Promoting Equality Of Opportunity

Implementing EU Equality Obligations in Northern Ireland:

Updating the Sex Discrimination Order

REGULATORY IMPACT ASSESSMENT

REGULATORY IMPACT ASSESSMENT

Purpose and intended effect of measure

The objective

The overall objective is to work towards gender equality in Northern Ireland.

The intended effect is to:

a) bring our sex discrimination legislation more in line with established case law, thus avoiding confusion, and
b) increase the coherence of legislation which deals with equality for individuals in work and vocational training so that, as far as is possible the rights and obligations are easier for individuals and employers to understand.

Background

The 1976 Equal Treatment Directive (76/207) established the European Community (EC) framework of equal treatment for men and women with regard to access to employment, vocational training, promotion and working conditions. The Equal Treatment Directive has now been amended by Directive 2002/73 (ETAD). The ETAD was published on 5 October 2002 and must be implemented by Member States by 5 October 2005.

A small number of existing provisions of the Sex Discrimination (Northern Ireland) Order 1976 (SDO) and other domestic legislation have had to be amended or repealed, and a few new provisions added, to comply with the ETAD.

Rationale for government intervention

In recent years, the UK and other states of the European Union have established a common framework to tackle unfair discrimination on six grounds: sex, race, disability, sexual orientation, religion or belief and age. We are committed to making this framework apply in Northern Ireland.

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 only. An amendment to the Directive – 2002/73 - was published on 5 October 2002 and must be implemented by Member States by 5 October 2005.

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 (EPANI). However, we need to make some amendments to the SDO and EPANI so that they are consistent with European law, though there will be no fundamental change in our approach.

The regulations implementing ETAD will lead to increased legal clarity and improved implementation of existing ECJ case law. All sectors affected in Northern Ireland should therefore benefit from more coherent equality legislation. Regulations that are clearer and easier to understand, and broadly consistent with other equality legislation in Northern Ireland, will benefit both employers and workers by making it easier for them to understand their respective obligations and rights.

The ETAD is being implemented through regulations made under section 2(2) of the European Communities Act 1972. This means that we are empowered to amend the SDO in relation to those areas covered by the Directive only, namely employment and vocational training, which includes vocational guidance and work experience. The SDO will continue to apply unchanged in relation to discrimination in education (other than vocational training), and the provision of goods, facilities, services and premises.

A number of the options for implementation that we considered and rejected had a high risk of legal challenge. , Should the European Commission find that the options selected have not implemented ETAD fully, it could institute infraction proceedings against the UK; and in certain circumstances, EU citizens can make a claim against the Government for damages if they show that they have suffered as a result of a failure to implement the Directive fully. We consider that the options recommended fully implement ETAD.

There is a small risk that amending the SDO to meet the requirements of ETAD could cause some initial confusion in the instances where this results in the SDO provisions in the areas of employment and vocational training differing from equivalent provisions in the areas of education, goods, facilities, services and premises. This is balanced to a great degree by the fact that in making these changes we will be improving consistency across discrimination strands. Such consistency should be beneficial to employers – small and large.

Consultation

In October 2002, Government consulted in 'Promoting Equality of Opportunity: Implementing EU equality Obligations in Northern Ireland' on the main concepts that apply to the different discrimination strands (sex, race, disability, sexual orientation, religion or belief and age). This consultation also sought views on pregnancy discrimination and sexual harassment.

A public consultation which sought views on the draft regulations to implement the ETAD ran from 27 April 2005 to 22 July 2005. Our report on the consultation responses is available on the Department's website at www.ofmdfmni.gov.uk/sex-discrimination-and-equal-pay.htm

Options

For each element of the relevant domestic legislation relating to employment, vocational training, promotion, or working conditions, we have assessed whether we should:

a. leave domestic legislation unchanged because it is compatible with and satisfies the requirements of ETAD;

b. amend domestic legislation where necessary in order to comply with ETAD;

c. supplement domestic legislation to clarify how the law already stands as a result of case law (in such circumstances, domestic legislation already complies with ETAD); or

d. repeal provisions of domestic legislation that do not comply with ETAD.

In each policy area considered below, we have set out a recommended proposal for implementing the ETAD. For each policy area an assessment of options has been provided, together with their associated costs, benefits and risks.

Costs and Benefits

Sectors affected

All employers and providers of vocational training in the public and private sector, along with trade unions, partnerships, and faith groups and those with responsibility for office holders, will need to familiarise themselves with the new legislation and associated guidance, and will need to make any necessary adjustments to comply with the ETAD.

Benefits

The benefits associated with each individual policy option are discussed under the relevant policy headings that follow.

However, in terms of overall benefits, the implementation of ETAD will lead to increased legal clarity by incorporating the principles set out in existing ECJ case law into NI legislation. Employers and workers will benefit from greater coherence across discrimination law . Explicit reference in legislation to areas of sex discrimination where case law already applies will simplify the legislation and lead to greater legal clarity.

The ETAD also requires a few outdated exemptions to be removed from sex discrimination legislation. We do not have evidence of these exemptions being applied in practice, their removal should safeguard against discrimination in these areas in the future and will reflect the modern world of work.

Costs

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. An assessment of these costs follows on from the options analysis under each individual policy area.

In the event of successful infraction proceedings against the UK or individual claims made against the Government for damages, both outcomes could be costly to the Government.

Specific costs and benefits associated with each policy area and associated options are discussed below.

Overarching implementation costs

Reading and Understanding Guidance

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.

The changes to domestic legislation as a result of the ETAD are fairly minor, and are mainly of a technical nature. A law-based explanation of the changes made to sex discrimination legislation will be available electronically in October 2005 on the Office of the First Minister and deputy First Minister's website.

In addition, the Equality Commission for Northern Ireland (ECNI) will produce updated practical guidance on harassment and sexual harassment, and revise its Model Harassment Policy, to ensure that employers and employees understand their rights and responsibilities in this particular area.

There will be a small cost to a manager in each business or organisation of reading and understanding this guidance which explains the law. In Great Britain it is assumed that small employers there, and partnerships with no employees (also potentially affected by the legislation), will spend 10-15 minutes reading guidance, at a total cost of between £6.3 million and £9.5 million.[2] It is also assumed that in medium and large employers, and also trade union headquarters, an equivalent manager will spend 20-30 minutes reading the guidance, at a cost of between £303,000 and £454,000.[3] Costs are likely to vary significantly. **Thus in Great Britain it is expected that the total cost to business of familiarising themselves with the guidance to be between £6.6 million and £10 million.**

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.

Thus 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 minimus, say a once only cost of under or around £100,000, with some ongoing savings through clarification.

Costs to the Government
The associated guidance will be available online and key stakeholders will be notified by letter.

Direct Discrimination: The ETAD defines direct discrimination as ''where one person is treated less favourably on grounds of sex than another is, has been, or would be treated, in a comparable situation.'' The SDO defines direct discrimination as less favourable treatment ''on the ground of her sex.'' Although the phrase " on grounds of sex" is used in the English text of the ETAD, we do not consider that this was chosen deliberately. Some other language versions of the text use the possessive adjective, for example "en raison de son sexe" in the French version.

Option 1: Change the SDO definition to 'on grounds of sex.'

Benefits: This would broaden the definition of direct discrimination to cover less favourable treatment because of association with someone of a particular sex, or false assumption of the victim's sex. For example, unfavourable treatment of a worker because their brother had undergone gender reassignment. This approach would also bring about consistency with the definition in the Race Relations Order and the 2003 regulations on sexual orientation and religion or belief.

Costs: Broadening the definition would enable people who currently cannot bring a claim of sex discrimination to do so, which could lead to an increase in tribunal costs. However we believe the increase in the number of direct discrimination cases would be minimal. In Great Britain, the department of Trade and Industry is aware of only two cases brought because of direct discrimination based on 'perception' or 'association' – one under the sexual orientation and one under the religion or belief legislation.

Risk: This change would only apply to employment and vocational training. Therefore, there would be two definitions of direct discrimination across the SDO; the new one would apply to employment and vocational training, and the existing one to education, goods, facilities, services and premises. This could cause confusion for those considering application of the law.

Option 2: Retain the existing SDO definition.

Benefits: This would ensure that the single familiar definition of direct discrimination continues to apply throughout the SDO.

Costs: None. The current legislation would be unchanged.

Risk: A very small risk that the European courts could find that ''on the grounds of sex'' in the ETAD extends to discrimination by association or false assumption.

Recommendation: option 2 (retain existing SDO definition)

The lack of evidence on discrimination experienced because of the victim's association with someone of a particular sex, or false assumption of the victim's sex, suggests that making this amendment to the SDO would be disproportionate to the extent of any problem. Thus the benefits would be

insufficient to justify a change which would additionally generate confusion resulting from two definitions of direct discrimination across the SDO.

Indirect Discrimination: The SDO currently provides two definitions of indirect discrimination, one for employment and vocational training, and another for education, goods, facilities, services and premises. This has been the case since the SDO was amended to implement the Burden of Proof Directive in 2001. The ETAD definition relates to employment and vocational training only. The definition in the SDO is currently narrower than that in the ETAD.

Option: Amend the SDO definition.

Benefits: This would lead to consistency with other equality legislation which would in turn benefit employers and workers and ensure that the protection for different areas of discrimination is comparable[1].

Costs: When the SDO definition of indirect discrimination was broadened with the implementation of the Burden of Proof Directive in 2001, legal opinion suggested that the change would make very little difference in practice to the way in which sex discrimination cases are decided in Northern Ireland, and it was considered that case law had generally been in line with the Burden of Proof Directive (97/80) before its implementation. This case law has long ensured that once a worker establishes that there was a discriminatory reason for the act about which the worker has a complaint, the onus shifts to the employer to provide evidence that there was a non-discriminatory reason for the act about which the worker has a complaint. It is unlikely that there have therefore not been significant practical changes in the way cases have been decided since the regulations implementing the burden of proof directive came into force. Whilst we are proposing to broaden the definition again, the extent of the broadening is significantly less than in 2001.

Risks: Amending the definition again following the amendment to implement the Burden of Proof Directive would draw attention again (as it did when we implemented the Burden of Proof Directive) to the different definitions of indirect discrimination that apply across the SDO.

Recommendation: (amend SDO definition)

Adopting this approach is the only viable option because the current definition does not transpose the ETAD definition into NI legislation. Not to do this would lead to the European Commission bringing infraction proceedings against the UK

Territorial Extent: The SDO covers discrimination against applicants and employees but is limited to recruitment for, or employment at 'an establishment in Northern Ireland.' However, where a worker is posted to another EU Member State they also have the protection against discrimination and other employment rights under the Posted Workers Directive. Protection under section 10 of the SDO applies unless the employee does his work

---

[1] 87% of respondents to the initial consultation on the proposed NI single Equality Bill (carried out in 2001) agreed that there should be a standardised definition of indirect discrimination covering all grounds.

wholly outside Northern Ireland, and outlines special provisions for those working on ships, aircraft, marine oil rigs etc.

The meaning of the phrase ‘employment at an establishment in Northern Ireland’ in section 10 of the SDO also applies for the purposes of section 1 of the Equal Pay Act (Northern Ireland) 1970 (EPANI). Therefore, providing section 10 of the SDO is amended, it will not be necessary to amend the face of the EPANI, but protection will include pay discrimination.

The ETAD is silent on the issue of territorial extent – as is the case in Article 13 of the Race and Employment directives. The 2003/4 regulations implementing strands of the Article 13 Directives therefore extended the application of these regulations further than in the SDO to include employment wholly outside Northern Ireland in the following specific circumstances:

- the employer has a place of business at an establishment in Northern Ireland; and
- the work is for the purposes of the business carried on at that establishment; and
- the employee is ordinarily resident in NI
  a) at the time when he applies for or is offered the employment, or
  b) at any time during the course of the employment.

Option 1: Amend the SDO and EPANI adopting the approach above.

Benefits: This would demonstrate the Government’s commitment to a coherent approach to tackling discrimination. This would also bring about greater legal clarity.

Costs: Anecdotal evidence suggests that no additional race discrimination cases have been identified as a direct result of the revised territorial limits criteria. In relation to equal pay, we are only aware of one successful private sector claim in the last four years. This suggests that the costs to business would be very small.

Risk: This would highlight that the territoriality provisions in discrimination and employment legislation differ which, in theory, could give rise to confusion. In NI and GB this would not be great, as, particularly in GB, claims where the geographical scope is an issue average less than one per year.

Option 2: Retain the existing SDO definition.

Benefits: No disruption to employers.

Costs: None identified.

Risks: A high risk of legal challenge.

Recommendation: Option 1 (extend application of SDO and EPANI)

Extending the cover of this aspect of the SDO, using an approach consistent with the provision found in the race, sexual orientation and religion and belief regulations in 2003 and 2004 disability regulations, would have the benefit of bringing greater legal clarity. The costs to business would be likely to be minimal.

Victimisation: ETAD contains two requirements with regard to victimisation. Firstly, there must be legal protection against dismissal or other adverse treatment by an employer which occurs as a result of a person's involvement in the making of a complaint about sex discrimination. The SDO already contains provisions protecting people in these circumstances. Secondly, an instruction to discriminate against someone on grounds of sex is deemed to be discrimination as defined in the Directive. The SDO already includes provisions which outlaw discrimination against both the intended victim and the person instructed to discriminate,.

The victimisation provisions of the SDO are not intended to protect someone who made an allegation which was false and not made in good faith. Consideration was given to whether this exception should be extended so that it also applies to false 'allegations, evidence or information' as is the case in the 2003 regulations on sexual orientation and religion or belief.

Option 1: Amend the SDO to provide a remedy for someone instructed to discriminate, who then resigns without first raising the issue.

Benefits: In theory this would extend the coverage of the SDO. However, in practice, we are not aware of any sex discrimination cases that would have benefited under this option.

Costs: We are not aware of any such cases having been brought under the SDO. While under current law such an individual would not be protected by the SDO, they may be able to claim constructive unfair dismissal, although we believe the costs under this option would be negligible. In addition, to offer individuals who have already left the workplace the means of resolving such sex discrimination cases would be contrary to the emphasis on resolving disputes in the workplace contained in the Department for Employment and Learning's Employment (Northern Ireland) Order 2003.

Risks: An increase in the number of sex discrimination cases made following resignation. The usual employer costs of handling such an allegation would be involved[2]

Option 2: Amend the SDO to explicitly refer to 'allegations, evidence, or information' that were false and not made, or given, in good faith.

Benefits: While the existing SDO provision could already be interpreted as covering the principles of 'evidence and information,' amending this provision would make the intent explicit and bring it into line with the sexual orientation and religion or belief regulations of 2003.

Costs: On the basis that these principles are already covered in the SDO, there would be no costs involved.

Risks: As the new definition would only apply to victimisation claims brought in respect of employment and vocational training, this could cause confusion because there would be two different victimisation provisions in existence across the SDO, when in practice the provisions are applied in the same way. Also, a race discrimination case in GB has already raised the question of how broadly false 'allegations' could be interpreted; the Home Office did not

---

[2] In Great Britain the average cost associated with a discrimination-related industrial tribunal to an employer is approximately £4750, estimated from the Survey of Employment Tribunals (SETA) 2003. The average cost of a case to the Employment Tribunal Service is approximately £900. No corresponding NI costs are available.

consider that this posed sufficient risk to warrant amending the Race Relations Act.

Option 3: Retain the existing SDO definition.

Benefits: The SDO provision would remain in line with other long-standing discrimination legislation - the Race Relations Order and Disability Discrimination Act.

Costs: None – there would be no change to the existing rights and responsibilities of employees and employers respectively.

Risks: A risk that we could be challenged for not implementing the ETAD effectively. As in the case when amending legislation on race and disability discrimination in 2003 and 2004, we consider this risk to be low.

Recommendation: Option 3 (retain existing SDO definition)

We recommend retaining the existing SDO provision, which would remain in line with the equivalent provision in race and disability discrimination. The risk of challenge is considered very low given that the analysis of options 1 and 2 indicate that in practice the SDO already complies with ETAD. Amending the SDO could be considered as going beyond the minimum necessary to comply with the Directive.

Vocational Training: in broad terms ETAD requires the UK to amend the SDO so as to explicitly prohibit discrimination, harassment and sexual harassment in vocational training, vocational guidance, and practical work experience. ETAD's definition of vocational training is wider than the SDO's current definition, requiring various sections of the SDO to be amended to include vocational guidance and both paid and unpaid practical work experience. However, the ETAD does not extend to general education so none of the amendments to the SDO will apply to schools, and 'practical work experience' in the amendment will not include short spells of what is often called "work experience" undertaken by school pupils.

The current SDO exemption for further or higher education institutions with regard to courses in physical education, allows for discrimination both in terms of single-sex access to such courses and discrimination against those attending such courses. This exemption will be repealed as a result of the ETAD.

Business sectors affected: Primarily public sector bodies, notably further education and higher education institutions. Businesses that discriminate when providing unpaid practical work experience will be prohibited from doing so once the SDO is amended; currently this would only be unlawful for those providing paid practical work experience.

Option 1: Amend the SDO only where necessary to take account of the vocational training provisions.

Benefits: This option should limit the necessary adjustment by organisations concerned, and avoid claims that the UK has gone beyond its powers under the European Communities Act. It would also make the coverage of vocational training provisions broadly consistent with those under the Employment and Race Directives.

Costs: It is already unlawful for such providers to discriminate in respect of paid work experience, thus we anticipate that applying the same law to unpaid work experience should only affect a very small number of providers.

An exclusion from the various education provisions of the SDO allows discrimination in access to physical education and will need to be removed. Government policy is that physical education should be fully inclusive. There is no evidence to suggest that institutions rely on this exemption, therefore there should be no costs associated with its removal.

Risks: There could be some confusion over which bodies are prohibited from discriminating and whether a body is prohibited from harassment in respect of functions relating to vocational training, but not in respect of other functions.

Option 2: Amend the SDO where necessary to take account of the vocational training provisions, but extend the prohibition of harassment and sexual harassment to all functions of the bodies covered by the relevant SDO provisions.

Benefits: It would be clear to all bodies concerned with the provision of vocational training, vocational guidance and practical work experience that it would be unlawful to discriminate in everything they do.

Costs: There would be a theoretical additional cost where, for example, a body has some functions that relate to vocational training and some that do not. In practice most, if not all, of those functions are already covered by prohibitions elsewhere in the SDO.

Risks: A legal challenge could be brought on the grounds that section 2(2) of the European Communities Act does not give the NI the legal power to legislate using secondary legislation (regulations) beyond functions relating to vocational training.

Option 3: Retain the existing SDO definition.

Benefits: Providers of vocational training, guidance, and practical work experience would not need to make any adjustments.

Costs: There would be no one-off implementation or policy costs for providers. In the event of successful legal challenge, the provider concerned could incur case costs, and Government could be liable for damages. Providers would need to adjust in response to such developments in case law, as would providers of guidance on the SDO.

Risks: There would be no explicit provision to cover harassment by vocational training providers. There would be a very high risk that infraction proceedings would be brought against the UK for failing to implement the Directive fully.

Recommendation: Option 1 (amend SDO only where strictly necessary to take account of vocational training provisions)

We recommend amending the SDO only where necessary in order to comply with ETAD. This option should limit the necessary adjustment by organisations concerned, and avoid claims that the UK has gone beyond its powers under the European Communities Act, while minimising the risk of legal challenge. It would also provide the necessary protection in vocational training provisions broadly consistent with those under the Employment and Race Directives.

Equality Commission for Northern Ireland (ECNI) - Statutory Powers: The ETAD requires promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on the ground of sex.

The ECNI has powers under the SDO which enable them to work towards the elimination of discrimination; promote equality of opportunity between men and women; and to keep under review the working of the SDO and the EPANI. Although ECNI does not have express statutory powers in relation to gender 'monitoring', its general powers enable it to carry out monitoring activities.

Business sectors affected: The ECNI is the primary organisation affected, however, employers and individuals would also be affected indirectly if the ECNI were unable to carry out the activities regarded as necessary by the ETAD.

Option 1: Amend the SDO to ensure that ECNI has statutory authority to 'monitor' trends in discrimination on grounds of sex.

Benefits: This would guarantee that ECNI has sufficient powers to undertake monitoring activity.

Costs: We consider that the SDO already empowers the ECNI to carry out monitoring activities. Therefore no costs would be incurred.

Risks: Such an amendment could unnecessarily call into question the current scope of ECNI's powers.

Option 2: No change to ECNI's powers.

Benefits: Would confirm that ECNI has sufficient powers to undertake activities set out in ETAD and maintains certainty by making no change to the SDO.

Costs: No costs identified.

Risks: If the ECNI's general powers were found to be not sufficient to enable it to conduct 'monitoring' then it would not be able to carry out this activity as required by the ETAD. However, we believe ECNI must already be conducting such activity given its objective of making progress on eliminating discrimination and promoting equality between men and women.

Recommendation: Option 2 (no change to SDO)

Retain the existing SDO provisions.

SDO exemption for partnerships and trade unions in relation to the provision of death and retirement benefits: The ETAD requires application of 'equal treatment' in relation to 'employment and working conditions' and 'membership of, or involvement in' a trade union. The SDO, however, 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. The sections of the SDO which allow partnerships and trade unions to discriminate in such a way (Articles 14(4) and 15(4)) are therefore in conflict with the requirements of ETAD.

Business sectors affected: Firms organised as partnerships, and trade unions would be the primary sectors affected. Examples of such partnerships include legal, doctors', dentists', and architects' practices, many of which are small

firms. In addition organisations whose members carry on a profession or trade would be affected. However, it is important to note that the extent to which all of these organisations might be affected is likely to be small as we have found no evidence that such discrimination takes place.

Option 1: Remove both the exemption for a partner in a firm (Article 14(4) of the SDO) and the exemption for a trade union or similar organisation (Article 15(4) of the SDO).

Benefits: This would guarantee compliance with ETAD and would remove an exemption which it appears is no longer in use.

Costs: We have not identified any death or retirement benefits which fall outside of occupational pension legislation (which prohibits discrimination), nor do we have evidence of partnerships or trade unions discriminating on grounds of sex in their provision of death and retirement benefits to partners or members. In view of this, we expect the impact on partnerships would be negligible and so do not expect businesses or trade unions would incur any significant costs under this option.

We did consider pension provision and similar benefits provided for trade union members through their trade unions, but which were provided by an insurer on a sex discriminatory basis as a result of the use of actuarial data. In these circumstances, trade unions or similar organisations would not be committing an unlawful act under sex discrimination legislation. The use of actuarial factors is expressly permitted by sections 62-65 of the Pensions Act 1995 which amend the Equal Pay Act (Northern Ireland)1970 (EPANI) to apply an equal treatment rule. Therefore, to issue such benefits to members would not be unlawful under the relevant legislation and so could continue whether or not the Article 14(4) and Article 15(4) exemptions were removed from the SDO.

Risks: There would be a small risk that new evidence could come to light of a positive sex discriminatory practice in this area that the Government would wish to protect and which would be threatened by the removal of the exemptions. However, this would be difficult to justify in light of the clarity with which the ETAD rules out such practices.

Option 2: Retain both the exemption for a partner in a firm (Article 14(4) of the SDO) and the exemption for a trade union or similar organisation (Article 15(4) of the SDO).

Benefits: This would ensure that no adjustment would be required on the part of stakeholders and certainty would be retained by making no change to the law.

Costs: If the European Commission found that the UK had not fully implemented the ETAD in NI, the Government could be liable for damages.

Risks: There is a clear risk that the UK would be challenged by the Commission for failing to implement the Directive fully in NI.

Recommendation: Option 1 (remove SDO exemptions – Article 14(4) and Article 15(4))

This would guarantee compliance with ETAD and is unlikely to have cost implications for trade unions or partnerships, as we have no evidence that the exemption is still used.

<u>Pregnancy and maternity leave discrimination</u>: The ETAD states that less favourable treatment related to pregnancy or maternity leave constitutes unlawful sex discrimination. Courts currently interpret the SDO's test of direct discrimination to include less favourable treatment on grounds of pregnancy or maternity leave. However, there is nothing on the face of the SDO making it clear that this is the case. Therefore, to ensure clarity of the law which implements this requirement of the ETAD, consideration has been given to including an explicit reference to such discrimination in the SDO.

Business sectors affected: All employers and providers of vocational training will be affected. However, their responsibilities will not change. The amended legislation would simply make the duties more explicit. New and expectant mothers in work would be affected in that their rights in relation to discrimination on grounds of pregnancy or maternity would be clearer. There are currently 7.7 million women of child-bearing age working in the UK, 33% of the total number of employees[3]. We do not have specific information for Northern Ireland. The Industrial Tribunal and the courts could also be affected if there is any short-term increase in the number of sex discrimination claims made as awareness of the law is raised.

<u>Option 1</u>: Add an explicit reference in the SDO to clarify what the law is- this would not add extra rights.

Benefits: This will improve clarity and transparency in relation to this area of the law.

Costs: Aside from the cost to business of reading the overall ETAD guidance, no other costs have been identified.

Risks: None identified.

<u>Option 2</u>: Do not amend the SDO.

Benefits: Employers and vocational training providers would not need to spend time considering what amounts to a clearer statement of existing law.

Costs: There would be a social cost in terms of failing to state clearly on the face of the relevant legislation the legal obligations of employers to employees who are pregnant or on maternity leave, thereby failing to address the complexity of the current law relating to pregnancy discrimination. There would be no cost to employers or providers of vocational training. However, in the event of successful legal challenge, the employer concerned could incur case costs, and Government could be liable for damages.

Risks: This option carries a high risk that the UK would be challenged by the Commission for failing to implement the Directive because the protection for women on grounds of pregnancy or maternity leave had not been made explicit..

Recommendation: Option 1 (clarify SDO)

Adding an explicit reference in the SDO would clarify what the law is and avoid the high risk of infraction proceedings against the UK associated with option 2.

---

[3] Labour Force Survey, Spring 2004

Maternity and adoption leave – the right to return to the same, or an equivalent job: The ETAD requires that a mother or adopter returning to work after maternity or adoption leave to be able to return to their job or to an equivalent post on terms and conditions which are no less favourable to them than those they enjoyed before their leave.

Women on maternity leave currently have the right to return to the same or an equivalent job under the Maternity and Parental Leave Regulations (Northern Ireland) 1999. However, where an employer has five or fewer employees, it does not currently constitute automatic unfair dismissal if the mother 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. 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 SDO. We believe this exemption is incompatible with the provisions of the ETAD which does not differentiate between small and large employers.

A similar exemption for employers of five or fewer employees applies to adoption leave under the Paternity and Adoption Leave Regulations (Northern Ireland) 2002,

This policy area is the responsibility of the Department for Employment and Learning ("DEL"). Proposals for changes to legislation have been brought forward by DEL in the Work and Families consultation held between March and May 2005. The Regulatory Impact Assessment associated with these proposals, itself the subject of public consultation until 14th October 2005, includes an impact assessment of this particular policy exemption. DEL concludes that, due to the low incidence of cases where small employers in Northern Ireland do not permit return after statutory maternity or adoption leave, the costs and benefits of the proposal are likely to be negligible.

The removal of the exemption has been delayed until April 2007 to coincide with a package of other changes to maternity and adoption rights which will be introduced at that time. The delay is consistent with DEL's commitment not to make changes to working parents' laws before 2006, and is designed to minimise burdens on small business. The later introduction of this measure is not likely to give rise to difficulties since current case law has established that women returning from maternity leave are already protected. DEL's Regulatory Impact Assessment can be downloaded from www.delni.gov.uk/workandfamilies.

Harassment and sexual harassment

The ETAD deems harassment on the ground of sex and sexual harassment to be sex discrimination. It also introduces a concept that 'a person's rejection of, or submission to, harassment or sexual harassment may not be used as a basis for a decision affecting that person.'

Harassment: The ETAD defines harassment as:

'where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person and creating an intimidating, hostile, degrading, humiliating or offensive environment.'

Sexual Harassment: The ETAD defines sexual harassment as:

'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 and creating an intimidating, hostile, degrading, humiliating or offensive environment.'

As regards the position in the SDO, discrimination on the ground of sex includes discrimination on the grounds of gender reassignment.

Courts already interpret sexual harassment as sex discrimination under the SDO. However, there is no express provision in the SDO.

Option 1: Amend the SDO.

Amending the SDO to cover harassment specifically would prohibit harassment on grounds of sex, harassment on grounds of gender reassignment, and sexual harassment. It would also set out provisions on less favourable treatment based on decisions affecting a person based on that person's rejection of, or submission to, harassment or sexual harassment. In addition, specific references to harassment would be inserted into all of the relevant sections of the SDO in order to ensure consistency throughout the Order.

Benefits: Explicit prohibition of both sexual harassment and harassment on the ground of sex and sexual harassment – both of which could currently be considered as forms of hidden discrimination – would add legal clarity in a potentially confusing policy area for employers and workers. With clearer guidance on employer responsibilities, this could also reduce discrimination on these grounds in the future.

The amendment would also carry through Government's commitment to promote consistency, where and as far as possible, with other strands of equality legislation.

Costs: The SDO is currently interpreted as outlawing harassment and sexual harassment so the ETAD would not impose any additional costs on business in this respect.

The new provision on decisions based on a person's submission to or rejection of harassment and sexual harassment, could lead to an increase in the number of tribunal cases, as individuals seek to test it. However, a woman in this situation could bring a claim under the SDO as it stands; it would just be easier to satisfy the Industrial Tribunal that harassment has taken place given the new specific prohibition. It is therefore our assessment that should there be an increase in cases, it would not be significant[4].

The Equality Commission for Northern Ireland (ECNI) will produce updated practical guidance on this particular policy area, and revise its Model Harassment Policy, to ensure that employers and employees understand their rights and responsibilities.

There would be a small cost to employers and providers of vocational guidance, training, and practical work experience in terms of familiarising themselves with the new guidance, these costs are assessed under the later section "Overarching implementation costs".

---

[4] In Great Britain the average cost associated with a discrimination-related industrial tribunal to an employer is approximately £4750, estimated from the Survey of Employment Tribunals (SETA) 2003. No corresponding NI figures are available.

Risks: None identified.

Option 2: Do not amend the SDO.

Benefits: No adjustment required by employers

Costs: Responses to the NI consultation in 2003[5] and the GB consultation in 2002[6] confirmed the view that employers and workers are not clear on conduct that can be construed as sexual harassment and harassment on the ground of sex. Lack of clarity could lead to an increase in the number of successful claims being brought against employers. In the event of successful legal challenge, Government could be liable for damages.

Risks: Failure to introduce an amendment to the SDO so that it explicitly outlaws harassment and sexual harassment would pose a high risk that the Commission would consider this to be non-compliance with the ETAD and take successful infraction proceedings.

Recommendation: Option 1 (amend SDO)

This would add legal clarity in a potentially confusing policy area for employers and workers. With clearer guidance from ECNI on employer responsibilities, this should also reduce discrimination on these grounds in the future. This would also avoid the risk of infraction proceedings associated with option 2.

Genuine occupational qualifications: The ETAD permits genuine occupational requirements (GOR)(allowing employers to discriminate on grounds of sex where being of a particular sex is a genuine occupational requirement for the job), provided that the objective of applying the GOR is legitimate and the way in which it is applied is proportionate.

---

[5] *Promoting equality of opportunity; Implementing EU Equality Obligations in Northern Ireland,* January to April 2003

[6] *Equality and Diversity – the Way Ahead* issued in GB in 2002

In the SDO includes some exceptions in the form of such 'genuine occupational qualifications' (GOQs). The SDO provides that there is not unlawful discrimination if there is a GOQ for a particular post and it lays down criteria for whether a particular job satisfies this exception. A typical example might be to stipulate that applicants for a post providing support and counselling in a women's refuge must be female.

The SDO makes the same GOQs available with regard 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 in relation to jobs which involve carrying out intimate physical searches pursuant to statutory powers where the statute requires the searcher to be of the same sex as the person searched. With the exception of the intimate physical searches provision, the GOQs in the SDO 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 employees who meet the GOQ and can take on the role). They therefore contain the element of proportionality required by ETAD. The intimate physical searches provision does not have this proportionality test and employers are not required to consider whether it is reasonable to apply the intimate searches GOQ.

Business sectors affected: Any employers relying on GOQ provisions and the public sector. The intimate physical searches GOQ applies to the police/prison/other security service and suitably qualified medical personnel carrying out searches on their behalf.

Option 1: Repeal existing GOQs and replace with a general occupational requirement (not qualification) as in the sexual orientation, religion or belief and race regulations which implemented the Article 13 Race and Employment Directives.

Benefits: This would remove all risk of a challenge that domestic legislation fails to comply with ETAD's proportionality test. This would also carry through the Government's commitment to promote consistency, where and as far as possible, with other strands of equality legislation.

Costs: Would impose what could be considered an unnecessary cost on business in terms of familiarising themselves with a new piece of legislation in an area where there is current familiarity and clarity.

Risks: If we replace the existing GOQs with a general genuine occupational requirement, albeit with one which includes a proportionality requirement, we would risk providing employers with more scope to discriminate than is allowed at present by the tightly defined provisions. This would mean that the majority of case law developed over the years would become redundant, reducing employer/ worker certainty.

Option 2: Leave existing provisions intact but add an overriding provision that the application of any GOQ must be proportionate.

Benefits: This should remove any risk of challenge that the GOQ criteria do not comply with ETAD's proportionality test, and could act as a low impact safeguard.

Costs: This would require some amendment to guidance and employers would need to ensure that their understanding, policies, and processes were

up to date. However, the limited scope for application of GOQs, implies that the costs would be very small.

Risks: Employers could criticise Government for making changes that are not strictly necessary.

Option 3: Leave the existing provisions intact but add an overriding provision that the application of the intimate physical searches GOQ must be proportionate.

Benefits: This should remove any risk of challenge that the intimate physical searches GOQ doesn't comply with ETAD's proportionality test as our view is that it does not currently do so. On the other hand, for the other more common GOQs, employers would be able to continue to apply widely understood criteria that have existed for up to 30 years, with only a very limited number of public sector employers having to adjust to the small amendment in the rules.

Costs: This option would impose only limited costs, confined to the public sector, and this could require revised processes to be introduced, by given that the GOQ on decency and privacy would already apply to medical staff, the GOQ on intimate physical searches would be likely to be relied upon in very few instances.

Risks: There could be some complaint that other GOQ provisions (for which we would not be adding a proportionality requirement) permit more scope for discrimination than ETAD allows, and that we have failed to transpose ETAD correctly. We consider the risk of challenge to be low because the Directive does not require the implementing legislation to copy out its wording in full.[7] We could also be criticised for failing to secure consistency across discrimination grounds by adopting a different approach to the sexual orientation, and religion or belief regulations.

Recommendation: Option 3 (amend SDO gender reassignment GOQ provision relating to intimate physical searches)

Leave the existing provisions intact but add an overriding provision that the application of the intimate physical searches GOQ must be proportionate. This should remove any risk of challenge that the intimate search GOQ does not comply with ETAD's proportionality test. Employers would be able to continue to apply widely understood criteria, whereas option 1 would make a lot of existing case law redundant. Options 1 and 2 could be considered as going beyond the minimum necessary to comply with the Directive, and would be hard to justify in terms of additional benefits.

Cadet Forces: The ETAD refers to:

'access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience.' This means that in broad terms ETAD requires the provisions in

---

[7] This view was upheld by the High Court in March 2004 in a judgement on the judicial review challenge to the GB Article 13 sexual orientation regulations. The complaint was that there was no specific reference to a legitimate objective, but the court held that this concept was implicit. In the court's view the proportionality requirement could be met where the provision had narrow scope.

the SDO to be amended so as to prohibit harassment and sexual harassment, and prohibit discrimination with regard to access to work experience and vocational guidance.

Members of Cadet Forces are not considered to be in employment, nor would the general life skills they acquire be considered to fall within the definition of vocational training. They do not prepare individuals for a particular profession or employment, so in this regard, they are not caught by the vocational training provisions of the ETAD. However, Cadet Forces do offer their members the opportunity to take a BTEC First Diploma in Public Services on a part-time basis. The Cadet Vocational Training Office is the only national youth organisation to offer the course which is open to cadets of both sexes who are aged 16 and over and who meet the necessary educational qualifications.

Section 85(5) of the SDO contains an exemption that applies to admission to the various Cadet Forces administered by the MoD and allows a Cadet Force to be restricted to one sex. However, the MoD has not taken advantage of the exemption for many years. Nevertheless, we have had to consider whether this exemption permits discrimination in access to the BTEC. In addition we have to consider whether the exemption applies to university cadetships (Cadets sponsored by the MoD through university and potentially covered by the ETAD vocational training provision.)

Option 1: Amend section 85(5) of the SDO to prohibit sex discrimination with regard only to the BTEC (and any other vocational training).

Benefits: This avoids the risk of a legal challenge that section 2(2) of the European Communities Act does not give the UK the legal power to legislate using secondary legislation (regulations) beyond the Community obligation, or a challenge that we have under-implemented the Directive.

Costs: None apparent because the MoD has not taken advantage of the exemption for many years.

Risks: Making the amendment could be taken, mistakenly, as suggesting that Cadet Forces are training organisations (which they are not) and therefore subject to the ETAD provisions on vocational training (which is not the case).

Option 2: Repeal section 85(5) of the SDO so that Cadet Forces are not exempt in any way from the prohibition on sex discrimination.

Benefits: This would remove any doubt as to when sex discrimination by the Cadet Forces is and is not unlawful. This would also provide an opportunity to fulfil a previous Government commitment to repeal this section.

Costs: There would be no cost to the MoD because they have not taken advantage of the exemption for many years.

Risks: A remote risk of challenge that we do not have the legal power under section 2(2) of the European Communities Act to repeal the exemption.

Option 3: Leave section 85(5) of the SDO in place.

Benefits: The Cadet Forces would not need to adjust to changes in the law which in any case could be considered unnecessary. We would also avoid the risk of challenge that we have acted beyond the legal power under section 2(2) of the European Communities Act.

Costs: There is a theoretical possibility that the Government would be challenged for failing to implement the Directive.

Risks: MoD has not taken advantage of the exemption for many years and argues that the exemption does not impact on admission to the BTEC course anyway because this is open to those who are already cadets, of both sexes. Even so, there would be a small risk that leaving the exemption in place could have a discriminatory effect of limiting access to the BTEC indirectly, if any evidence of discrimination in admissions to the Cadet Forces was found.

There would also be a small risk of legal challenge, or infraction on grounds that we have failed to implement the Directive. This is limited because the original 1976 Equal Treatment Directive already outlaws discrimination in access to vocational training and section 85(5) of the SDO has never been challenged. If the court found that the prohibition of discrimination in ETAD should apply to admission to the Cadet Forces, in practice, this would make no material difference to the MoD.

Recommendation: Option 2 (repeal SDO exemption – section 85(5))

This would remove any doubt as to when sex discrimination by the Cadet Forces is and is not unlawful, and would not impose any costs on the MoD because the exemption is not used in practice. It would avoid suggesting that Cadet Forces are training organisations, which they are not, and would avoid the risk of legal challenge for failing to implement the Directive.

Trade unions and elective bodies: We have had to consider whether anything in Article 50 of the SDO goes further than the positive action to promote equality that is permitted under the ETAD[8].

Article 50 of the SDO relates to trade unions, employers' organisations, and other bodies whose membership is voluntary, and whose members carry out a trade or profession, for which the body exists. Where members of these organisations are wholly or partly elected, Article 50 permits positive action in terms of using reserved seats where necessary to improve the gender balance of representation on its elected bodies. However, it does not make lawful any discrimination in relation to who is entitled to vote in an election, or in any arrangements relating to the membership of the organisation itself.

Business sectors affected: Trade unions and similar organisations, their members, and related umbrella organisations such as the NICICTU. Statistics available in GB demonstrate that there are 10 large trade unions that employ a system of reserved seats on their National Executive Committee for women.[9] 22% of TUC affiliated trade unions have reserved seats for women

---

[8] Article 2(8) of ETAD allows Member States to maintain or adopt measures within the meaning of Article 141(4) of the Treaty. This provides that 'with a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.'

[9] 'Waving *not* Drowning,' March 2004, SERTUC Women's Rights Committee, TUC: Upstream Publishers.

for their conferences, and 31% for their delegations to the TUC.[10] In addition, only 34% of the TUC General Council are women (compared with 42% of their membership). Whilst not drawing on equivalent data for Northern Ireland, informal consultation here reflects the GB position that policies to encourage a greater gender balance amongst elected representatives within trade unions, including positive action, are still needed.

Option 1: Remove Article 50 of the SDO.

Benefits: This would demonstrate a clear commitment to compliance with the ECJ jurisprudence and avoids the possibility of infraction proceedings.

Costs: There could be a social cost in terms of lower representation of women as a result of removing the provision for positive action.

Risks: Government's commitment to facilitating positive action to encourage a greater gender balance in both the workplace and public life could be compromised. The number of women in elected positions within trade unions, and involved in unions more generally, could fall significantly. This could have a negative effect on the representation of women's views and issues concerning women in the workplace.

Option 2: Amend Article 50 of the SDO to ensure that positive action allowed by trade unions is within the bounds of what is strictly permissible under the ETAD and related ECJ jurisprudence.

Benefits: This would ensure compliance with ETAD whilst still making provision for some types of positive action by trade unions. A re-draft of the legislation could also provide an opportunity for the provision to be drafted in a way which is more closely aligned to the approach taken in the 2003 sexual orientation and religion or belief regulations.

Costs: Trade unions would need to familiarise themselves with the guidance and adapt their procedures accordingly. If the amendment were to limit the effectiveness of positive action, for example the use of reserved seats for women on committees, this could lead to lower representation of women.

Risks: An amendment could make the law in this area more complex, and lead to a poorer representation of women's issues in trade unions.

Option 3: Retain Article 50 of the SDO.

Benefits: Stakeholders who currently rely on the provision would be able to continue to do so. To remove this opportunity to use positive measures where necessary within trade unions could risk jeopardising progress in terms of women's participation and representation in the workplace and in political life.

Costs: None.

Risks: We are not aware of any EC jurisprudence on this particular point and consider that the risk of legal challenge is low.

Recommendation: Option 3 (retain Article 50 of the SDO)

This would avoid the risk of taking a regressive step in terms of women's increased participation and representation in the workplace and political life and would not require any adjustment by trade unions.

---

[10] 'Equal Opportunities Audit 2003,' 2003, TUC: Chandlers Printers. ISBN: 1 85006 686 8.

Sex discrimination questionnaire: The ETAD requires Member States to have judicial and administrative procedures which provide access to justice for individuals who believe they have suffered discrimination. The SDO enforcement provisions meet the requirements of the ETAD and provide for a questionnaire process to help individuals.

There is no specific requirement in the ETAD about any questionnaire process, however, in 2003/4 regulations implementing the Article 13 Race and Employment Directives set an eight-week response period for questionnaires. By contrast, the SDO does not specify a time limit for the return of the questionnaire.

Option 1: Amend the SDO so that it is extended to apply claims of sexual harassment and harassment on the ground of sex ,and to introduce an eight-week time limit for return of questionnaires.

Benefits: Not to extend the scope to cover harassment claims would fail to allow claimants access to a remedy which ETAD requires. Making this amendment would increase clarity and certainty, and speed up some claims to the benefit of the claimant. It would also demonstrate Government's commitment to adopting a coherent and consistent approach to tackling discrimination across the strands of equalities legislation. Costs: There would be a small cost to employers and providers of vocational training, guidance and practical work experience, in terms of familiarising themselves with the new guidance and, possibly, in dealing more quickly with requests for information.

Risks: Having two time limits within the SDO could cause confusion as the existing 'reasonable period' time limit would continue to apply in relation to cases alleging discrimination in goods, facilities, services and premises. .

Option 2: Retain the existing 'reasonable period' provision for the return of questionnaires in the SDO.

Benefits: No additional burden on claimants from adjustment.

Costs: None identified.

Risks: Failing to introduce the eight-week time-limit risks victims of sex discrimination being deterred from making a claim due to the false expectation that sex discrimination cases are treated as a lower priority than other discrimination cases, or that delays/obstruction could worsen their anguish. This inconsistency between the SDO and other strands of equalities legislation could also cause confusion an uncertainty for employers and workers.

Recommendation: Option 1 (extend the scope of the application of ,and introduce an 8-week limit for return of the questionnaire)

The consistency of this approach with other discrimination strands would benefit employers. It would demonstrate Government's commitment to adopting a coherent and consistent approach to tackling discrimination across the strands of equalities legislation. This would increase clarity and speed up some claims, to the benefit of the claimant.

Office holders – their special position: The scope of ETAD extends to office holders. The SDO and EPANI apply to employment but do not extend to office holders who are not technically in employment, but whose position may be similar to that of employees. While some (non-statutory) office holders would be covered by the SDO and EPANI because they are employed under a contract of employment e.g. a Company Director, a statutory office holder would not.

Section 86 of the SDO prohibits discrimination in any appointment by a Minister or government department, but does not prohibit discrimination in the on-going relationship between appointer and appointee. Some office holders are specifically within the scope of the SDO (as amended), such as police constables and cadets under section 17, but where they are not, discrimination is not prohibited. The EPANI does not contain definitions in the same way. However, Article 3(1)(c) of ETAD applies to employment and working conditions, including dismissals, as well as pay as provided for in the Equal Pay Directive.

Business sectors affected: This policy does not apply to business.

Option: Amend the SDO and EPANI.

We propose to amend the SDO and EPANI to cover all office holders appointed by central government(whether the office /post is paid or unpaid) and other (non-government appointed) offices and posts – only where the office holder is paid and works under some direction, even if minimal. There would also need to be amendments to the Crown employment provision (Article) and the provision on Ministerial appointments (Article) would need to be deleted.

Benefits: This would bring the SDO and EPA into line with the definitions in the 2003 regulations on sexual orientation and religion or belief, and demonstrate the Government's commitment to a coherent, consistent approach across equalities legislation. Employing organisations would also benefit from this consistent approach. This would increase legal clarity and improve the implementation of ECJ case law.

Office holders would benefit from the reduced potential to be subjected to sex discrimination or unequal pay which should lead to better practice during the appointment and more representative appointments. This would encourage optimal use of the skills and talents of the office-holding workforce and increase motivation and loyalty.

Costs: None identified.

We believe that the cost implications of this change would be fairly small. We do not believe there is any significant discrimination in pay terms between male and female office holders, and appointment processes by government are already obliged to be non-discriminatory. We are making it unlawful to discriminate against them once appointed, but in practice, Government policy already takes this line.

In relation to other office holders, some of the larger groups such as police officers are already specifically protected by the SDO. An important large group identified is the clergy; they are considered separately below. Thus we are likely to be talking about a modest number, and the cost implications for the public sector would be likely to be minimal. The Article 13 Race and

Employment Directives adopted this approach and did not identify any financial costs associated with being required to treat office holders equally.

Risks: Amending the SDO and EPANI could create a difference of approach between non-elected and elected office holders such as district councillors whom we consider to be outside the scope o f ETAD; but this approach would be consistent with that taken in the race, sexual orientation and religious belief/political opinion legislation which exclude them and other elected posts from coverage.

Recommendation: (amend SDO and EPANI)

Adopting this approach is the only viable option if domestic legislation is to be compatible with ETAD.The SDO and EPANI position on office holders must be amended to comply with ETAD.

Office Holders – ministers of religion: Bringing ministers of religion, insofar as they are office holders, within the scope of the SDO (as required by the ETAD) raises complicated issues for the clergy. An existing exception in Article 21 of the SDO allows for discrimination in relation to employment, and to authorisations or qualifications (e.g. ordination) 'for purposes of an organised religion' where these are '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.' A similar exception applies to authorisations and qualifications where they are 'limited to persons who are not undergoing and have not undergone gender reassignment'.

We have had to consider how to ensure that there is compliance with ETAD whilst providing organised religions with appropriate levels of protection to act according to their doctrine or religious convictions in decisions about ordination and appointments. We will need to ensure that Article 21 is capable of applying to the new ETAD provision which prohibits discrimination and harassment against office holders, whichever option below is chosen.

Business sectors affected: All faith groups with clergy or other ministers holding 'office' as such will be affected by the inclusion of office holders within the SDO. The new Article 21 is being inserted to clarify the law, so its effect (other than the fact that it will prohibit harassment) is limited to the fact that people in faith groups who ordain or appoint people may want to familiarise themselves with new guidance

Option 1: Amend Article 21 of the SDO.

This option involves amending Article 21 of the SDO.

Benefits: Having a single over-arching SDO exemption for reasons of religious conscience, which applies equally to all faith groups, would be a fairer approach. An amended Article 21 of the SDO would more clearly set out the circumstances in which organised religions are permitted, for reasons of doctrine or religious conscience, to treat priests and applicants for ordination or appointment less favourably on grounds of gender reassignment. In addition, this approach would ensure that Article 21 would not provide an exception allowing faith groups to undertake harassment based on sex or sexual harassment in any circumstances.

Costs: Officials within faith groups will incur the small cost of familiarising themselves with the new guidance.

Risks: None identified.

Option 2: Retain Article 21 of the SDO in their present form.

Benefits: No change to legislation required..

Costs: The Government might face the cost of infraction proceedings for failing to fully implement the ETAD. There could also be costs of litigation brought in order to test the interpretation of Article 21 of the SDO.

Risks: Article 21 might give too wide an exception in the case of harassment.

Recommendation: Option 1 (amend SDO A21)

Having a single over-arching SDO exemption for reasons of doctrine or religious conscience, which applies equally to all faith groups, would be a fairer approach and would avoid the risk of infraction proceedings for the Government. It would also ensure that there would be no exception available to organised religions in cases of sexual harassment or harassment based on sex.

Non-legislative provisions: ETAD sets out a number of provisions which need to be implemented but do not require legislation in order to be satisfied. These are outlined in Annex A.

Small Firms' Impact Test

We do not expect this amendment to domestic legislation to have a significant effect on small firms as they have been covered by the SDO for 19 years. All employers will need to familiarise themselves with the new guidance, but this will be designed in such a way that it will be easy for all employers to identify if there are any key changes that they need to give further thought to. We only expect small employers to spend 10-15 minutes familiarising themselves with the new guidance.

On the removal of the small employers' exemptions in relation to the regulations on additional maternity and adoption leave, this is the subject of a separate impact assessment brought forward by DEL**.** Please visit www.delni.gov.uk/workand families for more information and for links to the Regulatory Impact Assessment and policy consultation document**.**

Equity and Fairness

The regulations implementing ETAD will lead to increased legal clarity and improved implementation of existing ECJ case law. All sectors affected in Northern Ireland should therefore benefit from more coherent equality legislation. Regulations that are clearer and easier to understand, and broadly consistent with other equality legislation in Northern Ireland, will benefit both employers and workers by making it easier for them to understand their respective obligations and rights.

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.

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.

Competition Assessment

We have not identified a sector or market where competition between firms may be affected by this regulation.

Enforcement, sanctions and monitoring

The primary route for enforcement of sex discrimination legislation is by the individual. All complaints relating to sex discrimination in employment under the provisions of the Sex Discrimination (Northern Ireland) Order 1976 and the Equal Pay Act (Northern Ireland) 1970, are dealt with by way of Industrial Tribunals. Trade Union representatives or the Equality Commission for Northern Ireland (ECNI) may support the individual through the tribunal process.

Claims under Part IV of the SDO (relating to education, including some elements of vocational training) are brought in the county courts. Costs here differ, but a successful claimant will recover their own costs – unlike in the Industrial Tribunal.

Under the Sex Discrimination (Northern Ireland) Order 1976, the sanctions which can be applied by an Industrial Tribunal are a) an order from the industrial tribunal declaring the rights of the complainant and the employer; and/or b) compensation, with interest, for financial loss, injury to feelings and injury to health; and/or a recommendation that the employer take action within a specified period to reduce the adverse effect on the complainant of the act of discrimination complained of. The median award for GB in 2004/5 was £6,235. No corresponding NI figures are available. For claims brought under Part IV of the SDO, a court can award compensation only. The Court Service does not collect data about the number of SDO Part IV complaints that are brought before the county courts, nor do they make available data about the administrative cost of hearing complaints in court. It is therefore not possible to make an estimate of the expected cost to the taxpayer of the cost of any extra court cases arising out of this legislation.

Sanctions under the Equal Pay Act (Northern Ireland) 1970 are a) an order from the industrial tribunal declaring the rights of the complainant and the employer; and/or award of payment by way of arrears of remuneration or damages in respect of the period in which equal pay was paid, to a maximum of 6 years , with extensions in cases of concealment or where the claimant was under a disability.

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

The ECNI carries out this role within its grant allocation, which for 2005/6 is £**6.956 m.**

The Office of Industrial Tribunals and the Fair Employment Tribunal monitors the numbers of sex discrimination claims and equal pay claims taken, and the numbers which are allowed, dismissed, withdrawn, conciliated and settled.

Implementation and delivery plan

Once the draft regulations come into operation on 5 October 2005, the Government will notify the European Commission that ETAD has been transposed in Northern Ireland.

"Changes to Sex Discrimination Legislation in Northern Ireland", a detailed law-based explanation of the amendments to the SDO and EPANI, will be available on the OFMDFM website in October 2005. The Department will notify key stakeholders of the availability of the explanation by letter.

Post-implementation review

Reviewing the effectiveness of the new legislation will be part of the ECNI's continuing statutory duties. Government will also carry out a review of how the measures we have proposed to implement ETAD are working. This information is to be provided to the European Commission by October 2008. The European Commission requires this information so that it can draw up a report to the European Parliament and Council on how ETAD is working across the European Member States.

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 EPANI**
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 across discrimination strands. 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 EPANI**
Office holders – ministers of religion	Fairer approach applying equally to all faith groups	Small cost to faith group officials of familiarisation with guidance	**'Package' of Changes (amend SDO)**

Annex A

Non-legislative provisions

ETAD sets out a number of provisions which Member States must implement but do not require legislation in order to be satisfied in the UK including Northern Ireland.

We consider each of these provisions is already satisfied by existing legislation, policies and practices.

Article 1(1) requires Member States to actively take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities.

Measures taken;

Legislation: the SDO and EPANI (both as amended) will form the main legislative vehicles, and all new legislation is screened for compliance.

Policy: Equality impact assessments as required by Section 75 of the Northern Ireland Act require identification of impacts (positive and negative) on gender grounds as part of the policy development process. The Government has issued a Gender impact assessment tool to help policy-makers assess whether their policies will deliver equality of opportunity. Priorities and Budgets 2005-2008 ; Government has committed to coordinated strategic action to promote equality and social exclusion of people with different gender. To meet this objective the Government is developing a Gender Equality Strategy and action plans to tackle gender inequalities in Northern Ireland

Article 2(5) requires Member States to encourage, in accordance with national law, collective agreements or practice, employers and those responsible for access to vocational training to take measures to prevent all forms of discrimination on grounds of sex, in particular harassment and sexual harassment at the workplace.

Measures taken

The SDO already conforms to the requirements of ETAD on direct and indirect discrimination. Formal and informal requirements, conditions and provisions are covered. Encouragement to tackle discrimination is provided through guidance developed and produced by Government and ECNI.

Article 8b(1) requires Member States, in accordance with national traditions and practice, to take adequate measures to promote social dialogue between the social partners with a view to fostering equal treatment, including through monitoring of workplace practices, collective agreements, codes of conduct, research, or exchange of experiences and good practices.

Measures taken

Funding initiative: the Department for Employment and Learning's Partnership Fund provides funding for projects which aim to improve the relationship between employers, employees and their representatives, and is open to the social partners. The Department for Employment and Learning also provides,

through the Labour Relations Agency, funding for a panel of recognised experts in the field of equal pay.

Code of practice: With Government agreement, the ECNI issued a revised statutory Code of Practice on Equal Pay in December 2003 to provide practical advice to employers such as recommending equal pay reviews, and consultation with their workforce.

Article 8b(2) requires Member States, where consistent with national traditions and practice, to encourage social partners to promote equality between men and women and to establish agreements at an appropriate level outlining anti-discrimination rules that fall within the scope of collective bargaining.

Measures taken

The Government generally adopts a ‘voluntarist’ approach to social partners, rather than promote particular forms of bargaining. However the Labour Relations Agency can provide advice to parties in developing their dialogue and bargaining behaviours.

Article 8b(3) requires Member States, in accordance with national law, collective agreements or practice, to encourage employers to promote equal treatment for men and women in the workplace in a planned and systematic way.

Measures Taken

ECNI: have a duty under the SDO to promote equality of opportunity between men and women generally.

Article 8b(4) requires Member States to encourage employers to provide employees and/or their representatives with regular information on equal treatment for men and women in the undertaking.

Measures Taken

Government consultation and dialogue with stakeholders such as; non-departmental public bodies, social partners and voluntary organisations will bring this to the attention of employers and individuals.

Article 8c requires Member States to encourage dialogue with appropriate non-governmental organisations (NGOs) which have a legitimate interest in contributing to the fight against discrimination on grounds of sex with a view to promoting the principle of equal treatment.

Measures Taken

Government maintains ongoing contact with NGO organisations including those representing women in the development of its gender strategy and action plans – Government also liaises with ECNI who themselves maintain a network of contacts with the same organisations.

Declaration

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

Signed by the responsible senior officer of the Office of the First Minister and deputy First Minister:

Laurene McAlpine……………………………………….

Date: 19 September 2005……………………………………

Contact Official:

Hilary Harbinson
Office of the First Minister and deputy First Minister
Room E3.14, Castle Buildings
Stormont Estate,
Belfast BT4 3SR

Tel: 028 9052 8194
Fax: 028 9052 3272
E-mail: hilary.harbinson@ofmdfmni.gov.uk