



**SUBMISSION BY AMICUS ON
DTI WOMEN AND EQUALITY UNIT CONSULTATION ON
*Equality and Diversity: Updating the Sex Discrimination Act***

Introduction

1. Amicus is the UK's largest private sector trade union and the fastest growing union in the public sector. With over 1.2 million members Amicus has members in a range of industries including, financial services, manufacturing, print and media, the voluntary and non-profit sectors, local government and NHS health professionals.
2. We welcome the opportunity to comment on the Women and Equality's consultation on *Equality and Diversity: Updating the Sex Discrimination Act* , which will bring improvements to the UK Sex Discrimination Act.
3. However, we would argue that there are a number of areas where the Government is not meeting the requirements of the EU Directives. Of particular concern is the lack of reference to the Equal Pay Act which now requires amendment to comply with the Equal Treatment Directive.
4. **Definition of harassment and sexual harassment**
 - 4.1 Amicus welcomes that the amendments to the Sex Discrimination Act will bring in a statutory definition of sexual harassment for the first time. However, we are concerned that the definition used in the draft regulations refers to "harassment where, on the grounds of..." as opposed to the wider definition of harassment "related to" as set out in the Employment Equality Framework Directive and Race Equality Directive. We would argue that this definition does not correctly implement the EU Directive and is in breach of EU law. This is equally the case on the harassment tests in the sexual orientation, religion or belief and race regulations.

- 4.2 Article 2(2) of the Equal Treatment Directive defines harassment as, “unwanted conducted related to the sex of a person”. It further defines sexual harassment as “unwanted ...conduct of a sexual nature”. If conduct “on the grounds” of sex must be shown, this would be regressive with reference to recent case law, i.e. *Moonsar v Fiveways Express Transport Ltd* (2005) IRLR 9. This found that a female employee had been sexually harassed when male colleagues downloaded pornographic images onto their computer screens, even though they did not show them to her. We would recommend that the draft legislation is amended to deem both “unwanted conduct related to sex” and “unwanted conduct of a sexual nature” as required by the Directive”.
- 4.3 “Conduct of a sexual nature” is not defined in the draft regulations with the suggestion that ACAS will provide practical guidance with examples. The Government must ensure that this guidance is clear and publicised widely to both employees and employers. We would recommend a Code of Practice on Sexual Harassment. Additionally, there must be encouragement from the Government and the ACAS for the training and awareness of managers as this is the key method of tackling the issue of harassment.
- 4.4 On the issue of the perception, we support the TUC and other unions’ view that all the recent European Equality Directives do not allow for a concept of “reasonableness” and legislation should relate to whether or not the conduct is wanted by the recipient. We believe that the UK implementing legislation should be redrafted in this respect.

5. Maternity Rights

- 5.1 We welcome that the small firms’ exemption is to be removed from the maternity leave regulations. However, we view the decision to delay its removal until April 2007 as a breach of the Equal Treatment Directive. The Government should repeal the exemption by October 2005 as required by Article 2(7).
- 5.2 Amicus supports the TUC’s view that the implementation of the Equal Treatment Directive should be used as an opportunity to strengthen maternity rights. Research, including the EOC’s recent investigation into pregnancy discrimination, has revealed that it is common practice for women to be discriminated against and dismissed whilst pregnant or on maternity leave. Our experience within Amicus reinforces this with high levels of complaints and cases about pregnancy and maternity discrimination. We would support more effective sanctions such as an

enforceable right to reinstatement, interim relief and relaxation of time limits.

- 5.3 We are concerned about the exclusion of women who are not legally “employees” for the purposes of UK maternity and parental rights legislation, e.g. agency workers, homeworkers and term-time workers. We would refer the Government to the Pregnant Workers’ and Parental Leave Directives, the Equal Treatment Amendment Directive and the decision of the ECJ in *Allonby v Accrington and Rossendale Community College*. It is Amicus’s view that all of these require the Government to extend maternity and parental rights to all workers.

6. Genuine occupational qualifications (exceptions to the general principle of equal treatment).

- 6.1 We do not support the addition of a “reasonableness requirement” to apply to posts which involve performing intimate physical searches where an employee or applicant is undergoing or intending to undergo gender reassignment. The worker should be treated for all purposes related employment to their chosen gender.

7. Office holders

- 7.1 The Government should consider using a more broader approach to the scope of the Equality Directives and include those that are undertaking any kind of occupation. For example, the Disability Discrimination Act covers elected representatives and this should be expanded to other equality legislation.

8. Office holders – ministers of religion

- 8.1 We welcome that as office holders, ministers of religion will come under the provisions of the amended Sex Discrimination Act.

9. Direct Discrimination

- 9.1 The Directive defines direct discrimination as where one person is treated less favourably “on grounds of sex” than another person has been, or would be treated in a comparable situation. The Sex Discrimination Act defines direct discrimination as less favourable treatment “on the grounds of her sex.” Adopting the language in the Directive would broaden the coverage of the Act to include less favourable treatment because of association with a person of a particular sex, or a false assumption of the

claimant's sex. Additionally, it would mean that the language is consistent with the other discrimination statutes.

10. Indirect Discrimination

8.1 The Directive requires that the "provision, criterion or practice is objectively justified by a legitimate aim, and that the means of achieving that aim are appropriate and necessary". However, the regulations require the means of achieving a legitimate aim to be "proportionate" which is not as stringent as "appropriate and necessary". We believe that the regulations should adopt the definition in the Directive to broaden its cover and meet the requirements of the Directive.

11. Victimisation

11.1 We do not agree with the proposal for retain the Sex Discrimination Act's wording on unlawful discrimination with regards to victimisation as it should not be a requirement that a comparator is needed.

12. Sex Discrimination Act Provisions for positive action by trade unions, employers' organisations and other bodies.

12.1 We welcome the proposal to leave the above provisions unchanged as it is vital that unions are able to take positive action measures to aim to achieve equality in their union structures.

13. Equal Pay

13.1 Article 3(1) of the amended Directive states that the Directive now applies to "employment and working conditions, including dismissals, as well as pay". We would argue that this requires an immediate revision of the Equal pay Act. The Equal Pay Act currently requires an actual comparator and this should be now revised to allow for a hypothetical comparator. The definitions of both direct and indirect discrimination under article 2(2) require the law to provide for this possibility.

13.2 Additionally, there is no remedy under the Equal Pay Act for those whose pay is discriminatorily under-valued in comparison with a person of the opposite sex. The Act needs to be strengthened to help to address the issue of the under-valuing of women's work.

14. Existing Government measures to implement the amended Equal Treatment Directive

- 12.1 The EU Equality Directives requires more social partnership arrangements regarding equality than the UK has at present. Amicus would ask that the Government consider trade union representation on the Equalities Review chaired by Trevor Phillips as well as on its subgroups.

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