EXPLANATORY MEMORANDUM TO

THE SEX DISCRIMINATION ACT 1975 (AMENDMENT) REGULATIONS 2008

2008 No. 656

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 Act (Amendment) Regulations 2008 amend the provisions of the Sex Discrimination Act 1975 ("SDA") in regards to (1) the definition of sex harassment; (2) the definition of discrimination on grounds of pregnancy or maternity leave; and (3) the exceptions applicable to claims of discrimination on grounds of maternity leave. The Regulations also amend the SDA to make it unlawful for an employer to fail to take reasonably practicable steps to protect an employee from persistent third party harassment where the employer has knowledge of such harassment.

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

3.1 The amended definition of sex harassment in section 4A(1)(a) will apply not only to employment and the related areas[1] covered by the Equal Treatment Amendment Directive 2002/73/EC ("the Directive") but also to the areas covered by the SDA sex harassment provisions, namely, the prohibition of sex harassment in the exercise of public functions (section 21A) and the duty to promote gender equality (section 76A). [2] Although sections 21A and 76A SDA are purely domestic measures, the Government considers that it is possible to rely on section 2(2)(b) of the European Communities Act 1972 to apply the same (amended) definition of sex harassment to all areas in which sex harassment is currently prohibited in the SDA.

3.2 We are not amending sections 21A or 76A themselves, but because the references to harassment in those sections depend on the definition in section 4A(1)(a), they will be affected as a result of its amendment. The Government considers that there is a sufficiently close connection to rely on section 2(2)(b) as the automatic application of the new definition is consequential and is necessary to provide a uniform legislative system to enable the greatest degree of consistency and clarity possible across the SDA. The alternative would have been to carve out the application of the new definition in relation to these provisions and to provide two different definitions of sex harassment within the same legislative framework. To do so would be contrary to the policy that a consistent definition should apply throughout the SDA (as intended when sections 21A and 76A were introduced by the Equality Act 2006). This change merely updates the definition to reflect that which is required where EC law applies.

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[1] The related areas to which the Directive applies are contract workers, office holders, partnerships, trade unions, qualifying bodies, vocational training (including further and higher education), employment agencies, barristers and advocates.

[2] On or as close to 6 April 2008 as possible, the Government intends to extend the prohibition of sex harassment (using the amended definition discussed below) to the provision of goods, facilities, services and premises under sections 29-31 SDA (subject to certain exclusions), see the draft Sex Discrimination (Amendment of Legislation) Regulations 2008, available at www.equalities.gov.uk.

4. Legislative Background

4.1 These Regulations are being made to comply with the High Court order in *Equal Opportunities Commission v Secretary of State for Trade and Industry* [2007] EWHC 483 (Admin), in which the Court ruled that the Employment Equality (Sex Discrimination) Regulations 2005 (the "2005 Regulations"), which made amendments to the SDA to implement the Directive, did not comply with the requirements of European law as set out in the Directive and European case law in certain respects or adequately reflect the Government's interpretation of the domestic provisions set out in guidance. Although the proceedings were initiated against the then Secretary of State for Trade and Industry (who made the 2005 Regulations), the Lord Privy Seal has since become responsible for the legislation.

4.2 The Directive amends the original Equal Treatment Directive (76/207/EEC), which established the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. It reflects changes to the Treaty and ECJ case law since the 1976 Equal Treatment Directive. Among other things, the Directive defines direct and indirect discrimination and harassment, including sexual harassment and discrimination by way of less favourable treatment because of pregnancy or maternity leave.

4.3 The decision requires the Government to recast the relevant provisions of the SDA to (1) eliminate the issue of causation in the definition of sex harassment which results from the formulation "on the ground of" in the SDA, facilitate claims of sex harassment by witnesses and provide for employer liability for harassment where an employer fails to take reasonably practicable steps to prevent repeated harassment of an employee by third parties such as clients and customers where the employer is aware of such conduct; (2) eliminate from the definition of discrimination on grounds of pregnancy or maternity leave the statutory requirement for a comparator who is not pregnant or who is not on maternity leave; and (3) permit claims for discrimination on grounds of maternity leave which are permitted under relevant European case law.

4.4 The negative resolution Parliamentary procedure is being used because the Regulations are necessary to implement a judgment with which the Government has agreed to comply as soon as reasonably practicable and which leaves little discretion as to amendments being made. Moreover, the judgment has been in the public domain since March 2007, and those likely to be affected will already be anticipating the amendments.

4.5 A brief scrutiny history follows, and a Supplementary Transposition Note addressing how these Regulations implement the Directive is attached to this Memorandum.

<u>Scrutiny History</u>

The scrutiny history of Directive 2002/73/EC is as follows:

House of Commons

- Explanatory Memorandum (EM) 10382/00 (21473) of 28 September 2000 on a Proposal for a Directive of the European Parliament and of the Council amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions was considered by the House of Commons European Scrutiny Committee on 1 October 2000 and again on 17 January 2001.
- On 2 May 2001 the European Scrutiny Committee reconsidered EM 10382/00 (21473) on the basis of a letter dated 11 April 2001 from the Minister Ms Tessa Jowell to the House of Lords European Union Select Committee.

- On 13 February 2002 a debate was held in the Commons European Standing Committee.
- The European Scrutiny Committee cleared the text of the Directive at its meeting on 12 June 2002.

House of Lords

- EM 10382/00 was considered by the House of Lords European Union Select Committee on 3 October 2000 and referred to Sub-Committee F. A letter dated 25 October 2000 was sent to Ms Jowell requesting further information (Progress of Scrutiny 27 October 2000, Session 2000-2001).
- Ms Jowell replied in a letter dated 4 December 2000. The European Union Select Committee subsequently requested further information in letters dated 24 January and 21 February 2001.
- Ms Jowell replied in a letter dated 11 April 2001. EM 10382/00 was subsequently cleared without report (Progress of Scrutiny 2 May 2001, Session 2000-2001).

Both Houses of Parliament

- Ms Jowell sent a letter to the leaders of both Houses dated 4 June 2001, stating that, if a satisfactory text could be achieved, the Government intended to agree the proposal at the Employment and Social Affairs Council on 11 June.
- An Explanatory Memorandum was sent on 7 January 2002 to both Committees explaining the implications of the Commission's comments on the European Parliament's amendments to the Common Position.
- On 8 May 2002: Minister Barbara Roche wrote to the Chairmen of both Committees updating them on the satisfactory outcome of the Conciliation process.
- On 30 May 2002, Ms Patricia Hewitt, the Secretary of State for Trade and Industry, wrote to the Chairmen of both Committees providing a text of the Directive issued by the Jurists-Linguists and an Explanatory Memorandum.

5. Territorial Extent and Application

5.1 This instrument applies to Great Britain. In Northern Ireland, separate but equivalent law on sex discrimination applies. Separate regulations are being brought forward in Northern Ireland to make equivalent changes to the Sex Discrimination (Northern Ireland) Order 1976.

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 Act 1975 (Amendment) Regulations 2008 are compatible with the Convention rights.

7. Policy background

Policy

7.1 The SDA, which applies to both women and men, is the primary piece of legislation in Great Britain which makes provision prohibiting discrimination on the grounds of sex, including discrimination on grounds of gender reassignment. Consistent with the requirements of European law, it prohibits discrimination and sex/sexual harassment in the areas of employment, vocational training, education, the exercise of public functions, the provision of goods, facilities and services and the disposal and management of premises. It also imposes a positive duty on public authorities to have due regard to the need to eliminate unlawful discrimination and harassment and promote equality of opportunity between men and women. Sex harassment is harassment which is not of a sexual nature (that is sexual harassment) but is related to gender, for example, a male manager asks a female

colleague to make the tea at every meeting because it is 'women's work'. In both cases it is unwanted conduct that has the purpose or effect of violating a persons' dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment. However, in relation to unintentional conduct, this will only constitute harassment where, if having regard to all the circumstances, including in particular the perception of the complainant, it is reasonably considered as having the effect of harassment.

7.2 The 2005 Regulations made a small number of changes to the SDA in the areas within the scope of the Directive to make it compatible with the Directive. A public consultation was held in the Spring of 2005, in response to which some key stakeholders (including the former Equal Opportunities Commission ("EOC")) queried the Government's interpretation of some of the requirements of the Directive. The definition of sex harassment and the provisions on pregnancy and maternity leave discrimination were amongst the issues raised. Some amendments to the drafting of the 2005 Regulations were made in respect of the maternity leave provisions in light of consultation responses and bilateral discussions with the EOC but the basis of the Government's proposals did not change.

7.3 The judgment of the High Court has set out the effect that the law must have (set out in 4.3 above) in respect of employment and related areas, therefore no consultation on this point was necessary. It should be noted, however, that the amended definition of sex harassment at section 4A(1) SDA will also automatically filter through to the provisions on the exercise of public functions and the gender equality duty as well, which are outside the scope of the Directive. The Government's view is that to retain the original definition of sex harassment in these two areas would give rise to a significant degree of uncertainty for public authorities and individuals and unnecessarily increase the complexity of the law. We have therefore decided that the same, amended definition should apply to all areas in which sex harassment is currently prohibited, including the exercise of public functions and the gender equality duty and have not carved out the application of the new definition in these areas.

7.4 To eliminate the issue of causation in the definition of sex harassment in section 4A(1)(a), regulation 3 replaces the phrase "on the ground of" with the language of the Directive itself, which uses the phrase "related to". The Court considered that the phrase "on the ground of" required the conduct to be motivated by the victim's sex whereas the phrase "related to" is merely associative, and therefore covers a wider range of conduct. For example, where male colleagues dislike a female colleague and decide to put office equipment on a high shelf to make it hard for her to reach, the former definition may not apply (because the men are acting out of dislike of the woman and not because she is a woman) but the new definition may apply because the conduct of putting equipment on a high shelf relates to sex because woman are, on average, shorter than men. Another example might be where a male manager follows a woman into the ladies toilets, which could be conduct relating to sex but might not be conduct on grounds of sex (if, for example, the reason for the manager following the employee into the toilet was to shout at her).

7.5 Use of the phrase "related to sex" instead of "on the ground of her sex" will also facilitate claims of sex harassment by witnesses because the person who considers that their dignity has been violated or the conduct creates an offensive and degrading environment for them need not be the primary recipient of that conduct. An example of this would be where a male manager calls a female employee a floozy or airhead and this is witnessed by another female colleague, who considers that her dignity is violated thereby or considers that it creates an intimidating, hostile, degrading, humiliating or offensive environment. Moreover, because the definition of sex harassment (and sexual harassment) is to be read as applying equally to the harassment of men and women with such modifications as are necessary (pursuant to section 4A(5)), the witness does not have to be of the

same sex as the primary recipient of the conduct in question. The witness would however have to show that all the elements of the test of harassment have been satisfied.

7.6 To provide for explicit employer liability where an employer fails to take reasonably practicable steps to prevent repeated harassment of an employee by third parties (such as clients and customers), regulation 4 amends the SDA to include a test for such liability. The provision imposes an obligation on employers to stop repetitive harassment by third parties, the trigger being knowledge of harassment (as defined in section 4A) of an employee by third parties on at least two other occasions. Liability only occurs where the employer cannot show that he took all reasonably practicable steps to prevent further harassment. This test encapsulates the following considerations. Employers should not be made liable for (1) not taking action in relation to third party conduct of which they have no knowledge (2) for one-off incidents of third party harassment and (3) for conduct beyond their control. Employer liability for third-party harassment will apply not only to sex harassment in section 4A(1)(a) SDA, but also to sexual harassment and gender reassignment harassment in section 4A(1)(b) and 4A(3)(a) respectively.

7.7 To eliminate from the definition of discrimination on grounds of pregnancy or maternity leave the statutory requirement for a comparator who is not pregnant or who is not on maternity leave in section 3A, regulation 2 amends the SDA to omit the statutory comparator. This means a claim of discrimination need only show that a woman has been treated "less favourably" on grounds of pregnancy or maternity leave without reference to how she would have been treated had she not become pregnant or exercised a right to maternity leave, consistent with the language of the Directive. For example, a woman whose employer refuses to let her take additional toilet breaks while pregnant may have a claim under the new definition, as might a woman whose job requires heavy-lifting which she cannot perform while pregnant but who is nonetheless required to do so.

7.8 To permit claims for discrimination on grounds of maternity leave which are permitted under relevant European case law, regulation 5 amends section 6A to provide for claims for discrimination under section 6(1)(b) and (2) in relation to a discretionary bonus which relates to the two week period of compulsory maternity leave. It also eliminates any distinction in the types of claim a woman can bring in relation to the periods of ordinary and additional maternity leave. This means a woman may have a claim if she is not afforded the same benefits of the terms and conditions of employment during additional maternity leave as she is during ordinary maternity leave. These changes will apply to women whose expected week of childbirth (as defined in the Maternity and Parental Leave etc. Regulations 1999 ("MPLR")) begins on or after 5 October 2008.

Consultation

7.9 The Government Equalities Office agreed with the EOC (which was subsequently replaced by the Commission for Equality and Human Rights) and represented to the Court that it would consider as soon as reasonably practicable what amending Regulations were required and would consult with the EOC before introducing them. Accordingly, we put a draft of the Regulations to the EOC for their views. The EOC considered that the original draft was inadequate because it limited an employer's liability for the repeated harassment of an employee by third parties to circumstances in which the repeated harassment was done by the same third party. It considered this to be overly-restrictive, particularly in the context of service industries frequented by transient customers where many incidences of harassment arise out of acts done by different third parties. In addition, the EOC considered that there was no legal justification to delay the application of the amendment to section 6A SDA (exception relating to terms and conditions during maternity leave).

7.10 The Government considered it appropriate to address the first issue with a view to tackling more effectively harassment (as defined in the SDA) that occurs in the workplace. Accordingly,

Government amended the Regulations so that an employer may be liable for the repeated harassment of an employee by third parties regardless of whether the third party is the same person on each occasion.

7.11 With regard to the delayed application of the amendment to section 6A, Government has taken into consideration the need for increased clarity as to how the law applies to women on statutory maternity leave and their employers. It is intended therefore that the MPLR, which govern the benefits afforded during maternity leave, should also be amended in order to remove the distinction between ordinary and additional maternity leave in respect of entitlement to non-pay benefits, as described at paragraph 7.16 below. The Department for Business, Enterprise and Regulatory Reform, which will be making the amendments to the MPLR, expect to apply the changes to women whose expected week of childbirth begins on or after 5 October 2008, being the first Sunday after the next common commencement date (because the expected week of childbirth, as defined, runs from Sunday to Saturday). The amendment to the MPLR cannot come into effect earlier as those regulations will be subject to the affirmative resolution Parliamentary procedure. The timings involved in this process, and the need to give effect to the MPLR amendment regulation on a common commencement date, prevent implementation of the MPLR changes prior to 5 October 2008.

7.12 Giving effect to the amendments made by these separate sets of regulations six months apart has the potential to cause confusion about the rights and responsibilities of employees and employers in relation to non-pay benefits of the terms and conditions of employment when on maternity leave. Were the amendments relating to claims of discrimination in relation to terms and conditions during maternity leave to take effect at an earlier date, a six month discrepancy would result, causing substantial confusion to employees and employers alike and introduce inconsistency in the law applying to maternity leave. We have therefore decided to retain the delayed application of regulation 5, applying the amendment to section 6A of the SDA to women whose expected week of childbirth is on or after 5 October 2008, (i.e. the first Sunday after the October common commencement date).

7.13 The Government has a commitment to introduce changes to employment law only twice a year – these are the common commencement dates of 6 April and 1 October. Ministers agreed that it is important to give effect to the amending legislation using a common commencement date; this is particularly important in respect of those changes to the SDA that relate to statutory maternity leave provisions because of the impact on business.

7.14 The changes to the sex harassment provisions and the definition of discrimination on the ground of pregnancy or maternity leave will take effect on 6 April 2008. The changes to the definition of sex harassment address a relatively small gap in protection and are expected to have a low impact on employers, workers, and public authorities because the potential additional claims are very specific and the circumstances in which they may arise are limited. Similarly, the introduction of explicit provision on employer liability for repeated harassment of an employee by third parties, such as customers, although important, is not expected to result in significant changes in practice. It has always been the Government's interpretation that such liability was implicit in the existing legislative framework, as reflected in published guidance for employers and others. Most employers are more likely to have relied on the guidance than the provisions in the SDA.

7.15 The change to the definition of discrimination on the ground of pregnancy or maternity leave means a woman bringing a claim need only demonstrate that she was treated less favourably, without reference to a specific comparator. Although the change is important in recognising the special situation of women who are pregnant or on maternity leave, it is likewise expected to have minimal impact on employers and workers because it effectively restores the position established by the courts before the introduction of the 2005 Regulations.

7.16 The changes to the exception relating to terms and conditions during maternity leave will apply to employees whose expected week of childbirth begins on or after 5 October 2008. These changes will mean that women on additional maternity leave will have recourse to the same claims of discrimination as those on ordinary maternity leave, resulting in some impact on those employers who provide non-pay benefits of the terms and conditions of employment to employees while on ordinary maternity leave (the first 26 weeks) but cease providing them during additional maternity leave (that is, the second 26 weeks). They will also have some impact on those employers who currently discount any period of additional maternity leave taken by employees from calculations of length of service for the purposes of certain contractual benefits. The delay in commencing this aspect of the new law is warranted for reasons of consistency and better regulation, discussed in paragraph 7.11 above.

7.17 The changes to the exception relating to terms and conditions during maternity leave will also enable women to bring claims of discrimination in relation to discretionary bonuses in respect of periods of compulsory maternity leave, such as a failure to pro-rate the payment of discretionary bonuses to include the two-week period of compulsory maternity leave. This is expected to have minimal impact as existing official guidance, reflecting case law, already makes clear that bonuses should be calculated in this way.

7.18 Government believes that the same commencement arrangement should apply to both of the changes to the SDA addressed in paragraphs 7.16 and 7.17 above as to do otherwise would result in complex legislation which would make the rights and responsibilities of employees and employers unclear.

7.19 The Court's decision received a low level of media interest, but discrimination law advisers have commented on it.

Guidance

7.20 The Government Equalities Office will publish guides to the Regulations on its website. These will provide information on how the Regulations will affect employers, providers of vocational training and workers within the private, public and voluntary sectors, and public authorities at http://www.equalities.gov.uk/legislation/factsheets.htm.

Consolidation

7.21 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 annexed to this memorandum. Copies are available to the public, free of charge, from the Government Equalities Office, 5th Floor, Eland House, Bressenden Place, London SW1E 5DU. Copies will also be available in the Library of both Houses of Parliament.

8.2 The impact of all but one of the amendments to the SDA on the public sector overall is expected to be minimal. However, there will be a more significant cost to some employers in relation to the change to the exception relating to terms and conditions during Additional Maternity Leave set out in more detail in the Impact Assessment.

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 2002/73/EC IN GREAT BRITAIN

THE SEX DISCRIMINATION ACT (AMENDMENT) REGULATIONS 2008

S.I. No. 2008/656

SUPPLEMENTARY TRANSPOSITION NOTE

Sex Discrimination Act 1975

(as amended by the Sex Discrimination Act 1975 (Amendment) Regulations 2008)

Transposition Note

European Parliament and Council Directive 2002/73/EC of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions

Directive 2002/73/EC prohibits discrimination on grounds of sex and harassment related to sex in employment and vocational training. It is implemented in Great Britain by existing law and these amending Regulations. These Regulations amend the Sex Discrimination Act 1975 as amended by the Employment Equality (Sex Discrimination) Regulations 2005. These Regulations do what is necessary to implement the Directive in accordance with the judgment of the High Court in *Equal Opportunities Commission v Secretary of State for Trade and Industry* [2007] EWHC 483 (Admin).

This table has been prepared by the Government Equalities Office. It sets out the objective of the amendments to new articles 2(2) and 2(3) of Directive 76/207/EEC insofar as they apply to harassment and new article 2(7) and how they are to be implemented in Great Britain following the judgement. The Lord Privy Seal is responsible for each aspect of implementation.

Article of 76/207/EEC	Objective of Amended Article	Implementation
2(2) and (3)	Prohibits harassment and sexual harassment, as defined.	Regulation 3 (harassment) amends Section 4A of the Sex Discrimination Act 1975 to prohibit harassment as defined by the Directive and interpreted by the judgment by eliminating the issue of causation and facilitating opposite-sex claims. Regulation 4 (liability of employers for failing to protect employees from third party harassment) adds Section 6(2B)-(2D) to the Sex Discrimination Act 1975 to facilitate employer liability for failing to protect employees from known, repeated harassment by third parties as required by the Directive and interpreted by the judgment.
2(7)	Prohibits less favourable treatment of a woman related to pregnancy or maternity leave.	Regulation 2 (discrimination on the ground of pregnancy or maternity leave) and Regulation 5 (exception relating to terms and conditions during maternity leave) amend Sections 3A and 6A of the Sex Discrimination Act 1975 to prohibit less favourable treatment of a woman related to pregnancy or maternity leave as defined by the Directive and interpreted by the judgment by removing the statutory requirement for a comparator who is not pregnant or on maternity leave and permitting claims for discrimination on grounds of maternity leave which are permitted under relevant ECJ case law[3].

Government Equalities Office

[3] *Lewen v Denda* [2000] ICR 648 and *Land Brandenburg v Sass* [2005] IRLR 147.

UK IMPLEMENTATION OF DIRECTIVE 2002/73/EC IN GREAT BRITAIN

THE SEX DISCRIMINATION ACT 1975 (AMENDMENT) REGULATIONS 2008

S.I. No. 2008/656

IMPACT ASSESSMENT

Summary: Intervention & Options

Department:	Title:	
Government Equalities Office	**Impact Assessment of amendments to the Sex Discrimination Act 1975 to give effect to the Order of the High Court of 16 March 2007**	
Stage: Implementation	**Version:** 2	**Date:** 3 March 2008
Related Publications:		

Available to view or download at:

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?

The former Equal Opportunities Commission (EOC) brought judicial review proceedings against the Government challenging some of the provisions of the Employment Equality (Sex Discrimination) Regulations 2005 which amended the Sex Discrimination Act 1975 (SDA) to implement the Equal Treatment Amendment Directive. The judicial review was heard on 27-28 February 2007. The Judgment of the Court handed down on 12 March 2007 requires amendments to be made to the SDA provisions on harassment and pregnancy and maternity leave discrimination.

What are the policy objectives and the intended effects?

Government is recasting provisions in the SDA to (1) eliminate the causation in the definition of harassment, facilitate claims of harassment by witnesses and provide for employer liability if an employer knowingly fails to prevent repeated harassment of an employee by third parties such as clients and customers; (2) eliminate from the definition of discrimination on grounds of pregnancy or maternity leave the statutory requirement for a comparator; and (3) permit claims for discrimination on grounds of maternity leave which are permitted under relevant European case law.

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

The judgment requires Government to recast specific provisions of the SDA. There is therefore no alternative to introducing amending legislation. The effect of recasting the definition of sex harassment at section 4A(1) SDA is that the new definition will also apply to the exercise of public functions and the gender equality duty, which are outside the scope of the Directive. To retain the original definition of sex harassment in these two areas would give rise to a significant degree of uncertainty for employers and individuals and an increase in the complexity of the law. Government therefore intends the new definition to apply to the exercise of public functions and the gender equality duty.

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. Government will also review how the measures are working to provide the European Commission with information by October 2008, so that it can draw up a report to the European Parliament and Council on how the Directive is working across the European Member States.

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) the benefits justify the costs.

Signed by Barbara Follett MP, Parliamentary Secretary:

Barbara Follett .....Date: 8 March 2008

Summary: Analysis & Evidence

Policy Option: 1	Description: Amend the Sex Discrimination Act 1975 to give effect to the Order of the High Court of 16 March 2007

COSTS

ANNUAL COSTS	
One-off (Transition)	**Yrs**
£ 8.76m	1
Average Annual Cost (excluding one-off)	
£156.92m	

Description and scale of **key monetised costs** by 'main affected groups'

The most significant costs fall to all employers – in the public, private and voluntary sectors – who provide their employees with non-pay benefits of their terms and conditions of employment during ordinary maternity leave (the first 26 weeks) but cease providing them during additional maternity leave (that is, the second 26 weeks). This is estimated at £156.6m.

Total Cost (PV) **£ 297.56m**

Other **key non-monetised costs** by 'main affected groups'

BENEFITS

ANNUAL BENEFITS	
One-off	**Yrs**
£	
Average Annual Benefit (excluding one-off)	
£	

Description and scale of **key monetised benefits** by 'main affected groups'

Total Benefit (PV) **£**

Other **key non-monetised benefits** by 'main affected groups' Women on Additional Maternity Leave able to seek a remedy under law if they are not awarded the same non-pay benefits of terms and conditions as when on Ordinary Maternity Leave.

Key Assumptions/Sensitivities/Risks While the policy is ongoing, costs and benefits have been calculated in NPV terms for only 3 years initially.

Price Base Year 2008	Time Period Years 3	**Net Benefit Range** (NPV) **-£**	**NET BENEFIT** (NPV Best estimate) **-£**

What is the geographic coverage of the policy/option?			Great Britain	
On what date will the policy be implemented?			6 April 2008	
Which organisation(s) will enforce the policy?			None – see evidence	
What is the total annual cost of enforcement for these organisations?			£ N/A	
Does enforcement comply with Hampton principles?			N/A	
Will implementation go beyond minimum EU requirements?			Yes	
What is the value of the proposed offsetting measure per year?			£ 0	
What is the value of changes in greenhouse gas emissions?			£ 0	
Will the proposal have a significant impact on competition?			No	
Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium	Large
Are any of these organisations exempt?	No	No	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices) (Increase - Decrease)

Increase of £ Decrease of £ **Net Impact** £

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.]

Overall benefits

In terms of overall benefits, implementation of this policy will provide legal clarity, by incorporating the High Court's interpretation of the requirements of the Equal Treatment Amendment Directive ("the Directive") in British legislation. This will benefit employers, workers, people undergoing vocational training, and public authorities in the exercise of their public functions and in fulfilling their legal requirements under the gender equality duty.

The changes proposed to the Sex Discrimination Act 1975 (SDA) do not alter fundamentally the way the law works in practice. The number of changes proposed is extremely small and they are limited to two forms of discrimination, i.e. harassment and discrimination on the ground of pregnancy or maternity leave. The new information that employees and individuals need to know about is modest.

Overall costs

There will be a cost to employers and to providers of vocational guidance, training and practical work experience, and public authorities in terms of familiarising themselves with the legislation and associated guidance.

Table 1. Detailed costs and benefits (£m).

	2008/09	**2009/10**	**2010/11**
BENEFITS			
All non-monetised			
COSTS			
Exchequer – total one-off costs	**0.19**	**0.0**	**0.0**
- familiarisation costs	0.20	0.0	0.0
Exchequer – total recurring costs	**0.0**	**0.05**	**0.05**
- increase in sex discrimination tribunals (measure 1)	0.0	0.05	0..05
Individuals – total one-off costs	**0.0**	**0.0**	**0.0**
Individuals – total recurring costs	**0.0**	**0.06**	**0.06**
- increase in sex discrimination tribunals (measure 1)	0.0	0.06	0.06
Employers – total one-off costs	**8.57**	**0**	**0**
- familiarisation costs	8.57	0	0
Employees – total recurring costs	**0.0**	**156.81**	**156.81**
- increase in sex discrimination tribunals (measure 1)	0.0	0.24	0.24
- Non-pay benefits (measure 4)	0	131.42	131.42
- Length of service (measure 4)	0.0	25.15	25.15
TOTAL	**8.76**	**156.92**	**156.92**

Measure 1: definition of sex harassment

The Directive defines sex harassment as:

'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 creating an intimidating, hostile, degrading, humiliating or offensive environment.' It goes on to say that 'harassment … within the meaning of this Directive shall be deemed to be discrimination on the grounds of sex and therefore prohibited'.

The Employment Equality (Sex Discrimination) Regulations 2005 inserted the following express provision into the SDA to make sex harassment unlawful:

'… a person subjects a woman to harassment if (a) on the ground of her sex, he engages in unwanted conduct that has the purpose or effect (i) of violating her dignity, or (ii) of creating an intimidating, hostile, degrading, humiliating or offensive environment for her".

The provision in the SDA was formulated so that a complainant can bring a case of harassment where the unwanted conduct that has taken place was on the ground of the sex of that complainant. The Court ruled that the definition should be able to allow claims to be brought in three further circumstances.

A person should be entitled to a legal remedy if

a) the unwanted conduct is <u>related to</u> the sex of the complainant even if it is not <u>motivated by</u> the complainant's sex;

b) the complainant witnesses a person of the opposite sex being subjected to conduct which has the purpose or effect of creating an intimidating, etc. environment for the witness, e.g. the treatment of a woman in the office creates an offensive environment for a male colleague; and

c) the employer knows that an employee is being repeatedly harassed by a third party, such as a customer or client, and does nothing within the employer's power to prevent the harassment occurring in the future.

The provision in the SDA will continue to include a test whereby an objective consideration of the conduct complained of must take place in addition to the subjective views of the complainant. Taking that into account, we consider that the number of additional cases brought would be few, and of those an even smaller number would be successful.

<u>Action proposed: Amend the harassment provisions of the SDA to give effect to the Court judgment</u>

As the Court has ruled that our SDA provisions do not adequately implement the Directive, there is no alternative to amending the SDA to cover the circumstances described above. The amendments we are required to make are to:

a) remove the issue of causation that arises from the use of the formulation "on the ground of" from the definition of sex harassment;

b) allow for claims by a witness who is the opposite sex of the primary recipient of the conduct at issue; and

c) make an employer liable for harassment where s/he knowingly allows a third party to subject an employee to repeated harassment.

Benefits: The amended provision would introduce legal clarity in a policy area that is potentially confusing for employers and workers. It would allow claims to be made in some marginal circumstances which would not be covered by the existing SDA provisions. With consistent guidance on employer responsibilities, this could also reduce harassment in the future.

Cases that would be covered by a) would be where the harassment that occurred was related to the sex of a person rather than motivated by the sex of the person. Hypothetical examples of such situations were provided by the former EOC. These included where male colleagues who dislike a female colleague – not because she is female, but because they just do not like her – put the equipment that she needs to access on a high shelf which she cannot reach (because as a woman she is shorter than a man). Other examples cited included disparaging comments about women such as women being useless at driving or mother-in-law jokes which, even if not motivated by the sex of the recipient, are nonetheless related to sex. We can conceive of few other instances that would not be covered by the existing provisions which outlaw harassment on the ground of the complainant's sex or sexual harassment, which is defined as unwanted conduct of a sexual nature.

The type of case that would be covered by b) is where the treatment of a woman was witnessed by a male colleague who makes a complaint that witnessing this treatment violated his dignity or created an intimidating, etc. or offensive environment for him.

The sort of case envisaged by c) would be where, for example, an employee was repeatedly subject to acts which constituted any kind of harassment covered by the SDA by customers or clients of the employer, the employer knew that the harassment was taking place, but took no reasonable steps to prevent it happening again.

It should be noted however that no actual cases of these types have been brought to light, and only hypothetical instances of such harassment were cited at the judicial review hearing.

Going beyond minimum EU requirements

The Directive applies to employment and related areas[4]. However, because the definition of harassment in the SDA is a freestanding provision, the new definition will automatically apply to the prohibition of harassment in the exercise of public functions (section 21A SDA) and the public sector duty to promote gender equality ("the gender equality duty" (section 76A SDA)). It would have been possible to amend the SDA so that the original definition of harassment continues to apply in these two areas, but we have not chosen to do so. It is Government's view that to retain the original definition of sex harassment for the exercise of public functions and the gender equality duty would give rise to a significant degree of uncertainty for employers, public authorities and individuals, and an increase in the complexity of the law. In the context of domestic legislation, this is a simplification measure. We expect the impact of this change will be low.

Costs: The amended SDA provision outlawing sex harassment could lead to a small increase in the number of tribunal cases, as individuals seek to test it. However, the majority of situations of sex harassment likely to arise in the workplace are already covered by existing SDA provisions. It is therefore our assessment that should there be an increase in cases, it would not be significant.

The Employment Tribunals Service records statistics on sex discrimination claims – see Annex A. Sex discrimination claims come under the sub-headings of direct discrimination, indirect discrimination and victimisation, as well as harassment, and the harassment category comprises sex harassment, sexual harassment and gender reassignment harassment.

[4] The related areas to which the Directive applies are contract workers, office holders, partnerships, trade unions, qualifying bodies, vocational training (including further and higher education), employment agencies, barristers and advocates.

However, the statistics are not broken down to this level. We estimate therefore that an increase in sex discrimination employment tribunal claims as a result of the wider definition of harassment, and the employer liability for repeated harassment by third parties, might be no more than 0.5%. Such an increase would cost employers £240,598, taxpayers £46,132 and claimants £59,364.[5]

	Number of Cases where Sex Discrimination is the main component (Average)	**X**	**0.5% Increase**	**X**	**Cost per Case**	**=**	**Total Cost**
Employer	10,139	**X**	0.5%	**X**	£4,746	**=**	£240,598
Taxpayer	10,139	**X**	0.5%	**X**	£910	**=**	£46,132
Claimant	10,139	**X**	0.5%	**X**	£1,171	**=**	£59,364
Total							**£346,094**

Acas and the Commission for Equalities and Human Rights would update their guidance on harassment in the workplace to provide practical advice on sex harassment and employer liability for repeated harassment by third parties to help employers, public authorities and workers understand their rights and responsibilities.

The cost of familiarisation with the new guidance is estimated under the later section "Overarching implementation costs".

Risks: None identified.

Measure 2: definition of pregnancy or maternity leave discrimination

The Directive states that less favourable treatment related to pregnancy or maternity leave constitutes unlawful sex discrimination. The Court ruling has determined that the definition of discrimination on the ground of pregnancy or maternity leave in the 2005 Regulations does not satisfy the requirement of the Directive and requires us to recast the relevant provision in the SDA to eliminate the requirement for a comparator.

Action proposed: Amend the pregnancy and maternity leave provision of the SDA to give effect to the Court judgment

As the Court has ruled that the provisions in the SDA do not adequately implement the Directive, there is no alternative to amending the SDA to eliminate the requirement of a comparator.

Business sectors affected: All employers and those in employment-related areas would be affected by this measure. However, their responsibilities would not change. The amended legislation would simply remove any uncertainty that our 2005 Regulations may have created. New and expectant mothers in work would be affected in that their rights in relation to discrimination on grounds of pregnancy or maternity would similarly be clearer. There are

[5] Based on the assumption that the average cost of an employment tribunal case is £4,746 for employers, £910 to the taxpayer and £1,171 for a claimant. See Annex A, paras 4-6

currently 7.7 million women of child-bearing age working in the UK, 33% of the total number of employees.[6] We do not consider that this would result in any additional claims as this measure places existing case law on the face of the SDA.

Benefits: The law would be clear that in the employment field, a woman would not need a comparator when bringing a claim of discrimination on the grounds of pregnancy or maternity leave as case law had established before the 2005 Regulations amending the SDA to implement the Directive came into effect Using the language of the Directive in the SDA means that it will be easier to accommodate any developments arising from ECJ case law in this area.

Costs: Only familiarisation costs have been identified. (See later section "Overarching implementation costs").

Risks: None identified.

Measure 3: compulsory maternity leave and discretionary bonuses

Action proposed: Amend the maternity leave provisions of the SDA to give effect to the Court judgment

In line with the Court ruling, we must amend the SDA to enable claims of sex discrimination to be brought that are consistent with the ECJ case of *Lewen v Denda*. This case established that a woman on compulsory maternity leave cannot be discriminated against in entitlement to discretionary bonuses.

Benefits: By amending the SDA, the law would clarify that for the purposes of the calculation of discretionary bonuses, any period spent on compulsory maternity leave – that is the period of two weeks immediately following the birth of the child – must be included as though the employee had been at work and working normally.

Costs: Because the official guidance provided by the Government currently informs employers that periods of compulsory maternity leave must be included in the calculation of discretionary bonuses, as set out above, the impact on employers is expected to be negligible. The Government is not aware of any evidence that suggests that employers are currently discounting such periods from their calculations. Only familiarisation costs have been identified. (See later section "Overarching implementation costs").

Risks: None identified.

Measure 4: terms and conditions during Ordinary and Additional Maternity Leave

Measure and Effect

The SDA would be amended to allow the same claims of sex discrimination to be brought by individuals against their employer in respect of periods of both Ordinary Maternity Leave (OML) and Additional Maternity Leave (AML), for example, where the benefits of terms and conditions of employment provided during AML are not of the same extent as are available in relation to periods of OML. This would be likely to have some impact on some, but not all, employers.

Those employers affected would be those who satisfy the following: a) provide benefits of terms and conditions of employment (other than remuneration)[7] *and* b) employ women who take

[6] Labour Force Survey, Spring 2004

[7] "Remuneration" means benefits that consist of the payment of money to an employee by way of wages or salary, and that are not benefits whose provision is regulated by the employee's contract of employment (i.e., non-contractual). Remuneration (as defined) during maternity leave is not affected by the SDA, with the exception of "maternity-related remuneration" (meaning remuneration to which a woman is entitled as a result of being pregnant

maternity leave for periods longer than 26 weeks, *and* c) do not currently provide those benefits after the 26th week, (i.e. during AML).

The types of benefits that are likely to result in an additional policy cost for employers who satisfy a), b) and c) above, are, for example: contractual annual leave above the statutory minimum, company cars, gym membership, and mobile telephones, among others. Also included in this list is the matter of counting time spent on AML towards length of service calculation, which is discussed in more detail below.

Impact

The calculation of the additional policy cost must be based on an assumption made about the anticipated amount of AML actually taken by employees. At present, relatively few employees take AML, but with the recent extension of statutory pay to 39 weeks (leaving the last 13 weeks of maternity leave unpaid), it is anticipated that more women will take at least some AML in future.

Thus, previous estimates of the take-up and duration of maternity leave show that around 247,000 mothers may take 27 weeks or longer (some 173,000 female employees are estimated to take AML from weeks 27 – 52)[8]. Assumptions have also been made about the varying periods of AML actually taken within this number, as some mothers will return to work within the 27-52 week period.

The net additional cost to employers as a result of providing non-pay benefits (with the exception of length of service calculations - see below) during AML to the same extent to which they are available in relation to periods of OML is therefore estimated to be:

Cost of additional contractual annual leave	£157.43m[9]
Cost of additional fringe benefits	£30.32m[10]

However there is evidence to show that some employers already offer such benefits during Additional Maternity Leave[11]. We have assumed here that 30% of employers already offer such extended benefits. Hence the total cost effect calculated above should be reduced by this amount to reflect this. Thus the additional policy cost of providing non-pay benefits is estimated to be £131.42m.

Length of Service Calculations

A further impact on employers as a result of these amendments is likely to be a new requirement to include periods of time spent on AML as part of an employer's calculations in respect of length of service for the purposes of assessing seniority or financial non-contractual benefits.

As above, the impact will only be felt by employers whose employees actually take AML and where they are provided benefits based on their total length of service. Clearly the employer

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or being on maternity leave), remuneration in respect of times when a woman is not on maternity leave or remuneration by way of bonus in respect of times when a woman is on compulsory maternity leave.

[8] For further details see the Work and Families: Choice and Flexibility Final RIA in the 2005 Compendium of Regulatory Impact Assessments, Volume 1, DTI, Employment Relations Research Series No.48, http://www.berr.gov.uk/files/file27449.pdf

[9] The number of women affected is 247,000 on Statutory Maternity Pay plus 61,000 on Maternity Allowance.

[10] Source: Survey of Expenses and Benefits, Inland Revenue

[11] Data from the 2005 Maternity and Paternity Rights Survey indicate that 29% of all mothers were in receipt of occupational maternity pay, compared with 58% who received SMP only and 11% who received MA. CIPD data also show that at the end of 2006 26% of employers already offered extended maternity leave and 37% offered enhanced maternity pay.

must, too, be in a position where, were it not for the change in the law, it would have actually discounted any period of time spent on AML from such calculations.

For the purposes of the cost calculations, we have considered here two principal areas where length of service may be an additional cost issue, namely:

- pay and progression that is based on length of service; and
- additional annual leave entitlement earned through length of service.

Before presenting the cost estimates for the impact of the policy change in these areas, some qualifications need to be made.

First of all, since the introduction of the Equality Employment (Age) Regulations in October 2006, many employers can be expected to have reduced the time taken to earn service-related benefits to five years or less, in order to take advantage of the protection in the regulations. Data shows that around 60% of mothers with children aged under 5 have the necessary qualifying job tenure[12].

Second, of those 247,000 employed mothers who take 27+ weeks maternity leave, not all will return to work and of those who do, a proportion change employer. In both cases their right to service-related benefits will cease. Data from the 2005 Maternity and Paternity Rights Survey[13] shows that in 2005, 74% of women returned to and remained in work. We have further assumed some mothers change employer once they have returned to work and estimate that 70% of mothers return and remain with the same employer.

Third, estimates of the duration of maternity leave used in the 2005 Works and Families: Choice and Flexibility RIA can be used to determine the proportion of mothers who may return to work between 27 and 52 weeks. For this, we have estimated those taking between 27 and 39 weeks and those taking 40 to 52 weeks.

Fourth, because of the difference in the type and provision of length of service benefits between the public and the private sector, the analysis undertaken has taken account of this in order to arrive at more reliable cost estimates.

As a result of the above, the relevant affected population has been scaled down to produce the following cost estimates.

(i) pay and progression

Data from the CIPD[14] shows that 88% of public services and 40% of private services use length of service as a criterion in the determination of annual pay awards. Using data from the Annual Survey of Hours and Earnings (ASHE) 2007 on median weekly wages for public and private sector employees we have estimated the effect of these policy changes will amount to £20.94m.

Similarly when it comes to progression, the CIPD survey shows that 41% of public service employers and 9% of private service sector employers used length of service as one of a number of reasons for determining promotion. We assume here that there is a 10% chance of promotion within an organisation and furthermore that such a promotion results in an increase in

[12] See Table 15.3 in H.Robinson, *Gender and Labour Market Performance in the Recovery*, in R.Dickens, P.Gregg, J.Wadsworth (eds), The Labour Market Under New Labour: The State of Working Britain

[13] see table 5.1 in ERRS No.50: 80% of mothers had returned to work by 17 months, but 6% returned and then left employment.

[14] *Reward Management 2007*, CIPD, February 2007, http://www.cipd.co.uk/NR/rdonlyres/08FE4AE7-7DD5-4185-9070-F34225A6EB0C/0/rewmansr0107.pdf

salary of 10%. On this basis, we estimate the effect of the policy change on progress to be £1.59m.

(ii) increased leave entitlement

There is little accurate data available on increased annual leave entitlement due to length of service. However, a survey of companies by IRS in February 2005[15] found that 61% of employee groups had service-related holiday and that annual leave is most commonly added at the rate of 1 day a year for the first 5 years' service. This rate of accrual may well be an upper end estimate, but using this as a benchmark would result in an estimated effect of £2.62m from this policy change.

Thus the additional policy cost of providing length of service benefits is estimated to be £25.15m.

Simplification Measures

The removal of the exceptions relating to the employee's terms and conditions during AML will have a positive impact as a simplification measure.

Whereas previously the claims of discrimination which could be made differed depending on whether it related to a period of OML or AML, employers will now need to be aware of, and comply with, a single approach during maternity leave.

The overall effect of these changes is given in table 4 at Annex B and amount to an estimated £156.57m. Overarching familiarisation costs will also apply.

Overarching familiarisation costs

Reading and Understanding Guidance

Everyone with responsibilities in employment and related areas, and public authorities, would need to be made aware of the nature of the changes being introduced. The related areas to which the Regulations apply are vocational training (including further and higher education), contract workers, partnerships, trade unions, qualifying bodies, employment agencies, office holders, barristers and advocates.

The changes to domestic legislation as a result of our proposals are relatively minor, and are mainly of a technical nature. An explanation of the changes made to sex discrimination legislation will be available electronically on the Government and Equalities Office website – http://www.equalities.gov.uk/legislation/factsheets.htm. In addition, Acas will update its advice leaflets dealing with harassment in the workplace to provide practical examples to help employers and workers familiarise themselves with their obligations and rights. *Bullying and Harassment at Work: a Guide for Managers and Employers (ACAS/AL04); Bullying and Harassment at work; Guidance for Employees (ACAS/AL05).*

There will be a small cost to a manager in each business or organisation of reading and understanding this guidance which explains the law. We assume that all employers in Great Britain will spend 10 – 15 minutes reading guidance, at a total cost of no more than £9.41 million – (see Annex C).

[15] IRS Employment Review No.817, February 2005

Costs to the Exchequer

The associated guidance will be available online and key stakeholders will be notified of this by e-mail.

In the event of successful infraction proceedings against the UK, or individual claims made against the Government for damages, both outcomes could be costly to the Government.

Specific costs and benefits associated with each policy area and associated options are discussed above.

Competition assessment

A detailed competition assessment is not necessary for the proposals put forward in this Impact Assessment. The options presented apply across the board and across all sectors of the economy. They do not favour one sector of employment or business activity over another. The answer is "No" (or, in the case of question 8, "not applicable") to all nine questions of the competition filter test:

Competition Filter Test	
Question	Answer Yes/No
Q1: In the market(s) affected by the new regulation, does any firm have more than 10% market share?	No
Q2: In the market(s) affected by the new regulation, does any firm have more than 20% market share?	No
Q3: In the market(s) affected by the new regulation, do the largest three firms together have at least 50% market share?	No
Q4: Would the costs of the regulation affect some firms substantially more than others?	No
Q5: Is the regulation likely to affect the market structure, changing the number or size of firms?	No
Q6: Would the regulation lead to higher set-up costs for new or potential firms that existing firms do not have to meet?	No
Q7: Would the regulation lead to higher ongoing costs for new or potential firms that existing firms do not have to meet?	No
Q8: Is the sector characterised by rapid technological change?	N/A
Q9: Would the regulation restrict the ability of firms to choose the price, quality, range or location of their products?	No

Small firms' impact test

We do not expect that the impact of this amendment to SDA would have a significantly greater impact on small firms than on large firms As with large firms and public authorities, small firms will need to familiarise themselves with the new guidance. On the costs side, we expect them to spend 10-15 minutes doing this. On the benefits side, there will be increased clarity in the law.

Human Rights

The provisions of the Sex Discrimination Act 1975 (Amendment) Regulations 2008 are compatible with the European Convention on Human Rights.

Enforcement, sanctions and monitoring

The primary means of enforcing the amended SDA will remain with individuals bringing claims to the employment tribunals. Trade Union representatives and the Commission for Equality and Human Rights may support individuals who bring a claim of sex discrimination (which includes harassment); however the Commission for Equality and Human Rights only supports cases of a strategic nature.

The Commission for Equality and Human Rights also has powers to conduct inquiries and investigations, e.g. into discrimination in a specific sector, or where it believes that an organisation is contravening sex discrimination law.

All complaints relating to sex discrimination in employment under the provisions of the SDA are dealt with by way of Employment Tribunals. Claims under Part 3 of the Act (relating to education, including some elements of vocational training, and to the exercise of public functions) are brought in the county courts (England and Wales) and the sheriff court (Scotland). Costs here differ, but a successful claimant will recover their own costs – unlike in the Employment Tribunal. Those failing to apply the gender equality duty properly may face a judicial review or enforcement action from the Commission for Equality and Human Rights

Under the SDA, the sanctions that can be applied by an Employment Tribunal are:

a) an order from the employment tribunal declaring the rights of the complainant and the employer; and/or

b) compensation, with interest, for financial loss, injury to feelings and injury to health; and/or

c) a recommendation that the employer take action within a specified period to reduce the adverse effect on the complainant of the act of discrimination complained of.

The Employment Tribunal Service monitors the numbers of sex discrimination claims taken, and the percentage which are successful, withdrawn and lost. In 2006/7, 28,153 applications were registered with employment tribunals where sex discrimination was one of the jurisdictions. The median award in 2006/07 was £6,724. [16]

For claims brought under Part 3 of the SDA, a court can award compensation only. The Court Service does not collect data about the number of SDA Part 3 complaints that are brought before the county courts, nor do they make available data about the administrative cost of

[16] ETS Annual Statistics 2006/07
http://www.employmenttribunals.gov.uk/publications/documents/annual_reports/ETSAS06-07.pdf

hearing complaints in court. It is therefore not possible to make an estimate of the expected cost to the taxpayer of the cost of any extra court cases arising out of this legislation.

The Government Equalities Office monitors the activities of the Commission for Equality and Human Rights. The Department for Business, Enterprise and Regulatory Reform monitors labour market data and employment tribunal costs. The Ministry of Justice monitors information on discrimination cases in courts.

Post-implementation review

Reviewing the effectiveness of these proposals will be part of the continuing duties of the Commission for Equality and Human Rights. Government will also carry out a review of how the measures we proposed to implement the Equal Treatment Amendment Directive are working. This information is to be provided to the European Commission by October 2008. The European Commission requires this information so that it can draw up a report to the European Parliament and Council on how the Directive is working across the European Member States.

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	***Results in Evidence Base?***	***Results annexed?***
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	No
Race Equality	Yes	Yes
Disability Equality	No	Yes
Gender Equality	No	Yes
Human Rights	Yes	No
Rural Proofing	No	No

Annexes

Annex A

Cases of discrimination at employment tribunals

1. In 2006/07, just over 132,500 claims were registered with the Employment Tribunals Service (ETS).[17] Any claim may be registered with the Service under one or more jurisdiction, or subsequently amended or clarified in the course of proceedings – but it will be counted only once. In 2006/07, just over 28,000 of the claims included sex discrimination complaints. No ETS Annual Report for 2006/07 is yet available to explain the increase in sex discrimination complaints over the previous year[18]. The ETS statistics on sex discrimination claims are not broken down under the different forms of sex discrimination, i.e. direct discrimination, indirect discrimination and victimisation, and harassment, nor within the harassment category to reflect claims for sex harassment, sexual harassment and gender reassignment harassment. The figures below reflect many more claims than are relevant to the changes being made by this instrument, therefore, which concern only sex harassment and discrimination on grounds of pregnancy or maternity leave.

Table 1: Complaints registered with the Employment Tribunals where the nature of the claim was sex discrimination

2001/02	**2002/03**	**2003/04**	**2004/05**	**2005/06**	**2006/07**
15,703	11,001	17,722	11,726	14,250	28,153
Source ETS Annual Reports and Statistics					

2. The issues raised in this Impact Assessment affect the sex discrimination aspect of a claim only (indeed, only a subset of such claims). It is therefore appropriate to consider only those cases that are brought before tribunals where sex discrimination is the only or main complaint[19]. These are detailed below.

Table 2A: Cases where sex discrimination is registered as the main jurisdictional complaint

1998/99	**1999/00**	**2000/01**	**2001/02**	**2002/03**	**2003/04**	**Average**
6,203	4,926	17,200	10,092	8,128	14,284	10,139
Source: ETS Annual Reports						

[17] ETS Annual Statistics 2006/07 http://www.employmenttribunals.gov.uk/publications/documents/annual_reports/ETSAS06-07.pdf

[18] The ETS has explained that the increase in sex discrimination claims in 2006/07 over 2005/06 is because some 19,000 of the 28,000 were recorded under both the sex discrimination and equal pay jurisdictions

[19] Since 2003/04, the statistics contained in the ETS Annual Reports have not identified where sex discrimination is the main jurisdiction

Table 2B:Cases where sex discrimination is one of the jurisdictional complaints						
1998/99	**1999/00**	**2000/01**	**2001/02**	**2002/03**	**2003/04**	**Average**
10,157	7,801	25,940	15,703	11,001	17,722	14,721
Source: ETS Annual Reports						

3. On average, in **two thirds** of claims where there was a sex discrimination complaint, it was the main complaint.

Cost of employment tribunal case – sex discrimination

4. Using data from the Survey of Employment Tribunals' Applications 2003, the BERR estimates that the average cost of an employment tribunal case (under any jurisdiction) is around £4,900 for the employer, and £910 for the taxpayer.[20] These costs include time spent on the case by members of staff, and the cost of advice and representation. These estimates also include amounts awarded if the claimant is successful.

5. The SETA data also explore the cost of an employment tribunal case by jurisdiction. The total cost, excluding any awards, *when discrimination is the main jurisdiction* is £4,746 to the employer, including total spent on advice and representation and time spent by staff including managers. This is higher than the average for all jurisdictions (£3,277), confirming that discrimination cases are more expensive than most other jurisdictions, as they tend to be longer and more complex.

6. The average total financial cost to a claimant (excluding lost earnings) in a discrimination case was £1,171, compared with £484 for all claims.

Discrimination in the workplace

7. Not all employment disputes go to tribunals. To work out the population of 'justiciable employment disputes' in discrimination, (i.e. events that could give rise to litigation) we assume that approximately 12-16% of justiciable employment disputes result in an employment tribunal claim.[21] Using this assumption, Table 3 estimates the incidence of sex discrimination disputes.

[20] DTI Employment Relations Research Series No.33: 'Findings from the Survey of Employment Tribunal Applications 2003'.
http://www.dti.gov.uk/files/file11455.pdf

[21] Based on the Legal Services Research Centre (LSRC) Periodic Survey, first findings published 2003, it is estimated that 2.94 million serious employment problems, which might have involved recourse to law, occurred in the three-and-a-half years from January 1998. Over this period, there were about 374,000 employment tribunal claims. Over this period, that equates to about 12.7% of disputes going to tribunal. Genn, *Paths to Justice*, 1998, suggests about 14.6% of disputes going to tribunal over the period 1992-7. Given these uncertainties, the current proportion of disputes going to tribunal is taken to be 12-16%.

Table 3: Estimated number of sex discrimination justiciable events	
low	High
63,000	84,000
Note: Based on average number of cases registered where sex discrimination is main jurisdiction (Table 2A), assuming that 12-16% of justiciable events lead to an ET case. Rounded to 3 significant figures	

Table 4: Estimated costs associated with measure 4	
	Cost (£m)
1. Non-pay Benefits	**131.42**
- Contractual annual leave	*110.20*
- Fringe benefits	*21.22*
2. Length of Service	**25.15**
- Annual pay awards	*20.94*
- Progression	*1.59*
- Increased leave entitlement	*2.62*

Table 5: Familiarisation costs of giving effect to the Order of the High Court of 16 March 2007

	Time Required	Unit cost	Cost per firm	Number of firms[22]	Total Cost (£m)
Micro firms	¼ hour	£26.95[23]	£6.74	1,054,875	7.11
Small firms	¼ hour	£26.95	£6.74	176,505	1.19
Medium & large firms	¼ hour	£29.11[24]	£7.28	37,615	0.27
Public authorities	¼ hour	£29.11	£7.28	25,481	0.19
Total					8.76

Sectors affected

All employers in the public, private and voluntary sectors, and public authorities (in relation to the exercise of public functions and fulfilling the gender equality duty) are affected by measures 1 – 4 described above. These measures also affect other employment relationships covered by the SDA, i.e. vocational training (including further and higher education), contract workers, partnerships, trade unions, qualifying bodies, employment agencies, office holders, barristers and advocates. They will all need to be aware of the changes and will have to familiarise themselves with them, and make any adjustments necessary to comply with the Directive, for instance where policies or practices do not accommodate the changes.

[22] Source: Statistics for Great Britain are sourced from BERR SME Statistics 2006 (UK) and 2005 (Northern Ireland) – http://stats.berr.gov.uk/ed/sme/smestats2006.xls#'UK Whole Economy'!A1 and http://stats.berr.gov.uk/ed/sme/smestats2005.xls#'Northern Ireland'!A

[23] Source: Annual Survey on Hours and Earnings (ASHE) Survey 2007 – code 11

[24] Source: Annual Survey on Hours and Earnings (ASHE) Survey 2007 – code 1135

Equality Impact Assessment

Amending the Sex Discrimination Act 1975 to give effect to the ruling of the High Court[25]

1. Introduction

1.1 This Equality Impact Assessment addresses the proposals for giving effect to the judgment of 12 March 2007 of the High Court following its judicial review of certain provisions of the Employment Equality (Sex Discrimination) Regulations 2005 which amended the Sex Discrimination Act 1975 (SDA). This assessment considers the impact of the proposals in terms of race, disability and gender.

1.2 The aim of this Equality Impact Assessment is to ensure that the implications for gender, race and disability equality are thoroughly assessed, and to provide assurance that changes needed to mitigate any potential adverse impacts have been identified.

1.3 The assessment follows the guidance produced by the former Commission for Racial Equality on conducting Equality Impact Assessments. While addressing the impact of proposals on all the equality strands, it therefore also fulfils our duties, arising from section 71 of the Race Relations (Amendment) Act 2000, section 3 of the Disability Discrimination Act 2005 and the section 76A of the SDA, to assess and consult where required on the likely impact of proposed policies on the promotion of race equality, equality for disabled people and gender equality.

2. Proposals

2.1 We propose to amend the SDA to give effect to the Court's judgment which interprets provisions of the Equal Treatment Amendment Directive which the Government implemented through the Employment Equality (Sex Discrimination) Regulations 2005 on 1 October 2005.

2.2 The judgment requires us to amend the provisions of the SDA defining harassment on the ground of a person's sex and those covering pregnancy and maternity leave discrimination to:

a) remove the issue of causation that arises from the use of the formulation "on the ground of" from the definition of harassment; and

b) allow for claims of harassment by a witness who is the opposite sex of the primary recipient of the conduct at issue;

c) make an employer liable for harassment where s/he knowingly allows third parties to subject an employee to repeated harassment;

d) remove the statutory requirement for a comparator who is not pregnant or on maternity leave; and

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

e) permit claims for discrimination on grounds of maternity leave which are permitted under ECJ case law[26].

2.3 The changes will apply to the law in England, Scotland and Wales only. In Northern Ireland separate but equivalent law on sex discrimination applies. Separate regulations are being brought forward in Northern Ireland to make equivalent changes to the Sex Discrimination (Northern Ireland) Order 1976.

3. Context and drivers for the proposals

3.1 The European Equal Treatment Amendment Directive is a legal framework that covers all European member states and updates the 1976 Directive on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. In Great Britain, the SDA has provided similar, and in some respects wider, protections for over 30 years. Nevertheless, we need to amend the Act to take account of the Court's ruling on the interpretation of European requirements.

3.2 These proposals will add clarity for everyone about their rights and responsibilities under the SDA.

4. Impact of the proposals

4.1 This section analyses the likely impact of each of the proposals in respect of the race, disability and gender equality duties. It provides analysis of 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) Amend the SDA to remove the issue of causation that arises from the use of the formulation "on the ground of" from the definition of harassment.

4.2 Under the current definition, a person is protected from harassment caused by their sex.

4.3 We propose to revise the definition so that a remedy will be available where harassment is not only motivated by the sex of the person subjected to harassment, but where the harassment is related to that person's sex.

4.4 Whilst the vast majority of claims would already be covered by the SDA, the main impact of this rewording will be that it will be possible that if the circumstances of a case were to fall at the extreme margins of the law, the claimant would be protected by discrimination law and would have a remedy.

b) Allow for claims of harassment by a witness who is the opposite sex of the recipient of the conduct at issue.

4.5 Currently the law only states specifically that the person who is the prime subject of harassment is protected. This provision is being amended so that it is extended to enable a person who witnesses conduct which violates his dignity, etc., to have a remedy, whether or not of the same sex as the recipient of the conduct or the conduct

[26] *Lewen* v *Denda* C-333/97 ECJ, and *Land Brandenburg* v *Sass* C-284/02 ECJ

was unwanted by the recipient.

c) *Make an employer liable for harassment where s/he fails to prevent known, repeated harassment of an employee by third parties.*

4.6 Under the current definition of harassment in the SDA, a person is protected from sex harassment, sexual harassment (i.e. unwanted conduct of a sexual nature), and gender reassignment harassment by their employer or someone under his/her direction and control. Our proposed amendment will extend the scope of the protection provided. The impact of this is to extend the provision so that an employee can bring a claim against an employer where the employee had been repeatedly harassed by third parties (such as customers or suppliers), and the employer had known about it but had not taken reasonably practicable steps to protect the employee from further harassment.

d) *Remove the statutory requirement for a comparator who is not pregnant or on maternity leave.*

4.7 In implementing the definition of pregnancy or maternity leave discrimination, the Government introduced as a comparator how the woman would have been treated if she had not been pregnant or on maternity. This seemed to transpose the provision in the Equal Treatment Amendment Directive which states that "less favourable treatment of a woman related to pregnancy or maternity leave shall constitute discrimination within the meaning of this Directive" (on the basis that "less favourable" necessitates comparison). However, the Court's interpretation means that we have to remove the statutory requirement for any comparator which is what our 2008 Regulations do. This will mean that a woman who claims discrimination on grounds of pregnancy or maternity leave will no longer have to show that she has been less favourably treated than she would have been had she not been pregnant or sought to exercise, or exercised, her right to maternity leave.

e) *Permit claims for discrimination on grounds of maternity leave which are permitted under ECJ case law.*

4.8 The SDA identifies certain exceptions applicable to claims of discrimination relating to terms and conditions during maternity leave. The judgment requires us to amend the SDA to make it sex discriminatory for an employer to deprive a woman of non-contractual bonuses in respect of the period while she was on compulsory maternity leave, and to enable the same claims of discrimination to be made relating to the terms and conditions of employment in relation to periods of both ordinary and additional maternity leave. These changes will implement the ECJ cases of *Lewen* v *Denda*[27] and *Sass*[28]. This will mean that women will be protected against discrimination on the ground of maternity leave in wider circumstances than is the case at present.

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[27] This case established that women on compulsory maternity leave cannot be discriminated against in entitlement to discretionary bonuses

[28] This case concerns whether or not a woman must be entitled to the same rights arising out of her contract of employment (except for remuneration) during any period of statutory maternity leave.

5. Conclusion

5.1 The Government believes that the proposed amendments to the SDA covered by this Equality Impact Assessment will benefit all men and women (in respect of harassment) and women (in respect of pregnancy and maternity leave discrimination). Clarification on the face of the legislation that a) a woman claiming discrimination because of her pregnancy or maternity leave does not need a comparator, that b) a woman on maternity leave is entitled to claim for discrimination in non-contractual bonuses in respect of the period she was on compulsory maternity leave, and c) to allow claims where women are discriminated against in the provision of the benefit of their terms and conditions of employment whilst on additional maternity leave (other than in relation to benefits by way of remuneration, with certain exceptions) will be particularly helpful to women of childbearing age. The SDA already allows claims as in c) in relation to terms and conditions of employment whilst a woman is on ordinary maternity leave.

6. Consultation

6.1 The judgment of the High Court has set out the effect that the law must have in respect of employment and related areas, therefore no consultation on this point was required The Government Equalities Office agreed with the EOC (which was subsequently replaced by the Commission for Equality and Human Rights) and represented to the Court that it would consider as soon as reasonably practicable what amending Regulations were required and would consult with the EOC on that matter before introducing them. Accordingly, we sought their views on draft regulations. Having considered their representations, we made some amendment to the draft provisions in respect of employer liability for harassment of their employees by third parties over whom the employer does not have direct control. A link to the regulations will be available from the Department's website once they have been laid before Parliament for those who have an interest in the technical drafting

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7. Decisions on whether to adopt the policy

7.1 The policy gives effect to the ruling of the Court to recast specific provisions in relation to harassment and pregnancy and maternity leave discrimination. It should be noted however, that the effect of recasting the definition of sex harassment at section 4A(1) SDA is that the new definition will apply to the exercise of public functions and the gender equality duty which are outside the scope of the Directive. Government's view is that to retain the original definition of sex harassment in these two areas would give rise to a significant degree of uncertainty for public authorities, employers and individuals and an increase in the complexity of the law. We have therefore decided that the new definition should apply to the exercise of public functions and the gender equality duty.

8. Monitoring arrangements

8.1 The Commission for Equality and Human Rights has a statutory duty to monitor the workings of the SDA. It may advise central or devolved government about the effectiveness of the Act and make recommendations for amendment. It also has powers to conduct inquiries and investigations, e.g. into discrimination in a specific sector, or where it believes that an organisation is contravening sex discrimination law. Government will also carry out a review of how the measures we proposed to implement the Equal Treatment Amendment Directive are working. This information is to be provided to the European Commission by October 2008. The European Commission requires this information so that it can draw up a report to the European Parliament and Council on how the Directive is working across the European Member States