

Sex Equality Legislation

Update on the provision of goods, facilities, services and premises

IN BRIEF...

On 6 April 2008, the **Sex Discrimination (Amendment of Legislation) Regulations 2008** came into force in Northern Ireland. They introduced a number of important changes to the Sex Discrimination (Northern Ireland) Order 1976 ('the SDO 1976'), which affect service providers, landlords and other persons who sell, let or manage premises in Northern Ireland.


In particular, in relation to the provision of **goods, facilities and services** and the disposal or management of **premises** (apart from excluded areas), they have:-

- extended protection against **direct discrimination** and **harassment** to transsexual people;
- amended certain **exceptions** under the SDO 1976;
- made it clear that it is unlawful to subject a woman to **pregnancy and maternity discrimination**; and
- amended **other provisions** in the SDO 1976, including the provisions relating to indirect discrimination, harassment, the burden of proof, the questionnaire procedure, and relationships which have come to an end.

Introduction

This fact sheet outlines changes made to the Sex Discrimination (Northern Ireland) Order 1976 ('SDO 1976'), by the **Sex Discrimination (Amendment of Legislation) Regulations 2008**, ('the 2008 Regulations').

It provides general guidance only, and the information and examples contained within it, should not be treated as complete or authoritative statements of the law. Authoritative interpretation of the 2008 Regulations is a matter for the Courts.



The 2008 Regulations came into force in Northern Ireland on **6 April 2008**. They were introduced in order to give effect to the **Gender Directive** (Directive 2004/113/EC) which implemented the principle of equal treatment between men and women in relation to the access to, and supply of, goods and services.

The changes **only** apply to the provision of **goods, facilities and services** and the disposal (selling or letting) or management of **premises**.

However, the following areas are **excluded** from the scope of the 2008 Regulations:-

- a. **education** (including vocational training);
- b. the content of **media and advertisements**; and
- c. the provision of goods, facilities or services (not normally provided on a commercial basis) at a place (permanently or for the time being) occupied or used for the purposes of an **organised religion**.

As a result, the SDO 1976 has **not** been amended as regards these areas.

New rights for transsexual people

The 2008 Regulations have extended protection against **direct discrimination** and **harassment** to **transsexual people** in the provision of goods, facilities and services and the disposal or management of premises (other than in relation to excluded matters). It is estimated that there are approximately 5000 transsexual people in the UK.

Prior to the introduction of the 2008 Regulations, the SDO 1976 only prohibited discrimination on the grounds of gender reassignment in the areas of employment and vocational training.

The SDO 1976 protects individuals who are subjected to discrimination because they **intend to undergo** treatment to change their sex, **are undergoing** treatment to change their sex, or **have undergone** such treatment.

The Regulations do **not** provide protection against discrimination for people who associate with transsexual people (such as friends or family members), or who are perceived to be transsexual, but are not.



Example

A transsexual man is subjected to ridicule and disparaging comments by the owner of the shop whilst shopping in his local grocery shop, because he is undergoing gender reassignment. He is asked to leave the shop by the owner.

This is likely to amount to unlawful harassment and discrimination under the SDO 1976.

Example

A transsexual woman who has undergone gender reassignment, indicates to a landlord that she wishes to rent a one-bedroom flat in a residential block of flats. The landlord refuses to allow her to rent the property, indicating that other tenants would feel uncomfortable in her presence.

This is likely to be unlawful discrimination under the SDO 1976.

Example

A local swimming pool refuses to allow a transsexual man who has undergone gender reassignment, to use the pool on the basis that his presence might upset other pool users.

This is likely to be unlawful discrimination under the SDO 1976.

Changes to Exceptions

Single sex exceptions

Prior to 6 April 2008, the SDO 1976 included a small number of exceptions that allowed facilities or services to be provided on a single-sex basis. The 2008 Regulations have amended the single-sex provisions in the SDO 1976 (other than in relation to excluded matters), to allow for different treatment of transsexual people on the ground of gender reassignment, and of men and women, where such treatment is a proportionate means of achieving a legitimate aim, or is a positive action measure. The changes to the single-sex exceptions are summarised below.



1. Hospitals, etc.

Under the SDO 1976, goods, facilities and services provided at a hospital or any other establishment for persons requiring special care, supervision or attention (for example, residential care homes), can be restricted to one sex. The exception now also applies to the ground of gender reassignment. However, any discrimination must be a proportionate means of achieving a legitimate aim.

2. Privacy or decency

Under the SDO 1976, it is lawful to restrict facilities or services (for example, toilets or changing rooms) to one sex, if they are provided for, or likely to be used by, two or more persons at the same time, and either:-

- a. male users are likely to suffer serious embarrassment at the presence of a woman (or vice versa), or
- b. a user is likely to be in a state of undress and a male user might reasonably object to the presence of a female user (or vice versa).

This exception now also applies to the ground of gender reassignment. However, any discrimination must be a proportionate means of achieving a legitimate aim.

3. Physical contact

Currently under the SDO 1976, facilities or services can be restricted to, for example, men, if physical contact between the user and any other person is likely, and the other person might reasonably object if the user were a woman.

This exception now also applies to the ground of gender reassignment. However, any discrimination must be a proportionate means of achieving a legitimate aim.

Other Exceptions

Charities

There is an exemption under the SDO 1976 for charities, permitting them to confer benefits on persons of one sex. The 2008 Regulations have amended this exception by making it clear that any discrimination on the ground of gender reassignment or sex, must be either a proportionate means of achieving a legitimate aim, or for the purpose of preventing or compensating for a disadvantage linked to sex.



Sport

The exemption under the SDO 1976 on the grounds of sex, relating to certain competitive sports and games has been amended to permit discrimination on the ground of gender reassignment, only if necessary to secure fair competition, or the safety of competitors.

Communal accommodation

The current exemption under the SDO 1976 on the ground of sex in relation to communal residential accommodation (such as dormitories or other shared residential accommodation), also now applies to the ground of gender reassignment. However, when restricting communal accommodation on the ground of gender reassignment, the degree to which such discrimination is a proportionate means of achieving a legitimate aim, is taken into account.

Voluntary bodies


The exemption under the SDO 1976 on the ground of sex, allowing voluntary bodies to restrict membership or benefits, facilities or services to persons of one sex, now also applies to the ground of gender reassignment. However, any discrimination must be either a proportionate means of achieving a legitimate aim, or for the purpose of preventing or compensating for a disadvantage linked to sex.

Insurance

The exemption under the SDO 1976 in relation to insurance and policies where there is an assessment of risk (including life assurance and accident insurance policies), has been amended by the 2008 Regulations (apart from as regards excluded matters). The changes apply to contracts entered into **on or after 6 April 2008**. Different treatment as regards premiums and benefits is unlawful, **unless** the following conditions apply:-

1. the use of sex as a factor in the assessment of risk is based on relevant and accurate actuarial and statistical data;
2. the data is compiled, published and regularly updated in accordance with Treasury guidance;
3. the differences in treatment are proportionate; and
4. the differences do not result from costs related to pregnancy or maternity.

In addition, insurance or related financial services can lawfully be provided only to members of one sex in relation to risks which only affect that sex.



The exception (as amended) also now applies to the ground of gender reassignment. The premiums and benefits for a transsexual person should only be based on the person's acquired gender if they hold a Gender Recognition Certificate; in all other cases, premiums and benefits should be based on the gender at birth.

Discrimination on the basis of pregnancy or maternity in calculating premiums or paying benefits, is unlawful from **22 December 2008**. Maternity is defined as the period of **26 weeks** beginning on the day of childbirth.

Pregnancy and maternity discrimination

The 2008 Regulations make it clear that it is unlawful to treat a woman less favourably because she is **pregnant** or because of her **maternity**, when providing goods, facilities or services, or in the disposal or management of premises (apart from excluded matters).

Maternity is defined as the period of **26 weeks** beginning on the day of childbirth.

There is a specific exemption for service providers and others relating to pregnancy-related **health and safety** risks. In particular, a service provider can refuse to provide goods, facilities and services to a pregnant woman, or impose certain conditions, if s/he believes that in providing such facilities and services, it would create a risk to her health and safety. It must be **reasonable** for the service provider to hold that belief.

In addition, the service provider must apply an **equivalent policy** to people with other physical conditions; namely a policy of refusing to provide or imposing certain conditions, because s/he believes they would, due to such physical conditions, create a risk to the health or safety of such persons.

Other changes to the SDO 1976

Relationships which have come to an end

The SDO 1976 gives protection from discrimination on the ground of sex to former employees in circumstances where the employment relationship had ended. This protection against discrimination **arising out of** and **closely connected** to a former relationship, now covers the provision of goods, facilities and services and the disposal and management of premises (apart from excluded matters).



Harassment

The 2008 Regulations apply the freestanding **definitions of sex harassment, sexual harassment and gender reassignment harassment** that apply in the field of employment, to the areas of goods, facilities and services and the disposal and management of premises (apart from excluded matters).

The definition of sex harassment has been amended from 6 April 2008 by the Sex Discrimination Order 1976 (Amendment) Regulations (Northern Ireland) 2008. The new definition prohibits unwanted conduct that is **'related to'** a woman's sex or that of another person. As a result of these changes, a wider range of conduct now amounts to unlawful sex harassment. For further information on the above changes, please see the Equality Commission's Information Sheet for employers on these Regulations (www.equalityni.org).

Indirect discrimination

The 2008 Regulations have amended the **definition of indirect discrimination** in the provision of goods, facilities and services and the disposal or management of premises (unless excluded).

Indirect discrimination under the SDO 1976 is where men and women are treated in the same way, so there is no direct discrimination, but as a result of the treatment, one sex is placed at a disadvantage.

The definition of indirect discrimination in these areas is now the same as that in the fields of employment and vocational training.

Burden of proof

The 2008 Regulations amend the SDO 1976 as regards the burden of proof in discrimination cases relating to the provision of goods, facilities, services and premises (unless excluded).

This means that in these areas, it is first up to the claimant to establish facts which could, in the absence of an adequate explanation from the respondent, lead to the conclusion that there had been discrimination. The burden of proof then shifts from the claimant to the respondent to show that there is a non-discriminatory reason for his/her actions.

The changes reflect the position as regards the burden of proof in the employment provisions of the SDO 1976.



Making a claim - the Questionnaire procedure

The SDO 1976 allows claimants to serve a questionnaire on a respondent in order to enable them to obtain further information about the way they have been treated, and to decide whether or not to bring a complaint to a tribunal or court.

The 2008 Regulations now require that in respect of claims relating to the provision of goods, facilities and services and premises (other than excluded matters), once the questionnaire is served, the respondent **must** reply within **eight weeks**, from the date the questionnaire was served.

The changes reflect the position as regards the questionnaire in the employment provisions of the SDO 1976.

Further Information

Further information and advice on the sex discrimination legislation is available from the Equality Commission.

This fact sheet can be obtained in alternative formats. The Equality Commission provides a free and confidential information and advice service, and produces a range of advisory publications on the sex discrimination legislation, which can be obtained free of charge from the Equality Commission, or downloaded from its website (www.equalityni.org).

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