

PROMOTING EQUALITY OF OPPORTUNITY

EMPLOYMENT EQUALITY (SEX DISCRIMINATION) REGULATIONS (NORTHERN IRELAND)

GOVERNMENT RESPONSE TO CONSULTATION

Introduction

- 1.1 The 1976 Equal Treatment Directive (76/207) prohibits sex discrimination in the fields of employment and vocational training. An amendment to the Directive - 2002/73 - was published on 5 October 2002 and must be implemented by Member States by 5 October 2005. This Directive, known as the Equal Treatment Amendment Directive or ETAD, incorporates European Court of Justice (ECJ) case law and strengthens the principle of equal treatment and its practical implementation. OFMDFM's Gender Equality Unit launched a public consultation on its proposals to implement the Directive in April 2005.
- 1.2 This document summarises the responses to consultation and explains the Government's final decisions on key points.

Consultation Activities

- 1.3 Draft regulations were developed and published in a consultation on 27 April 2005. The full consultation package consisted of draft Regulations; a consultation paper inviting views on the draft Regulations, and explaining what these draft Regulations aim to achieve; a partial Regulatory Impact Assessment; and a response form. A summary document was also available on request in alternative formats.
- 1.4 Some 270 paper copies of the full consultation package were sent to key stakeholders, including the Equality Commission for Northern Ireland (ECNI), and to other significant contacts. In addition some 210 letters were issued to other groups to inform them about the availability of the consultation package. The consultation document was also available on the OFMDFM website.

Responses to Consultation

- 1.5 The deadline for responses was 22 July 2005. A total of 7 responses were recorded - 3 from trade unions, 2 from voluntary organisations, 1 from a statutory body and 1 from an umbrella religious group.
- 1.6 The Government would like to thank respondents for supplying a great deal of high-quality feedback which it has carefully considered in reaching its final views.

- 1.7 The responses are available on request from the Equality and Rights Division. A list of the respondents can be found at Annex A.

Regulatory Impact Assessment

- 1.8 The consultation document contained a partial Regulatory Impact Assessment (RIA) that evaluated the potential impact of the draft Regulations.
- 1.9 A small number of respondents offered comments on the analysis and the information presented in the RIA. Where relevant, this feedback has been incorporated in the full RIA that will accompany the finalised Regulations. This document will be available separately on our website.
- 1.10 The changes to domestic legislation as a result of the Directive are fairly minor, and are mainly of a technical nature. There will be a small cost to a manager in each business or organisation of reading and understanding the guidance that explains the law. The total cost to business will not be more than £100,000.

Equality Screening

- 1.11 Screening of the policy proposals indicated a positive equality impact for men and women generally, no negative impacts were identified and the need for a full Equality Impact Assessment was therefore screened out. Views on this issue were invited in the consultation, and the only respondent to address this issue was in full agreement.

Understanding this Document

- 1.12 This report addresses the key issues raised by consultees in the order they were dealt with in the consultation document. Not every respondent is cited in each case, not least because some submissions repeated views already expressed by others. The Government's conclusions are set out in bold print at the end of each section.

1.13 Note

The following abbreviations are used:-

SDO: Sex Discrimination (Northern Ireland) Order 1976;

EPA: Equal Pay Act (Northern Ireland) 1970;

ETAD: Equal Treatment Amendment Directive.

2. Definition of Indirect Discrimination - Question 4 of Consultation

- 2.1 We are required to amend the current SDO definition of indirect discrimination which applies to employment and vocational training as it differs from that set out in ETAD.
- 2.2 The provision we have proposed uses the drafting approach taken in the 2003 and 2004 Regulations which implemented the Article 13 Directives on Race and Employment. This provision will bring out the elements of the test for indirect discrimination more clearly. The question of whether unlawful indirect discrimination has taken place will depend on the facts of the case, particularly when considering if an employer can show that a provision, criterion or a practice meets a legitimate aim and that it is a proportionate means of meeting that aim. If he can show this, then the provision, will be objectively justified and will not be unlawful.
- 2.3 This provision recognises that it is not always possible or necessary to use detailed statistical calculations to show particular disadvantage. However, Industrial Tribunals will still need to consider whether a provision, criterion or practice causes disadvantage to a particular group of people. Statistics could be helpful in establishing evidence of particular disadvantage, however such evidence could also come from experts or other witnesses.

Responses

- 2.4 Three respondents were satisfied with the proposed new definition of indirect discrimination, and ATGWU thought that it “outlines and defines the Acts more clearly and brings it in line with European Laws.” However 4 respondents do not support our proposal.
- 2.5 NIC/ICTU and ECNI expressed concern that our proposed definition unlawfully weakens the test for justification of indirect discrimination in implementing ETAD, and Women’s Support Network believed that the test as defined is not strong enough and falls short of ETAD requirements. The same arguments were put forward when Government consulted on the draft regulations implementing the Article 13 Race and Employment Directives and these were not accepted.
- 2.6 ETAD states that indirect discrimination occurs “where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of another sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.”
- 2.7 The proposed Regulations require that the means of achieving a legitimate aim be ‘proportionate’. ECNI, NIC/ICTU and NIPSA consider this test to be weaker than ‘appropriate and necessary’.

- 2.8 We will retain the test for justification as set out in the consultation document. The ECJ has used the terms ‘proportionate’ and ‘appropriate and necessary’ interchangeably, explaining that proportionality requires that the means used to achieve an aim must not exceed the limits of what is appropriate and necessary to achieve it.
- 2.9 We believe that if the ETAD formulation were to simply be copied out, there is a risk that this would be interpreted as a very strict requirement (e.g. that the legitimate aim pursued was essential to the employer’s business), in accordance with the usual legal interpretation in NI of the concept of necessity. But as the ECJ case law demonstrates the term “appropriate and necessary” in the European context does not set out an absolute test but, rather one of proportionality involving balancing between the discriminatory effects of a measure and the importance of the aim pursued.
- 2.10 ECNI also objected to the ‘legitimate aim’ test which it considers to be regressive. Legal advice on this issue is that it is unlikely that a court or tribunal would find that this was regressive. We have not therefore amended the draft which applies the principles included in the regulations which transposed the equivalent provisions in the Race and Employment Directives. In taking this approach, we are working towards achieving our often stated aim, both in the context of the Directives and of the single Equality Bill, of consistency of approach across discrimination legislation where possible.

Harassment - Question 5 of consultation

- 2.11 Case law has established that sexual harassment is unlawful where it amounts to less favourable treatment on the grounds of sex which results in a detriment. ETAD now requires us to make expressly unlawful a) harassment on the grounds of sex and b) sexual harassment. It also makes it unlawful to subject a person to a detriment on the grounds of the person's rejection of, or submission to, harassment or sexual harassment.

Harassment (on grounds of sex)

- 2.12 We proposed mirroring the definition set out in the regulations implementing the Race and Employment Directives, namely that harassment on the grounds of the complainant's sex occurs where conduct has been carried out which has the purpose or effect of *either* violating the person's dignity, *or* creating an intimidating, hostile, degrading, humiliating or offensive environment for that person.
- 2.13 Discrimination on the grounds of sex includes discrimination on the grounds of gender reassignment. The SDO will therefore cover harassment due to gender reassignment of a person and not just their gender.

Sexual Harassment

- 2.14 Sexual harassment is where conduct of a sexual nature occurs. This must also be expressly prohibited. Whilst not specifying the detail of what constitutes "conduct of a sexual nature", the draft Regulations use this exact phrase as set out in the Directive.
- 2.15 As with harassment on grounds of sex, the conduct in question must be unwanted and have the purpose or effect of violating the complainant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. Conduct will only be taken to have such an effect if taking all the circumstances into account, including in particular the perception of the complainant, it is reasonably considered as having that effect.

Responses

- 2.16 There was a mixed response on the draft Regulations to explicitly outlaw harassment on grounds of sex, sexual harassment, harassment on grounds of gender reassignment and rejection of, or submission to, such unwanted conduct:- ATGWU called the proposal "a huge improvement", while Evangelical Alliance and NIPSA called for guidance (which will be provided).
- 2.17 ECNI generally welcomed the definitions of harassment and sexual harassment but have concerns on a specific drafting point. NIC/ICTU

called the specific provisions on sexual harassment “a very progressive development” but called for proactive duties to be imposed on employers and also expressed serious drafting concerns.

On Grounds of Sex

- 2.18 ETAD refers to ‘unwanted conduct related to the sex of a person’ while the proposed regulations uses the phrase ‘on the ground of her sex’. ECNI and NIC/ICTU expressed the view that the drafting should follow the wording of the Directive. ECNI argue that this distinction is already familiar from disability discrimination law, and that there is therefore no reason not to adopt ETAD wording.
- 2.19 NIC/ICTU considers the proposed regulations need to be widened so that they not only address conduct that is engaged in because of the victim’s sex but also any conduct that has any connection with sex, and that the definition of sexual harassment should be broad enough to cover unwanted conduct such as derogatory remarks or gender-based abuse about a female friend, relative or colleague - conduct which is not necessarily “conduct of a sexual nature”.
- 2.20 We will retain the Regulations as proposed as we consider the provisions we have drafted fully implement ETAD. It is our view that the wording in ETAD is intended to protect individuals who are harassed on the grounds of their sex or on the grounds of gender reassignment. Within Article 2 of ETAD, the phrases “related to the sex of a person” and “on grounds of sex” are both used. In our view, there is no material difference between the two formulations.
- 2.21 The definition used in our draft regulations mirrors those used in the legislation which transposed the equivalent provisions in the Race and Employment Directives. In taking this approach, we are working towards achieving our often stated aim, both in the context of the Directives and of the single Equality Bill, of consistency of approach across the different strands of discrimination legislation where possible.

Reasonableness Test

- 2.22 Our draft regulations state that conduct shall only be regarded as meeting our definitions of harassment and sexual harassment if “having regard to all the circumstances, including, in particular, the perception of [the complainant], the conduct should reasonably be considered as having that effect”. This reasonableness test includes both objective and subjective elements. Women’s Support Network argued that the use of a reasonableness test is unnecessary, and NIC/ICTU that it is not permitted in ETAD.
- 2.23 We will retain the Regulations as proposed. The importance of the words underlined should not be disregarded and are supported by

case law. Although the ultimate judgment is an objective assessment of fact by the tribunal, among the factors that must be considered in particular, is the complainant's subjective perception of the act. We consider that our drafting strikes the right balance and will not be unduly burdensome for complainants.

- 2.24 This wording moves towards consistency of approach across the different strands of discrimination legislation.

Harassment by Third Parties

- 2.25 Women's Support Network suggests that "in the case of employers' duties" the regulations should prohibit harassment by a third person.
- 2.26 We will retain the regulations as proposed. We do not consider that ETAD requires its provisions to extend to outlaw harassment by all third parties. Provisions for vicarious liability currently exist in Article 42 of the SDO. This provision means that an employer is liable for the acts of his employees in the course of their employment, whether or not the employer knows about or approves the discriminatory treatment. 'In the course of his employment' is not restricted to the workplace, for example such conduct might take place at a 'works do'. Whether the act of harassment takes place 'in the course of employment' is a question of fact for the tribunal to determine.
- 2.27 We consider that the draft Regulation, taken together with the Article 42 SDO provision on vicarious liability, satisfies the requirements of ETAD.

Pregnancy and Maternity, Paternity and Adoption Leave - Question 6 of Consultation

2.28 ETAD makes it clear that less favourable treatment on the grounds of pregnancy and maternity leave is unlawful, and that where Member States have provisions on paternity and/or adoption leave, they must be compatible with ETAD. Less favourable treatment on grounds of pregnancy and maternity leave is already regarded as unlawful discrimination as a result of case law, despite there being no explicit reference to this sort of discrimination in the SDO. We are not creating any new rights or duties but are aiming to make it clearer that discrimination on the grounds of pregnancy or maternity leave is sex discrimination.

Responses

2.29 Most respondents supported the proposal to add an explicit reference to the SDO regarding discrimination on grounds of pregnancy and maternity leave. ECNI and NIC/ICTU disagreed with the draft regulations while ATGWU supported the proposal in that it “adds more protection”.

On Grounds of Pregnancy/Maternity Leave

2.30 ECNI and NIC/ITU argued that the use of ‘on grounds of’ in the draft regulations is narrower than ‘related to’ used in the Directive and requested this be amended to closer shadow the wording of the Directive. ECNI argued that the proposed drafting is inadequate implementation of the Directive.

2.31 We will retain the Regulations as proposed. The Directive uses both “related to” and “on the grounds of” and in our view, there is no material difference between the two formulations. Existing case law already provides that “on the ground of” will be interpreted widely. We consider that the provision fully implements the Directive.

Employee Status

2.32 NIC/ICTU called for maternity protection to be widened beyond employees to include all workers such as home workers, agency workers and temporary workers.

2.33 We will retain this aspect of the Regulations as proposed. ETAD does not require action on this issue; we are satisfied that the draft Regulations fulfil our obligations under the Directive.

Exceptions

2.34 The Regulations set out the extent to which it is unlawful to deprive a woman of the benefit of her terms and conditions of employment

during maternity leave. NIPSA raised concerns about the provisions for exceptions in the draft Regulation “as no explanation has been provided for this”. However, the purpose of the exceptions is to allow employers to apply a different rate of pay during maternity leave, without this being discriminatory.

2.35 We have decided that no change is necessary.

Small Employers’ Exemption

2.36 As provided for in the Maternity and Parental Leave Regulations (NI) 1999 and the Paternity and Adoption Leave Regulations (NI) 2002.

2.37 ECNI, NIC/ICTU and Women’s Support Network called for the small employers’ exemption to be removed by October 2005.

2.38 The Department of Employment and Learning in its consultation “Work and Families” explain the decision to remove the exemption alongside the Work and Families package by April 2007. It is considered this is more straightforward for both employers and employees. Responses to the Work and Families consultation gave little evidence of opposition to the timing.

2.39 In the meantime we believe that women are already protected against dismissal in these circumstances by sex discrimination law.

Genuine Occupational Requirements - Question 8 of the Consultation

- 2.40 DTI carried out an analysis of the genuine occupational qualifications (GOQ) in the SDA (Sex Discrimination Act 1975, their corresponding sex discrimination legislation) to assess their compatibility with the genuine occupation requirement (GOR) provision in the Directive. DTI took the view that only one of these GOQs did not comply, and considered that a 'reasonableness' requirement needed to be introduced into the provision that applies to posts, which involve performing intimate physical searches pursuant to statutory powers, where the employee or applicant is undergoing, has undergone or intends to undergo gender reassignment to bring it into line with the other GOQs.
- 2.41 This application of a proportionality requirement will have limited scope as it only applies in cases where a job requires an individual to carry out intimate physical searches *pursuant to statutory powers* e.g. the Police and Criminal Evidence (Northern Ireland) Order 1989 (PACE).
- 2.42 An employer filling a post where such physical searches may be part of the job will first need to consider whether he/she already has an employee who is not undergoing or intending to undergo gender reassignment who could be reasonably required to carry out those particular duties, and whether the employer could reallocate the duties to such an employee without undue inconvenience. If they can reallocate the duties in such a way, the GOQ will not apply.

Responses

- 2.43 The majority of respondents agreed with the proposal to add a 'reasonableness' requirement to this GOQ. NIC/ICTU stated its belief that workers should be treated for all purposes related to employment in their chosen gender.
- 2.44 **Government will retain the use of GOQ in the SDO.**
- 2.45 In response to the corresponding consultation in Great Britain the Equal Opportunities Commission criticised a number of existing GOQs highlighting their view that these were of 'questionable compatibility' with the Directive. ECNI noted that criticism, and added that it regretted that the opportunity had not been taken to conduct a 'root and branch' review of GOQs.
- 2.46 **We will retain the Regulations as proposed.** A comprehensive review on the existing GOQs in GB was undertaken by DTI to ensure compliance with the Directive. The same GOQs apply in NI. There will be an opportunity to consider this further in the context of the single Equality Bill.

- 2.47 It was suggested in response to the corresponding consultation in Great Britain that the draft regulations required amending to clarify that the gender reassignment GOQ provision does not apply to people who have undergone gender reassignment and have a gender recognition certificate.
- 2.48 We have amended the draft to clarify this provision in relation to those who have undergone gender reassignment and have a gender recognition certificate.

Office Holders - Question 11 of Consultation

- 2.49 The scope of the Directive requires that the SDO be extended to all office holders appointed by central government; other offices and posts where the office holder is paid and works under some direction, even if minimal; and give all office holders access to Industrial Tribunals to enforce their rights. In addition, the EPA will be amended to protect office holders who receive some remuneration from discrimination in that remuneration. It will not apply to office holders who are elected.
- 2.50 This means that office holders appointed by a Minister of the Crown, Northern Ireland Minister, the Assembly or a government department will be protected not just in recruitment and the terms of appointment, but for the duration of the position they hold. The SDO will also cover other office holders where they fall within the scope of the amended Equal Treatment Directive (that is, if they are paid and subject to some form of direction).
- 2.51 The test for whether a person is covered as an office holder, however formal or informal, is essentially that:
- the appointment was made or recommended by a Minister, the Assembly or government department (whether the post is paid or unpaid); or
 - the worker is paid and is subject to the direction of another person as to when and where he performs his functions.
- 2.52 Government Ministers and elected politicians would not be covered as there is a specific exclusion in the SDO for people who are elected to an office or a post.

Responses

- 2.53 Most respondents agreed with the proposed draft regulations covering office holders. NIC/ICTU argued that the provisions should apply to any kind of 'occupation' and also to elected representatives, since disability discrimination covers this category.
- 2.54 **We will retain the Regulations as proposed as we are satisfied they fully implement our obligations under the Directive. We are aware that the proposed Disability Discrimination (Northern Ireland) Order will include elected representatives. This is a policy decision aimed at dealing with the specific issues in relation to disability discrimination and was not required by the disability strand of the Employment Directive. Therefore it was necessary for this change to be introduced through primary legislation.**

Office Holders, Ministers of Religion - Question 12 of Consultation

- 2.55 The Directive requires that ministers of religion be brought within the scope of the provisions of the SDO insofar as they are office holders. We propose to do so and to amend Article 21 of the SDO, which allows discrimination in relation to employment which is ‘for purposes of an organised religion’ where that employment is ‘limited to one sex so as to comply with the doctrines of the religion or to avoid offending the religious susceptibilities of a significant number of its followers’. We also intend to amend the corresponding exception relating to the granting of authorisations or qualifications (which could include activities such as ordination) and the similar exception relating to discrimination on grounds of gender reassignment. Our intention is to clarify the effect of these measures and to ensure that they do not inadvertently provide an exemption from the new harassment provisions of the SDO. Sex discrimination against clergy and ministers, including treatment such as sexual harassment, will be unlawful in most circumstances.
- 2.56 Article 21 of the SDO will be clearer about the circumstances in which faith groups are permitted, for reasons of religious conscience, to treat priests or applicants for ordination or appointment less favourably because of their sex, married or civil partnership status or gender reassignment.

Responses

- 2.57 Most respondents agreed with the proposals. ECNI felt that the proposed amendment extends rather than clarifies the exceptions in Article 21. NIC/ICTU commented that the introduction of marriage or civil partnership status was a significant extension. ECNI and NIC/ICTU also expressed concerns about whether the proposed amendment to Article 21 would satisfy the general test in the Directive as to genuine occupational requirements, and ECNI called for a Ministerial statement to the effect that the amended Article 21 is in conformity with ETAD.
- 2.58 We are satisfied that the proposed regulations reflect the requirements of the Directive and relevant ECJ case law on what constitutes an office holder. Office holders must be protected by the SDO. The narrow exemption provided for faith groups, which exists in Article 21 SDO, is a necessary and appropriate means of achieving the legitimate aim of protecting the religious freedom of faith groups in Northern Ireland. It is our view that this provision meets the Directive’s provision on genuine occupational requirements. Our proposed regulations update this existing provision to a) make it clearer about the circumstances in which faith groups are permitted, for religious conscience, to treat priests or applicants for ordination or appointment less favourably because of their sex, married or civil partnership status or gender

reassignment, and b) ensure that it does not inadvertently provide an exemption from the new harassment provisions.

- 2.59 The GOR provisions in draft Regulation 19 have been the subject of careful consideration and detailed legal advice. The Department is satisfied that draft Regulation 19 is compatible with the Directive and is not regressive.

Territorial Extent - Question 13 of the Consultation

- 2.60 ETAD does not make reference to territorial provisions by individual Member States. However, it does provide us with an opportunity to extend the scope of the territoriality provisions in the SDO and EPA to be consistent with other strands of equalities legislation. We have adopted the approach taken in the 2003 Sexual Orientation and Religious Belief/Political Opinion Regulations, namely to extend it to cover people who work wholly outside the GB, but in specific limited circumstances only. No change on the face of the EPA will be necessary as we will ensure the amended Article 13 of the SDO continues to include reference to the EPA.
- 2.61 The SDO and EPA will cover employees who work for NI organisations wholly outside Northern Ireland in relation to recruitment, terms and conditions, pay, promotion, transfers and dismissals where the work is for an organisation in NI, and where the employee is ordinarily resident in NI either when she applies for the job or at some time during her employment.
- 2.62 In relation to claims concerning pay, where a claim attempts a comparison between workers in different countries, the claimants' work must be either work rated as equivalent, work of equal value or like work of a broadly similar nature, as now. It will remain possible for an employer to point to material differences other than sex to justify any pay differentials and prevent inappropriate cross-country comparisons. If there were genuinely no connection with the difference in sex then these defences will prevail.

Responses

- 2.63 The majority of respondents who addressed this question supported the proposed Regulations, although NIC/ICTU have suggested that the law on territoriality and application of employment protections is urgently in need of review. (We have noted this and will review provisions as the opportunity arises.)
- 2.64 NIPSA argued that the Regulations should be extended to cover employees of NI companies (including public sector employees) who may be required to volunteer or undertake work overseas but not necessarily for the NI organisation, for example on secondment.
- 2.65 We will as proposed bring the provisions in sex discrimination law into line with those in the other strands of equality legislation. ETAD is silent on the issue of territoriality - as is the case in the Article 13 Race and Employment Directives - but it does provide us with the opportunity to extend the scope in the SDO and EPA to be consistent with the other equality strands. It would be going significantly further however to require an employer to be responsible for employment practices in another organisation for which he would not otherwise be responsible. An employer

outside Northern Ireland will be subject to the laws of the country in which he carries on his business.

Definition of Direct Discrimination - Question 15 of the Consultation

2.66 ETAD defines direct discrimination as less favourable treatment ‘on grounds of sex’ - as did the original Equal Treatment Directive (76/207/EEC); the SDO defines it as less favourable treatment ‘on the ground of her sex’. We consider that our existing definition of satisfies the requirements of ETAD.

Responses

2.67 Some respondents were content with our proposal to retain the existing SDO definition of direct discrimination but Women’s Support Network, ECNI and NIC/ICTU did not agree.

On Grounds of Sex

2.68 Women’s Support Network, ECNI and NIC/ICTU are of the view that the SDO definition should be widened to apply to the sex of someone other than the claimant/victim. Examples of the situations these stakeholders consider the SDO should cover are discrimination a) on the grounds of association - the sex of a partner, friend, relative or colleague of the victim, or b) the perceived sex of the victim or victim’s partner or child. This wider definition applies in the Regulations which implemented the Article 13 Race and Employment Directives. ECNI made the further point that the no-change proposal “places sex equality in an inferior position to race, religious belief and political opinion and sexual orientation”.

2.69 We will maintain our position; we are of the view that the existing definition in the SDO satisfies the requirements of ETAD.

2.70 Although the phrase “on grounds of sex” is used in the English text of ETAD, we do not consider that this was chosen deliberately to ensure that discrimination because of association with someone of a particular sex, or because of the discriminator’s false perception of the victim’s sex are covered. Some other language versions of the text use the possessive adjective, for example “en raison de son sexe” is the French version.

2.71 We recognise that this appears to go against the grain of adopting the same approach as across all strands of equality legislation on race, sexual orientation and religion belief, political opinion. However, this is a case where we have had to weigh the merits of consistency across the equality strands against consistency within the SDO. Under the powers to make the Regulations, conferred by the European Communities Act, we are only able to amend the definition insofar as it applies to employment and vocational training (the scope of the Directive). The existing definition would continue to apply in the fields of education and the provision of goods, facilities, services and premises. There would therefore

have been different definitions applying within the same legislation.

Need for a Comparator

- 2.72 NIC/ICTU argue, as they did in response to the single Equality Bill consultation, that while a comparator may be relevant as proof of discrimination, it should not be a pre-requisite to establishing discrimination.
- 2.73 We maintain our position, that the existing definition in the SDO satisfies the requirements of ETAD. We note the reiterated views of NIC/ICTU. There is an opportunity to consider the issue of comparators in the context of the single Equality Bill.

Victimisation - Question 16 of Consultation

Extend the Victimisation Provisions of the SDO

- 2.74 The SDO specifically makes discrimination by way of victimisation unlawful in a way which we consider satisfies the requirement of ETAD.

Responses

- 2.75 Most respondents support the proposal to retain the current SDO's wording on unlawful discrimination by way of victimisation. However, ECNI and NIC/ICTU do not accept that a comparator should be required, and ECNI argue that this is inadequate implementation of ETAD.
- 2.76 We maintain our view that the SDO already complies with the ETAD requirements in respect of victimisation. The issue of a comparator in victimisation cases can be considered in the context of the single Equality Bill.

Statutory powers of the Equality Commission for Northern Ireland - Question 18 of the consultation

2.77 ECNI has 3 statutory duties under the SDO, which are to:

- work towards the elimination of discrimination;
- promote equality of opportunity between men and women; and
- keep under review the working of the SDO and EPA.

2.78 In order to enable ECNI to act on these duties, it has a number of powers to carry out a range of activities including:

- undertaking research or education;
- issuing Codes of Practice; and
- conducting formal investigations.

2.79 We are content that ECNI's current powers enable it to carry out the role and range of activities required by the "designated body" under the provisions of the amended Equal Treatment Directive.

Responses

2.80 The majority of respondents agreed that ECNI's current powers enable it to carry out the activities required under the Directive. ECNI itself maintained that ETAD requires that it has the power to bring cases in its own name on behalf of named complainants.

2.81 We are satisfied that the current ECNI powers meets the requirement of the Directive and do not propose to amend the SDO. The Directive requires that organisations may act either in support of or on behalf of claimants in bringing claims. The SDO allows the ECNI to grant assistance to claimants or prospective claimants in certain circumstances, and this includes representation. ECNI can therefore act *in support* of claimants and this satisfies the requirements of the Directive.

Equal Pay Claims and Hypothetical Comparators

2.82 NIC/ICTU has expressed the view that the definitions of direct and indirect discrimination in ETAD require the law of Member States to provide for the possibility of hypothetical comparators in equal pay claims.

2.83 We maintain our position that hypothetical comparators may not be used in equal pay cases. Although ETAD mentions pay, we do not consider that it amends the Equal Pay Directive thereby

changing the position set out in existing ECJ case law¹ that an actual comparator is necessary.

- 2.84 The Equal Pay Directive 75/117/EC is wholly consistent with our EPA which requires a person who is bringing a complaint under the equal pay legislation to identify an actual current or past worker with whom a valid comparison can be made. The European Court of Justice has held that “comparisons are confined to parallels which may be drawn on the basis of concrete appraisals of the work actually performed by employees of different sex within the same establishment or service”. Our view is that case law still applies, and therefore actual comparators are still required in equal pay cases. It is also the case that employers in GB have resisted strongly any proposals to allow hypothetical comparators.

Other areas - Question 19 of the consultation

- 2.85 Respondents were invited to comment on whether existing and proposed measures satisfy the requirements of ETAD.
- 2.86 NIC/ICTU called for systematic gender impact assessments on all proposed legislation and other Government measures. ECNI referred to its forthcoming review of effectiveness of section 75.
- 2.87 Section 75 of the Northern Ireland Act 1998 already requires public authorities to have due regard to the need to promote equality of opportunity between the 9 categories, including men and women.

EQUALITY AND RIGHTS DIVISION

OFFICE OF THE FIRST MINISTER AND DEPUTY FIRST MINISTER

¹ *McCarthy v Smith and Coloroll*

ANNEX A - List of respondents.

Amalgamated Transport and General Workers Union (ATGWU)

Equality Commission for Northern Ireland (ECNI)

Evangelical Alliance

Northern Ireland Committee, Irish Congress of Trade Unions (NIC/ICTU)

Northern Ireland Public Service Alliance (NIPSA)

Northern Ireland Women's European Platform (NIWEP)

Women's Support Network