

EXPLANATORY MEMORANDUM TO

The Sex Discrimination Order 1976 (Amendment) Regulations (Northern Ireland) 2016

2016 No. 191

1. Introduction

- 1.1. This Explanatory Memorandum has been prepared by the Office of the First Minister and deputy First Minister to accompany the Statutory Rule (details above) which is laid before the Northern Ireland Assembly.
- 1.2. The Statutory Rule is made under section 2(2) of the European Communities Act 1972 and is subject to the negative resolution procedure.

2. Purpose

- 2.1. The Statutory Rule amends the Sex Discrimination (Northern Ireland) Order 1976 (the "1976 Order") to comply with EU Pilot file 4853/13/JUST concerning the transposition of Council Directive 2006/54/EC in Northern Ireland ("the Recast Directive"). The Recast Directive implements the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.
- 2.2. The Statutory Rule substitutes Article 3 of the 1976 Order to create a new single definition of direct discrimination which applies to all provisions of the 1976 Order. The new definition of direct discrimination is broadened to provide protection from discrimination based on association or perception.
- 2.3. The Statutory Rule inserts a new Article 3A in the 1976 Order to create a single definition of indirect discrimination which applies to all provisions of the 1976 Order. The Statutory Rule also inserts a new Article 4B in the 1976 Order to provide protection from indirect discrimination on the ground of gender reassignment in matters of employment and occupation.
- 2.4. The Statutory Rule makes consequential amendments to the 1976 Order and to Article 3(3) of the Employment (Miscellaneous Provisions) (Northern Ireland) Order 1990. It also contains a transitional provision to deal with cases before the court at the time of the commencement of the Statutory Rule.

3. Background

- 3.1. In April 2013, the EU Commission launched an EU Pilot investigation regarding transposition of the Recast Directive in the UK (EU Pilot file 4853/13/JUST). The Commission requested clarification on a range of issues regarding the UK's transposition of the Directive. Ten of the issues raised by the Commission related to transposition of the Directive in Northern Ireland. Through correspondence with the EU Commission, the number of issues requiring legislative change was reduced down to three. These issues are set out below.

- 3.2. First issue - Article 2(1)(a) of the Recast Directive defines direct discrimination as occurring where "one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation". The EU Commission took the view that Article 3(2) of the 1976 Order, which contains a definition of direct discrimination, could have the effect of restricting the definition in the Recast Directive, in that it uses the words "on grounds of her sex". This, according to the Commission, excluded discrimination on the basis of perception and discrimination by association.
- 3.3. The current text of Article 3 was inserted by regulation 2 of the Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations (Northern Ireland) 2001 (SR No. 282). The 2001 Regulations introduced two definitions of direct discrimination into the 1976 Order albeit with substantially the same text: one definition (Article 3(1)(a)) was the domestic law definition and the other definition (Article 3(2)(a)) applied to provisions of the 1976 Order governed by EU law.
- 3.4. The legislative response is to divide the current Article 3 of the 1976 Order (direct and indirect discrimination against women) into two separate provisions, a new substituted Article 3, dealing with direct discrimination and a new Article 3A, dealing with indirect discrimination.
- 3.5. Second issue - Article 2(1)(b) of the Recast Directive defines indirect discrimination. The EU Commission pointed out that the 1976 Order contains two different definitions of indirect discrimination (Article 3(1)(b) and Article 3(2)(b)) and queried the rationale for this. The Department's response to the Commission outlined the historic developments which lead to the creation of the two definitions of indirect discrimination in Article 3 of the 1976 Order. Essentially, a second definition of indirect discrimination on grounds of sex was created for the purposes of applying to those areas of the 1976 Order governed by EU law.
- 3.6. In recognition of the potential for confusion and inconsistency, the Department agreed to amend the 1976 Order to provide a single definition of indirect discrimination. The legislative response is to insert a new Article 3A in the 1976 Order.
- 3.7. Third issue - The EU Commission asked whether the 1976 Order covered indirect discrimination on the ground of gender reassignment, as is the case in Great Britain under the Equality Act 2010. Article 4A of the 1976 Order was inserted by the Sex Discrimination (Gender Reassignment) Regulations (Northern Ireland) 1999 (SR No. 311) to cover direct discrimination on grounds of gender reassignment in the areas of employment and occupation.
- 3.8. The Department advised the EU Commission that the 1976 Order did not cover indirect discrimination on ground of gender reassignment. The legislative response is to insert a new Article 4B in the 1976 Order (indirect discrimination on the ground of gender reassignment) which will apply to Part 3 (employment) and Part 4 of the 1976 Order, so far as it applies to vocational training.

4. Consultation

- 4.1. An 8 week public consultation was launched on 1 December 2015 and closed on 29 January 2016. Two out of the four responses received raised substantive comments on the draft regulations. These both expressed disappointment that the draft regulations did not extend protection against indirect discrimination on ground of gender reassignment to the areas of goods, facilities and services. Both responses recommended that the opportunity be taken through the Regulations to amend the 1976 Order to provide such protection.
- 4.2. The amendments consulted on were confined to addressing the specific concerns raised by the EU Commission regarding conformity of the 1976 Order with the Recast Directive (which only applies to employment and occupation). The purpose of amending the 1976 Order is to avoid infraction proceedings being initiated by the EU Commission for failure to fully transpose the Recast Directive. The Regulations are not intended as a vehicle for making broader legislative changes to the 1976 Order.

5. Equality Impact

- 5.1. The amendments contained in the Statutory Rule are necessary to ensure compliance with EU law. The Recast Directive implements the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. The amendments have no differential or adverse impact on the other section 75 categories.

6. Regulatory Impact

- 6.1. The Statutory Rule makes technical amendments to existing law. It does not, of itself, impose any additional burdens on business. .

7. Financial Implications

- 7.1. There are no financial implications associated with this Statutory Rule.

8. Section 24 of the Northern Ireland Act 1998

- 8.1. The Department is satisfied that this legislation is compliant with section 24 of the Northern Ireland Act 1998.

9. EU Implications

- 9.1. The amendments to the 1976 Order are in response to an EU Pilot investigation initiated by the EU Commission. The amendments will ensure that Northern Ireland sex discrimination legislation is fully compliant with the Recast Directive.

10. Parity or Replicatory Measure

- 10.1. As Great Britain has consolidated and harmonised its discrimination law through the enactment of the Equality Act 2010, there is no need for corresponding amendments to the law in Great Britain.

11. Additional Information

- 11.1. Not applicable.