

# **Screening Assessment**

**Implementing EU Equality Obligations  
in Northern Ireland:**

**The Gender Goods and Services  
Directive**

**Consultation on draft Sex Discrimination  
Order 1976 (Amendment) Regulations  
(Northern Ireland) 2007**

# SCREENING ASSESSMENT

## Implementing the EU Equality Obligations in Northern Ireland: The Gender Directive on Goods and Services

### Consultation on draft Sex Discrimination Order 1976 (Amendment) Regulations (Northern Ireland) 2007

#### Introduction

1. In accordance with section 75 of the Northern Ireland Act 1998 and the requirements of OFMDFM's Equality Scheme, we have considered the extent and nature of the impact of the proposals for implementing the European Directive on equal treatment between men and women in access to and the provision of goods and services (the "Gender Directive") on the nine section 75 categories.
2. In assessing our compliance with section 75, we have used the screening procedure identified in the Equality Commission's Guidance and the Department's Equality Scheme. The proposals are contained in the consultation document *"Implementing EU Equality Obligations in Northern Ireland :The Gender Goods and Services Directive – Consultation on draft Sex Discrimination Order 1976 (Amendment) Regulations (NI) 2007"* which is available at [www.ofmdfmni.gov.uk/sex-discrimination-and-equal-pay](http://www.ofmdfmni.gov.uk/sex-discrimination-and-equal-pay).
3. In Northern Ireland, as in Great Britain, we already have legislation in place to protect people from discrimination on grounds of gender: the Sex Discrimination (Northern Ireland) Order 1976 (the "Sex Discrimination Order") and the Equal Pay Act (Northern Ireland) 1970. Although we need to make some amendments to the Sex Discrimination Order, so that it is consistent with European law, there will be no fundamental change in the way sex discrimination legislation works. Because the Sex Discrimination Order already satisfies many of the requirements of the Directive, the number of changes we have to make is small.

#### Proposals

4. We propose to amend the Sex Discrimination Order, which already makes discrimination on grounds of sex generally unlawful in the provision of access to and the supply of goods, facilities and services <sup>(1)</sup>. The proposals set out below will enable us to meet the new requirements of the Gender Directive.

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<sup>(1)</sup> References in this screening assessment to goods, facilities and services apply also to premises.

5. We propose to amend the Sex Discrimination Order as follows:
- amend the definition of indirect discrimination which currently applies in the field of goods, facilities and services;
  - introduce an explicit prohibition on harassment and sexual harassment in the field of goods, facilities and services;
  - apply the burden of proof provision that is currently used in relation to employment and vocational training matters to the field of goods, facilities and services;
  - where necessary, amend the exceptions which currently exist in the Sex Discrimination Order, to ensure that they are compatible with the Gender Directive;
  - extend protection against discrimination on grounds of gender reassignment, that currently exists in relation to employment and vocational training matters, to goods, facilities and services;
  - clarify that discrimination on grounds of pregnancy is unlawful and provide protection on grounds of maternity in the field of goods, facilities and services; and
  - 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.

## **Context and drivers for the proposals**

6. The Gender Directive is a legal framework that covers all European Member States and establishes the principle of equal treatment for men and women in access to and the supply of goods and services within the European Union. In Northern Ireland, the Sex Discrimination Order 1976 has provided similar, and in some respects wider, protections for over 30 years. Nevertheless we need to amend the Order to take account of European requirements.
7. At the moment, successive amendments to the Sex Discrimination Order have resulted in different levels of protection for individuals depending on whether discrimination occurs in the workplace or outside it. This also makes it more difficult for employers and service providers to understand and comply with the law and to avoid discriminatory practices.
8. While these proposals are limited to the matters covered by the Directive, they aim to remove, where possible, some of these inconsistencies. This will add clarity for everyone about their rights and responsibilities under the Sex Discrimination Order. We will make these changes to the Sex Discrimination Order by 21 December 2007 (the deadline for compliance with the Gender Directive) through amending Regulations.

## Impact of the proposals

9. In carrying out the screening exercise we considered the impact of the policy on equality of opportunity in terms of the nine section 75 categories using the following questions:-
  - is there any evidence of higher or lower participation or uptake by different groups within any of the nine categories?
  - is there any evidence that different groups have different needs, experiences, issues and priorities in relation to the particular policy?
  - is there an opportunity to better promote equality of opportunity for good relations by altering policy or working with others in Government or the community at large?
  - have consultations with relevant representatives, organisations or individuals within groups indicated that particular policies create problems that are specific to them?
10. Screening was undertaken by the officials responsible for the policy process in association with other colleagues with section 75 responsibilities in order that consideration of policy prepared against the preceding criteria would have independent objectivity.
11. It was important for all involved to note that implementation of the Gender Directive by means of Regulations made under section 2(2) of the European Communities Act 1972 creates restrictions on the scope and level of protection afforded and could therefore limit the extent of mitigating measures (in the event of any negative impacts being identified through screening and consideration being given to the need for mitigating measures).
12. As explained above, there is already legislation to protect people from discrimination on the grounds of their gender. The policy being screened is therefore the amending and extending of this legislation to primarily clarify the law and/or harmonise sex discrimination legislation with protection already in place for other equality grounds.
13. Screening 'discussions' evaluated the outcome of the policy development process detailed in the consultation document. The policy conclusion under review was that the Regulations amending the Sex Discrimination Order will lead to increased legal clarity and improved operation of the legislation. All sectors affected in Northern Ireland should therefore benefit from more coherent equality legislation. Legislation that is clearer and easier to understand, and which is broadly consistent with other equality legislation in Northern Ireland, will benefit both employers and employees (from all section 75 groups) by making it easier for them to understand their respective obligations and rights.
14. We have, however, provided further analysis of the likely impact of each of the proposals. For a cost/benefit analysis of the proposals, see the partial Regulatory Impact Assessment at [www.ofmdfmi.gov.uk/sex-discrimination-and-equal-pay](http://www.ofmdfmi.gov.uk/sex-discrimination-and-equal-pay)

**Proposal - to amend the definition of indirect discrimination which currently applies in the field of goods, facilities and services**

15. Under the current definition, as it applies in matters to do with goods, facilities and services, indirect sex discrimination occurs when a condition or requirement is applied equally to both sexes but, in practice, a significant proportion of one sex cannot meet it. Unless there is a reason unrelated to sex that would justify the condition or requirement, then it is unlawful.
16. We propose to revise the definition so that it refers to a “policy, criterion or practice” that is applied to both sexes which puts one sex “at a particular disadvantage”. We will also make clear that indirect discrimination can only be justified if it is a proportionate means of meeting a legitimate aim.
17. The main impact of the revision of the definition will be that if a person is bringing a claim of indirect sex discrimination, they will no longer need to produce statistical data to substantiate their claim. The proposed definition already applies in relation to sex discrimination in employment matters and so the use of a common definition will make it easier for people to understand their rights in relation to indirect sex discrimination both at work and as consumers.
18. The proposed definition is already used in discrimination law covering race, religious belief, sexual orientation and age. For disability, there is a requirement to make reasonable adjustments to policies and practices in order to accommodate a disabled person’s needs.

**Proposal – to introduce an explicit prohibition on harassment and sexual harassment in the field of goods, facilities and services**

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

**Proposal – to apply the burden of proof provision that is currently used in relation to employment and vocational training matters to the field of goods, facilities and services**

21. If someone brings a claim of sex discrimination at work to an industrial tribunal, they must provide evidence that indicates that discrimination has taken place. If the tribunal agrees, the evidence could point to that discrimination being unlawful. It then falls to the employer to explain why this is not the case. The proposal is to make clear that this approach should be followed by county courts when they are considering complaints of sex discrimination in access to, or the supply of, goods and services.
22. The principle that men and women should be treated equally when they buy goods or make use of services is generally well understood and followed. Consequently, sex discrimination cases of this type are rare. Nevertheless, such discrimination when it does occur can be difficult to prove because the claimant is unlikely to have access to sufficient information about the reasons for the defendant's behaviour.
23. The shift in the burden of proof to the supplier of goods and services after the claimant has made a basic case will ensure that a person who considers that they have been discriminated against because of their sex will not face insurmountable hurdles in producing evidence to prove their case. It is possible that this change may be of particular benefit to women or men who have communication problems due, for example, to a disability and who may have difficulty preparing or making a detailed case.

**Proposal - where necessary, amend the exceptions which currently exist in the Sex Discrimination Order, to ensure that they are compatible with the Gender Directive**

24. The Gender Directive, like the Sex Discrimination Order, recognises that there can be circumstances when it is appropriate to restrict services to only women or only men. They both state that such difference of treatment may not be unlawful, but they do so in different ways.
25. The Gender Directive has a "broad" provision that does not specify the type of service that is or is not unlawful but sets the test that the provision of a service to one sex must be justified by "a legitimate aim" and the means of achieving that aim must be "appropriate and necessary".
26. In contrast, the Sex Discrimination Order contains a number of "narrow" provisions that focus either on different types of circumstance, or on the conditions which have to be met, before differences of treatment on the basis of sex can be lawful. For instance, exceptions under the Sex Discrimination Order allow for separate services to be provided for men and women for reasons of decency or to meet the specific objectives of voluntary bodies or registered charities that have been set up to address the needs or interests of one sex only. This means that it is possible for

services to be provided for the specific needs of men and women which take account of their race, religion, disability, sexual orientation or age. Consequently, particular cultural or ethnic backgrounds or religious views can be catered for in the provision of services.

27. We propose to maintain the current focused approach to exceptions because it limits the circumstances when it would be lawful to treat men and women differently. Where the current wording leaves room for discrimination that may not be justified, we propose to make clear that service providers, if challenged, may need to explain the reason why they are providing their services to one sex only and that it is appropriate to do so in the circumstances. By adopting this approach, we will ensure that men or women can challenge unjustifiable sex discrimination.

**Proposal – to extend protection against discrimination on grounds of gender reassignment that currently exists in relation to employment and vocational training matters, to goods, facilities and services**

28. The proposals extend protection from discrimination on grounds of gender reassignment to goods, facilities and services and will benefit those transsexual people who already have protection in relation to employment and vocational training. This will provide important new protections for people who have acquired or are in the process of changing their gender and who may face discrimination because of this.

**Proposal – to clarify that discrimination on grounds of pregnancy is unlawful and provide protection on grounds of maternity in the field of goods, facilities and services**

29. The proposals will be wholly positive for pregnant women and new mothers. As the law currently stands, less favourable treatment for reasons related to pregnancy and maternity can constitute indirect sex discrimination. The Gender Directive specifically states that less favourable treatment of women for reasons of pregnancy and maternity constitutes direct discrimination and so we propose to amend the Sex Discrimination Order to provide explicit protection for pregnant women and new mothers in the field of goods, facilities and services.

**Proposal - to 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**

30. The Sex Discrimination Order allows differences in insurance premiums and benefits for women and men if they are based on actuarial data on which it is reasonable to rely. The Gender Directive requires either that those differences are removed or that the actuarial data on which they are based is compiled, published and regularly updated.

31. HM Treasury has taken the lead in this policy area for the whole of the UK. It is proposed to make it a legal requirement that actuarial data is published so that men and women can see more easily whether there is a reason for any difference in premiums and benefits for men or women. If Government had taken up the option of making any sex-based differences unlawful, it would have meant that premiums for both men and women would become more expensive.

## **Conclusion of Screening Exercise**

### **A - Evidence of higher or lower participation or uptake**

32. There is no indication of any higher or lower impact by different section 75 groups – neither on a ‘single identity’ basis nor on a multiple identity basis. Whilst there are examples of discrimination which are multi-identity (and addressed through the separate appropriate anti-discrimination legislation) there have been no indications identified of any of the existing equality grounds producing more instances of sex discrimination.

### **B - Evidence that different groups have different needs, experiences, issues and priorities**

33. Again, screening concluded that there is no evidence that different section 75 groups have different needs in relation to the policy. Particular attention was paid to the impact on transsexual people and pregnant women and new mothers since protection was being extended or being made more explicit. This is likely, therefore, to have a positive impact.

### **C - Opportunity to better promote equality of opportunity or good relations**

34. When completing this part of the screening process, it was borne in mind that implementation of the Gender Directive by way of Regulations made under section 2(2) of the European Communities Act 1972, limited the policy options available to those absolutely necessary to implement the Directive.
35. A number of other ‘non-legislative’ actions across the Department e.g. work done by the Gender Unit to support the mainstreaming of gender equality into policy development across NI Departments were identified as focusing on promoting equality of opportunity.

### **D - Do particular policies create problems for specific groups?**

36. We have not, at this stage, identified any specific problems. Screening determined no identified negative impacts.

## **Conclusion**

37. In conclusion, the policy proposals set out in the consultation document *“Implementing EU Equality Obligations in Northern Ireland – The Gender Goods and Services Directive - Consultation on draft Sex Discrimination Order 1976 (Amendment) Regulations (NI) 2007”* will have a positive equality impact for men and women generally.

38. While many of the changes are technical, they will mean that men and women will have the same rights not to be discriminated against or harassed because of sex when they are accessing goods or services as they do when they are at work. Clarification that it is unlawful to treat pregnant women or new mothers less favourably will also help some women. Many transsexual people will also benefit from the new protections.
39. As a result of the above conclusions, this policy has been screened out, in accordance with the Department's Equality Scheme provisions.
40. The formal consultation will include a mail shot to various stakeholders who have an interest in gender equality matters. There will also be bilateral discussions with key stakeholders. The draft Regulations will also be available from the Department's website for those who have an interest in the technical drafting.

### **Decisions on whether to adopt the policy**

41. Decisions will be taken in the light of the consultation responses. A final draft of the Regulations will be produced to a timescale that will allow for them to be laid before the Assembly, and affirmed by resolution of the Assembly, in time for them to come into operation no later than 21 December 2007.

### **Monitoring arrangements**

42. The Equality Commission for Northern Ireland, will continue to monitor the workings of the Sex Discrimination Order and it will continue to exercise its function of advising Government about the effectiveness of the legislation and make recommendations for amendment.

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