



Office of the

**First Minister and
Deputy First Minister**

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Promoting Equality of Opportunity

Implementing EU Equality Obligations in Northern Ireland:
Updating the Sex Discrimination Order

A Consultation Paper

This consultation document explains the changes we are proposing to make to sex discrimination legislation in Northern Ireland and seeks views on draft regulations to implement the amended Equal Treatment Directive. It will be of particular interest to those of you who responded to the sex discrimination elements of Government's January 2003 consultation *Promoting Equality of Opportunity – Implementing EU Equality Obligations in Northern Ireland*. We have taken account of the views you provided about some of the specific requirements of the amended Equal Treatment Directive. As stated in that consultation, we are aiming, as far as possible, to achieve consistency across our equality legislation and increase the clarity of our sex discrimination legislation.

This booklet does not assume previous knowledge of the law and should be useful to anyone who will use and benefit from sex discrimination legislation. All this is part of our commitment to ensure that you have accurate and easily accessible information about the effect of proposed changes to sex discrimination law in good time before any changes are introduced.

In Northern Ireland, we already have legislation in place to protect people from discrimination on grounds of sex: the Sex Discrimination (Northern Ireland) Order 1976 (SDO) and the Equal Pay Act (Northern Ireland) 1970 (EPA). Although we need to make some amendments to the SDO so that it is consistent with European law, there will be no fundamental change in the way sex discrimination legislation works. Because the SDO already satisfies many of the requirements of the Directive, the number of changes we have to make is small. Where these changes seek to clarify the law and what already happens in Industrial Tribunals, the amount of new information that employers and individuals will need to know about is modest.

A wide range of stakeholders has helped to shape the draft regulations, through a process of discussion and pre-consultation prior to this public consultation. We now wish to canvass views on the workability and acceptability of the draft regulations to all those who use sex discrimination legislation. We will carefully consider all responses to this consultation document. The intention is that the draft regulations will come into operation on 5 October 2005.

Respond by 22 July 2005

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Foreword

Tackling discrimination and promoting equality of opportunity is central to the drive to build a more equal, inclusive and prosperous community in Northern Ireland. It represents a key element of OFMDFM's objective of 'promoting equality of opportunity, human rights and improved community relations, tackling poverty and social disadvantage, and meeting the needs of victims'. It underpins our overarching aim of a 'cohesive, inclusive and just society'.

As part of this drive, we work to ensure that women and men have equality of opportunity and that diversity is both valued and promoted - in keeping with our commitments to the European Union.

The EU lays down minimum legal standards and in 2002 one of these, the Equal Treatment Directive, was updated. We sought your views about some parts of this Directive in our *Promoting Equality of Opportunity: Implementing EU Equality Obligations in Northern Ireland* consultation in January 2003. Your responses supported our proposals on the issues covered in this initial consultation.

We have built on your responses to draw up a series of changes to the Sex Discrimination (Northern Ireland) Order 1976 and the Equal Pay Act (Northern Ireland) 1970 so that the legislation complies with the requirements of the amended Equal Treatment Directive. The regulations to implement the changes will come into operation on 5th October 2005. This document sets out these changes and seeks your views.

As Northern Ireland's sex discrimination legislation already satisfies most of the requirements of the amended Equal Treatment Directive, the number of changes is small. However, we believe employers and individuals should know about the few changes so that they understand what this legislation means in practice. In particular, we want to make it easier for employers and individuals to understand what the law requires as this will help contribute to promoting a fairer workplace.

More women than ever before are in paid employment and they make a huge contribution through their efforts and talents to Northern Ireland's growing prosperity. But this contribution needs to be supported by clear, helpful legislation and a culture which supports the benefits of equality.

There is a vital link between Government in Northern Ireland's key objectives of economic competitiveness and building equality. Our constant message is that tackling discrimination brings considerable benefits for business. It helps to attract, motivate and retain staff. It helps employers make the best use of skills and experience. It can lead to a more diverse workforce, new ideas and access to wider markets. In short, fairness and productivity go hand in hand. These positive messages are as relevant to Northern Ireland as they are to the rest of the UK and across the European Union.

As well as summarising our proposals for implementing the amended Equal Treatment Directive, this document provides some illustrative examples.

We look forward to hearing your views.

Mary Bunting

Director of Equality
Office of the First Minister and deputy First Minister
April 2005

About this consultation paper ...

What does this paper do?

1. This paper:
 - explains changes we are proposing to make to the Sex Discrimination (Northern Ireland) Order 1976 (SDO) and the Equal Pay Act (Northern Ireland) 1970 (EPA) so that the legislation complies with the requirements of the amended Equal Treatment Directive – 2002/73/EC;
 - explains why we believe certain other requirements of the Directive do not call for legislative action; and
 - outlines the benefits, costs and equality impact of the changes.

Do you need to read it?

2. You need to know about changes to the law on sex discrimination if you are interested in your rights at work, if you employ others or are planning to recruit, or if you provide training, whether in the workplace, in a private company, or in the further and higher education sectors. Equality legislation also applies to professional or trade bodies, and to organisations which set and regulate standards associated with particular jobs or professions, and is now being extended to cover office holders. And, of course, lawyers, lay members of Industrial Tribunals and a wide range of advisers have a close interest.

What is in this consultation package?

3. This consultation package contains:
 - this consultation paper;
 - a partial Regulatory Impact Assessment
 - a copy of the draft regulations; and
 - a response form.

A summary document covering the main points contained in the consultation paper is also available. If the summary document is not in a format that meets your requirements please contact us at the address or numbers given on page 1.

The consultation closes on 22 July 2005.

PART 1

A quick guide

A quick guide

Why change the law?

4. In recent years, the UK and the other states of the European Union have established a common framework to tackle unfair discrimination on six grounds: sex, race, disability, sexual orientation, religious belief or political opinion and age. We are committed to making this framework apply in Northern Ireland.
5. The framework comprises three Directives:
 - The Race Directive (2000) is the most extensive in scope. It prohibits race discrimination in employment and training, the provision of goods and services (including housing), education and social protection.
 - The Employment Directive (2000) covers employment and vocational training only. It prohibits discrimination on grounds of sexual orientation, religion or belief, disability and age.
 - The Equal Treatment Directive (1976) 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 incorporates European Court of Justice (ECJ) case law and strengthens the principle of equal treatment and its practical implementation.
6. In January 2003, in *Promoting Equality of Opportunity: Implementing EU Equality Obligations in Northern Ireland* we consulted on our plans to change existing equality legislation (in relation to sex, race, religious belief or political opinion and disability) and to introduce new legislation on sexual orientation.
7. This consultation explains the changes we are proposing to make to sex discrimination legislation in Northern Ireland and seeks your views on draft regulations to implement the amended Equal Treatment Directive.

When will these changes take place?

8. It is our intention that the regulations will come into operation on 5 October 2005.

What are the benefits, costs and equality impact?

9. We have considered alternatives to further regulation but concluded that, to meet the commitments which we made in Europe, the changes

to the Sex Discrimination Order and Equal Pay Act outlined in this booklet are both necessary and appropriate.

10. All employers and providers of vocational training in the public and private sector, along with trade unions, partnerships, and faith groups, will need to familiarise themselves with the new legislation and associated guidance, and will need to make any necessary adjustments to comply with the amended Equal Treatment Directive.
11. In terms of overall benefits, the Directive will lead to increased legal clarity, including implementation of existing ECJ case law across Member States. Consistency with other equality legislation will benefit employers and employees and ensure that the protection for different areas of discrimination is comparable.
12. There will be a cost to employers and to providers of vocational guidance, training and practical work experience, in terms of familiarising themselves with the legislation and associated guidance. In addition there will be an overall cost to the public sector in producing the guidance. The costs and benefits of the legislation are outlined in part 4 of this document.

What is the equality impact?

13. The policy proposals set out in this consultation will have a positive equality impact for men and women generally. No negative equality impacts have been identified and consultations have not indicated that the policy proposals will create problems for any of the section 75 categories.

PART 2

Explaining changes to sex discrimination legislation in Northern Ireland

Indirect discrimination

What does the Directive say?

14. Indirect discrimination is defined as “where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other 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.”

What does the Sex Discrimination Order say now?

15. The SDO contains two definitions of indirect discrimination; one in relation to employment and vocational training and a different one in relation to the provision of education, goods, facilities, services and premises. In employment and vocational training, it is unlawful discrimination where:
 - a person applies a provision, criterion or practice which he applies or would apply equally to men and women; but
 - which is such that it would be to the detriment of a considerably larger proportion of members of one sex; and
 - is to the detriment of the particular complainant; and
 - he cannot show that provision, criterion or practice to be justifiable irrespective of the sex of the complainant.

What is the position in the other areas of equality legislation?

16. The Race Directive, the Employment Directive (which covers discrimination in relation to religion or belief, disability, age or sexual orientation) and the amended Equal Treatment Directive all have the same definition of indirect discrimination, although in relation to disability, there is an extra obligation on employers to eliminate disadvantages caused by a disability. The Race Relations (Northern Ireland) Order 1997 (RRO), and the Fair Employment and Treatment (Northern Ireland) Order 1998 (FETO), both Orders as amended by the 2003 Regulations, and the 2003 sexual orientation regulations all adopt the same approach towards indirect discrimination. Indirect discrimination is taken to occur where:
 - A applies to B a provision, criterion or practice which A applies equally to other persons; and
 - that provision, criterion or practice puts persons of B’s sexual orientation/religious belief or political opinion/race at a particular disadvantage; and B suffers that disadvantage; and

- A cannot show that it is a proportionate means of achieving a legitimate aim.
17. The position in relation to disability is different in that in the Disability Discrimination Act 1995 (DDA), it is unlawful discrimination if:
- for a reason relating to the disabled person's disability, a person treats the disabled person less favourably than he treats or would treat others to whom that reason does not apply; and
 - he cannot show that the treatment is justified. However, where the less favourable treatment amounts to direct discrimination, it cannot be justified.

An employer also discriminates against a disabled person if he fails to comply with the duty to make reasonable adjustments for the disabled person where under a duty to do so.

18. The DDA also reflects the Employment Directive in that it provides that where a provision, criterion or practice applied by the employer or any physical feature of the premises occupied by the employer places a disabled employee at a substantial disadvantage, the employer has a duty to take all reasonable steps to reduce the disadvantage.

What was said in previous consultation?

19. In 2003, we said that we would adopt a coherent approach to tackling indirect discrimination across equality legislation. We also said that the new provisions on indirect discrimination would bring out the elements of the test more clearly, based on a recognition that it is not always possible or necessary to use detailed statistical calculations to show that particular disadvantage to the group of people concerned.

What changes are we making?

20. We intend to adopt the same wording as in the RRO, FETO and the 2003 sexual orientation regulations.

What does this mean in practice?

21. Indirect sex discrimination happens when a policy or practice applies to all workers or applicants but causes particular disadvantage to one sex as compared to the other. So this would be the case, for example, where the policy or provision in question disadvantaged more women than men. Indirect discrimination is often inadvertent. For example, a:

- change in working hours imposed by the employer;
 - provision that employees should be available to work their normal contractual hours without variation;
 - requirement to work overtime;
 - contractual obligation or a practice of undertaking long hours
 - refusal to allow an employee to work from home;
 - requirement to work without set hours but as and when required.
22. However, if there are good reasons for the policy or practice, it is unlikely to constitute unlawful discrimination.
23. The new provision on indirect discrimination will bring out the elements of the test for indirect discrimination more clearly. Employers will need to objectively justify an indirectly discriminatory provision, criterion or practice, by showing that the provision, criterion or practice meets a legitimate aim and that it is a proportionate means of meeting that aim.
24. 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.
25. Different definitions of indirect discrimination will continue to apply in the SDO – one to employment and vocational training and the other to the provision of education, goods, facilities, services and premises.

Harassment and sexual harassment

What does the Directive say?

26. People must have legal protection from harassment and sexual harassment in employment and vocational training. Harassment is:
- “where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment”.
- Sexual harassment is:
- “where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment”.
- Member States must also make it unlawful for employers and employees to make decisions based on a person’s submission to, or rejection of, harassment or sexual harassment.

What does NI law say now?

27. The Protection from Harassment (Northern Ireland) Order 1997 is the only NI statute that deals explicitly with harassment. This Order makes it a criminal offence for a person to pursue a course of conduct (including speech) that amounts to harassment of another. Harassment is defined as:
- “a course of conduct which amounts to harassment of another, and which he knows or ought to have known amounts to the harassment of another”.
- The Order also provides that ‘a course of conduct’ must involve conduct on at least two occasions and that reference to harassing a person includes alarming the person and causing them distress. The Order does not distinguish between different forms of harassment and contains no reference to sexual harassment as a separate concept.
28. Current NI law contains no express prohibition of harassment or sexual harassment but as a result of case law, certain types of unwanted behaviour pursued because of a person’s sex amount to unlawful sex discrimination for the purposes of the SDO. The SDO is of course civil law.

What is the position in the other areas of equality legislation?

29. The definition of harassment in the amended Equal Treatment Directive is substantially the same as that in the Race and Employment Directives. However, there is only one sort of prohibited harassment for the other types of discrimination, namely when it is on the grounds of a person's race/religion or belief/sexual orientation/disability/age. In the DDA, harassment arises "for a reason which relates to" the disabled person's disability, rather than "on grounds of". Sexual harassment is a distinct concept covering situations where the behaviour is sexual in nature, rather than on the grounds of a person's sex.

What was said in previous consultation?

30. We used the 2003 consultation to seek views on harassment and sexual harassment. The majority of respondents were content that the same definition proposed for other grounds could apply equally effectively for harassment on the ground of sex. In response to the question of what forms of sexual harassment might or might not be covered only a few comments were received, ranging from those who thought the general definition adequate for sexual harassment, those who thought it might not cover unwelcome sexual advances, and others who referred to cultural and faith norms.
31. Responses to the corresponding consultation in GB however covered a range of very detailed and specific situations that might need to be covered. For instance, questions such as 'when does horseplay become harassment?' were raised. At the other end of the spectrum, there were responses that considered legislation should set out only a broad definition such as 'sex-based conduct'. A number of responses also stated that the definition should extend to harassment resulting from a person's sexuality. That, however, is now prohibited by the harassment provisions in the sexual orientation regulations.

What changes are we making?

Harassment (on grounds of sex)

32. We propose to adopt the same definition set out in the regulations implementing the Race and Employment Directives, namely that harassment on the grounds of the complainant's sex is 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.

Gender Reassignment

33. Discrimination on the grounds of sex includes discrimination on the grounds of gender reassignment. The SDO will therefore cover harassment due to the gender reassignment of a person and not just their gender.

Sexual Harassment

34. Conduct of a sexual nature will also be prohibited. Having thought through different situations that could be construed as sexual harassment, our view, backed up by the consultation responses, is that it would be extremely difficult and undesirable to draw up an all-encompassing description of sexual conduct which would amount to sexual harassment under the SDO. In addition, we do not consider that such a description is necessary to meet the requirement in the amended Equal Treatment Directive, namely that such harassment is “conduct of a sexual nature”. Individuals will have differing opinions of what they regard as satisfying this requirement. For example, would it be ‘conduct of a sexual nature’ to be reading a tabloid paper’s web page and accidentally open the link to page 3? Would it make any difference if the alleged victim of the harassment were a particularly ‘sensitive’ person?
35. We have therefore drafted regulations to make sexual harassment unlawful. Whilst not specifying the detail of what constitutes “conduct of a sexual nature”, the draft regulations use this exact phrase. It is our intention that practical guidance will be provided which will include examples so that employers and workers can understand more clearly what the law means in practice.
36. As with harassment on grounds of sex, the conduct in question must 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 the above effect if taking all the circumstances into account, including in particular the perception of the complainant, it is reasonably considered as having that effect.

What changes are we making?

37. We propose to insert definitions of harassment on grounds of sex, harassment on grounds of gender reassignment, and sexual harassment into the SDO. We will also add specific references to harassment to all of the relevant Articles of the SDO (as opposed to adding one discrete, cross-referenced Article) in order to ensure consistency throughout the Order. Regulations will also make it unlawful to subject a person to a detriment on the grounds of that person’s rejection of, or submission to, harassment or sexual harassment.

What does this mean in practice?

38. For many employers, this will mean no change is necessary in their management practices and advice to staff, because they already set out to prevent inappropriate behaviour among the workforce. Certain types of unwanted behaviour because of a person's sex - nearly always a woman - have been confirmed by case law over many years as unlawful sex discrimination. Such complaints can be brought before an Industrial Tribunal. The SDO will for the first time contain a specific prohibition against harassment and sexual harassment.
39. We consider that the best way of ensuring that employers and individuals know their responsibilities and rights in this complex area of sexual harassment is through practical guidance to help interpret the legislation.

Pregnancy and maternity, paternity and adoption leave

What does the Directive say?

40. Less favourable treatment on grounds of pregnancy or maternity leave (in employment and in access to vocational training) amounts to unlawful sex discrimination. In addition, where Member States recognise distinct rights to paternity and/or adoption leave, the Directive requires us to protect working men and women from dismissal as a result of exercising these rights.

What does the law say now?

41. Less favourable treatment on grounds of pregnancy or maternity leave already constitutes unlawful sex discrimination under the employment provisions of the SDO as a result of case law¹. However, there is nothing on the face of the SDO to make it clear that this is the case.
42. Under the Maternity and Parental Leave Regulations (Northern Ireland) 1999 (maternity leave) and the Paternity and Adoption Leave Regulations (Northern Ireland) 2002 (adoption leave), women and adopters must be able to return to their jobs or to equivalent posts on terms and conditions which are no less favourable. It is generally automatically unfair dismissal if the employer does not allow that person to return. However, where an employer has five or fewer employees, it does not currently constitute automatic unfair dismissal if the woman or adopter is not allowed to return at the end of Additional Maternity Leave (AML) or Additional Adoption Leave (AAL) because the employer regards this as not reasonably practicable. This exemption was intended to help very small firms but has not in practice had this effect. A woman in this position could still make an unfair dismissal claim, and more significantly, a sex discrimination claim. Case law has established that an employer who denies a woman a post on her return from maternity leave is likely to be in breach of the provisions of the Sex Discrimination Order.
43. We believe that the current framework leaves scope for confusion about pregnancy, maternity leave and adoption leave rights and that the small employer's exemption could mislead small businesses and their employees about their rights and responsibilities, leaving employers vulnerable to claims under the Sex Discrimination Order.

What was said in previous consultation?

¹ *Webb v EMO Air Cargo (No 2)* [1995] IRLR 6645 and other cases

44. The issue of pregnancy and maternity leave discrimination was raised in the 2003 consultation. A significant number of respondents were in favour of amending the SDO. In the main, the reason given for this view was the need to promote clarity and certainty of women's rights and employers' responsibilities during pregnancy and maternity leave.

What changes are we making?

45. For clarity, we are adding an explicit reference to discrimination on grounds of pregnancy and maternity leave to the SDO.
46. Government concluded that the small firms exemption should be removed from the maternity leave regulations. We believe it will be most straightforward for both employers and employees to remove the small employers' exemption alongside the other changes to the maternity leave arrangements we intend to bring in by April 2007. This will be the responsibility of the Department for Employment and Learning.
47. The Department for Employment and Learning is also looking at how it can work with employers' and employees' organisations to make sure that businesses have access to the information and guidance they need for staff who are pregnant, and for managing maternity and adoption leave (see *Work and Families: Choice and Flexibility* consultation, published March 2005).

What does this mean in practice?

48. No new rights or duties will be created, but it will be clearer that discrimination on grounds of pregnancy or maternity leave is sex discrimination. Therefore it will continue to be unlawful, for example, to demote or dismiss an employee or refuse a woman access to vocational training because she is pregnant or on maternity leave.
49. Removing the small employers' exemptions will make it clear that an employee cannot be dismissed or selected for redundancy simply because she is pregnant or has taken maternity or adoption leave, whatever the size of the organisation.

Vocational training

What does the Directive say?

50. Discrimination, harassment, sexual harassment and victimisation in relation to employment and access to vocational training are prohibited. “Vocational training” includes vocational guidance, advanced vocational training and retraining, and practical work experience.

What does the Sex Discrimination Order say now?

51. The SDO already makes it unlawful to discriminate in the provision of vocational training and paid work experience by private providers. However, the amended Equal Treatment Directive’s definition of vocational training is wider than the definition currently in the SDO, because it covers all practical work experience. In addition, the SDO does not expressly prohibit harassment and sexual harassment in vocational training, although harassment has been established as unlawful under case law (see section on harassment on page 15). The SDO also permits discrimination in physical education courses in further and higher education.

What is the position in the other areas of equality legislation?

52. Domestic and European legislation already prohibit discrimination and harassment in vocational training on grounds of disability², race or ethnic origin, religion or belief and sexual orientation. Such discrimination will also be unlawful on grounds of age by the end of 2006.
53. The approach taken to implementing the vocational training provisions of the religious belief or political opinion and sexual orientation legislation was to prohibit discrimination with regard to all functions of further and higher education institutions.

What changes are we making?

54. We propose to:
- amend the SDO’s definition of vocational training so that it includes practical work experience and vocational guidance;

² Disability regulations dealing with discrimination in the provision of further and higher education to the extent necessary to comply with the Employment Directive’s requirements on awarding qualifications, and provision of vocational guidance and vocational training have yet to be made.

- make it clear in the SDO that it is unlawful for providers of vocational training to subject individuals to harassment or sexual harassment; and
- repeal the SDO provision that permits discrimination with regard to physical education courses in further and higher education.

What does this mean in practice?

55. These changes mean that the vocational training provisions in the SDO will, in most cases, have the same effect as those in other areas of discrimination law. The changes are relatively minor and in most cases vocational training providers will not have to do anything new.
56. Discrimination on the grounds of sex in access to vocational training is already largely unlawful. The only genuinely new prohibition relates to discrimination in the provision of unpaid practical work experience by private organisations.

For example:

A small engineering firm offers unpaid work placements for students of local colleges as part of their work experience programme. The company has so far offered places to male students only because it believes that engineering is not a suitable vocation for women. The firm's exclusion of women would be unlawful under the new regulations.

Genuine occupational qualifications (exceptions to the general principle of equal treatment)

What does the Directive say?

57. Discrimination, harassment and sexual harassment in employment and vocational training are prohibited. The Directive does, however, allow for a difference of treatment on grounds of sex in access to employment and training that leads to employment in cases where, considering the nature of the job or the context in which it is carried out, there is a genuine and determining occupational requirement for the post-holder to be of a particular gender.

What does the Sex Discrimination Order say now?

58. Under the amended Equal Treatment Directive, a genuine occupational requirement (GOR) is permitted, providing the objective of applying the GOR is legitimate and the way in which it is applied is proportionate.
59. The SDO also includes some exceptions to the general prohibition of discrimination in the form of genuine occupational qualifications (GOQ). There are general GOQs which cover jobs of a particular nature or which occur in a particular context where sex is a genuine occupational qualification to carry out the job. Eight grounds are covered including authenticity (e.g. in dramatic performance), privacy and decency.
60. GOQs on these grounds can also be applied to people who intend to undergo, are undergoing or have undergone gender reassignment. There are also some supplementary GOQs relating only to gender reassignment, including a provision which relates to intimate physical searches carried out under statutory powers, e.g. the police.
61. With the exception of the provision in Article 10B(2)(a) relating to such intimate physical searches, GOQs can only be used where it is reasonable to do so (in most cases, after considering all the relevant circumstances, such as whether there are other existing employees who meet the GOQ and could take on the role). The intimate physical searches provision does not have this reasonableness/proportionality test.

What is the position in the other areas of equality legislation?

62. Occupation-related exceptions to the general discrimination prohibition exist in NI legislation on race, sexual orientation and religious belief or political opinion.

63. The RRO allows for exceptions where, because of the nature of the employment, or the context in which it is carried out, being of a particular race, or ethnic or national origin is a genuine and determining requirement and it is proportionate to apply that requirement in the particular case. Like the SDO, the RRO also includes a prescribed list of general GOQs, on grounds of authenticity or where a post is most effectively filled by someone of a particular racial group in providing welfare services to that group.
64. FETO does not apply to clergymen or ministers of a religious denomination, or where the essential nature of the job requires it to be done by a person holding or not holding a particular religious belief.
65. The 2003 sexual orientation regulations allow GORs where, considering the nature of the job or the context in which it is carried out, there is a genuine and determining occupational requirement for the post-holder to be of a particular sexual orientation. GORs are permitted only where their application is a proportionate means of achieving a legitimate aim.

What changes are we making?

66. We propose to add a reasonableness requirement to the supplementary GOQ in Article 10(2)(b) of the SDO which applies to posts which involve performing intimate physical searches pursuant to statutory powers, where the employee or applicant is undergoing or intends to undergo gender reassignment.

What does this mean in practice?

67. The 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).
68. 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 reasonably be 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.

For example:

A medical post is to be filled where the post-holder may (on rare occasions) be required to carry out intimate physical searches required by PACE. This post could, potentially, attract a GOQ that the jobholder should be a woman (or a man) and not undergoing gender reassignment. The employer will be required to consider whether there are other suitably trained medical staff who are not undergoing or have not undergone gender reassignment who could carry out these duties, and who it might be reasonable to ask to do so, *before* they advertise the post with a GOQ.

Provision of death and retirement benefits

What does the Directive say?

69. The “principle of equal treatment” must be applied in relation to “employment and working conditions” and “membership of, or involvement in” a trade union or similar organisation.

What does the Sex Discrimination Order say now?

70. The SDO permits partnerships and trade unions to discriminate on grounds of sex in the provision of death and retirement benefits to their partners and members respectively. (Employers are not permitted to discriminate against their employees in the provision of these benefits). The Articles of the SDO which allow partnerships and trade unions to discriminate in such a way (Articles 14(4) and 15(4)) are in conflict with the requirements of the amended Equal Treatment Directive.

What is the position in the other areas of equality?

71. There are no similar exceptions for partnerships and trade unions in the equality legislation on race, disability, sexual orientation and religious belief or political opinion.

What changes are we making?

72. We are removing these exceptions from the SDO.

What does this mean in practice?

73. Partnerships and trade unions will no longer be able to discriminate on the grounds of sex in their provision of death and retirement benefits. However, we have found no evidence that such discrimination actually takes place today. Therefore, we expect that this is unlikely to require any changes to the current practices of partnerships, trade unions and similar organisations.

Cadet Forces

What does the Directive say?

74. Discrimination, harassment and sexual harassment in employment and in relation to access to all types and all levels of vocational guidance and training, including practical work experience, are prohibited.

What does the Sex Discrimination Order say now?

75. The SDO prohibits sex discrimination in a wide range of situations. However, Article 82(6) of the SDO contains an exemption which allows discrimination in admission to the Cadet Forces administered by the Ministry of Defence (MoD). The exemption covers the Army Cadet Force, Air Training Corps, Sea Cadet Force and Combined Cadet Force and "any other cadet training corps" administered by the MoD.

What is the position in the other areas of equality legislation?

76. Legislation exists which prohibits discrimination and harassment in employment and vocational training on grounds of disability, race or ethnic origin, religious belief or political opinion and sexual orientation. There are no similar provisions that permit discrimination with regard to admission into these cadet forces in any of the other discrimination legislation.

What changes are we making?

77. We are removing this exemption.

What does this mean in practice?

78. This change means that it will become unlawful to discriminate on grounds of sex in admission to these Cadet Forces. However, in practice this will result in no change because the exemption has not been used for many years. In addition, removing this exemption fulfils a previous commitment by Government to repeal section 82(6) of the SDO.

Office holders – their special position

What does the Directive say?

79. Member States must apply the principle of equal treatment to conditions for access to employment, to self-employment, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion.

What does the Sex Discrimination Order say now?

80. With the exception of police constables, the definition of employee in the SDO does not extend to office holders who are not technically in employment, but whose position may be similar to that of employees.
81. Discrimination is prohibited in any appointment by a Minister or government department but not in the on-going relationship between appointer and appointee, such as pay.
82. The only available remedies are by way of judicial review.

What are the implications for the Equal Pay Act NI?

83. The EPA and SDO each offer complementary rights to workers, and are to be interpreted in a similar way.
84. Protection from discrimination in pay does not extend to office holders because currently they are excluded from scope by section 1(9) of the EPA.
85. We will change the EPA so that office holders are protected.

What is the position in the other areas of equality legislation?

86. The 2003 sexual orientation regulations, and the RRO, FETO and DDA amendment regulations all prohibit discrimination against and harassment of office holders, if:
- a) the appointment of the office holder in question is made or recommended by a Minister of the Crown, a Northern Ireland Minister, the Northern Ireland Assembly or a government department (whether the office/post is paid or unpaid); or
 - b) the office holder is appointed to discharge functions personally, is paid and is subject to the direction of another person as to when and where he performs his functions.

87. No other areas of equality have separate legislation dealing with pay. Instead, they have a single legislative source covering all working conditions including pay.
88. The regulations do not cover any political office or post holders (such as elected members of local or national representative bodies or officers of political parties). Both paid and non-paid Government appointments are protected from discrimination from the point of appointment to end of tenure.
89. The draft Disability Discrimination (Northern Ireland) Order contains provisions under which it will become unlawful for locally electable bodies to discriminate against or harass members, i.e. councillors, in relation to the carrying out of official business. The new Order will also require district councils to make reasonable adjustments in relation to disabled members where they are placed at a substantial disadvantage in comparison with non-disabled members in relation to the carrying out of official business. This arises from a domestic policy decision and not from any requirement of the Employment Directive .
90. Genuine occupational requirements apply to office holders in the same way as they do for employees (except for the DDA which does not contain genuine occupational requirements).

What changes are we making?

91. We intend to adopt the same approach as the 2003 sexual orientation amendment regulations, namely to (i) cover all office holders appointed by government; (ii) cover other offices and posts only where the office holder is paid and works under some direction, even if minimal; and (iii) give all office holders access to Industrial Tribunals to enforce their rights.
92. The EPA will be amended to protect office holders³ who receive some remuneration from discrimination in that remuneration. It will not apply to office holders who are elected.

What does this mean in practice?

93. Office holders appointed by a Minister or government department will be protected in not just 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).

³ Like the SDO, the EPA will cover all office holders appointed by government, and other offices and posts where the office holder is paid and works under some direction, even if minimal and to give all office holders access to industrial tribunals to enforce their rights.

94. 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 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.

It will be a matter for the courts and tribunals to decide whether a particular person satisfies the test.

95. The first category of office holders should include any member of the judiciary, including lay magistrates, chairs/members of some non-departmental public bodies (depending on how their post is set up) and chairs/members of tribunals. This would be so whether or not they are paid.

96. 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.

Examples of what this change will mean in practice include:

97. In contrast to the more straight-forward employer/employee relationship, for an office holder there may be one person who appoints her, another who sets her pay and conditions, and yet another who has the power to dismiss her. It is the relevant person or persons with the power to act in each set of circumstances (e.g. making the appointment, setting pay, dismissing) who will be liable under the SDO or EPA.

For example:

A member of a tribunal is appointed by an appointments body, but once in post her pay and conditions are regulated by a tribunals body. Under the SDO, the appointments body will be liable for any discrimination against her relating only to the appointment, and the tribunals body will be liable for any discrimination against her pay and conditions following the appointment only.

98. The requirement to discharge functions personally means that the appointment is for a specific individual to do the job.

For example:

If a firm is appointed to act as accountants for a company, the individual accountant sent by the firm to do the work is not appointed to discharge any functions personally, because the appointment is for any one (or more) of the firm's accountants to do the work.

99. The requirement to be subject to the direction of another person is satisfied if the other person can merely direct the office holder as to when and where he discharges his functions.

For example:

A member appointed to a tribunal is not directed as to the decisions he should make in the tribunal, but he would be directed as to when and where he should attend to sit as tribunal member. Therefore, he would be covered by the SDO.

However, a trustee appointed to collect and administer the estate of a deceased person does not act subject to the direction of any person (though a trustee has a number of legal duties). She would not fall under the SDO.

100. The requirement to be paid means that the office holder must receive more than simply expenses, or compensation for loss of income from another job from which the office takes him/her away.

For example:

A person who only received travel expenses for holding a post, and a small sum to offset the reduction in her earnings from taking off two hours each week to hold the post, would not be considered as a paid office holder under the SDO.

Office holders – ministers of religion

What does the Directive say?

101. Member States must apply the principle of equal treatment to conditions for access to employment and self-employment, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion.

What does the Sex Discrimination Order say now?

102. The SDO offers protection from discrimination on grounds of sex, married status⁴ and gender reassignment. At the moment ministers of religion, other than those who are employees or have a contract personally to execute work or labour, are not covered by the SDO provisions regarding discrimination in the employment field.
103. In relation to those ministers of religion who are covered by the SDO, there is an exception at Article 21 of the Order which allows for discrimination in relation to employment 'for purposes of an organised religion' where the 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.' The same exception applies to the granting of authorisations or qualifications (which could include issues such as ordination). Articles 21(3) and 21(4) of the SDO contains similar provisions relating to discrimination on grounds of gender reassignment.

What is the position in the other areas of equality legislation?

104. The 2003 sexual orientation regulations contain an exception for employment for the purposes of an organised religion similar to Article 21 of the SDO. FETO does not apply to clergymen or ministers of a religious denomination, or where the essential nature of the job requires it to be done by a person holding or not holding a particular religious belief. The RRO and the DDA have no equivalent provisions.

What changes are we making?

105. We are bringing ministers of religion within the scope of the provisions of the SDO insofar as they are office holders (for the definition of office holders see pages 28-31). In addition, we are amending Article 21 of the SDO to clarify it and to ensure that it does not inadvertently provide an exception from the new harassment provisions.

⁴ Upon commencement of the Civil Partnership Act 2004, civil partners will be protected under the SDO in the same way as married persons.

What does this mean in practice?

106. Ministers of religion who are office-holders or employees will be covered by the SDO. This means that sex discrimination against clergy and ministers, including treatment such as sexual harassment, will generally be unlawful. Faith groups will only be permitted to act contrary to the SDO where the circumstances fit within the narrow 'religious conscience' exception provided for at Article 21 of the SDO.
107. 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 status or gender reassignment.

Territorial extent

What does the Directive say?

108. The Directive applies across the EU but does not refer to territorial provisions by individual Member States.

What do the Sex Discrimination Order and Equal Pay Act NI say now?

109. The SDO provides that it is unlawful to discriminate against applicants and employees at an establishment in Northern Ireland (NI). Likewise, the EPA is limited to employment at an establishment in NI. Employees who work for NI organisations wholly outside NI are not covered although those who work only partly in NI became covered in 2000 following implementation of the Equal Opportunities (Employment Legislation) (Territorial Limits) (Northern Ireland) Regulations. There are special provisions for work on ships, aircraft, marine oil rigs etc. "Employment at an establishment in Northern Ireland" is defined for both the SDO and EPA in Article 13 of the SDO.

What is the position in the other areas of equality legislation?

110. The 2003 sexual orientation regulations extended the application of territorial extent further than in the SDO to include employment wholly outside NI if:
- a) the employer has a place of business at an establishment in NI; and
 - b) the work is for the purposes of the business carried on at that establishment; and
 - c) the employee is ordinarily resident in NI –
 - (i) at the time when he applies for or is offered the employment, or
 - (ii) at any time during the course of the employment.
111. As with the SDO, there are also special provisions in relation to working on ships, aircraft, marine oil rigs etc.
112. A similar provision is also to be found in the 2003 RRO and FETO amendment regulations and the 2004 disability amendment regulations.

What changes are we making?

113. Whilst the amended Equal Treatment Directive does not require Member States to amend their own domestic legislation in respect of territoriality, it provides us with the opportunity to extend the scope of

the territoriality provision in the SDO and EPA to be consistent with the other strands of equalities legislation.

114. We intend to adopt the approach taken in the 2003 sexual orientation regulations, namely to extend it to cover people who work wholly outside NI, but in specific limited circumstances only. No change on the face of the EPA will be necessary as long as the amended Article 13 of the SDO continues to include reference to the EPA. This is Government's intention.

What does this mean in practice?

115. The SDO and the EPA will cover employees who work for NI organisations wholly outside NI 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.
116. In relation to claims concerning pay, where a claim attempts a comparison between workers in different countries, the claimant's 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 would prevail.

For example:

A woman working abroad who has been required to comply with a new rostering arrangement, which does not take account of her caring responsibilities, could use the SDO to bring a claim of indirect discrimination as long as her employer a) has a place of business in an establishment in NI, b) the work she carries out is for the purposes of that business, and c) but for the work abroad, she would normally reside in NI.

Making a complaint – the sex discrimination questionnaire

What does the Directive say?

117. The Directive does not contain a specific requirement about any questionnaire process. However, amending the questionnaire procedure flows from Article 6(1) of the Directive which requires Member States to ensure that judicial and/or administrative procedures including appropriate conciliation procedures, are available to people who feel they have experienced discrimination, even after the relationship in which the discrimination is alleged to have occurred has ended.

What does the Sex Discrimination Order say now?

118. The SDO contains provisions for individuals who think they may have been subject to sex discrimination to obtain information from their employer/service provider, by means of a questionnaire. At present, no time limit is prescribed for return of the SDO questionnaire. Guidance states within a “reasonable period”.

What is the position in the other areas of equality legislation?

119. The 2003 sexual orientation regulations, the RRO and FETO amendment regulations of 2003, the DDA amendment regulations of 2004 and EPA all contain an eight-week response period for their questionnaires.

What was said in previous consultation?

120. In 2003, we said that we would adopt a coherent approach to setting an eight-week response period for return of questionnaires across equality legislation.

What changes are we making?

121. We intend to amend the SDO so that it is consistent with other strands of equalities legislation in respect of an eight-week time limit for return of questionnaires in cases of discrimination and harassment in relation to employment and vocational training.

What does this mean in practice?

122. If someone feels they have been discriminated against by another and would like to obtain information from that person about the treatment in question, they can complete the questionnaire and send it to that person for their response. The complainant can then use the

information provided to decide whether or not to bring legal proceedings, and if proceedings are brought, to present the complaint in the most effective way. The standard forms are set out in the Sex Discrimination (Questions and Replies) (Northern Ireland) Order 1976 SR 1976 No. 322.

123. As current guidance does not specify a set time for return of the questionnaire, setting an eight-week time limit will speed up some claims, to the benefit of the claimant.
124. Because the proposed changes apply to employment and vocational training only, SDO provisions for return of the questionnaire within “a reasonable period” will continue to apply in the provision of education, goods, facilities, services and premises.

PART 3

Where the Directive does not require us to take legislative action

Direct Discrimination

What does the Directive say?

125. Member States must provide legal protection for people who feel they have been treated less favourably on grounds of sex than another person is, has been or would be treated in a comparable situation.

What does the Sex Discrimination Order say now?

126. The SDO defines direct discrimination where “on the ground of her sex [a discriminator] treats [a woman] less favourably than he treats or would treat a man”⁵.

What is the position in the other areas of equality legislation?

127. There is no single approach to defining direct discrimination across the strands of discrimination legislation in Northern Ireland.
128. FETO and the DDA take a similar approach to the SDO in that the less favourable treatment must be on the grounds of the religious belief/political opinion or the disability of the complainant. The RRO takes a broader approach in that it defines direct discrimination as less favourable treatment “on racial grounds”. This means that included in the definition of direct discrimination is less favourable treatment not only on the grounds of the race of the victim but also on the grounds of a) the race of someone with whom the victim associates or b) the perception/(incorrect) assumption about the victim’s race. It also covers discrimination against a person by reason of a refusal to follow an instruction to discriminate on grounds of race.
129. The 2003 sexual orientation regulations also adopt the wider formulation which includes prohibition of less favourable treatment on the grounds of the sexual orientation of the victim, perception of the victim’s sexual orientation or the sexual orientation of someone with whom the victim associates.

Why are we making no change?

130. Although the phrase “on grounds of sex” is used in the English text of the amended Equal Treatment Directive, 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, e.g. in the case of transsexual people or transvestites. Some other language versions of the text use the possessive adjective – “en raison de son

⁵ **Note:** The SDO offers protection against unlawful sex discrimination to both women **and** men.

sexe” in the French version for example. We consider that the existing definition sufficiently transposes our obligations under the Directive. Therefore it does not need to be changed.

Victimisation

What does the Directive say?

131. Individuals must have legal protection against dismissal or other adverse treatment by an employer which occurs because someone has made or been involved in a complaint about sex discrimination.

What does the Sex Discrimination Order say now?

132. The SDO specifically makes discrimination by way of victimisation unlawful.

What was said in previous consultation

133. In 2003, we said that we would adopt a coherent approach to tackling victimisation across equality legislation.

Why are we making no change?

134. The requirements of the amended Equal Treatment Directive on victimisation mirror those in the Race and Employment Directives. The SDO victimisation provision is drafted in similar terms to the equivalent provisions in the RRO, FETO and DDA. When implementing the Race and Employment Directives, we considered that the victimisation provisions in the RRO, FETO and DDA complied with the requirements of those Directives. We are content now that the SDO already satisfies the requirements of the amended Equal Treatment Directive.
135. By making no change, we are maintaining consistency with race, fair employment and disability discrimination legislation.

Trade unions and elected bodies

What does the Directive say?

136. The “principle of equal treatment” must be applied in relation to “employment and working conditions” and “membership of, or involvement in” a trade union or similar organisation. However, Member States may maintain or adopt “positive measures” with a view to ensuring full equality in practice between men and women. Such measures must be for the purpose of preventing or compensating for disadvantage suffered by a group of persons of one sex.

What does the Sex Discrimination Order say now?

137. It permits positive action by trade unions, employers’ organisations and similar bodies. For example, the use of reserved seats for one sex on their elected committees is permitted to ensure that a reasonable lower limit of that sex serves on the committee.

What is the position in the other areas of equality legislation?

138. There are positive action provisions in the other areas of equality legislation. However, they tend to be expressed in general terms – e.g. affording persons of a particular group access to facilities or encouraging persons of a particular group to take advantage of certain opportunities – rather than the specific measures set out in the SDO such as reserving some Committee seats for persons of one sex.

Why are we making no change?

139. The government is committed to improving gender balance in the workplace and in public life; we are content that the current positive action provisions in the SDO both contribute towards that goal and are permissible under the amended Equal Treatment Directive.

The Equality Commission for Northern Ireland (ECNI) statutory powers

What does the Directive say?

140. Member States must designate and make the necessary arrangements for a body to promote, analyse, monitor and support the “equal treatment of all persons without discrimination on the grounds of sex”. The amended Equal Treatment Directive refers to a number of specific activities which the designated body(ies) should be able to do in order to achieve these objectives. These are:

- providing independent assistance to victims of discrimination in pursuing their complaints about discrimination;
- conducting independent surveys concerning discrimination; and
- publishing independent reports and making recommendations on any issue relating to such discrimination.

What does the Sex Discrimination Order say now?

141. The ECNI has three statutory duties under the SDO and the Northern Ireland Act 1998 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 the EPA.

142. In order to enable the 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.

Why are we making no change?

143. We are content that the 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.

Other requirements in the Directive where legislation is not needed

What does the Directive say?

144. The amended Equal Treatment Directive introduces a number of duties designed to improve equal opportunities across Europe. The actions required are the responsibility of Government. In summary, these require Member States to actively take into account the objective of equality between men and women in our legislation, administrative measures, policies and activities. The Directive also requires Member States to encourage employers, employees and their representatives, those responsible for vocational training and voluntary bodies to take collaborative steps and to prevent discrimination on grounds of sex, in particular sexual harassment in the workplace, and to promote equality between women and men.

What is the current position in Northern Ireland?

145. We have considered these duties carefully and are content that existing measures⁶, together with the introduction later this year of regulations to implement the amended Equal Treatment Directive, satisfy its requirements.

⁶ These are summarised in the Annex to the Partial Regulatory Impact Assessment which can be found on www.ofmdfmi.gov.uk/equality/etadconsult.htm

PART 4

Benefits, costs and equality impact of this legislation

Benefits

146. The benefits associated with each individual policy option proposed in this consultation are summarised in a table at the end of this section and discussed in greater depth in the regulatory impact assessment which can be found on www.ofmdfmi.gov.uk/equality/etadconsult.htm

Overarching Benefits

147. The implementation of the amended Equal Treatment Directive will lead to increased legal clarity, including implementation of existing ECJ case law across Member States. Consistency with other equality legislation will benefit employers and employees in terms of greater clarity and ensure that the protection for different areas of discrimination is comparable.
148. The Directive also requires a few outdated exemptions to be removed. We do not have evidence of these exemptions being applied in practice, but this will nonetheless safeguard against discrimination in these areas in the future. Removing these exemptions will also make the law in these areas clearer, and reflect the modern world of work.
149. Employers also see a further benefit in having a workplace free from discrimination as their operational requirements will be better matched to those best able to meet them. This reduces costs, increases efficiency and quality, and makes the entity as a whole more effective, and more sustainable.
150. There are also benefits to the economy as a whole and wider society as a more sustainable and effective economy creates the conditions for greater wealth generation and more equitable distribution thereof. A fairer workplace also makes for a fairer society more generally, as workplace attitudes, and relationships, are carried outside work.

Costs

151. The costs associated with each individual policy option are summarised in a table at the end of this section and discussed in greater depth in the regulatory impact assessment which can be found on www.ofmdfmi.gov.uk/equality/etadconsult.htm

Overarching Costs

152. Employers will need to be made aware of the nature of the changes being introduced. The format of the guidance, and the method of communicating it, will naturally help determine the response by employers.
153. The changes to our legislation as a result of the Directive are relatively minor and of a fairly technical nature. A key stage in the implementation of the legislation will be to communicate to employers and others the nature and extent of the changes being introduced, and

employers will need to consider, and possibly seek advice on, any changes required to their organisation. It will also be necessary for employees and other workers to gain awareness of any implications for their employment rights.

154. There will be a small cost to a manager in each business or organisation of reading and understanding this guidance. In GB, it has been assumed that small employers and partnerships with no employees (also potentially affected by the legislation) will spend 10-15 minutes reading the guidance, and that in medium and large employers, and also trade union headquarters, an equivalent manager will spend 20-30 minutes reading the guidance. Costs are likely to vary significantly.
155. The assumptions for Great Britain gave a total cost between £6.6m to £10m. Applying these assumptions to Northern Ireland will give a gross cost of around £0.25m. This is again a one-off cost.
156. In Northern Ireland however it is likely that the high profile afforded equality in the workplace will reduce these projected costs substantially. In addition employers see a reduction in cost through clarification and simplification of their legal responsibilities. This is particularly the case in relation to those issues where the impact of ETAD changes was purely to clarify existing uncertainty i.e. pregnancy and maternity leave / harassment and sexual harassment.
157. Consequently the net effect on Northern Ireland firms will be reduced further, although it is difficult to quantify this. It is likely however that the net impact on Northern Ireland businesses falls at a level that can be regarded as de minimis, say a once only cost of under around £100,000, with some ongoing savings through clarification.
158. A summary table of the individual costs and benefits associated with each of the policy recommendations can be found overleaf.

1. Summary of Recommendations			
Policy issue	Benefits	Costs	Recommendation
Direct discrimination	One definition across SDO	None	No change
Indirect discrimination	Coherence / clarity to discrimination law	Believed negligible as case law already advanced effective definition to that sought	Amend the SDO to reflect the definition in the Directive
Territorial extent	Coherence / clarity to discrimination law	Believed negligible on basis of GB experience	Extend the application of the SDO and EPA
Victimisation	SDO consistent with race and disability discrimination	None – no change to existing rights	No change
Vocational training	Bring consistency with Employment and Race Directives	Minimal – already applies to paid work experience	Amend the SDO where strictly necessary
ECNI's statutory powers	Signal that ECNI already has power to monitor	None	No change
Provision of death and retirement benefits by partnerships and trade unions	Simplify SDO - exemption no longer used	None identified	Remove the relevant SDO exemptions

Policy issue	Benefits	Costs	Recommendation
Pregnancy and maternity leave	Explicit reference will clarify law	None identified	Amend to make the law clearer
Additional maternity and adoption leave – right to return	Position for small employers will be clearer	Negligible: additional claims unlikely	Remove small employers’ exemptions through package of measures on the family rather than by regulations implementing the Directive
Harassment and sexual harassment	Explicit recognition will add clarity	None – no change to existing rights	Amend to make the law clearer
Genuine occupational qualification	Well-established criteria will continue to apply	Limited to public sector	Add proportionality element to GOQ on physical searches
Cadet forces	Adds clarity - exemption not in use	None – exemption not used	Remove the relevant exemption
Sex discrimination Questionnaire	Consistent approach to discrimination. Will speed up some claims	Potential cost of speedier handling of claims	Amend to include 8-week time limit to respond
Office holders	Consistency /clarity	None identified	Amend the SDO and EPA
Office holders – ministers of religion	Extended protection for Ministers of religion who are office holders or employees	Small cost to faith group officials of familiarisation with guidance	Amend the SDO

Equality impact

158. The policy proposals set out in this consultation will have a positive equality impact for men and women generally. No negative equality impacts have been identified and consultations have not indicated that the policy proposals will create problems for any of the section 75 categories. This is an exercise to implement the requirements of the amended Equal Treatment Directive.

As a result of the above conclusions, these policies have been screened out, in accordance with the Department's Equality Scheme provisions. A copy of the screening form is available by using the contact details on page 1.

Annexes

About this Consultation

Scope of consultation

159. This document invites views about changes we are making to the Sex Discrimination Order (Northern Ireland) 1976 so that it complies with the requirements of the amended Equal Treatment Directive – 2002/73/EC. We welcome responses from:

- organisations based in Northern Ireland;
- anyone resident or working in Northern Ireland; or
- anyone else who thinks they may be affected by this.

Questions about the consultation

160. We are happy to answer your questions about issues raised in this document or about the process of consultation itself. Please call the following number 028 90 or email

Access to information and alternative formats

161. A summary document covering the main points contained in the consultation paper is also available. If the summary document is not in a format that meets your requirements please contact us at the address or numbers below.

Consultation deadline

162. This consultation exercise closes **on 22 July 2005**. Please let us have your responses by then.

How to respond

163. A response form is enclosed as part of this pack. Please take time to complete it if you can. It should be returned to the address shown on the form. Alternatively, you might find it easier to complete the form by downloading a copy from the OFMDFM website – www.ofmdfmi.gov.uk/equality/etadconsult.htm – and returning it by email to paul.naylor@ofmdfmi.gov.uk. If you have a visual impairment and wish to respond orally, please telephone Paul Naylor on 028 9052 3183.

164. When responding, please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation

represents and, where applicable, how the views of members were assembled.

How to order further copies of this document

165. In addition to internet access, further copies of this and other documents in this consultation can be obtained from OFMDFM. Please contact :

Paul Naylor
Equality and Rights Division
Office of the First Minister and Deputy First Minister
Castle Buildings
Stormont Estate
BELFAST BT4 3SR
Email: paul.naylor@ofmdfmi.gov.uk
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Textphone: 028 90 522526
Fax: 028 90 523272

Confidentiality of consultations - Freedom of Information Act 2000

166. The Department will publish a summary of responses following completion of the consultation process. Your response, and all other responses to the consultation, may be disclosed on request. The Department can only refuse to disclose information in exceptional circumstances. **Before** you submit your response, please read the paragraphs below on the confidentiality of consultations and they will give you guidance on the legal position about any information given by you in response to this consultation.
167. The Freedom of Information Act gives the public a right of access to any information held by a public authority, namely, the Department in this case. This right of access to information includes information provided in response to a consultation. The Department cannot automatically consider as confidential information supplied to it in response to a consultation. However, it does have the responsibility to decide whether any information provided by you in response to this consultation, including information about your identify, should be made public or treated as confidential.
168. This means that information provided by you in response to the consultation is unlikely to be treated as confidential, except in very particular circumstances. The Lord Chancellor's Code of Practice on the Freedom of Information Act provides that:
- The Department should only accept information from third parties in confidence if it is necessary to obtain that information in connection with the exercise of any of the Department's functions and it would not otherwise be provided.

- The Department should not agree to hold information received from third parties 'in confidence' which is not confidential in nature.
 - Acceptance by the Department of confidentiality provisions must be for good reasons, capable of being justified to the Information Commissioner.
169. For further information about confidentiality of responses please contact the Information Commissioner's Office (or see website at: <http://www.informationcommissioner.gov.uk>).
For further information about this particular consultation please use the contact details above or on page 1.

GLOSSARY OF TERMS

DDA	The Disability Discrimination Act 1995
ECJ	European Court of Justice
Employment Directive	Directive 2000/78/EC - covers employment and vocational training only. It prohibits discrimination on grounds of sexual orientation, religious belief or political opinion, disability and age
ECNI	Equality Commission for Northern Ireland
EPA	The Equal Pay Act (Northern Ireland) 1970
EU	European Union
GOQ	Genuine occupational qualifications
GOR	Genuine occupational requirements
MoD	Ministry of Defence
Race Directive	Directive 2000/43/EC - prohibits race discrimination in employment and training, the provision of goods and services (including housing), education and social protection
RRO	The Race Relations (Northern Ireland) Order 1997
SDO	The Sex Discrimination (Northern Ireland) Order 1976
OR	
The Order	
The Directive	The amended Equal Treatment Directive 2002/73/EC
2003 consultation	<i>Promoting Equality of Opportunity: Implementing EU Obligations in Northern Ireland</i>

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