

EXPLANATORY MEMORANDUM TO
THE SEX DISCRIMINATION (AMENDMENT OF LEGISLATION) REGULATIONS
2008

2008 No. DRAFT

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

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

2. **Description**

2.1 The Sex Discrimination (Amendment of Legislation) Regulations 2008 (“the Regulations”) amend the Sex Discrimination Act 1975 (“SDA”), the Sex Discrimination (Northern Ireland) Order 1976 (“SDO”) and the Public Health Act 1936 to implement Council Directive 2004/113/EC in the UK. This Directive (which, for working purposes is also referred to as the “Gender Directive”) implements the principle of equal treatment between men and women in the access to and supply of goods and services.

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

3.1 Matters of special interest to the Joint Committee on Statutory Instruments are likely to be a) the fact that the provisions amending the SDO are being made by the Parliamentary Secretary, Government Equalities Office, by authority of the Lord Privy Seal (see paragraphs 7.4 – 7.5 below), b) the definition of sex harassment (as to which, see paragraphs 7.6 – 7.10 below), c) the lateness of the transposition of the Directive through the Regulations (as to which, see paragraphs 7.12 – 7.13 and 7.30 below), and d) maternity discrimination being defined by a period of 26 weeks from the date of childbirth (as to which, see paragraphs 7.19 – 7.24 below).

4. **Legislative Background**

4.1 This instrument implements the Gender Directive in Great Britain and Northern Ireland. The Gender Directive implements the European Community law principle of equal treatment between men and women in the access to and supply of goods and services. The Regulations are made under section 2(2) of the European Communities Act 1972 and will be subject to approval by resolution of each House of Parliament. This instrument replaces the draft Sex Discrimination Act 1975 (Amendment) Regulations 2007 (“the draft 2007 Regulations”) which were laid before Parliament on 28 November 2007.

4.2 In Great Britain, the SDA is already in place to protect people from discrimination on grounds of sex in the field of goods, facilities, services and premises. In Northern Ireland, the SDO provides equivalent protection. The SDA and SDO therefore already go some way in implementing the provisions of the Gender Directive. However, amendments are needed to the SDA and SDO to fully implement the Gender

Directive. Where appropriate, we have taken the same or a similar approach to implementation as was taken when implementing earlier equal treatment Directives including: the Equal Treatment Amendment Directive (2002/73/EC) concerning sex discrimination in employment and related areas; the Race Directive (2000/43/EC) concerning race discrimination in employment and related areas, goods and services, including housing, and the Employment Directive (2000/78/EC) concerning age, disability, sexual orientation and religion or belief discrimination in employment and related areas.

4.3 Common to these four Directives are the definitions of direct and indirect discrimination and harassment. Key concepts which apply to the Equal Treatment Amendment Directive and the Gender Directive only are: sex discrimination, sex harassment and sexual harassment (which is a different concept to sex harassment); gender reassignment discrimination and harassment; and discrimination by way of less favourable treatment because of pregnancy, maternity leave (in the employment context) and maternity (in the non-employment context).

4.4 A brief scrutiny history follows, and a Transposition Note addressing how the Regulations implement the Gender Directive is annexed to this Explanatory Memorandum.

Scrutiny History

The scrutiny history of when the Gender Directive was considered by the EU Scrutiny Committee is as follows:

An Explanatory Memorandum, 14812/03, was submitted by the Department of Trade and Industry on 15 December 2003 to the House of Commons Scrutiny Committee and the House of Lords Select Committee on the European Union on the “proposal for a Directive implementing the principle of equal treatment between women and men in the access to and supply of goods and services” (proposed by the European Commission 05/11/03).

The Commons European Scrutiny Committee considered it politically important and did not clear it, asking whether the requirement to engage in dialogue with relevant non-Governmental organisations was consistent with the principle of subsidiarity. It also asked for further information a) on proportionality in relation to equal treatment, specifically in insurance, b) on the outcome of the Government’s request for clarification of the text and of consultation with the insurance industry and consumer groups, and c) for a full Regulatory Impact Assessment (report 4, Item 25056, session 03/04).

A supplementary Explanatory Memorandum was submitted on 23 April 2004 and Ministerial correspondence with the Committees continued to 14 September 2004 as EU negotiations approached their conclusion in autumn 2004.

The House of Lords Select Committee on the EU (progress of scrutiny date 19/03/04 and session 03/04) issued calls for evidence on 31 March 2004 to complete an inquiry into the draft Gender Directive. The inquiry received evidence from a range of stakeholders including Ministers and officials. Its report, mainly focused on insurance aspects, was

published in September 2004 and is at:

www.publications.parliament.uk/pa/ld200304/ldselect/ldcom/165/165.pdf

This scrutiny inquiry informed the Government's EU negotiating position during spring and summer 2004, notably on insurance, and the subsequent work on implementation. The House of Lords scrutiny report includes as an appendix Ministerial correspondence to the committee indicating that the Gender Directive was moving to political agreement more quickly than anticipated. Whilst noting that it was pleased that the revised text presented to the Employment, Social Policy, Health and Consumer Affairs Council on 4 October 2004 met all the British negotiating objectives in full, and that all the UK's proposals were acceptable to all Member States, the Committee expressed regret that the Government decided to override the Parliamentary scrutiny reserve without mentioning that the process of Parliamentary scrutiny had not yet been completed.

5. Territorial Extent and Application

5.1 This instrument applies to Great Britain and Northern Ireland.

6. European Convention on Human Rights

Barbara Follett, Parliamentary Secretary, Government Equalities Office, has made the following statement regarding Human Rights:

In my view, the provisions of the Sex Discrimination (Amendment of Legislation) Regulations 2008 are compatible with the Convention rights.

7. Policy background

7.1 The Gender Directive implements the principle of equal treatment between men and women in relation to the access to and supply of goods and services. The SDA and SDO, which apply to both women and men, are the main pieces of legislation in Great Britain and Northern Ireland which prohibit certain kinds of discrimination on the ground of sex, including gender reassignment. The SDA and SDO prohibit sex discrimination in employment, vocational training, education, the provision and sale of goods, facilities or services, and the disposal or management of premises. The SDA additionally prohibits sex discrimination in the exercise of public functions. In employment and vocational training, it is also unlawful to discriminate against someone on the grounds that a person is married or a civil partner, or on the grounds of gender reassignment. In the employment field, discrimination on the grounds of pregnancy and maternity leave, sex harassment, sexual harassment and gender reassignment harassment are also prohibited by the SDA and SDO.

7.2 In some respects the SDA and SDO provide wider protection than that required by the Gender Directive, and already go a long way towards meeting the UK's obligations under it. However, some amendments are needed to the SDA and SDO to fully comply with the Gender Directive.

7.3 The general principle underlying our proposals for transposing the Gender Directive is to go no further than the Directive requires, unless it is considered that there are sound reasons for doing so.

Amending Northern Ireland anti-discrimination legislation at Westminster

7.4 The Regulations implement the Gender Directive in Great Britain and Northern Ireland. The draft 2007 Regulations were laid on 28 November 2007 in order to meet the implementation deadline of 21 December 2007 in Great Britain. Although the Northern Ireland Assembly has competence to legislate on this devolved matter, because the First Minister did not agree to the inclusion of references to transgender or gender reassignment in the Northern Ireland Regulations, the First Minister and Deputy First Minister could not reach joint agreement on all of the policy proposals to implement the Gender Directive.

7.5 Once it became clear that the First Minister and Deputy First Minister were unable to reach joint agreement on implementation in Northern Ireland, the decision was taken to take forward UK-wide regulations at Westminster. It was considered that the most effective way of securing UK-wide compliance with our European Community obligations was for the Government Equalities Office, headed by the Lord Privy Seal, to take the lead in implementing the Gender Directive in Great Britain and Northern Ireland. The present draft Regulations resulted.

Harassment

7.6 As of 6 April 2008, the definition of sex harassment in the SDA will be amended by a separate instrument, the Sex Discrimination Act 1975 (Amendment) Regulations 2008. This is in response to the ruling in March 2007 on the judicial review brought by the former Equal Opportunities Commission (EOC)¹ against the regulations which implemented the Equal Treatment (Amendment) Directive concerning sex discrimination and harassment in employment and related matters in Great Britain. We refer to this decision as the “EOC JR judgment”. The High Court ruled in the EOC JR judgment that the sex harassment provisions in section 4A(1)(a) SDA should be recast to a) eliminate the causal link between harassment and the sex of the person being harassed, b) facilitate claims made by an employee who is not subjected to the unwanted conduct herself, and c) impose liability where an employer knowingly fails to protect an employee from repeated harassment by a third party. We have dealt with a) and b) by changing the definition of sex harassment from 'on the ground of her sex' to 'related to her sex or that of another person'. We have dealt with c) by providing express protection in the employment field (new section 6(2B) of the Sex Discrimination Act 1975 inserted by Sex Discrimination Act 1975 (Amendment) Regulations 2008). Though the EOC JR judgment concerned s4A(1)(a) of the SDA, similar amendments are being made for consistency to the equivalent sex harassment provisions in the SDO.

7.7 Though the EOC JR was concerned primarily with employment and related matters, for consistency, as part of our implementation of the Gender Directive, the Sex Discrimination (Amendment of Legislation) Regulations 2008 will extend the new definition of sex harassment (to be introduced on 6 April by the Sex Discrimination Act 1975 (Amendment) Regulations 2008 and by the Sex Discrimination Order 1976 (Amendment) Regulations (Northern Ireland) 2008) to the provision of goods, facilities, services and premises.

¹ *Equal Opportunities Commission v Secretary of State for Trade and Industry* [2007] EWHC 483 (Admin)

Harassment – JCSI and Merits Committee interest in the draft 2007 Regulations

7.8 The harassment provisions of the draft 2007 Regulations (which these Regulations replace) were reported on by the Joint Committee on Statutory Instruments in its Fifth Report of Session 2007-08 for unexpected use of powers (<http://www.publications.parliament.uk/pa/jt200708/jtselect/jtstatin/25/2502.htm>). This concern is being addressed with the coming into force on 6 April 2008 of a) the Sex Discrimination Act 1975 (Amendment) Regulations 2008 and the Sex Discrimination Order 1976 (Amendment) Regulations (Northern Ireland) 2008 which will introduce the new definition of sex harassment in the SDA and SDO, and b) these Regulations, which once in force, will extend the prohibition of sex harassment to the field of goods, facilities, services and premises for the first time in the UK.

7.9 Though the draft 2007 Regulations were brought to the attention of the House of Lords Merits Committee by the Christian Institute, the Committee concluded that the special attention of the House need not be drawn. It published the evidence submitted in Annex 2 of its Fifth Report of Session 2007-08 (<http://www.publications.parliament.uk/pa/ld200708/ldselect/ldmerit/24/2402.htm>).

7.10 One of the issues raised by the Christian Institute was that the definition of harassment that would apply to the provisions relating to goods, facilities, services and premises is broader than the definition in the Gender Directive. The definition in the Directive is: "where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person **and** of creating an intimidating, hostile, degrading, humiliating or offensive environment". To bring that definition into line with the existing employment protections under the SDA, the Regulations adopt the same approach to defining harassment as in those provisions and in legislation implementing directives covering race, age, sexual orientation disability and religion or belief in employment, and race in relation to goods, facilities and services. This (by using the word "or" in place of "and") establishes the two largely overlapping limbs of the definition as alternatives, rather than cumulative. Thus, a person only need show either an "offensive environment" or that their dignity was violated. We note that a parallel provision was recently set aside in Northern Ireland, following a judicial review of the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006, however that ruling turned on the adequacy of the consultation on the draft Regulations.

Consultation in Great Britain on the implementation of the Gender Directive and the draft 2007 Regulations

7.11 Government made the decision that there should be a single consultation package presenting the proposals for implementing the Gender Directive alongside the wider proposals for an Equality Bill flowing from the Discrimination Law Review. A consultation on the Gender Directive alone would have only been on the minimal changes to the Sex Discrimination Act 1975 considered necessary to implement the Gender Directive. By consulting on the Gender Directive and the Discrimination Law Review at the same time, the intention was for consultees to understand how the proposals for implementing the Gender Directive fit into and were a step towards our wider proposals for simplification and harmonisation of discrimination law.

7.12 It had been the Government's intention to publish the proposals for an Equality Bill in March 2007. However, in order to focus on getting the policy for an Equality Bill right, consultation was delayed, with knock-on effects for the publication of the consultation on the proposals for implementing the Gender Directive.

7.13 The public consultation² ran from 12 June to 4 September 2007 alongside the wider package of proposals for the Equality Bill. The consultation package, which provided access to the draft Regulations, was distributed widely and made readily available on the Communities and Local Government website (Communities and Local Government was leading on this exercise at the time) and through stakeholder networks. Annex B of the consultation document set out Government proposals for implementation of the Gender Directive and sought views specifically on three aspects – compatibility with the Directive of existing exceptions in the SDA, insurance, and defining maternity discrimination.

7.14 Around 90 responses to public consultation on the proposals to implement the Gender Directive, together with the draft Regulations, were received. The greatest proportion of these came from local authorities with the others ranging through equality bodies, transgender lobby groups, employer organisations, trade unions and individuals. Work is in hand to publish the Government response

Compatibility of SDA exceptions

7.15 68 out of 86 responses (79%) agreed with our proposals in respect of which exceptions needed to be amended to comply with the Gender Directive, and which did not. The proposal to amend specific exceptions that allow provision to men or women only to make it clear that different treatment for transsexual people will be lawful only where this would be a proportionate means of achieving a legitimate aim drew some criticism from most of the remaining 21% of the responses. These were mainly from transgender rights organisations who questioned the compatibility of this clarification with the principle of equal treatment. Government will shortly produce guidance to help people better understand how the exceptions might work in practice.

7.16 Since the consultation, Schedule 1, paragraphs 7 and 11 of the 2008 Regulations which narrow the existing exceptions for voluntary bodies (section 34 SDA) and charities (section 43 SDA) in those areas in which the Gender Directive operates, have been amended to incorporate the derogations permitted in respect of single-sex provision in Article 4(5) of the Gender Directive and in respect of positive action in Article 6. Schedule 1, paragraphs 8, 12 and 14 of the 2008 Regulations which narrow the existing exceptions which permit single-sex provision (section 35 SDA; section 44 SDA, section 46 SDA) in those areas in which the Gender Directive operates also rely on the derogation permitted in respect of single-sex services in Article 4(5).

Insurance

7.17 40% of consultees who considered the impact of the Gender Directive's insurance provision on providers and/or customers of insurance and related financial products put

² Annex B of the consultation paper and draft Regulations :*A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain* <http://www.communities.gov.uk/publications/communities/frameworkforfairnessconsultation>

forward views. Of these the strongest were presented by the insurance industry. Some of these had also responded to HM Treasury's separate consultation on its draft guidance. Insurers were mainly concerned about costs arising from a possible December 2007 introduction of the ban on differences in premiums and benefits related to pregnancy and maternity. Where responses came from individuals, many of these questioned how transsexual people would be able to demonstrate they had 'undergone' gender reassignment, and felt the proposals were unclear. This is now addressed in Schedule 1, paragraph 13 of the 2008 Regulations which clarifies that premiums and benefits should be calculated on the basis of the transsexual person's sex, (i.e. their legal sex which is their birth sex, except when they have legally changed their gender via a full Gender Recognition Certificate).

7.18 The consultation paper set out two options for implementing the ban on differences in premiums and benefits related to pregnancy and maternity – implementation in December 2007 or deferral to December 2009³. 74% of responses favoured 2007 with 26% for 2009. In the main, those favouring implementation in 2007 did not give their reasons, whilst those who favoured implementation in 2009 did so because they considered that the insurance sector should be given time to plan and prepare for the changes. Following further consultation with the insurance industry, Government was persuaded that deferral was necessary if the implementation costs for the industry were not to be increased significantly. It is Government's view that deferral to 21 December 2008 will be sufficient to enable insurers to carry out the procedures to implement this measure within their normal updating process.

Defining maternity

7.19 The Gender Directive requires Member States to outlaw less favourable treatment on the grounds of maternity. It does not define maternity, thus leaving it to Member States individually to consider what it should mean. Having provided four options⁴ for transposing this requirement in the consultation in Britain, 71 out of 78 responses (91%) supported the Government's proposal to define maternity according to the age of the child, the option that would provide the greatest legal certainty. The comments provided by the remaining 7 discussed alternative ways of defining maternity.

7.20 The next consideration for Government was to determine the period of time during which a woman who has recently given birth should be protected. In doing so, we have looked to the position on maternity leave in the employment context.

7.21 The Government considered how the Equal Treatment Amendment Directive (see paragraph 4.2 above) addresses discrimination on the grounds of maternity leave. Article 2(7) of that Directive states that less favourable treatment related to pregnancy and maternity leave within the meaning of Directive 92/85/EEC is direct sex discrimination. Directive 92/85/EEC (the "Pregnant Workers Directive") introduces measures to

³ At the time of the consultation, it was intended that the implementing regulations would come into effect on, or around, 21 December 2007. However, as the current intention is to bring regulations into force on or as close to 6 April 2008 as possible, the December 2007 option no longer applies.

⁴ The four options were a) defining maternity as 'childbirth'; b) defining maternity according to the age of the child – for example, protecting mothers of babies aged up to one year; c) providing protection for 'mothers of young children'; and d) not defining maternity.

encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding. In relation to maternity leave, the Pregnant Workers Directive protects workers who have recently given birth and workers who are breastfeeding because of their vulnerability to risks to their health and safety at work. That Directive provides that women who have recently given birth or are breastfeeding must be allowed a minimum of 14 weeks unpaid maternity leave, of which two weeks are compulsory. The domestic employment regime goes further.

7.22 The consultation paper provided as an example a possible period of protection of 52 weeks from the birth of the child. This was chosen because, given that it is the period which applies domestically for the whole entitlement to maternity leave in the employment context (comprising 26 weeks “ordinary maternity leave” and a further 26 weeks “additional maternity leave”), it would have been familiar to consultees. It was also considered appropriate as it did not go below the minimum required by the Pregnant Workers Directive of 14 weeks’ maternity leave.

7.23 Consultation responses varied much in opinion with periods of time suggested of between 8-12 weeks and 2-3 years. In considering what period of protection to provide, the Government takes the view that adopting anything less than the minimum requirements under the Pregnant Workers Directive would not be effective implementation of the Gender Directive. Taking into account consultation responses that indicated that a period of protection lasting a full 52 weeks would impose disproportionate burdens on business in their role as service providers, the Government has opted for a period of 26 weeks (which mirrors the period of a woman’s ordinary maternity leave entitlement in the employment context).

7.24 In doing so, the Government was also mindful of ECJ caselaw in the employment context which recognises the need to protect women until such time as their *‘physiological and mental functions have returned to normal after childbirth’* or to protect *‘the special relationship between a woman and her child over the period which follows pregnancy and childbirth’*⁵. In the Government’s view, a period of 26 weeks following childbirth would achieve this purpose. It goes further than the 14 weeks leave required by the Pregnant Workers Directive (as does the domestic employment regime) to extend to the period recommended by the World Health Organisation and the Department of Health for exclusive breastfeeding. Beyond that point, we consider that where a provider of goods or services refuses to serve, or provides with less favourable service, a mother with her baby, she could claim either direct or indirect discrimination on grounds of sex under the existing provisions of the SDA.

Defining pregnancy discrimination

7.25 Although the consultation paper did not seek views on defining pregnancy discrimination, the civil aviation sector expressed concerns that where airlines have policies not to carry late-term pregnant women on flights, these policies may be direct pregnancy discrimination, a form of discrimination prohibited by the Regulations. This would be the case even if these policies are in place for reasons of health and safety and not, for example, for business continuity reasons. In response to this, and in considering

⁵ *Hofmann*: 184/83 [1984] ECR 3047; *Habermann*: C-421/92 [1994] ECR I-1657; *Webb* C-32/93 [1994] QB718; *Thibault*: C-136/95 [1998] ECR I-2011

related health and safety issues in the provision of goods, facilities and services with which the Directive is concerned, for the purposes of legal certainty Government has proposed to include in Schedule 1, paragraph 3 of the 2008 Regulations a clarificatory provision concerning circumstances in which there is no direct pregnancy discrimination where a provider treats a pregnant woman less favourably in order to protect her health and safety provided that others are subjected to similar treatment because of conditions that also create risks to health and safety. Such a provision would also be applicable in the case of dangerous sports, for example parachute or bungee jumping or rock climbing.

Other responses

7.26 A significant number of responses from individuals were concerned that the right to religious expression would be compromised by extending protection to transsexual people. As activities relating to religious worship/observance fall outside the scope of the Gender Directive, the Government believes that the core concerns of respondents are addressed.

7.27 It should be noted that the Christian Institute's written evidence to the House of Lords Merits Committee (see paragraph 7.9) also raised concerns about the implications for religious freedom and free speech of the provisions relating to transsexual people, to which the Government Equalities Office provided a written response.

7.28 The Government Equalities Office has also responded to the concern raised by the Joint Committee on Human Rights that there is the potential for the excluded matter (c) in draft Schedule 1, paragraph 9 of the 2008 Regulations to undermine the protection that the Gender Directive is intended to give. Draft Schedule 1, paragraph 9 of the 2008 Regulations sets out matters which fall outside the scope of the Gender Directive and which we have therefore excluded for the purposes of sections 29-31 SDA. Draft Schedule 1, paragraph 9(1)(c) of the 2008 Regulations specifically puts out of scope goods, facilities or services, which are likely to be related to religious observance or worship. It is not intended to introduce an exemption for individual religious believers or organisations. They, like anyone else, will be bound by the prohibition on discrimination or harassment on grounds of sex and gender reassignment. We believe that this strikes the correct balance between the rights of transsexual people (Article 8 ECHR) and the right to manifest a religious belief and freedom of expression (Articles 9 and 10), foreseen in Recital 3 of the Gender Directive which recalls the need to respect the right to freedom of religion when prohibiting discrimination.

7.29 In addition to the responses relating to the Gender Directive, a significant number of consultees responding to the wider proposals for the Equality Bill took the opportunity to press for a specific right to breastfeed children of any age in public (around 500 responses) and provide wider protections, beyond the ambit of the Gender Directive (around 100 replies from individuals, lesbian, gay, bisexual and trans lobby groups and local authorities).

Consultation in Northern Ireland

7.30 A public consultation exercise on proposals for implementing the Gender Directive in Northern Ireland ran from 30 July 2007 to 21 September 2007. These proposals to amend the SDO mirrored those in the Great Britain consultation on

amending the SDA. The timing of this consultation exercise was dependant on the timing of the consultation in Great Britain to ensure consistency of the proposals in Great Britain and Northern Ireland. The consultation document, entitled "*Implementing EU Equality Obligations in Northern Ireland: The Gender Goods and Services Directive*" was distributed widely to individuals and organisations and made readily available on the website of the Office of the First Minister and Deputy First Minister. The consultation package provided access to a set of draft Regulations entitled the Sex Discrimination Order 1976 (Amendment) Regulations (Northern Ireland) 2007.

7.31 The consultation document set out proposals for implementation of the Gender Directive in Northern Ireland and sought views specifically on three aspects – compatibility with the Gender Directive of existing exceptions in the SDO, insurance, and defining maternity discrimination. A total of 243 responses were received, of which 211 were from individuals and 13 were from churches and church based groups. The remainder came from district councils, statutory and voluntary bodies, a trade union and groups representing the interests of gay, lesbian, bisexual and trans people.

7.32 Over 200 of the responses were in the form of a single-issue campaign, namely concern about the proposals to extend protection against direct discrimination and harassment on the grounds of a person's gender reassignment to the field of goods, facilities, services and premises. In the main, the issues raised were: the need for strong exemptions for religious activities which extend beyond church premises; concern about the proposals potentially restricting religious freedom and freedom of speech; fear of litigation for Christians sharing their faith and its moral teachings with others; and strongly held views that freedom to share religious beliefs is an essential part of the freedom to manifest a religious belief. These are issues raised by the Christian Institute in relation to the draft Regulations to transpose the Gender Directive in Britain laid before Parliament in November 2007 (see paragraph 7.28).

Compatibility of the SDO exceptions

7.33 The majority of respondents commented on the exceptions from for the principle of non-discrimination on grounds of gender reassignment. Some expressed concern about the practical application of the privacy and decency exception in relation to, for example, transsexual people at the transitional stages of gender reassignment. Conversely, a number of comments were received from the transsexual community expressing concern that the exceptions reinforced discrimination and prejudice against transsexual people. They argued that single-sex providers (such as voluntary or charitable organisations set up for the benefit of one sex) should not be allowed to treat transsexual people differently from other men and women. As regards the exception in relation to single-sex sporting competitions, the proposed amendment to clarify that it will only be lawful to discriminate on grounds of a person's gender reassignment where this is necessary to secure fair competition or the safety of competitors was considered inappropriate and likely to lead to confusion and litigation. The intention is to produce guidance on the practical aspects of the new protections which are being introduced for transsexual people on the grounds of their gender reassignment.

7.34 In line with amendments being made to the SDA, the existing exceptions in the SDO in respect of voluntary bodies and charities (Articles 35 and 44 respectively) have been further amended since public consultation on the draft Regulations. As well as

allowing voluntary bodies and charities to provide services on a single-sex basis where this would be a proportionate means of achieving a legitimate aim, the amendments in Schedule 2, paragraphs 7 and 11 have been broadened to make clear that such services can also be provided for one sex only if this is to prevent or compensate for a disadvantage linked to sex (in reliance upon Article 6 of the Gender Directive permitting positive action).

Defining pregnancy and maternity discrimination

7.35 All respondents who commented on this issue were in favour of the proposals to make explicit that less favourable treatment on grounds of pregnancy and maternity is direct discrimination. However, some of these respondents wanted more information on the potential implications of adopting different age bands before reaching a view on the most appropriate definition for maternity.

Insurance

7.36 Those respondents who addressed this issue agreed that any costs related to pregnancy and maternity should not result in differences in individuals' premiums and benefits. They also argued that the ban on differences in premiums and benefits related to pregnancy and maternity should be implemented from December 2007 (and not deferred until December 2009).

Other matters

7.37 Since the consultations and following a trawl of existing legislation in Great Britain and Northern Ireland, a consequential amendment is also being made to the Public Health Act 1936. This amendment would enable local authorities in England and Wales to charge fees for the use of urinals provided under the Act. Without this amendment, this provision in the Act would contravene the requirement of the Gender Directive to abolish any laws which are contrary to the principle of equal treatment.

7.38 An amendment is also being made to section 51 of the SDA following implementation of Directive 2002/73/EC to ensure that in respect of barristers and advocates acts which are required by law and are necessary for the protection of women (and with which that Directive is concerned) are not unlawful under the SDA. There is no equivalent to section 51 of the SDA in the SDO, therefore no corresponding amendment is needed.

Guidance

7.39 The Government Equalities Office will publish a guide to the Regulations on its website for use by providers and users of goods, facilities or services, and premises, within the private, public and voluntary sectors. It will also be of use to legal and welfare advisors and interested parties, trade associations or equality organisations <http://www.womenandequalityunit.gov.uk/legislation/index.htm>.

7.40 A separate body of guidance has been produced for the insurance industry by HM Treasury and published, in draft, at www.hm-treasury.gov.uk. Publication prior to the Regulations' debates and their coming into force was considered appropriate in order to

allow the industry, which is the largest sector affected by the proposals, time to familiarise itself with the changes affecting its business and to prepare for the new arrangements, particularly the requirements on insurers to collate and publish the data on which decisions to treat men and women differently for the purposes of calculating premiums, are based.

Consolidation

7.41 The Government Equalities Office is taking forward proposals for an Equality Bill to simplify and modernise discrimination law. The Government is committed to introducing the Equality Bill during this Parliament, and the intention is that the Bill would consolidate discrimination law, including provisions contained in the SDA.

8. Impact

8.1 An Impact Assessment is attached to this memorandum. Copies are available to the public, free of charge, from the Government Equalities Office, 5th Floor, Eland House, SW1E 5DU. Copies will also be available in the Library of both Houses of Parliament

8.2 The impact on the public sector is expected to be low.

9. Contact

Elizabeth Solowo-Coker at the Government Equalities Office Tel: 020 7944 0639 or e-mail: elizabeth.solowo-coker@communities.gsi.gov.uk can answer any queries regarding the instrument.

UK IMPLEMENTATION OF DIRECTIVE 2004/113/EC

GREAT BRITAIN AND NORTHERN IRELAND

**THE DRAFT SEX DISCRIMINATION (AMENDMENT OF LEGISLATION)
REGULATIONS 2008**

[S.I. 2008/XXXX]

TRANSPOSITION NOTE

**The Sex Discrimination (Amendment of Legislation) Regulations 2008, implementing
Council Directive 2004/113 EC
[S.I. 2008/XXXX]**

TRANSPOSITION NOTE

Objective: Council Directive 2004/113/EC⁶ of 13 December 2004 implements the principle of equal treatment between men and women in the access to and supply of goods and services. It is implemented in the United Kingdom by the Sex Discrimination (Amendment of Legislation) Regulations 2008 (“the 2008 Regulations”), which amends the Sex Discrimination Act 1975 (“the SDA”), and the Sex Discrimination (Northern Ireland) Order 1976 (“the SDO”). Separate legislation will implement the Directive in Gibraltar.

Responsibility:

This table has been prepared by the Government Equalities Office. It sets out the objective of each article of Directive 2004/113/EC, and how it is to be implemented in Great Britain and Northern Ireland. The Lord Privy Seal is responsible for each aspect of implementation.

ARTICLE OF DIRECTIVE 2004/113/EC AND OBJECTIVE	PROVISIONS TRANSPOSING THE DIRECTIVE⁷
<p><u>Article 1</u> Purpose</p> <p>The purpose of this Directive is to lay down a framework for combating discrimination based on sex in access to and supply of goods and services, with a view to putting into effect in the Member States the principle of equal treatment between men and women.</p>	<p>No implementation required</p>
<p><u>Article 2</u> Definitions</p> <p>For the purposes of this Directive, the following definitions shall apply: (a) direct discrimination: where one person is treated less favourably, on grounds of sex, than another is, has been or would be treated in a comparable situation;</p>	<p>(a) Section 1 SDA, (direct and indirect discrimination against women) Schedule 1, paragraph 2 of the 2008 Regulations amends section 2A SDA (discrimination on the grounds of gender reassignment) to extend protection from direct discrimination on grounds of</p>

⁶Published in the Official Journal of the European Journal L 373, 12.12.2004, page 37. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0113:EN:HTML>

⁷ Unless otherwise specified, statutory references are to the Sex Discrimination Act 1975 and Sex Discrimination (Northern Ireland) Order 1976, as amended by the Sex Discrimination (Amendment of Legislation) Regulations 2008

ARTICLE OF DIRECTIVE 2004/113/EC AND OBJECTIVE	PROVISIONS TRANSPOSING THE DIRECTIVE ⁷
<p>(b) indirect discrimination: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary;</p>	<p>gender reassignment in the provision of goods, facilities, services or premises. Schedule 1, paragraph 13 of the 2008 Regulations provides how the SDA operates in relation to gender reassignment discrimination in respect of contracts entered into which relates to differences in premiums and benefits.</p> <p>(a) Article 3 SDO, (direct and indirect discrimination against women) Schedule 2, paragraph 2 of the 2008 Regulations amends Article 4A of the SDO (discrimination on the grounds of gender reassignment) to extend protection from direct discrimination on grounds of gender reassignment in the provision of goods, facilities, services or premises. Schedule 2, paragraph 13 of the 2008 Regulations provides how the SDO operates in relation to gender reassignment discrimination in respect of contracts entered into which relates to differences in premiums and benefits.</p> <p>(b) Section 1(2) SDA. Schedule 1, paragraph 1 of the 2008 Regulations applies the Directive-based definition of indirect discrimination in section 1(2) SDA to those areas of the SDA with which the Directive is concerned, namely sections 29-31, except in so far as they relate to an excluded matter.</p> <p>(b) Article 3(2) of the SDO. Schedule 2, paragraph 1 of the 2008 Regulations applies the Directive-based definition of indirect discrimination in Article 3(2) of the SDO to those areas of the SDO with which the Directive is concerned, namely Article 30-32, except in so far as they relate to an excluded matter.</p>
<p>(c) harassment: where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment; (d) sexual harassment: where any form of unwanted physical, verbal, non-verbal or</p>	<p>(c) and (d) Section 4A(1) and (3) SDA (harassment, including sexual harassment) Note: regulation 3 of the Sex Discrimination Act 1975 (Amendment) Regulations 2008 amends the definition of sex harassment at section 4A(1) as of 6th April 2008. Schedule 1, paragraphs 4 – 6 amend section 29 (discrimination in provision of goods, facilities or</p>

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<p>physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.</p>	<p>services), section 30 (discrimination in disposal or management of premises), and section 31 (discrimination: consent for assignment or sub-letting) to make it unlawful to subject a person to sex harassment, sexual harassment or harassment on the ground that the person intends to undergo, is undergoing or has undergone gender reassignment.</p> <p>(c) and (d) Article 6A(1) and (3) of the SDO (harassment, including sexual harassment) Note: regulation 3 of the Sex Discrimination Order 1976 (Amendment) Regulations (Northern Ireland) 2008 amends the definition of sex harassment at Article 6A(1) SDO as of 6th April 2008. Schedule 2, paragraphs 4 – 6 of the 2008 Regulations amend Article 30 (discrimination in provision of goods, facilities or services), Article 31 (discrimination in disposal or management of premises), and Article 32 (discrimination: consent for assignment or sub-letting) to make it unlawful to subject a person to sex harassment, sexual harassment or harassment on the ground that the person intends to undergo, is undergoing or has undergone gender reassignment.</p>
<p style="text-align: center;"><u>Article 3</u> Scope</p> <p>1. Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons who provide goods and services, which are available to the public irrespective of the person concerned as regards both the public and private sectors, including public bodies, and which are offered outside the area of private and family life and the transactions carried out in this context.</p>	<p>Sections 29 (discrimination in provision of goods, facilities and services), 30 (discrimination in disposal or management of premises), and section 31 (discrimination: consent for assignment or sub-letting) SDA deal with the areas which fall within the scope of the Directive. Schedule 1, paragraph 9 of the 2008 Regulations sets out which matters are excluded for the purposes of sections 29-31 SDA (“excluded matters”) since they are outside of the scope of the Directive.</p> <p>The excluded matters are specifically referred to in Schedule 1, paragraphs 1 of the 2008 Regulations (indirect discrimination), 2 (discrimination on the grounds of gender reassignment), 3 (pregnancy and maternity), 4 (goods, facilities and services), 5 (premises), 10 (relationships which have come to</p>

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	<p>an end), 13 (insurance), 16 (acts done under statutory authority), and 18 (time for answering questions from aggrieved persons).</p> <p>Articles 30 (discrimination in provision of goods, facilities and services), 31 (discrimination in disposal or management of premises), and 32 (discrimination: consent for assignment or sub-letting) of the SDO deal with the areas which fall within the scope of the Directive.</p> <p>Schedule 2, paragraph 9 of the 2008 Regulations sets out which matters are excluded for the purposes of Articles 30-32 of the SDO (“excluded matters”) since they are outside of the scope of the Directive.</p> <p>The excluded matters are specifically referred to in Schedule 2, paragraphs 1 (indirect discrimination), 2 (discrimination on the grounds of gender reassignment), 3 (pregnancy and maternity), 4 (goods, facilities and services), 5 (premises), 10 (relationships which have come to an end), 13 (insurance), 15 (acts done under statutory authority), and 18 (time for answering questions from aggrieved persons) of the 2008 Regulations.</p>
<p>2. This Directive does not prejudice the individual's freedom to choose a contractual partner as long as an individual's choice of contractual partner is not based on that person's sex.</p>	<p>No implementation necessary.</p>
<p>3. This Directive shall not apply to the content of media and advertising nor to education.</p>	<p>No implementation necessary, but see excluded matters at paragraph 9 in each of Schedules 1 and 2 of the 2008 Regulations.</p>
<p>4. This Directive shall not apply to matters of employment and occupation. This Directive shall not apply to matters of self-employment, insofar as these matters are covered by other Community legislative acts.</p>	<p>No implementation necessary.</p>
<p style="text-align: center;"><u>Article 4</u> Principle of equal treatment 1. For the purposes of this Directive, the principle of equal treatment between men</p>	

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<p>and women shall mean that</p> <p>(a) there shall be no direct discrimination based on sex, including less favourable treatment of women for reasons of pregnancy and maternity;</p>	<p>(a) Section 1(1)(a) SDA prohibits direct discrimination on the ground of a person's sex. Schedule 1, paragraph 3 of the 2008 Regulations extends protection from direct discrimination on grounds of pregnancy and introduces protection from direct discrimination on the grounds of maternity in the provision of goods, facilities, services or premises.</p> <p>(a) Article 3(1)(a) of the SDO prohibits direct discrimination on the ground of a person's sex. Schedule 2, paragraph 3 of the 2008 Regulations extends protection from direct discrimination on grounds of pregnancy and introduces protection from direct discrimination on the grounds of maternity in the provision of goods, facilities, services or premises.</p>
<p>(b) there shall be no indirect discrimination based on sex.</p>	<p>Section 1(2) SDA as amended by Schedule 1, paragraph 1 of the 2008 Regulations applies the Directive-based definition of indirect discrimination in section 1(2) SDA to those areas of the SDA with which the Directive is concerned, namely sections 29-31, except in so far as they relate to an excluded matter.</p> <p>Article 3(2) and (3) of the SDO Schedule 2, paragraph 1 of the 2008 Regulations amends Article 3(3) of the SDO to apply the Directive-based definition of indirect discrimination in Article 3(2) to those areas of the SDO with which the Directive is concerned, namely Articles 30-32, except in so far as they relate to an excluded matter.</p>
<p>2. This Directive shall be without prejudice to more favourable provisions concerning the protection of women as regards pregnancy and maternity.</p>	<p>Section 2(2) SDA sets out when it is not unlawful to discriminate by affording special treatment to women in connection with pregnancy or childbirth.</p> <p>Article 4(2) of the SDO sets out when it is not unlawful to discriminate by affording special treatment to women in connection with pregnancy or childbirth.</p>
<p>3. Harassment and sexual harassment</p>	<p>Section 4A(1) and (3) SDA (harassment, including</p>

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<p>within the meaning of this Directive shall be deemed to be discrimination on the grounds of sex and therefore prohibited. A person's rejection of, or submission to, such conduct may not be used as a basis for a decision affecting that person.</p>	<p>sexual harassment) Note: regulation 3 of the Sex Discrimination Act 1975 (Amendment) Regulations 2008 amends the definition of sex harassment at section 4A(1) as of 6th April 2008. Schedule 1, paragraphs 4-6 of the 2008 Regulations amend section 29 (discrimination in provision of goods, facilities or services), section 30 (discrimination in disposal or management of premises), and section 31 (discrimination: consent for assignment or sub-letting) to make it unlawful to subject a person to sex harassment, sexual harassment, or harassment on the ground that the person intends to undergo, is undergoing or has undergone gender reassignment.</p> <p>Article 6A(1) and (3) of the SDO (harassment, including sexual harassment) Note: regulation 3 of the Sex Discrimination Order 1976 (Amendment) Regulations (Northern Ireland) 2008 amends the definition of sex harassment at Article 6A(1) as of 6th April 2008. Schedule 2, paragraphs 4-6 of the 2008 Regulations amend Article 30 (discrimination in provision of goods, facilities or services), Article 31 (discrimination in disposal or management of premises), and Article 32 (discrimination: consent for assignment or sub-letting) of the SDO to make it unlawful to subject a person to sex harassment, sexual harassment or harassment on the ground that the person intends to undergo, is undergoing or has undergone gender reassignment.</p>
<p>4. Instruction to direct or indirect discrimination on the grounds of sex shall be deemed to be discrimination within the meaning of this Directive.</p>	<p>Where an individual is instructed to discriminate and refuses to carry out the instruction and is treated less favourably as a result, they will have a remedy for victimisation under section 4 SDA. Where an individual is instructed to discriminate and carries out the instructions, under the vicarious liability provisions in section 41 SDA, the ultimate victim of the instructions is able to claim a remedy against the person who gave the instructions as well as the person who actually discriminated. In addition, section 42 makes it unlawful for a person to knowingly aid another person to carry out a discriminatory act.</p>

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	<p>Where an individual is instructed to discriminate and refuses to carry out the instruction and is treated less favourably as a result, they will have a remedy for victimisation under Article 6 of the SDO. Where an individual is instructed to discriminate and carries out the instructions, under the vicarious liability provisions in Article 42 of the SDO, the ultimate victim of the instructions is able to claim a remedy against the person who gave the instructions as well as the person who actually discriminated. In addition, Article 43 of the SDO makes it unlawful for a person to knowingly aid another person to carry out a discriminatory act.</p>
<p>5. This Directive shall not preclude differences in treatment, if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.</p>	<p>See the exceptions in sections 34 (exception for voluntary bodies), 43 (charities) and 44 (sport) of the SDA as amended by Schedule 1, paragraphs 7, 11 and 12 of the 2008 Regulations, section 35(1)(c) SDA as amended by Schedule 1, paragraph 8 of the 2008 Regulations, and section 46 SDA (communal accommodation) as amended by Schedule 1, paragraph 14 of the 2008 Regulations.</p> <p>The exceptions in Articles 35 (exception for voluntary bodies), 44 (charities) and 45 (sport) of the SDO as amended by Schedule 2, paragraphs 7, 11 and 12 of the 2008 Regulations respectively. Article 36(1)(c) of the SDO, as amended by Schedule 2, paragraph of the 2008 Regulations 8. Article 47 of the SDO (communal accommodation), as amended by Schedule 2, paragraph 14 of the 2008 Regulations.</p>
<p style="text-align: center;"><u>Article 5</u> Actuarial factors</p> <p>1. Member States shall ensure that in all new contracts concluded after 21 December 2007 at the latest, the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits.</p>	<p>See section 45 SDA (insurance etc), as amended by Schedule 1, paragraph 13 of the 2008 Regulations.</p> <p>See Article 46 of the SDO (insurance etc), as amended by Schedule 2, paragraph 13 of the 2008 Regulations.</p>
<p>2. Notwithstanding paragraph 1, Member States may decide before 21 December 2007 to permit proportionate differences in</p>	<p>See section 45 SDA (insurance etc), as amended by Schedule 1, paragraph 13 of the 2008 Regulations.</p>

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<p>individuals' premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data. The Member States concerned shall inform the Commission and ensure that accurate data relevant to the use of sex as a determining actuarial factor are compiled, published and regularly updated. These Member States shall review their decision five years after 21 December 2007, taking into account the Commission report referred to in Article 16, and shall forward the results of this review to the Commission.</p>	<p>See Article 46 SDO (insurance etc), as amended by Schedule 2, paragraph 13 of the 2008 Regulations.</p>
<p>3. In any event, costs related to pregnancy and maternity shall not result in differences in individuals' premiums and benefits. Member States may defer implementation of the measures necessary to comply with this paragraph until two years after 21 December 2007 at the latest. In that case the Member States concerned shall immediately inform the Commission.</p>	<p>See section 45 SDA (insurance etc), as amended by Schedule 1, paragraph 13 of the 2008 Regulations. See also regulation 4(3) which defers implementation until 22 December 2008.</p> <p>See Article 46 of the SDO (insurance etc), as amended by Schedule 2, paragraph 13 of the 2008 Regulations. See also regulation 5(3) which defers implementation until 22 December 2008.</p> <p>The European Commission was informed that the UK is making use of this derogation on 19 December 2007.</p>
<p style="text-align: center;"><u>Article 6</u> Positive action</p> <p>With a view to ensuring full equality in practice between men and women, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to sex.</p>	<p>See sections 34 (exception for voluntary bodies) and 43 (charities) and SDA as amended by Schedule 1, paragraphs 7 and 11 of the 2008 Regulations.</p> <p>See Article 35 (exception for voluntary bodies) and Article 44 (charities) of the SDO as amended by Schedule 2, paragraphs 7 and 11 of the 2008 Regulations respectively.</p>
<p style="text-align: center;"><u>Article 7</u> Minimum requirements</p> <p>1. Member States may introduce or maintain provisions which are more favourable to the</p>	<p>No implementation required.</p>

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protection of the principle of equal treatment between men and women than those laid down in this Directive.	
2. The implementation of this Directive shall in no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive.	There is no reduction in the level of protection currently available.
<p style="text-align: center;"><u>Article 8</u> Defence of rights</p> <p>1. Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of the obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.</p>	<p>Section 66 SDA deals with claims under Part 3 of the SDA, including claims for discrimination or harassment in the provision of goods, facilities or services.</p> <p>Section 35C SDA (relationships that have come to an end), as amended by Schedule 1, paragraph 10 of the 2008 Regulations.</p> <p>Article 66 of the SDO deals with claims made under Part 4 of the SDO, including claims for discrimination or harassment in the provision of goods, facilities or services.</p> <p>Article 36A of the SDO (relationships which have come to an end), as amended by Schedule 2, paragraph 10 of the 2008 Regulations.</p>
2. Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation, as the Member States so determine, for the loss and damage sustained by a person injured as a result of discrimination within the meaning of this Directive, in a way which is dissuasive and proportionate to the damage suffered. The	<p>For goods and services discrimination section 66 SDA makes provision for remedies that would be obtainable in the High Court of the Court of Session as the case may be. These remedies include:-</p> <ul style="list-style-type: none"> • an order declaring the rights of parties, • an injunction or order to a specified person or body to do or cease doing specified acts; and

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fixing of a prior upper limit shall not restrict such compensation or reparation.	<ul style="list-style-type: none"> • damages. <p>For goods and services discrimination, Article 66 of the SDO makes provision for remedies that would be obtainable in the High Court. These remedies include:-</p> <ul style="list-style-type: none"> • an order declaring the rights of parties, • an injunction or order to a specified person or body to do or cease doing specified acts; and • damages.
3. Member States shall ensure that associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.	<p>Under the relevant rules and procedure there is no obstacle to such organisations supporting a complainant in proceedings. See also section 28 (legal assistance) of the Equality Act 2006 which specifies the powers of the Commission for Equality and Human Rights to an individual who alleges that he is a victim of behaviour contrary to the equality enactments.</p> <p>Under the relevant rules and procedure there is no obstacle to such organisations supporting a complainant in proceedings. Article 75 of the SDO enables the Equality Commission for Northern Ireland (ECNI) to provide advice and assistance to people who believe they have been discriminated against for a reason relating to their sex. Assistance by ECNI ranges from giving advice to arranging for legal representation in some cases.</p>
4. Paragraphs 1 and 3 shall be without prejudice to national rules on time limits for bringing actions relating to the principle of equal treatment.	No implementation required.
<p style="text-align: center;"><u>Article 9</u> Burden of proof</p> <p>1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent</p>	<p>Section 66A SDA, as amended by Schedule 1, paragraph 17 of the 2008 Regulations.</p> <p>Article 66A of the SDO (burden of proof: county court), as amended by Schedule 2, paragraph 17 of the 2008 Regulations.</p>

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authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.	
2. Paragraph 1 shall not prevent Member States from introducing rules of evidence, which are more favourable to plaintiffs.	No implementation required.
3. Paragraph 1 shall not apply to criminal procedures.	No implementation required.
4. Paragraphs 1, 2 and 3 shall also apply to any proceedings brought in accordance with Article 8(3).	Section 66A SDA, as amended by Schedule 1, paragraph 17 of the 2008 Regulations. Article 66A of the SDO (burden of proof: county court), as amended by Schedule 2, paragraph 17 of the 2008 Regulations.
5. Member States need not apply paragraph 1 to proceedings in which it is for the court or other competent authority to investigate the facts of the case.	No implementation required.
<p style="text-align: center;"><u>Article 10</u> Victimisation</p> <p>Member States shall introduce into their national legal systems such measures as are necessary to protect persons from any adverse treatment or adverse consequence as a reaction to a complaint or to legal proceedings aimed at enforcing compliance with the principle of equal treatment.</p>	<p>Section 4 SDA (discrimination by way of victimisation).</p> <p>Article 6 of the SDO (discrimination by way of victimisation).</p>
<p style="text-align: center;"><u>Article 11</u></p> <p>Dialogue with relevant stakeholders With a view to promoting the principle of equal treatment, Member States shall encourage dialogue with relevant stakeholders which have, in accordance with national law and practice, a legitimate interest in contributing to the fight against discrimination on grounds of sex in the area of access to and supply of goods and</p>	<p><u>Great Britain:</u> Relevant stakeholders have been consulted on the implementation of this Directive, including a formal public consultation on the draft Sex Discrimination Act 1975 (Amendment) Regulations 2007 between June and September 2007. This formed part of a wider consultation on the Discrimination Law Review - <i>A Framework for Fairness</i>: proposals for Single Equality Bill for Great Britain. In addition the Government Equalities Office, the government department with</p>

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<p>services.</p>	<p>lead responsibility for cross-government coordination on equality and discrimination matters, regularly consults and engages in dialogue with the Commission for Equality and Human Rights (and its predecessor, the Equal Opportunities Commission). Key stakeholders include the devolved administrations, local government, and groups representing the following: business (including the insurance industry), consumers, the voluntary sector, organised religions, pregnant women and new mothers, and trans-people. Further dialogue is taking place on the development of information advice and guidance. Wider proposals are being discussed as part of the proposed Equality Bill.</p> <p><u>Northern Ireland:</u> Relevant stakeholders have been consulted on the implementation of this Directive, including a formal public consultation on the draft Sex Discrimination Order 1976 (Amendment) Regulations (Northern Ireland) 2007 which ran from 30 July 2007 to 21 September 2007.</p>
<p style="text-align: center;"><u>Article 12</u></p> <p>1. Member States shall designate and make the necessary arrangements for a body or bodies for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on the grounds of sex. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights, or the implementation of the principle of equal treatment.</p>	<p><u>Great Britain:</u> The Equality Act 2006 established the Commission for Equality and Human Rights – CEHR (operating as the Equality and Human Rights Commission - ECHR). As of October 2007 this designated body took over the role of the Equal Opportunities Commission in respect of sex discrimination matters (including gender reassignment). Section 8 of the Equality Act 2006 sets out the CEHR's duties on equality and diversity, including working towards the elimination of unlawful discrimination and harassment, promoting equality of opportunity, promoting awareness of rights and enforcing the equality enactments.</p> <p><u>Northern Ireland:</u> The Equality Commission for Northern Ireland (ECNI) is an independent public body established under the Northern Ireland Act 1998. ECNI has a legal duty under Article 54 of the Sex Discrimination (Northern Ireland) Order 1976 to work towards the elimination of sex discrimination and harassment, to promote equality of opportunity between the sexes and to keep the working of the Order under review. Schedule 2,</p>

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	<p>paragraph 16 amends Article 54 of the SDO to extend the duties of ECNI to promote equality of opportunity on grounds of gender reassignment in the provision of good, facilities, services or premises.</p>
<p>2. Member States shall ensure that the competencies of the bodies referred to in paragraph 1 include:</p> <p>(a) without prejudice to the rights of victims and of associations, organisations or other legal entities referred to in Article 8(3), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination;</p>	<p>See section 28 (legal assistance) of the Equality Act 2006 which specifies the powers of the Commission for Equality and Human Rights to an individual who alleges that he is a victim of behaviour contrary to the equality enactments.</p> <p>Article 75 of the SDO enables the Equality Commission for Northern Ireland (ECNI) to provide advice and assistance to people who believe they have been discriminated against for a reason relating to their sex. Assistance by ECNI ranges from giving advice to arranging for legal representation in some cases.</p>
<p>(b) conducting independent surveys concerning discrimination;</p>	<p>Section 13 (information, advice, &c) Equality Act 2006. The power to undertake “research” under section 13 Equality Act incorporates activities such as surveys, which are a form of research.</p> <p>Article 55 of the SDO permits the Equality Commission for Northern Ireland (ECNI) to undertake any research or educational activities which appear to it necessary for the purposes of carrying out its general duties. ECNI may also assist financially, or otherwise, other persons undertaking any such research or educational activities.</p>
<p>(c) publishing independent reports and making recommendations on any issue relating to such discrimination.</p>	<p>See the following sections of the Equality Act 2006: subsection 2 of section 11 (monitoring the law), section 12 (monitoring progress), section 13 (information, advice, &c)</p> <p>Under Article 54(1)(c) of the SDO, the Equality Commission for Northern Ireland (ECNI) has a duty to keep the working of the SDO under review. ECNI also has a power under Article 57 of the SDO to conduct formal investigations for any purpose connected with the performance of its duties.</p>

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<p style="text-align: center;"><u>Article 13</u> Compliance</p> <p>Member States shall take the necessary measures to ensure that the principle of equal treatment is respected in relation to the access to and supply of goods and services within the scope of this Directive, and in particular that:</p> <p>(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;</p>	<p>(a) The only piece of legislation, which has been identified as being contrary to the principle of equal treatment, and which is being amended as a result by regulation 3, is section 87 of the Public Health Act 1936.</p>
<p>(b) any contractual provisions, internal rules of undertakings, and rules governing profit-making or non-profit-making associations contrary to the principle of equal treatment are, or may be, declared null and void or are amended.</p>	<p>No specific implementation required.</p>
<p style="text-align: center;"><u>Article 14</u> Penalties</p> <p>Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The penalties, which may comprise the payment of compensation to the victim, shall be effective, proportionate and dissuasive. Member States shall notify those provisions to the Commission by 21 December 2007 at the latest and shall notify it without delay of any subsequent amendment affecting them.</p>	<p>For goods and services discrimination section 66 SDA makes provision for remedies that would be obtainable in the High Court or the Court of Session as the case may be. These remedies include:-</p> <ul style="list-style-type: none"> • an order declaring the rights of parties, • an injunction or order to a specified person or body to do or cease doing specified acts; and <p>damages.</p> <p>For goods and services discrimination, Article 66 of the SDO makes provision for remedies that would be obtainable in the High Court. These remedies include:-</p> <ul style="list-style-type: none"> • an order declaring the rights of parties, • an injunction or order to a specified person

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	<p>or body to do or cease doing specified acts; and</p> <ul style="list-style-type: none"> • damages.
<p style="text-align: center;"><u>Article 15</u></p> <p>Dissemination of information</p> <p>Member States shall take care that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force, are brought to the attention of the persons concerned by all appropriate means throughout their territory.</p>	<p><u>Great Britain:</u> There has been a public consultation on the proposals for implementation of the Directive.</p> <p>The Government Equalities Office website will provide updates on the new legislation. The newly-established Commission for Equality and Human Rights also provides information and guidance on discrimination law.</p> <p><u>Northern Ireland:</u> There has been a public consultation on the proposals for implementation of the Directive (this ran from 30 July 2007 to 21 September 2007). The Equality Commission for Northern Ireland also provides information and guidance on discrimination law.</p>
<p style="text-align: center;"><u>Article 16</u></p> <p style="text-align: center;">Reports</p> <p>1. Member States shall communicate all available information concerning the application of this Directive to the Commission, by 21 December 2009. and every five years thereafter.</p> <p>The Commission shall draw up a summary report, which shall include a review of the current practices of Member States in relation to Article 5 with regard to the use of sex as a factor in the calculation of premiums and benefits. It shall submit this report to the European Parliament and to the Council no later 21 December 2010. Where appropriate, the Commission shall accompany its report with proposals to</p>	<p>Arrangements are in hand to ensure the Commission is so notified.</p>

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<p>modify the Directive. 2. The Commission's report shall take into account the viewpoints of relevant stakeholders.</p>	
<p style="text-align: center;"><u>Article 17</u> Transposition</p> <p>1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 21 December 2007 at the latest. They shall forthwith communicate to the Commission the text of those provisions. When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such publication of reference shall be laid down by the Member States.</p>	<p>The Sex Discrimination (Amendment of Legislation) Regulations 2008 shall come into force on the fifth day after the day on which they are made or on 6th April 2008, whichever is the later.</p>
<p>2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.</p>	<p>Consolidated versions of the relevant SDA and SDO provisions will be provided electronically alongside this Transposition Note.</p>

UK IMPLEMENTATION OF DIRECTIVE 2004/113/EC

GREAT BRITAIN AND NORTHERN IRELAND

**THE DRAFT SEX DISCRIMINATION (AMENDMENT OF LEGISLATION)
REGULATIONS 2008**

[S.I. 2008/XXXX]

IMPACT ASSESSMENT

Summary: Intervention & Options

Department /Agency: Government Equalities Office	Title: Impact Assessment of the draft Sex Discrimination (Amendment of Legislation) Regulations 2008	
Stage: Implementation	Version: 1	Date: 28 February 2008
Related Publications: 1. Annex C of the Initial Regulatory Impact Assessment for the Discrimination Law Review Consultation paper, "A Framework for Fairness" (DCLG, June 2007). 2. A Partial Regulatory Impact Assessment formed part of the NI consultation package "Implementing EU Equality Obligations in Northern Ireland: the Gender Goods and Services Directive".		

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<http://www.equalities.gov.uk/>

Contact for enquiries: Elizabeth Solowo-Coker

Telephone: 020 7944 0639

What is the problem under consideration? Why is government intervention necessary?

In Great Britain and Northern Ireland, existing legislation on sex discrimination in the access to and provision of goods, facilities services and premises, while comprehensive, does not fully comply with the requirements of the Gender Directive. There is a consequent need to make some changes and clarifications to the Sex Discrimination Act 1975 and the Sex Discrimination (Northern Ireland) Order 1976 to bring them into line with the precise requirements of the Directive. The deadline for implementation of this Directive was 21 December 2007.

What are the policy objectives and the intended effects?

To make the amendments necessary to fulfil our obligations under the Directive, while ensuring that the proposals, wherever possible, reduce existing inconsistencies and avoid creating further complexity, in line with better regulation principles. Consistency with Directive-based definitions already used for sex discrimination in employment. Some new protection from discrimination on grounds of pregnancy, maternity and gender reassignment.

What policy options have been considered? Please justify any preferred option.

Amending existing sex discrimination legislation is the only way that the UK can comply with the Directive. However, our general principle has been to make the minimum legislative change necessary to do this.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects? Reviewing the effectiveness of these proposals will be part of the continuing duties of the Commission for Equality and Human Rights.

Ministerial Sign-off For final proposal/implementation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.

Signed by Barbara Follett MP, Parliamentary Secretary

Barbara FollettDate: 2 March 2008

Summary: Analysis & Evidence

Policy Option: 1

Description: Implementation of the Gender Directive by Regulations amending the Sex Discrimination Act 1975 and the Sex Discrimination (Northern Ireland) Order 1976

COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups' Micro and small firms - familiarisation £10.29m Medium and large firms - familiarisation £2.38m Public authorities - familiarisation £1.59m Insurance - transitional £0.72m
	One-off (Transition)	Yrs	
	£ 14.98m		
	Average Annual Cost (excluding one-off)		
	£ 0.25m		Total Cost (PV)
			£ 15.23m
Other key non-monetised costs by 'main affected groups'			

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups' The number of goods and services discrimination cases is too small to accurately estimate benefits.
	One-off	Yrs	
	£		
	Average Annual Benefit (excluding one-off)		
	£		Total Benefit (PV)
			£ NIL
Other key non-monetised benefits by 'main affected groups' There will be benefits to some people not currently subject to specific protection in the fields of goods, facilities, services and premises, e.g. on grounds of pregnancy, maternity and gender reassignment. Where protection already exists, benefits will arise from reversal of the burden of proof in favour of the claimant.			

Key Assumptions/Sensitivities/Risks

Price Base Year	Time Period Years	Net Benefit Range (NPV) £	NET BENEFIT (NPV Best estimate) £ NIL
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What is the geographic coverage of the policy/option?	United Kingdom			
On what date will the policy be implemented?	On or as close to 6 April 2008 as possible			
Which organisation(s) will enforce the policy?	None – see Annex 1			
What is the total annual cost of enforcement for these organisations?	£ N/A – see Annex 1			
Does enforcement comply with Hampton principles?	N/A – see Annex 1			
Will implementation go beyond minimum EU requirements?	Yes - (evidence base)			
What is the value of the proposed offsetting measure per year?	£ N/A			
What is the value of changes in greenhouse gas emissions?	£ N/A			
Will the proposal have a significant impact on competition?	No			
Annual cost (£-£) per organisation (excluding one-off)	Micro 0	Small 0	Medium 0	Large 0.25
Are any of these organisations exempt?	No	No	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices)		(Increase - Decrease)	
Increase of	£ 0.25m	Decrease of	£ 0.00
		Net Impact	£ 0.25m

Key: Annual costs and benefits: Constant Prices (Net) Present Value

Evidence Base (for summary sheets)

[Use this space (with a recommended maximum of 30 pages) to set out the evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Ensure that the information is organised in such a way as to explain clearly the summary information on the preceding pages of this form.]

For impact assessment evidence base purposes, the proposals have been summarised into 7 policy blocks (A-G), on which we have developed the options set out in the initial regulatory impact assessment published for consultation. All the options being implemented are those recommended in the consultations. In each case, doing nothing, or going significantly beyond the scope of the Directive are not viable options.

A. Indirect Sex Discrimination - use the Directive-based definition which already applies to employment and vocational training.

In broad terms, indirect sex discrimination occurs when the same policy or practice is applied to both men and women but in practice it particularly disadvantages one sex. Implementing the Directive means the definition for goods and services in the Sex Discrimination Act 1975 (SDA) and Sex Discrimination Order 1976 (SDO) needs to change to the European-law definition which already applies for employment and vocational training. This replaces the narrower original SDA and SDO definitions which relied heavily on the use of statistical evidence to prove that indirect discrimination had occurred, and would not meet the Gender Directive's requirements. Consultation has supported this overall approach. The narrower definition will continue to apply to the goods, facilities, services and premises provisions in the SDA and SDO that are outside the scope of the Directive, and therefore outside the scope of the Regulations.

Benefits – single, consistent definition of indirect discrimination in all areas covered by the SDA and SDO that are within scope of European discrimination law, and greater consistency with other equality legislation implementing European law. This will reduce confusion for service providers (especially those who are also employers) and users.

Costs – part of the £14.26m one-off familiarisation costs for service providers.

The alternative option, do nothing is not viable as it would not comply with the Gender Directive or provide benefits, and there may be costs associated with the UK being in breach of its EU obligations.

B. Harassment and sexual harassment – new explicit prohibitions in the supply of goods, facilities and services and the disposal or management of premises

To implement the Directive, the SDA and SDO are being amended so that sex harassment, sexual harassment, and harassment on grounds of gender reassignment are explicitly prohibited in the supply of goods, facilities and services and the disposal or management of premises in those areas in which the Directive operates. The freestanding definitions of harassment in the SDA and SDO will apply to the provision of goods, facilities, services and premises as it does to employment and related areas. These definitions are being amended by the Sex Discrimination Act 1975 (Amendment) Regulations 2008 and the Sex Discrimination Order 1976 (Amendment) Regulations (Northern Ireland) 2008.

Since 2005, the SDA and SDO have explicitly prohibited sex harassment, sexual harassment and harassment on grounds of gender reassignment, in employment and vocational training, in order to meet EU law. Before the 2005 change was made, GB and NI courts had been able to interpret the SDA and SDO in a way that provided a degree of protection against sexual harassment, so the concept is not new. But reliance on caselaw is no longer sufficient to comply with the Gender Directive as regards harassment in the supply of goods, facilities,

services and premises. In the interest of certainty, the SDA and SDO are therefore being amended to explicitly confer such protection from sex harassment, sexual harassment and harassment on the ground of gender reassignment.

Benefits – Provides greater legal clarity and greater consistency of protection in respect of European law obligations both within the SDA and SDO and with other strands of equality legislation. Reduces risks of confusion as to where the harassment provisions apply.

Costs – Negligible other than as part of the overall £14.26m familiarisation costs, because caselaw suggests that in the main, harassment claims could be brought under the direct discrimination provisions of the SDA and SDO in relation to goods, facilities and services. Therefore, making this explicit on the face of the legislation should not impose any substantial additional costs on business.

Again, the do nothing option is not viable as in A above.

C: Burden of proof - extend the SDA and SDO burden of proof provisions to the supply of goods, facilities, services and premises

The Regulations implementing the Gender Directive reverse the burden of proof in discrimination cases falling within the Directive's scope. It is often difficult for someone to prove that he or she has been discriminated against because he/she does not have access to the range of facts underlying the alleged act of discrimination. The SDA and SDO were similarly amended in 2001 to provide that once an employee has established facts that constitute a prima facie case of discrimination, it is then for the employer to prove that the employer's action was not discriminatory. These amendments implemented the Burden of Proof Directive which covered only employment and vocational training.

Benefits – Individuals who have been subject to unlawful discrimination or harassment in the supply of goods and services may be better able to prove their case. The law will be easier to understand because there would be greater consistency within the SDA and SDO as well as with other equality legislation implementing European law obligations.

Costs – Negligible other than as part of the overall £14.26m familiarisation costs. The do nothing option would not be viable as in A above.

D: Exceptions from the principle of equal treatment

The Directive contains two general exceptions from the principle of equal treatment between men and women – firstly a general provision permitting goods and services to be provided on a single sex basis if doing so is “justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”; and secondly a positive action provision which permits Member States to maintain or adopt “specific measures to prevent or compensate for disadvantages linked to sex. Some existing goods, facilities and services and premises exceptions in the SDA and SDO need amendment, in so far as they relate to areas with which the Directive is concerned, to make clear that if challenged, a service provider would need to justify difference of treatment, to ensure compatibility with these exceptions in the Directive. For example, current exceptions allow different treatment for reasons of privacy and decency, or for charities and voluntary bodies that choose to promote the interests of one sex only (positive action), or for the organisation of single-sex sports events. To minimise risks of gold-plating we have relied on these derogations where appropriate.

Comments received focussed on the workability and legal necessity of exceptions, rather than on the costs.

Benefits

Retaining the current approach of specifying exceptions, i.e. the conditions and circumstances where different treatment is lawful, will be generally understood by service providers as it has been in place since 1975. We have identified each of the current SDA and SDO exceptions that already comply with the Gender Directive and those which should be amended to ensure any difference of treatment is justified. This approach reduces the potential impact of changes to the SDA and SDO and any associated familiarisation costs.

Costs

Negligible other than as part of the overall £14.26 familiarisation costs. The requirement to justify difference of treatment will only apply to providers that restrict access according to sex, or supply their services in a different way for men and for women. Providers will need to consider whether they can justify their current arrangements as being a proportionate means of meeting a legitimate aim, and if not, they may need to review their practices. There is a very low risk that some service providers may be challenged about practices they are unable to justify.

E. Discrimination on grounds of gender reassignment

The amendments to the SDA and SDO prohibit discrimination on grounds of gender reassignment in the provision of goods, facilities and services, and the disposal or management of premises, in those areas in which the Directive operates, unless justifiable in limited circumstances, e.g. exceptions in relation to single sex services, and sport. They extend protection from discrimination which has applied in the SDA and SDO employment provisions since 1999, using the same definition/protected ground.

Consultation responses did not oppose these proposals on grounds of cost or regulatory burden, but there was significant concern expressed by from Christian groups and individuals on religious grounds. On exceptions, overall consultees, including the then Equal Opportunities Commission in GB, accepted that some exceptions were needed, although some responses from transsexual people and organisations queried this.

Benefits

Extending protection in this way will benefit transsexual people in their access to goods, facilities and services and premises in those areas in which the Directive operates and provide a remedy where they are subjected to unlawful discrimination or harassment.

The Directive allows different treatment if it can be justified. Providing a small number of limited exceptions will ensure that the law is workable and balances the needs and rights of all service providers and users. For example, there are some circumstances where organisations that provide services or activities on a single-sex basis may need to treat transsexual people differently from other men or women. We are amending exceptions to clarify that this should be lawful if the provider can show that the way the service is provided to a transsexual person is justified by being a proportionate means of meeting a legitimate aim.

Costs

Negligible, apart from part of the overall familiarisation costs for service providers of £14.26m. Given the small number of transsexual people (around 5,000 in the UK, not all of whom will be protected from discrimination under the 'gender reassignment' definition used in the SDA and SDO), the costs to business are expected to be small.

There may be a small resource impact on the county courts, as transsexual people who have been discriminated against on grounds of gender reassignment will be able to bring claims of discrimination against providers of goods, facilities and services. This is also likely to be

minimal, given the small numbers of transsexual people concerned.

We expect very few businesses will need to change their existing practices or policies in order to comply with the new Regulations and so no costs would accrue for the majority.

F. Provide explicit protection against discrimination on grounds of pregnancy or maternity

The amendments to the SDA and SDO make it explicit that discrimination on grounds of pregnancy and maternity in the provision of goods, facilities and services is unlawful discrimination. These reflect the Gender Directive prohibition of direct discrimination on grounds of pregnancy or maternity. Already the SDA and SDO explicitly made it unlawful to discriminate in employment and vocational training on grounds of pregnancy and maternity leave, but there is currently no equivalent provision in respect of goods, facilities, services or premises.

Following consultation on firstly whether to define maternity, and secondly what definition to use (a period of 52 weeks from birth was suggested), we have confirmed that a definition of maternity will be used, and that it should be defined as a period of 26 weeks from birth. The impact of the maternity provision on some insurers is covered in G below.

There were few responses on this issue in Northern Ireland. In Britain, consultation responses varied in opinion as to the period of time a woman should be protected from maternity discrimination under the SDA, suggesting periods of time between 8-12 weeks and 2-3 years. Government has decided that protection should be provided for a period of 26 weeks from the day the baby is born.

Consultees favoured defining maternity by reference to a period of time from birth. In determining the period of time during which a woman who has recently given birth should be protected.

Government considered how the Equal Treatment Amendment Directive – 2002/73/EC (equal treatment between men and women in the employment field) addresses discrimination on the grounds of maternity leave. That Directive states that less favourable treatment related to pregnancy and maternity leave within the meaning of Directive 92/85/EEC is direct sex discrimination. Directive 92/85/EEC introduces measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding. In relation to maternity leave, that Directive protects workers who have recently given birth and workers who are breastfeeding because of their vulnerability to risks to their health and safety at work. The Directive provides that such workers must be allowed a minimum of 14 weeks' unpaid maternity leave, of which two weeks are compulsory. The Government considered that this would be the minimum period of protection that could be allowed in implementing the Gender Directive.

Government was also mindful of ECJ caselaw in the employment context which recognises the need to protect “a woman’s biological condition and the special relationship between a woman and her child over the period which follows pregnancy and childbirth”⁸.

A further consideration that arose from the consultation in Britain is that lengthier periods of protection would impose disproportionate burdens on business in their role as service providers. On the basis that the purpose of maternity discrimination protection is to protect a woman’s biological condition and the special period of bonding with her child following childbirth, Government considered that protection for a period of 26 weeks following childbirth would achieve this purpose. This mirrors the entitlement to ordinary maternity leave in employment and significantly exceeds the 14 weeks provided for in that context in Directive 92/85/EEC.

⁸ Extract from ECJ decision in *Land Brandenburg v Ursula Sass* - C-284/02 ECR 2004 I-11143

The new direct pregnancy discrimination provision has also been modified following consultation, to include a clarification that provides that direct pregnancy discrimination would not occur where:

- a provider refuses to provide a pregnant woman with goods, facilities or services or provides them conditionally because s/he considers that by providing them there would be a risk to the woman's health and safety because of her pregnancy, and
- it is reasonable for the provider to think this way; and
- the provider operates an equivalent policy of refusing to provide or providing them conditionally to persons having other physical conditions with the goods, facilities or services where s/he considers that to do so would because of those conditions give rise to a risk to their health or safety.

The Government considers this provision is necessary to provide clarity on when a pregnant woman may be treated less favourably for legitimate health and safety reasons. It reflects existing practice by service providers, e.g. in the civil aviation sector across the EU and internationally. It responds to concerns raised about the impact of the Directive on UK airlines' existing policies on not carrying late-term pregnant women on flights (usually after 28-32 weeks of pregnancy). It would also be applicable in the case, for example, of high risk sports such as parachute or bungee jumping or rock climbing. Providers will need to review their policies concerning pregnant women to ensure compliance. This may result in one-off costs of minor changes to procedures and guidance. The clarification should also help avoid potential costs from potential pregnancy discrimination claims that providers may otherwise face.

Benefits

The new provisions in the SDA and SDO make it clear and certain what pregnant women's and new mothers' rights and service providers' responsibilities are, and ensure compliance with our EU obligations.

Costs

Part of the overall £14.26m familiarisation costs for service providers. Otherwise small because under the SDA and SDO as they stand, it is possible that if a pregnant woman or new mother experiences less favourable treatment in relation to access to goods, facilities or services, this would be construed as unlawful indirect sex discrimination. We know of few, if any circumstances where goods facilities or service providers treat women less favourably because of their pregnancy or maternity. So for the vast majority of organisations this clarification will be cost neutral.

It is possible that women may bring more cases alleging pregnancy/maternity discrimination against service providers due to the provision and raised awareness of the new remedy of direct pregnancy/maternity discrimination, with potential resource implications for the courts and providers. However, the number of any additional cases is likely to be small. In Britain, we estimate that only between 4 and 9 gender-related goods, facilities and services discrimination cases are brought before the county courts each year .

G: Insurance and related financial products

The Gender Directive requires that if sex is used as an actuarial factor in calculating insurance premiums and benefits, this must not result in different premiums and benefits for men and

⁹ Data on the number and nature of cases of discrimination in the provision of goods, facilities and services in the courts is limited. In 2004 and 2005, the EOC received an average of 175 calls to their helpline regarding discrimination in the provision of goods, facilities and services. It is likely that only a very small proportion of these calls would result in a claim actually going to court. If we assume that 2-5% of those calls end up being brought to court, this gives an estimated 4-9 gender discrimination cases in the county court each year.

women. It also requires that costs relating to pregnancy and maternity must not result in differences in individuals' premiums and benefits (see (ii) below).

However, the Directive also permits Member States to allow departures from this principle, provided that data are compiled, published and regularly updated which support using sex as an actuarial factor.

The SDA and SDO include an exception that allows sex to be taken into account when assessing insurance risks. Moving to unisex premiums and benefits in all cases would restrict insurers' ability to price risks efficiently. It would disadvantage both women and men by raising premium rates overall. The Directive allows departures from the unisex requirement, in line with the condition prescribed for supporting data (see (i) below).

To meet the Directive's requirements we are making three changes to the treatment of insurance in the SDA and SDO in those areas in which the Directive operates:

- (i) insurers will be required to compile, publish and update data that support sex-based differentials in insurance premiums and benefits – based on guidelines issued by the Treasury;
- (ii) costs relating to pregnancy and maternity must not result in differences in individuals' premiums or benefits from December 2008;
- (iii) clarification of how premiums and benefits should be calculated for transsexual people, particularly people in the process of changing from one gender to another; only those with a Gender Recognition Certificate will be entitled to premiums and benefits calculated in their acquired gender.

The Directive includes a derogation which permits deferral of implementation of the ban on differences in premiums and benefits due to pregnancy and maternity costs for up to two years – December 2009. Following consultation, the Government has proposed to take advantage of this derogation by deferring the ban until December 2008 as this should give the insurance industry sufficient time to introduce the necessary adaptations to their policies and systems. Not taking advantage of the full two years permitted by the Directive might be considered to be 'gold-plating'.

Insurers will now need to publish data either individually or collectively. To balance consistency of reporting with the flexibility to accommodate market developments and widely differing requirements for different sectors, the Treasury has issued guidance setting out the scope, form, content, timing and manner of data publication. This meets the minimum requirement on the Government to ensure that accurate data are compiled, published and regularly updated. A separate consultation response and impact assessment relating to the data publication obligation has been published by HM Treasury alongside its guidance:

http://www.hm-treasury.gov.uk/media/7/2/consult_gender_insurance_response141107.pdf

Benefits

Consumers will benefit by having access to evidence justifying proportionate differences in premiums and benefits based on sex. Insurers have discretion to publish data individually or collectively, and to adapt reports to their own circumstances based on broad reporting guidelines.

Costs

We assume that almost all insurers will choose to enter into collective publication arrangements through the Association of British Insurers (ABI) or another agency. The ABI is preparing a data

collection and publication scheme.

Much of the data collection infrastructure is already in place. Further one off set-up costs are estimated to be £720,000 representing the development of some internal reporting systems (£5,000 for a large firm and £2,000 for a small firm) together with the development of a central collection and publication system (£110,000).

Estimated annual running costs are £250,000. These are based on 15 senior manager and 20 administrator hours for a large company and 5 and 10 hours respectively for a small company (£235,000), including associated overheads of 30%; central staff costs (£5,000) and central publication costs (£10,000).

Pregnancy and maternity – insurance costs

The Directive imposes a specific prohibition on insurers. The costs related to pregnancy and maternity must not result in differences in individuals' premiums and benefits regardless of whether data can be produced to justify differing treatment. The Government has decided to defer the introduction of this prohibition until 22 December 2008.

Pregnancy and maternity are not insured risks. However complications arising from them are insured under some policy types. The ban is likely to have three main impacts

- travel insurers will no longer be able to exclude cover for mothers close to delivery; or load premiums for women expecting twins or a multiple birth, known medical complications and complications in previous pregnancies;
- life and other long term protection insurers will not be able to take account of pregnancy-related conditions such as hypertension in setting their terms and conditions;
- Insurers may revise their policy wordings to clarify insured and uninsured risks, for example differentiating between pregnancy costs that are excluded from cover and the costs of complications arising from pregnancy that may be included. This may extend to other policy types such as health, income and payment protection.

Under the terms of the Directive the additional one-off and on-going costs arising from the three impacts above are likely to be passed on to other policyholders. The likely increase in pregnancy and maternity-related claims will be relatively small, but the size of those claims may be big, potentially of the order of £1m according to one insurer. This may raise premium rates overall, but we cannot predict by how much.

We consulted on whether to impose this provision on 21 December 2007¹⁰ or defer it for up to two years, as permitted by the Directive.

The arguments supporting an immediate entry into force rested on the obvious benefit to expectant mothers. For deferral, the insurance industry argued that making policy changes outside the normal review and printing process would raise costs significantly (around £2.50 per policy). For example, for travel insurers alone, the costs would be around £32.5 million, increasing premiums by 8 per cent. For this reason the Government has decided to defer implementation by one year to 22 December 2008. This period will enable insurers to take legal advice, carry out repricing exercises, and update policies. We therefore believe that the costs of implementing this measure can be accommodated within insurer's normal updating process.

¹⁰ At the time of the consultation, it was intended that the implementing regulations would come into effect on, or around, 21 December 2007. However, as the current intention is to bring regulations into force on or as close to 6 April 2008 as possible, the December 2007 option no longer applies.

Familiarisation costs of the Gender Directive

	Time Required	Unit cost	Cost per firm	Number of firms ¹¹	Total Cost (£m)
Micro firms	¼ hour	£28.95 ¹²	£7.24	1,064,170	7.70
Small firms	½ hour	£28.95	£14.48	178,695	2.59
Medium & large firms	2 hours	£31.28 ¹³	£62.56	37,970	2.38
Public authorities	2 hours	£31.28	£62.56	25,481	1.59
Total					14.26

Sectors affected

All providers of goods, facilities, services and premises that are available to the public in the public, private and voluntary sectors are affected by measures A – F described above. Measure G applies to the insurance sector only. They will need to familiarise themselves with the new legislation and associated guidance, and will need to make any necessary adjustments to comply with the Directive.

Small Firms Impact Test

Micro, small and medium sized enterprises are less likely to have procedures relating to provision of services. However, most would recognise that avoiding discrimination in any form is in line with best business practice. We do not anticipate that any action will be needed beyond the familiarisation already identified under costs above. Apart from managers reading the awareness raising literature, small businesses are unlikely to provide formal training or guidance for staff as a result of these changes. Consultation has not raised any particular issues on the impact on small business, other than the provision of guidance.

Competition Assessment

In Britain, we have applied the competition filter – a competition assessment is not required in Northern Ireland. The Gender Directive contains provisions that impact on the insurance sector, but the approach taken for implementation avoids potential adverse impact. Following consultation we have included a clarification on pregnancy direct discrimination in response to concerns raised by UK airlines.

¹¹ Source: BERR SME Statistics 2006 – [http://stats.berr.gov.uk/ed/sme/smestats2006.xls#UK Whole Economy!A1](http://stats.berr.gov.uk/ed/sme/smestats2006.xls#UK%20Whole%20Economy!A1)

¹² Source: Annual Survey on Hours and Earnings (ASHE) Survey 2007 – code 11

¹³ Source: Annual Survey on Hours and Earnings (ASHE) Survey 2007 – code 1135

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	No	No
Sustainable Development	No	No
Carbon Assessment	No	No
Other Environment	No	No
Health Impact Assessment	No	Yes
Race Equality	No	Yes
Disability Equality	No	Yes
Gender Equality	No	Yes
Human Rights	No	Yes
Rural Proofing	No	No

Annexes

Annex 1

Consultation

Great Britain

Following informal consultation with key stakeholders throughout the policy development stage, meetings with them and other organisations were held between June and early September 2007. Stakeholders included the former Equal Opportunities Commission, Press for Change, a:gender, National Childbirth Trust and Breastfeeding Manifesto Coalition, and the Association of British Insurers. Meetings with other business and equality stakeholders, Christian churches and organisations were also held as part of the wider Equality Bill consultation.

Northern Ireland

Following informal consultation with key stakeholders throughout the policy development stage, meetings with them and other organisations were held between 30 July and 21 September 2007. Stakeholders included the Federation of Small Businesses, the Equality Commission for Northern Ireland, the Local Government, Commission, and the Northern Ireland Committee of the Irish Congress of Trade Unions.

Enforcement, sanctions and monitoring of individual cases

Great Britain

Victims of discrimination may rely on remedies provided to bring their own cases. Claims are brought in the county courts (England and Wales) and the sheriff court (Scotland). Costs differ, but a successful claimant will generally recover his/her own costs. The Courts Service does not collect data about the number of SDA complaints about goods, facilities, services or premises that are currently brought before the county courts, but all discrimination cases brought before county courts (that is on grounds of sex, race and disability and outside the employment field) are estimated to comprise between 1% and 3% of the total number of cases brought, and, of those, we estimate that only 1 in 7 is related to sex discrimination. While there may be a slight increase in cases as a result of these changes we do not consider that they will have a significant impact on court running costs.

Northern Ireland

Victims of discrimination may rely on remedies provided to bring their own cases. Claims are brought in the county courts. Costs differ, but a successful claimant will generally recover his/her own costs. While there may be a slight increase in cases as a result of these changes we do not consider that they will have a significant impact on court running costs.

Monitoring and review of the law

Great Britain

The Equality and Human Rights Commission has a statutory duty to monitor discrimination and human rights law. In doing so the Commission may

- advise the Government about the effectiveness of the equality and human rights enactments, one of which is the SDA;
- recommend to the Government the amendment, repeal, consolidation or replication of any of the SDA;
- advise the Government or the devolved administrations in Scotland and Wales about the effect of the SDA;
- and advise the Government or the devolved administrations in Scotland and Wales about the likely effect of a proposed change to the law. This can include monitoring and investigations to ascertain the position, challenging the law by supporting individuals' cases up to and including the European Court of Justice, and advising the Government where they think amendments to legislation are necessary.

Northern Ireland

The Equality Commission for Northern Ireland has a statutory duty under the SDO to:

- Work towards the elimination of discrimination and harassment;
- Promote equality of opportunity; and
- To keep the SDO under review.

Specific Impact Tests

Health impact Assessment

The provisions on pregnancy and maternity discrimination may have cross-benefits in respect of the health of expectant and new mothers, and of their new born babies which may continue into later life. The provisions do not provide new mothers with a general right to breastfeed their new baby in public, but they may provide redress if a mother is prevented from accessing goods, facilities or services, in those areas in which the Directive operates on grounds of her maternity. The greater protections from discrimination on grounds of gender reassignment may also have positive impact on health of transsexual people.

Equality Impact Assessment – Great Britain

The Government believes that the proposals will benefit all men and women. While many of the changes are technical, they will mean that men and women will have similar rights not to be discriminated against or harassed because of sex when they are accessing goods facilities or services as they do when they are at work. There is also specific protection for people who intend to undergo, are undergoing or who have undergone gender reassignment.

This assessment considers the impact of the proposals in terms of gender (including gender reassignment), race, disability, sexual orientation, religion or belief and age. It was published in draft as part of the consultation proposals as an Annex to the Equality Impact Assessment for the Equality Bill proposals.

This measure is about gender equality, but implications for equality in all the equality strands have been thoroughly assessed as the proposals have been developed and consulted on. Full account has been taken of views expressed, and any changes needed to mitigate any potential adverse impacts have been identified.

The assessment follows the Commission for Racial Equality guidance on conducting Equality Impact Assessments. While addressing the impact of proposals on all the equality strands, it therefore also fulfils our duty, arising from section 71 of the Race Relations (Amendment) Act 2000, section 3 of the Disability Discrimination Act 2005 and sections 84 and 85 of the Equality Act 2006, to assess and consult on the likely impact of proposed policies on the promotion of race equality, equality for disabled people and gender equality.

Equality Assessment – Northern Ireland

The Government believes that the proposals will benefit all men and women. While many of the changes are technical, they will mean that men and women will have similar rights not to be discriminated against or harassed because of sex when they are accessing goods facilities or services as they do when they are at work. There is also specific protection for people who intend to undergo, are undergoing or who have undergone gender reassignment.

The assessment considered the impact of the proposals in relation to the nine Section 75 categories and we published a screening document as part of the consultation proposals.

This measure is about gender equality, but implications for equality in all the equality strands have been assessed as the proposals have been developed and consulted on.

In the cases of both the Equality Impact Assessment (Great Britain) and the Equality Assessment (Northern Ireland), we have analysed the likely impact of each of the proposals (A-G) including the impact on men and women and an analysis of any differential impact that could arise due to a person's race, sexual orientation, religion or belief, age or whether they are disabled or not.

A: Indirect discrimination

The proposed definition of indirect discrimination is already used in discrimination law implementing European obligations concerning race and ethnic origin, religion or belief, sexual orientation and age. For disability, there is a requirement to make reasonable adjustments to policies and practices in order to accommodate a disabled person's needs.

B: Harassment and sexual harassment

Previously the law only stated specifically that harassment and sexual harassment is unlawful in the field of employment and vocational training. It is possible that a court may interpret some acts of harassment in the field of goods, facilities, services or premises as a form of direct discrimination. Harassment can be the cause of much distress to either a woman or a man. Introducing an explicit provision in sex discrimination will remove any doubt that such behaviour is unlawful.

C: Burden of proof

If someone brings a claim of sex discrimination at work to an employment tribunal, they must provide evidence that indicates that discrimination has taken place. If the tribunal agrees the evidence could point to that discrimination being unlawful, then it falls to the employer to explain why this is not the case. The proposal is to make clear that this approach should be followed by the courts when they are considering complaints of sex discrimination in access to, or the supply of, goods and services in those areas in which the Directive operates.

The principle that men and women should be treated equally when they buy goods or make use of facilities, services or premises is generally well understood and followed. Consequently, sex discrimination cases of this type are rare. Nevertheless, such discrimination when it does occur can be difficult to prove because the claimant is unlikely to have access to sufficient information about the reasons for the defendant's behaviour. This shift in the burden of proof to the supplier of goods, facilities, services or premises after the claimant has made a basic case will ensure that a person who considers that they have been discriminated against because of their sex or gender reassignment will not face as many hurdles in producing evidence to prove their case.

D: Exceptions

The Gender Directive, like the SDA and SDO, recognises that there can be circumstances when it is appropriate to restrict services to only women or only men. They both state that such differences of treatment may not be unlawful, but they do so in different ways. The Gender Directive does not specify the type of service that is or is not unlawful but provides a test that the provision of a service to one sex must be justified by “a legitimate aim” and the means of achieving that aim must be “appropriate and necessary”. The SDA and SDO contain a number of provisions that focus either on different types of circumstance, or on the conditions which have to be met, before differences of treatment on the basis of sex can be lawful.

For instance, exceptions under the SDA and SDO allow for separate services to be provided for men and women for reasons of decency or to meet the specific objectives of voluntary bodies or registered charities that have been set up to address the needs or interests of one sex only. This means that it is possible for single-sex services to be provided for the specific needs of men and women which take account of their race, religion or belief, disability, sexual orientation or age.

We will maintain the current focussed approach to exceptions because it limits the circumstances when it would be lawful to treat men and women differently. If challenged, service providers will need to justify their policies.

The amendments made to the existing exceptions for charities and voluntary bodies following consultation, implementing Article 6 of the Directive (positive action) are wholly positive for women.

E: Gender Reassignment

The amendments extend protection from discrimination on grounds of gender reassignment to goods, facilities, services, and premises, in those areas in which the Directive operates, and will benefit those transsexual people who already have protection in relation to employment and vocational training. This will provide them with important new protections.

F: Pregnancy and Maternity

The changes will be wholly positive for pregnant women and new mothers. As the law currently stands, less favourable treatment for reasons related to pregnancy and maternity may constitute indirect sex discrimination (there is no express protection from pregnancy discrimination in the goods, facilities, services or premises field, or maternity discrimination). The Directive specifically states that less favourable treatment of women for reasons of pregnancy and maternity constitutes direct discrimination, and so we propose to amend the SDA and SDO to provide explicit protection for pregnant women and new mothers in the field of goods, facilities services or premises.

G: Insurance and related financial products

The SDA and SDO currently allow differences in insurance premiums and benefits for women and men if they are based on actuarial data on which it is reasonable to rely. The Gender Directive requires that in those areas in which it operates, either that those differences are removed or that the actuarial data on which they are based is compiled, published and regularly updated.

The Government proposes to make it a legal requirement that actuarial data are published so that men and women can see more easily whether there is a reason for any difference in premiums and benefits for men or women. If the Government had taken up the option of making any sex-based differences unlawful, it would have meant that premiums for both men and women would become more expensive.

The use of the derogation in the Directive to defer the ban on differences due to pregnancy and maternity costs for one year (rather than two) responds to the consultation and strikes a balance between positive impact on gender equality and imposing significant cost on insurers which would have been passed on to all consumers. It also aims to minimise gold-plating.

Human Rights

The provisions of the Sex Discrimination (Amendment of Legislation) Regulations 2008 are compatible with the European Convention on Human Rights.