EXPLANATORY MEMORANDUM TO

THE EMPLOYMENT EQUALITY (SEX DISCRIMINATION) REGULATIONS 2005

2005 No. 2467

1. This Explanatory Memorandum has been prepared by The Department of Trade and Industry and is laid before Parliament by Command of Her Majesty.

2. Description

2.1 The Employment Equality (Sex Discrimination) Regulations 2005 amend the Sex Discrimination Act 1975 and Equal Pay Act 1970 so that they are compatible with the requirements of European legislation.

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

3.1 None

4. Legislative Background

4.1 This instrument implements Directive 2002/73/EC in Great Britain – a Transposition Note is attached at Annex A. Directive 2002/73/EC updates the original Equal Treatment Directive (76/207/EEC) which established the European Community principle of equal treatment for men and women with regard to access to employment, vocational training, promotion and working conditions.

4.2 In Great Britain, we already have the Sex Discrimination Act and Equal Pay Act in place to protect people from discrimination on grounds of sex. However, we have had to make some amendments to these Acts so that they are consistent with the Directive. The main principles which Directive 2002/73 requires Member States to transpose have their equivalents in the Race and Employment Directives (Directives 2000/43 and 2000/78 respectively). Where appropriate, we have taken the same or a similar approach to implementation of Directive 2002/73 as was taken when implementing the Race and Employment Directives.

4.3 Principles common to these three Directives are the definitions of direct and indirect discrimination and harassment. There are key concepts which apply to Directive 2002/73 only. These are sexual harassment - a different concept to harassment on the ground of sex - and discrimination by way of less favourable treatment because of pregnancy and maternity leave.

4.4 Section 80 of the Sex Discrimination Act makes provisions for the Act to be amended by an order which has been approved by each House of Parliament. We have, however, made these regulations using the powers under section 2(2) of the European Communities Act 1972. We have used the negative resolution Parliamentary procedure because a) the amendments needed to implement the amended Equal Treatment Directive are relatively few, b) the principles common to Directives 2002/73, 2000/43 and 2000/78 were debated in both Houses in 2003 (when regulations implementing Directives 2000/43 and 2000/78 were laid

before Parliament, and c) the amendments will have little substantive impact on employers or individuals other than to increase the clarity of the Act.

4.5 The scrutiny history of Directive 2002/73/EC is as follows:

House of Commons

Explanatory Memorandum (**EM) 10382/00** (21473) of 28 September 2000 on a Proposal for a Directive of the European Parliament and of the Council amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions was considered by the House of Commons European Scrutiny Committee on 1 October 2000 and again on 17 January 2001.

On 2 May 2001 the European Scrutiny Committee reconsidered **EM 10382/00** (21473) on the basis of a letter dated 11 April 2001 from the Minister Ms Tessa Jowell to the House of Lords European Union Select Committee.

On 13 February 2002 a debate was held in the Commons European Standing Committee.

The European Scrutiny Committee cleared the text of the Directive at its meeting on 12 June 2002.

House of Lords

EM 10382/00 was considered by the House of Lords European Union Select Committee on 3 October 2000 and referred to Sub-Committee F. A letter dated 25 October 2000 was sent to Ms Jowell requesting further information (Progress of Scrutiny 27 October 2000, Session 2000-2001).

Ms Jowell replied in a letter dated 4 December 2000. The European Union Select Committee subsequently requested further information in letters dated 24 January and 21 February 2001.

Ms Jowell replied in a letter dated 11 April 2001. **EM 10382/00** was subsequently cleared without report (Progress of Scrutiny 2 May 2001, Session 2000-2001).

Both Houses of Parliament

Ms Jowell sent a letter to the leaders of both Houses dated 4 June 2001, stating that, if a satisfactory text could be achieved, the Government intended to agree the proposal at the Employment and Social Affairs Council on 11 June.

An Explanatory Memorandum was sent on 7 January 2002 to both Committees explaining the implications of the Commission's comments on the European Parliament's amendments to the Common Position.

On 8 May 2002: Minister Barbara Roche wrote to the Chairmen of both Committees updating them on the satisfactory outcome of the Conciliation process.

On 30 May 2002, Ms Patricia Hewitt, the Secretary of State for Trade and Industry, wrote to the Chairmen of both Committees providing a text of the Directive issued by the Jurists-Linguists and an Explanatory Memorandum.

5. Extent

5.1 This instrument applies to Great Britain.

6. European Convention on Human Rights

6.1 Alun Michael, Minister of State for Industry and the Regions, has made the following statement regarding Human Rights:

6.2 In my view the provisions of the Employment Equality (Sex Discrimination) Regulations 2005 are compatible with the Convention rights.

7. Policy background

7.1 Directive 2002/73/EC amends the provisions of Directive 76/207/EC on the European Community principle of equal treatment for men and women with regard to access to employment, vocational training, promotion and working conditions. Directive 2002/73 was amended to incorporate changes to the Treaty and ECJ case law. The Sex Discrimination Act 1975 and the Equal Pay Act 1970, which apply to women and men, are the main two pieces of legislation in Great Britain which make provision relating to discrimination on the grounds of sex.

7.2 The Employment Equality (Sex Discrimination) Regulations 2005 make a small number of changes to the existing provisions of the Sex Discrimination Act, Equal Pay Act and other domestic legislation to make them compatible with Directive 2002/73.

7.3 A public consultation ran from 7 March to 31 May 2005. The consultation package was distributed widely and made readily available on Government website and through stakeholder networks. The number of responses to public consultation on the draft regulations was reasonable (76) and ranged through employer organisations, trade unions and similar, local authorities, legal organisations, religious and other belief organisations and individuals. Strong views were expressed by key stakeholders in the area of sex discrimination. These are the Equal Opportunities Commission (EOC) – who have a statutory duty to review the working of the Sex Discrimination Act and Equal Pay Act – the Trades Union Congress (TUC) and the Confederation of British Industry.

7.4 The main issues on which these stakeholders raised views which diverged from our proposals are: definitions of direct and indirect discrimination; sexual harassment and harassment on the ground of sex, the Directive's provisions on pregnancy and maternity leave discrimination; territorial extent, namely the geographical scope of the regulations; and the extent to which the Directive amends the Equal Pay Act. The TUC and EOC have a different interpretation to the Government of the requirements of the Directive, and so made representations on these points to the DTI during pre-consultation activity, and raised them again in the press after the public consultation was launched. Although we have amended some of the drafting of the regulations in light of consultation responses, we have not changed the basis of the proposals on which we consulted.

7.5 A full analysis of the consultation can be found in "Equality and Diversity: Updating the Sex Discrimination Act: Government Response to Consultation" which is on the Department of Trade and Industry's Women and Equality Unit

website - http://www.womenandequalityunit.gov.uk/publications/etadgovtresponse.doc

7.6 This instrument is required to come into force to meet the European Commission transposition deadline of 5 October 2005.

8. Impact

8.1 A Regulatory Impact Assessment is attached to this memorandum. Copies are available to the public, free of charge, from the Women and Equality Unit, 3rd Floor, Department of Trade and Industry, 1 Victoria Street, London SW1H 0ET. Copies will also be placed in both Houses of Parliament.

8.2 The impact on the public sector is minimal. The purpose of this instrument is to clarify the law and should result in few changes having to be made by employers.

9. Contact

Elizabeth Solowo-Coker at the Department of Trade and Industry Tel: 020 7215 6788 or e-mail: elizabeth.solowo-coker@dti.gsi.gov.uk can answer any queries regarding the instrument.

ANNEX B

EXPLANATORY MEMORANDUM TO

THE EMPLOYMENT EQUALITY (SEX DISCRIMINATION) REGULATIONS 2005:

REGULATORY IMPACT ASSESSMENT

URN 05/854

Full Regulatory
Impact Assessment

dti

Implementation of the amended Equal Treatment Directive – 2002/73/EC (ETAD)

September 2005

Purpose and intended effect of measure

The objective

The overall objective is to work towards gender equality in Great Britain.
The intended effect is to:

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

Proposals extend to England, Scotland and Wales only. Separate legislation has been drafted in Northern Ireland to comply with the Directive.

Background

The 1976 Equal Treatment Directive (76/207) established the European Community (EC) framework of equal treatment for men and women with regard to access to employment, vocational training, promotion and working conditions. The Equal Treatment Directive has now been amended by Directive 2002/73 (ETAD). ETAD was published on 5 October 2002 and must be implemented by Member States by 5 October 2005.
A small number of existing provisions of the Sex Discrimination Act 1975 (SDA) and the Equal Pay Act 1970 (EPA) have had to be amended or repealed, and a few new provisions added, to comply with ETAD.

Rationale for government intervention

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

The framework comprises three Directives:

- The Race Directive (2000) is the most extensive in scope. It prohibits race discrimination in employment and training, the provision of goods and services (including housing), education and social protection.
- The Employment Directive (2000) covers employment and vocational training only. It prohibits discrimination on grounds of sexual orientation, religion or belief, disability and age.
- The Equal Treatment Directive (1976) prohibits sex discrimination in the fields of employment and vocational training only. An amendment to the Directive – 2002/73 - was published on 5 October 2002 and must be implemented by Member States by 5 October 2005.

In Great Britain, we already have legislation in place to protect people from discrimination on grounds of sex: the SDA and the Equal Pay Act 1970 (EPA). However, we need to make some amendments to the SDA and EPA so that they are consistent with European law, though there will be no fundamental change in our approach.

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

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

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

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

Consultation

In October 2002, Government consulted in ‘Equality and Diversity: The Way Ahead’ on the main concepts that apply to the different discrimination strands (sex, race,

disability, sexual orientation, religion or belief and age). This consultation also sought views on pregnancy discrimination and sexual harassment[1].

From the early stages of development of our policy proposals, we consulted with other policy makers across the DTI and in other government departments where they had a policy interest. We also engaged external stakeholders at an early stage where their expertise and particular knowledge was essential to the development of well-informed proposals.

In November 2004, a specific consultation meeting was held with the EOC who have a statutory duty to keep under review the working of the SDA and the EPA.

This was followed up in January 2005 by a consultation meeting with a small number of key stakeholders – the EOC together with national organisations representing employers, employees and trades unions. A public consultation, which sought views on draft regulations to implement ETAD, ran from 7 March to 31 May 2005. A Government Response was published on 31 August 2005 and can be downloaded from the DTI's Women and Equality Unit website.

Options

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

a. leave domestic legislation unchanged because it is compatible with and satisfies the requirements of ETAD;
b. amend domestic legislation where necessary in order to comply with ETAD;
c. supplement domestic legislation to clarify how the law already stands as a result of case law (in such circumstances, domestic legislation already complies with ETAD); or
d. repeal provisions of domestic legislation that do not comply with ETAD.

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

Costs and benefits

Sectors affected

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

Benefits

The benefits associated with each individual policy option are discussed under the relevant policy headings that follow. However, in terms of overall benefits, implementation of ETAD will lead to increased legal clarity, by incorporating the principles set out in existing ECJ case law in GB legislation. Employers and workers will benefit from greater coherence across discrimination law. Explicit reference in legislation to areas of sex discrimination where case law already applies will lead to greater legal clarity.

The changes proposed to the SDA and EPA do not alter fundamentally the way the law works in practice. The number of changes proposed is relatively small. Where the purpose of these changes is to clarify existing case law and what already happens

[1] There were almost 150 responses on pregnancy discrimination and harassment. On pregnancy, 78% of respondents were in favour of putting pregnancy and maternity leave discrimination on the face of the SDA. 69% expressed a range of views on what constitutes sexual harassment and what conduct it might cover.

in Employment Tribunals, the new information that employees and individuals need to know about is modest.

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

Costs

There will be a cost to employers and to providers of vocational guidance, training and practical work experience, in terms of familiarising themselves with the legislation and associated guidance. An assessment of these costs follows on from the options analysis under each individual policy area.

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

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

Overarching implementation costs

Reading and Understanding Guidance

Employers will need to be made aware of the nature of the changes being introduced. The format of the guidance, and the method of communicating it, will naturally help determine the response by employers.

The changes to domestic legislation as a result of the ETAD are fairly minor, and are mainly of a technical nature. An explanation of the changes made to sex discrimination legislation is available electronically on the DTI's Women and Equality Unit website - http://www.womenandequalityunit.gov.uk/legislation/index.htm. In addition, a simple, plain English, one-page guide explaining the impact of the legislative changes on small businesses, in an easy-to-understand format, is on the BusinessLink website. This is, and will remain, in the form of a Regulation Update until the end of November 2005 when it will be absorbed into the mainstream content of the website.

In addition, Acas is updating its advice leaflets on bullying and harassment in the workplace to provide practical examples to help employers and workers familiarise themselves with their obligations and rights. *Bullying and Harassment at Work: a Guide for Managers and Employers (ACAS/AL04); Bullying and Harassment at work; Guidance for Employees (ACAS/AL05).*

There will be a small cost to a manager in each business or organisation of reading and understanding this guidance which explains the law. We assume that small employers in Great Britain, and partnerships with no employees (also potentially affected by the legislation), will spend 10-15 minutes reading guidance, at a total cost of between £6.3 million and £9.5 million.[2]

[2] From Small Business Service data for 2003, we estimate that there are 1.2 million employers with less than 50 employees in Great Britain, and approximately 0.3 million partnerships with no employees. The average hourly earnings of a manager/senior official are £19.28 (New Earnings Survey 2003). We have increased this by a factor of 1.3 to reflect non-wage costs, and based our costs on 10-15 minutes of their time. 19.28*1.3=£25.06 for wage and non-wage costs. (25.06/6 * 1.5 million) = £6.3 million and (25.06/4*1.5 million) = £9.5 million.

We assume that in medium and large employers, and also trade union headquarters, an equivalent manager will spend 20-30 minutes reading the guidance, at a cost of between £303,000 and £454,000.[3] Costs are likely to vary significantly.
Thus we expect the total cost to business of familiarising themselves with the guidance to be between £6.6 million and £10 million.

Costs to the Exchequer

The associated guidance will be available online and key stakeholders will be notified by email.

Direct Discrimination: ETAD defines direct discrimination as ''where one person is treated less favourably on grounds of sex than another is, has been, or would be treated, in a comparable situation.'' The SDA defines direct discrimination as less favourable treatment ''on the ground of her sex.''[4] Although the phrase " on grounds of sex" is used in the English text of ETAD, we do not consider that this was chosen deliberately. Some other language versions of the text use the possessive adjective, for example "en raison de son sexe" in the French version.

Option 1: Change the SDA definition to 'on grounds of sex.'
Benefits: This would broaden the definition of direct discrimination to cover less favourable treatment because of association with someone of a particular sex, or false assumption of the victim's sex. For example, unfavourable treatment of a worker because their brother had undergone gender reassignment. This approach would also bring about consistency with the definition in the Race Relations Act, and the 2003 regulations on sexual orientation and religion or belief.
Costs: Broadening the definition would enable people who currently cannot bring a claim of sex discrimination to do so, which could lead to an increase in tribunal costs. However we believe the increase in the number of direct discrimination cases would be minimal. We are aware of only two cases brought because of direct discrimination based on 'perception' or 'association' – one under the sexual orientation and one under the religion or belief legislation.
Risk: This change would only apply to employment and vocational training. Therefore, there would be two definitions of direct discrimination across the SDA; the new one would apply to employment and vocational training, and the existing one to education, goods, facilities, services and premises. This could cause confusion for those considering application of the law.
Option 2: Retain the existing SDA definition.
Benefits: This would ensure that the single familiar definition of direct discrimination continues to apply throughout the SDA.

Costs: None. The current legislation would be unchanged.

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

Recommendation: option 2 (retain existing SDA definition)

[3] There are an estimated 36,033 medium and large employers in Great Britain (Small Business Service data 2003) and around 200 trade unions (Certification Office Annual Report 2003/04) (£25.06/3*36,250) = £303,000 and (£25.06/2*36,250) = £454,000
[4] Because the Sex Discrimination Act (SDA) and Equal Pay Act (EPA) do not use gender-neutral language, the greater part of this document is written in terms of discrimination against women. However, it should be noted that the SDA and EPA apply equally to men and women, so, for the most part, references in this document to sex discrimination against women should be read as applying equally to men.

The lack of evidence on discrimination experienced because of the victim's association with someone of a particular sex, or false assumption of the victim's sex, suggests that making this amendment to the SDA would be disproportionate to the extent of any problem. Thus the benefits would be insufficient to justify a change which would additionally generate confusion resulting from two definitions of direct discrimination across the SDA.

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

Option: Amend the SDA definition[5].
Benefits: This would lead to consistency with other equality legislation which would in turn benefit employers and workers and ensure that the protection for different areas of discrimination is comparable.[6]
Costs: When the SDA definition of indirect discrimination was broadened with the implementation of the Burden of Proof Directive in 2001, legal opinion suggested that the change would make very little difference in practice to the way in which sex discrimination cases are decided in Great Britain. Acas confirms that British case law had generally been in line with the Burden of Proof Directive (97/80) before its implementation. This case law has long ensured that once a worker establishes that there has been a discriminatory set of circumstances, the onus shifts to the employer to provide evidence that there was a non-discriminatory reason for the act about which the worker has a complaint. There have therefore not been significant practical changes in the way cases have been decided since the regulations implementing the Burden of Proof Directive came into force. Whilst we are proposing to broaden the definition again, the extent of the broadening is significantly less than was the case in 2001.
Risks: Amending the definition again would draw attention again (as it did when we implemented the Burden of Proof Directive) to the different definitions of indirect discrimination that apply across the SDA.
Recommendation: (amend SDA definition)
Adopting this approach is the only viable option because the current definition does not transpose ETAD definition into GB legislation. Not to do this would lead to the European Commission bringing infraction proceedings against the UK.

Territorial Extent: The SDA covers discrimination against applicants and employees but is limited to recruitment for, or employment at 'an establishment in Great Britain.' However, where a worker is posted to another EU Member State they also have protection against discrimination and other employment rights under the Posted Workers Directive. Protection under section 10 of the SDA applies unless the employee does his work wholly outside Great Britain, and outlines special provisions for those working on ships, aircraft, marine oil rigs etc.

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[5] Further information about the amended definition of indirect discrimination can be found in "Equality and Diversity: Updating the Sex Discrimination Act – Government Response to Consultation" on the DTI's Women and Equality Unit website.
[6] Responses to the Article 13 consultation, 'Equality and Diversity: the way ahead' (2002/03) indicated that 70% of respondents preferred a coherent approach.

The meaning of the phrase ‘employment at an establishment in Great Britain’ in section 10 of the SDA also applies for the purposes of section 1 of the EPA. Therefore, providing section 10 of the SDA is amended, it will not be necessary to amend the face of the EPA, but protection will include pay discrimination.

ETAD is silent on the issue of territorial extent – as is the case in the Article 13 Race and Employment Directives. The 2003 regulations implementing strands of the Article 13 Directives extended the application of these regulations further than in the SDA to include employment wholly outside Great Britain in the following specific circumstances:

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

Option 1: Amend the SDA and EPA adopting the approach above.

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

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

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

Option 2: Retain the existing SDA definition.

Benefits: No disruption to employers.

Costs: None identified.

Risks: A high risk of legal challenge.

Recommendation: Option 1 (extend application of SDA and EPA)

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

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

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

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

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

Costs: We are not aware of any such cases having been brought under the SDA. While under current law such an individual would not be protected by the SDA, they may be able to claim constructive unfair dismissal, although we believe the costs under this option would be negligible. In addition, offering a means of resolving such sex discrimination cases, to individuals who have already left the workplace, would be contrary to the dispute resolution approach introduced in the Employment Act 2002.

Risks: An increase in the number of sex discrimination cases made following resignation. The usual employer costs of handling such an allegation would be involved.[7]

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

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

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

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

Option 3: Retain the existing SDA definition.

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

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

Risks: A risk that we could be challenged for not implementing ETAD effectively. We consider this risk to be low, as did the Department for Work and Pensions and the Home Office when amending legislation on disability and race discrimination respectively in 2003,.

Recommendation: Option 3 (retain existing SDA definition)

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

[7] The average cost associated with a discrimination-related employment tribunal to an employer is approximately £4,750, estimated from the Survey of Employment Tribunals (SETA) 2003. The average marginal cost to the Employment Tribunal Service of a hearing is estimated to be around £1,300.

Vocational Training: in broad terms, ETAD requires the UK to amend the SDA so as to explicitly prohibit discrimination, harassment and sexual harassment in vocational training, vocational guidance, and practical work experience. ETAD's definition of vocational training is wider than the SDA's current definition, requiring the SDA to be amended to include vocational guidance and unpaid practical work experience as well as paid. However, ETAD does not extend to general education so none of the amendments to the SDA will apply to schools, and 'practical work experience' in the Government's amendment will not include short spells of what is often called "work experience" undertaken by school pupils.
The current SDA exemption for further or higher education institutions with regard to courses in physical education, allows for discrimination both in terms of single-sex access to such courses and discrimination against those attending such courses. This exemption will be repealed as a result of ETAD.
Business sectors affected: Primarily public sector bodies, notably further education and higher education institutions. There are around 450 further education institutions (FEIs) and 150 higher education institutions (HEIs), but DfES are not aware of any such discrimination taking place in HEIs or FEIs. Businesses that discriminate when providing unpaid practical work experience will be prohibited from doing so once the SDA is amended; currently this would only be unlawful for those providing paid practical work experience.
Option 1: Amend the SDA only where necessary to take account of the vocational training provisions.

Benefits: This option should limit the necessary adjustment by organisations concerned, and avoid claims that the UK has gone beyond its powers under the European Communities Act. It would also make the coverage of vocational training provisions broadly consistent with those under the Employment and Race Directives.
Costs: It is already unlawful for such providers to discriminate in respect of paid work experience, thus we anticipate that applying the same law to unpaid work experience should only affect a very small number of providers.

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

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

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

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

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

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

Option 3: Retain the existing SDA definition.

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

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

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

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

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

Single-Sex Admissions and Academic Posts in Single-Sex Colleges: The Employment Act 1989 provides an exemption from the SDA in relation to employment of any academic staff at any college in a university where the instrument of government requires that the post holder should be a woman. It applies only to those instruments that took effect before the section came into force. The SDA provide s an exemption which allows pupils or students of one sex only to be admitted to single-sex establishments.

The single-sex provision in Oxbridge colleges was developed to counteract the less advantageous position of women staff in Oxford and Cambridge universities as a whole. In Oxford only 8.6% of statutory professors, 15% of readers and 23% of lecturers are women[8]. In Cambridge 10% of professors, 19% of readers and 30% of lecturers are women[9]. More widely in higher education, even though women are forming an ever-rising proportion of the workforce, they are still proportionally over-

[8] (Source: University of Oxford July 2004).
[9] (Source: University of Cambridge October 2004).

represented in the lower grades. Women make up 38% of all academic staff; they constitute approximately 8% of vice-chancellors and only 14% of the total number of professors and 26% of senior lecturers[10].

On the face of it, these exemptions appear to run counter to what ETAD (and indeed the original 1976 Equal Treatment Directive) requires unless it can be justified under the positive action provision of Article 2(8) of ETAD[11].

Business sectors affected: Single-sex colleges within universities in Great Britain, recruiting only women to academic posts. Oxford University has one such college, and Cambridge University has three.

Option 1: Repeal section 5(3) of the Employment Act and section 26 of the SDA.

Benefits: This would ensure that we fully implement ETAD, and avoid legal challenges for not doing so. While the single-sex colleges do employ men, only women can serve on the Governing Bodies and only women can be head of the college. Males wishing to take up these roles would benefit if section 5(3) was repealed.

Costs: The four single-sex colleges would incur a limited cost in terms of adjusting their recruitment policies and related guidance. There could also be a potential withdrawal of funding to these colleges if such funding was provided on the basis that only women are appointed to academic posts.

Risks: Opposition from single-sex colleges on the basis that the current exemptions assist in addressing inequalities among male and female staff in higher education. Historically, section 5(3) of the Employment Act (1989) was incorporated into the Employment Act after the single-sex colleges of Oxford and Cambridge brought a challenge.

Option 2: Retain section 5(3) of the Employment Act and section 26 of the SDA.

Benefits: The colleges concerned would not need to adjust to a change in the legislation, and could continue to make a positive contribution to addressing inequalities in higher education for female academics.

Costs: Sex discrimination with respect to recruitment of academic staff in a limited number of single-sex colleges would continue. In the event of successful legal challenge, these colleges may incur case costs and the Government could be liable for damages.

Risks: The ETAD makes no amendments to the original Equal Treatment Directive's provisions which relate to the subject matter of section 5(3). If someone sought to challenge the compatibility of section 5(3) with the Directive, they would accordingly be challenging the provisions of the ETD, which was implemented in the 1970s. We consider, therefore, that the risk of legal challenge is low. Furthermore, and in any event, we consider that this is a positive action which is consistent with Article 2(8) of the ETAD.

Recommendation: Option 2

We recommend retaining section 5(3) of the Employment Act 1989 because we consider it assists in addressing inequalities experienced by academic women. As there are comparable opportunities for men - staff and students - in other Oxbridge

[10] Data source the Higher Education Statistics Agency 2002/03.

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

colleges and in wider higher education, we do not see this provision as leading to disadvantages for men in the sector.

Equal Opportunities Commission (EOC) - Statutory Powers: The ETAD requires promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on the ground of sex.
The EOC has powers under the SDA which enable them to work towards the elimination of discrimination; promote equality of opportunity between men and women; and to keep under review the working of the SDA and the EPA. Although the EOC does not have express statutory powers in relation to 'monitoring', its general powers enable it to carry out monitoring activities. The Commission for Equality and Human Rights (CEHR), which is expected to be established in 2007, will have a duty to monitor the effectiveness of equality and human rights enactments. The new Commission will also be required to monitor progress in the advancement of equality and human rights throughout society, and to periodically report on this.
Business sectors affected: The EOC is the primary organisation affected, however, employers and individuals would also be affected indirectly if the EOC were unable to carry out the activities regarded as necessary by the ETAD.

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

Benefits: This would guarantee that the EOC has sufficient powers to undertake monitoring activity.
Costs: We consider that the SDA already empowers the EOC to carry out monitoring activities. Therefore no costs would be incurred.
Risks: Such an amendment could unnecessarily call into question the current scope of the EOC's powers.
Option 2: No change to the EOC's powers.
Benefits: Would confirm that EOC has sufficient powers to undertake activities set out in ETAD and maintains certainty by making no change to the SDA.
Costs: No costs identified.
Risks: If the EOC's general powers were found to be not sufficient to enable it to conduct 'monitoring' then it would not be able to carry out this activity as required by the ETAD. However, we believe the EOC must already be conducting such activity given its objective of making progress on eliminating discrimination and promoting equality between men and women.
Recommendation: Option 2 (no change to SDA)
Retain the existing SDA provisions.

SDA exemption for partnerships and trade unions in relation to the provision of death and retirement benefits: The ETAD requires application of 'equal treatment' in relation to 'employment and working conditions' and 'membership of, or involvement in' a trade union. The SDA, however, permits partnerships and trade unions to discriminate on grounds of sex in the provision of death and retirement benefits to their partners and members respectively. The sections of the SDA which allow partnerships and trade unions to discriminate in such a way (sections 11(4) and 12(4)) are therefore in conflict with the requirements of ETAD.
Business sectors affected: Firms organised as partnerships, and trade unions would be the primary sectors affected. There are around 525,000 partnerships in Great Britain, around 320,000 of which have no employees. Examples of such partnerships include legal, doctors', dentists', and architects' practices, many of which are small firms. There are around 200 trade unions, and in addition organisations similar to trade

unions, such as the CBI and the BCC, whose members carry on a profession or trade, which would be affected. However, it is important to note that the extent to which all of these organisations might be affected is likely to be small as we have found no evidence that such discrimination takes place.
Option 1: Remove both the exemption for a partner in a firm (section 11 (4) of the SDA) and the exemption for a trade union or similar organisation (section 12 (4) of the SDA).
Benefits: This would guarantee compliance with ETAD and would remove an exemption which it appears is no longer in use.
Costs: We have not identified any death or retirement benefits which fall outside of occupational pension legislation (which prohibits discrimination), nor do we have evidence of partnerships or trade unions discriminating on grounds of sex in their provision of death and retirement benefits to partners or members. In view of this, we expect the impact on partnerships would be negligible and so do not expect businesses or trade unions would incur any significant costs under this option.
We did consider pension provision and similar benefits provided for trade union members through their trade unions, but which were provided by an insurer on a sex discriminatory basis as a result of the use of actuarial data. In these circumstances, trade unions or similar organisations would not be committing an unlawful act under sex discrimination legislation. The use of actuarial factors is expressly permitted by sections 62-65 of the Pensions Act 1995 which amend the EPA to apply an equal treatment rule. Therefore, to issue such benefits to members would not be unlawful under the relevant legislation and so could continue whether or not the section 11(4) and section 12(4) exemptions were removed from the SDA.
Risks: There would be a small risk that new evidence could come to light of a positive sex discriminatory practice in this area that the Government would wish to protect and which would be threatened by the removal of the exemptions. However, this would be difficult to justify in light of the clarity with which the ETAD rules out such practices.
Option 2: Retain both the exemption for a partner in a firm (section 11(4) of the SDA) and the exemption for a trade union or similar organisation (section 12(4) of the SDA).
Benefits: This would ensure that no adjustment would be required on the part of stakeholders and certainty would be retained by making no change to the law.
Costs: If the European Commission found that the UK had not fully implemented the ETAD, the Government could be liable for damages.
Risks: There is a clear risk that that the UK would be challenged by the Commission for failing to implement the Directive fully.

Recommendation: Option 1 (remove SDA exemptions – section 11(4) and section 12(4))
This would guarantee compliance with ETAD and is unlikely to have cost implications for trade unions or partnerships, as we have no evidence that the exemption is still used.

Pregnancy and maternity leave discrimination: ETAD states that less favourable treatment related to pregnancy or maternity leave constitutes unlawful sex discrimination. The UK courts currently interpret the SDA's test of direct discrimination to include less favourable treatment on grounds of pregnancy or maternity leave. However, there is nothing on the face of the SDA making it clear that this is the case. Therefore, to ensure clarity of the law which implements this requirement of the ETAD, consideration has been given to including an explicit reference to such discrimination in the SDA.
Business sectors affected: All employers and providers of vocational training will be affected. However, their responsibilities will not change. The amended legislation would simply make the duties more explicit. New and expectant mothers in work would be affected in that their rights in relation to discrimination on grounds of pregnancy or maternity would be clearer. There are currently 7.7 million women of child-bearing age working in the UK, 33% of the total number of employees. [12] The Employment Tribunal Service and the courts could also be affected if there is any short-term increase in the number of sex discrimination claims made as awareness of the law is raised.

Option 1: Add an explicit reference in the SDA to clarify what the law is – this will not add extra rights.
Benefits: This would improve clarity and transparency in relation to this area of the law.
Costs: Aside from the cost to business of reading the overall ETAD guidance, no other costs have been identified.
Risks: None identified.
Option 2: Do not amend the SDA.
Benefits: Employers and vocational training providers would not need to spend time considering what amounts to a clearer statement of existing law.
Costs: There would be a social cost in terms of failing to state clearly on the face of the relevant legislation the legal obligations of employers to employees who are pregnant or on maternity leave, thereby failing to address the complexity of the current law relating to pregnancy discrimination. There would be no cost to employers or providers of vocational training.
Risks: This option carries a risk that the UK would be challenged by the Commission for failing to implement the Directive because the protection for women on grounds of pregnancy or maternity leave had not been made explicit.

Recommendation: Option 1 (clarify SDA)
Adding an explicit reference in the SDA would clarify what the law is and avoid the risk of infraction proceedings against the UK associated with option 2.

Maternity and adoption leave – the right to return to the same, or an equivalent job: The ETAD requires a mother or adopter returning to work after maternity or adoption leave to be able to return to their job or to an equivalent post on terms and

[12] Labour Force Survey, Spring 2004

conditions which are no less favourable to them than those they enjoyed before their leave.

Women on maternity leave currently have the right to return to the same or an equivalent job under the Maternity and Parental Leave Regulations 1999. However, where an employer has five or fewer employees, it does not currently constitute automatic unfair dismissal if the mother or adopter is not allowed to return at the end of Additional Maternity Leave (AML) or Additional Adoption Leave (AAL) because the employer regards this as not reasonably practicable. We believe this exemption is incompatible with the provisions of ETAD which does not differentiate between small and large employers. Nevertheless, a woman in this position could still make an unfair dismissal claim, and more significantly, a sex discrimination claim. Case law has established that an employer who denies a woman a post on her return from maternity leave is likely to be in breach of the provisions of the SDA.

A similar exemption for employers of five or fewer employees applies to adoption leave under the Paternity and Adoption Leave Regulations 2002.

Business sectors affected: Small employers with five or fewer employees would be the primary group affected, although anecdotal evidence from small employer organisations suggests that awareness of this exemption is very low, and practical application negligible. There are an estimated 875,000 employers with 1-5 employees[13] (22% of all employers) and an estimated 504,000 women of childbearing age employed in these small firms (9% of all women of childbearing age).[14]

We do not have figures on the number of women working for small employers who are prevented from returning to work each year. However, for women employees in general, the Employment Tribunal Service has only processed around 100 unfair dismissal cases per year, on average, over the last five years from women claiming they were prevented from returning to work after maternity leave. There may obviously be women who do not make a tribunal application, or have their case classified as sex discrimination rather than unfair dismissal, but the Employment Tribunal Service figures still suggest numbers would be small.

The number of adopters who could be affected is likely to be very small as there are less than 4,000 adopters eligible for adoption leave each year.

<u>Option 1: Remove small employer exemptions.</u>

Benefits: It would be clear on the face of the law that mothers and adopters working for employers of five or fewer employees would have the right to return to the same or equivalent job after Additional Maternity Leave (AML) and Additional Adoption Leave (AAL), and that it would be automatic unfair dismissal if such an employer were to refuse to allow a mother or adopter to return to their job in these circumstances. In the case of maternity leave, the position for small employers would be clearer, since at present a refusal to allow a woman to return after AML, while not prohibited by the Employment Rights Act, could still be subject to a claim under the SDA which has no small employers' exemption. The Small Business Service view is that the exemption has no real effect and any employer relying upon it would be leaving themselves exposed to the strong possibility of being taken to an Employment Tribunal. Anecdotal evidence from bodies that advise small employers suggests that awareness of the existence of these exemptions is very low. The few employers who do make enquiries are discouraged from making use of the exemption because under

[13] Estimate by the DTI's Small Business Service based on their SME Statistics.
[14] Using the standard definition of childbearing age of 16-44.

the current legislation it would be very difficult to prove that a dismissal was not unfair at a Tribunal.

Removing the exemption will be delayed until April 2007 to coincide with a package of other changes to maternity and adoption rights in order to minimise the burden on small firms in terms of the shorter time they will need to familiarise themselves with the guidance and their responsibilities under it. This also upholds Government's commitment not to make changes to the working parents laws before 2006.
Costs: Given the small number of complaints that reach tribunal on the right to return to work, it appears unlikely that the Employment Tribunal Service would experience an increase in claims of any significance.

Risks: The effect of this change is negligible, given that the SDA already covers employers with five or fewer employees and a woman could already bring a case of unfair dismissal. Removal of the exemption could give rise to misplaced concern among small businesses that additional burdens are being placed on them. To counter this risk, guidance would set out the rights and responsibilities that apply when a woman returns to work after maternity leave.

Option 2: Retain small employers' exemptions.

Benefits: None. In reality, this apparent protection is misleading. In the case of maternity leave, a woman dismissed in these circumstances would have an alternative claim under the SDA and would be able to bring an unfair dismissal claim.

Costs: If mothers and adopters are currently prevented from returning to work this practice could continue.

Risks: This option would continue to confuse and mislead small employers with five or fewer staff as they may believe they were exempted from the requirements to allow a mother or adopter to return to work and could leave themselves open to claims of sex discrimination. The SDA protection for pregnant women and women on maternity leave may not be sufficiently transparent to enable all employers and women to understand the full protection given to a woman's right to return.

Recommendation: Option 1 (remove small employers' exemptions)
We recommend removing the small employers' exemptions. This would offer greater clarity to both employers and employees. Use of the exemptions appears to be rare, and removing them is therefore likely to have a negligible impact on the practices of small employers.
The Government has consulted on the detail of this and other measures to support working parents and their employers[15].
We believe it will be most straightforward for employers if we were to remove the small employers' exemptions alongside the other changes to the maternity leave arrangements we intend to bring in by April 2007.
The Government has decided on the timing of the removal of the exemption in order to minimise burdens on small business. In the interim, current case law has established that women returning from maternity leave are still protected. The Work and Families consultation looked at what we can do to simplify the system of maternity administration more generally.

Harassment and sexual harassment

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

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

Sexual Harassment: The ETAD defines sexual harassment as:

'where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person and creating an intimidating, hostile, degrading, humiliating or offensive environment.'

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

The UK courts already interpret sexual harassment as sex discrimination under the SDA. However, there is no express provision in the Act.

[15] *Work and Families: Choice and Flexibility* consultation published February 2005.

Option 1: Amend the SDA.

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

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

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

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

The new provision on decisions based on a person's submission to or rejection of harassment and sexual harassment, could lead to a increase in the number of tribunal cases, as individuals seek to test it. However, a woman in this situation could bring a claim under the SDA as it stands; it would just be easier to satisfy the Employment Tribunal that harassment has taken place given the new specific prohibition. It is therefore our assessment that should there be an increase in cases, it would not be significant.[16]

Acas would update their guidance on bullying and harassment in the workplace to provide practical advice on sexual harassment as well as harassment on the ground of sex to help employers and workers understand their rights and responsibilities.

There would be a small cost to employers and providers of vocational guidance, training, and practical work experience in terms of familiarising themselves with the new guidance, these costs are assessed under the later section "Overarching implementation costs".
Risks: None identified.
Option 2: Do not amend the SDA.

Benefits: No adjustment required by employers
Costs: Responses to consultation in 2002 [17] confirmed our view that employers and workers are not clear on conduct that can be construed as sexual harassment and harassment on the ground of sex. Lack of clarity could lead to an increase in the number of successful claims being brought against employers. In the event of successful legal challenge, the Government could be liable for damages.
Risks: Failure to introduce an amendment to the SDA so that it explicitly outlaws harassment and sexual harassment would pose a high risk that the Commission would

[16] The average cost associated with a discrimination-related employment tribunal to an employer is approximately £4,750, estimated from the Survey of Employment Tribunals (SETA) 2003.
[17] Whilst only 31% of those who expressed a view on harassment and sexual harassment in response to the 2002 consultation 'Equality and Diversity: The way ahead' provided examples of conduct to be covered by the SDA definition, those provided covered a broad spectrum.

consider this to be non-compliance with the ETAD and take successful infraction proceedings.

Recommendation: Option 1 (amend SDA)
This would add legal clarity in a potentially confusing policy area for employers and workers. With clearer guidance on employer responsibilities, this should also reduce discrimination on these grounds in the future. This would also avoid the risk of infraction proceedings associated with option 2.

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

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

The SDA makes the same GOQs available with regard to people who intend to undergo, are undergoing or have undergone gender reassignment. There are also some supplementary GOQs relating only to gender reassignment, including a provision in relation to jobs which involve carrying out intimate physical searches pursuant to statutory powers where the statute requires the searcher to be of the same sex as the person searched. With the exception of the intimate physical searches provision, the GOQs in the SDA can only be used where it is reasonable to do so (in most cases, after considering all the relevant circumstances, such as whether there are other employees who meet the GOQ and can take on the role). They therefore contain the element of proportionality required by ETAD. The intimate physical searches provision does not have this proportionality test and employers are not required to consider whether it is reasonable to apply the intimate searches GOQ.

Business sectors affected: Any employers relying on GOQ provisions. The intimate physical searches GOQ applies to the police/prison/other security service and suitably qualified medical personnel carrying out searches on their behalf.
Option 1: Repeal existing GOQs and replace with a general occupational requirement (not qualification) as in the sexual orientation, religion or belief and race regulations which implemented the Article 13 Race and Employment Directives.
Benefits: This would remove all risk of a challenge that domestic legislation fails to comply with ETAD's proportionality test. This would also carry through the Government's commitment to promote consistency, where and as far as possible, with other strands of equality legislation.

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

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

developed over the years would become redundant, reducing employer/worker certainty.

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

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

Costs: This would require some amendment to guidance and employers would need to ensure that their understanding, policies, and processes were up to date. However, the limited scope for application of GOQs, implies that the costs would be very small.

Risks: Employers could criticise the Government for making changes that are not strictly necessary.
Option 3: Leave the existing provisions intact but add an overriding provision that the application of the intimate physical searches GOQ must be proportionate.
Benefits: This should remove any risk of challenge that the intimate physical searches GOQ doesn't comply with ETAD's proportionality test as our view is that it does not currently do so. On the other hand, for the other more common GOQs, employers would be able to continue to apply widely understood criteria that have existed for up to 30 years, with only a very limited number of public sector employers having to adjust to the small amendment in the rules.
Costs: This option would impose only limited costs, confined to the public sector. This could require revised processes to be introduced by the Home Office, and possibly the Department of Health and HM Customs and Excise. The GOQ on intimate physical searches would be likely to be relied upon in very few instances.
Risks: There could be some complaint that other GOQ provisions (for which we would not be adding a proportionality requirement) permit more scope for discrimination than ETAD allows, and that we have failed to transpose ETAD correctly. We consider the risk of challenge to be low because the Directive does not require the implementing legislation to copy out its wording in full.[18] We could also be criticised for failing to secure consistency across discrimination grounds by adopting a different approach to the sexual orientation, and religion or belief regulations.
Recommendation: Option 3 (amend SDA gender reassignment GOQ provision relating to intimate physical searches)
Leave the existing provisions intact but add an overriding provision that the application of the intimate physical searches GOQ must be proportionate. This should remove any risk of challenge that the intimate search GOQ does not comply with ETAD's proportionality test. Employers would be able to continue to apply widely understood criteria, whereas option 1 would make a lot of existing case law redundant. Options 1 and 2 could be considered as going beyond the minimum necessary to comply with the Directive, and would be hard to justify in terms of additional benefits.

Cadet Forces: The ETAD refers to:
'access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience.'
This means that in broad terms, ETAD requires the provisions in the SDA to be amended so as to prohibit harassment and sexual harassment, and prohibit discrimination with regard to access to work experience and vocational guidance.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

There would also be a small risk of legal challenge, or infraction on grounds that we have failed to implement the Directive. This is limited because the original 1976

Equal Treatment Directive already outlaws discrimination in access to vocational training and section 85(5) of the SDA has never been challenged. If the court found that the prohibition of discrimination in ETAD should apply to admission to the Cadet Forces, in practice, this would make no material difference to the MoD.
Recommendation: Option 2 (repeal SDA exemption – section 85(5))
This would remove any doubt as to when sex discrimination by the Cadet Forces is and is not unlawful, and would not impose any costs on the MoD because the exemption is not used in practice. It would avoid suggesting that Cadet Forces are training organisations, which they are not, and would avoid the risk of legal challenge for failing to implement the Directive.

Trade unions and elective bodies: We have had to consider whether anything in section 49 of the SDA goes further than the positive action to promote equality that is permitted under the ETAD[19].
Section 49 of the SDA relates to trade unions, employers' organisations, and other bodies whose membership is voluntary, and whose members carry out a trade or profession, for which the body exists. Where members of these organisations are wholly or partly elected, section 49 permits positive action in terms of using reserved seats where necessary to improve the gender balance of representation on its elected bodies. However, it does not make lawful any discrimination in relation to who is entitled to vote in an election, or in any arrangements relating to the membership of the organisation itself.
Business sectors affected: Trade unions and similar organisations, their members, and related umbrella organisations such as the TUC. There are 10 large trade unions that employ a system of reserved seats on their National Executive Committee for women.[20] 22% of TUC affiliated trade unions have reserved seats for women for their conferences, and 31% for their delegations to the TUC.[21] In addition, only 34% of the TUC General Council are women (compared with 42% of their membership). All of this suggests that policies to encourage a greater gender balance amongst elected representatives within trade unions, including positive action, are still needed.
Option 1: Remove section 49 of the SDA.

Benefits: This would demonstrate a clear commitment to compliance with the ECJ jurisprudence and avoids the possibility of infraction proceedings.
Costs: There could be a social cost in terms of lower representation of women as a result of removing the provision for positive action.
Risks: The Government's commitment to facilitating positive action to encourage a greater gender balance in both the workplace and public life could be compromised. The number of women in elected positions within trade unions, and involved in unions more generally, could fall significantly. This could have a negative effect on the representation of women's views and issues concerning women in the workplace.
Option 2: Amend section 49 of the SDA to ensure that positive action allowed by trade unions is within the bounds of what is strictly permissible under the ETAD and related ECJ jurisprudence.
Benefits: This would ensure compliance with ETAD whilst still making provision for some types of positive action by trade unions. A re-draft of the legislation could also provide an opportunity for the provision to be drafted in a way which is more closely

[19] See footnote 6
[20] 'Waving *not* Drowning,' March 2004, SERTUC Women's Rights Committee, TUC: Upstream Publishers.
[21] 'Equal Opportunities Audit 2003,' 2003, TUC: Chandlers Printers. ISBN: 1 85006 686 8.

aligned to the approach taken in the 2003 sexual orientation and religion or belief regulations.
Costs: Trade unions would need to familiarise themselves with the guidance and adapt their procedures accordingly. If the amendment were to limit the effectiveness of positive action, for example the use of reserved seats for women on committees, this could lead to lower representation of women.
Risks: An amendment could make the law in this area more complex, and lead to a poorer representation of women's issues in trade unions.

Option 3: Retain section 49 of the SDA.

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

Costs: None.

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

Recommendation: Option 3 (retain section 49 of the SDA)

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

Sex discrimination questionnaire: The ETAD requires Member States to have judicial and administrative procedures which provide access to justice for individuals who believe they have suffered discrimination. The SDA enforcement provisions meet the requirements of the ETAD and provide for a questionnaire process to help individuals.
There is no specific requirement in the ETAD about any questionnaire process, however, in 2003, regulations implementing the Article 13 Race and Employment Directives set an eight-week response period for questionnaires. By contrast, the SDA does not specify a time limit for the return of the questionnaire.
Option 1: Amend the SDA so that it is extended to apply to claims of sexual harassment and harassment on the ground of sex, and to introduce an eight-week time limit for return of questionnaires.
Benefits: Not to extend the scope to cover harassment claims would fail to allow claimants access to a remedy which ETAD requires. Making this amendment would increase clarity and certainty and speed up some claims to the benefit of both parties. It would also demonstrate the Government's commitment to adopting a coherent and consistent approach to tackling discrimination across the strands of equalities legislation.
Costs: There would be a small cost to employers and providers of vocational training, guidance and practical work experience, in terms of familiarising themselves with the new guidance and, possibly, in dealing more quickly with requests for information.
Risks: Having two time limits within the SDA could cause confusion as the existing 'reasonable period' time limit would continue to apply in relation to cases alleging discrimination in goods, facilities, services and premises.
Option 2: Retain the existing 'reasonable period' provision for the return of questionnaires in the SDA.
Benefits: No additional burden on claimants from adjustment.
Costs: None identified.

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

Recommendation: Option 1 (extend the scope of application of, and introduce 8-week limit for return of the questionnaire)
The consistency of this approach with the other discrimination strands would benefit employers. It would also increase clarity and speed up some claims, to the benefit of the claimant.

Office holders – their special position: The scope of ETAD extends to office holders. The SDA and EPA apply to employment but do not extend to office holders who are not technically in employment, but whose position may be similar to that of employees. While some (non-statutory) office holders would be covered by the SDA and EPA because they are employed under a contract of employment e.g. a Company Director, a statutory office holder would not.
Section 86 of the SDA prohibits discrimination in any appointment by a Minister or government department, but does not prohibit discrimination in the on-going relationship between appointer and appointee. Some office holders are specifically within the scope of the SDA (as amended), such as police constables and cadets under section 17, but where they are not, discrimination is not prohibited. The EPA does not contain definitions in the same way. However, Article 3(1)(c) of ETAD applies to employment and working conditions, including dismissals, as well as pay as provided for in the Equal Pay Directive.
Business sectors affected: This policy does not apply to business.

Option: Amend the SDA and EPA.
We propose to amend the SDA and EPA to cover all office holders appointed by central government (whether the office /post is paid or unpaid) and other (non-government appointed) offices and posts – only where the office holder is paid and works under some direction, even if minimal. The provision on Ministerial appointments (section 86) would need to be deleted.
Benefits: This would bring the SDA and EPA into line with the definitions in the 2003 regulations on sexual orientation and religion or belief, and demonstrate the Government's commitment to a coherent, consistent approach across equalities legislation. Employing organisations would also benefit from this consistent approach. This would increase legal clarity and improve the implementation of ECJ case law.
Office holders would benefit from the reduced potential to be subjected to sex discrimination or unequal pay which should lead to better practice during the appointment and more representative appointments. This would encourage optimal use of the skills and talents of the office-holding workforce and increase motivation and loyalty.
Costs: None identified.
We believe that the cost implications of this change would be fairly small. We do not believe there is any significant discrimination in pay terms between male and female office holders, and appointment processes by central government are already obliged to be non-discriminatory. We are making it unlawful to discriminate against them once appointed, but in practice, Government policy already takes this line.

In relation to other office holders, some of the larger groups such as police officers are already specifically protected by the SDA. An important large group identified is the clergy; they are considered separately below. Thus we are likely to be talking about a modest number, and the cost implications for the public sector would be likely to be minimal. The Article 13 Race and Employment Directives adopted this approach and did not identify any financial costs associated with being required to treat office holders equally.

Risks: Amending the SDA and EPA could create a difference of approach between non-elected and elected office holders, such as local councillors, whom we consider to be outside the scope of ETAD; but this approach would be consistent with that taken in the race, sexual orientation and religion or belief discrimination legislation which exclude them and other elected posts from coverage.

Recommendation: (amend SDA and EPA)
Adopting this approach is the only viable option if domestic legislation is to be compatible with ETAD. The SDA and EPA position on office holders must be amended to comply with ETAD.

Office Holders – ministers of religion: Bringing ministers of religion, insofar as they are office holders, within the scope of the SDA (as required by the ETAD) raises complicated issues for the clergy and for the Church of England in particular.
An existing exception in section 19 of the SDA allows for discrimination in relation to employment, and to authorisations or qualifications (e.g. ordination) 'for purposes of an organised religion' where these are 'limited to one sex so as to comply with the doctrines of the religion or to avoid offending the religious susceptibilities of a significant number of its followers.' It has been suggested that there is doubt as to whether this sufficiently clearly covers the situation in the Church of England, where the priesthood is 'limited to one sex' in some cases, but not across the board. A

similar exception applies to authorisations and qualifications where they are 'limited to persons who are not undergoing and have not undergone gender reassignment'.
In 1993 the General Synod of the Church of England agreed to the ordination of women as priests, but put arrangements in place so that those who could not accept women priests for religious reasons did not have to accept them. It passed a Synod Measure[22] which includes a very wide exemption for the Church of England from certain provisions of the SDA in order to avoid any risk that the SDA might be interpreted as being at odds with those arrangements. In effect, section 6 of the Measure allows those within the Church of England to discriminate in the ordination, licensing and appointment of women priests and is not specifically limited to reasons of religious conscience. This section of the Measure is not compatible with the ETAD.
We have had to consider how to ensure that there is compliance with ETAD whilst providing organised religions with appropriate levels of protection to act according to their doctrine or religious convictions in decisions about ordination and appointments. We will need to ensure that section 19 is capable of applying to the new ETAD provision which prohibits discrimination and harassment against office holders, whichever option below is chosen.
Business sectors affected: All faith groups with clergy or other ministers holding 'office' as such will be affected by the inclusion of office holders within the SDA. The new section 19 is being inserted to clarify the law, so its effect (other than the fact that it will prohibit harassment) is limited to the fact that people in faith groups who ordain or appoint people may want to familiarise themselves with new guidance. Any change to the ability of the Church of England to rely on the provisions of their 1993 Measure of Synod will, in theory, affect the Church of England, its ministers, aspiring ministers and congregations to the extent that a more limited form of discrimination would be permitted than at present. However, we have no evidence that section 6 of the Measure is relied upon in practice in any circumstances where section 19 would not also apply.
Option 1: Amend section 19 of the SDA and repeal section 6 of the 1993 Measure of Synod.
This option involves amending section 19 of the SDA and repealing section 6 of the Measure by government regulations (with the agreement of the Church of England).
Benefits: Having a single over-arching SDA exemption for reasons of religious conscience, which applies equally to all faith groups, would be a fairer approach. An amended section 19 of the SDA would more clearly set out the circumstances in which organised religions are permitted, for reasons of doctrine or religious conscience, to treat priests and applicants for ordination or appointment less favourably on grounds of gender reassignment. In addition, this approach would ensure that section 19 would not provide an exception allowing faith groups to undertake harassment based on sex or sexual harassment in any circumstances.
Costs: Officials within faith groups will incur the small cost of familiarising themselves with the new guidance.
Risks: None identified.

Option 2: Amend section 19 of the SDA, without repealing section 6 of the 1993 Measure of Synod.

Benefits: An amended section 19 of the SDA would more clearly set out the circumstances in which organised religions are permitted, for reasons of doctrine or religious conscience, to treat priests and applicants for ordination or appointment less

[22] The Priests (Ordination of Women) Measure 1993

favourably on grounds of gender reassignment. In addition, this approach would ensure that section 19 would not provide an exception allowing faith groups to undertake harassment based on sex or sexual harassment in any circumstances.
Costs: Officials within faith groups would incur a small cost of familiarising themselves with the new guidance.
Risks: The Church of England could face a domestic discrimination claim and it would be within the power of the court/tribunal to strike down the offending section of the Measure of Synod.
Option 3: Retain both section 6 of the 1993 Measure of Synod and section 19 of the SDA in their present form.
Benefits: This does not require any action on the part of the Government or the Church of England.
Costs: The Government might face the cost of infraction proceedings for failing to fully implement the ETAD. There could also be costs of litigation brought in order to test the interpretation of section 19 of the SDA.
Risks: Section 19 might give too wide an exception in the case of harassment. In addition, the Church of England might face a domestic discrimination claim and it would be within the power of the court/tribunal to strike down the offending section of the Measure of Synod.

Recommendation: Option 1 (repeal section 6 of Measure of Synod and amend SDA s19)
Having a single over-arching SDA exemption for reasons of doctrine or religious conscience, which applies equally to all faith groups, would be a fairer approach and would avoid the risk of infraction proceedings for the Government. It would also ensure that there would be no exception available to organised religions in cases of sexual harassment or harassment based on sex.

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

Small firms' impact test

We do not expect this amendment to domestic legislation to have a significant effect on small firms as they have been covered by the SDA for 19 years. All employers will need to familiarise themselves with the new guidance, but this will be designed in such a way that it will be easy for all employers to identify if there are any key changes that they need to give further thought to. We only expect small employers to spend 10-15 minutes familiarising themselves with the new guidance.
Consultation with two major small employer organisations revealed that the removal of the small employers' exemptions in relation to the regulations on additional maternity and adoption leave would have little impact on employers with fewer than 5 employees, because awareness of the exemption is very low. Furthermore the few employers who have enquired about applying the exemptions have been discouraged from doing so by legal experts in the field, partly because it would be very difficult for the employer to prove that it would not be reasonably practicable to allow a mother or adopter who has requested additional maternity leave to return to work, and partly because the SDA itself still applies. The Small Business Service view is that the exemption has no real effect and any employer relying upon it would be leaving themselves exposed to the strong possibility of being taken to an Employment Tribunal.

Competition assessment

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

Enforcement, sanctions and monitoring

The primary route for enforcement of sex discrimination legislation is by the individual. All complaints relating to sex discrimination in employment under the provisions of the SDA, and the EPA, are dealt with by way of Employment Tribunals. Trade Union representatives or the Equal Opportunities Commission (EOC) may support the individual through the tribunal process.

Claims under Part III of the SDA (relating to education, including some elements of vocational training) are brought in the county courts (England and Wales) and the sheriff court (Scotland). Costs here differ, but a successful claimant will recover their own costs – unlike in the Employment Tribunal.

Under the SDA, the sanctions which can be applied by an Employment Tribunal are a) an order from the employment tribunal declaring the rights of the complainant and the employer; and/or b) compensation, with interest, for financial loss, injury to feelings and injury to health; and/or a recommendation that the employer take action within a specified period to reduce the adverse effect on the complainant of the act of discrimination complained of. The median award in 2004/05 was £6,235. For claims brought under Part III of the SDA, a court can award compensation only. The Court Service does not collect data about the number of SDA Part III complaints that are brought before the county courts, nor do they make available data about the administrative cost of hearing complaints in court. It is therefore not possible to make an estimate of the expected cost to the taxpayer of the cost of any extra court cases arising out of this legislation.

Sanctions under the EPA are a) an order from the employment tribunal declaring the rights of the complainant and the employer; and/or award of payment by way of arrears of remuneration or damages in respect of the period in which equal pay was paid, to a maximum of 6 years in England and Wales (5 in Scotland), with extensions in cases of concealment[23] or where the claimant was under a disability[24].

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

The EOC carries out its role within its Grant in Aid, which for 2005/06 is £9,775,000.

[23] Concealment is where the employer has deliberately concealed any fact relevant to his/her failure to comply with the equality clause in the woman's contract, and without knowledge of which the woman could not reasonably have been expected to institute proceedings.

[24] In England and Wales a person is for the purposes of this section of the Equal Pay Act 1970 (EPA) under a disability if they are a minor or of unsound mind. In Scotland, a person is for the purposes of this section of the EPA defined as under a disability if they have not attained the age of sixteen years or if they are incapable within the meaning of the Adults with Incapacity (Scotland) Act 2000.

The Employment Tribunal Service monitors the numbers of sex discrimination claims and equal pay claims taken, and the percentage which are successful, withdrawn and lost.

Implementation and delivery plan

Once the draft regulations come into force on 1 October 2005, the Government will notify the European Commission that ETAD has been transposed in Great Britain. It is expected that we will be able to notify the Commission that ETAD has been transposed in Northern Ireland at around the same time. Legislation to transpose the Directive in Gibraltar is expected to be presented to the House of Assembly at one of their earliest meetings in the autumn.

"Changes to Sex Discrimination Legislation in Great Britain", the Government's more detailed explanation of the amendments made to the SDA and EPA, was made available on the DTI's Women and Equality website in draft form on 12 July. The advice leaflets on bullying and harassment updated to reflect the new legislation on harassment and sexual harassment produced by Acas were similarly made available in draft form on the Acas website from 7 July. Once the draft regulations have come into force, these documents will be finalised and replace the draft versions available up till that point. The Women and Equality will notify all of their stakeholders with an interest in sex discrimination law of the availability of the explanation to the law by e-newsletter.

On 25 July, a Regulation Update to the changes to sex discrimination was published on the DTI's BusinessLink website. Regulation Updates are simple, plain English, one-page guides explaining the impact of legislative changes on small businesses in an easy-to-understand format. Once the regulations come into force, the content of the Regulation Update is assimilated into the main content of the BusinessLink website.

Post-implementation review

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

Summary of Recommendations			
Policy issue	**Benefits**	**Costs**	**Recommendation**
Direct discrimination	One definition across SDA[25]	None	No change
Indirect discrimination	Coherence /clarity to discrimination law	Negligible due to case law	**Amend the SDA to reflect the ETAD definition**
Territorial extent	Coherence /clarity to discrimination law	Negligible. Only aware of 1 successful equal pay claim in the last 4 years [26]	**Extend the application of the SDA and EPA**
Victimisation	SDA consistent with race and disability discrimination	None – no change to existing rights	No change
Vocational training	Bring consistency with Employment and Race Directives	Minimal – already applies to paid work experience	**Amend the SDA where strictly necessary**
Single-sex admissions and academic posts in single-sex colleges	Benefits of single-sex colleges will remain	Potential sex discrimination cases	No change
EOC's statutory powers	Signal that EOC already has power to monitor	None	No change
Provision of death and retirement benefits by partnerships and trade unions	Simplify SDA: we believe exemption no longer used	None identified	**Remove the relevant SDA exemptions**

[25] The amended Equal Treatment Directive relates to employment, vocational training, vocational guidance and work experience. In addition to these areas, the Sex Discrimination Act also applies to education (other than vocational training), and the provision of goods, facilities, services and premises – these provisions will not be amended as a result of ETAD.
[26] Also based on anecdotal evidence from Acas on the impact of the 2003 race and disability regulations on race discrimination cases.

Summary of Recommendations			
Policy issue	**Benefits**	**Costs**	**Recommendation**
Pregnancy and maternity leave	Explicit reference will clarify law	None identified	**Amend to make the law clearer**
Additional maternity leave and adoption leave – right to return	Position for small employers will be clearer	Negligible: additional claims unlikely[27]	**Remove small employers' exemptions through package of measures on the family rather than by regulations implementing the ETAD**
Harassment and sexual harassment	Explicit recognition will add clarity	None – no change to existing rights	**Amend to make the law clearer**
Genuine occupational qualification	Well-established criteria will continue to apply	Limited to public sector[28]	**Add proportionality element to GOQ on physical searches**
Cadet Forces	Adds clarity - exemption not in use	None – exemption not used	**Remove the relevant exemption**
Sex discrimination questionnaire	Consistent approach across discrimination strands. Will speed up some claims	Potential cost of speedier handling of claims	**Amend to include 8-week time limit to respond**
Office holders	Consistency /clarity	None identified	**Amend the SDA and EPA**
Office holders – ministers of religion	Fairer approach applying equally to all faith groups	Small cost to faith group officials of familiarisation with guidance	**'Package' of Changes' (amend SDA and repeal section 6 of Synod Measure)**

[27] Awareness of exemption is very low. Small employer organisations that are aware of the exemption, advise against using it because of difficulty in proving fair dismissal. Only a small number of complaints on right to return reach tribunal at the moment.
[28] May require revised processes to be introduced in the Home Office.

Contact Point

Elizabeth Solowo-Coker
020 7215 6788

Annex A

Non-legislative provisions

ETAD sets out a number of provisions which Member States must implement but do not require legislation in order to be satisfied in the UK.
We consider each of these provisions is already satisfied by existing legislation, policies and practices.

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

Measures taken:

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

Policy: The Government has developed a gender impact assessment mainstreaming tool to help policy-makers assess whether their policies will deliver equality of opportunity. The Government is also working to apply equality impact assessments across the board at the earliest stage in the decision making process.

Public Service Agreements: the Government has committed itself to reduce gender inequalities through a PSA whose current objective is, 'by 2008, working with all departments, the Government will bring about measurable improvements in gender equality across a range of indicators, as part of its objectives on equality and social inclusion.' This objective is supported by specific targets and initiatives across Government, set out in the document, 'Delivering on Gender Equality.'

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

Measures taken:

The SDA already conforms to the requirements of ETAD on direct and indirect discrimination. Formal and informal requirements, conditions and provisions are covered. Encouragement to tackle discrimination is provided through guidance developed and produced by Government, the EOC and the Advisory, Conciliation and Arbitration Service (Acas).

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

Measures taken:

Funding initiatives: the Strategic Partnership Fund provides funding for projects which aim to improve the relationship between employers, employees and their representatives, and is open to social partners. The Government also provides funding for a panel of recognised experts in the field of equal pay who have the confidence of both employers and unions.

Sponsoring research: the DTI sponsors a number of research projects including the various 'Workplace Employment Relations' surveys which include information on equal opportunities.

Code of practice: With Government agreement, the EOC issued a revised statutory Code of Practice on Equal Pay in December 2003 to provide practical advice to employers such as recommending equal pay reviews, and consultation with their workforce.
Article 8b(2) requires Member States, where consistent with national traditions and practice, to encourage social partners to promote equality between men and women and to establish agreements at an appropriate level outlining anti-discrimination rules that fall within the scope of collective bargaining.
Measures taken:

The Government generally adopts a 'voluntarist' approach to social partners, rather than promote particular forms of bargaining. However, publicly-supported assistance is available; the Advisory, Conciliation and Arbitration Service (Acas) can provide advice to parties in developing their dialogue and bargaining behaviours.
Article 8b(3) requires Member States, in accordance with national law, collective agreements or practice, to encourage employers to promote equal treatment for men and women in the workplace in a planned and systematic way.
Measures taken:

EOC: have a duty under the SDA to promote equality of opportunity between men and women generally.
Article 8b(4) requires Member States to encourage employers to provide employees and/or their representatives with regular information on equal treatment for men and women in the undertaking.
Measures taken:

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

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

The Women's National Commission (WNC) is an advisory Non Departmental Public Body (NDPB), fully funded by government. In its role, the WNC liaises with, and is consulted by, the Women and Equality Unit as well as other government departments.

Consultation: with appropriate NGOs during the implementation of the Directive. There was an initial consultation, Equality and Diversity: The way ahead in October 2002, and a more detailed consultation will take place early in 2005. Pre-consultation meetings will also be held.

Declaration

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

Signed by the responsible Minister

Alun Michael

Minister for Industry and the Regions
Department of Trade and Industry

Date 5th September 2005

Contact Official:

Elizabeth Solowo-Coker
Department of Trade and Industry
Bay 377-379
1 Victoria Street,
London SW1H 0ET

Tel: 020 7215 6788
Fax: 020 7215 2826
E-mail: elizabeth.solowo-coker@dti.gsi.gov.uk

ANNEX A

EXPLANATORY MEMORANDUM TO

THE EMPLOYMENT EQUALITY (SEX DISCRIMINATION) REGULATIONS 2005:

TRANSPOSITION NOTE

Equal Pay Act 1970, Sex Discrimination Act 1975, and Employment Rights Act 1996
(as amended by the Employment Equality (Sex Discrimination) Regulations 2005)

Transposition Notes

Table 1

European Parliament and Council Directive 2002/73/EC of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions		
Directive 2002/73/EC prohibits discrimination in employment and vocational training on grounds of sex. It is implemented in Great Britain by existing law and these amending Regulations. These regulations do what is necessary to implement the Directive, including making consequential changes to domestic legislation to ensure its coherence in the area to which they apply. Separate regulations will implement the Directive in Northern Ireland and Gibraltar. This table has been prepared by the Department of Trade and Industry. It sets out the objective of each article of the Directive, and how it is to be implemented in Great Britain. The Secretary of State is responsible for each aspect of implementation.		
Article of 2002/73/EC	**Objective of Article**	**Implementation**
1.	Makes substantive amendments to Council Directive 76/207/EEC. Please see Table 2.	Please see Table 2.
2.	Requires Member States to: • Adopt the necessary laws and provisions to comply with the Directive by 5 October 2005. • Report to the Commission by October 2008 on the application of the Directive. • Report to the Commission by October 2008 (and every four years thereafter) the texts of any laws, regulations and administrative provisions adopted pursuant to Article 141(4) of the Treaty, and any reports on these measures and their implementation.	The Regulations will come into force on 1 October 2005 (see Regulations 1 and 2). No further implementation required until 2008.
3.	Provides that the Directive entered into force on 5 October 2002.	No implementation required.

4.	Indicates that the Directive is addressed to the Member States.	No implementation required.

<u>Table 2</u>

European Parliament and Council Directive 2002/73/EC of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions

Directive 2002/73/EC prohibits discrimination in employment and vocational training on grounds of sex. It is implemented in Great Britain by existing law and these amending Regulations. These regulations do what is necessary to implement the Directive, including making consequential changes to domestic legislation to ensure its coherence in the area to which they apply. Separate regulations will implement the Directive in Northern Ireland and Gibraltar.

This table has been prepared by the Department of Trade and Industry. It sets out the objective of the amendments to each article of Directive 76/207/EEC, and how they are to be implemented in Great Britain. The Secretary of State is responsible for each aspect of implementation.

Article of 76/207/EEC	**Objective of Amendment**	**Implementation**
1.	Inserts a requirement for Member States to actively take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities.	The UK Government has developed a gender impact assessment mainstreaming tool to help policy makers assess whether their policies will deliver equality of opportunity. Equality impact assessment forms part of the screening process for all new legislation and can equally be applied to policy, plans and programmes at the earliest stage of the decision-making process. The UK Government has also, via a Public Service Agreement, committed itself to specific targets and initiatives aimed at reducing gender inequalities by 2008. The UK government is in the process of legislating to place a duty on public authorities to promote equality of opportunity between men and women, and to prohibit sex discrimination in the exercise of public functions (see the *Equality Bill 2005*).
2.	Sets out the purpose of the provisions of the Directive	No implementation required.

	• Prohibits direct and indirect discrimination, as defined; indirect discrimination may be justified. • Prohibits harassment and sexual harassment, as defined. • Prohibits instructions to discriminate.	Section 1 of the Equal Pay Act 1970 (EPA) and Sections 1-4, 39-41 and 82 of the Sex Discrimination Act 1975 (SDA), as amended by: • Regulation 3 (indirect discrimination); • Regulation 4 and 8 (pregnancy and maternity leave); • Regulation 5 and 19 (harassment and sexual harassment); • Regulation 6 (interpretation); and • Regulation 33 (definitions), prohibit discrimination, harassment, sexual harassment, and instructions to discriminate as defined by the Directive.
	Permits exceptions where sex constitutes a genuine and determining occupational requirement.	Sections 7-7B, 17-19 and 85 of the SDA, as amended by: • Regulation 9 (genuine occupational qualifications); • Regulation 20 (ministers of religion); and • Regulation 34 (removing exception for cadet forces), permit exceptions where sex constitutes a genuine and determining occupational requirement.
	• Prohibits less favourable treatment of a woman related to pregnancy or maternity leave. • Requires that a person on maternity, paternity or adoption leave be entitled, after the end of their period of leave, to return to their job or to an equivalent post on terms no less favourable. • Prohibits dismissal due to exercising a right to maternity, paternity, adoption or other form of parental leave.	The Maternity and Parental Leave etc Regulations 1999 and the Paternity and Adoption Leave Regulations 2002, made under the Employment Rights Act 1996, require that a person on maternity, paternity or adoption leave be entitled, after the end of their period of leave, to return to their job or to an equivalent post on terms no less favourable. This applies to all employers except those with five or fewer employees. A woman in this position could still make an unfair dismissal claim, and more significantly, a sex discrimination claim. This has proved to provide an effective remedy for a woman who is treated less favourably because she is pregnant or on maternity leave. These Regulations also prohibit dismissal due to exercising a right to maternity, paternity, adoption or other form of parental leave.
	Permits positive action with a view to ensuring full equality in practice between men and women.	Sections 47-51 of the SDA permit positive action with a view to ensuring full equality in practice between men and women.

<table>
<tr><td></td><td>In accordance with national law, traditions and practice, requires Member States to encourage employers and those responsible for vocational training to take measures to prevent discrimination, in particular harassment and sexual harassment.</td><td>The UK Government encourages employers and those responsible for vocational training to take measures to prevent discrimination by providing in Great Britain an explanation of the law in this area and best practice advice and guidance via the Equal Opportunities Commission (EOC) and the Advisory, Conciliation and Arbitration Service (Acas).</td></tr>
<tr><td rowspan="2">3.</td><td>Specifies that the Directive applies in relation to:
• access to employment, self-employment and occupation;
• employment conditions;
• access to vocational training, vocational guidance and practical work experience;
• membership of workers' (or other professional) organisations.</td><td>Section 1of the EPA and Sections 6, 8-17, 22, 35A-35B and 82 of the SDA, as amended by:
• Regulation 7 (applicants and employees);
• Regulation 10 (contract workers);
• Regulations 11 and 12 (territorial extent);
• Regulation 13 (office holders – SDA);
• Regulation 14 (partnerships);
• Regulation 15 (trade unions);
• Regulation 16 (qualifying bodies);
• Regulation 17 (vocational training);
• Regulation 18 (employment agencies);
• Regulation 22 (educational establishments);
• Regulation 23 (physical training);
• Regulation 24 (barristers);
• Regulation 25 (advocates);
• Regulation 33 (definitions);
• Regulation 35 (office holders – EPA);and
• Regulation 36 (pregnancy and maternity leave – EPA),
apply the provisions of the Directive to access to employment, self-employment and occupation; employment conditions; access to vocational training, vocational guidance and practical work experience; and membership of workers' (or other professional) organisations.</td></tr>
<tr><td>Requires Member States to ensure that:
• any laws or administrative provisions contrary to the Directive are abolished;
• any provisions in contracts, collective agreements, and internal rules of undertakings, may be made void.</td><td>No laws or administrative provisions contrary to the Directive have been identified.</td></tr>
<tr><td>4.</td><td>To be deleted.</td><td>No implementation required.</td></tr>
<tr><td>5.</td><td>To be deleted.</td><td>No implementation required.</td></tr>
</table>

6.	Requires Member States to ensure that procedures are available for individuals to enforce the Directive's obligations.	Sections 2-7B of the EPA together with sections 8-10 and Part VII of the SDA, as amended by: • Regulations 11 and 12 (territorial extent); • Regulation 28 (jurisdiction of employment tribunals); • Regulation 29 (burden of proof – employment tribunals); • Regulation 30 (enforcement); and • Regulation 31 (burden of proof – county and sheriff courts), provide procedures enabling individuals to enforce the Directive's obligations. The usual rules of procedure in tribunals and courts apply, including time limits. Section 74 of the SDA, as amended by Regulation 32 (period within which respondent must reply), provides for a complainant to issue a questionnaire to their employer in order to obtain information related to their complaint.
	Requires Member States to ensure that procedures are also available in relation to discrimination which takes place after the relevant relationship has ended.	Sections 20A and 35C of the SDA, as amended by Regulations 21 and 26 (relationships which have come to an end), provide that procedures are also available in relation to discrimination which takes place after the relevant relationship has ended.
	Requires Member States to ensure that real and effective compensation or reparation is available for person injured.	Section 2 of the EPA provides that a complainant may be awarded arrears of remuneration and/or damages as compensation and reparation for injury suffered. Section 65 of the SDA provides that a complainant may be awarded a declaratory order; and/or; damages; and/or a recommendation to the respondent, by way of compensation and reparation for injury suffered. The amount of damages that can be awarded is uncapped.
	Requires Member States to ensure that organisations with a legitimate interest may engage in proceedings on behalf of or in support of a complainant.	Section 75 SDA provides that the EOC (an organisation with a legitimate interest) may support a complainant in proceedings.
7.	Requires Member States, in accordance with national legal systems, to provide protection for persons who suffer victimisation as a result of a complaint of discrimination.	Section 4 of the SDA prohibits less favourable treatment of persons who have complained of sex discrimination.

8.	Requires Member States to designate a body for the promotion, analysis, monitoring and support of equal treatment between men and women.	The UK government established the EOC in 1975. Part VI of the SDA, as amended by Regulation 27, empowers the EOC to undertake the activities required of the designated body under the Directive.
	Requires Member States to provide for effective sanctions to enforce obligations under the Directive.	Section 2 of the EPA and section 65 of the SDA provide for effective remedies for a complainant (see above).
	Sets out the principle that Member States may maintain a higher level of protection than the Directive requires, but may not justify a reduction in the level of protection by reference to the Directive.	No specific provision is required to implement this aspect of the Directive.
	In accordance with national law, traditions and practice, requires Member States to promote social dialogue between social partners to foster equal treatment.	The UK government promotes dialogue by funding initiatives, research and guidance, as appropriate. One initiative supported is the Partnership Fund which aims to improve the relationship between employers and employees. Research supported includes the various 'Workplace Employment Relations' surveys which include information on equal opportunities. Guidance supported includes a 2003 Code of Practice on Equal Pay produced by the EOC.
	In accordance with national law, traditions and practice, requires Member States to encourage social partners to conclude collective agreements laying down anti-discrimination rules.	UK tradition and practice does not include promotion by the government of collective agreements as a model preferable to others for employer-employee dialogue on equality or any other grounds, and it would be inconsistent with that tradition and practice for the government to do so now. However, Acas offer advice on a range of dialogue methods including collective bargaining.
	In accordance with national law, traditions and practice, requires Member States to encourage employers to promote equal treatment for men and women in the workplace.	The EOC have a statutory duty to promote equality of opportunity between men and women. Part of their work towards achieving this includes advising employers on how best to achieve equal treatment in the workplace.
	In accordance with national law, traditions and practice, requires Member States to encourage employers to provide information (for employees and/or their representatives) on equal treatment for men and women in their undertaking.	The UK government is supportive of employers who provide appropriate information for employees (and their representatives) on equal treatment.

	In accordance with national law, traditions and practice, requires Member States to encourage dialogue with appropriate non-governmental organisations with a legitimate interest in combating sex discrimination.	Non-governmental organisations (NGOs) were consulted during the implementation of the Directive on all matters from first principles to detailed draft regulations and guidance on the amended legislation. Dialogue took the form of face-to-face meetings and a formal written consultation process (see *Equality and Diversity: Updating the Sex Discrimination Act* document). In addition, the UK government regularly consults the EOC, the Women's National Commission (WNC) and other NGOs on issues related to combating sex discrimination.
	Requires Member States to provide for effective, proportionate and dissuasive sanctions to enforce obligations under the Directive.	Section 63 of the SDA provides for the remedies for complaints in employment tribunal proceedings which include payment of compensation. Section 65 of the SDA makes provision for remedies in county or sheriff court proceedings. The usual remedies for claims in tort apply, including the payment of compensation. Section 2 of the EPA makes provision for remedies in employment tribunal proceedings by way of arrears of remuneration or damages.
	Sets out the principle that Member States may introduce or maintain a higher level of protection than the Directive requires, but may not justify a reduction in the level of protection by reference to the Directive.	No implementation required.

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