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Dear Madam or Sir

#### CONSULTATION PAPER: LEGISLATION REGARDING DISCRIMINATION ON GROUNDS OF TRANSSEXUALISM IN EMPLOYMENT

On 30 April 1996 the European Court of Justice ruled in the case *df-v- S and Cornwall County Council* that it is contrary to the European Equal Treatment Directive to dismiss a person on grounds of gender reassignment. Like all Member States of the European Union, the United Kingdom is required to implement the ruling in its domestic law.

Since the 1996 European Court of Justice ruling, UK Industrial Tribunals have been called upon to consider a handful of cases, and have successfully interpreted the Sex Discrimination Act 1975 as regards protecting transsexuals or those undergoing gender reassignment against discrimination in employment. However, it is acknowledged that the Sex Discrimination Act was not designed or written to meet the specific situation of gender re-assignment, which is a complex area where relatively few employers or lawyers have experience.

Accordingly, the Government proposes to introduce specific Regulations which will amend the legislation to prohibit discrimination against transsexuals or people undergoing gender reassignment in the fields of recruitment, employment, terms and conditions of work, training, promotion, dismissal and mistreatment such as harassment at work. The Government believes it will benefit from advice, and has produced a Consultation Paper *Legislation regarding discrimination on grounds of transsexualism in employment*. The Paper describes the possible scope of the proposed provisions and invites views where there appear to be options, such as circumstances giving rise to exceptions from the principle of protection, where employers might treat transsexuals differently from other staff, if only temporarily, and how to make exceptions both clear and reasonable.

The Government is fully committed to implementing the European Court of Justice ruling but has said that it will consider carefully any responses to this Consultation Paper before finalising the proposed Regulations, which will be introduced under the European Communities Act 1972.

Written responses to the Consultation Paper are sought by 13th March 1998 and should be sent to Ms F A Martin at this address.

Yours faithfully

Margaret Scott (Mrs)  
Sex and Race Equality Division

**Legislation regarding discrimination on grounds  
of transsexualism in employment**

**Department for Education and Employment, January 1998**

**Introduction**

1. The Government deplores unfair discrimination, and intends to make specific provision in domestic law for the protection given to transsexuals by the European Equal Treatment Directive. The Directive was found to give this protection by the 1996 European Court of Justice decision in the case of *P. v S. and Cornwall CC*. Details of the decision are at Annex A. The Government will proceed by Regulations made under the European Communities Act 1972, which will effect an amendment to the Sex Discrimination Act 1975.

2. Transsexualism is a subject where relatively few people have experience and where the Government believes it will benefit from advice. This paper invites organisations and individuals who have knowledge of and an interest in transsexualism and gender re-assignment to contribute. The aim is to ensure the Regulations make the appropriate provisions in the fields of recruitment, employment, terms and conditions of work, training, promotion, dismissal and mistreatment such as harassment at work. (For more detail on the stages of gender reassignment, see Annex B)

**Legal Position**

3. Like all Member States the United Kingdom is required to implement European Community Directives, as interpreted by case law, in its domestic law. The rights conferred by the Equal Treatment Directive are reflected in GB by those parts of the Sex Discrimination Act 1975 which deal with discrimination in employment. (and in Northern Ireland by the Sex Discrimination Regulations). Since the 1996 European Court of Justice ruling that the Directive includes discrimination on the grounds of gender re-assignment, Industrial Tribunals in the UK have considered a number of cases of alleged discrimination against transsexuals, and have worked to interpret the Sex Discrimination Act to conform with the ruling.

4. Despite UK Courts' successful adaptation to date of the Sex Discrimination Act to give protection to transsexuals, the re-interpretation places a strain upon the provisions of the Sex Discrimination Act. The Sex Discrimination Act was not written to operate in a way which conforms to the European Court of Justice's ruling, nor does it have specific and suitable terminology regarding transsexualism. Furthermore, as with all anti-discrimination legislation exceptions to the principle of protection must be considered. The Government wishes to receive views on whether gender re-assignment gives rise to some circumstances in which it might be considered reasonable to allow employers to treat transsexuals differently from other staff, if only temporarily. In essence, therefore, the Government wishes to ensure its legislation is expressly designed to meet the particular case, and gives protection with clear and appropriate exceptions.

## Information about the condition

5. Transsexualism is "A desire to live and be accepted as a member of the opposite sex, usually accompanied by a sense of discomfort with, or inappropriateness of, one's anatomic sex and a wish to have hormonal treatment and surgery to make one's body as congruent as possible with the preferred sex." (International Classification of Disorders). The term "gender dysphoria" is often used to convey the medical problem. The procedure of hormonal treatment and surgery which transsexuals seek is usually called gender re-assignment.

6. The diagnostic guideline states that the transsexual identity should be persistent - at least two years - and not be a symptom of another condition such as schizophrenia or of any genetic or chromosomal abnormality. Transsexualism is likely to begin in childhood, and is experienced, it is estimated, by some 1 in 30,000 men and 1 in 100,000 women. The condition is to be distinguished from being a transvestite: transvestites wear the clothes of the opposite sex as a temporary experience but are content with their birth sex, and have not been accepted for hormone treatment or re-assignment surgery.

7. Under UK law an acquired sexual identity, whether or not involving gender re-assignment surgery, can be given a degree of official recognition (for instance passport issued in the new name and looks, National Insurance number in the new name) so that transsexuals can in practice live under their new identity. But there are certain areas (notably marriage and receipt of pension) where "sex" cannot be changed by treatment or surgery.

8. Annex C describes a) cases which have appeared before Industrial Tribunals b) other examples of problems which have come to the government's attention. They illustrate issues arising at work for transsexuals and their employers, which include: harassment; confidentiality; dress code. changing rooms or lavatories. offering alternative work; and jobs with vulnerable individuals.

## Issues arising on which views are sought

9. **What comparator?** The traditional approach in sex discrimination law was formulated on a basis of comparison of treatment as between men and women. If the test for discrimination should be a comparative one, with whom should the comparison be made? The European Court of Justice used as the test for discrimination a comparison "with persons of the sex to which he or she was deemed to belong before undergoing gender re-assignment." Should the Regulations allow other approaches? For instance, if absences or poor performance due to gender reassignment treatment are the cause of an employer's action, then it would seem appropriate to require comparison with the employer's conduct towards someone undergoing lengthy medical treatment for some illness, or who is undergoing a crisis which may impair job performance.

10. **What defines the individual who needs protection?** The Equal Treatment Directive forbids discrimination "on grounds of sex, either directly or indirectly". To ensure the new Regulations carry forward this principle expressly in the Sex Discrimination Act on the grounds of gender re-assignment, a crucial matter is the point at which protection should begin. An

individual's realisation that radical steps must be taken to overcome his or her gender dysphoria may emerge gradually. The Government believes that a specific request to the medical profession to intervene can mark the appropriate point.

11. Views are therefore sought on the proposal that defining the protected group should involve a medical practitioner. The intention is for the new Regulations to protect from discrimination someone who has formally recorded with a relevant medical practitioner or qualified psychiatrist that he or she has a settled intention to achieve a new sexual identity in the process of doing so; or has achieved a permanent new sexual identity. This will mean that in cases of dispute, evidence such as a letter from the individual's medical or psychiatric consultant or GP can confirm whether he or she is a transsexual as described above.

12. Views are also sought about what, if any, disclosure is required to an employer or prospective employer by the individual and by their medical practitioner, in order to be able to rely on the right not to be discriminated against, and to apply the exceptions below. Such disclosure might be information from the individual's doctor as to the period during which there will be hormonal, psychological or surgical intervention and advice on when this might be said to have formally been completed. (Good practice seems to recommend any such information should be kept confidential to the minimum number of employer's staff.)

13 ***What Exceptions?*** The Sex Discrimination Act 1975 and the Race Relations Act 1976 do allow recruiters and employers, in certain narrowly defined circumstances, to reject an individual on grounds of sex or race, for instance where work involves authenticity in dramatic performances; or a post is in a private household. Industrial Tribunals adjudicate on whether an exception has been correctly applied. Applying the principle of protection against discrimination, but allowing certain exceptions, is complex in the case of gender re-assignment: for instance we propose that some exceptions should "lapse" after completion of the process. Views are sought on the exceptions outlined below - and whether these are sufficient and practicable.

14. The Government proposes that during the process of gender re-assignment:

- a) It will be lawful for the employer to specify that the transsexual individual must use particular facilities for that period (eg the male or female lavatories or those for disabled people). The individual will have the right to request a change at the point of believing that he or she would, when observed by a reasonable person, appear to be of the new sexual identity.
- b) During the period and for one year afterwards, it will be lawful to exclude the individual from jobs which involve intimate physical contact with members of the public or customers (eg body searches by the police, Prison Service, Customs and Excise and airport security, or beauty therapy/massage); or close personal interaction with vulnerable people whom the employer reasonably believes would be disturbed, such as those seeking counselling for rape, or people with mental disabilities.
- c) During the period and for six months afterwards, it will be lawful to exclude ~~the~~ individual from jobs involving contact with members of the public or customers who are changing eg staff in health clubs, clothes shop assistants, home helps, swimming attendants etc.

15. ***What is the position after the process of gender re-assignment?*** The Government intention is to treat the individual as thereafter belonging to the re-assigned sex for employment and training purposes. Once working in the new sexual identity, the individual would if necessary have the protection of the Sex Discrimination Act in employment in that new sexual identity

16. However, the Government proposes certain narrow exceptions even after the gender reassignment is complete. It would remain lawful to exclude transsexuals from posts:

- a) where the employment has to comply with the doctrines of an organised religion.
- b) where the transsexual seeks to return to the same employer and activity, and to work with the same people (eg patients) who were of an unusually vulnerable nature. This exception seeks to recognise that in such exceptional cases, some vulnerable people could be disturbed by the fact of gender re-assignment in someone they know.

c)

Views are sought on these and on the exceptions referred to in paragraph 13.

17. In very rare cases a person who has been through the process of gender re-assignment may find themselves in a job lawfully restricted to the other sex (eg in a single-sex hospital). The Sex Discrimination Act's genuine occupational qualification exceptions expressly cover acts in the course of recruitment, training, transfer and promotion, but not dismissal. The Regulations would make it lawful to dismiss a transsexual from a post restricted to someone of the 'original' sex.

**18. *Restrictions on working with children?***The Government seeks views on whether there should be a specific exception for jobs which involve working with children. If so should all children be regarded as vulnerable up until 18, as in the Children Act 1989, or is this unnecessarily restrictive? Information would be helpful about the merits of i) a comprehensive approach permitting discrimination against transsexuals for all jobs in schools, and for any work involving substantial contact with children under age 18, during the gender re-assignment process plus one year, as at 14b) or ii) a narrower approach which allowed employers to exclude transsexuals from work bringing them in contact with children regarding changing Facilities (eg swimming trips) and sleeping accommodation (eg boarding schools) during the gender reassignment process plus six months as at 14c).

### **Equal Opportunities Commission**

19. Under the Sex Discrimination Act the Equal Opportunities Commission has the power to keep under review the working of that Act and the Equal Pay Act 1970, and to grant assistance to individuals who complain under the provisions of those Acts. The Government notes that the Equal Opportunities Commission is now responding to enquiries and requests for help by transsexuals and their employers. The Government proposes the Regulations should formalise this position by allowing the Equal Opportunities Commission the power to help an individual take a complaint to an Industrial Tribunal, but not the power to help an individual take a complaint to other courts, under the Sex Discrimination Act's provisions for goods, Facilities, services and education.

### **Consultation process**

20. Comments are invited on paragraphs 9 to 19 of this document. Please send them to Ms F A Martin of Sex and Race Equality Division, Level 4, Department for Education and Employment, Caxton House, 6-12 Tothill Street, London SW1H 9NF, by 13 March 1998.

Annex A

Extract from ECJ ruling in *P v S and Cornwall County Council*

The principle of equal treatment "for men and women" to which the Equal Treatment Directive refers in its title, preamble and provisions means, as Articles 2(1) and 3(1) in particular indicate, that there should be "no discrimination whatsoever on grounds of sex." Thus the Directive is simply the expression, in the relevant field, of the principle of equality, which is one of the fundamental principles of Community law. Moreover, as the Court has repeatedly held, the right not to be discriminated against is one of the fundamental human rights whose observance the Court has a duty to ensure.

Accordingly, the scope of the Directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of the Directive is also such as to apply to discrimination arising, as in this case, from the gender reassignment of the person concerned. Such discrimination is based essentially, if not exclusively, on the sex of the person concerned. Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment. To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard. .... It follows from the foregoing that the reply to the question referred by the Industrial Tribunal must be that, in view of the objective pursued by the Directive, Art 5(1) of the Directive precludes dismissal of a transsexual for a reason related to a gender re-assignment.

## Annex B

### Information about the Gender Re-assignment process

The **first** stage involves the individual reaching the conclusion that he or she is transsexual, ie is in the "wrong body" and deciding to consult the medical profession. A general practitioner will usually refer the individual to a specialist who can begin steps to make the gender re-assignment possible.

Having reached this **second** stage the International Gender Dysphoria Association recommends a two year phase in which the individual will dress and "live" in the new identity as a test of intent and feasibility. During this period the individual should receive regular psychological counselling and assistance. An endocrinologist should supply specific drug treatment to alter the metabolism - inhibitors to cancel the hormone action of the former sex and replacement hormones of the new sex - and should monitor the effect on the individual's health. This "life test" phase will involve changes in the individual's appearance, behaviour, dress and manner, which will be visible to colleagues, customers and other contacts.

For those individuals who confirm they wish to move further, and gain medical agreement, the **third** stage involves period(s) when surgery is undertaken, when absences and recuperation are necessary. The length of absence(s) will depend on each case, but recovery is likely to take some weeks.

The **fourth** stage is post-operative, when the individual will have a re-assigned gender, including name, and will aim to return to a normal routine within their new identity either in the old job or in a new job. Hormone replacement therapy may well continue for life.

Progress from the first stage to a successful post-operative position may well take several years. Some individuals receive only the drug treatment without the surgery process, but nevertheless are formally registered with a medical specialist and adjust to life completely in the new sexual identity.

In the United Kingdom it is not legally possible to change a birth certificate following gender reassignment. However, people who are living permanently as a member of the opposite sex are legally able to change their name and acquire certain documents in that new name such as driving licence, passport, National Insurance number, medical card, tax code and electoral registration, so enabling them in general to live "in the new identity". However, the principle that a man can only marry a woman according to sexual identity at birth prevents a transsexual being free to marry "in the new identity". The age for receipt of state pension is dependent on sex as stated on the birth certificate (until the equalisation of pensions concludes in 2020.)

## Annex C

### Illustrative Industrial Tribunal cases regarding transsexuals

- 1) Z worked for a charity under contract to the Prison Service to give counselling to prisoners to help them stop drug-taking habits. Whilst planning to change sex from male to female, Z began to wear make-up and more feminine clothing. Prisoners ceased to volunteer for Z's counselling sessions. The Prison Governor told the Charity not to send Z to the prison any more, as the sessions were not assisting prisoners; the Charity dismissed Z as there was no other work. At IT there was a dispute over whether the dismissal was because of the transsexualism or because (as the Prison Service said) there was a fear for Z's safety among violent prisoners. Z was awarded compensation against the Home Office.
- 2) Y, an RAF technician who had been promoted, was temporarily demoted during the period while undergoing medical treatment to change sex to female. The lengthy medical processes and absences involved led to the demotion lasting well over a year, at which point the RAF dismissed Y. At IT there was a dispute over whether the dismissal was because of the transsexualism or because it was standard RAF policy to dismiss for unfitness for service someone who had failed to meet the required standards of the higher rank over so long a period. Y was awarded compensation against the RAF.
- 3) Y, a female applicant to the police force, had passed all tests until she had to send in medical references, which revealed that some years before she had changed sex. The police recruiters rejected X. At IT there was a dispute whether the dismissal was because of the transsexualism or because, as the police said, X would be unable to carry out the full range of duties. They specified the duty of searching suspects' clothes and body: as the applicant looked female, male suspects would object to the body search. But as the applicant had been born a man, it was indecent to search female suspects. The Tribunal found the police service's rejection of X was justified and not discriminatory.
- 4) R was an engineer on the adventure rides of a funfair, who underwent full sex change treatment, and continued to work at the funfair as a woman. She was the only female among a dozen engineers. R's colleagues ostracised her, insulted and intimidated her and prevented her working (eg damaging and stealing her tools, refusing to help lift heavy loads). R became ill. When absent following a suicide attempt, she was dismissed. At the IT, R complained of sexual harassment, which is unlawful under the SDA, and was awarded compensation against the funfair. The Employment Appeal Tribunal dismissed the appeal by the employer.
- 5) P was registered at birth as male and was employed as the manager and sponsorship organiser of an educational establishment run by Cornwall County Council. When P intimated to her employers her intention to begin a lifetest (which included dressing as a woman) prior to undergoing full gender re-assignment surgery) she was dismissed, and subsequently raised a sex discrimination action. The Industrial Tribunal found that P had been dismissed because of her intention to undergo a sex change (not for redundancy, as the employer had claimed) but could give no remedy under the relevant UK law (the SDA). The Tribunal made reference to the

European Court of Justice as to whether the ETD precluded the dismissal, and the ECJ found that it was unfair on grounds of sex.

### *Examples of employment issues encountered*

- Where someone works in a job with a uniform or similar "dress code", what special arrangements might be needed eg who is responsible for purchase of a new uniform.
- Protection against harassment by the employer, colleagues or customers about undergoing gender re-assignment or for having undergone it previously. This should be prevented on the same basis as sexual harassment. (The Courts have ruled that employers have duties to prevent harassment of staff and investigate cases which are brought to their attention, of harassment either by colleagues or by customers or others in the course of work.)
- What is appropriate if a person is in a job where, although the gender of the person doing the job is irrelevant, the process of gender reassignment (either the transition phase, the completed fact) could affect vulnerable persons adversely (such as people with learning difficulties or people in counselling).
- Considerations due to changes which the individual experiences (eg where it is unclear whether an employer's male or female toilets or changing rooms are appropriate for maintenance of decency) and whether making special and appropriate working arrangements might be necessary for the individual.
- Confidentiality: It may become known that someone has not always been of their current gender, eg from job references. Whether it is right or practical to maintain a transsexual's confidentiality at work is a matter for consideration depending on the particular circumstances.
- Even where it may be lawful to exclude a transsexual from certain work (either temporarily or permanently), it is desirable to protect individuals against dismissal where possible. Good practice seems to indicate that where it is reasonably practicable, the employer should offer the individual alternative work at the same pay. Where that is not possible, the employer should offer alternative work at lower pay; or if that is not possible, unpaid leave until a vacancy arises or the process of gender re-assignment (as defined by the time limits in paragraph 14) is complete. Dismissal should be the last resort.
- Some employers have been known to suggest that an individual who is going through the gender-reassignment process would be more comfortable if transferred to other duties - eg involving less public contact - or if sent on leave then transferred to a new work area with new colleagues. These may be acceptable offers as far as the individual is concerned, but extreme care is needed lest he or she feels forced into an unacceptable detriment.