of these methods may present considerable difficulties for the applicant. Potential witnesses, for example, may be reluctant to appear, for fear of incurring employer hostility. Major problems of access to evidence are likely to occur over the discovery of documents in the respondent's possession, and the disclosure of information in the respondent's control.

In applying rules governing discovery, the tribunals have considerable discretion to decide what information is relevant and necessary for a fair disposal of the proceedings. The question of the discoverability of
'confidential' documents reached the House of Lords in the case of *Nasse v. SRC*, (1979) IRLR 465.

In *Nasse*, the applicant was employed as a clerical officer by the SRC. She applied unsuccessfully for promotion to the post of Executive Officer, and subsequently brought a complaint under the SDA alleging marital discrimination. In pursuit of her claim she sought discovery of confidential reports on herself and two other people, who were promoted to the position she was seeking, plus discovery of the review boards notes on all those who had applied. The SRC disclosed the report on Mrs. Nasse, but refused to give her access to the other documents. The industrial tribunal upheld Mrs. Nasse's application for discovery, as did the EAT. The Court of Appeals, however, allowed the SRC's appeal against discovery. Nasse then appealed to the House of Lords, where the case was heard jointly with another, arising under the Race Relations Act, and involving the same issues. The EOC and the Race Relations Board both appeared as *amicus curiae*, a mark of the significance those organizations attached to the discovery issue.

The standard for discovery set out by the Lords was that chairpersons of tribunals should inspect disputed documents to determine whether they are relevant and necessary for a fair disposal of the proceedings. The court rejected the applicant's contention that relevancy alone was a sufficient condition to compel discovery, and the
respondent's position that a public interest immunity shielded confidential information. In some cases, confidentiality might be maintained by excluding irrelevant parts of documents, but once discovery is held to be necessary for a fair disposal of the proceedings, there is no public interest immunity to prevent disclosure.

Essentially, the standard is a balancing test, in which individual tribunals are given the discretion to balance the interest in confidentiality against the need for disclosure in the interest of justice. Thus, while formally affirming the Court of Appeals decision in Nasse, the House of Lords substantially broadened the applicant's potential access to information by laying down the broad principle that, where a document is deemed to be necessary, the interest in maintaining confidentiality must be superseded. However, the House of Lords left the tribunals with significant discretion in applying the test, both as to whether there is a prima facie case for examining the disputed documents, and as to the merits of disclosure of documents that have been examined.

The sample includes two interlocutory decisions on discovery, both pre-dating the House of Lords decision in Nasse. One case is in fact the original decision in Nasse, in which the industrial tribunal ordered the disclosure of the disputed documents. In setting out the standard on which it based its opinion, the tribunal quoted from the opinion of Brett L.J., in the case of Compagnie Financiere
v. Peruvian Guano Co., (1882) 11 QBD 55 at 63, stating that every document must be disclosed, "which, it is reasonable to suppose, contains information which may - not which must - either directly or indirectly enable the party. . . either to advance his own case or to damage the case of his adversary (including) a document which may fairly lead him to a train of inquiry which may have either of these two consequences." (Nasse v. SRC, London 27 Oct 1977, p. 4)

Applying this standard to the case in hand, the tribunal rejected the notion that the applicant must make an affirmative showing of the way in which the disclosure might help her case, noting, "It is enough for her to show that they may fairly lead her to a train of inquiry which may enable her either to advance her own case or damage that of the respondent and that inspection is genuinely necessary in the interest of justice" (Ibid. p 5). Thus, the tribunal utilized a 'wide open' standard for discovery holding any document discoverable if it either was relevant to the case of either party or if it might lead to information that was so relevant. The House of Lords narrowed the test by making it subject to balancing the requirements of disclosure against an interest in protecting confidentiality.

The second case in the sample is a 1978 EqPA complaint in which the applicant sought discovery of documents which would disclose to her the length of service and salary paid to all employees on certain salary scales. The tribunal allowed discovery of documents relating to the comparable
man in the applicant's complaint but not to other employees, using the standard of 'relevant and necessary for the fair disposal of the proceedings,' which the House of Lords subsequently adopted in *Nasse*.

In applying the standard the tribunal examined the applicant's burden of proof and the information that would be necessary to make out her case:

If the applicant successfully discharges the burden of proving like work, then the burden of proof shifts to the respondent to establish under s(1) (5) that the variation in the rate of remuneration between the applicant's contract and (the comparable man's) contract is genuinely due to a material difference...between her case and his. While the Chairman respects the respondent's desire to protect the interests of their employees, it is the essence of the Equal Pay Act that a comparison be made between the terms of employment of a woman and a comparable man and for this purpose it is inevitable that employers will be required to disclose information sufficient for establishing the personal equation...The Chairman does not see how the defence of material difference can be fairly tested without making available to the applicant full details of (the comparable man's) terms of employment (*Wilkinson v. Butterworth and Co.*, London C., 27 Nov. 1978, p. 1-2).

The question of discovery and disclosure is of enormous importance in litigating an equal pay or sex discrimination complaint, as these examples show, as it is usually the respondent who controls most of the information necessary to establish the complaint, and the applicant who bears the burden of proof. The significance of the issue for both parties is reflected in the extent to which it recurs in the reported case law. Lustgarten (1980, p. 220) notes that the claim of confidentiality to avoid disclosure is the single issue which has generated the largest amount of reported
case law under both the sex discrimination and race relations legislation.

The significance of the discovery issue further emphasizes the need for adequate preparation, and representation during the preparation stages of the complaint. The kind of information that is requested, and the applicant's response to any reluctance to disclose on the part of the respondent will crucially affect the kind of evidence that the applicant is able to muster in support of her case at the tribunal hearing. The unrepresented applicant is likely to be disadvantaged both in terms of her knowledge of what information is necessary to make a persuasive showing at the hearing, and in her ability to pursue this information in the face of respondent refusal. At the very least a disputed request for disclosure will result in some delay and, if the applicant persists and knows how to proceed, in the necessity for an additional interlocutory hearing before the complaint can proceed on the merits.

The prior problem of deciding what information to seek from the respondent is one in which the unassisted applicant is likely to face some difficulty even before she reaches any problems in procuring such information. In a SDA complaint an applicant may request certain information from the respondent by using a s (74) (1) (a) questionnaire. The questionnaire includes some prewritten questions but also makes provision for the applicant to enter her own
additional questions under Q. 6. The EOC guide notes that this question is "an opportunity to collect the information you will need to prepare your case" and gives examples of the kinds of question that might usefully be included. A lawyer with the EOC recently commended that if used properly a s. 74 questionnaire could lead to a good deal of relevant information but noted that its usefulness is limited by an EAT ruling that ordinary rules of discovery apply to its use. Thus, an applicant cannot use the questionnaire to determine what kind of information the respondent has in his possession, as this kind of 'fishing' is prohibited under rules relating to discovery (Donnelly interview, 1982).

These examples of potential preparation difficulties are included to illustrate some of the problems that applicants may face. They may provide some insight into the high withdrawal rate of complaints, noted in the previous chapter. They may provide a partial explanation of the relatively high failure rate of complaints that reach a tribunal hearing. They certainly illustrate how difficult may be the task of preparation if undertaken by an applicant who lacks informed assistance or representation.

B. The Burden of Proof

The availability of access to information has direct bearing on a second major procedural hurdle, the ability of the applicant to meet the burden of proof required by the legislation.
The required burden of proof differs as to the two Acts. The EqPA requires that an applicant establish that she is being treated less favorably with regard to pay than a comparable man, i.e., a man engaged in the same or broadly similar work as the applicant. The burden then shifts to the employer to prove that the variation here is to establish comparability, the similarity of her work with that of the man with whom she claims equal pay.

Under the SDA, the burden of proof is rather different. To prove direct discrimination, the applicant must establish that she has been treated less favorably than another, because of sex or marital status. The whole burden is on the applicant to establish, on the balance of probabilities, not just a difference in treatment, but also to convince the tribunal that the variation arose from considerations prohibited by the SDA.

In Equality for Women, the White Paper that preceded the introduction of a government sex discrimination bill into Parliament, the proposals provided for the applicant to make an initial showing that the respondent had acted to her detriment in circumstances suggesting that the reason was sex or marital discrimination, and for the burden of proof to shift to the respondent to show that the applicant was not treated less favorably on that basis. At the Bill's Second Reading in the House of Lords, Baroness Fisher of Rednal noted that there had been a change from the proposal outlined in the White Paper, and that the proposed burden of proof now
appeared to be inconsistent with that set out in the EqPA. (H.L. Debs., 1 July 1975, c 154).

She drew attention to the possible effect of the shift in the burden of proof on applicants: "For any woman to bring a case before a tribunal especially a working class woman - will be a major personal achievement, for her anyway. I think that we shall be victimising the woman if she has to bear the onus of proof." (Ibid. c. 155). For the Government, Lord Crowther-Hunt replied to criticisms of the change in the burden of proof from that proposed in the White Paper, and addressed the suggestion that the bill should revert to an approach where, after an initial showing of an alleged act of discrimination, the burden should be upon the respondent to show a legitimate reason for the act complained of. His argument bears quoting at some length, not least for the disingenuousness of the logic:

The House will appreciate that [the suggestion] cuts right across the principle of our law, both civil and criminal, that a person is innocent until he is proven guilty. To prove a negative is a very onerous burden and it would not be reasonable as a general proposition to require the respondent to do so (Ibid. c. 188).

However, since the burden in unfair dismissal cases under the 1974 Trade Unions and Labour Relations Act was identical to that proposed in the White Paper and now rejected by the Government, it was necessary for the Government spokesman to attempt to distinguish the two situations:

It is perfectly fair and defensible that when an employer dismisses an employee he should be obliged to see that he had a proper reason for doing so. That is
why in dismissal cases the main evidential burden is on the respondent. In this situation it should be noted that the respondent is not asked to prove a negative. He has to show that the dismissal was for a reason which the Act says is a legitimate one (Ibid., c. 189).

It is difficult to see the distinction that the speaker was attempting to make, since the situation he describes as acceptable for the purposes of unfair dismissal legislation was precisely the one advocated by critics of the Government's position, for the sex discrimination legislation - where the respondent would be required not to prove a negative, but to establish that the differential treatment occurred for a reason which the legislation allowed as legitimate.

The government was not, however, persuaded by the arguments of those advocating a shift in the burden of proof, and the statute that became law puts the whole burden on the applicant. This burden of proof is particularly onerous because of the nature of sex discrimination complaints. Direct evidence is rare, and the more usual situation is the need to prove discrimination by relying on circumstantial evidence. The EOC notes that this task can be "particularly onerous, requiring skill and expertise in formulating and presenting the evidence to enable the facts to be found from which the proper inferences can be drawn." (EOC Proposed Amendments, January 1981, p. 8) For the unrepresented applicant, this task will be a formidable one. The EOC did not suggest, in its proposals for change, that there should be any provision for making representation more
readily available, but it did note that the situation for applicants would be ameliorated by reversing the burden of proof.

The EOC pointed out that there were precedents for reversing the burden of proof, giving sections 23 and 25 of the Employment Protection (Consolidation) Act of 1978 as examples. These provisions related to discrimination on the basis of trade union membership. In cases involving allegations of discrimination on this basis, the burden of proof mirrors that in unfair dismissal cases, with the applicant bearing the initial burden of demonstrating that the respondent acted in a particular way, and the burden then shifting to the respondent to establish that the act complained of was legitimate. This approach does constitute a reversal of the normal principle of civil law where it is for the plaintiff to show that the defendant has contravened the law. The justification for this latter approach is, as Lord Crowther Hunt rightly pointed out in the House of Lords, that it prevents the defendant from being placed in the untenable position of having to prove a negative. Lustgarten (1980) argues, however, that in discrimination cases, the applicant, under the present approach to the burden of proof, is compelled to prove a negative - that the employer did not have a legitimate reason for the less favourable treatment alleged. (Lustgarten, 1980, p. 206). This burden may become particularly onerous when the applicant encounters difficulties in obtaining access to
information under the respondent's control. As noted earlier it is comparatively rare to find direct and uncontradicted evidence of discrimination. An applicant will usually go forward by relying on circumstantial evidence, which means that credibility becomes a crucial test in deciding whether the burden has been met in the particular case.

The higher courts have given some guidance on the burden of proof. While the formal burden is on the applicant in direct discrimination cases, "it would only be in exceptional or frivolous cases that it would be right for the industrial tribunal to find at the end of the applicant's case that there was no case to answer," Oxford v. DHSS (1977) ICR 884, 887 (EAT). The EAT suggests that concepts of shifting evidential burdens be avoided, as overly legalistic and more likely to obscure than illuminate the answer. Rather, the tribunal should consider all the evidence, and "take into account the fact that direct evidence of discrimination is seldom going to be available and that, accordingly, in these cases, the affirmative evidence of discrimination will normally consist of inferences to be drawn from the primary facts" Khanna v. Ministry of Defense (1981) ICR 688-9 (under the Race Relations Act of 1976). Thus, if the primary facts indicate that there has been discrimination "the employer is called on to give an explanation and, failing clear and specific explanation being given by the employer to the tribunal, an inference of industrial discrimination from the primary facts will mean the complaint succeeds"
The Northern Ireland Court of Appeal adopted a similar approach in Wallace v. South Eastern Education and Library Board (1980) IRLR 193, 195. In Wallace the court drew an inference of sex discrimination from the failure to promote a woman whose qualifications and experience were demonstrably superior to those of the successful male candidate, noting that if inferences of discrimination could not be drawn in cases such as this, "the object of the legislation would be largely defeated."

Cases from the sample will illustrate these points in more detail. Since the burden of proof can be especially difficult to meet in cases alleging discrimination in recruitment and promotion due to the enormous significance in these cases of access to information in establishing the prima facie case, examples have been chosen from those complaints in the sample in which this kind of discrimination was at issue.

Out of a total of 65 SDA complaints in the sample, nearly half were concerned with either recruitment or promotion related discrimination, as the following list shows.

(cont'd.)
Table 21.
Types of discrimination alleged in SDA complaints, sample.

<table>
<thead>
<tr>
<th>Discrimination Type</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Promotion, transfer, and training</td>
<td>15</td>
</tr>
<tr>
<td>Recruitment</td>
<td>14</td>
</tr>
<tr>
<td>Dismissal</td>
<td>9</td>
</tr>
<tr>
<td>Redundancy</td>
<td>8</td>
</tr>
<tr>
<td>Terms and conditions of employment</td>
<td>8</td>
</tr>
<tr>
<td>Reduction in status</td>
<td>3</td>
</tr>
<tr>
<td>Certification</td>
<td>1</td>
</tr>
<tr>
<td>Licensing</td>
<td>1</td>
</tr>
<tr>
<td>Advertising</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>60</strong></td>
</tr>
</tbody>
</table>

(+ 5 not known)

Two contrasting cases will illustrate some of the issues that are likely to arise in a promotion or recruitment case, and the ways in which tribunals may respond to them.

In Wilkie v. Strathclyde Regional Council (Glasgow Industrial Tribunal, 1980), the applicant alleged sex discrimination in the respondent's failure to interview her for the post of lecturer in social policy. The respondent initially denied discrimination and asserted that the candidates for the post who were interviewed were considered to be those best qualified for the position. The applicant was a temporary lecturer at one of the respondent's colleges when a permanent full-time post was advertised. She applied for the job, for which the Head of Department received a total of 4 applicants, 2 male and 2 female. The Head of
Department drew up an interview list of 3 candidates; the applicant, and the two men who had applied. He submitted this list to the College Director who withdrew the applicant's name from the list, interviewed the two male candidates, and appointed one of them to the post. At this point the applicant contacted the EOC for advice, and subsequently filed a complaint with the Industrial Tribunal.

It should be noted here that at the time the applicant contacted the EOC, she knew as a matter of fact that her qualifications were at least as good as those of the candidates who were interviewed. She knew the Head of Department who was responsible for drawing up the interview list, and he later testified on her behalf at the hearing. In light of the issues raised in Nasse, the fact that the applicant had this information available to her is of some significance in terms of her ability to prepare the case, and the quality of evidence she was able to present at the hearing. During the hearing the Head of Department testified that he had had an opportunity to compare the applicant's qualifications with those of the candidates who were interviewed, that the applicant would have been a "strong candidate," and in his opinion should also have been interviewed. The applicant also presented similar testimony from another senior lecturer who had examined the candidates' qualifications. In addition to this witness testimony, the applicant testified on her own behalf, and
also submitted what the tribunal referred to as "a substantial body of helpful documentary evidence."

During the evidence of the respondent's witnesses, the representative for the respondent conceded that there had been an act of discrimination against the applicant, but that it was grounded not in sex discrimination, but arose from the fact that she had previously lodged an unfair dismissal complaint against the College. The applicants representative contended that where it was established that there had been an act of discrimination against a woman, it was sufficient to raise the presumption of discrimination on the grounds of sex, and that the burden of proof should shift to the respondent at this point to rebut the presumption. In support of this contention the applicant's representative directed the tribunal's attention to two appellate decisions, Moberly v. Commonwealth Hall (1977) IRLR 176, and Wallace v. Southeastern Education and Library Board (1980) IRLR 193. The Tribunal notes in its decision that:

Resting on these authorities the tribunal had no hesitation in finding that the burden of proof in this case did shift to the respondents and that it was for the respondents to prove that their admitted act of discrimination was on ground other than sex. This they were required to establish to the normal standard of balance of probabilities. (Decision, p.7)

If the applicant had not had access to the evidence that showed that she was at least as well qualified as the other candidates who were interviewed, the case may have turned out differently. Because of the evidence that the applicant was able to present on the qualifications issue, it
would have been difficult for the respondent to assert that it was an obvious lack of qualification for the post that constituted the grounds for their refusal to interview her. Thus, the respondents changed the grounds of their defence and admitted discrimination on the basis of a previous action against the College by the applicant. This had the effect of shifting the burden of proof from the applicant to the respondent, to disbel the inference of sex discrimination that arises in such a circumstance.

The tribunal's decision as to whether the respondent met the burden of proof was essentially a judgement of the relative credibility of the parties. The tribunal stated that the testimony of the respondent's witnesses was unsatisfactory, and that on credibility grounds it preferred the testimony of the applicant's witnesses where there were discrepancies. The tribunal did not accept that the applicant's previous complaint of unfair dismissal was the reason for the College's failure to interview her. The tribunal noted that this defence was submitted by the respondent's solicitor at the end of the presentation of the respondent's evidence, and had only been referred to as a peripheral matter in the testimony of the respondent's witnesses. Further, the respondent had failed to raise this defence in response to the applicant's s. 74 questionnaire. The tribunal noted that such evasiveness in s. 74 replies permits a tribunal to draw inferences that the respondent had committed an unlawful act. On the evidence available to
it, the tribunal reached a unanimous verdict for the applicant.

This case demonstrates the application by an industrial tribunal of the principles governing the burden of proof enunciated in *Oxford v. DHSS* and *Khanna v. Ministry of Defence*. It also demonstrates how crucial is the issue of weighing credibility when the tribunal is asked to consider whether the primary facts permit an inference of discrimination, and whether the respondent's explanation is convincing enough to dispel it.

The resolution of the credibility issue is one of six variables that the *Wilkie* case demonstrates, and that the sample shows as tending to be important in the

(Cont'd.)
resolution of complaints generally: access to information, pre-hearing preparation, the submission of appropriate, persuasive, and credible evidence, both documentary and testimonial, the presence of a legal representative able to direct the tribunal's attention to cases supporting the party's position, the resolution of credibility issues by the tribunal in favour of one party or the other, and finally the willingness and/or ability of the tribunal to draw from the facts the inferences necessary for a finding of discrimination. In Wilkie, the applicant had access to information through friendly contacts with colleagues, senior members of the Department who drew up the interview list, including her name, and subsequently felt that she had been badly treated. Her case was well prepared; the tribunal commented on the "helpful" documentary material she submitted. Her witnesses, employees of the respondent, testified directly to the issue at hand from personal knowledge. The applicant had the services of an able representative, who drew attention of tribunal members to cases favouring her position on the issue of the burden of proof; the tribunal stated that it relied on the authorities cited by the applicant's representative in deciding the proper allocation of the burden of proof. The tribunal resolved the credibility issue in favour of the applicant, noting that the respondent's witness testimony did not support the defence on which it rested, and examining the entire proceedings, including the respondent's reply to the
s. 74 questionnaire, for inconsistencies. From the facts presented, the tribunal drew the inference that sex discrimination had occurred. Not only was the applicant well prepared to present her case, but the tribunal appears to have been scrupulous in its approach to evidentiary matters, the determination of legal issues raised by the complaint and the inferential leap required to establish sex discrimination in the absence of a direct admission.

A complaint which is in some ways analogous, since it also concerns access to promotion, demonstrates how the resolution of a complaint may be affected when the important variables do not weigh in favour of the applicant, as they do in Wilkie. In Mitchell v. Essex Area Health Authority, (London, N. 1981), the applicant was a medical technician in one of the respondent's hospitals, who applied for promotion to the post of Senior Medical Physics Technician. Six candidates were short-listed, three men, and three women. This list was then reduced to three--two women, one of whom subsequently brought the complaint of sex discrimination, and one man. The male candidate was appointed to the post, and the woman, who was the 'internal' candidate, brought a complaint alleging sex discrimination as the reason for her failure to be appointed. The tribunal dismissed her complaint.

In Mitchell, the applicant represented herself, but the respondent was represented by a lawyer. In Wilkie, by comparison, both parties had legal representation. In
Mitichell, the applicant was unable to rely on the sympathetic testimony of colleagues or superiors, the latter instead giving evidence supportive of the respondent; nor does it appear from the record of the decision that she submitted any large volume of documentary evidence helpful to her case. The tribunal appeared to be much less rigorous in its approach to probing the evidence for inconsistencies than the tribunal in Wilkie, and more willing to accept the respondent's version of the facts at face value, despite a statement that "...there is seldom direct evidence of discrimination, and we must accordingly be prepared to draw necessary inferences."

In evidence, the applicant submitted a copy of the male candidate's application form as the basis for a comparison between her qualifications and experience and those of the successful male candidate. She also submitted a job description for the post as an additional support for her claim that she was better qualified for the post than the man who was appointed. The tribunal compared the two candidates' qualifications and experience in light of the written job description, and the respondent's witnesses' statements about the managerial qualities required of the successful candidate. Comparing the male candidate's qualification with those of the applicant, the tribunal noted that "[his] academic qualifications are undoubtedly less impressive than those of the applicant." Looking at the technical experience of the two candidates the tribunal
found that with regard to two of the areas mentioned in the job description the applicant had the greater experience, and that with regard to one area the successful candidate was the more experienced.

In light of the apparently greater experience, and undoubtedly higher academic qualifications of the applicant, it might be supposed that an inference of discrimination could have been drawn. The respondent removed any doubt about its motivation in appointing the male candidate, however, by convincing the tribunal that he scored higher on managerial capacity and supervisory experience than the applicant, and that these factors were of great importance, since in making this appointment the hospital was in fact, because of a foreseeable retirement, choosing the next Chief Technician. Since these qualities were advanced as the major reason for appointing the male candidate in preference to the applicant, it is surprising that the tribunal does not appear to have enquired as to the details of his supervisory experience. In the written decision there is no report of how many employees he had supervised, or for how long, although the tribunal records that the applicant was told when she first announced her intention of applying for the post that her supervisory experience was inadequate. Nevertheless, she had filled the disputed position in an acting capacity and had been responsible for supervising "two or three" other technicians. All that the tribunal records of the successful candidate's experience in this
field is that he was previously in charge of a smaller department than the one in question, in a specialist hospital. Beyond this the tribunal records that the respondent appointed him to the position because he had "suitable management potential and a pleasing personality, and [he] would be in a position to act as an able chief technician" [emphasis added]. Thus, without any probing of the evidence submitted, the tribunal resolved all credibility issues in favour of the respondent, and dismissed the applicant's complaint.

It is not the purpose of the foregoing discussion to imply that this case was wrongly decided since such a determination is outside the scope and competence of this examination. Rather it is to show how, in contrast to Wilkie, the factors identified as tending to affect complaint resolution can operate to the applicant's detriment and in favour of the respondent. The discussion of the tribunal's approach to the evidentiary and credibility issues also suggests the wide variation in approach between different tribunals. The written decision, in setting out the tribunal's fairly uncritical acceptance of the respondent's explanation, also indicates the areas in which a skilled representative may have been able to improve the applicant's chance of success, through skillful cross examination to draw out any inconsistencies that may have not been immediately apparent in the respondent's witnesses'
testimony and in the respondent's general approach to its defence.

At a tribunal hearing, as in any dispute adjudication where there are differing versions of the facts, credibility must be a central issue. As Wilkie and Mitchell suggest, tribunals appear to vary considerably in the extent to which credibility determinations are based upon strict scrutiny of all available facts and sources. The Mitchell case also indicates that the credibility issue is likely to be a difficult one for tribunals to evaluate where recruitment or promotion decisions are based on 'soft' criteria, dependent on professional judgement, since tribunals recognize that it is not a legitimate part of the task to substitute their own judgement for that of selection panels or appointment committees, except in as much as discrimination appears to have been a guiding principle.

Applicants who complain of discrimination in promotion may well have a very difficult task in attempting to persuade tribunals of an inference of discrimination when they can show only that they were as well qualified as the successful candidate, rather than better qualified. In Saunders v. Richmond-upon-Thames LBC, for example, (1978) ICR 75, 80, the EAT, discussing the complaint of an unsuccessful female applicant for the post of golf professional, noted that it did not find her qualifications "were, or anyhow much, superior to those of the successful candidate," and concluded that her
qualifications were not thus "of a kind that the failure to appoint a candidate so qualified prima facie gave rise to an inference of discrimination."

Lustgarten (1980) suggests that tribunals would be better able to evaluate the parties' conflicting interpretations of events if, in complaints of direct discrimination, evidence bearing on employer's policies and practices were more widely introduced, not to prove the truth of the individual complaint, but to aid in determining relative credibility. As Lustgarten points out, admission of evidence of this kind conforms to the normal principles governing the use of 'similar fact' evidence in civil cases (Lustgarten, 1980, p. 208). For example, statistical data on the relative numbers of men and women in a given grade of employment would not be dispositive of an individual's complaint alleging sex discrimination in access to that grade, but it could aid the tribunal in evaluating the credibility of the employer's pattern and practice of conduct. Lustgarten rightly suggests that such evidence would be of particular value in situations like that in Mitchell, above, where decisions rest on highly subjective criteria which are inaccessible to external evaluation.

The EAT has accepted the validity and utility of statistical evidence in cases involving indirect sex discrimination (See Price v. Civil Service Commission, 1977, IRLR 198). In 1981, in a case arising under the 1976 Race
Relations Act, the EAT held that evidence of the employer's pattern of conduct may be a relevant factor in deciding whether on the evidence presented, sex discrimination occurred, Owen and Briggs v. James (1981) ICR 377, 382-3. Such evidence thus may help to establish or rebut an inference of direct discrimination.

The practice of the industrial tribunals with regard to the introduction of such evidence appears to have varied considerably (Lustgarten, 1980, p. 210). Some cases from the sample illustrate the kinds of fact situations where the introduction of evidence of systematic conduct might be illuminating, and the approach of the tribunals in the cases considered.

In Healy v. Messrs. Forrester Ketley and Co. (Birmingham, 1981), the applicant was a chartered patent agent with the respondent firm, who was under consideration for promotion to junior partner, but was not ultimately one of the two successful appointees. Four employees were under consideration for two junior partner positions, three male
and one female. When two men were promoted and she was not, the applicant brought a complaint of sex discrimination. The case involved the tribunal in evaluating the respondent's behaviour, which was based on subjective criteria of professional judgement. In making this evaluation the tribunal considered not only the bearing of the respondent's witnesses ("honest and reliable") but also made some minimal use of evidence relevant to an overall pattern of conduct. The tribunal noted that it had considered the suggestion that there was a background of incidents from which discrimination could be inferred, and recounted the factors which appeared to indicate that no discrimination had in fact taken place. The tribunal noted the total number of partners, and the number of women partners and set this information in the context of the male/female ratio for the whole occupation, using the Register of Patent Agents numbers as a reference point. It also considered briefly the numbers of men and women employed by the respondent at the lower grade of technical assistant and noted that it found no evidence of different treatment. The tribunal records all these factors in its decision, as well as a detailed account of the steps leading up to the incident giving rise to the applicant's allegation, and the respondent's rationale for choosing a man in preference to the applicant who, it was conceded, was 'partnership material.' Thus in assessing the relative credibility of the parties' versions of events, the tribunal
relied not only on its evaluation of witness testimony, although this undoubtedly played a part, but also considered the position of women in the respondent's firm more generally, in addition to looking at the number of women employed in the profession as a whole.

By contrast, the case of *Stewart v. John Haldane Ltd.* (Glasgow, 1980) illustrates a decision where the tribunal does not appear to have utilized any evidence other than witness testimony. In this case, the applicant was a woman who applied speculatively, for a job as a casual coach driver, to the respondent, a small firm operating three coaches. She was told that there might be casual work available and the manager took her details. She heard nothing more from the firm, but two months later she saw that they were advertising for a driver. She was not interviewed and a man was appointed. The applicant then lodged a complaint of sex discrimination. At the hearing, there were discrepancies in the respondent's evidence, which the tribunal acknowledged, and circumstances which might arguably have permitted an inference of discrimination, but which were accepted at face value by the tribunal. The fact situation as set out by the tribunal is that the applicant sought work and was told there was none, but that two months later an advertisement for a driver appeared. The respondent manager said that business had increased in this period. A male driver was then appointed, but between accepting the offer and starting work, he changed his mind.
and did not take up the post. The respondent then decided that there was no need for an additional driver, although only three weeks had elapsed since the job was advertised. In addition to this explanation, the respondent also stated that the applicant lacked the qualifications necessary for the job. In the face of these inconsistent assertions, and a version of the facts which appears at best to be insubstantial, the tribunal did not attempt to weigh the credibility of the version of events presented by seeking any evidence relevant to a pattern of conduct, nor did it appear willing or able to draw any inferences from the inconsistencies which it acknowledged as being present.

The idea of a greater use of statistical data is an appealing one, not least because it focusses attention on discrimination as a collectively experienced phenomenon, rather than a question only of individual rights. However, there are a number of practical matters associated with the suggestion that more use should be made of this kind of evidence, which must be addressed, albeit briefly.

First, the increased use of statistical information is likely to intensify the struggle for access to information, and may well produce protracted discovery battles. Secondly, an unrepresented applicant is less likely to benefit from a trend towards the increased use of such information than one with representation, since its use requires expertise in selecting and obtaining the kind of information necessary to the case. Thirdly, a trend towards
greater reliance on statistical data as a means of proof may exacerbate rather than reduce the differences of power and resources between applicants and respondents which already exist in terms of access to legal representation, and could conceivably come to include differences in access to the services of data and statistical specialists. In the United States where the Federal courts have increasingly relied on statistical data of a sophisticated kind, the ability to retain and pay for the services of computer experts and statisticians has increasingly become a necessity for plaintiffs in employment discrimination cases. Although it seems unlikely that the degree of reliance on experts which is to be found in the American courts will develop in the tribunal system, it is worth remembering that evidence of systematic conduct may be used to challenge or support respondent credibility, and the interpretation which is put on such information by the tribunal is likely to depend to some extent on the way in which it is presented. Thus, access to the information, and to the services of expert presenters is just another way in which existing differences in resources between the parties may again be manifested. These issues of discovery and the burden of proof serve to stress how difficult may be the task facing any applicant; the problems can only be exacerbated when the applicant lacks assistance in preparation of the complaint and presentation of the case at the tribunal hearing. To a potentially difficult situation must be added the
possibility that the tribunal will have had little experience in dealing with equal pay and sex discrimination complaints, a situation where again, the presence or absence of a skilled representative may be of crucial importance, particularly if the respondent's defence is conducted by a lawyer.

CONCLUSION

As this chapter demonstrates, there are, under the present system of enforcement, anumber of problems for the individual contemplating the bringing of an EqPA or SDA complaint. It has been suggested that ameliorating some of the procedural burdens that an individual may face may have the effect of not only improving the success rate at tribunals, but also, in consequence, of encouraging more complaints to be made, and more to be pursued beyond an early withdrawal. However, as some of the material on the emergence of disputes shows, it is unlikely to completely change the situation. There appears to be a particular problem in relying on individual complaints of discrimination in a world where occupational sex segregation is common and where studies suggest that it is in precisely this situation that perceptions of discrimination may not emerge. In such a situation, reliance on individual complaints may not be the most appropriate system of enforcement for anti-discrimination legislation.

It is possible, however, to suggest certain changes in the system which would facilitate the process of bringing
and presenting complaints, regardless of whether to do so would ultimately lead to an increase in the total number of complaints adjudicated. Such proposals may be justified solely by reference to concepts of fairness for the individual, and the public interest in the even-handed administration of justice.

Possible reforms may concern either the tribunals, the applicants, or the law itself. With regard to the tribunals, improvements in training and/or changes in composition have been suggested. With regard to applicants, proposals for change focus on the practical difficulties of preparing and presenting a case, and indicate a need for increased availability of trained and competent representatives. With regard to the law, more liberal discovery rules, and a shift in the burden of proof would both be advantageous to the applicant, particularly, but not exclusively, in difficult recruitment and promotion cases under the SDA. These changes together may facilitate the development of a process in which it is easier for the applicant than it is now to pursue and succeed with a meritorious claim.

The focus of this chapter has been on the identification of important procedural concerns which potentially affect the resolution of an equal pay or sex discrimination complaint. This is not to suggest that substantive factors have no impact on outcome. Equal pay claims may be brought, for example, where the jobs compared
for pay purposes are clearly outside the scope of the Acts 'like work' provision; similarly some sex discrimination claims may lack a basis in the context of existing legal provisions.

The inability of the legislation to remedy certain kinds of disadvantage in the workplace has been well documented elsewhere, and proposals for substantive charges have been advanced. The purpose of this chapter has been to suggest that procedural concerns, which have received less attention, are nevertheless of considerable, independent importance.

This chapter started with an examination of the complaint statistics, and the ensuing analysis and discussion has taken place implicitly within that statistical context. Ultimately, however, the fact of a low complaint rate and a lower success rate under the anti-discrimination legislation must be considered not just from the negative position of the problems posed in enforcement, but also from the standpoint of the ideological or symbolic message that this situation conveys. To have a weak, difficult or under-utilized law is not the same thing as having no law at all.

While the law exists, it implicitly conveys a number of symbolic statements which go beyond the perception that the law is relatively ineffective. While a law exists, it is possible to assert that the role of public policy is over, that the limits of legal change have been reached, and that
if a problem of discrimination persists, then it is the responsibility of those victimized by it to seek the remedies the law provides. Pressing for changes in the law, in this context, is more than a campaign to help the individual victims of discrimination who seek to bring a legal complaint. It is an ideological challenge to the implicit message or hidden agenda of an 'unsuccessful' law -- that victims now have only themselves to blame and that the limits of change through law have been reached.

In this chapter, the focus has been on the enforcement process which is available to the individual. In this context, problems like the lack of representation and the difficult burden of proof loom large. Proposals for the reform of the enforcement system, through the kind of changes discussed above, would almost undoubtedly improve the chance of an applicant with a legally meritorious claim to pursue it successfully to a remedy. The problem would remain, however, of attempting to enforce anti-discrimination legislation primarily through individual complaints. While reform in the individual enforcement system is doubtless a worthy policy objective, it should not obscure the fact that perhaps the major obstacle to effective enforcement is the individualism which lies at the core of the legislative solution.

Recognition of this fact is important, and not only because it directs the attention to a different order of changes from those proposed in this chapter. It also points
up the necessity of placing the study of procedural concerns within a broader context than that of the enforcement system alone. While a close concern to technical details of enforcement is necessary to the sociologist's understanding of the effectiveness, or lack of effectiveness of a particular statute, the enforcement system as a whole must be examined with reference both to the nature of the underlying phenomenon which gives rise to the complaints processed, and to the nature of the remedy that the law provides. Thus, if anti-discrimination law incorporates an approach to discrimination which is essentially individualistic, when the fact of discrimination results from membership in a social group, then changes that address only technical or procedural issues must ultimately fail, even though their incremental effect may be beneficial to individual complainants. Without a recognition of the collective nature of discrimination as a phenomenon, and the structural situation of the group in question, and of the lack of 'fit' between the problem identified and the legal solution offered, changes in procedural matters of the kind described here can only offer a partial remedy to the charge that the law is ineffective.
NOTES

1 For an extended discussion of remedy, see Chapter 9 below.

2 Interview with Elaine Donnelly, 1982.

3 See Appendix A for details of the sample.


5 It should be noted that in the circumstances of being held to precedent, it is difficult to see how a tribunal can avoid a legalistic approach, and it is debatable whether it would be desirable to do so. This point is developed below.

6 These issues are illustrated below in the discussion of the tribunal's approach to the burden of proof and other evidentiary issues that the SCA presents. Also see the discussion of interpretations of key provisions of the EqPA in Chapter 10.

7 However, as the total number of complaints has fallen, a smaller proportion of those reaching the tribunals is represented by a union official (See Table 13).

8 In a case alleging indirect discrimination, the applicant must show that there is a requirement or condition that has a disproportionate impact on women. The burden of proof then shifts to the respondent to 'justify' the requirement. The tests established by the appellate courts for the meeting of these burdens are discussed in Chapter Six, above.

9 Consideration of appellate decisions is limited to the period covered by the sample, i.e. up to and including 1981.

10 The approach of the EAT was upheld on appeal to the Court of appeals (1982) I R 618, 622-23.

11 Some of this effect may be due to the availability of class actions, but even where the complaint is an individual one it may require considerable statistical expertise to present a convincing case in terms of demographics, and the workforce profile, and to refute the defendant's use of such data.
CHAPTER EIGHT

ADMINISTRATIVE ENFORCEMENT:

THE EQUAL OPPORTUNITIES COMMISSION

In introducing the Sex Discrimination Bill in Parliament, the then Home Secretary, Roy Jenkins, stated that, as to enforcement, "The general approach is to combine the right of direct individual access to County Courts, or Industrial Tribunals in employment cases, with the strategic role of the powerful EOC which has the responsibility and power to enforce the law in the public interest." (H.C. Debs. March 26 1975, c. 552). In preceding chapters I have examined the process of individual enforcement and some of the problems it poses in the context of anti-discrimination legislation. In this chapter the focus turns to the EOC in its role as strategic agency for the enforcement of the legislation.

The Equal Opportunities Commission (EOC), as established by the terms of the SDA, is in many respects a hybrid organization. It is the product of a variety of experiences in state intervention in the field of race
relations, and the result of compromises between differing assumptions as to the desirability and feasibility of the legislation itself and as to the appropriate means of enforcement. The idea of such an organization, with its strategic role, is borrowed from the United States, where both state and Federal governments have long used administrative agencies as the linch-pin of anti-discrimination law enforcement. The British variant of this kind of organization differs, however, in some significant ways from its American counterparts, and raises important questions about the transcultural borrowing of legal and administrative concepts and structures, and the subsequent efficacy of such transplants outside of their originating environment.

Both the idea of the limitations produced by partial transcultural borrowing, and the debates concerning the roles of quasi-non-governmental organizations (Quangos), inform the analysis presented here, if somewhat tangentially. The main purpose of this chapter is to focus on the statutory powers of the EOC (which invites comparison with the American originals) and to examine the use that the EOC has made of the powers (which invites questions about the possible limitations that the social formation places on the use of those powers). Initially, however, the purpose is an empirical one: to present an accurate account of the organization's use of the statutory powers. Such an account provides both a basis for short-term recommendations for
improvement or amendment and contributes to the debates on the limits of administrative power by examining the factors which have had an influential impact on the operation of one agency. The ultimate question which lies behind this analysis concerns the extent to which the present system provides for effective collective enforcement of the anti-discrimination legislation, and the feasibility of amending the system in ways which would facilitate this objective. To pose this question is to acknowledge the need for an empirical investigation of the enforcement powers and the record of the EOC, in the context of the insights provided by the broader theoretical debates mentioned above.

I. THE STATUTORY POWERS OF THE EOC

The EOC as established by section 53 of the SDA combines the ability to assist individuals in certain cases with the authority to conduct broad-ranging investigations on its own initiative, backed up by statutory powers of discovery. In those areas of enforcement which the Government deemed to be primarily in the public interest, the Commission has the authority to bring proceedings on its own behalf. In addition to these responsibilities, the EOC is to encourage research, to monitor the legislation and to report to the Government. The Commission was also given powers to issue Codes of Practice, in an amendment passed under the Race Relations Act. This configuration of powers and responsibilities was designed, if government spokesmen are to be believed, to enable the new agency to fulfill a
strategic role with respect to the enforcement of the litigation, a notion based on the recognition that individual enforcement could not of itself be sufficient in this area.

The general duties of the Commission are set out in S. 53 (1) of the SDA and include: working towards the elimination of discrimination; promoting equality of opportunity between men and women; keeping the operation of the SDA and the EqPA under review; and, where appropriate, making recommendations for amendments. Section 55 gives the Commission its specific duty in pursuance of its general responsibility to promote equality and discourage discrimination, to keep under review protective legislation, in consultation with the Health and Safety Commission.

The SDA confers specific powers on the Commission to enable it to fulfill its statutory functions. It has wide discretionary powers in relation to undertaking or supporting research on educational activities thought to be necessary or expedient for the general purposes set out in s. 53(1). It is empowered under s. 56 to issue Codes of Practice for the purpose of eliminating discrimination in the field of employment, or promoting equality of opportunity in employment. This provision was added to the SDA after a similar authority was conferred on the Commission for Racial Equality (CRE) under the terms of s. 47 of the 1976 Race Relations Act (RRA). Before issuing a Code of Practice, the Commission must consult interested
organizations, and consider their representations. Any codes issued by the Commission are subject to Parliamentary approval. If approved, a code issued by the EOC is not enforceable in itself but may be admitted in evidence.

Both the power to undertake and sponsor research and the power to issue Codes of Practice fall within the sphere of authority designed to further the Commission's role in persuasion and education. Other powers, however, give the Commission a direct role in the enforcement of the legislation. These enforcement powers comprise the authority under s. 75 to assist individual complainants, the special enforcement arrangements which exist in relation to cases of pressure to discriminate and discriminatory practices and advertisements, and perhaps most important of all the authority conferred on the EOC under s. 57 to conduct formal investigations on its own initiative, "for any purpose connected with the Commission's duties."

At the heart of the strategic role of the Commission lies this power to conduct formal investigations. This authority in particular appears to have raised, among opponents at least, the spectre of unbridled authority, and among the Commission's well-wishers the hope that the power to conduct formal investigations might be used as a potent tool for uncovering and eradicating discrimination. For these reasons, the statutory powers are worthy of a close examination.
The SDA sets out with considerable specificity the power of the EOC to conduct formal investigations, statutory bounds within which it must operate and the limits of its authority in this area. The statutory power to conduct formal investigations is contained in sections 57 to 61 of the Act.

It is entirely within the scope of the Commission's authority to decide which matters, if any, to investigate, subject only to the right of the Secretary of State to require an investigation into any matter he or she considers appropriate. Once the Commission has decided to investigate, Commissioners (either existing or newly appointed) must be nominated to conduct the investigations (s. 57). When the EOC contemplates an investigation into the activities of a particular person an opportunity must be afforded that person to make presentations to the Commission concerning that allegation before the investigation begins.

Before conducting a formal investigation, the EOC must draw up terms of reference. At the stage of contemplating an investigation however, terms of reference do not exist in the strict sense of the term, and the Act "lays down no detailed rules for the conduct of the preliminary inquiry" R. v. CRE Ex parte Hillingdon LBC [1982] Ac 779, 787 (construing analogous provisions of the 1976 RRA). Nevertheless, the requirement at this stage of the proceedings is to inform the person of "any act which the Commission proposes to
investigate", including "very such act" Hillingdon [1982] AC 779, 786. Thus, the Commission must inform the individual with some specificity of the acts which are the target of the contemplated investigation: it cannot merely "throw the book at him" (Ibid. at 787-9).

Where the proposed investigation is of a general nature, the Commission must give general notice of the holding of the investigation. Where it is confined to the activities of named persons, notice must be served upon those persons (s. 58). The EOC must draw up terms of reference for a general investigation or a named person investigation. The terms of reference of an investigation may be amended at any time, provided the notification requirements of s. 58 are met.

If the investigation concerns the activities of named persons "the Commission should have formed the belief and should so state in the terms of reference, that the named persons may have done or may be doing discriminatory acts made unlawful by the "act of a kind specified in the terms of reference" R. v. CRE Ex parte Hillingdon LBC [1982] AC 779, 786. The House of Lords stated in Hillingdon that because of the wide scope of the 1976 RRA, "fairness requires that the statement in the terms of reference as to the kind of acts which the Commission believe the persons named may have done... should not be expressed in any wider language than is justified by the genuine extent of the Commission's belief" ([1982] AC 779, 786). It is the terms of reference
themselves that determine the scope of the formal investigation (Ibid.). After the preliminary inquiry and the EOC's decision to proceed according to express terms of reference, the formal investigation may commence. At this stage of embarking on a formal investigation, it is not necessary for the Commission to show that it is more likely than not that there has been an unlawful act of discrimination (Ibid. at 791). It is enough if there is material which is "sufficient to raise in the minds of reasonable men, possessed of the experience of covert... discrimination that has been acquired by the Commission, a suspicion" that there may have been acts of sex discrimination of the kind which the Commission proposes to investigate (Ibid.).

Once the investigation is begun, the Commission may collect evidence within the terms of reference. If
necessary, the Commission may use the statutory powers under s. 59 to compel the disclosure of information. These powers are much the same as those vested in the High Court in civil proceedings, with respect to the restrictions on information which must be disclosed, or documents produced, and with regard to the reimbursement of witnesses' expenses (s. 59[3]). Failure to comply with a request for information may result in an order from the County Court to which penalties will attach for non-compliance. The destruction, suppression or alteration of material required by a notice or order under s. 59 is punishable by fine, as is the making of a statement which is false as to a material particular when complying with an s. 59 notice or order (s. 59[6]).

However, the Commission is restricted in the use that it can make of information acquired in the course of formal investigations. If an investigation reveals evidence of discrimination against a particular individual, the Commission may not provide the individual in question with that evidence to enable her to bring a complaint. Rather, the information may only be disclosed in a form that does not allow identification of any person to whom it relates (s. 61[1][c]).

Lustgarten (1980, p. 246) points out that both the EOC and CRE are prohibited by the disclosure restrictions in their respective statutes from pooling detailed information acquired during formal investigations. Thus, if either
organization uncovers evidence of discrimination that would be of interest to the other, this may be indicated only in general terms. An amendment to the Race Relations Act which would have permitted more detailed pooling was resisted by the Government.

At the end of the investigation, the Commission must draw up a report of its findings, and may either during the course of the investigation or at its completion, make recommendations based on these findings (s. 60). Section 60[3] provides that in preparing a report for publication or inspection the Commission shall exclude, as far as is consistent with their duties and the object of the report, any matter which might in the opinion of the Commission prejudicially affect an individual or person with regard to their private affairs or business interests.

The EOC has noted that "In conducting a formal investigation the Commission must have careful regard not only to the strict and explicit requirements of the statute, but also to the wider common-law requirements imposed upon any statutory body which exercises statutory powers" (EOC, 1978, p. 21). Specifically, the Commission addresses the requirements of "the rule of natural justice which requires that every person should know what allegations are made against him or her and be given an adequate opportunity to state his or her own case in answer..." and notes that this requirement is satisfied by the opportunity of the potential subject of an investigation to make
representations to the Commission in respect of allegedly unlawful behavior, before the commencement of an investigation. (Ibid.) Lustgarten, however, notes in a discussion of the powers of the CRE, that this right to be heard prior to an investigation was added to both the SDA and RRA by the opposition, with the hope that representations at this stage might deter any further proceedings, and that the provision goes "well beyond the requirements that the common law would impose... in the name of natural justice or, as it has increasingly come to be understood in relation to administrative gathering of evidence, the duty to act fairly." (Lustgarten, 1980, p. 245) Noting that the common law requirement was set out some years previously by Lord Denning MR in terms of a requirement that administrative investigators must give a person the opportunity to correct or contradict what was said against him before he could be condemned or criticized, Lustgarten notes that the right to make representations before an investigation begins is otiose, since the opportunity to be heard before a non-discrimination notice can issue is guaranteed elsewhere. Thus the additional procedural step is undesirable, leading only to unnecessary delay. (Ibid.)

The procedure governing the issuance of a non-discrimination notice is set out in sections 67-70 of the SDA. Non-discrimination notices may be issued by the Commission only after a formal investigation has disclosed
evidence of unlawful acts within either the SDA or the EqPA. Non-discrimination notices may not be issued under any other circumstances. The statute requires that the Commission give notice of its intent to issue a non-discrimination notice, specifying the grounds on which such an action would be based. (s. 67 [5][a]) The person to whom the notice would be addressed then has a period of not less than 28 days within which to make oral and/or written representations to the Commission. The Commission must take into account any such representations in deciding whether to proceed with the issuance of a notice.

A non-discrimination notice may direct the respondent not to commit unlawful acts, and where compliance with the law involves changes in any practices or arrangements, to notify the Commission that those changes have been effected, and how, and to take reasonable steps to afford this information to other persons concerned (s. 67[2]). The Commission may also require that the respondent furnish such other information "as may be reasonably required" in order to verify that the notice has been complied with, and may specify when and how such information is to be provided, so long as the time period does not exceed five years after the issuance of the notice. (Sections 67[3] and 67[4]). Once a notice is served, the respondent has the right to appeal to an industrial tribunal within six weeks of the date of service, to quash the notice entirely or to amend any of its requirements, where in the tribunal's opinion, the
requirement is unreasonable because it is based on an incorrect finding of fact, or for any other reason (Sections 68[2] and 68[5]). There is no right of appeal against the amendments to a notice made by a tribunal(s. 68 [4]). If no appeal to a tribunal is made within the six week period, the notice becomes final.

The same procedure applies to non-discrimination notices issued by the CRE pursuant to the 1976 RRA. In this context it has been noted that the power to quash or amend a notice "seems extraordinarily vague, and gives the tribunal wide-ranging and virtually unreviewable powers to substitute its judgement for that of a purportedly expert administrative body." (Lustgarten, 1980, p. 246) Given the doubts as to the general suitability and preparedness of industrial tribunals to determine sex discrimination applications, as set out in Chapter 7 above, this provision seems particularly inappropriate. Lustgarten (1980, p. 247) notes, however, that it seems unexceptional for a tribunal to have power of review in relation to issues of fact, since tribunals normally function as fact-finding bodies. Thus, Lustgarten concludes that respondents' rights could have been adequately protected had tribunal jurisdiction been limited to quashing recommendations based on substantial mistakes of fact or law.

The nature of the appeal that may be taken against a non-discrimination notice was considered by the Court of
Appeal in a case arising under the RRA, CRE v. Amari Plastics Ltd. [1982] ICR 304. In Amari Plastics, the Court of Appeal considered the argument of the CRE that the appeal cannot re-open the findings of fact upon which the Commission based their conclusions in the formal investigation. The Court of Appeal rejected this argument because it is "clear from the language of this statute that such is not the case" (Ibid. at 315, per Griffiths, LJ). The Court of Appeal was plainly sympathetic to the logic of the CRE's position, but held, regardless, that the statutory language barred the interpretation given it by the Commission.

Thus, a person who is served with a non-discrimination notice may appeal the EOC's findings of fact which will then be decided anew by the tribunal or court hearing the appeal. The EOC must state the facts upon which they relied and the person contesting the notice must state which of the findings of fact are disputed (Ibid. at 312-13, 317). The EAT has stated that the burden is on the person contesting the notice to show that the true facts are different from those relied on by the Commission, so as to render the requirement of the notice unreasonable. CRE v. Amari Plastics Ltd. [1981] ICR 767, 776 (EAT). This statement of the burden was approved by the Court of Appeal in its decision in the Amari Plastics case. [1982] ICR 304, 312 (per Lord Denning), 317 (per Griffiths, LJ).

That factual findings may be appealed and redetermined
poses a problem for the EOC, with regard to its obligation to publish or make available for inspection the report of its formal investigation. While to delay publication is not unlawful in these circumstances, such a decision will mean that publication will not occur until the issues are stale, as Griffiths LJ noted in his opinion in Amari Plastics (Ibid. at 314-15).

Even more problematic is the fact that the entire procedure established by Parliament for a formal investigation is "so elaborate and so cumbersome that it is in danger of grinding to a halt" (Ibid. at 313). Lord Denning also remarked in Amari Plastics that the Commission was "caught up in a spider's web spun by Parliament from which there is little hope of their escaping" (Ibid.). Even if the EOC conducts a formal investigation in full compliance with all the procedural barriers established under the statute, the availability of an appeal against a non-discrimination notice, opening up all the findings of fact, destroys much of the value a formal investigation otherwise might have (Pannick, 1958: p. 283). As Griffiths LJ stated in Amari Plastics:

If Parliament empowers a body to carry out a formal investigation and hedges the procedure with safeguards to ensure that the person investigated shall have every opportunity to state his case and then requires that body to publish its findings one might be forgiven for thinking that Parliament intended that would be the end of the matter. ([1982] ICR 304, 315)

Section 68, as it stands, appears to represent two factors which are common-place in the system of enforcement for the sex-discrimination (and race-discrimination)
legislation -- a desire to limit the scope of authority of the central enforcement agency; and, wherever an issue is employment-related, to defer to the authority of the existing industrial relations machinery. Whilst it is arguable that there should be some form of review of, or appeal from, a non-discrimination notice, the provisions as they stand seem only to indicate a lack of faith in the ability of the Commission to act fairly and appropriately.

This response seems particularly inappropriate when the Commission's lack of power to enforce a non-discrimination notice is taken into account. Non-compliance with a non-discrimination notice does not result automatically in the imposition of monetary penalties, nor does it represent a contempt. The statute makes provision for ensuring compliance with a non-discrimination notice under the provisions covering 'persistent discrimination,' but the procedure is lengthy, cumbersome, and not backed by substantial penalties.

If a notice has been in force for less than five years and there is evidence of non-compliance, the Commission may apply to the County Court for an injunction. (s. 71) However, in any matter over which an industrial tribunal has jurisdiction, the Commission must first seek a ruling from the tribunal that the respondent has indeed acted unlawfully (s. 72[5]). The Commission must make application to the tribunal within one month of the alleged act. Only armed
with a tribunal ruling in its favour can the Commission then seek to invoke the injunctive power of the Court.

Once an injunction has been granted, the respondent may be proceeded against for contempt of court, if further acts of unlawful discrimination are committed, and may then face fines or imprisonment. As one commentator has noted, however, "the enforcement procedure is so tortuous and protracted that it is probable that the Commission would only rarely feel justified in taking it through to the very end. Even more to the point, in view of the problems of proof (facing the Commission) it is most unlikely that the Commission would be able to take such proceeding even if it wanted to." (Creighton, 1979 p. 233) While Creighton perhaps overstates the discouraging effects of problems of proof to an agency committed to using its powers to the full, the point remains that even for a determined enforcement agency the proceedings are needlessly protracted, and even if successful, result only in an injunction, i.e., an order that the conduct complained of cease. It is difficult to see any incentive in this system for a respondent voluntarily to comply with the law, since penalties for non-compliance are non-existent up to the point that an injunction issues.

Taken together, these are the powers which aroused such hostility among those opposed to the establishment of the EOC and which were referred to by their proponents as the
basis for a strategic attack on discrimination by an agency with a mandate to act in the public interest.

Although some critics of the EOC have characterized it as a "busybody" with "immense powers," others have complained of the agency's lack of forceful action. Unfortunately, there has been no detailed study of the EOC's statutory powers and the use to which they have been put, to place these criticisms in context. Looking only at the statutory powers as outlined here, it is hard to concur in the assessment that, when the SDA became law at the end of 1975,

...the EOC had emerged as a body with the power to force its case upon employers, trade union professionals, educators, advertisers, and so on, even though in the final analysis enforcement remains in the hands of the county courts and tribunals. (Emphasis added) (Byrne and Lovenduski, 1978, p. 137)

A more realistic assessment points out that the EOC's powers are not so formidable since "formal investigations and non-discrimination notices are subjected to legal restrictions designed to safeguard employers' rights..." (Gregory, 1974, p. 149)

A close examination of the EOC's statutory powers can only lead to the conclusion that overall, there is little in them which would enable the Commission to enforce the law in the public interest. Its powers to gather information, to conduct investigations, to issue Codes of Practice would appear to be adequate, but it seems unlikely that any of these activities would in itself lead a reluctant discriminator to comply with the law, since the statute
provides only a cumbersome and time consuming procedure to exact compliance. If legislators genuinely believe that employers need to be 'persuaded' of the rationality of complying with the law, then the prospect of penalty for non-compliance after a non-discrimination notice has become final would seem to be an essential part of an enforcement system which purports to balance persuasion and conciliation with the need to address "persistent discrimination."

Whilst an examination of the statutory powers as written is sufficient to sustain the conclusion that the much vaunted powers of the EOC are considerably less formidable than is often thought, a true assessment of the worth of those powers, or proposals for amendments, must include an examination of the way in which the Commission has utilized the powers that the statute confers.

Any analysis of the enforcement work of the EOC must be predicated on an understanding of the way in which the organization itself is organized, and the way it construes its powers and functions.

II. ORGANIZATIONAL STRUCTURE AND COMPOSITION OF THE EOC

Section 53 of the SDA provides for the establishment of the EOC as a body corporate, consisting of between 8 and 15 members, appointed on either a full or a part-time basis by the Secretary of State. One of these members will be appointed as Chairman (sic) and one or more as deputies. Members are appointed for any period up to five years, may be re-appointed at the end of this period, and may have
their appointments terminated in specified circumstances. The terms of office are set out in Schedule 3 of the Act.

The initial appointments to the Commission represented a very conventional spread of interests, with the majority of Commissioners drawn from the two major political parties, the trade union movement and employers associations. Betty Lockwood was formally the Labour Women's Advisory Secretary at Transport House, and her deputy was a Bow Group activist and the wife of a ranking Conservative politician. Thirteen part-time members were appointed in addition to the full-time chairperson and deputy, and included three each from the CBI and the TUC. The remaining positions were allocated to members drawn from the spheres of education and the law; to one representative each of Scotland and Wales; and to three 'others' whom members of Parliament thought should include 'someone from family planning.' (Byrne and Lovenduski, 1978, p. 138) Previous writers and feminist critics of the Commission have pointed out that none of the original Commissioners had taken a leading part in the campaign for sex discrimination legislation, and that none had been identified with the Women's Movement. Thus, one interest that was not represented amongst appointees to the Commission was the feminist movement. (Byrne and Lovenduski, 1978, p. 138; Ashdown-Sharp, 1977, p. 17; Coussins, 1976, p. 109).

This pattern of appointments with the numerical majority coming from the Labour and Conservative parties,
the TUC and the CBI, mirrors the system of appointments in the industrial tribunals, where three separate panels are composed of legally qualified chairpersons, representatives of labour, and representatives of employers. More broadly, both appointments to the EOC and to the tribunals reflect a largely unchallenged consensus about the appropriate personnel for public organizations in the area of industrial relations. What is important about this fact is that it reflects an assumption that sex discrimination in employment is a phenomenon which should be dealt with, if not by existing industrial relations machinery, then by new organizations which reflect their conventional pattern of representation. This assumption in turn affects the way in which organizations so constituted conceive of their role.

III. HOW THE COMMISSION APPROACHES ITS OWN ROLE

The Commission's own attitude to its work and responsibilities may be deduced from its Annual Reports, which also provide detailed information on the work that the Commission has undertaken in various areas of responsibility. The Commission's own view of its most appropriate role in the employment sphere, as well as generally, appears to be that persuasion and consultation are likely to be more effective in furthering the aims of the SDA than a militant deployment of the powers conferred on it by the legislation. In its first Annual Report, the Commission argued:

The Act gives the Commission wide discretion in selecting its priorities. . . . The very breadth of this
discretion places upon the Commission the responsibility of choosing its priorities carefully. Sex discrimination is rooted deep in that sort of attitude. Many of its manifestations are obvious; the remedies, frequently, are not. Sometimes there is more than one option available; they all have to be weighed carefully. It is especially important that the credibility of this powerful law should not be weakened on account of lack of forethought or deliberation. Neither the public interest nor the cause of equality for women would be served by precipitate action or the indiscriminate use of power because these powers exist (EOC, 1977, p. 1) (Emphasis added).

During the first two years of the Commission's work, the agency attracted some criticism that it was not pursuing a forceful enough use of the powers it had in the interest of women's equality (See e.g., Coussins, 1976, pp. 111-116). In its Second Annual Report the Commission acknowledged, and responded to, these criticisms:

The work of the Commission has attracted a certain amount of adverse comment. Where these criticisms are legitimate . . . we can assure you that the Commission takes them seriously and is prepared to act upon them . . . We must also, however, record the view that, there can never be an accurate reply to the generalized charge that the Commission has not gone far enough fast enough, especially as for every critic who takes this view, there is at least one critic on the opposite side who believes that whatever the Commission does is too much. The complexity of the problem which we are required to deal with . . . make it wholly unrealistic to expect rapid and dramatic solutions (EOC, 1978, p. 1) (Emphasis added).

In defending its record and approach, the Commission went on to emphasize that other organizations must also take responsibility for sex discrimination, if progress was to occur:

Dealing with sex discrimination and promoting equality of opportunity does not lend itself to instant results and the results will certainly not come about as a consequence of the Commission's activities alone. We wish to stress again our conviction that the Commission
does not have an exclusive responsibility in the field of sex discrimination -- all of us, from the Government and the powerful organizations on both sides of industry to small local voluntary groups and individuals are equally implicated in the task. (EOC, 1978, p. 1) (Emphasis added)

In the next Annual Report the Commission went further and suggested that "it is up to the TUC and CBI to set the lead. The Commission alone cannot succeed" (EOC 1979, p. 4).

These extracts from the Annual Reports of the Commission indicate an organizational approach to the use of its statutory powers which is characterized by caution, a desire to inhabit the middle ground between the conflicting "extremities" of its critics, and a belief that the Commission's primary role is as a persuader and educator of those, in government and industry, who must share equally in the responsibility for progress toward the elimination of sex discrimination. Thus, "[t]he more positive and voluntary initiatives are taken, the less need there will be for legal compulsion." (EOC, 1977, p. 46) Given this view of its responsibilities, it is not surprising that, in defining its strategic role the Commission has given primacy of place to what may be termed an 'education and development' perspective, and to clarifying the law, rather than to a forceful use of formal investigations to expose and indict patterns of unlawful discrimination. This nexus is made explicit in the Second Annual Report where the Commission first defines an essential element of its strategy as being to change institutional practices and then
goes on to give examples of the kind of work which, in the Commission's view, furthers this objective:

... a Commission which is required to act in the public interest has a duty wider than the resolution of individual grievances. It has a duty, so far as is possible, to change the practice which gave rise to the isolated complaint; to make management and unions aware of the ways in which their practices place women at a disadvantage and then attempt to change these practices, is an essential element of the Commission's strategy (EOC, 1978, p. 2) (Emphasis in the original).

Having defined the need to change practices as an important part of its strategic role the Commission then sets out examples of its work in furtherance of this objective. The examples chosen are indicative of the assumptions that seem to underlie the EOC's definition of what is the most appropriate form of action for an agency charged with responsibility to act in the public interest. The Commission chooses four achievements to illustrate what has been involved in this attempt to change discriminatory practices: the issuing of guidelines on employment advertising to the advertising industry; extensive consultations with management and unions and the subsequent development of guidance on employment practices; the report of the Commission's first formal investigation, into educational provision in the Borough of Tameside, which is "widely regarded ... as providing for the first time, a clear map of the educational provisions of the SDA ..."; and the publication of a consultative document on income tax and sex discrimination setting out the EOC's specific proposals for reform (EOC, 1978, p. 3).
These activities are not in themselves inconsequential but as examples chosen by the Commission itself to illustrate the important work it has done in attempting to change discriminatory practices, the selection reveals a good deal about the importance that the Commission attaches to persuasion and conciliation, and the lesser significance that has attached to a vigorous use of the powers of formal investigation, to identify those engaged in persistent discrimination.

A closer examination of the Commission's record bears out this conclusion. The Commission's annual reports for the years 1976-1981 are replete with examples of its education and development work, which confirm the emphasis given to high level consultation that Byrne and Lovenduski noted in 1978:

"...the EOC's view is that a significant part of its work must be making such representations Government departments, nationalized industries, employees, unions, local authorities and professional organizations as are necessary to ensure that these bodies give full weight to the importance of the issue of Equality of Opportunity in their specific concerns (Byrne and Lovenduski, 1978, p. 141).

The Fifth Annual Report provides examples of the kind of work the EOC did in this area in 1980. After consultation, the EOC produced a publication giving guidance on job evaluation schemes, and on positive discrimination in training, under section 47 of the SDA. The Commission also launched a survey of trade unions; provided assistance with the design of a women-only management training course; made oral and written submissions to the House of Lords Select
Committee on Long-Term Remedies for Unemployment; provided a formal response to the report of the organization set up to review the 1973 Employment and Training Act; and engaged in consultative work with local authorities, nationalized industries and private sector employers. (EOC, 1981, p. 13-14) Most importantly of all, perhaps, the EOC at the end of 1980 submitted to the Secretary of State for the Home Office, the organization's proposals for amending the equal pay and sex discrimination legislation. At this level of consultation the EOC has been consistently unsuccessful, but more will be said of this below, in analyzing the EOC's relationship to the organs of government.

Education and development work has not of course constituted the entire record of the Commission in the years 1976-1981. It is, however, appropriate to emphasize it here, as the significance the Commission attaches to this work derives from a particular conception of its role, which has had implications for the way in which the Commission has approached the deployment of its other discretionary powers under the statute. Turning to what properly appears as powers of enforcement in the statute, the s. 75 authority to assist individual complainants, and the ss. 67-70 powers to conduct formal investigations, it is not surprising to find that here the EOC has given greater emphasis to 'clarifying the law' through s. 75, than to challenging persistent discriminators through ss. 67-70. This is not to suggest that the EOC should not attempt to clarify the law; indeed,
the Commission appears to have done valuable work in this area, and together with its suggestions for amendments to the legislation its s. 75 work may arguably constitute its greatest concrete achievement. Rather, the point is to examine both the Commission's s. 75 work and its use of the power to conduct formal investigations, in the context of the EOC's overview of its strategic role, remembering that the EOC provides the only route in law to collective enforcement of the legislation. It is for this reason that the degree of importance that the Commission has attached to its enforcement power is so crucial, particularly in light of the inadequacies of individual enforcement, both practical and conceptual.

A. Section 75 Assistance

The Commission has construed the existence of the power to assist individuals under s. 75 as an important part of its strategic role, rightly insisting that there need be no contradiction between assisting individual complainants and fulfilling its mandate to act in the public interest.

In its annual reports the Commission has repeatedly stressed the 'strategic' element in s. 75 assistance, where 'strategic' is to be understood as clarifying the law. In the Third Annual Report for example, the Commission pointed out that in 1978 it had nearly doubled the number of cases assisted under s. 75 over the previous year, and stated that "...the Commission is entitled to point to its achievement as a record of its strategic role in clarifying the meaning
of the law...Clarifying the meaning and application of the two acts is an essential part of the Commission's law enforcement role." (EOC, 1979, p. 2) (Emphasis added)

Since the assistance given under s. 75 is conceived of primarily as a part of the EOC's strategic role, the Commission is involved in a process of case selection in furtherance of that objective.

The Commission is required to consider all applications for assistance under s. 75 although the decision to grant assistance is discretionary. Assistance is granted for hearings at both tribunal and appellate levels and the Commission points out that "Although both stages are important, it is at the second stage where [the Commission] acts in a strategic way by helping to clarify the law through the establishment of case law." (EOC, 1977, p. 21)

Decisions about the granting of assistance in particular cases were originally made on behalf of the Commission by the Assistance and Monitoring Committee. After some internal reorganization these decisions became the province of the Legal Committee, which, acting with delegated powers, makes decisions about the Commission's objectives in clarifying the law, and applies the Commission's priorities to individual cases. In rendering a decision on whether or not to grant assistance, the Committee considers the facts of the case and its legal and policy implications. The Committee will also consider the needs of the individual applicant and whether she could or
should act for herself, in addition to points of law that
the complaint presents. Elaine Donnelly of the EOC Legal
Department emphasizes that since the objective is to clarify
the law, assistance may be granted in a case which has a
"99% chance of losing" if it presents a legal point which
the Commission wishes to bring out. Overall, approximately
one-half of all requests for s. 75 assistance are granted.
The proportion granted is higher for appellate jurisdictions
than for industrial tribunal hearings, as the tables below
illustrate.

Table 22.
Section 75 Assistance, Selected Years.

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(Source: EOC Annual Reports)
Table 23.

**Section 75 Assistance, Industrial Tribunals, Selected Years**

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<tr>
<td>Total</td>
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* Includes assistance for county court cases.

(Source: EOC Annual Reports)

Table 24.

**Section 75 Assistance, EAT/ Court of Appeals, Selected Years**

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</table>

(Source: EOC Annual Reports)
Using its s. 75 powers, the EOC has supported a wide range of issues in recent years. In particular, the Commission has supported a line of cases designed to clarify the impact of European law on the interpretation of British statutes. For example, in 1980, the EOC assisted three cases stayed on appeal pending a referral to the European Court of Justice (ECJ) on questions of Community law (EOC, 1981, p. 4).

While the Commission appears to give considerable emphasis to s. 75 assistance as an essential part of its responsibilities for enforcement of the law, the link between clarifying the law and enforcing it is in fact quite a tenuous one. Once the Commission has clarified points of law it still remains primarily the responsibility of individual complainants to enforce the law by seeking redress, which again brings to the fore the practical and conceptual difficulties in reliance on a system of
individual enforcement for anti-discrimination legislation. While some have advocated the extension of the EOC's powers to allow it not just to assist individuals but to act on their behalf (e.g. Creighton, 1979), other critics have pointed out that the EOC already has some powers of enforcement which it does not fully use, namely its powers of formal investigations.

While the statutory powers are perhaps less formidable than is sometimes suggested, it is nevertheless the case that the Commission's record in this area appears to substantiate the criticism that the EOC has been less than vigorous in its efforts to deploy them.

B. Formal Investigations

Criticism of the EOC's approach to formal investigations usually centres on the small number of investigations undertaken. Between January 1976 and the end of 1981, the Commission began only seven formal investigations, and completed work in only three of them. In its Third Annual Report, the Commission acknowledged its critics, stating:

The Commission recognizes the importance of its law enforcement role but feels that those who criticize the Commission for having undertaken comparatively few investigations have little appreciation of either the legal complexities of a formal investigation or the degree of staff expertise and time involved. (EOC, 1979, p. 16)

That the EOC must operate with relatively limited resources is indisputable. However, the point should be made that the Commission itself allocates its resources
between projects, depending on the significance it attaches to them, and to this extent could increase the resources available for formal investigations if the Commission made the value judgement that such work should be increased, at the expense of another area of involvement. However, as previously illustrated, public statements of the Commission indicate a much greater commitment to education and development work than to law enforcement *per se*, a preference which is doubtless reflected in the allocation of resources. The Commission for Racial Equality, by contrast, appears to have given much higher priority to formal investigations; between 1977 and 1980, 30 were begun (Gregory, 1979, p. 149).

While the small number of investigations undertaken by the Commission appears to illustrate an organizational preference for kinds of work other than formal investigation, the particular organizations that the Commission has chosen as the subject of investigations are also illuminating with respect to the EOC's priorities.

The first investigation the Commission conducted was concerned with the possibility of discrimination in the provision of secondary education by the Tameside Local Education Authority. The second investigation of possible contraventions of the EqPA and the SDA at Electrolux, Ltd. was concerned with the practices of a large industrial employer. The possibility of discrimination by a trade union against its women members was the focus of a formal
investigation of the Society of Graphical and Allied Trades (SOGAT). Two further investigations inquired into possible discrimination between men and women in teaching (at the Sidney Stringer Community School, Coventry, and the North Gwent College of Further Education) focusing on possible discrimination against women employees of the Leeds Permanent Building Society represents a concern with private sector white-collar employment. A final investigation, into the effect of the state pension age on redundancies at the British Steel Corporation's Sholton works, examined discrimination which was the result of government policies outside the scope of the SDA.

While these investigations seem to illustrate a 'balanced' approach to choosing subjects for investigation, the question arises whether they also represent the most appropriate choices for a Commission committed to enforcing the law in the public interest. Unfortunately, the Commission does not make public the criteria that it applies in a particular case in deciding whether to embark on a formal investigation into an organization, and any analysis must therefore be speculative.

It is a matter of record that the investigation into alleged discrimination at Electrolux Ltd. resulted from a suggestion by a member of the Employment Appeals Tribunal hearing the case of individual complainants against the employer, Electrolux, that the EOC might be of assistance in a complex situation, involving hundreds of individual Equal
Pay Act applications. Giving judgement against the company, Mr. Justice Phillips stated that:

It may well be that in complicated situations, such as that confronting Electrolux Ltd., where there are hundreds of claims and the circumstances of the applicants are not identical, a process of litigation under the EqPA 1970 can never produce a satisfactory result. Although the litigation in each individual case may produce a theoretically correct answer in accordance with the terms of the Equal Pay Act of 1970, it is unlikely that the individual answers put together can produce a coherent wage structure capable of general application in other cases. That can only be done by negotiation, applying the current views and statutory proscriptions on equal pay and equal opportunities. It may be that the EOC could be of assistance in such an exercise (EOC, 1977, p. 22).

The EOC responded to this hint, after some deliberation, by embarking upon a formal investigation in February 1977. This investigation is the only one to have resulted in the issuance of a non-discrimination notice, and in subsequent monitoring for compliance by the Commission. Of the other six investigations that were completed at the end of 1981, the Tameside inquiry resulted in a finding of no discrimination, and the investigation into redundancy at the BSC Shotton works concerned a matter outside the scope of the SDA (the statutory retirement age) and could not therefore result in the issuing of a notice. The Tameside investigation, into the allocation of grammar school places between girls and boys, was initiated after complaints from members of the public and press commented that the selection ratio was evidence of discrimination. Whether or not the Government also suggested activity in an area in which it
was much concerned is not clear (Byrne and Lovenduski, 1978, p. 140).

The investigation into the redundancies at the Shotton Works was begun after the Commission received approximately 130 enquiries from male employees, alleging that they received lower redundancy benefits than those which female colleagues in the same circumstances received. In addition to giving advice to all individual complainants the EOC also began a formal investigation during 1980 into the redundancy arrangements which were the basis of the complaint (EOC, 1981, p. 13). The following year the investigation was complete, and the Commission's findings were incorporated into recommendations to the Government, and into evidence presented to the Social Services Select Committee in its enquiry into the retirement age (EOC, 1982, p. 6). It seems that in this case the EOC was using its power of formal investigation to gather evidence in support of its recommendations to equalize the retirement age. This is not, in terms of the statute, an improper use of its power. Whether, in the context of the limited resources the EOC admits to operating under, it is an appropriate choice from an enforcement perspective is another matter, since such an investigation from the outset, was unlikely to lead to enforcement measures, being an area outside the scope of the legislation.

The EOC's record with regard to formal investigation is one of hesitancy, if not inaction. In the First Annual
Report the EOC stated that it was important to take stock of the priorities so that "in the years ahead its powers of enforcement can be deployed with the full force which Parliament intended," (EOC, 1977, p. 5) In the Second Annual Report the Commission reported that it was in the process of elaborating a five year long-range strategy which would "give greater emphasis to the Commission's law enforcement activities under the existing legislation including a more vigorous use of the power to conduct formal investigations," (EOC, 1978, p. 4). The Commission promised that it would "use all its resources to ensure that the law is enforced" although noting that "formal compliance with the letter of the law will not be enough." (Ibid.) With regard to the enforcement provisions relating to formal investigations the EOC has not carried through on these commitments. It should be noted here however, that the public commitment to greater use of the enforcement provisions may well have resulted from internal staff pressure, Byrne and Lovenduski, (1978, p. 143) note that at the July 1977 meeting of the Commission, the Commissioners were asked by staff members to commit the EOC to a programme of action which would emphasize the use of formal investigations. Faced with threats of staff resignations, the Commission announced that in principle it would begin to place greater emphasis on law enforcement.

In conclusion, then, the EOC, despite public statements to the contrary, has appeared reluctant to use the statutory
powers of formal investigation, preferring instead to emphasize high level consultation, and the development of voluntary initiatives. Where it has embarked upon formal investigations the choice of subjects appears to have been marked by a similar caution and a desire to 'balance' different interests.

A number of studies serve to indicate that the approach chosen by the EOC is inappropriate. The EOC's own study of 500 employers revealed that little progress had been made in changing either attitudes or practices. An in-depth study of 26 organizations conducted between 1974 and 1977 reveals that one of the reasons for this lack of progress may be the failure of the EOC to utilize, in a forceful manner, its existing powers of enforcement. Snell et al (1981, p. 95) state that, according to their study:

There was evidence that employers would have done more had the EOC used its powers of investigation and enforcement more fully, despite the difficulties involved. Indeed, some employers told us that they had expected initially to have to do more than they did, and that the possibility of an investigation would have proved a strong impetus to action.

Although it is inadvisable to place too much reliance on generalizations based on surveys of a small number of employers, these studies suggest that a more active use of power of formal investigation may have produced more in the way of 'voluntary' compliance than the EOC's chosen emphasis on high level consultation. Whether such a change of approach is possible, given the essentially 'tripartite' nature of appointments to the Commission, and the present
political climate, is necessarily an issue for speculation; but on the past performance of the Commission, at least, it seems unlikely.

Even if the EOC were to pursue a more forceful course of action there would still remain the question of the capacity of the enforcement system to deal with situations where a formal investigation does not result in voluntary compliance. The question must be asked of how appropriate is a system of enforcement which involves a protracted process leading only to the ultimate granting of injunctive relief, with no penalties for non-compliance, and no damage awards to the victims of discrimination. Until the EOC attempts to use its powers, however, it is unlikely that there can be a mobilization of support for the granting of more direct or more forceful powers to facilitate compliance after a formal investigation has shown the existence of unlawful discriminatory practices.

IV. COMPARING THE EOC WITH ITS AMERICAN COUNTERPART

The discussion above illustrates that areas of concern with respect to the EOC fall into three categories: the pattern of appointments, the substantive formal powers of enforcement, and the use of those powers by the Commission. Of relevance to all of these issues is the overarching issue of what can realistically be expected in the area of social reform from an organization which is closely tied to the machinery of government, through the power of high level appointment, and the control over budget.
The question is often posed in general terms as whether 'conformative' institutions, such as administrative agencies, can ever make an effective contribution to social change. Stearns (1979, p. 38) in a study of the Swedish Labour Inspectorate notes that administrative agencies are structures imposed from above, by the forces being challenged, rather than by the agents of challenge, and that they are by nature "depoliticizing institutions, drawing action out of the political sphere into the realm of rules, regulations and processing." Gregory (1979, p. 141) notes that the discretionary powers of organizations like the EOC enable them to determine the pace and direction of action, so that they can respond selectively and with flexibility to policy requirements. While it is the government that retains ultimate control through appointments and finance, any hostility is deflected on to the organization.

While general theories of 'conformative' institutions are doubtless useful in attempting to determine the outer limits of effective agency action, there is an intermediate set of questions posed by the comparison, on an empirical basis, of particular organizations operating within specific contexts. For this reason it is instructive briefly to examine some of the differences between the EOC and its American counterpart, the Equal Employment Opportunities Commission (EEOC).

The EEOC was established in 1964 under the terms of Title VII of the Civil Rights Act of that year. Its
authority was increased in 1972 when the 1964 Act was amended, and again in 1978 as part of the Carter Administration's reform of the federal equal employment opportunity structure. Today it stands as the major enforcement agency in the field of employment discrimination in the United States.

The EEOC and the British EOC are both modelled upon earlier American experiments in the use of administrative agencies for the implementation of anti-discrimination initiatives. As such, they share some characteristics, but each bears the imprint of the political system in which it operates, a fact which results in some significant differences between the two organizations. These differences can be seen both in the enforcement powers that each enjoys, and in the composition of the organizations' leadership.

A. Statutory Authority of the EEOC

The EEOC was created by Title VII of the 1964 Civil Rights Act, and is "empowered . . . to prevent any person from engaging in any unlawful practice" (42 U.S.C. s. 2000E - 5 (a)). The Commission has responsibility in all areas of discrimination covered by Title VII -- sex, race, colour, religion, and national origin. In 1979, it also acquired responsibilities for the enforcement of the 1967 Age Discrimination in Employment Act, and the 1963 Equal Pay Act, both previously within the jurisdiction of the Department of Labor.
The EEOC has responsibility for the processing of individual complaints of discrimination, a responsibility which represents a major difference between the British and American organizations. Any individual wishing to bring suit under one of the statutes within the EEOC's area of authority must first file a complaint with the Commissioner. The Commission is then under a statutory duty to investigate the complaint, and to attempt conciliation between the parties upon a finding of 'reasonable cause.' Until 1972, the process of investigation and attempted conciliation comprised the full extent of the EEOC's enforcement powers. However, in 1972, the Commission's authority was increased to allow the organization to sue in federal district court when it had reached a finding of reasonable cause and had failed to achieve a settlement with the discriminator. This power to sue directly in court represents a second major difference between the British and American commissions.

The EEOC's experience of processing individual complaints confirms the wisdom of the decision to establish the EOC as a strategic agency with only limited responsibility to provide assistance to individual complainants. The EEOC's large caseload of individual complaints has resulted in a considerable volume of backlogged cases, and has hampered the agency in its pursuit of a strategic approach to the elimination of employment discrimination. The EEOC's authority to bring suit in
court, however, when coupled with the power to initiate and investigate charges on its own account, suggests a way in which the enforcement power of the EOC could be strengthened.

B. Litigation by the EEOC

Between 1972, when it acquired the power to sue directly in court, and 1978, when it underwent a process of internal reorganization, the EEOC tended to litigate "pattern and practice" cases which had important precedential value, or affected large numbers of individuals. Since 1978, cases suitable for litigation have been identified either through the EEOC's systemic programs unit, or through its early litigation identification (ELI) program.

An office of systemic programs within EEOC headquarters is responsible for developing standards for the selection of systemic respondents and for the identification of potential systemic targets. The majority of systemic charges are generated by an analysis of data provided to the EEOC by employers, under the provisions of s. 709 (c) of the Act. Section 709 (c) provides in part that

Every employer, employment agency and labor organization subject to this title shall (1) make and keep such records relevant to the determination of whether unlawful practices have been or are being committed (2) preserve such records. . . and (3) make such reports therefrom as the Commission shall prescribe by regulation or order. . .

Under the regulations issued by the EEOC pursuant to s. 709 (c), employers with 100 or more employees are required
to file annually a form known as the employer information report, EEO-1. This form shows the relationship of minority and female workers to the total workforce of the employer in specified job categories. Section 709 (c) specifically authorizes court orders to enforce compliance with the reporting requirements; and the Fifth Circuit has strongly endorsed the use of injunctive relief against recalcitrant employers (Schlei and Grossman, 1983, p. 936).

The data collected through the s. 709 (c) provisions is computer tabulated, and distributed to all EEOC offices, and all contracting offices of Federal, state and local government agencies. The data then form the basis of statistical investigations to identify possibly discriminatory patterns, which may result in the filing of a Commissioner's charge, and a subsequent investigation.

Section 709 (a) and s. 710 as amended in 1972, confer on the EEOC certain statutory powers of investigation, once a charge is filed. The Commission has the right of access to evidence, to require the attendance and testimony of witnesses, and to issue subpoenas to this end. The EEOC may petition the district court to enforce the subpoenas in the event of non-compliance. The EEOC also has similar investigatory powers under the Equal Pay Act.

Once a systemic charge is issued, the process of investigation, determination, and attempted settlement or conciliation begins.
The decision to litigate any systemic case that fails conciliation will be made by the Commissioners upon recommendation of the General Council. Although reorganization of the EEOC appeared to make the addressing of systemic patterns of discrimination a priority concern, the success and effectiveness of the program remains in doubt. Prior to fiscal year (FY) 1981, a total of 104 Commissioner's charges were issued, and investigations were completed on 20 percent at the end of FY 1981. During the last quarter of that year, seven decisions were issued based on systemic charges; these were the first systemic charge decisions to be issued by the EEOC. Decisions were drafted in another seven cases with issuance deferred pending settlement negotiations. Four more decisions were in the process of headquarters review. Thus, more than two years after reorganization no systemic charge had resulted in litigation, although the office had litigated carry-over 'pattern and practice' cases from before the reorganization. (Fiscal year end [1981] Report by EEOC Acting Chairman Smith 197 Daily Labor Report BNA Oct. 13, 1981).

In addition to the System Programs unit, the Commission also approved in February 1979 an Early Litigation Identification (ELI) Program "to identify and process changes for which the evidence indicates that litigation oriented investigation and conciliation will be another vehicle to enforce Title VII." (EEOC Compliance Manual, s. 12.1 CCH [1981]). This program exists to provide a
procedural structure within district offices to enable them to identify charges that warrant expansion of the investigation beyond the individual harm to the charging party. The program is intended to complement the systemic program, and is not a substitute for it. An objective of the program is to involve Commission attorneys in the early stages of charge processing, and so to ensure that the investigation is oriented toward the suit that may follow, if conciliation fails (Schlei and Grossman, AP-953).

A charge may be selected as an ELI on the basis of either the issue or the respondent involved. Issue lists and respondent lists are developed by the district office Top Management Committee, and intake personnel review incoming charges against these lists to identify potential ELI cases. Before a new charge is finally designated as part of the ELI program the charging party is counseled as to the nature of both the regular rapid processing and ELI programs, and given the opportunity to decide how she/he wants the charge to be processed. EEOC procedures do not require that the respondent be informed that the charge is being processed as an ELI until the investigation is complete (EEOC Compliance Manual s. 12.5 BNA 12:0004-05, May, 1979).

The ELI program thus provides something of a 'half-way' house between the basic rapid processing system and the systemic processing system, and permits the district offices to take a strategic approach to Title VII enforcement, on
the basis of an investigation which is nevertheless more restricted in scope than a systemic investigation. If an ELI charge proceeds to litigation, then the EEOC is able to take advantage of the "court-sanctioned doctrine of expansion of individual charges into class, and other related issues." (General Counsel Manual Ch 2 s. 1-B BNA p. 1110, July 1980) This doctrine allows the litigation to be broader in scope than the initial charge, and permits the EEOC to seek relief on a class wide basis.

The systemic charge approach and the ELI program may be compared to the British EOC's power of formal investigation. All of these approaches are designed to go beyond the resolution of an individual complaint and address the underlying conditions which produce individual instances of discriminatory conduct in the workplace. Although the EEOC's record on the use of its systemic powers is not encouraging, particularly under the Reagan administration, it cannot be doubted that it holds out the promise of greater effectiveness than the powers of formal investigation open to the EOC. Issuance of a systemic charge, if not conciliated, may result in direct litigation of the issues involved, on a class basis, in the federal district courts. The district courts, in passing judgment on such cases are not limited to declaratory or injunctive relief, but may order the payment of monetary relief in the form of back pay or front pay. There is, therefore, a cost attached to non-compliance after the finding of
discriminatory conduct, which is absent in the British system.

C. Conciliation and Compliance

The very existence of an ELI program where "The early identification of charges susceptible to expansion is stressed to permit the investigation to be litigation oriented..." (EEOC Compliance Manual, s. 12.1 CCH 1981) raises the question of the role of conciliation in EEOC's operations. A consideration of the role of conciliation is instructive as it serves as a comparison for the way in which conciliation and persuasion is viewed in the context of the British system.

Prior to 1972, the EEOC had no enforcement powers in the Federal Courts. It had the authority to investigate complaints, to make determinations of 'reasonable cause,' and to attempt conciliation or negotiated settlements. If such conciliation failed, only the individual complainant could bring suit in the Federal courts, not the Commission. In 1972, Congress gave the EEOC the enforcement powers that it had denied the agency in 1964, by authorizing it to bring suit on its own behalf, should conciliation fail. In their 7th Annual Report to Congress, the Commissioners noted that:

With the granting of enforcement powers to the EEOC, the entire nature of the Commission's operations takes on a new perspective. Previously, the Commission's specific enforcement methodology concentrated on securing conciliation agreements. The ability to secure such agreements is now enhanced by the Commission's authority to compel compliance through litigation in the federal courts, if voluntary conciliation is not secured.
This assessment was borne out by changes in the Commission's rate of successful conciliations. In the first quarter of FY 1973, the EEOC was successful in about 28% of attempted conciliations. By the second quarter of FY 1974, the success rate was nearly 50%. The Commissioners attributed the rise to their new enforcement powers, noting in the Ninth Annual Report that "As employers learned that the Commission would exercise its new enforcement powers, there was a greater incentive for them to settle discrimination charges through conciliation" (EEOC, 1975, p. 1).

As noted above, the enforcement power of the Commission to bring suit to compel compliance is very different from that of the British Commission to enforce compliance with a non-discrimination notice, as it is not limited to injunctive relief. If conciliation fails and the EEOC brings suit, it will seek not only injunctive relief, but quite frequently affirmative relief (which the courts have the authority to order under s. 706 (g)), and, if appropriate, backpay for the victims of discrimination. In bringing suit the Commission is not limited to acting on behalf of the individual whose complaint gave rise to the finding of discrimination, but may broaden its scope to a class action. The EEOC has consistently maintained that in bringing a class action, it is not governed by the requirements of Rule 23 of the Federal Rules of Civil Procedure (FRCP) which otherwise applies to all class
actions. The Commission's view was upheld by the Supreme Court in the case of General Telephone Co. of the Northwest v. EEOC, 446 U.S. 318 (1980). The importance of this decision is that the EEOC is thereby freed from the procedural requirements of Rule 23, including the need to seek class certification.

The case is instructive as it illustrates both the ways in which the EEOC's enforcement powers may be used if conciliation fails, and the approach to enforcement adopted by the Commission and sanctioned by the Court.

The case originated when four employees of General Telephone filed charges with the EEOC complaining of sex discrimination. After investigation, the EEOC found reasonable cause to suspect discrimination. Conciliation failed and in April 1977 the Commission brought a class action suit against General Telephone, thereby broadening the complaint to allege discrimination against women employees across four states. The complaint alleged discrimination in the form of restrictions on maternity leave, access to craft jobs and promotion to managerial positions; and it sought injunctive relief and backpay for the women affected by the challenged practices.

The complaint did not mention FRCP 23 and the EEOC did not seek class certification pursuant to that rule. The defendant then moved for an order dismissing the class action aspects of the complaint on the basis of non-compliance with the Federal rule. The Supreme Court held...
that Rule 23 is not applicable to an enforcement action brought by the EEOC in its own name, and pursuant to its s. 706 authority to prevent unlawful employment practices. In reaching this holding the Supreme Court also explained its own view of the enforcement powers of the EEOC, noting:

As Title VII was originally enacted. . . the EEOC's role in eliminating unlawful employment practices was limited to "informal methods of conference, conciliation, and persuasion". . . Congress became convinced, however, that the "failure to grant the EEOC meaningful enforcement powers has proved to be a major flaw in the operation of Title VII" (cite omitted). The 1972 amendments. . . accordingly expanded the EEOC's enforcement powers by authorizing the EEOC to bring a civil action in federal district court. . . In so doing, Congress sought to implement the public interest as well as to bring about more effective enforcement of private rights. . . When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination. (446 U.S. at 318, 326)

Thus, the EEOC, acting on behalf of individuals, acts also in the public interest, a view which is consonant with the expansion of the complaint, and the consequent expansion of the remedy sought. The EEOC's ability to seek class-wide relief in both administrative proceedings and litigation serves this function of eradicating systemic discrimination in the public interest. The ability to bring suit is seen as an additional means to secure compliance, should administrative proceedings fail, and the scope of the potential court-ordered relief operates as an incentive to settlement.

The contrast between the powers of the American and British Commissions is thus noticeable at the level of
statutory authority to seek monetary and affirmative relief, and in the attitudes of the two organizations to the relationship of conciliation and compliance. The difference in attitude may be explained not only in terms of the different political and legal context in which the organizations operate, but also by reference to the different systems of appointment to the two Commissions.

D. Appointment to the EEOC

EEOC Commissioners are appointed by the President, and confirmed in their appointments by the Senate. The Commissioners do not represent the traditional spread of interests which constitute the British EOC, but instead are drawn from what may be termed the civil rights community of organized women's and minority groups, nevertheless reflecting the political colour of the president making the appointment. That the president cannot completely ignore the interests of the civil rights community in making appointments to the EEOC, was demonstrated by the response to President Reagan's chairman-designate in 1981. Reagan's choice as his nominee was William Bell, a black Republican from Detroit, described as president and owner of an executive search firm placing minority members with private companies. Black leaders in Detroit told the Senate Labor and Human Resources Committee that despite Bell's claims to have been involved in civil rights activities there, he and his company were virtually unknown. (FEP Summary, BNA, no. 434, Nov. 19, 1981, p. 1). A Senator on the Committee
revealed that the firm had placed fewer than two people a year for the preceding two years. In November, 1981 a coalition of nine major civil rights organizations and women's groups including the NAACP, the National Urban League and the National Organization of Women, announced their opposition to the nominee, on the grounds that he lacked "the necessary background, knowledge and comprehension" needed to lead the country's major civil rights enforcement agency, and had demonstrated "no commitment or involvement with civil rights." (FEP Summary, p. 1) With support in the Senate quickly eroding, the Administration asked the Senate Committee to postpone indefinitely a vote on the nominee's confirmation, a strategy designed to avoid the embarrassment to Republicans on the committee that calling for a vote could bring. In August, 1982 William A. Webb was nominated as Commissioner, and later confirmed by the Senate.

This process of Presidential nomination, with the power of confirmation lying with the U.S. Senate is the usual one for the appointment of ranking officials of the Federal bureaucracy. That it has generally been conducted with some deference to the views of organized civil rights and women's groups, a situation which contrasts sharply with that in Britain, may be explained by reference to the idea of 'agency capture.' Traditionally this concept has been used to describe the 'capture' of regulatory agencies by the very
groups whose activities are to be regulated. Empirically it seems, however, that agencies may sometimes be captured by members of the groups whose interests are to be protected; certainly, in the United States, both the EEOC and the Federal Civil Rights Commission provide some evidence for this tendency.

What is clear from the pattern of appointments to the EEOC is that the range of interests considered to have a legitimate interest in representation in the organization is very different from that included in the leadership of the EOC. This difference points both to the greater political strength of the American civil rights and women's lobbies as compared to their British counterparts, and to a fundamental difference between the British and American political systems with regard to the structuring of the representation of interests in the public arena.

While the American pattern of appointment may avoid the immobilism which appears to result from the tripartite balancing of representation in the EOC, it would be a mistake to overstate the advantages of the approach. While it may result in the appointment, as Chair of the EEOC, of a well qualified activist like Eleanor Holmes Norton, appointed by President Carter after extensive consultation with the EEOC's constituencies, it may also result in the substitution of tokenism for qualifications and commitment. The Reagan Administration, in its choice of nominees, has been only minimally responsive to the civil rights and
women's organizations with an interest in the EEOC; these interest groups have not had the power, under a Republican President and Senate, to insist upon the appointment of Commissioners who, like Norton, were committed to an active pursuit of their goals. The lesson here is that immobilism in the American Commission is also possible, when the political winds change direction. Thus, when the climate is generally favourable to the EEOC's objectives, it may be that the pattern of appointment will enable it to act more vigorously then its British couterpart. On the downside is the possibility that when the climate is unfavourable, the Commission will be completely robbed of its capacity to act through the appointment of a leadership completely attuned to the political goals of their patrons, since, unlike the EOC, the EEOC does not have a built-in balance which might prevent too great or rapid a change of direction.

Conclusion

In conclusion, the question that must be posed is what the comparison between the two Commissions contributes about our understanding of the potential of either as effective enforcers of anti-discrimination legislation, and thus as agents of social change.

The EOC and the EEOC have both operated under budgetary constraints which hamper effective enforcement efforts. Nevertheless, the United States' Commission has over time pursued a more aggressive stance than its British counter-
part. This more forceful approach stems in part from the fact that it has had greater authority, since 1972 at least, in terms of the ability to act as an enforcement agency. The influence of the different systems of appointment should also be noted. In Britain, the system of appointments is contained by the boundaries of what constitutes legitimate interest or the 'tripartite' system of industrial relations. By contrast, the EEOC to a much greater extent has been 'captured' by a civil rights constituency to which it has been, at various periods, more or less responsive.

This difference in the representation of interests on the two commissions raises as a more general question the importance not only of the choice of structures of enforcement, but also of the structuring of representation within the institutions established and the potential impact of this fact in the propensity of the institution to operate as a force for containment or change.

The issue of financing and the appointment of key personnel are, as Gregory points out, key factors in allowing the government to keep ultimate control of quasi-autonomous institutions like the EOC. Leaving aside the question of whether the conformative role of such organizations is ultimately unassailable, in the short run changes may be proposed in the budget allocation to the Commission and in the pattern of appointments which could enhance its effectiveness. Similarly, changes could be proposed in the statutory powers of the EOC, to enable it to
act more effectively as an enforcement agency by, for example, streamlining the cumbersome procedure for enforcing compliance with a non-discrimination notice, and providing monetary penalties for non-compliance, in addition to injunctive relief.

In conclusion then, an analysis of the British EOC shows that its much heralded statutory powers are in fact unlikely, without amendment, to produce compliance with the law, and that in practice this problem is compounded by the Commission's cautious approach to the enforcement role. This caution may be attributed at least in part to the traditional representation of interests on the Commission, and to its precarious position of semi-dependancy, particularly at a time when its organizational objectives are out of political favour.

While the record of its American counterpart is not unflawed, and it too operates under the constraint of restricted financing, the EEOC has acted more forcefully than its British counterpart. It has more effective powers of enforcement at its disposal and has displayed a more aggressive attitude towards the deployment of those powers.

The experience of the EEOC suggests directions in which proposals for change could enhance the ability or willingness of the British Commission to pursue a more active enforcement role, while leaving open the ultimate question of how much can be expected from an agency whose
ultimate purpose is more likely to be only of containment rather than change.
NOTES

1 This provision was not included in the SDA as originally enacted, but was added under Schedule 4 Paragraph 2 of the 1976 RRA, which originated as an Opposition amendment to that act. See Lustgarten, 1980, pp. 244-245.

2 It should be emphasized that the Commission has no power to compel a discriminator to take any positive steps to encourage equal opportunities. All it can do is require the cessation of illegal practices.

3 The EOC's total budget was approximately $2.5 million for 1981.

4 Complaints may also be initiated by the Commission; such a procedure is known as a Commissioner's charge.

5 If the Commission has not reached a finding within 60 days, the individual may request a "right to sue" letter, allowing her or him to proceed directly in Federal District Court.


7 Additionally, individuals or organizations may request the issuance of a Commissioner's charge of a systemic violation.

8 In EEOC v. Rogers Bros., 470 F. 2d 965 (5th Cir. 1975) cert. denied, 409 U.S. 1059 (1975), the court insisted upon issuance of an injunction even though the employer had belatedly filed the required reports.

9 For a discussion of class actions, generally, see Chapter 9 below.
CHAPTER NINE
LEGAL REMEDIES

In earlier chapters, some of the weaknesses underlying the individual systems of enforcement have been discussed. Underlying those discussions but not addressed in them is the important question of the nature and availability of the remedies provided in anti-discrimination law.

Just as earlier chapters have demonstrated that the enforcement system incorporates elements of both common law, and public or administrative law, so will this chapter examine the influence of each of these elements on the remedies provided by the enforcement system. Specifically, the purpose of this chapter is to examine how specific remedies address the issue of compliance with the law, through emphasizing either compensatory (common-law) or regulatory (administrative law) functions. Both functions are concerned with compliance, but there are differences in emphasis between them, with the latter showing greater concern for compliance through regulation than the former. This distinction between an emphasis on compensation or
regulation also involves a distinction between negative and positive sanctions. The common law has traditionally concerned itself with the former, and this common-law emphasis pervades the anti-discrimination laws, despite their incorporation of administrative and public law structures.

It should be emphasized at the outset that although there is a distinction between these two approaches, there is no necessary contradiction between them, as evinced by the American approach to the question of remedies for sex discrimination violations.

The first part of this chapter focuses on the British approach to the question of individual compliance, by examining the statutory provisions of remedial powers, and by analyzing a sample of remedies obtained after successful tribunal hearings.

I. INDIVIDUAL REMEDIES -- THE POWER OF INDUSTRIAL TRIBUNALS UNDER THE SEX DISCRIMINATION ACT

In cases under the Sex Discrimination Act (SDA), industrial tribunals are empowered to order any or all of the remedies made available to them by statute, that they consider "just and equitable" in a particular case. These remedies include: a declaration of the rights of the parties in relation to the complaint; a recommendation that the respondent take certain actions; and an order for compensation.
Declaration

Under s. 65 (1) (a) of the SDA, an industrial tribunal may make an order "declaring the rights of the complainant and the respondent in relation to the act to which the complainant relates." As the statutory language indicates, a declaration is no more than a statement that the respondent has violated the applicant's statutory rights. As such, it makes no compensation available to the applicant but represents an authoritative statement of the rights and wrongs of the complaint presented to the tribunal. A declaration may also function as the precondition for action by the EOC to seek injunctive relief under powers granted under s. 71, in the case of "persistent discrimination."

A sample of 25 industrial tribunal hearings in which the applicant prevailed included five cases where the tribunal made a declaration. The 1981 decision in Bath v. British Airways Engine Overhaul Ltd. (Cardiff, 1981) provides a clear illustration of the use, and limitations, of the declaration as remedy, the tribunal in this decision having clearly delineated the scope of the action available to them. The applicant in this case was a woman employed by the respondents as an aircraft component worker, a job graded as "Schedule VI." She applied for a position as a Production Assistant (Schedule III) but was turned down because of the existence of a union/management agreement that limited promotion for this job to personnel in Schedule IV. In a 1980 tribunal hearing, the woman alleged indirect discrimination since the requirement for promotion was such
that the proportion of women who could comply was smaller than the proportion of men. The tribunal, in an unanimous decision, agreed that this was the case, and since the requirement was not justifiable, irrespective of sex, made a recommendation that the employers use their best endeavors to bring about a change in the requirements.

In 1981, the case again came before the tribunal, as the management and unions had failed to meet the terms of the recommendation. At this second hearing, the tribunal made a declaration as to the rights of the parties, noting:

It is common ground that we are not functas officio and have jurisdiction to make an order under s. 65 (1)(a) of the 1975 Act. The declarations are declarations which are limited in extent because of the limited jurisdiction which we have. We are only entitled to make declarations and not to order the respondents to actually do anything. Moreover, the declarations that we are entitled to make are declarations as to the rights of the complainant and the respondents. Had we the power to do so, we would have unhesitatingly made a declaration in the terms of the suggestion which the respondents made to the trade union side. We would have declared that it is appropriate that with immediate effect staff in all E and M Schedules are deemed to be appropriate for consideration for Production Assistant vacancies. However, to make such a declaration would in our view be beyond our jurisdiction.

In the light of this declaration, the EOC pressed the employers to open the high-paid grade to all lower grades, and considered using its s. 71 enforcement powers to achieve this objective. The employers then agreed to comply with the Commission's request (EOC, 1981, p. 5).

The limitations of the declaration as a remedy are cogently expressed by the tribunal in Bath. However appropriate the tribunal thinks a particular course of
action would be, it may not order the parties to pursue this course of action: it is limited instead to a declaration concerning the rights of the parties involved. As the ultimate outcome in Bath illustrates, the impact of a declaration may result in compliance and may indeed go beyond the individual complainant, but the fact remains that it is not within the jurisdiction of the tribunal to assure that particular steps are taken.

Compensation

Under s. 65 (1)(b) of the SDA, the tribunal may make an order requiring the respondent to pay compensation to the complainant, in any amount corresponding to the damages that could have been ordered by a county court or sheriff's court hearing a discrimination complaint in a field other than employment. Section 66 of the SDA sets out the guidelines for awards of compensation by the county courts (in England) and sheriff's courts (in Scotland), and under the terms of s. 65 (1)(b) these guidelines also apply to awards made by tribunals hearing employment cases.

Under s. 66, complaints under the SDA are specifically analogized to torts proceedings. The heads under which compensation may be awarded are not enumerated, with the exception of compensation for injury to feelings, which is explicitly authorized, "for the avoidance of doubt." (s. 66 (1)(a)). The guidelines of s. 66 apply to employment claims with a couple of extra provisos. Section 66(3) provides that where a successful complaint is based on
evidence of indirect discrimination, the tribunal may not make an order of compensation, if the respondent can prove that the discriminatory requirement was not applied with the intention of treating the complainant unfavorably. Section 65(3) establishes that where a respondent fails "without reasonable justification" to heed a recommendation made by a tribunal, the tribunal may subsequently increase the amount of compensation ordered to be paid, or if no compensation was initially made, may then make such an order.

Awards under the SDA may not be duplicative of payments received under other statutes (e.g. for unfair dismissal) but complainants may simultaneously receive compensation under separate statutes for separate wrongs. Where a successful complainant has received payments from the state, in the form for example of unemployment benefits, for a period properly the responsibility of the respondent, the principle of recoupment applies, which allows the tribunal to deduct from the complainant's award the amount received from the state, and to direct that the respondent repay this sum directly to the public authority in question. Finally, the general tort principle of the responsibility to mitigate damages applies to the calculation of awards under the SDA.

Thus, the basic system governing awards of compensation under the SDA is one of a torts damages framework, subject to a statutory maximum award, and with explicit provision for the discretionary award of compensation for injury to feelings, regardless of which other heads of damages apply.
In the sample of successful tribunal decisions which provides an empirical basis for this part of the chapter, there were 14 awards of compensation, as compared with 5 declarations, and two recommendations. Clearly, a monetary award may have the appeal of a direct and simple remedy, conferring immediate and tangible benefits on the recipient. An examination of some of the decisions in the sample illustrates some of the problems associated with orders of compensation in current tribunal practice. These problems concern the generally small size of awards, the lack of explicit guidelines, and the corresponding discrepancies between tribunals confronted with similar cases, the particular calculation problems associated with awards for economic loss, and the incapacity of monetary awards as presently constituted to provide any regulatory or deterrent effect.

Both the small size of most compensation awards, and the degree of divergence between tribunals are illustrated particularly in decisions making awards for injury to feelings. In 11 out of the 14 cases under consideration here, the tribunal ordered compensation for injury to feelings. The awards ranged from 50 p to £1000, although the latter sum was subsequently reduced on appeal.

In Hurley v. Mustoe (London C. 1981) the tribunal, in its discretion, awarded a 'successful' complainant the sum of 50 p for injury to feelings at the conclusion of a case which had generated considerable local criticism of the
respondent. At an initial tribunal hearing the respondent prevailed, but on appeal the Employment Appeals Tribunal (EAT) reversed the tribunal's original decision and held that the complainant, a married woman with 2 children, had been discriminated against on the grounds of sex and marital status, when a restaurant owner refused her employment as a waitress because she was the mother of young children. The case was then returned to the industrial tribunal for a decision on compensation.

The counsel heard evidence that while the appeal to the EAT was pending, demonstrations and pickets supporting the complainant's position had caused the respondent's two restaurants to lose business. These demonstrations were lawful and peaceful, and the tribunal acknowledged that although the restauranteur had called the police several times, no arrests had been made. The complainant had been present as an observer on a couple of occasions, but had not actively participated in the protest activity which was organized and supported by local community groups.

Counsel for the complainant contended that such matters were irrelevant for the purpose of making an award, but the tribunal disagreed, stating:

we have thought it necessary to receive full evidence as to the said demonstrations or picketing in that, so far as the principle of awards under employment, and discrimination legislation is concerned, the amount shall be just and equitable. From this premise, we consider that he who comes to equity must come with clean hands.
Counsel for the applicant argued unsuccessfully, in the face of this contention, that equitable discretion should not apply to questions of compensation, since the statute provided, under s. 65 (1)(b), that once a tribunal comes to consider an order directing the respondent to pay compensation, the amount should correspond to damages that could have been awarded in a county court (under s. 66). Counsel for the complainant also cited *Coleman v. Skyrail* (1981) IRLR 398, to support the proposition that compensation in such cases should be as in any other case in law. The tribunal countered this argument with an assertion that "discretion remains to us in regard to the element of compensation applicable to 'injury of feelings' under section 66(4)" and that if they were wrong as to their exercise of discretion "then we find in the alternative that the position of the applicant in relation to the demonstrations against the respondent was such as to reduce any injury to her feelings." In light of what the tribunal termed the "various factual elements" in the case, which included the demonstrations against the respondent, the complainant's refusal of an offer of employment while the appeal was pending, and the "previous experience of the adversities of life which the applicant must have gained in her employment," (as a waitress at a London rock club/dance hall), the complainant was awarded only 50 p in compensation for injury to feelings, in addition to a sum equivalent to 8 weeks loss of earnings.
The inescapable conclusion in reading this decision is that despite the facade of alternative legal arguments to legitimate the tribunal's exercise of discretion, the fact that it was exercised in such a fashion had little to do with the law as such, and a great deal to do with the tribunal's distaste for the complainant and her association with political activists. Such a case serves to illustrate the considerable discretion that a tribunal has, in making an award for injury to feelings. This discretion is emphasized, as is the discrepancy which exists between tribunals, by comparing the factors taken into account in the Hurley case, with the reasoning advanced by tribunals in other cases in the sample.

In four cases in the sample, the amount awarded for injury to feelings appears to have been quite arbitraril determined, with no explanation offered as to how the sum was reached. In *Dunlop v. Royal Scottish Academy* (Edinburgh 1977) a woman art student employed as a temporary security guard for four weeks for a summer art exhibition was denied the opportunity to work the night shift, an opportunity which was afforded to all the male students employed as guards. She consequently lost the opportunity of earning overtime in the amount of £ 40. Finding that her complaint of sex discrimination was well-founded, the tribunal awarded her £ 20 for injury to feelings in addition to the £ 40 loss of earnings. No explanation was given for the choice of that particular amount.
In O'Connell v. Adams Personnel Employment Agency, the respondent refused to interview a male applicant for the job of telex operator. The tribunal, finding that sex discrimination had occurred, awarded him £50 for injury to feelings, as his sole remedy. In another case involving a male applicant, refused a job as a toy-filler because only women were employed, the tribunal calculated his economic losses at £95.40, and then rounded up the sum to £100, the additional £4.60 being awarded as compensation for what the tribunal viewed as his "minimal feeling of outrage at being refused the job because he was not a woman." Williamson v. Dellcourt Ltd. (Manchester 1979). By comparison, a woman refused employment as a collection supervisor because she was the mother of three children, was awarded £100 to compensate for injury to her feelings in Thorndyke v. Bell Fruit (North Central) Ltd. (Liverpool, 1978).

In contrast to these cases, some tribunals are more explicit about the way in which they arrived at a particular sum to compensate for injury to feelings.

In Kerr v. Clyde Factors (Electrical) Ltd. (Newcastle-Upon-Tyne 1981) a case involving a discriminatory dismissal, the tribunal awarded £50 for injury to feelings, noting that this was approximately one week's wages for the applicant. In Railton v. S.O.S. Bureau Ltd. (Liverpool 1979) the standard was much less objective, but the tribunal did at least make an attempt to explain its award. This case involved an unfair dismissal for which an award of
£1377 was made. In addition to this sum, the tribunal awarded £123 for the separate grievance of sex discrimination, explaining that:

We consider the discrimination involved to be not of a serious degree but rather merely a description of the manner in which the applicant was generally treated leading up to her dismissal. . . from our joint experience we have come to a conclusion that a sum in the region of £120 is proper. . . (and) £123 for the Sex Discrimination would bring the total compensation up to the round sum of £1500.

In Wilkie v. Strathclyde Regional Council (Glasgow 1980) the tribunal gave a very high award of £1000, in a case involving a discriminatory failure to interview a woman applicant for a post as Lecturer in Social Policy. The £1000 was given for injury to feelings, loss of opportunity and injury to reputation, and represents a composite award for all three injuries. Although the amount awarded for each injury suffered is not explicit, nor is the basis for the total made clear, it is apparent from the tribunal's decision that professional standing was an important factor to be taken into account. Noting that the award includes compensation for injury to reputation, the decision states that "it is the Tribunal's impression from the evidence in the case that the academic world is such that reputation is extremely important."

Finally, the case in which the reasoning on the determination of remedy is most explicit is Coleman v. Skyrail Oceanic (London 1979) in which the tribunal, drawing explicitly on other tort analogies, made a high award for injury to feelings, only to see that award reduced
on appeal. In Coleman, the applicant was a clerk employed by the respondents, a firm of travel agents. When she married a man employed by a rival travel agency she was dismissed. The tribunal found her complaint of sex and marital discrimination well-founded, and awarded her £1000 for compensation for injury to feelings, stating,

"We find that the applicant's reputation must inevitably have suffered. Knowledge of that and the abrupt method of dismissal caused a substantial injury to her feelings. We award on the above consideration £1000."

In arriving at this relatively high figure, the tribunal had noted a "substantial similarity" between awards in defamation cases. The tribunal stated, however, that it would welcome "guidance by a higher tribunal on the proper method of assessment."

On appeal by the respondent, the EAT reversed the industrial tribunal's finding of discrimination, and noted anyway that even if there had been discrimination, the sum of £1000 as an award for injury to feelings was too high, and that £250 would have been more appropriate. The complainant, supported by the EOC, appealed the EAT's decision to the Court of Appeal.

The Court of Appeal upheld the industrial tribunal's finding of unlawful discrimination, and addressed explicitly the issue of compensation, considering what factors a tribunal should take into account when making an award for injury to feelings, and on what principles an appellate court should interfere with a tribunal's calculation.
Lawton, LJ, set out a relatively narrow standard for assessing injury to feelings, asserting that,

Any injury to feelings must result from the knowledge that it was an act of sex discrimination which brought about a dismissal. Injury to feelings unrelated to sex discrimination such as, in this case, the circumstance that leakages of information had taken place... and that others might reasonably have suspected Mrs. Coleman to have been responsible for them is not properly attributable to an unlawful act of sex discrimination. The Industrial Tribunal thought that the circumstances in which Mrs. Coleman was dismissed may have damaged her reputation. This would not have been a consequence of sex discrimination and should have been disregarded (Coleman v. Skyrail Oceanic Ltd. [1981] ICR 864, 871, per Lawton, LJ).

Using this narrow and formalistic reasoning, the Court of Appeals reduced the amount of damages for injury to feelings to £100.

The Court of Appeals asserted the right of appellate courts to overturn tribunal awards, on the basis that they should be treated in the same way as awards made by judges sitting alone. Such awards are subject to appellate review, while those made by juries are not. Lawton, LJ reasoned:

Industrial Tribunals are presided over by chairmen who have legal qualifications. Reasoned decisions are given, including reasons for making awards. The giving of reasons distinguishes their decision from the verdicts of juries. If they have acted on a wrong principle of law or have misapprehended the facts or for other reasons have made a wholly erroneous estimate of the damage suffered, an appellate court can interfere. (Ibid.)

This reasoning appears to ignore the reality of tribunal decision-making as evidenced by the sample, where often no explanation is given for the figure awarded, or the criteria are 'soft' and ambiguous. Nevertheless, the effect
of this assertion of the power of appellate review may further encourage caution in the tribunals which would reinforce the practice of making minimal awards for injury to feelings, since awards under this head appear to be the most common form of remedy in discrimination complaints.

As has been suggested earlier, the small sums awarded in successful discrimination cases may discourage potential complainants from pursuing their grievance. Furthermore, the small sums in question can have no deterrent or regulatory effect on the discriminators. Although it has been suggested that it would be improper for compensation for injury to feelings to be used as a means of regulation (Lustgarten 1980, p. 228) it does not seem unreasonable to suggest that larger amounts, in keeping with the sums awarded in defamation cases, would serve a dual function, primarily in making an appropriate award of compensation to the injured party, secondarily in increasing the cost of discrimination to the perpetrator.

In addition to awards for injury to feelings, many of the tribunals in the sample also awarded compensation for economic loss. Whilst the calculation of loss of potential earnings involves few difficulties in a case involving discriminatory dismissal, complaints of discrimination in hiring or promotion do present a problem for a tribunal making awards for economic losses, absent a showing that the complainant would definitely have been awarded the position sought, but for the impact of discrimination. Tribunals
approached this problem in different ways as the examples below will illustrate.

In Crocker v. J.S. Bamford Excavators (Nottingham, 1980) the tribunal held that the respondent had unlawfully discriminated against the complainant, by passing her over for promotion, in favor of a male employee. Having reached this conclusion, the tribunal left it to the parties to reach a remedy, noting:

...we have been very sensible throughout our deliberation in this matter, that it is not for us to substitute our judgement for that of the board as to which of the candidates was the most suitable for employment.

This statement is a good example of the 'hands-off' approach that many tribunals bring to recruitment and promotion cases. Whilst appearing as an apparently reasonable deference to managerial perogative, the inner logic of such statements is in fact convoluted, in the context of discrimination cases. In Crocker, the complainant alleged discrimination when, in a contest for promotion, a less qualified male applicant was appointed and she was rejected. The man appointed for promotion had only half the experience of the complainant, nor were his annual appraisal reports as good as hers. The tribunal obviously took these factors into account in reaching a conclusion that discrimination occurred. In this context the logic of the 'hands-off' approach is that appointment of a lesser qualified male over a better qualified woman constituted evidence indicating discrimination: nevertheless, it is the
perogative of the employer to appoint the lesser qualified
man, although they must also avoid contravening the
provision of the anti-discrimination legislation. Having
placed itself in this position, it is small wonder that the
tribunal left the parties to reach an agreement, merely
noting that in the event of the parties failing to reach
accord, the case would have to be re-listed for a
determination of remedies.

In Wilke v. Strathclyde Regional Council, (Glasgow,
1980) a woman applicant was denied an interview for a post
of college lecturer, and the tribunal found that unlawful
discrimination had occurred. In making an order of
compensation, however, the tribunal confined itself to a
large award (£1000) for injury to feelings, injury to
reputation, and loss of opportunity. The tribunal felt
itself unable to make any award for economic loss,
explaining that:

...while the Tribunal can say without hesitation
that the applicant should have been interviewed for the
post. . . there is no way in which the Tribunal can say
that she should have been appointed to the position.
It might very well appear to the Tribunal that the
applicant was by far the best qualified candidate for
the job, but it is not the person who in the Tribunal's
view is best qualified who will necessarily be given
the job. The right to make the selection and make the
appointment must always lie entirely with the
appointing panel.

Other tribunals have been prepared to calculate an
award on the assumption that the applicant would have been
hired or promoted, then reducing the amount to take into
account the uncertainty involved.
In Clements v. Gosport Borough Council (Southampton, 1978), for example, the tribunal faced a situation where a woman employed by a local council was denied promotion on the grounds that the job applied for was not suitable for a woman. Finding that discrimination had occurred, the tribunal awarded £400 for injury to feelings, and then entered into a complex calculation of the actual economic loss suffered by the complainant. In this calculation, the tribunal took into account the salary level in the post applied for, the effect on damage calculations of either a six month or three year multiplier, and the possible effect of losing access to a cheap car loan as one of the fringe benefits of the job sought. The tribunal also took into account "the fact that in any event the complainant may not have been able to hold down the job, she may not have the necessary qualities... we have to make a substantial discount in respect of that aspect in view of the uncertainties involved." In concrete terms the tribunal arrived at a figure of £600 representing actual losses, and then halved this figure to make allowances for the uncertainties involved.

In Braine-Hartnell v. Merton, Sutton and Wandsworth Area Health Authority (London S. 1978) the tribunal adopted a different approach from the tribunal in Clements, when dealing with the same issue of compensation after a discriminatory denial of promotion. The tribunal in this case calculated the economic loss on the implicit assumption
that the complainant would have been given the post. Therefore the award was based on the difference in salary that existed between the post she sought and the post she was offered, over a one year period.

These examples illustrate the wide discrepancies in approach between tribunals on the important question of calculating economic loss. There is no agreement as to what constitutes the appropriate period of time for the assessment of damages in various circumstances, nor is there agreement as to how to resolve the question of uncertainty. Some tribunals make no award for economic loss, because of the uncertainty factor, others take it into account by reducing the sum awarded, others ignore its effect completely although this last appears to be a minority approach.

In *Skyrail Oceanic* the Court of Appeal, per Lawton J (with Sir David Cairns in agreement) held that compensation for economic loss could be awarded "for foreseeable damage arising directly from an unlawful act of discrimination. It follows that an applicant can claim for any pecunary loss properly attributable to an unlawful act of discrimination" [1981] ICR 864, 871. This formulation does not however address the question of how tribunals should deal with the 'uncertainty factor' when considering the economic loss of a complainant discriminatorily denied a job opportunity or promotion.

Lustgarten (1980, p. 230) suggests a solution to this
problem in the form of a rebuttable presumption in favor of the complainant. Once discrimination was established, the complainant could rely on the presumption that she would have been awarded the job in question, absent discrimination, for the purpose of assessing compensation. The way would be open for the respondent to rebut the presumption by a showing to the contrary. This presumption would have the effect of reversing the present burden of proof, and placing it on the party with the most access to information. It would clarify the assessment procedure, and open the way for the operation of a consistent standard between tribunals.

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It would increase the likelihood of a reasonable compensation for economic injury suffered by the individual complainant, and would allow the easy computation of 'front pay' damages. Such an effect would have the advantage not only of greater compensation for the individual victim of discrimination, but by making an award for economic injury more likely, and by increasing the possible amount, would also have the desirable effect of increasing the possible cost of discrimination to the perpetrator.

The calculation of compensation for both injury to feelings and economic loss share certain features. Both are characterized by the award of relatively small sums, and the absence of computation guidelines, leading to considerable discrepancies between tribunals. Both also compensate the individual for a proven grievance; they do nothing to ensure compliance in the future. Larger sums awarded not only to the individual victim but to others similarly situated (as in America's 'class action' below) might have some deterrent effect, but it is unlikely that the present system and practice has any such effect at all, since the present costs of discrimination to the perpetrator are negligible.

Recommendations

Tribunals are empowered under s. 65 (1)(c) of the SDA to make a recommendation that the respondent take such action as is "practicable for the purposes of obviating or reducing the adverse effect on the complainant of any act of discrimination to which the complaint relates."
The Court of Appeal considered the power of an industrial tribunal to make recommendations in *Prestcold Ltd. v. Irvine* [1981] ICR 777, holding that a tribunal may not make a recommendation concerning wages, as the power to make recommendations relates to non-monetary matters. In *Prestcold* the tribunal found that the employer had discriminated against the complainant by denying her promotion. The tribunal awarded her damages under s.65(1)(b), and made a recommendation under s.65(1)(c) that she be seriously considered for the post as soon as it became available, and that she be given career development opportunities in the meantime. In the alternative the tribunal recommended that she should continue to receive the difference in salary between her job and the post for which she applied, until she was promoted to the position sought or one of equal status. The Court of Appeal held that recommendations under s.65(1)(c) do not extend to those which recommend monetary compensation. Rather, it is s.65(1)(b) which gives tribunals the power to award compensation to cover economic loss.

Section 65(3) provides, however, that if a respondent fails to comply with a recommendation "without reasonable justification" then the tribunal may, if they think it just and equitable, increase the amount of compensation ordered to be paid under s.65(1)(b), or make such an order for compensation under s. 65(1)(b) if none was originally made. See *Nelson v. Tyne and Wear Passenger Transport Executive*
[1978] ICR 1183 (EAT). Although s. 65(3) appears to give the tribunal a means of encouraging compliance with its recommendations, two points must be made. First, if an employer chooses to pay the increased compensation rather than comply with the recommendation, that is the end of the matter and there is nothing more the tribunal can do. Secondly, and more importantly in practical terms, the use of a compensation award as a means of encouraging compliance with a recommendation effectively leaves the tribunal powerless in most cases involving indirect discrimination. Section 65(3) provides that in cases of indirect discrimination "no award of damages shall be made if the respondent proves that the requirement or condition in question was not applied with the intention of treating the claimant unfavorably on the grounds of his sex or marital status." (Emphasis added.) In such cases, the tribunal, barred from ordering compensation, may only make a recommendation or declaration. If a recommendation is made, and the respondent fails to

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comply, the tribunal is barred by s. 66(3) from utilizing the powers to award or increase compensation under s. 65(3). The only recourse open to the tribunal then is to make a declaration of the rights of the parties, which is the course of action taken by the tribunal in *Bath v. B.A. Engine Overhaul*, supra. This in itself will not produce compliance although it may open the doors to the EOC's use of its s. 71 powers against persistent discrimination. Section 71 confers on the Commission the authority, in cases of persistent discrimination as defined by the Act, to apply for injunctive relief. Thus the final measure in the lengthy and cumbersome process would be an order by the court that the discriminator refrain from his discriminatory behaviour. As the *Bath* case, *supra*, demonstrates, a successful complaint of indirect discrimination may take two tribunal hearings, (over a period, in *Bath*, of 18 months), and intervention by the EOC to affect compliance with a recommendation. This case illustrates how important it is for the EOC to monitor tribunal decisions, especially in cases alleging indirect discrimination, since the intervention of the Commission may be crucial to the achievement of compliance.

This lack of enforcement power which is inherent in the device of a 'recommendation' is consonant with the way in which the common law has defined the limits of intervention in the contractual relationship, through the

...ancient doctrine that a contract of employment cannot be specifically enforced against either side --
because an order for specific performance against the worker would savour of compulsory labour, and the rule of mutuality demands that if no such order can be made against the employee it cannot be made against the employer either. (Kahn-Freud, 1974, p. 24)

This tenet underlies the reluctance with which employment legislation in Britain approaches the positive sanction of reinstatement, and illustrates the extent to which statutory law in Britain is overshadowed by common-law concepts. In the United States, by comparison, statutory law is not bound to the same degree by the influence of common-law theory. Legislators have not hesitated to provide remedies like reinstatement, and judges have interpreted these statutory provisions with reference to the demands of public policy rather than the traditional shibboleths of private law.

A second problem with the use of recommendations by tribunals is that, as with compensation and declarations, the remedy is formally limited in scope to the removal of the discriminatory impact on the complainant. Particularly in cases of indirect discrimination, a whole group of potential victims of the alleged discriminator may be implied, but it is outside the scope of the tribunal's jurisdiction to fashion a recommendation that would take this factor into account. While even an individual recommendation, limited as it may be in scope and intent, may have some carry-over effect on other employees, evidence from the sample suggests that the tribunals in practice make but little use of the powers they have to make
recommendations. In the entire sample of successful SDA complaints, only four decisions involved recommendations by the tribunal. The decision of the tribunal in *Clements v. Gosport Borough Council, supra* illustrates the kind of recommendation that a sensitive and conscientious tribunal might make. In this case, the complainant was refused promotion for a job considered unsuitable for a woman. The tribunal made an award of compensation totalling £100 for economic loss and injury to feelings and in addition made the following recommendations: that the complainant be given a chance to take on the job sought on occasions when the incumbent was absent; that the applicant be considered for any suitable promotion when it arose; and that the respondent encourage the complainant to take any relevant day release course to qualify her for promotion. Whilst these recommendations at least display some sensitivity to the possible needs of the aggrieved complainant, they also illustrate the limits of the individual remedy, when placed in the context of a case involving a respondent which intentionally discriminated against a woman applicant for promotion, on the grounds that a man would be preferable for the job. The tribunal decision states, "we think that the minds of the employers were...opposed right from the start to the taking on of a woman...as the post was not considered suitable for a woman." The recommendations devised by the tribunal seem unlikely to bring about the
necessary change of attitude among the council managers, to bring the respondent into compliance with the law.

The sample shows that on average, where monetary compensation was allowed, the sums of money awarded for sex discrimination were small. Where indirect discrimination is involved, no monetary compensation is allowable under the statute if there was no intent to discriminate against the applicant. Since tribunals are reluctant to act positively to recommend that an individual be hired, promoted or re-instated, then the victim of indirect discrimination who brings a successful complaint to the tribunal may effectively be left without any remedy. Further, the available remedies appear to provide little incentive for compliance with the law.

II. INDIVIDUAL REMEDIES: THE EQUAL PAY ACT

The remedy available to the industrial tribunals under the Equal Pay Act (EqPA) shares with the remedies available under the SDA the characteristic that it is unlikely to encourage compliance with the law. By concentrating, however, on the award of compensation for economic loss within a statutorily defined time period, the EqPA remedy does avoid the uncertainties of calculation, and the exercise of discretion, which account for the divergent practices of tribunals hearing SDA complaints.

Section 2(5) of the EqPA sets out the remedy for a successful equal pay complaint before an industrial tribunal,
by providing for arrears of remuneration or damages for a period not exceeding two years before the date on which proceedings were instituted.

As with the remedies under the SDA, the regulatory impact of a back pay award is lessened by the fact that it is limited to the individual complaint, and does not extend to other employees who may be similarly situated, unless they too have presented complaints to the industrial tribunal. However, because of the realities of industrial relations and personnel practices, a successful case under the EqPA may "indirectly affect large numbers of persons other than parties to the particular complaint" Eaton Ltd. v. Nuttall [1977] ICR 272,274 (EAT).

Thus, in a successful EqPA complaint the employer is not obliged to raise the wages of other women receiving unequal pay, only to guarantee equal pay for the complainant, and to pay such arrears as the tribunal orders.

(cont'd.)
The statute makes no provision for any kind of punitive award against employers, nor does it allow for awards to compensate for injury to feelings. Since the SDA makes a specific provision for such awards, in addition to any other compensation ordered, and since unequal pay represents sex discrimination in the payment of wages, it would seem reasonable to compensate women who have successfully pursued an equal pay claim for the injury to feelings caused by the ongoing underevaluation of their service. A punitive award, or a provision allowing compensation for injury to feelings would have the additional advantage of increasing the cost to the employer of unequal pay. Under the present system, it is rational for the employer to pay unequal wages until challenged, since even if the complainant prevails, the respondent will only have to pay arrears owing and no additional penalty attaches.

In the sample, there were twenty successful complaints under the EqPA. In all but one of these cases, the tribunal either calculated the amount of back pay due, or directed the parties to do so. In the one case in which no award was made, the male applicant had not suffered any quantifiable financial loss. In five of these decisions, the remedy was directed to multiple complainants, where separate complaints had been considered and heard together. Amongst the cases in which the back pay award was calculated by the tribunal, the highest award was for £2,845 in back pay awarded to a sales executive in Welch v. Venteck Ltd. (London, 1981).
This sum represented arrears for just under one year, and indicates that, for the individual, quite considerable sums of money may be at stake in a claim for equal pay.

While calculations for compensation under the EqPA presented few of the uncertainties intrinsic to monetary remedies under the SDA, the remedies available under both Acts demonstrate the same failure to encourage compliance with the law, through their focus on the individual, and the absence of any meaningful sanctions for non-compliance. As shown in earlier chapters, both the EqPA and the SDA make some provision for enforcement outside of the individual tribunal remedy system through the arbitration powers of the Central Arbitration Committee, (CAC), and the power of the EOC to issue non-discrimination notices and to seek injunctive relief in the county courts. However, as illustrated earlier, the possible impact of the CAC has been limited by the small number of cases brought to its attention by trade unions, and by the decision in the Hymac case which effectively limited the scope of its jurisdiction. The EOC's powers are essentially formalistic and do not adequately address the need either for compensation or for deterrence.

The problems in the remedial provisions of the legislation are not inherent in the idea of anti-discrimination law, but rather, represent conscious choices about the nature of enforcement and the functions that remedies are seen as appropriately addressing. Although the
British legislation borrowed a number of ideas and structures from the United States, it did not incorporate the same approach to remedy. In the second part of this chapter, the American approach is examined for the purpose of comparison.

III. THE AMERICAN APPROACH TO REMEDY

The American approach to remedy overcomes to a considerable extent two of the problems associated with the British approach: the failure to address the need for remedies to fulfill regulatory as well as compensatory objectives, and the focus only on individual rather than group remedy. These problems are necessarily inter-related in practice, since an approach which allows a broad form of remedy, encompassing more than the individual complainant, is more likely to achieve some degree of deterrence through its remedial provisions. However, it is useful to examine each of these issues separately, as the arguments surrounding each question are distinct.

The Regulatory Function of Title VII

Earlier in this chapter the question of remedy was presented in the context of the British legislation as involving a choice between compensatory or deterrent functions, although it was acknowledged that all remedies address the question of compliance to a lesser or greater degree. In American anti-discrimination law, the line between the two kinds of remedies has blurred, with the legislators conferring on the court's broad powers to frame
remedies, and with the courts explicitly recognizing the legitimate regulatory function of the remedies devised. This development has occurred within a context in which the role of judges as policy makers in contemporary American society has gained legitimacy with regard to a wide range of social concerns (Chayes, 1976; Hurst, 1980-81; Horowitz, 1977; Sarat and Cavanagh, 1978).

Title VII provides by way of remedy, in s. 706(g), (42 U.S.C. s. 2000e -5[g]), that the courts may issue injunctions forbidding illegal practices, and may additionally:

order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay -- or any other equitable relief as the court deems appropriate.

In deciding cases in which the kind or extent of remedy has been an issue, American courts have affirmed that the primary purpose of Title VII is to eradicate employment discrimination, and have designed remedies with that objective in mind. A landmark case in the area is Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), a Supreme Court decision on a class action by black employees seeking injunctive relief from Title VII violations, and an award of back pay to compensate for lost earnings opportunities. On the question of whether back pay was appropriate, the Court noted that:

The power to award backpay was bestowed by Congress as part of a complex legislative design directed at a historic evil of national proportions. A court must
exercise this power in light of the large objective of the Act. (422 U.S. at 416).

Asserting that the courts' discretion in awarding or refusing back pay must be measured against the purposes which inform Title VII, and not as the appellant argued against some standard of good faith or intentionality, the Court quoted its own prior decision in Griggs v. Duke Power Co. 401 U.S. 424 (1971) to the effect that the primary objective of Title VII was a prophylactic one:

It was to achieve equality of employment opportunities and remove the barriers that have operated in the past to favor an identifiable group of white employees over other employees (Griggs cited in Albemarle 422 U.S. at 417).

The Court in Albemarle goes on to state that:

Backpay has no obvious connection with this purpose. If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality (Ibid.) (Emphasis added).

Thus, the Court continues,

The reasonably certain prospect of a backpay award provides the spur and catalyst which causes employers. . . to self-examine and to self-evaluate their employment practices, and to endeavor to eliminate, so far as possible, the last vestiges of discrimination (Ibid.).

The Court found no contradiction between this explicit deterrent purpose of an award of back pay and the objective of compensating individuals for injuries suffered. On the general nature of compensation for legal injuries of an economic character, the Court cited a 19th Century case, Wicker v. Hoppock (6 Wall. 94, 99, 1867) to the effect that:

. . . the general rule is that when a wrong has been done and the law gives a remedy the compensation shall be equal to the injury. The latter is the standard by
which the former shall be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed.

In the context of Title VII, of which "it is also the purpose ... to make persons whole for injuries suffered on account of unlawful employment discrimination," this principle enables the court to award backpay for injuries suffered, without a showing as to each individual before the court that they would have been promoted to a higher paying position, absent discrimination. Rather, the conclusive showing of practices illegal under Title VII triggers the award of back pay, at the Court's discretion, but in light of the twin objectives of deterrence and compensation, there is no contradiction in this view, between the purposes of remedy: a monetary award may fulfill simultaneously both purposes, and both are legitimate. 7

Expanding the Scope of the Remedy -- Class Actions

The history of the American class action can be traced to the English 'bill of peace' in the seventeenth century. This 'bill' was a procedural device used by the Courts of Chancery to allow an action to be brought by or against representative parties when three conditions could be met: the number of persons involved had to be too large to permit joinder, all members had to have a joint interest in the matter adjudicated, and the named parties had to adequately represent the interest of those members not present. If these conditions were met the judgement issued would be
binding on all members of the represented group (Cound, Friedenthal and Miller, 1980, p. 561).

Provisions for class actions modelled on the old English procedure existed, prior to 1938, in various state codes and in the Federal Equity Rules. In 1938, the Federal Rules of Civil Procedure (FRCP) were adopted, and Rule 23 provided for a class action that would be available in both legal and equitable actions in the Federal courts. In 1966, the Federal Rules were amended, and some significant changes made in the rule governing class actions.

Class actions are particularly appropriate where those who have allegedly been injured "are in a poor position to seek legal redress either because they do not know enough or because such redress is disproportionately expensive" (Kalven and Rosenfield, 1941, p. 686). Furthermore, the "historic mission" of the class action has been "to take care of the smaller guy" (Frankel, 1966, p. 299). In a decision on a class action by stockholders against a corporation, Judge Weinstein noted that, "It is the duty of the Federal courts to render private enforcement practicable. Other than the class action, the procedures available for handling proliferated litigation - joinder, intervention, consolidation, and the test case - cannot serve this function in a situation like the one presented here" (Dolgow v. Anderson, 43 F.R.D. 472, 484, E.D.N.Y. 1968). The judge explained that the alternative devices presuppose a group of economically powerful parties able and
willing to take care of their own interests, through individual suits or individual decisions about joinder or intervention. Where the parties lack these attributes, the class action nevertheless provides an avenue for redress of grievances.

A second function of the class action is its deterrent effect. Again Judge Weinstein, in his decision in the Dolgow case, pointed to the prophylactic effect of the class action. Noting that the Federal securities laws under which the case was brought have a deterrent function, the judge stated that the class action served to effectuate this objective by making real the threat of exposure and civil liability. A 1973 article in the business periodical Fortune made the same point. Quoting the Dean of the plaintiffs bar in class action suits, the author explained that the big problem that class actions posed for corporations was "the enormously increased legal exposure. That class suit really strikes at the pocketbook. In some cases the corporation's very existence is at stake."

(Carruth, 1973, p. 66).

These arguments about the impact of class actions generally apply with particular force in the area of employment discrimination litigation, where the individual harm suffered is usually part of a pattern and practice of discrimination, affecting, potentially or actually, a much larger group than the individual plaintiff.
The utility of the class action as a means of vindicating the rights of small claimants has inevitably led to its increasing use by social activists and their advocates, and this phenomenon has in turn led to increasing criticism of the device on the grounds that it imposes large burdens on already overburdened courts (Cound, Friedenthal and Miller, 1980, p. 564), and that it is a form of "legalized blackmail" (Handler, 1971, p. 9). In recent years, this counter-attack has achieved some success, as the courts' interpretation of the procedural requirements for a class action have become more stringent. Courts have rejected putative class actions on a number of grounds, including unmanageability, and the existence of dissimilar interests within the class.

To understand the ways in which defendants may attack the validity of a class action, it is necessary to understand the procedural requirements of Rule 23. The rule establishes four prerequisites for a class to be certified, to which the courts have in practice added two more. Under Rule 23 (c) (1) a suit brought as a class action must be certified as fit to proceed on a class basis. Typically there is a hearing on this question, often accompanied by extensive documentation and sometimes by oral testimony (Cound, Friedenthal and Miller, p. 579). It is at this stage that challenges to the validity of the class may be made by the defendant.
The two requirements developed by the courts are that there must be a class, and that the class representative must be a member of the class. Although these matters appear to be self-evident, the court's requirements address in the first instance the need for a class to be described in such a way as to be ascertainable, and secondly to meet the technical standing requirement by providing that the class representative be a present member of the class.

Challenges to the validity of a class are more likely to be made with reference to one of the express provisions of Rule 23, or on the grounds that the suit does not fall within one of three categories of class action described in the rule.

The first of the four express prerequisites is Rule 23(a)(1) which requires that the class be so numerous that joinder of all members is "impracticable." This requirement tends to be interpreted according to a formula. If a class has more than forty members, the 'numerosity' requirement is usually satisfied; if it has less than twenty-five, it usually fails to satisfy the requirement. In a putative class of between 25 and 40 members, the court will examine such variables as geographic dispersion, and the size of the individual's claim, in order to determine whether joinder would be more appropriate than a class action.

The second of the express prerequisites is the 'commonality' requirement of Rule 23(a)(2). The action must raise issues of law or fact common to the class. One
significant common question is enough. The third of the express requirements is the requirement of Rule 23(a)(3) that the claims of the representative party be typical of those of the class. Neither of these requirements is likely to raise any significant issues during the certification hearing. Indeed, the 'typicality' requirement appears to be redundant, serving no further purpose beyond that achieved by the requirement of commonality, and adequacy of representation, the latter being the fourth requirement, as set out in Rule 23(a)(4).

The fourth requirement, that of adequacy of representation is probably the single most important requirement, and the one that is most heavily litigated. The Rule requires that the court find that the representative party will fairly and adequately protect the interests of the class, and it derives its importance from two factors, one philosophical and one more pragmatic. On the philosophical level the rule embodies a concern for ensuring the due process rights of the members of the class who will be bound by the judgement in the action. On a more pragmatic level the rule seeks to minimize the chance of a collateral attack on the judgement on the grounds of a defect in the adequacy of representation. The test for adequacy of representation includes three factors. First, the representative party must be adequate in the sense of having a substantial stake in the litigation. Second, the court will enquire into the adequacy of the class lawyer.
As with the class representative, the main focus of the enquiry is on the attorney's *bona fides*, but technical competence is also important, given the complex nature of class action litigation. Third, the court has the responsibility of examining the proposed class for evidence of any internal antagonisms.

In addition to meeting the express requirements of Rule 23(a), the proposed class action must also fall within one of the three categories of class actions enumerated in Rule 23(b). The first category, the 'prejudice' class action, covers situations in which individual actions which might cause prejudice to either class or non-class members can be avoided by the use of a class action. The second category includes suits for injunctive or declaratory relief. More actions are brought under this category than under either of the other two, and one of its primary applications is to employment discrimination actions. For an action to fall within this category, it is sufficient that the defendants conduct be "generally applicable" to the class; there is no requirement that the conduct is damaging or offensive to every class member. Finally, there is the "damage" class action where the only tie among members of the class is that they claim to have been injured in the same way by the defendant. There are two prerequisites for an action to fall under this provision: first, common questions of law and fact must "predominate" over questions involving only individual members and second the court must find that "a
class action is superior to other available methods for fair and efficient adjudication of the controversy" (FRCP 23 (b)(3)).

Employment discrimination suits tend to fall within the second two categories of class action. A suit might allege discrimination in recruitment, for example, and seek injunctive relief, under 23 (b) (2), and damages under 23 (b) (3). Although the action could be maintained under either of these provisions, it will be certified only under one of them. Some courts have adopted the practice in such a situation of certifying the action under 23 (b)(2) to avoid the procedural complexities which attach to an action under 23 (b)(3).

Rutherglen (1980, p. 696) notes that the difference between the minimal requirements of 23 (b)(2) and the more extensive procedural safeguards of 23 (b)(3) has become particularly important in Title VII litigation. He notes that plaintiff's lawyers have persuasively argued for a liberal interpretation of Rule 23 in Title VII cases in light of the weight to be accorded to the substantive policy against discrimination. Commenting on what he appears to view as an excessively pro-plaintiff approach he notes that:

Ironically, the fear that the EEOC would enforce the statute too vigorously led Congress to grant the power to interpret and apply the statute to the federal courts, which enforced it as vigorously as any administrative agency could, but with the greater prestige of the federal judiciary.

Although some Circuits have in recent years adopted a more restrictive approach to class certification, it is
still true to state as a generalization that the federal courts have favoured a liberal approach towards class certification in Title VII cases. The liberal trend was halted but not reversed by the Supreme Court decision in *Rodriguez v. Taylor* 431 U.S. 395 (1977) in which a more restrictive attitude towards class certification was approved. The precedential significance of this decision has been limited, but it has nevertheless signalled to some lower courts to depart from the trends towards liberal certification. Others have continued as before (Rutherglen, 1980 p. 723).

Even where the attitude of the courts is reasonably favorable, litigating a class action produces problems of considerable magnitude for plaintiffs. Defendants almost invariably oppose certification in order to limit their exposure to monetary and injunctive relief, and the process of certification will therefore represent an additional and probably quite burdensome stage in the proceedings.\(^8\)

One study has shown that relief benefiting a class of employees has only been awarded in a minority of Title VII actions. Dunlap (1977, pp. 62-63) states that reported cases for the years 1965 through mid-1970's indicate that courts awarded class relief in only 13% of all Title VII sex discrimination cases, and 24% of race discrimination cases.\(^9\)

It would be a mistake, however, to focus only on the procedural difficulties potentially attendant upon a class action suit, without restating the advantages of this kind
of action. The class action provides a way of expanding the scope of relief, and thereby promoting compliance with the law through deterrence; it helps to spread the cost of litigation; and it is a procedure suited to the achievement of the broad, remedial objectives.

The development of some kind of system of class relief, going beyond the aggregation of the claims of individual named plaintiffs, would appear to suggest one direction in which the British legislation might be amended to secure more compliance with the law. Such a proposal must, however, confront a number of difficulties. First, there is no provision for a class action in current British civil procedure; and proposing the development of such a system for discrimination law is therefore likely to run aground on the shoals of political opposition, and judicial inertia. Nevertheless, it may be possible to frame such a recommendation in a way that would maximize its acceptability, by seeking its introduction in a relatively limited context, thus avoiding the charge that it would cause disruption throughout the legal system. The ability to bring suit on behalf of a class, seeking a class-wide remedy, could for example only be granted to the EOC, which organization is already entrusted with powers of formal investigation that extend beyond individual complaints.

Introducing class action suits in this way would have the advantage of making the procedure available to an organization with sufficient resources to use it. Private
class actions are becoming increasingly rare in the United States, as their cost and complexity increases. The EEOC has the authority to bring class action suits, and private and charitably funded litigation groups in the United States have also borne much of the brunt of pursuing class action; groups like the ACLU Women's Project, Equal Rights Advocate, NOW Legal Defense Fund, the League of Women's Voters, and the Center for Law and Social Policy have all contributed to the development of Title VII class action litigation. In Britain, which lacks a developed litigation network, and where the idea of introducing a class action procedure would be at odds with established legal procedures, a proposal which sought at least initially to introduce the procedure as part of the administrative branch of enforcement, might mitigate the degree of resistance to be expected while conferring the authority on an organization which could bring institutional resources to bear on its use. Since the EOC already has powers of formal investigation which may be company wide and do not have to be triggered by an individual complaint, the proposal could be presented as an incremental change, but one which would put real weight behind the idea of the strategic agency.

This proposal represents only one idea as to how some variant of class action procedure could be introduced into the British system of anti-discrimination enforcement. That such a change is desirable, if not necessarily politically feasible, is illustrated by the empirical data on the
present approach to remedy, and on the social literature which links compliance to deterrence.

Whether a proposal for class action is introduced or not, the present remedy system should provide a major focus for efforts to amend the legislation. The American system provides an example of a system in which the regulatory and compensatory functions of legal remedy are synthesized in a way which is not apparent in Britain. Within a theoretical framework which sees no contradiction between those two functions, the statutory provisions have allowed courts to order a wide range of remedies, including back pay, front pay, reinstatement, affirmative action, and equitable remedies. To introduce a broader range of remedies, and to break down the compensation/deterrence dichotomy should be high on the agenda of those seeking to improve the effectiveness of the British legislation.

A concern with remedy is not one which appears frequently in the literature on British anti-discrimination law, perhaps because of its connotation as an essentially legalistic and therefore limited concern; but until attention is focussed on the shortcomings of the British remedy system, as well as on the conceptual, definitional, and procedural inadequacies, widespread compliance is unlikely.
NOTES

1 See Appendix A for details of the sample.

2 The complainant in Hurley v. Mustoe appealed again to the EAT. The EAT held that the tribunal has the discretion whether or not to award any compensation, since its duty is to award such of the available remedies as is "just and equitable." However, if the tribunal exercises its discretion to award compensation, it must compute the amount on the basis of what would be recoverable in county court, not on the basis of what the industrial tribunal thinks is just with regard to damages recoverable at common law. Further, the EAT explained, the equitable doctrine of "clean hands" has no application to the assessment of damages in the county court.

3 See Chapter 7, above.

4 The common-law has traditionally allocated the burden of proof between parties, with a consideration for who has access to information, so this proposal would not represent any radical departure from customary procedures.

5 "Front pay" is an American concept which refers to monetary relief for any future loss of earnings resulting from past discrimination. See e.g. Patterson v. American Tobacco Co., 535 F. 2d 257 (4th Cir. 1976), cert. denied; 492 U.S. 920 (1976).

6 In this context it is worth re-emphasizing that no costs are available to the complainant at tribunal hearings, so the expense of the proceeding can be borne without any monetary recompense.

7 This view of the remedial provisions of Title VII was reasserted in a more recent case, Ford Motor Company v. EEOC, 458 U.S. 219 (1982). Although the effect of this decision is, according to the minority opinion by Justices Blackmun, Brennan and Marshall, to reduce the employer's liability, and hence his incentive to comply with the law, the majority decision does nevertheless reassert the two legitimate purposes of Title VII as ending discrimination
and providing compensation.

8 It should be noted that Rule 23 does not apply to class actions brought by the EEOC, and thus such suits are not hampered in the same way by the procedural requirements outlined here. (Shee Chapter 8, supra.)

9 The small percentages should, however, be read in light of the scope of the awards made in actions that result in class relief, which can be very far-reaching.
CHAPTER TEN

THE INTER-RELATIONSHIP OF SUBSTANCE AND PROCEDURE IN
THE ADJUDICATION OF DISCRIMINATION LEGISLATION

In preceding chapters I have examined both the legal
definitions which provide substantive meaning to the equal
pay and sex discrimination legislation, and the structural
and procedural characteristics which provide a framework
for implementation. The procedural and substantive character-
istics of the legislation are, of course, intertwined in
numerous ways. It is a truism to assert that procedural
factors will determine, at least in part, the impact of a
specific law. It is nevertheless useful to emphasize this
point by empirical analyses of implementation. My concern
here is to illustrate the interrelationship of substantive,
structural and procedural factors in the specific context of
an examination of the way in which key elements of the Equal
Pay Act have been operationally defined in the process of
adjudication. Cases in the sample provide the basis for an

Cases in the sample provide the basis for an examin-
ation of the way in which tribunals adjudicate cases in light
of their understanding of the statute and judicial precedent.¹

Two elements have appeared as being of prime importance in the adjudication of claims under the original provisions of the Equal Pay Act by the tribunals and the appellate courts: the factors that are significant in determining "like work" for the purposes of a claim for equal pay, and the factors that will successfully constitute the defense of a material difference or factor other than sex.

These two issues illustrate the burden of proof borne by the respective parties, the kind of evidence adduced by them and the significance attached to it by tribunals, and the range of situations which fall within, and outside of, the scope of the Act.

I. LIKE WORK

Section 1(4) of the 1970 EqPA, as amended, provides that:

A woman is to be regarded as employed on like work with men if, but only if, her work and theirs is of the same or a broadly similar nature, and the differences (if (cont'd.)
any) between the things she does and the things they do are not of practical importance in relation to terms and conditions of employment; and accordingly, in comparing her work with theirs, regard shall be had to the frequency or otherwise with which any such differences occur in practice as well as to the nature and extent of the differences.

This section not only provides a definition of 'like work' (work that is of the same or broadly similar nature) but also offers guidance in how to assess the weight that should be given to any differences that exist between the jobs sought to be compared. Thus, the extent and nature of any differences is to be considered, and attention is to be paid to the frequency with which they occur in practice. Applying section 1(4) to the facts of a particular case involves the tribunal in a two-stage process of determining first, whether the jobs are the same or broadly similar, and second what import should be attached to any differences that exist. The burden of proof is on the applicant, at this state of proceedings, to demonstrate that she is engaged in 'like work' with the chosen comparator. In Capper Pass v. Lawton, (1976) IRLR 366, the EAT set out guidelines for the way in which tribunals should approach these two issues. On the question of whether the work involved is the same or broadly similar, (Mr. Justice Phillips) noted:

This question can be answered by general considerations of the type of work involved and of the skill and knowledge required to do it. It seems to us to be implicit in the words of subsection (4) that it can be answered without a minute examination of the details of the differences between the work done by the man and the work done by the woman. (Ibid. at 367)
If the work being compared is the same or broadly similar, it is then necessary to go on to consider the detail and to inquire whether the differences between the work being compared are of practical importance in relation to terms and conditions of employment. In answering that question the Industrial Tribunal will be guided by the concluding words of the subsection. But it seems to us trivial differences or differences not likely in the real world to be reflected in the terms and conditions of employment ought to be disregarded... The only differences which will present work which is of a broadly similar nature from being like work are differences which in practice will be reflected in the terms and conditions of employment.

Thus the EAT directs the attention of the tribunals to the wording of the statute, and for guidance in interpretation asserts that a broad approach is to be taken, a general assessment rather than a minute examination, to determine whether the work is the same or broadly similar; and that in considering differences between jobs, "trivial" differences should be ignored, and only those that could be expected in the real world to be reflected in the terms and conditions of employment should be taken into account. Guidance of this kind leaves the industrial tribunals discretion in applying these standards to concrete situations.

In the sample, most tribunals hearing equal pay applications are involved in making a determination as to whether the work of the complainant and a comparable man are 'like work' under the terms of the Act. Unless a complaint is brought on the basis of a job evaluation study under S1(5) of the Act, the burden of proof is on the complainant
to show that she and her comparator are employed on like work under the terms of S 1(4).

There is, however, considerable variation between the tribunals in the way they approach the task, the specificity with which they spell out the statutory and interpretive basis of the conclusion they reach, and in their assessment of what jobs are similar enough to come within the scope of the Act.

In some cases, the job of the tribunal is concluded with a determination of whether the work sought to be compared is similar. If they find that the jobs in question are completely dissimilar, then there will be no need to address the question of the importance to be attached to any differences between them. However, for many tribunals, this second question does arise and again there is considerable variation between tribunals on the kinds of differences that are of sufficient practical importance to justify a wage differential between men and women otherwise engaged on broadly similar work.

Although the determination of whether jobs are broadly similar, and the issue of whether differences between the jobs are of practical importance, may be conceptualized as a two-part enquiry, in practice, some tribunals reach a decision on the merits of a case without formalizing their enquiry in this way. Consequently, the empirical data on tribunal decision-making presented here is set out in the form of brief case description and analysis, rather than by
addressing the two topics separately, and attempting to extract from the decision the part of the reasoning which applies to each issue. Presenting brief descriptions of some decisions provides a fuller picture of tribunal reasoning on the general question of comparability and a clearer sense of the diversity in the process, than would otherwise be gained from the material. The cases presented here were chosen from the sample because of the complexity of their fact situations, the illuminating nature of the tribunal reasoning, and because together they provide some idea of the extent of discretion and diversity which characterizes this area.

The first case, Hancock v. L.C. Plant Hire (Manchester, 1977), characterizes the 'easy' pay case: there are no differences in the jobs performed by the applicant and the comparable male, the comparable male gave evidence as to the discrepancy between his job description and the actual job performed, the respondents made clumsy attempts to fabricate evidence, and their managing director stated to the industrial tribunal that he did not believe in equal pay for women.

The applicant was employed as a hire desk clerk at one of the respondent's depots. She earned less than men doing the same work at other depots, and after raising the matter with her employer, contacted the EOC. The EOC in turn contacted the employers who replied that differences in pay were related to differences in responsibility and ability.
At the hearing the employers asserted that the men received more pay as they were 'managers' whereas the applicant was a 'clerk'. However, the tribunal found that the work of each was broadly similar and noted that "whether the job which the applicant was doing or which the other men referred to were doing is described as being 'a clerk' or 'manager' in our view makes no difference."

In order to bolster their case the respondents put in a document purported to be the job description of one of the comparable men. "The Tribunal finds that it was nothing of the kind! It was prepared a week or so before this case and... it was most misleading." The applicant requested, and was granted, an adjournment to call this man as a witness. At the adjourned hearing it became clear to the Tribunal that "the so-called job description... was a figment of somebody's imagination," as it set out qualifications and work experience that the job holder testified that he did not have. ("...not that he was any the worse for that," noted the Tribunal. "We were most impressed by him as a witness and to his ability.")

The Tribunal was also given as evidence by the respondents a document stated to be the firm's grading system and salary scale, prepared in November 1976. The Tribunal found that this data was false, and that it had in fact been prepared after the applicant raised her claim for equal pay. The Tribunal was "not very happy" about the falsification. Both the chief accountant/company secretary and the managing
director of the company gave evidence to the tribunal. The tribunal rejected the evidence of the former as "demonstrably false," while the managing director "made it perfectly clear beyond peradventure to us that he did not believe in equal pay for equal work and had no hesitation in telling us such, his reason being that men are breadwinners."

In reaching this conclusion that work done by the applicant and the male 'manager' were broadly similar the tribunal relied heavily on the testimony of the comparable man himself, "a patently honest witness with no axe to grind," and on the evidence of the respondents regional manager. They rejected the evidence given by the senior officer of the firm, and the documents produced by them, labelling these last as patently false.

The decision in this case turned almost entirely upon credibility issues, and in this respect it is unusual. The tribunal did not have to weigh whether certain differences between jobs took them outside of the meaning of "broadly similar," but only to consider whether there was any credible evidence of differences, and they concluded there was not.

The next case encapsulates a more common situation, where some differences do exist between jobs sought to be compared, and the crucial task of the tribunal is to examine these differences in light of the statutory provisions.
In *Linton et al. v. British Steel Corporation* (Cardiff, 1981), the applicants were four women working as vending assistants/drivers. Their job was to replenish, clean and repair some 80 vending machines at 20 locations on site, and to check, count and bag money, and to refill the machines' change givers. This job had always been done by women, working in pairs. The applicants compared their job to that of the catering supplies officers (CSO's), who were all men.

In reaching their decision, the tribunal compared written job descriptions for the two jobs, and heard evidence from the parties. They found that CSO's worked alone, unlike the women who worked in pairs, but under the supervision of a senior supervisor. Their job involved transporting catering supplies to site buffets. They had no responsibility for cash handling, their shift pattern differed from that of the women, and they did more loading and unloading of supplies than the vending assistant/drivers. After considering the evidence the tribunal divided, with the majority, concluding that the women were entitled to equal pay, and the minority (the chairman) disagreeing.

The majority found that the jobs were broadly similar. Both men and women drove vehicles, and although the vans driven were not the same size, both came within the same license group. Both groups worked on the same site, and drove approximately the same distances in the same weather and site conditions. Both groups loaded and unloaded their
own materials, and were responsible for checking deliveries and keeping records. Both groups supplied the same customers. Both men and women were responsible for basic maintenance duties for their vehicles.

The majority conceded that there were some differences between the jobs, but concluded that they were not of practical importance. The major differences lay in the fact that the men carried heavier weights than the women in the course of their duties, and that only the women had responsibility for the handling of cash. The majority decision weighs these factors against each other, noting:

It is true that there were some differences, since the ladies had additional responsibilities for cash and for security. The fact that that made their roles more valuable ought not to disentitle them to their remedy. The extra weight carried by the men was compensated in work value by the extra responsibilities for cash security and technical skills in repairing machines.

The chairman's minority decision found that the differences between the mens' and womens' jobs took them outside the scope of like work. He attached particular importance to the differences in the size of van driven, and in the amount of heavy lifting undertaken.

The CSO would spend a typical shift loading and unloading bulk supplies at various points, and for the rest of his time he would be driving a 30 cwt. van. The ladies on the other hand would spend the bulk of their time replenishing, cleaning, and maintaining vending machines. It is true that by generalising one can find a formula which would describe both jobs in similar terms. That however is not the test. One has to look at what the individuals actually did. In the Chairman's view the men did tasks which were different from those of the ladies. . .He has some sympathy for the view of his colleagues, that in some ways they had a more difficult and responsible job, and on that account ought arguably to have been paid more than the
men. That, however, in itself is an argument which impliedly acknowledges that the two jobs were different.

The majority and minority views in this decision encapsulate the kind of differences which are often found between tribunals. In Linton, the majority decision was that the women applicants were entitled to equal pay with their comparators. In a second case involving a similar, although not identical fact situation, a unanimous tribunal found no basis for an award of equal pay. In this case, Young v. Beecham Group Ltd. (Glasgow 1977), a female vending assistant claimed equal pay with male vending stewards. The tribunal found that the work of both was broadly similar, but that differences of practical importance explained the pay differential. The tribunal examined the job description of the applicant and her comparators, and heard evidence on behalf of both parties. The tribunal explicitly used the decision in Capper Pass to guide their determination, looking at the frequency, nature, and extent of the differences. The tribunal found a difference in responsibility, between the applicant and her male colleagues, with respect to the maintenance and repair of machines. Male vending stewards were given "at least a week's training" in the job and were then supervised by an experienced steward while they learned how to carry out their duties. The job was graded semi-skilled. The applicant, whose job was graded unskilled, was not responsible for repairs or maintenance of machines. The
tribunal also took into account the fact that because the applicant worked only day-time hours, there was always available a supervisor to handle complaints. The male stewards, when working on the night shift were expected to handle complaints themselves, and in the event of a machine breakdown in these hours, to decide whether food in the machine would have to be discarded. The tribunal appears to have heard no evidence on the frequency with which male stewards had to make repairs, handle complaints, or make decisions following a machine breakdown, but concluded nevertheless that, "These differences seemed to the Tribunal to be differences of considerable importance" and refused the application for equal pay.

These two decisions, Linton et al. and Young, illustrate how quite similar fact situations, decided by tribunals on the basis of the same guiding statutory provisions, may result in dissimilar outcomes. The point is not to suggest that either of the tribunals was wrong in the decision it reached, but rather, to indicate the leeway the statutory provisions confer, and the difficulty in establishing an objective test for what constitutes like work.

Even where the statute and the EAT offer what appears to be more detailed guidance, on what constitutes a difference of 'practical importance,' the process of tribunal decision-making appears to be infinitely variable. Some tribunals examine much more closely than others the question of how frequently differences which exist between the jobs
actually occur in practice. The approach of the tribunal in *Young* above may usefully be compared with that of the tribunal which heard *Butler v. E.H. Booth and Co. Ltd.* (Carlisle 1977). In this case a woman counter assistant in a grocery store claimed equal pay with a man employed as a provisions assistant. The tribunal made findings of fact as to the work done by each of these employees, paying particular attention, in the case of the male provisions assistant, to the alleged differences between his work and that of the complainant. Out of six alleged differences put forward by the employer, the tribunal found that four of them were in fact differences between the work of the employees. They then went on to consider, in the light of the findings of fact about the two jobs whether the differences were such as to be reflected in terms and conditions of employment, noting "for this purpose we stress that we have regard to the frequency with which such differences occurred." Using this test, with regard to all four job differences, the tribunal found that the male employees' involvement was minimal, and that the applicant had therefore satisfied the burden of showing like work."

In *Cassidy et al v. Edward Gardiner and Sons, Ltd.* (Edinburgh, 1977), the tribunal took the unusual step of paying an observational visit to the work site to help them in their determination of whether there was like work. The case involved three women weavers claiming equal pay with men weavers employed at the same textile mill. Jobs in the
mill were segregated by sex to a considerable extent. The applicant was a weaver in a department in which all employees were women, and she claimed equal pay with men working in a department in which no women were employed. It was common ground between the parties that the quality of tweed produced in the two departments was the same, but that the quantity produced differed: women weavers, who looked after only one or two looms, produced fairly small lengths of material for use as samples and patterns, whereas male weavers, responsible for up to four or five looms, produced saleable lengths of material. The women worked only day shifts, whereas the men worked either a rotating shift or permanent night shift (for a shift allowance). There were some differences in process between the two looms, although the tribunal noted that the National Agreement dealing with minimum wages did not distinguish between types of looms. Taking all the factors into account, and applying the tests of Capper Pass, the tribunal found that the applicant was employed on like work and was entitled to equal pay. In reaching this decision the tribunal noted that "we must confess that we would not have been able to reach this decision with such confidence if we had been required to do so purely on the basis of the oral evidence," and thanked the employers for allowing them to carry out an inspection. In particular it seems that the on-site visit was invaluable to the tribunal in reaching their conclusions as to the respondent's argument that the different looms used by the
men and women involved different degrees of responsibility. The employers asserted that since the men and women were employed on different types of loom, the male workers employed worked under greater pressure than the women, since the looms they used were much faster. The tribunal rejected this argument, not on the oral evidence alone, but from their own observations during the visit to the mill:

Our own firm impression gained from watching the men and women at work was that the men showed no sign of being under greater pressure than the women. Seeing the highly automated machines which the men had in operation our impression was exactly to the contrary.

The decision in Cassidy is an interesting one since it shows the successful application of equal pay for like work in an industry in which sex segregation is common, and belies the argument that the 'like work' standard is necessarily limited in its ability to redress inequities in such situations. The case of Harris v. Duramin Engineering Co. (Gloucester 1979) provides a similar illustration.

In Harris, the respondent employers were manufacturers of plastic components for food containers. The applicant, a woman, was a chargehand in a section in which the only other chargehand was male. The applicant, who was classified as semi-skilled, supervised 25 women, also semi-skilled. The male chargehand was classified as skilled and supervised 12 male employees, seven skilled and five semi-skilled. The male chargehand earned £8 per week more than the applicant, and asserting that they were both engaged in like work, she brought a claim for equal pay.
The respondents conceded that the work of the two chargehands was similar but asserted that there were two differences which justified the pay differential: the fact that the man arrived 1 1/2 hours earlier than the applicant in the morning to supervise the lifting of heavy components, and that he had the ability to read technical drawings. The tribunal ascertained that the latter involved no more than the ability to measure components, that the male chargehand had acquired his ability on the job, and that the applicant had not been given the opportunity to do so. The tribunal rejected the employer's contention that these factors were differences of practical importance within the meaning of the Act, explaining that:

The heavy lifting which was done early in the morning was compensated by overtime rates. The opportunity of reading technical drawings could have been given to (the applicant) but it was not. We do not think that these two differences are of practical importance... One would not normally expect a difference in rates of pay or hours in a contract of employment because of these two factors.

The tribunal in reaching this decision attached no importance to the difference in skill labels between the applicant and the male chargehand, noting earlier in the decision,

In connection with the meaning of the word 'skilled' in the context of this case, we were in a certain difficulty. On the evidence put before us it was difficult to ascertain any concrete criteria by which the company distinguished skilled and semi-skilled and unskilled employees.

What is important in both Harris and Cassidy is the willingness and ability of the tribunals to consider the
effect in practice of any differences which the respondents offer as a defence to the assertion that work is broadly similar. In both cases, the tribunal found a basis for an award of equal pay despite a quite rigid segregation by sex in the employer's labour force.

In Garden v. Ministry of Defense (Edinburgh 1977) the equal pay claim also arose in the context of a segregated labour force, but here the differences between jobs compared were considered by the tribunal to be substantial enough to justify in law a pay differential between men and women workers. In this case, a woman upholsterer employed by the Ministry of Defense claimed equal pay with male upholsterers. The applicant, despite having completed an apprenticeship, was employed as a semi-skilled worker. The male upholsterers were employed as craftsmen. According to the applicant's evidence, the male workers spent about 70 per cent of their time in cutting materials and making templates. The applicant on the other hand was employed almost totally in sewing on different machines. The applicant conceded that there was no doubt that the nature of the work done by the male upholsterers was quite different, but she felt that she was engaged in like work with them, within the meaning of the Act, because both jobs involved equal skill and were of equal value to the respondents. On the evidence presented and the job descriptions submitted, the tribunal held that there was not 'like work,' stating, "No matter how broad a view we were to
take we could not see any way in which the jobs in this case would be described as vaguely similar." The situation in this case differs from that in Cassidy and Harris above, in that here not only was the workforce segregated, but the job process was divided into two separate but related components as between the male and female occupations. In this respect, the case illustrates the classic situation in which an equal value approach to equal pay could, if properly implemented, provide a remedy which is not available under the 'broadly similar' approach.

The above cases show the range of situations which may be presented to tribunals as the basis for an equal pay claim, as well as the varying degrees of rigour and precision with which the tribunals approach the question of what constitutes 'broadly similar' work. As the dissenting chairman in Linton noted, it is often true that "by generalizing one can find a formula which would describe both jobs in similar terms." The extent to which tribunals are willing or able to generalize in this way becomes a crucial factor in those situations in which some differences between jobs exist, and the question the tribunal must address is whether they are of practical importance. At this stage of the proceedings the burden of proof is on the applicant. Particularly in the absence of an objective test, the ability of the applicant to meet the burden of proof will depend not only on the context of the jobs under consideration and the predisposition of the tribunal to a
particular kind of approach, but also on her ability to adequately prepare her case and to present the evidence in the most compelling manner.

Thus, the factors noted as significant in Chapter Seven again come to the fore: the need for expert representation and adequate preparation of the case will enhance the ability of the individual complainant to make the most compelling demonstration of the similarity between her work and that of the male comparator.

In Capper Pass, Phillips J explained that there were a number of courses open to the legislators responsible for enactment of the EqPA in seeking "to define the test which is to be applied in determining whether discrimination exists" [1977] ICR 83, 87. The definition of like work or work rated as equivalent represented a "middle course" between the test which would be "least favourable from a women's point of view," of equality of treatment for the same work, and that which would be more favourable to women, of requiring equal treatment for work of equal value [Ibid.].

The limited scope of the like work definition is beyond doubt, and the sample includes cases which illustrate its limiting effect. Perhaps of equal importance, however, is the fact that within a given definition, apparently quite similar factual cases may be decided in dissimilar ways. The discretion that the tribunals must exercise in interpreting
the statutory criteria emphasizes the impact of non-definitional factors on the outcome of cases involving similar fact situations and the same legal grounds of action, particularly where, as here, the test to be construed is essentially subjective. A change in the statutory definition of when equal treatment is required, to broaden the scope of the Act, will bring within the compass of the law some cases which would otherwise be excluded. The way in which a new definition is drafted, and its subsequent interpretation by appellate courts and tribunals, will however determine the parameters of the statutory amendment in practice.

Once the applicant has demonstrated that she is engaged in like work with a man, the burden shifts to the respondent to establish that any difference in pay is genuinely due to a material difference other than sex. The burden of proof is the ordinary burden of proof in civil cases — that is, the employer must show, on the balance of probabilities, that the difference is due to some factor other than sex. National Vulcan Engineering Insurance Group Ltd. v. Wade [1979] ICR 800.

The defense to an equal pay claim of the existence of a material difference other than sex is found in section 1(3) of the EqPA. Unlike section 1(4), which spells out some of the factors to take into account when deciding whether a difference is of practical importance, section 1(3) does not give any guidance as to the range of factors that might constitute a material difference. The appellate courts have, however,
stepped into the breach, and have set out with some
specificity the kinds of factors that tribunals might
consider.

In Methven v. Cow Industrial Polymers, Ltd., (1980) ICR
463, the Court of Appeal analysed section 1(3) and set out
the decision process that tribunals should undertake:

An analysis of section 1(3) of the Equal Pay Act shows
that three questions arise for decision; one, was
there a variation between the woman's contract and
the man's; two, was there a material difference
(other than the difference of sex) between her case and
his, and thirdly, had the employers proved on the balance of

(cont'd.)
probability that the variation in wages was due to the material difference. (Ibid. at 468)

Other decisions have set out the kinds of factors that tribunals might consider in answering the second of these three questions. In *Clay Cross (Quarry Services) Ltd. v. Fletcher*, (1979) ICR 1, Lord Denning explained that:

The issue depends on whether there is a material difference (other than sex) between her case and his. Take heed to the words "between her case and his." They show that the Tribunal is to have regard to her and to him - to the personal equation of the woman as to that of the man - irrespective of any extrinsic forces which led to the variation in pay.

The facts of *Clay Cross* involved an employer who defended a higher payment to a male employee employed on like work with a woman, on the basis that the higher sum was necessary to attract the man to the job. He was the only suitable applicant for the post, and, the employer argued, it was necessary to offer him a sum comparable to that paid by his former employer in order to secure his services. The Court of Appeal rejected this argument, Lord Denning explaining that:

...the tribunal is not to have regard to any extrinsic forces which have led to the man being paid more. An employer cannot avoid his obligations under the Act by saying "I paid him more because he asked for more" or "I paid her less because she was willing to come for less." If any such excuse was permitted, the Act would be a dead letter. These are the very reasons why there was unequal pay before the statute. They are the very circumstances in which the statute was intended to operate. (Ibid. at 5)

Lord Denning proceeds to enumerate the kinds of factors that would be acceptable as material differences, drawing on
his earlier decision in *Shields v. Coombes (Holdings) Ltd.*, (1978) ICR 11559:

As I said (in Shields), section 1(3) applies when "the personal equation of the man is such that he deserves to be paid at a higher rate than the woman." Thus, the personal equation of the man may warrant a wage differential if he has much longer length of service, or has superior skill or qualifications, or gives bigger output or productivity or has been placed, owing to downgrading in a protected category, or to other circumstances personal to him doing his job.

Thus, any factor which may come within the scope of the personal equation may constitute a material difference for the purposes of an equal pay defence, but extrinsic factors, such as the operation of market forces, may not.4

It should be noted however that the language of the Court of Appeal's decision in *Clay Cross* wrongly suggests that only differences in the personal equation may constitute a s.1(3) defence, and that an employer may not succeed in such a defence when it establishes that a man was paid more than a woman for an insubstantial but non-discriminatory reason (Pannick, 1985, p. 109). As the EAT noted in a case subsequent to *Clay Cross*, "if there is a sufficient explanation for the different wages paid which has nothing to do with the sex of the employees, the purpose of the legislature is not going to be achieved by insisting on equal wages," Albion Shipping Agency v. Arnold [1982] ICR 22, 28.

That the factor must be "material" means that it must be "real" *Navy, Army and Air Force Institutes v. Varley* [1977] ICR 11, 15 (EAT). It does not mean that the tribunal must
approve of the explanation given, only that it must be satisfied that the pay difference was not due to sex discrimination, either direct or indirect.\(^5\)

It should be emphasized that the enumeration of acceptable and unacceptable factors does not constitute the description of an objective test to be mechanically applied by the tribunals. Rather, following Methven, the tribunals must examine not only the character of the alleged material factor, but also the relationship between the factor and the pay differential. The employer must show that all of the variation in pay, not only part of it, is attributable to the material difference. \textsc{NCB v. Sherwin} [1978] ICR 700, 703 (EAT). However, tribunals will not examine this with "mathematical precision" \textsc{Boyle v. Tennent Caledonian Breweries Ltd.} [1978] IRLR 321 (EAT). Cases from the sample of tribunal decisions illustrate how in practice the question of what constitutes a material difference may be determined within the context of specific fact situations.

\textbf{Skill and Experience as a Material Difference}

Two cases from the sample, one successful and one unsuccessful, provide examples of the way in which skill or experience may provide the basis for a defense to a claim for equal pay. In \textsc{Welch v. Ventek Ltd.} (London, C. 1981), the applicant, a computer sales representative, claimed
equal pay with a man employed on the same work, but receiving a higher basic salary. The respondents conceded the issue of like work but relied on an alleged difference in experience to justify a pay differential between the two employees.

The tribunal examined the work record, training and experience of the applicant and the comparable man, and concluded that "They are totally different people," although they declined to comment on whether the experience of either appeared superior. Rather, they examined the context in which the difference in experience was asserted, stating:

...what the tribunal has to look at is not whether they are different people, but whether the difference between them was material and such as would justify in the circumstances...a difference in salary. The tribunal are satisfied that it would not...it seemed to the tribunal that if there had been a material difference that would justify the difference in salary. ...at the time that the applicant was engaged she would have been told that she was receiving a lesser salary because of her lack of experience in selling.

The applicant had not been so informed, and the tribunal concluded that the difference in pay had arisen because the applicant was prepared to take the salary offered, whereas the comparable male, employed later, had insisted on a higher figure. The tribunal concluded that:

This is not a case where the applicant has been picked on and discriminated against in a deliberate way. She has accepted a lower salary for like work and the respondents have offered her a salary which they thought she would take. It seems that it is one of those cases which the Equal Pay Act and Sex Discrimination Act were actually legislated for.

In reaching its decision, the tribunal starts with the respondent's assertion that a material difference exists
between the two employees with respect to the experience that each brings to the job. The tribunal examines the evidence that bears upon this argument but does not reach a conclusion on this basis. Instead, the tribunal implicitly addresses a pretextual justification, and looking at the circumstances in which each employee was hired, finds, again implicitly, that an extrinsic factor was at work to produce the variation in pay. The applicant's claim for equal pay was successful.

The decision in Welch represents a broad or liberal approach to the evaluation of the importance of an alleged material difference; the tribunal were concerned not only with examining evidence as to the existence of the material factor and its relationship to the pay differential, but were also concerned with the important question of how the pay differential first arose, by concentrating on what happened in the hiring process as it affected both the applicant and the comparable male. It is this latter concern that leads the tribunal to the 'hidden' extrinsic factor, which they labelled chance, but which might equally accurately be described in terms of the operation of market factors, or differential expectations in light of such factors.

In exposing the hidden extrinsic factor, the tribunal in Welch would appear to go further than many other tribunals confronted with similar situations. Another way of expressing the difference would be to say that the Welch
tribunal took a more critical approach to the evidence than some of the other tribunals in the sample. In *Grace-Walsh v. Andrew Page Ltd.*, (Leeds 1981) the tribunal considered the claim of a sales representative for equal pay with a male colleague who was younger than she, and it was agreed, had less experience in selling. Its approach to the question of experience as a material factor illustrates, through comparison with *Welch*, how tribunal decision-making may vary, even in the face of quite similar fact situations and legal questions.

The applicant began working for the respondent employer in 1977, at a basic salary of £50 per week, initially as a van driver, but subsequently as a sales representative. She had years of sales experience with a former employer. The man with whom she compared herself was employed in 1980, and began at a basic salary of £60 per week. In 1981 salaries were reviewed, and the applicant was given a basic weekly wage of £75.50, compared with the man's basic wage of £78. The employer employed other male sales representatives; all were receiving a higher weekly basic than the applicant.

The tribunal admitted that this situation suggested that there might be discrimination against the applicant, but felt that this suspicion was mitigated when the question of commission was taken into account. The applicant came third in a league of six, in terms of the amount of commission earned, and far exceeded the comparable male in this respect. The tribunal explained why this fact operated
to dispel the suspicion of discrimination, reasoning that "... if the company (consciously or unconsciously) were out to get female labour on the cheap, one would have expected them to rig her target figure for commission unduly high to keep her commission down." 6

The tribunal found that the applicant had more years of sales experience than the comparable man, and that she was very successful in her work which was with "high volume outlets, such as accessory shops." The tribunal went on to argue however that "there is evidence that, although Mr. H. had had shorter experience. . . the work done had been of a different kind from what the applicant had done, and could have demanded greater competence." (emphasis added)

Attention should be drawn to the tentative nature of this finding. The tribunal is comparing the experience of the applicant and the comparable man before they entered employment with the respondent. Lacking direct evidence as to the nature of this experience, the tribunal resorts to the speculative, but nevertheless proceeds to the conclusion that this possible difference in the nature of the prior experience of the two employees constitutes a material difference for the purposes of the Act.

This conclusion is corroborated by the male employee's performance since he joined the respondents:

He has studied the catalogues, taken them home and made himself familiar with the goods which he was selling, whereas the applicant has not a similar detailed knowledge. (His) ability is shown by his success with (outlets) to whom it is not as easy to sell as the high volume outputs with which the applicant is successful.
The tribunal states that they are aware that a variation in pay due to a personal appraisal must be scrutinized even more carefully than one that results from the operation of a grading system, but that, nevertheless, they are satisfied on the balance of probabilities that the variation in pay was due to the comparable man's personal skill and experience. The applicant's claim for equal pay was denied.

Together, the decisions in Grace-Walsh and Welch demonstrate the highly subjective component in tribunal decision making, and how this may operate to produce quite different results in seemingly similar situations. This variance emphasizes how important may be the factors of pre-hearing preparation, access to evidence, and competent presentation and cross-examination during the hearing.

Grading Systems as the Basis for a Material Difference.

In Welch and Walsh-Grace above the question of material difference between two jobs revolved around an assessment of the relative skills and experience of two employees. In neither of those cases did the employer have in effect a formal grading system to support the assertion that one employee had more skill or ability than another. It is well-settled that an employer may be able to rely upon a grading system to justify a pay difference, as long as it is based on factors such as skill and experience, and is "fairly and genuinely applied irrespective of sex" National Vulcan
Engineering Insurance Group Ltd. v. Wade [1979] ICR 800, 808, per Lord Denning. A grading system is not therefore an automatic s.1(3) defence; the tribunal must assess the factors on which it is based, and determine that it is applied fairly without regard to the sex of employees. In the two cases from the sample discussed in this section, the tribunals considered a purported material difference based on the differential ranking of employees within a formal grading system. They are two rather different cases, chosen to illustrate the scope that is covered by

(cont'd.)
this particular factor as the basis for a defence of material difference.

In Hoare v. British Aerospace Dynamics Group (Cambridge, 1979), the applicant was a 'quality inspector and test assistant' who sought equal pay with a man employed as a senior quality inspector. The respondents had a grading system, although there were no formal job descriptions, and job evaluation techniques were not in use. Employees in the applicant's department were divided among four grades, of which the top two were classified as skilled, and were composed only of men. The man with whom the applicant sought to be compared was in the top grade. The remaining two grades were classified as semi-skilled and were composed of both men and women, with women in the majority. Thus:

**Skilled:**

<table>
<thead>
<tr>
<th>Job Description</th>
<th>Men</th>
<th>Women</th>
</tr>
</thead>
<tbody>
<tr>
<td>Senior quality inspector</td>
<td>85</td>
<td>0</td>
</tr>
<tr>
<td>Quality inspector</td>
<td>25</td>
<td>0</td>
</tr>
</tbody>
</table>

**Semi skilled:**

<table>
<thead>
<tr>
<th>Job Description</th>
<th>Men</th>
<th>Women</th>
</tr>
</thead>
<tbody>
<tr>
<td>Quality inspector and test assistant 1</td>
<td>1</td>
<td>19</td>
</tr>
<tr>
<td>Quality inspector and test assistant 2</td>
<td>10</td>
<td>30</td>
</tr>
</tbody>
</table>

The grading system is reproduced here since its contours were important in the tribunal's decision as to whether it justified a pay differential between the applicant, a grade 1 quality inspector and test assistant, and the male senior quality inspector she chose as her comparator.
The respondents argued that there were differences in the range of duties of the two employees and offered them as constituting a material difference. This argument indicates some confusion as to the application of sections 1(3) and 1(4) of the Act, since a difference in the range of duties should have been asserted as differences of practical importance, rather than a material difference, the former applying to job content, and the latter to the 'personal equation.' The tribunal considered this argument in the context of section 1(4), and concluded that the differences were not of practical importance in relation to the terms and conditions of employment.

With like work thus established, the tribunal turned to a consideration of the different grades of the two employees as a possible material difference, and concluded that the grading system was "not genuine and not fairly applied." The tribunal elaborated by stating that, "We find as a fact that a situation where all the female employees are in the bottom two grades and all the male employees in the top two grades is discrimination which cannot be justified by the sort of distinction drawn by (the respondent)" (i.e., by reference to differences in job content which do not qualify as differences of practical importance for the purpose of the EqPA).

This decision illustrates the way in which a tribunal may look behind the facade of a grading system to the discriminatory reality behind it, and make an award of equal
pay for like work even where the employer has attempted an artificial segregation by sex in the labour force.

A second case illustrates for comparison a situation in which a tribunal held that differences in grading did justify a pay differential, since the grades reflected a real difference in the personal equation of the two employees. In Hare v. Scammell Motors, British Leyland (London N. 1980), the applicant was a male order clerk in the respondent's Parts Department, claiming equal pay with a woman employed at the same job. The respondents conceded like work, but relied on the existence of an alleged material difference, ability as reflected in a different job grade, to justify the pay differential.

The respondents employed four clerks in the Parts Department, of which only one was a woman. All were employed on the same grade, Grade III. In 1979, the respondents installed a computer in the Department, and began discussions with union representatives as to the possible upgrading of the Order Clerks. It was ultimately agreed to upgrade them, not according to their involvement with the computer, but on the basis of ability. Two clerks were immediately upgraded to Grade IV, one man and one woman. The other two clerks, both male were given a two month probationary period to determine whether they qualified. At the end of this period, one, whose work had improved, was upgraded, but the other was not. The clerk who remained on Grade III then brought a complaint to the tribunal claiming equal pay with the woman clerk who had been upgraded.
As evidence, the tribunal considered the job description of the employees, and the history of the upgrading exercise. They also heard assessments of the abilities of the four clerks from the Parts Manager. On this evidence they concluded that the distinction between the applicant and the comparable woman had nothing to do with sex, and the equal pay claim was dismissed.

These two cases show that a difference in grading may or may not constitute a material difference under section 1(3). The question to be determined in each case is whether the grading system is genuine and fairly applied. In Hoare, the tribunal found that the grading system was pretextual and lacking in justification. The differences in pay that resulted from this system did not reflect an underlying distinction in the personal equation of the two employees. In Hare, by contrast, the employees' difference in pay resulted from their different positions in the grading system, which in turn reflected an underlying difference in ability. There was no evidence of the grading system being used to legitimate sex based differences through the device of relegating all or most members of one sex to particular grades within the hierarchy. The first case falls within the rubric of material difference, the second does not.

Superior Qualifications as the Basis for a Material Difference

Although the existence of a superior qualification may appear as a relatively objective distinction between employees, when it is advanced as the basis for a difference in pay, the
tribunal may consider not only the existence of the qualification, but its relationship to the job done. This approach is illustrated in the decision in *Bavnham v. Hoover* (London C. 1978). In this case, a woman employed as a payroll manager claimed equal pay with a man employed in the same capacity at a different location. The applicant was the older of the two, she had longer service with the company, and earned £1000 per annum less than the comparable man. The tribunal found that there was like work, rejecting the minor differences between the two jobs as of no practical importance.

The respondents argued that the man the applicant compared to herself, had an accountancy qualification that she lacked, and that this difference constituted a material difference. The tribunal rejected this argument, explaining that:

... without playing down that qualification, we find that it was not of such a grade as to make a material difference. We find that (the applicant) in dealing with a wider class of people who in fact raised queries, matched any difference that could have worked in Mr. P's favour due to having the qualification ... which was one of the less well-known qualifications in accountancy. It was not established to our satisfaction that (she) had less ability to manage than (him).

In this reasoning the tribunal looks not just at the existence of a qualification, but at the type of qualification and its relationship to a difference in practical
ability, and goes beyond the formal existence of a superior qualification to the question of whether it was reflected in a difference in competence.

'Red Circle' Cases

Employers sometimes agree to protect the existing pay levels of workers who have been re-graded or re-employed in lower-grade work through no fault of their own. This practice is referred to as "red-circling."

The question then arises of whether a woman who is not red-circled may claim equal pay with a man doing like work who is. In Snoxall v. Vauxhall Motors Ltd. [1977] ICR 700, the EAT held that an employer may not rely on red-circling as a s.1(3) defence where the red-circling itself originates in discrimination. Where, however, "it can be demonstrated that there is a group of employees who have had their wages protected for causes neither directly nor indirectly due to a difference of sex, and assuming that the male and female employees doing the same work who are outside the red circle are treated alike," then a 2.1(3) defence may exist. (Ibid. at 729).

In determining whether the red-circling itself was sex-based, the tribunal should take into account the relevant factors of how long a time has elapsed since the protection was introduced, and "whether the employers have acted in accordance with current notions of good industrial practice
in their attitude to the continuation of the practice" Outlook Supplies Ltd. v. Parry [1978] ICR 388, 393 (EAT).

When the original reason for the pay difference ceases to exist, the red circle may continue to give a s.1(3) defence, so long as it was not initially based on sex discrimination. Avon and Somerset Police Authority v. Emery [1981] ICR 229 (EAT). The employer may not, however, rely on red-circling as a defence when he admits into the red circle a man whose higher pay cannot be justified and a woman employed on like work claims equal pay, even though the red-circling may be justified for all other men doing that work United Biscuits v. Young [1978] IRLR 15 (EAT).

Thus, as the appellate cases demonstrate, red-circling is to be treated as any other defence under s.1(3), and will only succeed where the employer can establish that there is a reason, other than sex, for the variation in pay between a woman's pay and that of a male comparator.

The principle is illustrated in the sample in the case of Roberts v. Wright and Green (Holdings) Ltd., (Hull 1978). The applicant was a non-food manager at the respondent's Scarborough depot, claiming equal pay with a man employed in the same position at another depot, and receiving £600 per year more in salary. The respondents conceded that the two employees were doing the same work, but asserted that they reason for paying the man more than the woman lay in historical circumstances. He had originally been paid more for
the responsibility of supervising an additional, but now defunct, depot. The respondents testified that the man was now receiving lower percentage increases than other managers to bring the salaries of all managers into line. (cont'd.)
The tribunal accepted this argument, and held that the pay differential was a result of anomalies due to historical circumstance, which constitutes a material difference other than sex.

The 'Personal Equation'

Some cases in which respondents raise a section 1(3) defence do not fit easily into such categories as 'skill' 'qualification' or 'experience.' In such cases respondents rely on a highly individual constellation of circumstances and abilities to support a claim that a material difference exists. In Sohove v. John Wyeth and Brother Ltd. (London, C. 1979) the respondents resisted a claim for equal pay by pointing to the superior adaptability, flexibility and interest of the comparable male.

In Sohove, the applicant was an Accounts Assistant, claiming equal pay with a male colleague. The respondents contested her claim that she was employed on like work with the comparable man. The tribunal found that for a one year period there had been like work under the Act; although subsequently the content of their two jobs had diverged with the man taking on more responsibility. For that period the applicant was entitled to equal pay unless the respondent could show a material difference other than sex as the basis for the difference in pay. On this question the tribunal was divided with the chairman, and the male lay member finding that there was a material difference, and the women lay member disagreeing.
The tribunal considered in detail the events that led up to the applicant's claim, and the duties and responsibilities of each of the employees. On this basis, the majority found a material difference due to the difference in the personal equation of the applicant and her comparator. The male employee had joined the staff after the applicant but had rapidly acquired a knowledge of the job which allowed him to take on new responsibilities. The acquisition of new responsibilities ended the similarity between his work and that of the applicant, but before that, in the period in which the two jobs were broadly similar, the same attitude to his work which subsequently led to his promotion justified a higher salary than that which the applicant was receiving. The majority explained that:

When you look at the relative performance of Miss S. and Mr. A., divorced from the content of specific tasks, the reason for the difference can be found in the personal equation. Miss S. performed her allotted tasks and was unwilling to extend the range of her duties; Mr. A. had a keen interest in his job, and was always willing to take on extra duties and responsibilities. . . . the premium reflected Mr. A's superior adaptability or flexibility at work and his potential for taking responsibility, and accordingly, he was of greater utility within the Department.

This reasoning raises a number of interesting questions -- if two employees are engaged in work which a tribunal finds is like work, then should a difference in the employee's attitude to that work justify a difference in pay, if it does not in some measurable way affect his output or ability to do the work? Are extra payments for 'potential' within the scope of exceptions to the Act?
Should a willingness to take on extra work be compensated by higher pay, even where the work actually done is the same or broadly similar? Unfortunately, the minority opinion did not discuss these issues, but based an opposition to the majority's finding of material difference in a seemingly unexplained rise in salary given to the comparable man during the period of comparability.

Assuming that in some circumstances it will be legitimate for employers to pay employees higher salaries if they manifest superior attitudes to their work, then particular application of section 1(3) raises some difficult evidentiary problems. Since it is an area fraught, of necessity, with reliance on highly subjective assessments for evidence, then the burden on an applicant of contesting such assertions will be a difficult one. In this sense the problem is similar to that which often confronts SDA applicants pursuing claims that they have been discriminated against in access to promotion, particularly in professional and higher managerial settings.

As the cases chosen from the sample illustrate, a broad range of factual settings may give rise to the employers' assertion of a s.1(3) defence. Some of the factors put forward as a material difference to explain a variation in pay are perhaps generally easier for tribunals to evaluate than others. Cases involving grading systems or red circles,
for example, may hinge on factors more susceptible of objective evaluation than those involving relatively subjective criteria in the personal equation. However, whichever kind of factor is at issue, the degree of scrutiny which a tribunal (cont'd.)
brings to bear on an alleged material difference may be crucial to the outcome of the application.

The variation that exists between tribunals has been noted not only with regard to the determination of what constitutes a material difference in a given set of circumstances, but also with relation to the whole issue of what constitutes like work. In its review of the operation of tribunals after one year of implementing the EqPA and SDA, the NCCL commented on the same phenomenon, but expressed the hope that with time, and more guidance from courts of record, the amount and extent of variation would diminish (Coussins, 1976). Examination of a sample of tribunal decisions seems to indicate however that broad discrepancies between tribunals continue to exist.

It is likely that a number of factors contribute to this situation: the fact that tribunal decisions are not published, and are not therefore subject to scrutiny, the fact that tribunal decisions do not constitute precedent, and may not therefore be relied on, the fact that a majority of applicants appear to be without legal representation, and the fact that the percentage of decisions that is appealed is low. In addition to these factors must be added the suggestion that some tribunal members may not be as knowledgeable about the legislation as others, and may lack experience in hearing Equal Pay Act complaints. An improved programme of training in the law, and in its application,
might provide a partial solution. Increased availability of trained and competent representatives for applicants may also go some way to improving the situation.

This small study of tribunal decision-making illustrates the complex relationship between interpretation of statutory provisions, the facts that are presented as the basis of a legal claim, and the processes of implementation. The substantive provision contained in the statute is only one element in the adjudication, and the divergent outcomes of factually similar complaints demonstrates that it is not determinative.

In light of this circumstance, the question must be posed of what can be expected of a change in the substance of the law, when unaccompanied by procedural amendments. The initial point is that by broadening a substantive definition, a whole range of potential complainants previously outside the scope of the Act are brought within it. The unsuccessful applicant in Garden, (above), is an example. With a broader definition of equal pay to encompass situations where work is dissimilar but of equal value, her complaint would have come within the scope of the legislation. Thus, a change in substantive definitions will re-define the situations and individuals who come within the purview of the legal regulation, but does not in itself say anything about the actual effect of the law on those newly included in its scope.
The EqPA, although perhaps on its face a relatively simple statute, is one which has required considerable judicial interpretation to fill in the statutory outline, as Phillips J noted in NCB v. Sherwin [1978] ICR 700, 703. Lord Ormrod in the Court of Appeal stated that the Act "has to be applied by hundreds and thousands of ordinary people who are not lawyers, and it should therefore be kept as simple and as free from legalistic complications as is possible" National Vulcan Engineering Insurance Group v. Wade [1979] ICR 800, 808. As early as 1979, Lawton LJ noted however that "legalism has started to take over" Clay Cross (Quarry) Services v. Fletcher [1979] ICR 1,8.

That "legalism" should develop in the context of a complex and somewhat ambiguous statutory scheme is to be expected. That it has so developed emphasizes the need for representation and expert assistance in the preparation and presentation of discrimination complaints.

Of equal significance, however, is that these complaints involve fact-finding of a particular kind, a process which Parliament entrusted to bodies thought to have expertise in the area of industrial relations, the industrial tribunals. The examples taken from the sample demonstrate how difficult that process may be, and how it requires sensitivity to social facts from outside the traditional realm of industrial relations. Hepple (1983, pp. 74-75) notes that the courts and tribunals were expected to accomplish their tasks by adopting
methods of fact-finding and evaluation which are outside
the usual compass of civil adjudication in Britain, and that
this "mis-match" between the structure of the judicial
process and the kind of purposive social engineering
required by the discrimination legislation provides a key
to understanding the performance of the courts and tribunals.

To summarize, both the procedures enacted for imple-
mentation and the structure of the enforcement system have
a significant impact on the way in which key elements of
the statute are interpreted and applied. Any substantive
change in the law will be limited to the parameters of what
it is practicable to expect of tribunals and courts used to
operating within the traditional forms of civil adjudication
and industrial relations practice. Reforms may be feasible
of course, with respect to both procedural and structural
factors, but in the absence of attention to these problems,
it is unlikely that merely broadening the scope of the
legislation can have a substantial effect on the capacity
of the legislation to reflect and address the material
conditions of women workers.
The focus here is on the provisions of the original statute, in force during the time period covered by the statute. I do not therefore include any discussion of the possible effect of the 1983 equal value amendments.

The 1983 Regulations amending the EqPA have substituted a new s.1(3). Prior to 1983 the section provided that "An equality clause shall not operate in relation to a variation between the woman's contract and the man's contract if the employer proves that the variation is genuinely due to a material difference (other than the difference of sex) between her case and his." It is this form of the defence that is under discussion here. Para.2(2) of the 1983 Regulations provided that in cases involving like work or work rated as equivalent, the equality clause would not operate "if the employer proves that the variation is genuinely due to a material factor which is not the factor of sex and that factor... must be a material difference between the woman's case and the man's." The Regulations provide that in a case of work of equal value, the factor "may be such a material difference."

Earlier decisions of the EAT had stated that the burden was a "very heavy" one, but this interpretation was overturned by the Court of Appeal in Vulcan v. Wade.

Under the 1983 Regulations, the operation of market forces may constitute a s.1(3) defence when a case of work of equal value is involved, as the employer in such cases is not confined to pointing to a material difference between the woman's case and the man's. See Pannick, 1985, pp. 112-114.

For a discussion of the concept of indirect discrimination and its incorporation into the EqPA see Chapter 5 above.
The tribunal correctly noted that the fact that with commission the applicant had gross earnings in excess of the comparable man did not preclude an equal pay claim when basic pay is one term of the contract, and commission another.
CONCLUSION

The female labour force in Britain possesses certain characteristics that distinguish it clearly from the male; the women's average earnings are lower than men's; women are concentrated in a relatively small number of occupations and industries relative to men; women comprise the overwhelming majority of part-time workers; and jobs which are performed in the main by women tend to be classified at a low level of skill or to lack prestige. But these relatively quantifiable factors do not tell the whole story. In addition there is a nexus for the majority of women between waged work and familiar roles and responsibilities which has both a material and an ideological component. The question posed in this research is the capacity of the Equal Pay Act (EqPA) and the Sex Discrimination Act (SDA) to affect these seemingly entrenched practices, relationships, and attitudes. The conclusion to which this research points is that the law in its present form provides only a partial solution; and that fundamental changes would be required if terms of both the substance of the law and the system for its enforcement if the
legislation is to address the social and economic factors which lie beyond the legal concept of discrimination.

The purpose of this study was to examine both the historical emergence of the statutes and their central concepts, and the subsequent interpretation and implementation of the legislation. As such it is concerned with the legal meaning as an emergent phenomenon, constructed on the basis of statutory provisions, and developed and interpreted within the parameters of particular legal and social processes and structures. The study also poses the question of the congruence between the legal definition of the problem of discrimination (and the concomitant legal solutions) and the actuality of the underlying phenomenon.

The issues that the study seeks to address fall into three categories: the effect of social, historical and political factors on the kind of legal solution enacted in the discrimination statutes, and the nature of the concepts that are central to the legislation as enacted and interpreted; the fit between the legal concepts and the phenomena they seek to address, and the social impact of the legislation; and the feasibility of changes in the law.

In the first part of this study I examined the historical context in which the anti-discrimination legislation emerged, the key features of the legislation and the particular concept of equality that underlies the legislation. In the second part I examined the structures and processes of implementation. Although separable for purposes of analysis, these issues are not at bottom discrete: the historical process of emergence has affected both the substantive and procedural aspects of the legislation; and substantive legal meaning develops within the parameters of a procedural and structural process. Thus, in a critique of the legislation it is necessary to consider the
system as a whole. While individual aspects of the system may, and indeed must, be discussed in close focus, proposals for change must take into account the interlocking structural, historical, and conceptual factors which have given the legislation shape and meaning.

With that caveat, this chapter summarizes the conclusions that may be drawn from the analysis of the legislation with regard to the three categories of issues posed above. These conclusions operate at two distinct levels of conceptualization, the first concerned with a social policy perspective, identifying issues that may be addressed through amendments to the law, and the second concerned with those features of the legislation that may be less amenable to change, either because they involve core values of liberal or juridical ideology, or because they would necessitate far-reaching structural changes.

Statutory provisions do not develop in a social or historical vacuum. Both what is included and what is excluded in a legislative enactment is moulded by a policy process which extends beyond the immediate policy debates at the time of the passage of a bill. In examining the emergence of the anti-discrimination legislation, three factors appear to be of considerable significance in shaping the form and content of the statutes: the impact of an industrial relations model for legislative intervention; the experience of previous state interventions in the area of race discrimination on the way in which sex discrimination legislation was comprehended and defined; and the formalistic and individualistic approach to the concept of equality which is central to the liberal philosophical tradition. These factors together implied certain assumptions about employment rights, the nature of discrimination, and the role of law that coloured both the substantive concepts which defined
the parameters of the problem, and the enforcement system established to provide the legal remedy.

When the EqPA was enacted the influence of the industrial relations model was manifest in the enforcement structure chosen for the new legislation, which included the existing industrial tribunals, whose personnel included representatives of both sides of industry. Legislative intervention was viewed as a necessary response to the failure of collective bargaining but the limited role that the law could be expected to fulfill was, in the tradition of industrial relations intervention, quiet explicit. These influences carried over into the SDA, which utilized the same enforcement structure for individual complaints as the EqPA.

The effect of the industrial relations model goes further, however, than influencing the choice of enforcement structures. It also permeates the approach to enforcement, which emphasizes the conciliation of claims, and defines the parties whose interests are properly represented when resort to legal remedy is sought. The predominance of the structures, processes and personnel of the industrial relations model means, on a practical level, that the institutions of the enforcement system are not well-adapted to the resolution of discrimination issues. Further, on an ideological level, this predominance reinforces the notion that discrimination against women workers is essentially an employment issue, and serves to de-emphasize the broader societal factors which give rise to and perpetuate the specific position of women as a group.

The second significant influence on the legislative scheme is the previous experience of race discrimination legislation, and a model which borrows from American experience in this area. Both race and sex
discrimination legislation in Britain have transplanted some American
congcepts and structures, in modified form. The modifications, and the fact
that the American transplants are expected to operate in a quite different
judicial and political environment from that in which they originated, means
however that there are substantial differences between the British and
American approaches, even where the former has expressly borrowed from
the latter. The borrowing is also very selective. The British legislation
incorporates the concept of indirect discrimination, expressly following a
document judicially created by the American courts. British legislators chose,
however, not to incorporate the American courts' equitable approach to the
question of remedies, and expressly rejected the idea of affirmative action as
either a voluntary or a court-ordered remedy for past discrimination. The
idea of an administrative enforcement agency is borrowed from the United
States, but again with significant differences in the powers given to the
agency and with personnel of the British agency gain reflecting the
traditional representation of interests of the industrial relations model.

The primary effect of using a race discrimination model to address sex
discrimination, regardless of whether that model is home-grown or borrowed
from elsewhere, is that discrimination is treated as an undifferentiated
phenomenon. Discrimination as a concept thus operates at a level of
abstraction that cannot but fail to address the specificity of women's position
in the labour force. Discrimination in the present scheme is constituted as an
abstract category, independent of the social practices which constitute the
social relations of gender. Because of the particular nature of women's
relationship to the labour market, and the nexus between women's wage
labour and their domestic and familial roles, this abstraction is of crucial importance.

The third factor that emerges from a consideration of the statutory scheme is the persistence of a particular approach to the concept of equality, central to a traditional liberal philosophy, which is individualistic, formalistic, negative rather than positive, and which is premised on the notion of treating like with like. This approach to equality has informed a number of important historical interventions in the area of civil rights. When directed at such issues as the franchise, jury service, and the removal of legal disabilities, the concept is clearly appropriate, since it requires that similarly situated individuals be treated alike, on a one-by-one basis. In discrimination law, the concept is less appropriate however. The essence of the problem is that men and women are not similarly situated for the purpose of equality of employment opportunity, because of the social relations of gender, and thus the identicality equation as a basis for equal treatment is insufficient. Further the emphasis on individual rights which is at the heart of this approach, is inadequate to address the problem of discrimination as a group or collective phenomenon.

In light of this critique, the question must be asked of whether those who, like Coote and Campbell (1982), assert that the law has failed are correct, or whether there remains a possibility that through modification the legislation can be made to work, as Seear (1982) suggests. To assert that the law has failed because of its internal contradictions, and weaknesses in the system of enforcement, leaves unanswered important questions about the emergent nature of rights, and the continuing effect of the legislation as a focus, negative or positive, in that process. To assert that the law might be
made to work through modification requires that questions be asked about the scope and feasibility of the necessary changes.

For instance, while the individualism which is a primary feature of the enforcement process appears as a fundamental problem, changes may be proposed which would go some way to mitigating the problems encountered in practice by individual complainants; while other proposals, perhaps more difficult to implement would have a more radical effect on the legislation, moving it towards an approach which recognizes the collective dimension to discrimination.

The system of enforcement reflects and reinforces the individualistic focus of the legislation. Individual complaint procedures have provided the primary method of enforcement, but the empirical study of the tribunal process suggests a number of procedural issues that have weakened the individual enforcement efforts. These issues may be categorized as having to do with the applicants, (or potential applicants), with the tribunals, and with the law itself.

An examination of the complaint rate and the hearing rate led to a number of questions concerning the public's knowledge of the law, and confidence in the law. The information available suggests that knowledge of the law's existence and basic provisions may be limited, and that the perceived difficulties of pursuing a complaint may discourage potential applicants from pursuing discrimination claims. However, the information available on thes issues from other studies and secondary sources is sparse and somewhat speculative, and further research is necessary before firm conclusions can be reached.
The study of the hearing rate raised questions about the high proportion of complaints withdrawn before a tribunal hearing. The available information suggests that the role of the Advisory, Conciliation and Arbitration Service (ACAS) would bear further investigation here.

ACAS' own statistics point to a discrepancy in the withdrawal rate between the discrimination legislation and other statutes within its field of authority. However, ACAS is not under any obligation to publish even the most minimal of details of how and why cases are withdrawn. A requirement of record-keeping and publication would surely increase the accountability of the organization, and make easier the monitoring of its activities by the EOC and the Race Relations Commission. A full study of withdrawn complaints, interviewing the complainants, would be useful here to confirm or deny the conclusions suggested by the few available sources of information. With hindsight, I feel that more emphasis on work in this area would have been useful in understanding the practical limitations of the individual complaint process.

Similarly, my analysis of the representation of both parties at tribunal hearings tentatively points to the conclusion that discrepancies in legal representation between them may correlate with successful or unsuccessful outcomes. The numbers in the sample were small, and there was no attempt to control for the operation of external factors. Since the legislation does not presently provide for the legal representation of applicants, a showing that lack of such representation affects case outcomes would have significant policy implications. This area would be a fruitful one for further research.
The study of the tribunal decision-making process revealed a considerable diversity in the adjudication of factually comparable cases. This finding suggests that training in the concepts of discrimination law and their interpretations might be appropriate for tribunal members. It also suggests that increased legal representation might benefit not just the parties, but also might have a beneficial effect on tribunal adjudication, by making available within the context of the adversary process, the contributions of legal representatives expert in the field.

In terms of the composition of tribunals and the role of chairpersons as against lay members, and men as against women, the sample yielded only a tiny number of non-unanimous cases for study. A useful subject for follow-up research would be to select a larger sample of non-unanimous decisions for analysis, and to combine this study with a systematic observation of tribunal hearings, in order to evaluate the roles and contributions of the various members, lay and legal, male and female.

These previous recommendations are concerned with the personnel of the tribunal hearings: applicants, lawyers, and tribunal members. The research also points to some procedural changes in the law that would facilitate for the applicant the process of individual enforcement, and would improve the capacity of the legislation to encourage compliance. The first change concerns the burden of proof in SDA cases. The sample confirms the statements of other commentators that the present burden of proof makes it exceedingly difficult for applicants to prove sex discrimination, particularly in employment situations where the recruitment or promotion criteria are 'soft.' Second, the system of remedies as presently constituted provides little in the way of compensation for the victims of proven discrimination, or as an
incentive to compliance. The examination of remedies in the study points to a considerable difference between the British and American approaches, and this again goes to the issue of individual versus collective enforcement.

In sum, the study points to a number of procedural and practical difficulties which underlie the individual remedy provisions for enforcement of the anti-discrimination legislation. At bottom, however, there is a more complex issue to be confronted than the practical problems which an individual applicant may encounter, and this is the very choice of individual complaints and remedies as the primary mechanism for enforcement. The practical problems may be ameliorated by, for example, more legal aid for applicants, changes in the composition of tribunals, or more training in the field of anti-discrimination law for tribunal members. None of these policy measures, however, even if fully implemented, would address the core contradiction of establishing individual complaint as the major remedy for a wrong which by definition emerges from the relative structural positions of social groups, collectivities, a wrong which is itself defined by reference to concepts which are meaningless in a context limited to the individual. There thus appears to be a lack of fit between the fundamental approach in the legislation to the concept of discrimination, and the material reality of women's position. This disjuncture between the individual and the collective is central not just to sex discrimination legislation, but to race discrimination law as well. In the case of the sex discrimination legislation the problem is exacerbated by an essentially formalistic and ungendered approach to discrimination which through its use of conceptual abstractions obscures the fact that women as women experience discrimination as a specific group, distinct in some important respects from other disadvantaged minorities.
A central question is the extent to which this individualism, and this lack of group specificity, is susceptible to change. The question is relevant on the policy level, since such changes appear to be necessary for a more effective, more situationally relevant piece of legislation. It is also relevant to the question of the limits of law, and its relationship to social change, posed as an underlying theme at the beginning of this study.

American experience suggests that some progress towards collective enforcement is possible within the confines of a legal framework, but whether this experience is transferable to the British legal system remains an open question. The borrowing of American approaches to the administrative enforcement of discrimination legislation suggests that some procedural innovation is possible within the British legal framework, but also clearly indicates the need for the political will to innovate, before any such change is likely.

It is also possible to conceive of ways in which specifically British structures and institutions might be reformed so as to provide a more effective route to collective enforcement. The EOC's powers could be increased, its composition changed, for example. Further, the EOC, in its proposed amendments to the laws, suggested ways in which existing institutions could be given additional powers under the EqPA, (EOC, January 1981). The EOC suggested, for example, that the Central Arbitration Committee be given the authority to review any discriminatory provision, direct or indirect, in a collective agreement or pay structure, rather than as now being limited to the review of provisions specifically referring in terms to "male" and/or "female" conditions, (EOC, January 1981, p.6). The EOC further suggested that the Commission itself be given the authority to refer
such provisions to the CAC, in addition to the parties to the agreement, or the Secretary of State as under the current section. Lastly, the EOC suggested amending s.3(6) of the EqPA so that when an individual complaint to an industrial tribunal appeared to affect employees not party to the application, the ACAS would have the authority to refer the case to the CAC, without prejudice to the individual complaint. Such seemingly modest changes could lead to real improvements in the capacity for collective enforcement, without the difficulties inherent in the attempt to introduce procedures like the class action into the British legal system.

Thus, there are seemingly a number of fairly specific changes that could be wrought which would go some way towards redirecting the discrimination legislation towards a more collective approach to enforcement and one which would therefore be more appropriate in terms of the underlying phenomenon. While such changes may appear politically to be most unlikely, the case of the recent changes in the legal definition of equal pay is instructive. The British legislation now incorporates the definition of equal pay for work of equal value, a definition which equal pay activists advocated from the start. This amendment to the equal pay definition was introduced, reluctantly, by a Conservative government, only under the threat of infringement proceedings by the European Commission for Britain's failure to comply with Article 119 of the Treaty of Rome, and Article 1 of the Equal Pay Directive. Here is a case of the law being used to remedy a fundamental flaw in the law. While the impact of the new definition will depend to a large extent upon procedural and structural factors, and is therefore subject to the limitations discussed above, it nevertheless constitutes an ideological shift of some magnitude and one which indicates that the law can be pushed closer to
definitions which more realistically reflect the underlying material conditions.

One further set of questions remains. The study began with some questions about the role of law in effecting social change. Some degree of change is clearly possible; and short-run, non-fundamental changes may positively affect the capacity of the legislation to provide redress for employment discrimination. At the same time, it must be recognized that the law as it stands provides a specific structured system for the negotiated settlement of conflicts, and as such operates as an ideological form which may mask social reality, in that the adjudication of individual rights, a process central in the present legislation, has profound ideological implications for the definition of the problem itself, the substance of the matter. Discrimination is manifested through legal process as an individual wrong, forcing a direct relationship between the individual and legal redress. Thus, the deeper roots of the problem are masked and at the same time the paradigm of law as the mechanism for dispute resolution is fostered.

At the same time, the legal approach to sex discrimination fails to address one of the most significant characteristics of women's participation in the labour force, their structural differentiation from male workers in terms of the nexus between paid employment and domestic and familial responsibilities. Because of this failure, the legislation does little to reconstruct the ideology of gender relations. By regulating discrimination in the workplace, but defining other factors which affect women's labour force participation as being outside the reach of law, the legislation in fact reinforces the public/private dichotomy, and fragments women's experience. In both practical and ideological terms, it validates a system in which women
may compete equally with men in paid employment, but where the employment sphere is not expected to change in material ways to reflect women's different structural position.

The power of law to mask reality is not, however, absolute. It may be argued that the enactment of legislation changes the terms of debate, and that subsequent demands for the reform of the law, or for more effective enforcement, may mask more important developments in raising political awareness, and securing broader definitions of the rights in question. The law itself as it presently stands also makes some inroads in terms of addressing women's relative disadvantage, on both the ideological and the practical levels. The recent introduction of a definition of equal pay for work of equal value, for instance, breaches the identicality equation, and recognizes the structural fact of a high degree of occupational segregation between men and women workers. While the legislation is predominantly individualistic in its approach, some key provisions recognize the group nature of discrimination, particularly those dealing with indirect discrimination.

It must also be recognized that law may bring real, if limited gains to some groups and individuals -- there are certainly women whose earnings have increased because of the Equal Pay Act or who have benefited under the Sex Discrimination Act. That these women may be relatively few in number should not blind us to their existence.

Thompson (1975, p. 265), in his study of law in eighteenth century England, writes:

The rhetoric and rules of society are a great deal more than a sham. In the same moment they may modify in profound ways the behaviour of the powerful and mystify the powerless. They
may disguise the true relations of power, but at the same time, they may curb that power and check its intrusion.

For the sociologist, these multi-faceted dimensions of the law point to a need for a more sophisticated approach to the inter-relationship of the substantive definitions of the law, legal process, and both instrumental and ideological effects, in the context of specific investigations.

Legislation which reconstitutes and redefines rights is a particularly interesting subject in the context of a debate on the limits of the role of law, and the consequences of the legal form. If this study raises more questions than it answers, it may at least provide a direction for further research in this area. While this study is capable of indicating some of the more immediate policy changes that might increase the capacity of the legislation to address the position of women in the labour market, it can do no more than speculate about the likelihood of such changes being introduced, or of their possible effect. Consequently, while indicating some of the limitations in the law as presently constituted, I am reluctant to concede that such problems represent the limits of the law in any fundamental sense.

The particular forms and concepts adopted in the British legislation may seem ill-adapted in some fundamental ways to address employment practices and problems which arise in the context of the social relations of gender. Some incremental changes appear feasible which might improve the operation of the statutory scheme while leaving major problems unresolved. The form of law, however, arises from the confluence of historical and social factors. A particular confluence has influenced the form that anti-discrimination legislation has taken in Great Britain. Whether that legislation
will be susceptible to amendment of a fundamental and far-reaching kind will also depend on such factors. It is premature to conclude therefore that the limits of law have been reached in addressing social discrimination.
APPENDIX A

The Sample of Industrial Tribunal Decisions

The sample of 125 industrial tribunal decisions provides the primary data base for the second part of the preceding study, constituting the major source of information on aspects of tribunal adjudication, the representation of parties, the allocation of the burden of proof, and the remedies available in successful cases.

Constructing the Sample

The Equal Opportunities Commission (EOC) maintains a register of all cases heard by Industrial Tribunals, listed by year. This register provided the population from which the sample was selected. Given the time constraints of a study of this kind, and the desire to engage in an in-depth analysis of the content and method of tribunal decision-making, I decided fairly arbitrarily that the largest sample size that was feasible was somewhere in the region of 120 complaints.

I decided to select the sample from a population consisting of all the complaints registered over a five year period 1977-1981, rather than concentrating the research within a narrower time frame. In this way, I hoped to minimize the possibility that a relatively small sample might be skewed by a particular external factor or event. Similarly, in order to minimize the possible skewing
effect of selecting decisions from just one or two tribunal offices, I decided to select them randomly from all those listed in England, Scotland and Wales.

The period 1977-1981 was chosen as including five of the six years of implementation of the Act completed at the time this part of the study was undertaken. The first year of implementation was omitted for two reasons. First, Coussins (1976) study had analysed a number of decisions for that year, and had pointed to a certain amount of confusion, and lack of expertise in tribunal decision-making, while expressing the hope that the accumulation of guidance from the Employment Appeals Tribunal (EAT) and other appellate courts would improve the situation. Secondly, it was to be expected that in the very first year of implementation the process of adjudication might be unrepresentative of later years in other ways. A higher number of complaints might be expected initially, for example; representatives were likely to be less well-informed and less well-prepared than later when the parameters of the law became clearer. Consequently, because of the prior study by Coussins and the likelihood that the first year of implementation would be aberrational in some respects, I decided to begin the research with the year 1977.

The sample was stratified by year in order to provide the same number of cases for analysis in each year in the research period. I elected to take this approach to ensure
a minimum number of cases for each year, in order to compare the internal process of decision-making across the research period. I decided twenty-five complaints each year as representing both the minimum necessary for any kind of meaningful analysis, and the maximum that I would analyse in-depth in the time available. Thus, twenty-five cases were randomly sampled from the register for each year in the research period, using a random number table, for a total sample of 125 cases.

One effect of stratifying the sample in this way is that the sample does not consistently represent the same proportion of the total population, as the total population changes for each year but the number sampled remains the same. Table A-1 shows the total population for each year, and the proportion represented by the sample.

Table A-1
Complaints under the EqPA and the SDA heard by Industrial Tribunals, 1977-1981.

<table>
<thead>
<tr>
<th>Year</th>
<th>EqPA</th>
<th>SDA</th>
<th>TOTAL</th>
<th>SAMPLE AS % OF TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>1977</td>
<td>363</td>
<td>77</td>
<td>440</td>
<td>5.6%</td>
</tr>
<tr>
<td>1978</td>
<td>80</td>
<td>67</td>
<td>147</td>
<td>17.0%</td>
</tr>
<tr>
<td>1979</td>
<td>78</td>
<td>59</td>
<td>137</td>
<td>18.2%</td>
</tr>
<tr>
<td>1980</td>
<td>26</td>
<td>69</td>
<td>95</td>
<td>26.3%</td>
</tr>
<tr>
<td>1981</td>
<td>27</td>
<td>89</td>
<td>116</td>
<td>21.5%</td>
</tr>
</tbody>
</table>

(Source for numbers of complaints: Annual Reports of the EOC).
Details of the Sample

The sample consists of 60 EqPA and 65 SDA complaints occurring over a five year period. Table A-2 shows the breakdown of the complaints by statute, and year. Table A-3 shows the breakdown by statute, year, and disposition.

Table A-2
Sample of Industrial Tribunal Decisions, by Year and Statute

<table>
<thead>
<tr>
<th>Year</th>
<th>EqPA</th>
<th>SDA</th>
</tr>
</thead>
<tbody>
<tr>
<td>1977</td>
<td>18</td>
<td>7</td>
</tr>
<tr>
<td>1978</td>
<td>14</td>
<td>11</td>
</tr>
<tr>
<td>1979</td>
<td>10</td>
<td>15</td>
</tr>
<tr>
<td>1980</td>
<td>9</td>
<td>16</td>
</tr>
<tr>
<td>1981</td>
<td>9</td>
<td>16</td>
</tr>
<tr>
<td>Total</td>
<td>60</td>
<td>65</td>
</tr>
</tbody>
</table>

Table A-3
Sample of Industrial Tribunal Decisions by Year, Statute and Disposition

<table>
<thead>
<tr>
<th>Year</th>
<th>EqPA</th>
<th>SDA</th>
</tr>
</thead>
<tbody>
<tr>
<td>1977</td>
<td>4</td>
<td>3</td>
</tr>
<tr>
<td>1978</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>1979</td>
<td>3</td>
<td>5</td>
</tr>
<tr>
<td>1980</td>
<td>3</td>
<td>5</td>
</tr>
<tr>
<td>1981</td>
<td>3</td>
<td>5</td>
</tr>
<tr>
<td>Total*</td>
<td>17</td>
<td>21</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Year</th>
<th>EqPA</th>
<th>SDA</th>
</tr>
</thead>
<tbody>
<tr>
<td>1977</td>
<td>14</td>
<td>3</td>
</tr>
<tr>
<td>1978</td>
<td>8</td>
<td>6</td>
</tr>
<tr>
<td>1979</td>
<td>7</td>
<td>10</td>
</tr>
<tr>
<td>1980</td>
<td>6</td>
<td>11</td>
</tr>
<tr>
<td>1981</td>
<td>6</td>
<td>11</td>
</tr>
<tr>
<td>Total*</td>
<td>41</td>
<td>41</td>
</tr>
</tbody>
</table>

*Totals do not match the sample as set out in Table A-2 because of the exclusion here of 5 interlocutory decisions. Interlocutory decisions are limited to preliminary points of law and do not go to the substance of the complaint.
The sample includes decisions from 31 different tribunal offices throughout England, Scotland and Wales with the largest number coming from London (23), Birmingham (14), Manchester (13) and Glasgow (10). Table A-4 shows the number of complaints in the sample originating from each of the 31 tribunal offices.

Table A-4

<table>
<thead>
<tr>
<th>Tribunal Offices, Showing Number of Sample Decisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>London*</td>
</tr>
<tr>
<td>Birmingham</td>
</tr>
<tr>
<td>Manchester</td>
</tr>
<tr>
<td>Glasgow</td>
</tr>
<tr>
<td>Southampton</td>
</tr>
<tr>
<td>Liverpool</td>
</tr>
<tr>
<td>Leeds</td>
</tr>
<tr>
<td>Cardiff</td>
</tr>
<tr>
<td>Nottingham</td>
</tr>
<tr>
<td>Brighton</td>
</tr>
<tr>
<td>Gloucester</td>
</tr>
<tr>
<td>Middlesborough</td>
</tr>
<tr>
<td>Edinburgh</td>
</tr>
<tr>
<td>Hull</td>
</tr>
<tr>
<td>Newcastle on Tyne</td>
</tr>
<tr>
<td>Leicester</td>
</tr>
<tr>
<td>Cambridge</td>
</tr>
<tr>
<td>Sheffield</td>
</tr>
<tr>
<td>Reading</td>
</tr>
<tr>
<td>Bedford</td>
</tr>
</tbody>
</table>

*The total for London includes cases sampled from each of the three London tribunal offices, South, Central, and North.
Table A-4 (Cont'd.)

<table>
<thead>
<tr>
<th>Location</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exeter</td>
<td>1</td>
</tr>
<tr>
<td>Grimsby</td>
<td>1</td>
</tr>
<tr>
<td>Colwyn Bay</td>
<td>1</td>
</tr>
<tr>
<td>Inverness</td>
<td>1</td>
</tr>
<tr>
<td>Plymouth</td>
<td>1</td>
</tr>
<tr>
<td>Bury St. Edmunds</td>
<td>1</td>
</tr>
<tr>
<td>Bristol</td>
<td>1</td>
</tr>
<tr>
<td>Carlisle</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>125</strong></td>
</tr>
</tbody>
</table>

The sample's 60 EqPA decisions comprise 59 concerned with wages or salary, and 1 concerned with fringe benefits. Of the 59 concerned with pay, 8 were also concerned with the issue of job grading and evaluation.

The 65 SDA decisions fall into nine categories, as shown in Table A-5.

Table A-5

Sample SDA Decisions, by Issue

<table>
<thead>
<tr>
<th>Issue</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Promotion, transfer and training</td>
<td>15</td>
</tr>
<tr>
<td>Recruitment</td>
<td>14</td>
</tr>
<tr>
<td>Dismissal</td>
<td>9</td>
</tr>
<tr>
<td>Selection for redundancy</td>
<td>8</td>
</tr>
<tr>
<td>Terms and conditions of employment</td>
<td>8</td>
</tr>
<tr>
<td>Reduction in status</td>
<td>3</td>
</tr>
<tr>
<td>Certification</td>
<td>1</td>
</tr>
<tr>
<td>Licensing</td>
<td>1</td>
</tr>
<tr>
<td>Advertising</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>60</strong>*</td>
</tr>
</tbody>
</table>

*Does not include 3 interlocutory decisions, and 2 dismissed for want of prosecution in which it was not possible to ascertain the basis of the complaint.
Analysis of the Sample

A copy was obtained of the full text of the tribunal decision for each case in the sample. The tribunal is required by law to render a decision in writing and the vast majority of them clearly detail the reasons for arriving at the result reached. The decision is written by the chairman or chairwoman of the tribunal and so represents his or her view of the case more than that of the lay members. Each decision also contains the name of the parties, the names of their representatives, if any, the names of the tribunal members, the place and date of the hearing, and whether the decision of the tribunal was unanimous.

As such the decisions contain two basic kinds of information: that which may be easily tabulated and categorized, such as the type of complaint, SDA or EqPA, the gender composition of the tribunal, and the representation of the parties, and that which is less susceptible to easy categorization, the textual content, and tribunal reasoning. An initial step in analyzing both these kinds of information was to read each decision carefully, noting the main features on a pre-prepared summary analysis chart.

This chart contains the basic identifying information of date, statute, names of parties, and place of hearing. It also includes the disposition of the case, and whether the decision was unanimous, the remedy, where applicable, and the representation of the parties. The chart also
contains the applicant's occupation, salary, and length of service, where known. The members of the tribunal, both the chair and the lay members, are identified as to gender. Additionally, the chart allows for a preliminary legal analysis of the decision, through columns which identify the sections of the statute considered in the decision, and the principal legal issues (e.g., 'job evaluation,' 'material difference,' marital discrimination in hiring). Two further columns allow for a notation as to whether there was a discrepancy in the evidence, (as opposed to its interpretation) and if so, the party in whose favour it was resolved. The chart also contains two columns for information relating to the citation of precedent by the Tribunal. Finally, space was provided in the summary chart for comments on interesting or unusual aspects of the case.

This chart provided a means of identifying cases for further analysis and for illustration in the text. Groups of cases were then re-read, re-analysed, summarized and annotated in terms of specific issues like the availability of remedy or the burden of proof.
APPENDIX B

List of Tribunal Decisions In Sample

Equal Pay Act Decisions


Clement v. Russ Hill Hotel Ltd., (Brighton), 1980.


Emery v. Triplex Foundry, (Birmingham), 1978.


Roberts v. Wright & Green, (Hull), 1978.


Underwood and Green v. Lesney UK Operations Ltd.,


Dukes et al. v. GEC Machines Ltd., (Birmingham), 1977.

Poynor v. GEC Machines Ltd., (Birmingham), 1977.

Febery v. Redditch Controls Ltd., (Birmingham), 1977.


Rozarowszczyk and Brown v. P. and S. Textile Ltd.,
(Manchester), 1977.


Sex Discrimination Act Decisions

Mead v. DCA Industries Ltd., t/a "Colchester Oven Door,"
(London N.), 1981.

Roberts v. Tate and Lyle Food and Distribution Ltd., (Liverpool), 1981.
Marshall v. Southampton and South West Hampshire District Health Authority, (Southampton), 1980.
Vernon v. Irvine Sellars Ltd., (Sheffield), 1980.
Manning v. Wallop Industries Ltd., (Southampton), 1980.
MacDonald v. Rolls Royce Ltd., (Glasgow), 1980.
Stewart v. Haldane, (Glasgow), 1980.
Munroe v. M.F.I. Furniture Centres Ltd., (Southampton),
1979.
McKelvey v. Mace Deck Chair Services, (Brighton), 1979.
Sharkey v. Batemans Catering Organisation Ltd., (Leeds),
1979.
Stanford and Elliot v. Simpson, Wright and Lowe, Ltd.,
(Nottingham), 1979.
Equal Opportunities Commission v. C.M. Robertson et al.,
(Plymouth), 1979.
Pattison v. Commonwealth Holiday Inns of Canada Ltd.,
(Reading), 1979.
Sohoye v. John Wyeth and Brother Limited, (London C.),
1979.
Lee v. Lambeth Southwark and Lewisham Area Health Authority,
(London S.), 1978.
Ashworth v. Nottinghamshire County Council, (Nottingham),
1978.
Baker v. Soil-Less Cultivation Systems, Ltd., (Southampton),
1978.
O'Rourke v. Grandmet Scottish Site Services Ltd., (Glasgow), 1977.
Royds v. Grandmet Scottish Site Services Ltd., (Glasgow), 1977.
Harris v. The Kingsway Casino, (Cardiff), 1977.
APPENDIX C

The Central Arbitration Committee

The Central Arbitration Committee (CAC) was given powers under the Equal Pay Act to remove discriminatory provisions in collective agreements, employer's pay structures, and statutory wage orders.

Under S. 3 (1) of the EqPA any party to a collective agreement, or the Secretary of State for Employment can refer to the CAC any agreement which "contains any provision applying specifically to men only or women only." The CAC has the authority to amend such provisions so that terms previously applying to one sex extend both to men and women, provided that no-one shall be treated less favourably than they were before the amendment.

The CAC adopted a liberal approach to the interpretation of S. 3 (1) reviewing agreements referred to it that were indirectly as well as directly discriminatory. The CAC explained the rationale for its position, noting that:

It would be unusual to find a current collective agreement with a clear discriminatory provision. Yet problems still exist and the cases the Committee has had indicate plainly that an agreement which at first sight looks fair may not produce real equality and may in fact conceal the absence of any change in the position at all. Two powerful factors emerge—the actual rate of pay, which may still be affected by the old, lower, 'women's rate,' and the distribution of the sexes in a grade which may be real evidence that the rate paid is not truly unisex—that is to say, as attractive to men as to women. (CAC, 1980, pp. 12-13)
Consequently, the CAC approached cases with the intent to "discover and evaluate the actual position, rather than to rely on the superficial description in the collective agreement or the apparent intent of the pay structure" (ibid.). This approach was at odds with that of the Department of Employment, who held that the CAC could only intervene when a provision made reference in its terms specifically to "male" and/or "female" conditions, (EOC, 1979, p. 16).

The dispute over the correct interpretation of the CAC's authority under S. 3 (1) was resolved in the case of Regina v. CAC ex parte Hy-mac Ltd. (1979) 1 RLR 614, and it was the narrow interpretation that was upheld. For the reason set out by the CAC itself, that, after 1975 agreements tended to eschew explicitly discriminatory provisions, the Hy-mac decision effectively signalled an end to the CAC's role in the enforcement of the statute. The EOC has suggested an amendment to the EqPA which would re-instate the pre-Hy-mac interpretation of S. 3 (1) by allowing review of all discriminatory provisions in collective agreements, whether directly or indirectly so. The EOC has also proposed that the Commission itself should have the power to refer discriminatory provisions to the CAC, (EOC, January 1981, p. 6).
REFERENCES AND
SELECTED BIBLIOGRAPHY


. (Spring 1980). Volume One, No. 3. EOC: Manchester.


. (Spring 1981). No. 5. EOC: Manchester.


January 1981.


Washington, D.C.

Washington, D.C.

Washington, D.C.

Washington, D.C.

Washington, D.C.


. (July 1980). General Counsel Manual. BNA:
Washington, D.C.


Workers Education Association. (1972). *Background Notes on Industrial Relations.* No. 1. W.E.A.

Working Women's Charter. (Date unknown). *Newsletter No. 4.*
