

# The Scottish Transgender Alliance Conference 2008

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# Transgender status and the law

- ECJ decides that discrimination on grounds of gender reassignment is a form of discrimination on grounds of sex
- Amendments made to the SDA
- By Sex Discrimination (Gender Reassignment) Regulations 1999
- For those undergoing, who intend to undergo or who have undergone gender reassignment
- Direct discrimination is outlawed
- But only for employment and training

# Further extension of protection

- As a result of changes to the SDA because of the Equal Treatment Amendment Directive
- SDA is extended to explicitly outlaw harassment and sexual harassment
- And harassment on the grounds of gender reassignment

# Beyond employment?

- British courts say that the SDA can in any event be read to comply with the terms of the P v S judgement of the ECJ
- The definition of “direct discrimination”
- Should be interpreted to mean the same thing for all aspects of the SDA
- This should apply to all fields of discrimination including goods and services?
- But See Lalor v Red Lion Pub

## European backdrop

- Article 141 Treaty of Rome
  - relates to gender equality in the employment sphere only
- Article 13 Treaty of Amsterdam
  - Allows action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation

# Article 13 Directives

- Race Directive
  - Covering employment, training, goods and services and education
- Employment Framework Directive
  - Covering sexual orientation, religion or belief, age and disability
- Equal Treatment Amendment Directive
  - Bringing ETD into line with newer directives
- Article 13 Gender Directive
  - Sex equality in goods and services

# A13 Gender Directive - Scope

- No explicit reference to transgender
- but ECJ has interpreted sex discrimination to include discrimination on the grounds of gender reassignment
- Thus the reference to outlawing discrimination on the grounds of sex
- In the context of goods and services
- Extends protection for those suffering discrimination arising from gender reassignment

# A13 Gender Directive

- Outlaws -
- Direct discrimination
- Indirect discrimination
- Harassment
- Sexual harassment
- Victimisation
- In the provision of goods and services

# How does the government implement this obligation?

- The SDA 1975 (Amendment) Regulations 2007
- Amending the SDA
- Extending protection for those undergoing gender reassignment
- In the context of the provision of goods and services
- Note that these regulations have been withdrawn or at least not been brought into force

# What are the implications of the government withdrawing the regulations?

- Britain required to comply with European law by 21 December 2007
- Individuals making claims about their treatment in the public sector
- Can rely directly on their rights under European law
- Individuals making claims about their treatment in the private sector argue SDA must be interpreted to comply with European law

# Stop press!

- The Sex Discrimination (Amendment of Regulations) Regulations 2008
- To be debated during March
- To be laid 5 April
- Expected to come into force 6 April 2008

# Incorrect implementation?

- No provision addressing
- Indirect gender reassignment discrimination
- In the goods and services context

# Examples of harassment

- 47% of trans people do not use public social or leisure facilities for fear of discriminatory treatment
- Many calls to the EOC helpline concerning harassment in the provision of services
- May be possible to argue that harassment is a form of direct discrimination

# Examples of indirect discrimination

- Many calls to the EOC helpline regarding identification related issues
- Eg requirements to disclose all previous names
- Or requirements to disclose medical history
- in order to get access to facilities or services such as banking, insurance, grants, loans, credit, finance or housing
- Such requirements may have no objective justification

# Incorrect implementation?

- Insurance exception
- Allowing the use of sex as a factor in the assessment of risk so long as it is based on relevant and accurate actuarial data
- Applies to transpersons
- But only where there is less favourable treatment as compared to other persons of her sex
- Therefore must have a GRC
- But gender reassignment should suffice?

# Proposals in the Discrimination Law Review

- To extend protection against discrimination on the basis of association to gender reassignment
- To extend indirect discrimination protection to transsexual people
- To extend protection in respect of public functions (but not education)
- To retain the existing definition of gender reassignment