

Partial Regulatory Impact Assessment (RIA)

Implementation of the EU Gender Directive on Goods and Services in Northern Ireland

Title of proposal

1. Regulations to implement Directive 2004/113/EC ('the Gender Directive') - equal treatment between men and women in the access to and supply of goods and services.

Purpose and intended effect of measure

2. Implement the EU Gender Directive by:
 - amending the Sex Discrimination (Northern Ireland) Order 1976 (SDO) as follows:
 - (a) amend the current definition of indirect discrimination in the field of goods, facilities and services;
 - (b) introduce an explicit prohibition on harassment and sexual harassment in the field of goods, facilities and services;
 - (c) apply the same burden of proof provision to goods, facilities and services as exists for employment and vocational training;
 - (d) where necessary, amend the current exceptions in the SDO to ensure they are compatible with the Directive;
 - (e) extend protection against discrimination on grounds of gender reassignment to goods, facilities and services.
 - (f) clarify that discrimination on grounds of pregnancy and maternity is unlawful in the field of goods, facilities and services.
 - (g) specify the circumstances under which the use of sex as an actuarial factor in the calculation of premiums and benefits for insurance and other financial products can result in different treatment for men and women.
 - bringing regulations under the European Communities Act 1972 into effect in time to meet the implementation deadline of 21 December 2007.

Background

3. The Gender Directive implements the principle of equal treatment between men and women in the access to and supply of goods and services across all EU Member States. The Directive must be implemented by Member States by 21 December 2007.

4. It has been unlawful in Northern Ireland to discriminate between men and women in the provision of goods, facilities and services since 1976 and the SDO already largely complies with the Gender Directive.
5. We do not consider that the changes proposed will lead to a major increase in cases.
6. The SDO currently contains inconsistencies arising from changes when implementing previous European Directives on employment matters. Many will be removed when the Gender Directive is implemented. There will also be greater consistency between the SDO and the other "strands" of discrimination law, such as those covering race and religion or belief.
7. The Directive will be implemented through regulations under section 2(2) of the European Communities Act 1972. This allows amendments to be made to the SDO in areas covered by or related to the Directive. But changes under the regulations will not extend to education in schools or the content of media and advertisements because the Directive explicitly excludes these matters from its scope.
8. A Joint EU Council and Commission statement ⁽¹⁾ linked to the Gender Directive highlights the European Court of Justice ruling ⁽²⁾ that the right not to be discriminated against on grounds of sex includes discrimination arising from gender reassignment. **The Government considers that the Gender Directive therefore makes it unlawful to discriminate on grounds of gender reassignment as well as on grounds of sex, as is already the case in employment and vocational training.**

Rationale for government intervention

9. The proposed amendments to the SDO are necessary to ensure compliance with the Gender Directive. The deadline for implementation is 21 December 2007.

Consultation

Within government

10. The NI consultation document and draft Regulatory Impact Assessment mirror the approach being taken in Great Britain in implementing the Directive and have been adapted for Northern Ireland by the Equality Directorate in the Office of the First Minister and deputy First Minister (OFMDFM).

⁽¹⁾ Contained in Addendum to draft minutes of 2630th Meeting of the Council of the European Union on 13.12.2004 Reference 16273/04 Add1

⁽²⁾ C-13/94 *P v S and Cornwall County Council*

Public Consultation

11. This partial Regulatory Impact Assessment forms part of the consultation on our proposals to amend the SDO by way of Regulations. The draft Regulations can themselves be viewed on the following website [..] and comments are welcome on them as well as on the partial Regulatory Impact Assessment. The estimates in this Regulatory Impact Assessment will be considered in the light of responses to the consultation.

Options and their costs and benefits

12. We have analysed each element of the SDO relating to goods and services against the Directive's requirements and have assessed whether we should:
 - leave the SDO unchanged because it is compatible with and satisfies the requirements of the Gender Directive;
 - amend the SDO in order to comply with the Directive; or
 - repeal provisions of the SDO that do not comply with the Directive.

Sectors and groups affected

13. The Directive affects providers of goods, facilities and services in the public and private sectors as well as members of the public who are customers for goods and services or who make use of public or private sector facilities.
14. Organisations already have responsibilities under the SDO and its associated case law in the areas covered by the Directive. They will benefit from the greater consistency achieved by many of the changes proposed to the SDO. This will make it easier for organisations to understand their obligations as employers and service providers.
16. Existing protections for pregnant or new mothers will be clarified by introducing an explicit protection from discrimination on grounds of pregnancy and maternity in the supply of goods, facilities and services.
17. The regulations will particularly benefit transsexual people, who will gain protection from direct discrimination in the supply of goods, facilities and services.

Costs and benefits of detailed proposals

(a) Amend the definition of indirect discrimination

18. In broad terms, indirect sex discrimination occurs when the same policy or practice is applied to both men and women but in practice one sex is particularly disadvantaged by it. The SDO currently contains two different

definitions of indirect discrimination: one derives from EU law and applies to employment and vocational training; the other (the original domestic definition) applies in all other fields covered by the SDO. The latter is narrower, relies heavily on the use of statistical evidence to prove that indirect discrimination has occurred, and does not meet the Gender Directive's requirements.

Option 1 (recommended): amend the SDO definition, using the formulation which currently applies to employment and vocational training.

Benefits

19. A consistent definition of indirect discrimination within the SDO and greater consistency of the SDO with other equality legislation. Having just one definition will reduce confusion for service providers (especially those who are also employers and therefore already covered by the wider EU definition) and users

Costs

20. Schools in their roles as employers and providers of educational services will not benefit from this simplification, because the Gender Directive does not apply to education in schools.

Option 2: do nothing.

This is not considered to be a viable option because the current definition does not meet the Gender Directive's requirements.

Benefits

21. None identified.

Costs

22. If the definition of indirect discrimination is not amended, the UK would be in breach of its EU obligations.

(b) Harassment and sexual harassment

23. EU law deems that harassment on grounds of sex and sexual harassment are forms of sex discrimination. Since 2005, the SDO has **explicitly** prohibited harassment on grounds of sex and sexual harassment in employment and vocational training, in order to meet EU law .

24. Before the 2005 change was made, UK courts had been able to interpret the SDO in a way that provided a degree of protection against sexual harassment, so the concept is not new. But this approach is no longer

sufficient to comply with the Gender Directive as regards harassment in the supply of goods and services and premises.

Option 1 (recommended): amend the SDO so that harassment on grounds of sex and sexual harassment are explicitly prohibited in the supply of goods, facilities and services and the disposal or management of premises, as is already the case in employment and vocational training.

Benefits

25. Provides greater legal clarity and greater consistency of protection both within the SDO and with other strands of equality legislation. Reduces risks of confusion as to where the harassment provisions apply.

Costs

26. It is likely (though not absolutely certain) that the courts would already interpret the SDO as outlawing harassment on grounds of sex and sexual harassment in the supply of goods, facilities and services, so making this explicit on the face of the legislation should not impose any substantial additional costs on business.

Option 2: do nothing.

Benefits

27. None identified.

Costs

28. Individuals would not gain the protection from harassment to which they are entitled under European Law and the UK would be in breach of its EU obligations. Both outcomes would be costly to the Government and the taxpayer.

(c) Burden of proof

29. It is often difficult for someone to prove that he or she has been discriminated against because he/she does not have access to the range of facts underlying the alleged act of discrimination. The SDO was amended in 2001 to provide that once an employee has established facts that constitute a *prima facie* case of discrimination, it is then for the employer to prove that the employer's action was not discriminatory. This amendment implemented the Burden of Proof Directive but covered only employment and vocational training.

30. The Gender Directive applies the same burden of proof to discrimination cases in the field of goods, facilities and services.

Option 1 (recommended): extend the SDO's burden of proof provision to the supply of goods, facilities and services.

Benefits

31. Individuals who have been subject to unlawful sex discrimination in the supply of goods and services may be better able to prove their case. The law will be easier to understand because there would be greater consistency within the SDO as well as with other equality legislation. Generally speaking, the county courts already apply the proposed approach in discrimination cases, and the amendment will put this beyond doubt.

Costs

32. As the change will be in tune with existing practice, there are no specific new obligations on either the courts or service providers.

Option 2: do nothing

This is not a viable option because we are obliged to transpose the Gender Directive into GB legislation.

Benefits

33. None identified.

Costs

34. If the application of the burden of proof provision is not extended to goods, facilities and services, the UK would be in breach of its EU obligations.

(d) Exceptions from the principle of equal treatment

35. The SDO contains a number of exceptions from the principle of equal treatment which apply in the supply of goods, facilities and services. The Gender Directive allows differences in treatment on the basis of a justification test:

“...if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”.

36. The Government negotiated this provision to ensure that we could retain certain specific exceptions in the SDO which allow different treatment for men and women. For example, current exceptions allow different treatment for reasons of privacy and decency, or for voluntary bodies that choose to promote the interests of one sex only, or for the organisation of single-sex sports events.

Option 1 (recommended): where necessary, amend the existing specific exceptions in the SDO, to make clear that if challenged, a service provider would need to justify difference of treatment, to ensure compatibility with the Directive

Benefits

37. Retaining the current approach of specifying exceptions, i.e. the conditions and circumstances where different treatment is lawful, will be generally understood by service providers as it has been in place since 1975. We have identified each of the current SDO exceptions that already complies with the Gender Directive's justification test and those which should be amended so that it is explicitly necessary to justify the difference of treatment. The Option 1 approach reduces the potential impact of changes to the SDO and any associated familiarisation costs.

Costs

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

Option 2: repeal all existing specific exceptions and replace with a general 'genuine service requirement' test.

39. A "genuine service requirement" test would be a general test where service providers would have to justify that any service they provide exclusively or primarily to one sex is in order to achieve a legitimate aim, and is a proportionate means of achieving that aim.

Benefits

40. While this approach could offer some flexibility in how services are provided for men and for women, we see little benefit at this stage of a complete overhaul of the existing SDO approach, where narrowly defined exceptions are generally well understood. However, the issue of a "genuine service requirement" test covering all equality "strands" may be considered within the context of the Single Equality Bill (SEB) at a later date.

Costs

41. A genuine service requirement test would introduce uncertainty where legal clarity currently exists. It would impose an unnecessary cost for service providers to familiarise themselves with a new legislative approach, when the current approach is clearly understood and works well. We have not identified

a need for any exceptions in addition to those where difference of treatment is already lawful under the SDO.

(e) Discrimination on grounds of gender reassignment

Option 1: prohibit discrimination on grounds of gender reassignment in the provision of goods, facilities and services, unless justifiable in limited circumstances e.g. in relation to single sex services, sport, and religious doctrine

Benefits

42. Arbitrary discrimination against transsexual people is wrong. Extending protection in this way will provide recurring benefits for transsexual people who will have better access to goods, facilities and services and greater opportunity to challenge discrimination. Given the small number of transsexual people (around 5,000 in the UK) the knock-on economic benefits will be small. But there may be some benefits for business in tackling discrimination – and the fear of discrimination – amongst this group of potential customers.

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

Costs

44. Given the small number of transsexual people (5,000 in the UK) the costs to business will be small.

45. There may be a small resource impact on the county courts once transsexual people can bring claims of discrimination against service providers. This is also likely to be minimal, given the small number of transsexual people.

46. We expect very few businesses will need to change their existing practices or policies in order to comply with the new regulations and so no costs would accrue for the majority. Organisations that stop refusing their services to potential customers on the grounds of gender reassignment may experience an increase rather than decrease in their business.

Option 2: prohibit discrimination on grounds of gender reassignment in the provision of goods, facilities and services - with no exceptions.

Benefits

47. None identified.

Costs

48. When someone is changing gender, decisions will vary according to the particular circumstances as to whether the transsexual person should have access to services in their acquired sex or their birth sex. Without the flexibility that the proposed exceptions for single-sex services would provide, there is greater likelihood that a transsexual person's dignity will be compromised and a service provider is more likely to face a discrimination claim.

(f) Provide explicit protection against discrimination on grounds of pregnancy or maternity

49. The Gender Directive prohibits direct discrimination on grounds of pregnancy or maternity. The SDO explicitly makes it unlawful to discriminate in employment and vocational training on grounds of pregnancy and maternity, but there is no equivalent provision in respect of goods, facilities and services.

Option 1 (recommended): make it explicit that discrimination on grounds of pregnancy and maternity in the provision of goods, facilities and services is unlawful sex discrimination.

Benefits

50. This would make it clear and certain what women's rights and service provider's responsibilities are, and ensure compliance with our EU obligations.

Costs

51. Even under the SDO as it stands, it is likely that if a pregnant woman or new mother experiences less favourable treatment than a man in relation to access to goods or services, this would be construed as unlawful sex discrimination. We know of few, if any circumstances where goods or service providers treat women less favourably because of their pregnancy or maternity. So for the vast majority of organisations this clarification will be cost neutral.

52. Any organisation that currently treats pregnant women or new mothers less favourably is already at risk of challenge. It is possible that women may bring more cases alleging pregnancy/maternity discrimination against service providers due to raised awareness of their rights, with potential resource implications for the courts.

Option 2. Do not amend the SDO

Benefits

53. None identified.

Costs

54. The UK would be in breach of its EU obligations. It would be left to the courts to interpret whether discrimination on grounds of pregnancy and maternity in the provision of goods, facilities and services was unlawful sex discrimination, and it would not be clear to service providers or women whether the law applied in the same way in this respect as in employment and vocational training.

(g) Insurance

55. It is important to note that the issue of insurance is being taken forward by HM Treasury on a UK-wide basis. Costs identified here therefore include Northern Ireland.

56. The Gender Directive requires that if sex is used as an actuarial factor in calculating insurance premiums and benefits, this must not result in different premiums and benefits for men and women. It also requires that costs relating to pregnancy and maternity must not result in differences in individuals' premiums and benefits (see (ii) below).

56. However, the Directive also permits Member States to allow departures from the requirement for premiums and benefits to be "uni-sex", provided that data are compiled, published and regularly updated which support using sex as an actuarial factor.

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

58. To meet the Directive's requirements we propose three changes to the treatment of insurance in the SDO:

- (i) insurers will be required to compile, publish and update data that support sex-based differentials in insurance premiums and benefits;
- (ii) costs relating to pregnancy and maternity must not result in differences in individuals' premiums or benefits;
- (iii) clarification is required of the treatment of transsexual people by insurance companies, particularly people in the process of changing from one gender to another.

59. The options below consider how the Directive's requirement to publish data (item (i) above) might be met.

Option 1: rely on existing published data sources

Benefits

60. This option has the lightest regulatory touch, involving no change. There are no implementation costs.

Costs

61. The public data are incomplete, widely scattered and inaccessible. Insurers rely on their own forecasting estimates and data as well as or instead of published sources. Even if the existing sources were brought together, they would be difficult for the layman to interpret. Consumers would not be clear whether or how the published sources relate to differences in premium and benefit levels. So this option does not fully meet the requirements of the Directive.

Option 2: mandatory record-keeping and full disclosure of underwriting data and assumptions by insurance companies, with new reporting, inspection and compliance functions for the Financial Services Authority.

Benefits

62. This option exceeds the minimum requirements of the Directive in terms of the volume of data to be published and extension of the role of the regulator, the Financial Services Authority (FSA).

Costs

63. We estimate the one-off set-up costs to be £11.5m. This covers establishing integrated reporting systems by 151 insurance companies in the life, annuities, motor, health and travel sectors based on £100,000 for a large company and £50,000 for a small company. The FSA's set up costs are estimated to be £45,000.

64. Annual running costs are estimated to be £3.5m. These are composed of 100 senior manager and 150 administrator hours for a large company and 50 senior manager and 100 administrator hours for a small company, with associated overheads of 30%; (£1.8m); compliance costs (£0.2m); publication costs (£1.5m) and FSA monitoring costs (£5,000).

65. There would also be a negative impact on competition in the insurance sector. The quality of an insurer's actuarial data is one of its main competitive tools and incentives to develop and improve internal data and underwriting techniques would be reduced if some of those data had to be published. This in turn would reduce the quality of insurance provision. Although it is difficult

to put an accurate figure on this , it is likely to be qualitatively and quantitatively significant.

Option 3 (recommended): an obligation on insurance companies to publish data based on guidelines issued by the Government

66. It is proposed to enable insurers to publish high-level summary data either individually or collectively. To balance consistency of reporting with the flexibility to accommodate market developments and widely differing requirements for different sectors, the Government proposes to issue guidance setting out the scope, form, content, timing and manner of data publication. This will meet the minimum requirement on the Government to ensure that accurate data are compiled, published and regularly updated.

Benefits

67. Consumers will benefit by having access to simple summaries, rather than raw data, justifying proportionate differences in premiums and benefits based on sex. This option is a lighter touch regulatory requirement than Option 2. It gives insurers discretion to publish data individually or collectively, and to adapt reports to their own circumstances based on broad reporting guidelines.

Costs

68. We assume that almost all insurers will choose to enter into collective publication arrangements through the Association of British Insurers (ABI) or another agency. The ABI has indicated that it is prepared to enter into such arrangements and is preparing a data collection and publication scheme.

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

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

Familiarisation costs

71. The extent to which goods and services providers spend some time familiarising themselves with the guidance covering these changes to the law will depend on the nature and size of the organisation. When calculating the unit cost for small firms we have assumed that the person undertaking the familiarisation will be a general administrator/manager. For medium and large firms we have assumed that it will be a personnel manager. We have drawn

on the Annual Survey on Hours and Earnings (ASHE) (2005) for data on wage costs and uplifted this by 30% to cover non-wage costs.

72. Assuming that 20% of small firms spend an extra hour reading and understanding guidance on discrimination legislation in this area, and all medium/large firms and public authorities spend 2 hours, then the familiarisation costs come out as:

Table 22: Familiarisation costs of the Gender Directive

	Time Required	Unit cost	Cost per firm	Number of firms & Total Cost
Small firms	1 hour	£27.03	£27.03	20,600 [20% of NI SME employers] = £556,818
Medium & large firms	2 hours	£29.00	£58.00	1050 = £60,900
Public authorities	2 hours	£29.00	£58.00	270 = £15,660
Total				£633, 378

Monitoring and Review

73 The Equality Commission for Northern Ireland (ECNI) currently has a formal responsibility to keep under review the working of the SDO. This can include monitoring and investigations to ascertain the position, challenging the law by supporting individuals' cases up to and including the European Court of Justice, and advising the Government where they think amendments are necessary.

Competition Assessment

74 The Gender Directive contains provisions that could impact on the insurance sector, but the recommended options for implementation avoid potential adverse impact. Concerns have also been raised by representatives of the airline industry as to how the explicit requirement not to discriminate on grounds of pregnancy and maternity would affect those airlines that currently operate a blanket ban on carrying women who are nearing their date of confinement. However, these organisations already risk challenge under the existing law and in any event, we are aware that not all airlines impose such a ban. Several choose instead to consider, on a case by case basis, all passengers whose physical condition raises issues about the desirability of flying.

Enforcement, Sanctions and Monitoring

75 The primary means of enforcing sex discrimination legislation is by the individual. Claims are brought in the county courts. Costs differ, but a successful claimant will generally recover his/her own costs. The Courts Service does not collect data about the number of SDO Part III complaints that are brought before the county courts. All discrimination cases brought before county courts (that is discrimination on grounds of sex, race and disability) are estimated to comprise between 1% and 3% of the total number

of cases brought, and we estimate that only 1 in 7 of discrimination cases is related to sex discrimination. While there may be a slight increase in cases as a result of these changes we do not consider that they will have a significant impact on court running costs. [NI data required for this paragraph?]

Declaration and Publication

I have read the Regulatory Impact Assessment and I am satisfied that the benefits justify the costs.

Signed.....

Date

NI Minister name

NI Minister full title