EXPLANATORY MEMORANDUM TO

THE SEX DISCRIMINATION ACT 1975 (AMENDMENT) REGULATIONS 2007

2007 No.

1. This explanatory memorandum has been prepared by the Government Equalities Office and is laid before Parliament by Command of Her Majesty.

2. Description

2.1 The Sex Discrimination Act 1975 (Amendment) Regulations 2007 amend the Sex Discrimination Act 1975 ("SDA") and Public Health Act 1936 to implement Council Directive 2004/113/EC, implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 Matters of special interest to the Joint Committee on Statutory instruments are likely to be a) the definition of harassment (as to which, see paragraphs 7.3 – 7.8 below), b) the lateness of the consultation period leading to a short period of time between the making and coming into force of the Regulations (as to which, see paragraphs 7.9 – 7.11 below), and c) maternity discrimination being defined by a period of 26 weeks from the date of childbirth (as to which, see paragraphs 7.18 – 7.23 below).

4. Legislative Background

4.1 This instrument implements Directive 2004/113/EC in Great Britain (which for working purposes is also referred to as the "Gender Directive"). Directive 2004/113/EC implements the European Community law principle of equal treatment between men and women in the access to and supply of goods and services. The Regulations are made under section 2(2) of the European Communities Act 1972 and will be subject to approval by resolution of each House of Parliament.

4.2 In Great Britain, the SDA is already in place to protect people from discrimination on grounds of sex in the field of goods, facilities and services. The SDA therefore already goes some way in implementing the provisions of Directive 2004/113/EC. However, the Government has identified the need to make some amendments to the SDA to fully implement the Directive. The main principles which Directive 2004/113/EC requires Member States to transpose are extensions of the protection already afforded by the other equality directives – see the Equal Treatment Amendment Directive (2002/73/EC) concerning sex discrimination in employment and related areas; the Race Directive (2000/43/EC) concerning race discrimination and the Employment Directive (2000/78/EC) concerning age, disability, sexual orientation and religion or belief discrimination in employment and related areas. Where appropriate, we have taken the same or a similar approach to implementation of Directive 2004/113/EC as was taken when implementing these three earlier equal treatment Directives.

4.3 Principles common to these four Directives are the definitions of direct and indirect discrimination and harassment. Key concepts which apply to Directives 2002/73/EC and 2004/113/EC only are sexual harassment – a different concept to harassment related to sex – and discrimination by way of less favourable treatment because of pregnancy, maternity leave (in the employment context) and maternity (in the non-employment context).

4.4 A Transposition Note addressing how these Regulations implement the Directive is attached at Annex A to this Explanatory Memorandum. The scrutiny history of when Directive 2004/113/EC was considered by the EU Scrutiny Committee is as follows:

An Explanatory Memorandum, 14812/03, was submitted by the Department of Trade and Industry on 15 December 2003 to the House of Commons Scrutiny Committee and the House of Lords Select Committee on the European Union on the "proposal for a Directive implementing the principle of equal treatment between women and men in the access to and supply of goods and services" (proposed by the European Commission 05/11/03).

The Commons European Scrutiny Committee considered it politically important and did not clear it, asking whether the requirement to engage in dialogue with relevant non-Governmental organisations was consistent with the principle of subsidiarity. It also raised concerns on proportionality in relation to equal treatment, specifically in insurance, and on the outcome of the Government's request for clarification of the text and of consultation with the insurance industry and consumer groups and for a full Regulatory Impact Assessment (report 4, Item 25056, session 03/04).

A supplementary Explanatory Memorandum was submitted on 23 April 2004 and Ministerial correspondence with the Committees continued to 14 September 2004 as EU negotiations approached their conclusion in autumn 2004.

The House of Lords Select Committee on the EU (progress of scrutiny date 19/03/04 and session 03/04) issued calls for evidence on 31 March 2004 to complete an inquiry into the draft Directive. The inquiry received evidence from a range of stakeholders including Ministers and officials. Its report, mainly focused on insurance aspects, was published in September 2004 and is at:
www.publications.parliament.uk/pa/ld200304/ldselect/ldeucom/165/165.pdf

This scrutiny inquiry informed the Government's EU negotiating position during spring and summer 2004, notably on insurance, and the subsequent work on implementation. The House of Lords scrutiny report includes as an appendix Ministerial correspondence to the committee indicating that the Directive was moving to political agreement more quickly than anticipated. Whilst noting that it was pleased that the revised text presented to the Employment, Social Policy, Health and Consumer Affairs Council on 4 October met all the British negotiating objectives in full, and that all the UK's proposals were acceptable to all Member States, the Committee expressed regret that the Government decided to override the Parliamentary scrutiny reserve without mentioning that the process of Parliamentary scrutiny had not yet been completed.

5. Territorial Extent and Application

5.1 This instrument applies to Great Britain.

6. European Convention on Human Rights

6.1 The Parliamentary Lord Privy Seal has made the following statement regarding Human Rights:

In my view the provisions of the Sex Discrimination Act 1975 (Amendment) Regulations 2007 are compatible with the Convention rights.

7. Policy background

7.1 Directive 2004/113 implements the principle of equal treatment between men and women in relation to the access to and supply of goods and services. The SDA, which applies to both women and men, is the main piece of legislation in Great Britain which prohibits certain kinds of discrimination on the grounds of sex. It prohibits discrimination on grounds of sex in employment, vocational training, education, the exercise of public functions, the provision of goods, facilities and services and the disposal and management of premises. It also prohibits harassment, including sexual harassment, in employment and vocational training. The SDA therefore already goes a long way in implementing the provisions of Directive 2004/113/EC. However, some amendments to the SDA are required to fully comply with the Directive.

7.2 The principle underpinning Government policy for transposing the Directive is to go no further than the Directive requires, unless it is considered that there are sound reasons for doing so. The Regulations therefore amend the goods, facilities, services and premises provisions of the SDA only in those areas with which the Directive is concerned.

Harassment

7.3 The Regulations draw on the existing definitions of harassment and sexual harassment in 4A of the SDA, which was inserted to implement the provisions of the Equal Treatment Amendment Directive. Following an application for Judicial Review brought by the former Equal Opportunities Commission (EOC)[1], the High Court ruled that the harassment provisions should be recast to eliminate the causal link between harassment and the sex of the person being harassed, to facilitate claims made by an employee who is not subjected to the unwanted conduct himself, and to impose liability where an employer knowingly fails to protect an employee from repeated harassment by a third party. We refer to this decision as the EOC judgment.

7.4 The EOC judgment was specific to implementation of the Equal Treatment Amendment Directive and therefore relates to the fields of employment and related areas, where there is a special relationship between an employer and employee that does not exist between a service provider and a customer.

[1] *Equal Opportunities Commission v Secretary of State for Trade and Industry* [2007] EWHC 483 (Admin)

7.5 Accordingly, although the prohibition of harassment in the Gender Directive and the Equal Treatment Amendment Directive are phrased in similar terms, the concerns raised in the judicial review resulting in the need to amend section 4A do not necessarily apply in the field of goods, facilities and services. Nothing in the judgment requires amending the definition of harassment for purposes other than those with which the Equal Treatment Amendment Directive are concerned.

7.6 Nonetheless, the Government intends to amend the definition in section 4A for all purposes, for the sake of simplicity and to ensure consistent protection in all spheres in which harassment is prohibited. The Government is in the process of producing regulations implementing this change, and dealing with the other aspects of the EOC judgment.

7.7 It would not be appropriate to delay these Regulations to await finalisation of all the amendments to the SDA necessary to implement the EOC judgment (because that would involve breaching the UK's obligations under EU law). Nor would it be appropriate to introduce some kind of interim definition of harassment for the purposes of implementing the Gender Directive pending further amendment in the near future. That would result in potential confusion, and added regulatory burdens as the result of the changes happening piecemeal.

7.8 It is therefore the Government's view that the best course, both from the point of view of better regulation, and compliance with the UK's obligations under EU law, is for these Regulations to come into force in time to meet the deadline to implement the Gender Directive, for the time being drawing on the existing definition of harassment in the SDA, and for that definition to be amended subsequently, albeit in the short term.

Consultation

7.9 Government made the decision that there should be a single consultation package presenting the proposals for implementing the Gender Directive alongside the wider proposals for an Equality Bill flowing from the Discrimination Law Review. A consultation on the Gender Directive alone would have only been on the minimal changes to the Sex Discrimination Act 1975 considered necessary to implement the Gender Directive. By consulting on the Gender Directive and the Discrimination Law Review at the same time the intention was for consultees to understand how the proposals for implementing the Gender Directive fit into and were a step towards our wider proposals for simplification and harmonisation of discrimination law.

7.10 It had been the Government's intention to publish the proposals for an Equality Bill in March 2007. However, in order to focus on getting the policy for an Equality Bill right, consultation was delayed, with knock-on effects for the consultation on the proposals for implementing the Gender Directive.

7.11 Whilst this decision to combine the consultation on the proposals for implementing the Gender Directive with proposals for a Single Equality Bill was in keeping with better regulation principles, it unfortunately resulted in a delay in laying the Regulations

7.12 The public consultation[2] ran from 12 June to 4 September 2007 alongside the wider package of proposals for the Equality Bill. The consultation package, which provided access to the draft Regulations, was distributed widely and made readily available on the Communities and Local Government website (the Department for Communities and Local Government was then leading on these Regulations) and through stakeholder networks. Annex B of the consultation document set out Government proposals for implementation of the Directive and sought views specifically on three aspects – compatibility with the Directive of existing exceptions in the SDA, insurance, and defining maternity discrimination.

7.13 Around 90 responses to public consultation on the proposals to implement the Directive, together with the draft regulations, were received. The greatest proportion of these came from local authorities with the others ranging through legal groups, trans lobby groups, employer organisations, trade unions and similar and individuals.

Compatibility of SDA exceptions

7.14 79% of responses agreed with our proposals in respect of which exceptions needed to be amended to comply with the Directive, and which did not. The proposal to amend specific exceptions that allow provision to men or women only to make it clear that different treatment for transsexual people will be lawful only where this would be a proportionate means of achieving a legitimate aim drew some criticism from some trans organisations who questioned the compatibility of this clarification with the principle of equal treatment. Government will provide guidance on the factors that service providers will need to take into account in such circumstances to ensure that they know what to do to operate lawfully.

7.15 Since the consultation, regulations 10 and 14 which narrow the existing exceptions for voluntary bodies (section 34 SDA) and charities (section 43 SDA) in those areas in which the Directive operates, have been amended to incorporate the derogations permitted in respect of single-sex provision in Article 4(5) of the Directive and in respect of positive action in Article 6. Regulations 11, 15 and 17 which narrow the existing exceptions which permit single-sex provision (section 35 SDA; section 44 SDA, section 46 SDA) in those areas in which the Directive operates also rely on the derogation permitted in respect of single-sex services in Article 4(5).

Insurance

7.16 40% of consultees who considered the impact of the Directive's insurance provision on providers and/or customers of insurance and related financial products put forward views. Of these the strongest were presented by the insurance industry. Some of these had also responded to HM Treasury's separate consultation on its draft guidance. Insurers were mainly concerned about costs arising from a possible December 2007 introduction of the ban on differences in premiums and benefits related to pregnancy and maternity. Where responses came from individuals, many of these questioned how transsexual people would be able to demonstrate they had 'undergone' gender

[2] Annex B of the consultation paper and draft Regulations :*A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain* http://www.communities.gov.uk/publications/communities/frameworkforfairnessconsultation

reassignment, and felt the proposals were unclear. This is now addressed in regulation 16 which clarifies that premiums and benefits should be calculated on the basis of the transsexual person's sex, (i.e. their legal sex which is their birth sex, except when they have legally changed their gender via a full Gender Recognition Certificate).

7.17 The consultation paper set out two options for implementing the ban on differences in premiums and benefits related to pregnancy and maternity – implementation in December 2007 or deferral to December 2009. 74% of responses favoured 2007 with 26% for 2009. Following further consultation with the insurance industry, Government was persuaded that deferral was necessary if the implementation costs for the industry were not to be increased significantly. It is Government's view that a one year deferral to 21 December 2008 will be sufficient to enable insurers to carry out the procedures to implement this measure within their normal updating process.

Defining maternity

7.18 The Gender Directive requires Member States to outlaw less favourable treatment on the grounds of maternity. It does not define maternity, thus leaving it to Member States individually to consider what it should mean. Having provided four options[3] for transposing this requirement in the consultation in Britain, 91% of responses supported the Government's proposal to define maternity according to the age of the child, the option that would provide the greatest legal certainty.

7.19 The next consideration for Government was to determine the period of time during which a woman who has recently given birth should be protected. In doing so, we have looked to the position on maternity leave in the employment context.

7.20 The Government considered how the Equal Treatment Amendment Directive (see paragraph 4.2 above) addresses discrimination on the grounds of maternity leave. Article 2(7) of that Directive states that less favourable treatment related to pregnancy and maternity leave within the meaning of Directive 92/85/EEC is direct sex discrimination. Directive 92/85/EEC (the "Pregnant Workers Directive") introduces measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding. In relation to maternity leave, the Pregnant Workers Directive protects workers who have recently given birth and workers who are breastfeeding because of their vulnerability to risks to their health and safety at work. The Directive provides that women who have recently given birth or are breastfeeding must be allowed a minimum of 14 weeks unpaid maternity leave, of which two weeks are compulsory. The domestic employment regime goes further.

7.21 The consultation paper provided as an example a possible period of 52 weeks. This was chosen because, given that it is the period which applies domestically for the whole entitlement to maternity leave in the employment context (comprising 26 weeks "ordinary maternity leave" and a further 26 weeks "additional maternity leave"), it would have been familiar to consultees. These periods are a matter of domestic choice since the equal treatment directive only requires a minimum of 14 weeks' maternity leave.

[3] The four options were a) defining maternity as 'childbirth'; b) defining maternity according to the age of the child – for example, protecting mothers of babies aged up to one year; c) providing protection for 'mothers of young children'; and d) not defining maternity.

7.22 Consultation responses varied much in opinion with periods of time suggested of between 8-12 weeks and 2-3 years. In considering what period of protection to provide, the Government takes the view that adopting anything less than the minimum requirements under the Pregnant Workers Directive would not be effective implementation of the Gender Directive. Taking into account consultation responses that indicated that a period of protection lasting a full 52 weeks would impose disproportionate burdens on business in their role as service providers, the Government has opted for a period of 26 weeks (which mirrors the period of a woman's ordinary maternity leave entitlement in the employment context).

7.23 In doing so, the Government was also mindful of ECJ caselaw in the employment context which recognises the need to protect women until such time as their *'physiological and mental functions have returned to normal after childbirth'* or to protect *'the special relationship between a woman and her child over the period which follows pregnancy and childbirth"*[4]. In the Government's view, a period of 26 weeks following childbirth would achieve this purpose. It goes further than the 14 weeks leave required by the Pregnant Workers Directive (as does the domestic employment regime) to extend to the period recommended by the World Health Organisation and the Department of Health for exclusive breastfeeding. Beyond that point, we consider that where a provider of goods or services refuses to serve, or provides with less favourable service, a mother with her baby, she could claim either direct or indirect discrimination on grounds of sex under the existing provisions of the SDA.

Defining pregnancy discrimination

7.24 Although the consultation paper did not seek views on defining pregnancy discrimination, the civil aviation sector expressed concerns that where airlines have policies not to carry late-term pregnant women on flights, these policies may be directly discriminatory under the SDA as amended by our regulations. This would be the case even if these policies are in place for reasons of health and safety and not, for example, for business continuity reasons. In response to this, and in considering related health and safety issues in the provision of goods, facilities and services with which the Directive is concerned, for the purposes of legal certainty Government has proposed to include in regulation 5 a clarificatory provision concerning circumstances in which there is no direct pregnancy discrimination where a provider treats a pregnant woman less favourably in order to protect her health and safety provided that others are subjected to similar treatment because of conditions that also create risks to health and safety. Such a provision would also be applicable in the case of dangerous sports, for example parachute or bungee jumping or rock climbing.

Other responses

7.25 A significant number of responses from individuals were concerned that the right to religious expression would be compromised by extending protection to transsexual people. As activities relating to religious worship/observance fall outside the scope of the Directive, the Government believes that the core concerns of respondents are addressed.

[4] *Hofmann: 184/83 [1984] ECR 3047; Habermann: C-421/92 [1994] ECR I-1657; Webb C-32/93 [1994] QB718; Thibault: C-136/95 [1998] ECR I-2011*

7.26 In addition to the responses relating to the Directive, a significant number of consultees responding to the wider proposals for the Equality Bill took the opportunity to provide a specific right to breastfeed children of any age in public (around 500 responses) and provide wider protections, beyond the ambit of the Directive (around 100 replies from individuals, lesbian, gay, bisexual and trans lobby groups and local authorities).

Other

7.27 Since the consultation and following a trawl of existing legislation, a consequential amendment is also being made to the Public Health Act 1936. This amendment would enable local authorities to charge fees for the use of urinals provided under the Act. Without this amendment, this provision in the Act would contravene the requirement of the Directive to abolish any laws which are contrary to the principle of equal treatment.

7.28 An amendment is also being made to the SDA following implementation of Directive 2002/73/EC to ensure that in respect of barristers and advocates acts which are necessary for the protection of women (and with which that Directive is concerned) are not unlawful under the SDA.

Guidance

7.29 The Government Equalities Office will publish guidance on its website, on the date the Regulations come into force, for use by the providers of goods, facilities or services, and premises, within the private, public and voluntary sectors and their customers. It will also be of use to legal and welfare advisors and interested parties, trade associations or equality organisations http://www.womenandequalityunit.gov.uk/legislation/index.htm. An overview of the changes being made to the Act can also be found on the website.

7.30 Whilst the guidance is not intended as and cannot be a definitive statement of the law, it does address the scope of the amendments to the Act, describe the main changes and explain the exceptions. It also describes how complaints can be made with the assistance of the Commission for Equality and Human Rights.

7.31 A separate body of guidance has been prepared for the insurance industry by HM Treasury and published, in draft, at www.hm-treasury.gov.uk. Publication prior to the Regulations' debates and their coming into force was considered appropriate in order to allow the industry time, which is the largest sector affected by the proposals, to familiarise itself with the changes affecting its business and to prepare for the new arrangements, particularly the requirements on insurers to collate and publish the data on which decisions to treat men and women differently for the purposes of calculating premiums, are based.

8. Impact

8.1 An Impact Assessment is attached to this memorandum. Copies are available to the public, free of charge, from the Government Equalities Office, 2nd Floor, 123

Victoria Street, London SW1E 6DE. Copies will also be placed in the Library of both Houses of Parliament

8.2 The impact on the public sector is expected to be low with one exception.

9. Contact

Elizabeth Solowo-Coker at the Government Equalities Office Tel: 020 7944 0639 or e-mail: elizabeth.solowo-coker@communities.gsi.gov.uk can answer any queries regarding the instrument.

Annex A

GB IMPLEMENTATION OF DIRECTIVE 2004/113/EC

THE SEX DISCRIMINATION ACT 1975 (AMENDMENT) REGULATIONS 2007 [SI]

TRANSPOSITION NOTE

The Sex Discrimination Act 1975 (Amendment) Regulations 2007, implementing Council Directive 2004/113 EC[5]
[SI]

TRANSPOSITION NOTE

Objective: Council Directive 2004/113/EC of 13 December 2004 implements the principle of equal treatment between men and women in the access to and supply of goods and services. It is implemented in Great Britain by the Sex Discrimination Act 1975 ("the Act"), as amended by the Sex Discrimination Act 1975 (Amendment) Regulations 1975 ("the Regulations"). Separate legislation will implement the Directive in Northern Ireland and Gibraltar.	
Responsibility: This table has been prepared by the Government Equalities Office. It sets out the objective of each article of Directive 2004/113/EC, and how it is to be implemented in Great Britain. The Lord Privy Seal is responsible for each aspect of implementation.	
Article of Directive 2004/113/EC and objective	**Provisions transposing the Directive (Unless otherwise specified, statutory references are to the Sex Discrimination Act 1975, as amended by the Sex Discrimination Act 1975 (Amendment Regulations) 2007)**
Article 1 Purpose The purpose of this Directive is to lay down a framework for combating discrimination based on sex in access to and supply of goods and services, with a view to putting into effect in the Member States the principle of equal treatment between men and women.	No implementation required
Article 2 Definitions For the purposes of this Directive, the following definitions shall apply: (a) direct discrimination: where one person is treated less favourably, on grounds of sex, than another is, has been or would be treated in a comparable situation;	(a) Section 1 SDA, (direct and indirect discrimination against women) Regulation 4 amends section 2A SDA (discrimination on the grounds of gender reassignment) to extend protection from direct discrimination on grounds of gender reassignment

[5]Published in the Official Journal of the European Journal L 373, 12.12.2004, page 37. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0113:EN:HTML

Article of Directive 2004/113/EC and objective	**Provisions transposing the Directive (Unless otherwise specified, statutory references are to the Sex Discrimination Act 1975, as amended by the Sex Discrimination Act 1975 (Amendment Regulations) 2007)**
(b) indirect discrimination: 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;	in the provision of goods, facilities, services or premises. Regulation 16 provides how SDA operates in relation to discrimination under a contract entered into after the appropriate date which relates to differences in premiums and benefits. (b) Section 1(2) SDA. Regulation 3 applies the Directive-based definition of indirect discrimination in section 1(2) SDA to those areas of the SDA with which the Directive is concerned, namely sections 29-31, except in so far as they relate to an excluded matter.
(c) harassment: 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 of creating an intimidating, hostile, degrading, humiliating or offensive environment; (d) sexual harassment: where any form of unwanted physical, 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.	(c) and (d) Section 4A(1) and (3) SDA (harassment, including sexual harassment) Regulations 6 – 9 amend section 29 (discrimination in provision of goods, facilities or services), section 30 (discrimination in disposal or management of premises), and section 31 (discrimination: consent for assignment or sub-letting) to make it unlawful to subject a person to harassment on the ground of the person's sex, or on the ground that the person intends to undergo, is undergoing or has undergone gender reassignment.
<u>Article 3</u> Scope 1. Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons who provide goods and services, which are available to the public irrespective of the person concerned as regards both the public and private sectors, including public bodies, and which are offered outside the area of private and family life and the transactions carried out in this context.	Sections 29 (discrimination in provision of goods, facilities and services), 30 (discrimination in disposal or management of premises), and section 31 (discrimination: consent for assignment or sub-letting) SDA deal with the areas which fall within the scope of the Directive. Regulation 12 sets out which matters are excluded from scope of the Directive - "excluded matters" for the purposes of sections 29-31 SDA. The excluded matters are also referred to in regulations 3 (indirect discrimination), 4 (discrimination on the grounds of gender

Article of Directive 2004/113/EC and objective	**Provisions transposing the Directive (Unless otherwise specified, statutory references are to the Sex Discrimination Act 1975, as amended by the Sex Discrimination Act 1975 (Amendment Regulations) 2007)**
	reassignment), 5 (pregnancy and maternity), 7 (premises), 13 (relationships which have come to an end), 16 (insurance), 19 (acts done under statutory authority), 21 (time for answering questions from aggrieved persons).
2. This Directive does not prejudice the individual's freedom to choose a contractual partner as long as an individual's choice of contractual partner is not based on that person's sex.	No implementation necessary.
3. This Directive shall not apply to the content of media and advertising nor to education.	No implementation necessary.
4. This Directive shall not apply to matters of employment and occupation. This Directive shall not apply to matters of self-employment, insofar as these matters are covered by other Community legislative acts.	No implementation necessary.
Article 4 Principle of equal treatment 1. For the purposes of this Directive, the principle of equal treatment between men and women shall mean that (a) there shall be no direct discrimination based on sex, including less favourable treatment of women for reasons of pregnancy and maternity;	(a) Section 1(1)(a) SDA prohibits direct discrimination on the ground of a person's sex. Regulation 5 extends protection from direct discrimination on grounds of pregnancy and introduces protection from direct discrimination on the grounds of maternity in the provision of goods, facilities, services or premises.
(b) there shall be no indirect discrimination based on sex.	Section 1(2) SDA as amended by regulation 3 Regulation 3 applies the Directive-based definition of indirect discrimination in section 1(2) SDA to those areas of the SDA with which the Directive is concerned, namely sections 29-31, except in so far as they relate to an excluded matter.
2. This Directive shall be without prejudice to more favourable provisions concerning the protection of women as regards pregnancy and maternity.	Section 2(2) SDA provides that for the purposes of Parts 2 and 3 SDA, it is not unlawful to discriminate by affording special treatment to women in connection with pregnancy or childbirth.

Article of Directive 2004/113/EC and objective	**Provisions transposing the Directive (Unless otherwise specified, statutory references are to the Sex Discrimination Act 1975, as amended by the Sex Discrimination Act 1975 (Amendment Regulations) 2007)**
3. Harassment and sexual harassment within the meaning of this Directive shall be deemed to be discrimination on the grounds of sex and therefore prohibited. A person's rejection of, or submission to, such conduct may not be used as a basis for a decision affecting that person.	Section 4A(1) and (3) SDA (harassment, including sexual harassment) Regulations 6 – 9 amend section 29 (discrimination in provision of goods, facilities or services), section 30 (discrimination in disposal or management of premises), and section 31 (discrimination: consent for assignment or sub-letting) to make it unlawful to subject a person to harassment on the ground of the person's sex, or on the ground that the person intends to undergo, is undergoing or has undergone gender reassignment.
4. Instruction to direct or indirect discrimination on the grounds of sex shall be deemed to be discrimination within the meaning of this Directive.	Where an individual is instructed to discriminate and refuses to carry out the instruction and is treated less favourably as a result, they will have a remedy for victimisation under section 4 SDA. Where an individual is instructed to discriminate and carries out the instructions, under the vicarious liability provisions in SDA section 41, the ultimate victim of the instructions is able to claim a remedy against the person who gave the instructions as well as the person who actually discriminated. In addition, section 42 makes it unlawful for a person to knowingly aid another person to carry out a discriminatory act.
5. This Directive shall not preclude differences in treatment, if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.	SDA exceptions in sections 34 and 43 as amended by regulations 10 and 14 SDA section 35(1)(c) as amended by regulation 11 SDA section 46 as amended by regulation 17
<u>Article 5</u> Actuarial factors 1. Member States shall ensure that in all new contracts concluded after 21 December 2007 at the latest, the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits.	See section 45 SDA (insurance etc), as amended by regulation 16.

Article of Directive 2004/113/EC and objective	**Provisions transposing the Directive (Unless otherwise specified, statutory references are to the Sex Discrimination Act 1975, as amended by the Sex Discrimination Act 1975 (Amendment Regulations) 2007)**
2. Notwithstanding paragraph 1, Member States may decide before 21 December 2007 to permit proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data. The Member States concerned shall inform the Commission and ensure that accurate data relevant to the use of sex as a determining actuarial factor are compiled, published and regularly updated. These Member States shall review their decision five years after 21 December 2007, taking into account the Commission report referred to in Article 16, and shall forward the results of this review to the Commission.	See section 45 SDA (insurance etc), as amended by regulation 16
3. In any event, costs related to pregnancy and maternity shall not result in differences in individuals' premiums and benefits. Member States may defer implementation of the measures necessary to comply with this paragraph until two years after 21 December 2007 at the latest. In that case the Member States concerned shall immediately inform the Commission.	See section 45 SDA (insurance etc), as amended by regulation 16. See also regulation 23(4) which defers implementation until 22 December 2008.
Article 6 Positive action With a view to ensuring full equality in practice between men and women, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to sex.	See sections 34 (exception for voluntary bodies) and 43 (charities) and SDA as amended by regulations 10 and 14.
Article 7 Minimum requirements 1. Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment between men and women than those laid down in this Directive.	No implementation required.

Article of Directive 2004/113/EC and objective	**Provisions transposing the Directive (Unless otherwise specified, statutory references are to the Sex Discrimination Act 1975, as amended by the Sex Discrimination Act 1975 (Amendment Regulations) 2007)**
2. The implementation of this Directive shall in no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive.	There is no reduction in the level of protection currently available.
Article 8 Defence of rights 1. Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of the obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.	Section 66 SDA deals with claims under Part 3 of the SDA, including claims for discrimination or harassment in the provision of goods, facilities or services. Section 35C SDA (relationships that have come to an end), as amended by regulation 13.
2. Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation, as the Member States so determine, for the loss and damage sustained by a person injured as a result of discrimination within the meaning of this Directive, in a way which is dissuasive and proportionate to the damage suffered. The fixing of a prior upper limit shall not restrict such compensation or reparation.	For goods and services discrimination section 66 SDA makes provision for remedies that would be obtainable in the High Court of the Court of Session as the case may be, such as an order declaring the rights of parties, an injunction or order to a specified person or body to do or cease doing specified acts; and damages.
3. Member States shall ensure that associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.	Under the relevant rules and procedure there is no obstacle to organisations supporting a complainant in proceedings. See also section 28 (legal assistance) of the Equality Act 2006 which specifies the powers of the Commission for Equality and Human Rights to an individual who alleges that he is a victim of behaviour contrary to the equality enactments.
4. Paragraphs 1 and 3 shall be without prejudice to national rules on time limits for bringing actions relating to the principle of	No implementation required.

Article of Directive 2004/113/EC and objective	**Provisions transposing the Directive (Unless otherwise specified, statutory references are to the Sex Discrimination Act 1975, as amended by the Sex Discrimination Act 1975 (Amendment Regulations) 2007)**
equal treatment.	
Article 9 Burden of proof 1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.	Section 66A SDA, as amended by regulation 20
2. Paragraph 1 shall not prevent Member States from introducing rules of evidence, which are more favourable to plaintiffs.	No implementation required.
3. Paragraph 1 shall not apply to criminal procedures.	No implementation required.
4. Paragraphs 1, 2 and 3 shall also apply to any proceedings brought in accordance with Article 8(3).	Section 66A SDA, as amended by regulation 20
5. Member States need not apply paragraph 1 to proceedings in which it is for the court or other competent authority to investigate the facts of the case.	No implementation required.
Article 10 Victimisation Member States shall introduce into their national legal systems such measures as are necessary to protect persons from any adverse treatment or adverse consequence as a reaction to a complaint or to legal proceedings aimed at enforcing compliance with the principle of equal treatment.	Section 4 SDA (discrimination by way of victimisation).
Article 11 Dialogue with relevant stakeholders With a view to promoting the principle of equal treatment, Member States shall encourage dialogue with relevant	Relevant stakeholders have been consulted on the implementation of this Directive, including a formal public consultation on the draft Sex Discrimination Act 1975 (Amendment) Regulations 2007 between June and September

Article of Directive 2004/113/EC and objective	**Provisions transposing the Directive (Unless otherwise specified, statutory references are to the Sex Discrimination Act 1975, as amended by the Sex Discrimination Act 1975 (Amendment Regulations) 2007)**
stakeholders which have, in accordance with national law and practice, a legitimate interest in contributing to the fight against discrimination on grounds of sex in the area of access to and supply of goods and services.	2007. This formed part of a wider consultation on the Discrimination Law Review - *A Framework for Fairness*: proposals for Single Equality Bill for Great Britain. In addition the Government Equalities Office, the government department with lead responsibility for cross-government coordination on equality and discrimination matters, regularly consults and engages in dialogue with the Commission for Equality and Human Rights (and its predecessor, the Equal Opportunities Commission). Key stakeholders include the devolved administrations, local government, and groups representing the following: business (including the insurance industry), consumers, the voluntary sector, organised religions, pregnant women and new mothers, and trans-people. Further dialogue is taking place on the development of information advice and guidance. Wider proposals are being discussed as part of the proposed Equality Bill.
Article 12 1. Member States shall designate and make the necessary arrangements for a body or bodies for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on the grounds of sex. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights, or the implementation of the principle of equal treatment.	The Equality Act 2006 established the Commission for Equality and Human Rights – CEHR (operating as the Equality and Human Rights Commission - ECHR). As of October 2007 this designated body took over the role of the Equal Opportunities Commission in respect of sex discrimination matters. Section 8 of the Equality Act 2006 sets out the CEHR's duties on equality and diversity, including working towards the elimination of unlawful discrimination and harassment, promoting equality of opportunity, promoting awareness of rights and enforcing the equality enactments.
2. Member States shall ensure that the competencies of the bodies referred to in paragraph 1 include: (a) without prejudice to the rights of victims and of associations, organisations or other legal entities referred to in Article 8(3), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination;	See section 28 (legal assistance) of the Equality Act 2006 which specifies the powers of the Commission for Equality and Human Rights to an individual who alleges that he is a victim of behaviour contrary to the equality enactments.

Article of Directive 2004/113/EC and objective	**Provisions transposing the Directive (Unless otherwise specified, statutory references are to the Sex Discrimination Act 1975, as amended by the Sex Discrimination Act 1975 (Amendment Regulations) 2007)**
(b) conducting independent surveys concerning discrimination;	Section 13 (information, advice, &c) Equality Act 2006. The power to undertake "research" under section 13 Equality Act incorporates activities such as surveys, which are a form of research.
c) publishing independent reports and making recommendations on any issue relating to such discrimination.	See the following sections of the Equality Act 2006: subsection 2 of section 11 (monitoring the law), section 12 (monitoring progress), section 13 (information, advice, &c)
Article 13 Compliance Member States shall take the necessary measures to ensure that the principle of equal treatment is respected in relation to the access to and supply of goods and services within the scope of this Directive, and in particular that: (a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;	(a) The only piece of legislation, which has been identified as being contrary to the principle of equal treatment, and which is being amended as a result by regulation 22, is section 87 of the Public Health Act 1936.
(b) any contractual provisions, internal rules of undertakings, and rules governing profit-making or non-profit-making associations contrary to the principle of equal treatment are, or may be, declared null and void or are amended.	No specific implementation required.
Article 14 Penalties Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The penalties, which may comprise the payment of compensation to the victim, shall be effective, proportionate and dissuasive. Member States shall notify those provisions to the Commission by 21 December 2007 at the latest and shall notify it without delay of any subsequent amendment affecting them.	For goods and services discrimination section 66 SDA makes provision for remedies that would be obtainable in the High Court of the Court of Session as the case may be, such as an order declaring the rights of parties, an injunction or order to a specified person or body to do or cease doing specified acts; and damages.

Article of Directive 2004/113/EC and objective	**Provisions transposing the Directive (Unless otherwise specified, statutory references are to the Sex Discrimination Act 1975, as amended by the Sex Discrimination Act 1975 (Amendment Regulations) 2007)**
Article 15 Dissemination of information Member States shall take care that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force, are brought to the attention of the persons concerned by all appropriate means throughout their territory.	There has been a public consultation on the proposals for implementation of the Directive. The Government Equalities Office website will provide updates on the new legislation. The newly-established Commission for Equality and Human Rights also provides information and guidance on discrimination law.
Article 16 Reports 1. Member States shall communicate all available information concerning the application of this Directive to the Commission, by 21 December 2009. and every five years thereafter. The Commission shall draw up a summary report, which shall include a review of the current practices of Member States in relation to Article 5 with regard to the use of sex as a factor in the calculation of premiums and benefits. It shall submit this report to the European Parliament and to the Council no later 21 December 2010. Where appropriate, the Commission shall accompany its report with proposals to modify the Directive. 2. The Commission's report shall take into account the viewpoints of relevant stakeholders.	Arrangements are in hand to ensure the Commission is so notified.
Article 17 Transposition 1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 21 December 2007 at the latest. They shall forthwith communicate to the Commission the text of those provisions. When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such	The Sex Discrimination Act 1975 (Amendment) Regulations 2007 shall come into force on the fifth day after the day on which they are made or on 21 December 2007, whichever is later.

Article of Directive 2004/113/EC and objective	**Provisions transposing the Directive (Unless otherwise specified, statutory references are to the Sex Discrimination Act 1975, as amended by the Sex Discrimination Act 1975 (Amendment Regulations) 2007)**
publication of reference shall be laid down by the Member States. 2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.	

Government Equalities Office

Annex B

GB IMPLEMENTATION OF DIRECTIVE 2004/113/EC

THE SEX DISCRIMINATION ACT 1975 (AMENDMENT) REGULATIONS 2007 [SI]

IMPACT ASSESSMENT

Summary: Intervention & Options

Department /Agency:	Title:	
Government Equalities Office	**Impact Assessment of the Sex Discrimination Act 1975 (Amendment) Regulations 2007**	
Stage: Implementation	**Version:** 2	**Date:** 28 November 2007
Related Publications: Annex C of the Initial Regulatory Impact Assessment for the Discrimination Law Review Consultation paper, A Framework for Fairness (DCLG, June 2007)		

Available to view or download at:

http://www.womenandequalityunit.gov.uk

Contact for enquiries: Elizabeth Solowo-Coker **Telephone:** 020 7944 0639

What is the problem under consideration? Why is government intervention necessary?

Our existing legislation on sex discrimination in the access to and provision of goods, facilties services and premises, while comprehensive, does not fully comply with the requirements of the European Council Gender Goods and Services Directive (2004/113/EC), which must be implemented by 21 December 2007.

There is a consequent need to make some changes and clarifications to the Sex Discrimination Act 1975 to bring it into line with the precise requirements of the Directive.

What are the policy objectives and the intended effects?

To make the amendments necessary to fulfil our obligations under the Directive, while ensuring that the proposals, wherever possible, reduce existing inconsistencies and avoid creating further complexity, in line with better regulation principles. Consistency with Directive-based definitions already used for sex discrimination in employment. Some new protection on grounds of pregnancy, maternity and on gender reassignment.

What policy options have been considered? Please justify any preferred option.

Not making changes to existing legislation at this time, or deferring them to be included in the Government's proposed Equality Bill are not viable options as they would not meet the obligation on the Government to transpose the Directive by 21 December 2007.

The option being taken is to make the minimum legislative change necessary to implement the Directive.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

There is ongoing impact assessment for the proposed Equality Bill which is envisaged to absorb this legislation in due course.

Ministerial Sign-off For final proposal/implementation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.

Signed by the responsible Minister:

Harriet Harman

.....Date: 28 November 2007

Summary: Analysis & Evidence

Policy Option:	Description:

COSTS

ANNUAL COSTS	Description and scale of **key monetised costs** by 'main affected groups'
One-off (Transition) **Yrs**	Micro and small firms - familiarisation £8.57m
£ 12.73m	Medium and large firms - familiarisation £1.83m
Average Annual Cost (excluding one-off)	Public authorities - familiarisation £1.61m
£ 0.25m	**Total Cost** (PV) **£ 12.98m**

Other **key non-monetised costs** by 'main affected groups'

BENEFITS

ANNUAL BENEFITS	Description and scale of **key monetised benefits** by 'main affected groups'
One-off **Yrs**	The number of goods and services discrimination cases is too small to accurately estimate benefits.
£	
Average Annual Benefit (excluding one-off)	
£	**Total Benefit** (PV) **£ NIL**

Other **key non-monetised benefits** by 'main affected groups' There will be benefits to some people not currently subject to specific protection in the fields of goods, facilities, services and premises, e.g. on grounds of pregnancy, maternity and gender reassignment. Where protection already exists, benefits will arise from reversal of the burden of proof in favour of the claimant.

Key Assumptions/Sensitivities/Risks

Price Base Year	Time Period Years	**Net Benefit Range** (NPV) **£**	**NET BENEFIT** (NPV Best estimate) **£ NIL**

What is the geographic coverage of the policy/option?					Great Britain
On what date will the policy be implemented?					21 December 2007
Which organisation(s) will enforce the policy?					None – see Annex 1
What is the total annual cost of enforcement for these organisations?					£ N/A – see Annex 1
Does enforcement comply with Hampton principles?					N/A – see Annex 1
Will implementation go beyond minimum EU requirements?					Yes - (evidence base)
What is the value of the proposed offsetting measure per year?					£ N/A
What is the value of changes in greenhouse gas emissions?					£ N/A
Will the proposal have a significant impact on competition?					No
Annual cost (£-£) per organisation (excluding one-off)		Micro **0**	Small **0**	Medium **0**	Large **0.25**
Are any of these organisations exempt?		No	No	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices) (Increase - Decrease)

Increase of £ 0.25m Decrease of £ 0.00 **Net Impact** **£** 0.25m

Key: **Annual costs and benefits: Constant Prices** **(Net) Present Value**

Evidence Base (for summary sheets)

[Use this space (with a recommended maximum of 30 pages) to set out the evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Ensure that the information is organised in such a way as to explain clearly the summary information on the preceding pages of this form.]

For impact assessment evidence base purposes, the proposals have been summarised into 7 policy blocks (A-G), on which we have developed the options set out in the initial regulatory impact assessment published for consultation. All the options being implemented are those recommended in the consultation. In each case, doing nothing, or going significantly beyond the scope of the Directive are not viable options.

A. Indirect Sex Discrimination - use the Directive-based definition which already applies to employment and vocational training.

In broad terms, indirect sex discrimination occurs when the same policy or practice is applied to both men and women but in practice it particularly disadvantages one sex. Implementing the Directive means the Sex Discrimination Act 1975 (SDA) definition for goods and services needs to change to the European-law definition which already applies for employment and vocational training. This replaces the narrower original SDA definition which relied heavily on the use of statistical evidence to prove that indirect discrimination had occurred, and would not meet the Gender Directive's requirements. Consultation has supported this overall approach

Benefits – single, consistent definition of indirect discrimination in all areas covered by the SDA that are within scope of European discrimination law, and greater consistency with other equality legislation implementing European law. This will reduce confusion for service providers (especially those who are also employers) and users.

Costs – part of the £12.01m one-off familiarisation costs for service providers.

The alternative option, do nothing is not viable as it would not comply with the Gender Directive or provide benefits, and there may be costs associated with the UK being in breach of its EU obligations.

B. Harassment and sexual harassment – new explicit prohibitions in the supply of goods, facilities and services and the disposal or management of premises

To implement the Directive, the SDA is being amended so that harassment on grounds of sex and sexual harassment are explicitly prohibited in the supply of goods, facilities and services and the disposal or management of premises in those areas in which the Directive operates, as is already the case in employment and vocational training. EU law deems that harassment on grounds of sex and sexual harassment are forms of sex discrimination.

Since 2005, the SDA has explicitly prohibited harassment on grounds of sex and sexual harassment in employment and vocational training, in order to meet EU law. Before the 2005 change was made, UK courts had been able to interpret the SDA in a way that provided a degree of protection against sexual harassment, so the concept is not new. But this approach is no longer sufficient to comply with the Gender Directive as regards harassment in the supply of goods and services and premises.

Benefits – Provides greater legal clarity and greater consistency of protection in respect of European law obligations both within the SDA and with other strands of equality legislation. Reduces risks of confusion as to where the harassment provisions apply.

Costs – Negligible other than as part of the overall £12.01m familiarisation costs, as it is likely (though not absolutely certain) that the courts would already interpret the SDA as outlawing harassment on grounds of sex and sexual harassment in the supply of goods, facilities and

services, so making this explicit on the face of the legislation should not impose any substantial additional costs on business.

Again, the do nothing option is not viable as in A above. A third option suggested by some equality stakeholders is an extension of the provision to include third party harassment (i.e. service providers' liability in respect of discrimination and harassment between users of goods, facilities and services and premises). This would however amount to 'gold plating' of the Directive and go beyond Government's current proposals for the Equality Bill.

C: Burden of proof - extend the Sex Discrimination Act's burden of proof provision to the supply of goods, facilities and services

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

Benefits – Individuals who have been subject to unlawful sex discrimination in the supply of goods and services may be better able to prove their case. The law will be easier to understand because there would be greater consistency within the SDA as well as with other equality legislation implementing European law obligations.

Costs – Negligible other than as part of the overall £12.01m familiarisation costs. The do nothing option would not be viable as in A above.

D: Exceptions from the principle of equal treatment

The Directive contains two general exceptions from the principle of equal treatment between men and women – firstly a general provision permitting goods and services to be provided on a single sex basis if doing so is "justified by a legitimate aim and the means of achieving that aim are appropriate and necessary"; and secondly a positive action provision which permits Member States to maintain or adopt "specific measures to prevent or compensate for disadvantages linked to sex. Some existing goods, facilities and services and premises exceptions in the SDA need amendment, in so far as they relate to areas with which the Directive is concerned, to make clear that if challenged, a service provider would need to justify difference of treatment, to ensure compatibility with these exceptions in the Directive. For example, current exceptions allow different treatment for reasons of privacy and decency, or for charities and voluntary bodies that choose to promote the interests of one sex only (positive action), or for the organisation of single-sex sports events. Nevertheless, it could be argued that retaining the SDA exceptions, rather than taking the full benefit of those derogations in the Directive, is 'goldplating'.

However, consultation showed support for this approach. Comments received focussed on the workability and legal necessity of exceptions, rather than on the costs.

Benefits

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

Costs

Negligible other than as part of the overall £12.01m familiarisation costs. The requirement to justify difference of treatment will only apply to providers that restrict access according to sex, or supply their services in a different way for men and for women. Providers will need to consider whether they can justify their current arrangements as being a proportionate means of meeting a legitimate aim, and if not, they may need to review their practices. There is a very low risk that some service providers may be challenged about practices they are unable to justify.

E. Discrimination on grounds of gender reassignment

The amendments to the SDA prohibit discrimination on grounds of gender reassignment in the provision of goods, facilities and services, and the disposal or management of premises, in those areas in which the Directive operates, unless justifiable in limited circumstances, e.g. exceptions in relation to single sex services, and sport. They extend protection from discrimination which has applied in the SDA employment provisions since 1999, using the same definition/protected ground.

Consultation responses did not oppose these proposals on grounds of cost or regulatory burden, but there was opposition from Christian businesses and individuals on doctrinal grounds. On exceptions, overall consultees including the then Equal Opportunities Commission accepted that some exceptions were needed, although some responses from transsexual people and organisations queried this and took exception to the way in which the consultation paper had presented them.

Benefits

Extending protection in this way will benefit transsexual people in their access to goods, facilities and services in those areas in which the Directive operates and provide a remedy where they are subjected to unlawful discrimination or harassment. Given the small number of transsexual people the knock-on economic benefits will be small. But there may be some benefits for business in tackling discrimination – and the fear of discrimination – amongst this group of potential customers.

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

Costs

Negligible, apart from part of the overall familiarisation costs for service providers of £12.01m. Given the small number of transsexual people (around 5,000 in the UK, not all of whom will be protected from discrimination under the ‘gender reassignment’ definition used in the SDA), the costs to business are expected to be small.

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

We expect very few businesses will need to change their existing practices or policies in order to comply with the new regulations and so no costs would accrue for the majority.

F. Provide explicit protection against discrimination on grounds of pregnancy or maternity

The amendments to the SDA make it explicit that discrimination on grounds of pregnancy and maternity in the provision of goods, facilities and services is unlawful sex discrimination. These reflect the Gender Directive prohibition of direct discrimination on grounds of pregnancy or maternity. Already the SDA explicitly made it unlawful to discriminate in employment and vocational training on grounds of pregnancy and maternity leave, but there is currently no equivalent provision in respect of goods, facilities and services.

Following consultation, we have confirmed that a definition of maternity will be used, and also that direct pregnancy discrimination will be clarified for the purposes of legal certainty. This also seeks to ensure that costs to service providers do not extend beyond those for familiarisation. If the pregnancy provision had not been clarified there may have been significant unintended impact on providers from potential discrimination claims and consequent disruption to business. The impact of the maternity provision on some insurers is covered in G below.

Consultation responses varied in opinion as to the period of time a woman should be protected from maternity discrimination under the SDA, suggesting periods of time between 8-12 weeks and 2-3 years. Government has decided that protection should be provided for a period of 26 weeks from the day the baby is born. The basis for defining the maternity period by reference to a 26 week period is connected principally with the current position taken in respect of European obligations in relation to maternity leave in the employment context.

In determining the period of time during which a woman who has recently given birth should be protected, given there is no caselaw on maternity discrimination in the fields of goods, facilities and services, Government looked to caselaw on maternity leave in the employment context.

Government considered how the Equal Treatment Amendment Directive – 2002/73/EC (equal treatment between men and women in the employment field)) addresses discrimination on the grounds of maternity leave. That Directive states that less favourable treatment related to pregnancy and maternity leave within the meaning of Directive 92/85/EEC is direct sex discrimination. Directive 92/85/EEC introduces measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding. In relation to maternity leave, this Directive protects workers who have recently given birth and workers who are breastfeeding because of their vulnerability to risks to their health and safety at work. The Directive provides that such workers must be allowed a minimum of 14 weeks' unpaid maternity leave, of which two weeks are compulsory.

Government was also mindful of ECJ caselaw in the employment context which recognises the need to protect “a woman’s biological condition and the special relationship between a woman and her child over the period which follows pregnancy and childbirth”[6].

A further consideration that arose from consultation is that lengthier periods of protection would impose disproportionate burdens on business in their role as service providers. On the basis that the purpose of maternity discrimination protection is to protect a woman’s biological condition and the special period of bonding with her child following childbirth, Government considered that protection for a period of 26 weeks following childbirth would achieve this purpose.

The new direct pregnancy discrimination provision has also been modified following consultation, to include a clarification that provides that direct pregnancy discrimination would not occur where:

- a provider refuses to provide a pregnant woman with goods, facilities or services or provides them conditionally because s/he considers that by providing them there would be a risk to the woman’s health and safety because of her pregnancy, and
- it is reasonable for the provider to think this way; and

[6] Extract from ECJ decision in *Land Brandenburg v Ursula Sass* - C-284/02 ECR 2004 I-11143

- the provider operates an equivalent policy of refusing to provide or providing them conditionally to persons having other physical conditions with the goods, facilities or services where s/he considers that to do so would because of those conditions give rise to a risk to their health or safety.

The Government considers this provision is necessary to provide clarity on when a pregnant woman may be treated less favourably for legitimate health and safety reasons. It reflects existing practice by service providers, e.g. in the civil aviation sector across the EU and internationally. It responds to concerns raised about the impact of the Directive on UK airlines' existing policies on not carrying late-term pregnant women on flights (usually after 28-32 weeks of pregnancy). It would also be applicable in the case, for example, of high risk sports such as parachute or bungee jumping or rock climbing. Providers may still need to review their policies concerning pregnant women to ensure compliance. This may result in one-off costs of minor changes to procedures and guidance. The clarification should also help avoid potential costs from potential pregnancy discrimination claims that providers may otherwise face.

Benefits

The new provisions in the SDA make it clear and certain what pregnant women's and new mothers' rights and service providers' responsibilities are, and ensure compliance with our EU obligations.

Costs

Part of the overall £12.01m familiarisation costs for service providers. Otherwise small because under the SDA as it stands, it is possible that if a pregnant woman or new mother experiences less favourable treatment in relation to access to goods, facilities or services, this would be construed as unlawful indirect sex discrimination. We know of few, if any circumstances where goods facilities or service providers treat women less favourably because of their pregnancy or maternity. So for the vast majority of organisations this clarification will be cost neutral.

It is possible that women may bring more cases alleging pregnancy/maternity discrimination against service providers due to the provision and raised awareness of the new remedy of direct pregnancy/maternity discrimination, with potential resource implications for the courts and providers. However, we estimate that only between 4 and 9 gender-related goods, facilities and services discrimination cases are brought before the county courts each year, so the number of any additional cases is likely to be small.[7]

G: Insurance

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

However, the Directive also permits Member States to allow departures from this principle, provided that data are compiled, published and regularly updated which support using sex as an actuarial factor.

The SDA has an exception that allows sex to be taken into account when assessing insurance risks. Moving to unisex premiums and benefits in all cases would restrict insurers' ability to price risks efficiently. It would disadvantage both women and men by raising premium rates overall. The Directive allows departures from the unisex requirement, in line with the condition

[7] Data on the number and nature of cases of discrimination in the provision of goods, facilities and services in the courts is limited. In 2004 and 2005, the EOC received an average of 175 calls to their helpline regarding discrimination in the provision of goods, facilities and services. It is likely that only a very small proportion of these calls would result in a claim actually going to court. If we assume that 2-5% of those calls end up being brought to court, this gives an estimated 4-9 gender discrimination cases in the county court each year.

prescribed for supporting data (see (i) below).

To meet the Directive's requirements we are making three changes to the treatment of insurance in the SDA in those areas in which the Directive operates:

(i) insurers will be required to compile, publish and update data that support sex-based differentials in insurance premiums and benefits – based on guidelines issued by the Treasury;

(ii) costs relating to pregnancy and maternity must not result in differences in individuals' premiums or benefits from December 2008;

(iii) clarification of how premiums and benefits should be calculated for transsexual people, particularly people in the process of changing from one gender to another; only those with a Gender Recognition Certificate will be entitled to premiums and benefits calculated in their acquired gender.

The Directive includes a derogation which permits deferral of implementation of the ban on differences in premiums and benefits due to pregnancy and maternity costs for up to two years – December 2009. Following consultation, the Government has proposed to take advantage of this derogation by deferring the ban until 2008 as this should give the insurance industry sufficient time to introduce the necessary adaptations to their policies and systems. Not taking advantage of the full two years permitted by the Directive might be considered to be 'goldplating'

Insurers will now need to publish data either individually or collectively. To balance consistency of reporting with the flexibility to accommodate market developments and widely differing requirements for different sectors, the Treasury has issued guidance setting out the scope, form, content, timing and manner of data publication. This meets the minimum requirement on the Government to ensure that accurate data are compiled, published and regularly updated. A separate consultation response and impact assessment relating to the data publication obligation has been published by HM Treasury alongside its guidance:

http://www.hm-treasury.gov.uk/media/7/2/consult_gender_insurance_response141107.pdf

Benefits

Consumers will benefit by having access to evidence justifying proportionate differences in premiums and benefits based on sex. Insurers have discretion to publish data individually or collectively, and to adapt reports to their own circumstances based on broad reporting guidelines.

Costs

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

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

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

Pregnancy and maternity – insurance costs

The Directive imposes a specific prohibition on insurers. The costs related to pregnancy and maternity must not result in differences in individuals' premiums and benefits regardless of whether data can be produced to justify differing treatment. The Government has decided to defer the introduction of this prohibition until 21 December 2008.

Pregnancy and maternity are not insured risks. However complications arising from them are insured under some policy types. The ban is likely to have three main impacts

- travel insurers will no longer be able to exclude cover for mothers close to delivery; or load premiums for women expecting twins or a multiple birth, known medical complications and complications in previous pregnancies;
- life and other long term protection insurers will not be able to take account of pregnancy-related conditions such as hypertension in setting their terms and conditions;
- Insurers may revise their policy wordings to clarify insured and uninsured risks, for example differentiating between pregnancy costs that are excluded from cover and the costs of complications arising from pregnancy that may be included. This may extend to other policy types such as health, income and payment protection.

Under the terms of the Directive the additional one-off and on-going costs arising from the three impacts above are likely to be passed on to other policyholders. The likely increase in pregnancy and maternity-related claims will be relatively small, but the size of those claims may be big, potentially of the order of £1m according to one insurer. This may raise premium rates overall, but we cannot predict by how much.

We have consulted on whether to impose this provision on 21 December 2007 or defer it for up to two years, as permitted by the Directive.

The arguments supporting an immediate entry into force rested on the obvious benefit to expectant mothers. For deferral, the insurance industry argued that making policy changes outside the normal review and printing process would raise costs significantly (around £2.50 per policy). For example, for travel insurers alone, the costs would be around £32.5 million, increasing premiums by 8 per cent. For this reason the Government has decided to defer implementation by one year to 21 December 2008. This period will enable insurers to take legal advice, carry out repricing exercises, and update policies. We therefore believe that the costs of implementing this measure can be accommodated within insurer's normal updating process.

Familiarisation costs of the Gender Directive					
	Time Required	Unit cost	Cost per firm	Number of firms[8]	Total Cost (£m)
Micro firms	¼ hour	£27.03	£6.76	957,205	6.47
Small firms	½ hour	£27.03	£13.52	155,350	2.10
Medium & large firms	2 hours	£29.00	£58.00	31,545	1.83
Public authorities	2 hours	£29.00	£58.00	27,840	1.61
Total					12.01

Small Firms Impact Test

Small to medium sized enterprises are less likely to have procedures relating to provision of services. However, most would recognise that avoiding discrimination in any form is in line with best business practice. We do not anticipate that any action will be needed beyond the familiarisation already identified under costs above. Apart from managers reading the awareness raising literature, small businesses are unlikely to provide formal training or guidance for staff as a result of these changes. Consultation has not raised any particular issues on the impact on small business, other than the provision of guidance.

Competition Assessment

We have applied the competition filter. The Gender Directive contains provisions that impact on the insurance sector, but the approach taken for implementation avoids potential adverse impact. Following consultation we have included a clarification on pregnancy direct discrimination in response to concerns raised by UK airlines.

[8] Source: Small Business Statistics 2005

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	*Results in Evidence Base?*	*Results annexed?*
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	No	No
Sustainable Development	No	No
Carbon Assessment	No	No
Other Environment	No	No
Health Impact Assessment	No	Yes
Race Equality	No	Yes
Disability Equality	No	Yes
Gender Equality	No	Yes
Human Rights	No	Yes
Rural Proofing	No	No

Annexes

Annex 1

Consultation

Following informal consultation with key stakeholders throughout the policy development stage, meetings with them and other organisations were held between June and early September 2007. Stakeholders included the former Equal Opportunities Commission, Press for Change, a:gender, National Childbirth Trust and Breastfeeding Manifesto Coalition, and the Association of British Insurers. Meetings with other business and equality stakeholders, Christian churches and organisations were also held as part of the wider Equality Bill consultation.

Enforcement, sanctions and monitoring of individual cases

Victims of discrimination may rely on remedies provided to bring their own cases. Claims are brought in the county courts (England and Wales) and the sheriff court (Scotland). Costs differ, but a successful claimant will generally recover his/her own costs. The Courts Service does not collect data about the number of SDA complaints about goods, facilities and services that are currently brought before the county courts, but all discrimination cases brought before county courts (that is on grounds of sex, race and disability and outside the employment field) are estimated to comprise between 1% and 3% of the total number of cases brought, and, of those, we estimate that only 1 in 7 is related to sex discrimination. While there may be a slight increase in cases as a result of these changes we do not consider that they will have a significant impact on court running costs.

Monitoring and review of the law

The Equality and Human Rights Commission has a statutory duty to monitor discrimination and human rights law. In doing so the Commission may

- advise the Government about the effectiveness of the equality and human rights enactments, one of which is the SDA;
- recommend to the Government the amendment, repeal, consolidation or replication of any of the SDA;
- advise the Government or its devolved administrations in Scotland and Wales about the effect of the SDA;
- and advise the Government or its devolved administrations in Scotland and Wales about the likely effect of a proposed change to the law. This can include monitoring and investigations to ascertain the position, challenging the law by supporting individuals' cases up to and including the European Court of Justice, and advising the Government where they think amendments to legislation are necessary.

Specific Impact Tests

Health impact Assessment

The provisions on pregnancy and maternity discrimination may have cross-benefits in respect of the health of expectant and new mothers, and of their new born babies which may continue into later life. The provisions do not provide new mothers with a general right to breastfeed their new baby in public, but they may provide redress if a mother is prevented from accessing goods, facilities or services, in those areas in which the Directive operates on grounds of her maternity. The provisions on gender reassignment may also have positive impact on health of transsexual people.

Equality Impact Assessment

The Government believes that the proposals will benefit all men and women. While many of the changes are technical, they will mean that men and women will have similar rights not to be discriminated against or harassed because of sex when they are accessing goods facilities or services as they do when they are at work. There is also specific protection for people who intend to undergo, are undergoing or who have undergone gender reassignment.

This assessment considers the impact of the proposals in terms of gender (including gender reassignment), race, disability, sexual orientation, religion or belief and age. It was published in draft as part of the consultation proposals as an Annex to the Equality Impact Assessment for the Equality Bill proposals.

This measure is about gender equality, but implications for equality in all the equality strands have been thoroughly assessed as the proposals have been developed and consulted on. Full account has been taken of views expressed, and any changes needed to mitigate any potential adverse impacts have been identified.

The assessment follows the Commission for Racial Equality guidance on conducting Equality Impact Assessments. While addressing the impact of proposals on all the equality strands, it therefore also fulfils our duty, arising from section 71 of the Race Relations (Amendment) Act 2000, section 3 of the Disability Discrimination Act 2005 and sections 84 and 85 of the Equality Act 2006, to assess and consult on the likely impact of proposed policies on the promotion of race equality, equality for disabled people and gender equality.

We have analysed the likely impact of each of the proposals (A-G) including the impact on men and women and an analysis of any differential impact that could arise due to a person's race, sexual orientation, religion or belief, age or whether they are disabled or not.

A: Indirect discrimination

The proposed definition of indirect discrimination is already used in discrimination law implementing European obligations concerning race and ethnic origin, religion or belief, sexual orientation and age. For disability, there is a requirement to make reasonable adjustments to policies and practices in order to accommodate a disabled person's needs.

B: Harassment and sexual harassment

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

C: Burden of proof

If someone brings a claim of sex discrimination at work to an employment tribunal, they must provide evidence that indicates that discrimination has taken place. If the tribunal agrees the evidence could point to that discrimination being unlawful, then it falls to the employer to explain why this is not the case. The proposal is to make clear that this approach should be followed by the courts when they are considering complaints of sex discrimination in access to, or the supply of, goods and services in those areas in which the Directive operates.

The principle that men and women should be treated equally when they buy goods or make use of services is generally well understood and followed. Consequently, sex discrimination cases of this type are rare. Nevertheless, such discrimination when it does occur can be difficult to prove because the claimant is unlikely to have access to sufficient information about the reasons for the defendant's behaviour. This shift in the burden of proof to the supplier of goods and services after the claimant has made a basic case will ensure that a person who considers that they have been discriminated against because of their sex will not face as many hurdles in producing evidence to prove their case.

D: Exceptions

The Gender Directive, like the SDA recognises that there can be circumstances when it is appropriate to restrict services to only women or only men. They both state that such differences of treatment may not be unlawful, but they do so in different ways. The Gender Directive does not specify the type of service that is or is not unlawful but provides a test that the provision of a service to one sex must be justified by "a legitimate aim" and the means of achieving that aim must be "appropriate and necessary". The SDA contains a number of provisions that focus either on different types of circumstance, or on the conditions which have to be met, before differences of treatment on the basis of sex can be lawful.

For instance, exceptions under the SDA allow for separate services to be provided for men and women for reasons of decency or to meet the specific objectives of voluntary bodies or registered charities that have been set up to address the needs or interests of one sex only. This means that it is possible for services to be provided for the specific needs of men and women which take account of their race, religion or belief, disability, sexual orientation or age. In particular, cultural or ethnic backgrounds and religious views can be catered for in the provision of services.

We will maintain the current focussed approach to exceptions because it limits the circumstances when it would be lawful to treat men and women differently. If challenged, service providers will need to justify their policies.

The amendments made to the existing exceptions for charities and voluntary bodies following consultation, implementing Article 6 of the Directive (positive action) are wholly positive for women.

E: Gender Reassignment

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

F: Pregnancy and Maternity

The changes will be wholly positive for pregnant women and new mothers. As the law currently stands, less favourable treatment for reasons related to pregnancy and maternity may constitute

indirect sex discrimination (there is no express protection from pregnancy discrimination in the goods and services field, or maternity discrimination). The Directive specifically states that less favourable treatment of women for reasons of pregnancy and maternity constitutes direct discrimination and so we propose to amend the SDA to provide explicit protection for pregnant women and new mothers in the field of goods, facilities and services.

G: Insurance

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

The Government proposes to make it a legal requirement that actuarial data are published so that men and women can see more easily whether there is a reason for any difference in premiums and benefits for men or women. If the Government had taken up the option of making any sex-based differences unlawful, it would have meant that premiums for both men and women would become more expensive.

The use of the derogation in the Directive to defer the ban on differences due to pregnancy and maternity costs for one year (rather than two) responds to the consultation and strikes a balance between positive impact on gender equality and imposing significant cost on insurers which would have been passed on to all consumers.

Human Rights

The provisions of the Sex Discrimination Act 1975 (Amendment) Regulations 2007 are compatible with the European Convention on Human Rights.