EXPLANATORY MEMORANDUM TO THE

GENDER RECOGNITION (DISCLOSURE OF INFORMATION) (ENGLAND, WALES AND NORTHERN IRELAND) ORDER 2005

2005 No. 635

1. This Explanatory Memorandum has been prepared by the Department for Constitutional Affairs and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Description

2.1 This instrument prescribes further circumstances in which disclosure of "protected information" about a person's gender history is not an offence under section 22 of the Gender Recognition Act 2004 ("the Act").

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

3.1 None.

4. Legislative Background

4.1 Section 22 of the Gender Recognition Act 2004 ("the Act") provides that it is an offence for person who has acquired protected information in an official capacity to disclose the information to any other person. "Protected information" is defined in section 22(2) as information relating to a person who has applied for a gender recognition certificate under the Act, and which concerns that application (or a subsequent application by them), or their gender prior to being granted a full gender recognition certificate. Section 22(3) defines where a person acquires protected information "in an official capacity".

4.2 Section 22(4) sets out certain circumstances where disclosure of protected information does not constitute an offence (for example, where person to whom the information relates is not identifiable, or has agreed to the disclosure). This Order prescribes additional circumstances where the disclosure of protected information does not constitute an offence. These concern disclosure for the purpose of obtaining legal advice (article 3), disclosure for religious purposes (article 4) or medical purposes (article 5), disclosure by or on behalf of a credit reference agency (article 6) and disclosure for purposes in relation to insolvency or bankruptcy (article 7).

4.3 Section 22 of the Act comes into force on 4 April 2005 by virtue of the Gender Recognition Act 2004 (Commencement) Order 2005 S.I. 2005/54 (C.2). This instrument is made in advance of that date in reliance on section 13 of the Interpretation Act 1978. It is the first exercise of the power in section 22(5).

5. Extent

5.1 This instrument extends to England and Wales and Northern Ireland. Section 22(6) of the Act provides that the power in section 22(5) is exercisable by the Scottish Ministers (rather than the Secretary of State) where the provision to be made is within the legislative competence of the Scottish Parliament. The circumstances in which a criminal offence applies in Scotland is a devolved matter.

6. European Convention on Human Rights

6.1 The Parliamentary Under-Secretary of State, Baroness Ashton, has made the following statement regarding Human Rights:

"In my view the provisions of the Gender Recognition (Disclosure of Information) (England, Wales and Northern Ireland) Order 2005 are compatible with the Convention rights."

7. Policy objectives

7.1 Section 22 of the Act is designed to protect the privacy rights of transsexual people under Article 8 of the European Convention on Human Rights by criminalising the disclosure of information relating to their gender history by a person who acquired that information in an official capacity. Section 22 already sets out a series of exceptions, where disclosure is considered to be justified. This Order sets out a series of additional circumstances in which disclosure is not to constitute an offence.

7.2 Article 3 contains an exception allowing disclosure for the purpose of obtaining legal advice. This complements the exception in section 22(4)(e) (disclosure for the purpose of legal proceedings) by ensuring that those in receipt of protected information are able to obtain legal advice. This will assist them in being able to comply properly with the law, for example with the requirements of the Act, or the law on discrimination.

7.3 Article 4 allows disclosure by a person who acquired the protected information in an official capacity in relation to an organised religion, for the purpose of enabling any person to make certain decisions in connection with such a religion. Examples will be a decision on whether to officiate at or permit the marriage of the person to whom the information relates (defined as "the subject" in article 2), or whether to admit or appoint that person as a minister of religion. In certain

cases this is subject to the person making the disclosure holding the reasonable belief that the person to whom they disclose the information may need it in order to reach a decision which complies with the doctrines of religion or avoids conflicting with the strongly held convictions of a significant number of its followers.

7.4 The exceptions in this article are intended to protect rights under Article 9 of the European Convention on Human Rights (freedom to hold and manifest belief). For example the Act entitles clergy in England and Wales to refuse to solemnise a marriage of a person if the clergyman reasonably believes that person's gender has become the acquired gender under the Act (see the Fifth Progress Report of the Joint Committee on Human Rights). By permitting the disclosure of protected information to enable decisions of this kind to be made, subject to appropriate safeguards, the Order enables this right to be exercised in practice, whilst ensuring that the resulting interference with the rights of transsexual people is proportionate and justified. Article 4 is, however, drafted in a way which is appropriate to all organised religions, not just the Church of England and the Church in Wales, so as to respect the diversity of religious faiths.

7.5 Article 5 concerns disclosure for medical purposes. The policy objective is to protect the health of transsexual people who are unable to give consent for disclosure, for example in a medical emergency. It is also to ensure that health professionals do not commit an offence when treating a transsexual person where they have a reasonable belief that the transsexual person has either given consent or cannot give consent to the disclosure. The definitions of "medical purposes" and of "health professional" are narrower than similar definitions in the Data Protection Act 1998 in order to allow disclosure only where necessary and give proper protection to transsexual people's privacy.

7.6 Article 6 permits disclosure by or on behalf of a credit reference agency of information contained in a court or tribunal order (which includes bankruptcy orders and judgments against debtors). The purpose is to allow the disclosure of key elements of the credit history of people who change gender. Requiring the credit reference agency also to disclose the fact that a gender recognition certificate has been issued (where they have been informed of that information). The effect of including this information is that the person to whom the disclosure is made will not be able to disclose the information to a third person in reliance on section 22(4)(c) of the Act (which permits disclosure where the person making it does not know or believe that a full gender recognition certificate has been issued).

7.7 Article 7 permits disclosure for purposes connected with insolvency or bankruptcy. The investigative work of the IS does not come under any of the exceptions in the Act but the trustee may need legitimately to disclose the identity of an uncooperative bankrupt in order to realise his assets and perform his statutory duties i.e. where someone is bankrupt in the new identity but shifted

assets in their old name. Section 22(4)(j) (which permits disclosure when it is made in accordance with any provision of, or by virtue of, an enactment other than this section) cannot be applied because the disclosure is too remote from the statutory scheme, especially if the trustee in bankruptcy is not the "official receiver" because he does not have a statutory duty to "investigate" the bankrupt but merely to realise assets of the bankrupt. The disposal of assets may well not be a "crime" so section 22(4)(f) (disclosure for the purpose of preventing or investigating crime) does not apply, and the matters come after a bankruptcy order is made: thus section 22(4)(e) (disclosure for the purpose of instituting, or otherwise for the purposes of, proceedings before a court or tribunal) cannot be applied.

7.8 A list of those included in the consulted exercise is attached. Over 200 responses were received, by far the majority being from individuals responding to the disclosure for religious purposes. Many of the faith groups made detailed submissions, and DCA officials met with officials of most of those organisations to clarify the issues raised. Our response to the consultation process has been to move from a position of two exceptions in the consultation draft, for the purpose of marriage, and for ordination and appointment, to the exceptions outlined above. Changes made to other exceptions as a result of consultation were minor drafting changes.

8. Impact

8.1 A Regulatory Impact Assessment has not been prepared because it is not considered that there will be any impact on charities and voluntary bodies. By providing additional circumstances where a person who acquired protected information in an official capacity will be permitted to disclose that information, this instrument will reduce the impact of section 22 of the Act on the only business specifically targeted in the instrument, but not by any quantifiable amount.

8.2 There is no impact on the public sector other than the exceptions will assist the investigative work of the Insolvency Service, and health professionals will be able to disclose protected information without concern or delay. These are not quantifiable benefits.

8.3 It is estimated that there may only be 5,000 transsexual people across the UK.

9. Contact

9.1 Ann Holland at the Department for Constitutional Affairs (0207 210 1421 or ann.holland@dca.gsi.gov.uk) can answer any queries regarding the instrument.