

## **EXPLANATORY MEMORANDUM TO**

### **The Sex Discrimination Order 1976 (Amendment) Regulations (Northern Ireland) 2011**

**SR No.156**

#### **1. Introduction**

1.1 This Explanatory Memorandum has been prepared by the Office of the First Minister and deputy First Minister to accompany the Sex Discrimination Order 1976 (Amendment) Regulations (Northern Ireland) 2011 (The Regulations) which is laid before the Northern Ireland Assembly.

1.2 The Regulations are made under section 2(2) of the European Communities Act 1972 and are subject to the negative resolution procedure.

#### **2. Purpose**

2. These Regulations amend the Sex Discrimination (Northern Ireland) Order 1976 ("the 1976 Order") to give full effect in Northern Ireland to Articles 2(1)(b) (indirect discrimination) and 17(1) (Defence of rights) of Council Directive 2006/54/EC of 5<sup>th</sup> July 2006 ("the Directive") on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

#### **3. Background**

3.1 Council Directive 2006/54/EC ("the Directive") implements the principle of the equal opportunities and equal treatment of men and women in matters of employment and occupation.

3.2 Much of the necessary domestic legislation was already in place in the form of the 1976 Sex Discrimination Order (SDO), as amended by The Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations (Northern Ireland) 2001<sup>1</sup> (the 2001 Regulations), The Employment Equality (Sex Discrimination) Regulations (Northern Ireland) 2005<sup>2</sup> (the 2005 Regulations), and The Sex Discrimination Order 1976 (Amendment) Regulations (Northern Ireland) 2008<sup>3</sup>.

3.3 The European Commission has queried the Member State (UK) regarding the compatibility of the SDO, regarding the definition of *indirect discrimination* and in relation to enforcement of a claim regarding *instructions to discriminate*, with the Directive. OFMDFM is proposing these amending regulations in order to make the changes required to implement the relevant provisions.

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<sup>1</sup> SR 2001 No.282

<sup>2</sup> SR 2005 No.426

<sup>3</sup> SR 2008 No.159

## **Indirect discrimination**

4.1 Indirect discrimination on the grounds of gender and marital status in employment is prohibited under both European and UK law. Indirect discrimination occurs when a policy which applies in the same way for everybody has an effect which particularly disadvantages persons of one sex compared with persons of the other sex. Where a man or a woman is disadvantaged in this way, a man or a woman is indirectly discriminated against if he or she is put at that disadvantage, unless the person applying the policy can justify it by a legitimate aim, and the means of achieving that aim are appropriate and necessary. Indirect discrimination can also occur when a policy would put persons of one sex at a disadvantage compared with persons of the other sex, if it were applied. This means, for example, that where a person is deterred from doing something, such as applying for a job or taking up an offer of service, because a policy which would be applied would result in his or her disadvantage compared with persons of the other sex, this may also be indirect discrimination.

4.2 Article 2(1)(b) of the Directive applies to the situation where a person is deterred from doing something, such as applying for a job or taking up an offer of service, because of an apparently neutral provision, criterion or practice which if applied would result in his or her disadvantage compared with persons of the other sex. That person will be entitled to bring a claim against that organisation for indirect discrimination. Article 2(1)(b) of the Directive is not however intended to cover allegations of purely hypothetical indirect discrimination - for example, by a person who never intended to apply for a job or is not qualified to do the job.

4.3 Regulations 3 and 4 amend the definition of indirect discrimination, to clarify that it is not the intention to require any personal disadvantage to have been suffered by a claimant.

## **Instructions to discriminate**

4.4 Article 17 of the Directive relates to the provisions concerning instructions to discriminate:

*“Member States shall ensure that, after possible recourse to other competent authorities including where they deem it appropriate conciliation procedures, judicial procedures for the enforcement of 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.”*

4.5 The Sex Discrimination (Northern Ireland) Order 1976 provides that proceedings in relation to certain contraventions, including instructions to discriminate, shall be brought only by the ECNI, and subject to certain conditions. The proposed amendments provide for judicial procedures for the enforcement of obligations under this Directive to be available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them.

#### **4. Consultation**

4. The 2005 Regulations which gave effect to the Directive were subject to public consultation. These amending Regulations provide greater transparency and clarify the provisions on indirect discrimination and instructions to discriminate consistent with the Directive requirements. Consequently, there is little discretion as to the nature of the amendment to be made to the definition of indirect discrimination or instructions to discriminate. In view of this and with Ministerial agreement it has been decided that a full consultation would not be appropriate.

However discussions have taken place with the relevant authorities, in relation to the possible implications for the Equality Commission for Northern Ireland and for the Industrial Tribunals and other courts, and to ensure that full and accessible information is promulgated as widely as possible.

#### **5. Regulatory Impact**

5. The Department has carried out a full Regulatory Impact Assessment and found the impact on business, charities, voluntary bodies and the public sector to be minimal.

#### **6. Equality Impact**

6.1 The new provisions have been screened for equality impact. There was found to be no requirement for a full EQIA.

6.2 The equality screening is attached to this Explanatory Memorandum.

#### **7. Financial Implications**

7. As the amendment to the definition of indirect discrimination is clarificatory, the financial impact per firm is expected to be minimal.

#### **8. Section 24 of the Northern Ireland Act 1998**

8. The Regulations are fully compatible with the Northern Ireland Act 1998.

#### **9. EU Implications**

9. A Transposition Note has been prepared and is laid along with the Amendment Regulations and this Explanatory Memorandum.

#### **10. Parity or Replicatory Measure**

10. The corresponding legislation in Great Britain is the Equality Act 2010.

#### **11. 21 Day Rule**

11. The Regulations are made on 24 March 2011 and come into operation on 31 March 2011. The unavoidable breaching of the 21-day rule is because of the complexity of the considerations, and the risk of infraction proceedings if the clarifying provisions are not in place as soon as possible.

The amending regulations clarify issues raised by the European Commission in September 2010 with the United Kingdom government through the 'pilot case' (accelerated pre-infraction proceedings) procedure. The Statutory Rule clarifies the definition of indirect discrimination and that an individual may take

proceedings in relation to instructions to discriminate, compliant with Council Directive 2006/54/EC.

**The Sex Discrimination Order 1976 (Amendment) Regulations (Northern Ireland) 2011, implementing Council Directive 2006/54/EC  
SR 2011 No 000.**

## TRANSPOSITION NOTE

### Objective:

Council Directive 2006/54/EC of 5 July 2006 implements the principle of equal treatment between men and women in matters of employment and occupation. It is implemented by the Sex Discrimination (Northern Ireland) Order 1976 ("the 1976 Order"), as amended by the Employment Equality (Sex Discrimination) Regulations (Northern Ireland) 2005 ("the Regulations")

### Responsibility:

This table has been prepared by the Office of the First Minister and Deputy First Minister. It sets out the objectives of a number of articles of Directive 2006/54/EC and how they are to be implemented in Northern Ireland. The First and Deputy First Minister are responsible for each aspect of implementation.

### Article of Directive 2006/54/EC

**Provisions transposing the Directive (Unless otherwise specified, statutory references are to the Sex Discrimination (Northern Ireland) Order 1976, as amended by the Employment Equality (Sex Discrimination) Regulations (Northern Ireland) 2005.**

### Article 2 (1)(b) Indirect Discrimination – Definition

Indirect discrimination: where an apparently neutral provision, criteria or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criteria or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

Regulations 3 and 4 amend the definition of indirect discrimination in Articles 3(2)(b)(ii) and 5(1)(b)(ii) of the Order. The amendment makes clear that the provisions cover both person who are put at a disadvantage by the discriminatory provision and those who would be put at such a disadvantage.

<p><b>Article 17 – Defence of Rights</b></p> <p><u>1. Member States shall ensure that, after possible recourse to other competent authorities including where they deem it appropriate conciliation proceedings, judicial procedures for the enforcement of 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 discrimination is alleged to have occurred has ended.</u></p> <p><u>2. Member States shall ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down in their national law, a legitimate interest in ensuring the provisions of this Directive are complied with, may engage, either on behalf of or in support of the complainant, with his/her approval, in any judicial and/or administrative procedure provided for enforcement of obligations under this directive.</u></p> <p><u>3. Paragraphs 1 and 2 are without prejudice to national rules relating to time limits for bringing actions as regards the principle of equal treatment.</u></p>	<p>Regulation 5 amends Article 38 to make it clear that proceedings in respect of a contravention of Article 38 may be taken by an individual.</p> <p>Regulations 6 and 7 enable an individual to make a complaint to an industrial tribunal under Article 63 in respect of an act made unlawful by Article 40 or 41.</p> <p>Regulations 8 and 9 enable an individual to make a claim and bring proceedings to a county court under Article 66 in respect of an act made unlawful by Article 40 or 41.</p> <p>Regulation 10 amends Article 72 to make clear that proceedings in respect of a contravention of Article 72 may be taken by an individual.</p>
<p><b>Article 33 – Implementation</b></p> <p><u>Member States shall bring into force the laws, regulations and administrative provisions to comply with this Directive by 15 August 2008<sup>4</sup> at that latest, or shall ensure, by that date, that management and labour introduce the requisite provisions by way of agreement.</u></p> <p><u>Member states may, if necessary to take account of particular difficulties, have up to one additional year to comply with this directive. Member States shall take all</u></p>	<p>These provisions clarify the necessary legislation, in place through the Sex Discrimination (Northern Ireland) Order 1976. (As amended)</p> <p>The Sex Discrimination Order 1976 (Amendment) Regulations (Northern Ireland) 2011 shall come into force 21 days after it's laid.</p>

<sup>4</sup> The Office of the First Minister and deputy First Minister are introducing new legislation after the date determined by the Commission, in response to communication from the Commission that the 1976 Order was not properly compliant with this Directive.

necessary steps to be able to guarantee the results imposed by this Directive. They shall forthwith communicate to the Commission the texts of those measures.

When Member States adopt these measure, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. They shall also include a statement that references in existing laws, regulations and administrative provisions to the Directives repealed by this Directive shall be construed as references to this Directive. Member States shall determine how such reference is to be made and how that statement is to be formulated.

The obligation to transpose this Directive into national law shall be confined to those provisions which represent a substantive change as compared with the earlier Directives.

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.

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24 March 2011

## **REGULATORY IMPACT ASSESSMENT**

### **The Sex Discrimination Order 1976 (Amendment) Regulations (Northern Ireland) 2011**

### **SR 2011 No. 156**

**March 2011**

#### **1. Title of proposal**

1.1 This Regulatory Impact Assessment considers the impact on business of the Sex Discrimination Order (Amendment) Regulations (Northern Ireland) 2011.

#### **2. Purpose and intended effect**

##### **The objective**

2.1 These Regulations aim to address issues raised by the European Commission in respect of indirect discrimination and instructions to discriminate. The Regulations will amend the provisions relating to indirect discrimination on grounds of gender, marital status or civil partnership and will comply with Council Directive 2006/54/EC ("the Directive") by making it clear that the provisions cover both persons who are put at a disadvantage by a discriminatory provision, criterion or practice and those who would be put at such a disadvantage. They will further amend the provisions concerning instructions to discriminate; enabling proceedings in respect of a contravention to be brought by an individual claimant (previously only the Equality Commission for Northern Ireland (ECNI) could do so).

##### **The background**

2.2 The Directive consolidated and recast previously existing directives on gender equality in matters of employment and occupation. EU Member States were required to bring into force by 15 August 2008 the laws, regulations and administrative provisions necessary to implement the Directive. Although much of what was required was already in place in the Sex Discrimination (Northern Ireland) Order 1976 (as amended) (SDO), the Directive introduced some new requirements. In order to comply fully with the Directive, The Sex Discrimination Order 1976 (Amendment) Regulations (Northern Ireland) 2008 were made. However, the European Commission has subsequently queried the compatibility of the UK legislation which implements the Directive as regards Northern Ireland, in particular as far as the definition of indirect discrimination and enforcement of claims of instruction to discriminate is concerned.

##### **Indirect discrimination**

2.2 Indirect discrimination on the grounds of gender and marital status in employment is prohibited under both European and UK law.

Indirect discrimination occurs when a policy which applies in the same way for everybody has an effect which particularly disadvantages persons of one sex compared with persons of the other sex. Where men or women are disadvantaged in this way, a man or a woman is indirectly discriminated against if he or she is put at that disadvantage, unless the person applying the policy can justify it.

Indirect discrimination can also occur when a policy would put a person at a disadvantage if it were applied. This means, for example, that where a person is deterred from doing something, such as applying for a job or taking up an offer of service, because a policy which would be applied would result in his or her disadvantage, this may also be indirect discrimination.

2.3 Article 2(1)(b) of the Directive is not however intended to cover allegations of purely hypothetical indirect discrimination - for example, by a person who never intended to apply for a job or is not qualified to do the job.

2.4 Article 3(2) of the SDO states:

*"In any circumstances relevant for the purposes of a provision to which this paragraph applies, a person discriminates against a woman if –*

*(a) on the ground of her sex, he treats her less favourably than he treats or would treat a man, or*

*(b) he applies to her a provision, criterion or practice which he applies or would apply equally to a man, but –*

*(i) which puts or would put women at a particular disadvantage when compared with men,*

*(ii) which puts her at that disadvantage; and*

*(iii) which he cannot show to be a proportionate means of achieving a legitimate aim.*

2.5 The European Commission has queried how a requirement of actual disadvantage, as required at 3(2)(b)(ii) above, suffered by a complainant is compatible with the Directive definition of indirect discrimination, which mentions only that 'an apparently neutral provision, criterion or practice *would put* persons of one sex at a particular disadvantage compared with persons of the other sex'. The draft amending regulations reflect the wording of Directive.

### **Instructions to discriminate**

2.6 Article 17 of the Directive relates to the provisions concerning instructions to discriminate:

*"Member States shall ensure that, after possible recourse to other competent authorities including where they deem it appropriate conciliation procedures, judicial procedures for the enforcement of 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."*

The Sex Discrimination (Northern Ireland) Order 1976 allowed certain cases relating to instructions to discriminate to be brought only by the ECNI. The amendments are to address this to bring the Order in line with Art.17.



## **Risk Assessment**

2.7 It was always the intention that legislation complied with the obligations under the Directive and indeed common provisions were in place across the United Kingdom until changes introduced elsewhere through the Equality Act 2010. It has been decided to put this matter beyond doubt by making these clarificatory Regulations, which introduce amending legislation reflecting current provisions elsewhere in the UK.

## **3. Options**

### **Do nothing (option 1)**

3.1 If we do nothing, the European Commission will almost certainly refer the matter eventually to the European Court of Justice (ECJ) which will almost certainly rule against us. This will result in time and money being expended on legal action that could have been averted by taking necessary, timely remedial action. Should the ECJ rule against us, which is more than likely, our good record of transposing EU legislation will be blemished, while substantial fines (to be met by the Northern Ireland Executive) could be incurred.

### **Introduce and implement remedial regulations (option 2)**

3.2 In order to address the European Commission's specific concern about the definition of indirect discrimination in relation to the 'deterred applicant', and to ensure we address the Art.17 issue, we should make a clarificatory amendment to the Sex Discrimination (Northern Ireland) Order 1976 (SDO) by introducing relevant amending Regulations.

3.3 These Regulations will amend Article 3(2)(b)(ii) of the SDO to make it clear that its provisions cover individuals who are put at a disadvantage by a discriminatory provision, criterion or practice and also those who *would be put* at a disadvantage. The amendment will make it clear that the SDO protects a person who is 'deterred' by a discriminatory provision, criterion or practice from seeking employment for which he or she is qualified.

3.4 The amending Regulations will also amend the existing legislation to bring it into line with the requirements of Article 17 of the Directive as outlined above at paragraph 2.6.

## **4. Benefits**

4.1 OFMDFM believes that the second option is necessary. It will provide clarity to the existing law on indirect discrimination and ensure compliance with our obligation in relation to implementing European Community Directives.

4.2 A clearer understanding of the law will enable employers to take the necessary action that will prevent them from falling foul of the law. This in turn will result in averting potential legal costs being incurred and further reduce the burdens on courts and industrial tribunals.

## **Other Impact Assessments**

4.4 It is widely accepted that the Employment Equality (Sex Discrimination) Regulations (Northern Ireland) 2005 had a positive impact on the equality of opportunity for men and women. As these amending Regulations are purely clarificatory (and not a new policy)

they also may be expected to have a positive impact on the equality of opportunity for men and women as well as married and unmarried persons or those in a civil partnership.

4.5 These Regulations are made under powers in the European Communities Act 1972 to right a failure to transpose an Article of a Directive of the European Commission. This defines and restricts their scope.

## 5. Costs

5.1 The changes to legislation are clarificatory, not new policy. As such, the cost to businesses will be minimal. The Equality Commission for Northern Ireland will provide briefing and support for businesses as part of their ongoing work in support of equality of opportunity. Estimated one-off familiarisation costs will be applicable to small private and medium to large firms and public bodies (somewhere in the region of about £1.88 per organisation).

5.2 For the vast majority of organisations, this clarification will be largely cost neutral.

### Familiarisation costs of amending Regulations

Type of firm	Time required	Unit cost <sup>1</sup>	Cost per firm	No of firms	Total cost
Small firms	1/12 hour (5 mins)	£22.59	£1.88	68015	£127,868 (+2 as we estimate only 50% of firms will familiarise themselves with this change) £63934
Medium to large firms	1/12 hour (5 mins)	£22.59	£1.88	1380	£1282
Public authorities	1/12 hour (5 mins)	£22.59	£1.88	270	£254
<b>Total</b>					£65470

### Number of firms

		Number	Data source
Small firms (VAT or PAYE registered)	Firms fewer than 50 employees	68015	Inter Departmental Business Register December 2010
Medium to large Firms (VAT or PAYE registered)	Firms with over 50 employees	1380	Inter Departmental Business Register December 2010
Public bodies		270	Inter Departmental Business Register December 2010

*Note: Figures have been rounded to the nearest 5*

### Wage Costs

	Mean Gross hourly wage <sup>2</sup>	30% uplift non labour costs	Data Source
<b>Small firms</b>			
Managers	£17.38	£22.59	Annual Survey on Hours and Earnings for Northern Ireland 2010
<b>Medium to large firms</b>			
Managers	£17.38	£22.59	Annual Survey on Hours and Earnings for Northern Ireland 2010
<b>Public bodies</b>			
Managers/Senior Officials	£17.38	£22.59	Annual Survey on Hours and Earnings for Northern Ireland 2010

## 6. Small Business Impact Test

6.1 The proposed amendments to the Sex Discrimination (Northern Ireland) Order 1976 should have no significant cost impact on small businesses other than the familiarisation costs that we have pointed out above.

6.2 The proposed amendments are a clarification of legislation that has been in existence since at least 2005. Small businesses have a duty not to discriminate indirectly, and not to instruct others to do so. The provisions of these Regulations should not be introducing any additional burdens on small firms.

## 7. Enforcement, sanctions

7.1 There may be implications for the Equality Commission for Northern Ireland, and for the Industrial Tribunals and other courts, as a result of the increased availability of judicial procedures to complainants. The provisions in these amending Regulations will be enforced by courts and by the Equality Commission for Northern Ireland.

7.2 It is not clear whether the Francovich judgment, which lays down the principle of the liability of the State with regard to individuals for damages deriving from the failure to transpose a directive, may be relevant in respect of the anonymous Complainant.

## 8. Monitoring and Review

8.1 The Equality Commission for Northern Ireland has a duty under Article 54 of the Sex Discrimination (Northern Ireland) Order 1976 to keep under review the working of the Order.

<sup>2</sup> Mean gross hourly wage calculated by taking Managers mean gross weekly wage of £674.5 at December 2010 and dividing by the mean total weekly hours of 38.8.

## **9. Consultation**

9.1 The Employment Equality (Sex Discrimination) Regulations (Northern Ireland) 2005 which gave effect to the Directive were subject to public consultation in 2005.

9.2 The proposed amending Regulations are not changing the policy contained in the 2005 Regulations; rather they are simply providing greater transparency as to the Directive's provisions on indirect discrimination and instructions to discriminate in line with the European Commission's queries to the UK Government on this matter. Consequently, there is no discretion as to the nature of the amendment to be made to the definition of indirect discrimination. In view of this and with Ministerial agreement it has been decided that a full consultation would not be necessary.


9.3 However discussions have taken place with the relevant authorities, in relation to the possible implications for the Equality Commission for Northern Ireland and for the Industrial Tribunals and other courts, and to ensure that full and accessible information is promulgated as widely as possible.

## **10. Summary**

10.1 It is estimated that the cost to business of the proposed amendment to the definition of indirect discrimination amounts to around £65470, or less than £2 per firm, on average. This will be a one-off familiarisation cost.

## **11. Declaration**

We have read the Regulatory Impact Assessment and we are satisfied that the benefits justify the costs.



**RT HON PETER D ROBINSON MLA**  
First Minister



**MARTIN McGUINNESS MP MLA**  
deputy First Minister

**Date: 24 March 2011**