

## **Scottish Trades Union Congress**

### **Draft Response to DTI Consultation Equality & Diversity – The Way Ahead**

#### **Introduction**

The STUC is Scotland's Trade Union Centre. Its purpose is to co-ordinate, develop and articulate the views and policies of the Trade Union Movement in Scotland and, through the creation of real social partnership, to promote trade unionism, equality and social justice; the creation and maintenance of high quality jobs and the public sector delivery of services.

The STUC represents around 630,000 working people and their families throughout Scotland. It speaks for trade union members in and out of work, in the community and in the workplace. Our affiliated organisations have interests in all sectors of the economy. Our representative structures are constructed to take account of the specific views of women members, young members, black/minority ethnic members, LGBT members, and members with a disability, as well as retired and unemployed workers.

#### **General Comments**

The STUC is delighted to respond to this consultation, which paves the way for some of the most significant legal reforms in equality legislation and policy in many years.

The STUC welcomes the fact that the Government has taken account of the points made by trade unions in its previous consultation on the implementation of the Employment Equality and Race Directives across a number of key areas, which we will point to throughout this response.

However, a concern throughout the proposed guidance is the Government's reluctance to implement standards higher than the minimum required by the Employment Equality and Race Directives.

Furthermore, we are of the view that an opportunity has been missed by the Government to bring about an overall harmonisation

and simplification of equality legislation, which we believe would be easier to implement and more effective to deliver than the current staggered approach, which has been adopted. The STUC believes that the introduction of a comprehensive Single Equality Act with high and consistent standards of protection across all equalities areas, and including goods and service issues, remains the best way of achieving this.

It is also disappointing that the Government has failed to make proposals about how they will deal with the provisions within the Directives dealing with social dialogue. These provisions require that adequate measures be taken to promote dialogue between social partners, with a view to fostering equal treatment, including through the monitoring of workplace practices, collective agreements, codes of conduct and through research or exchange of good practice.

## **Cross-cutting Definitions and Concepts**

### Direct Discrimination

The STUC is satisfied that the draft regulations on sexual orientation and religion and beliefs are of a standard equivalent to the RRA and SDA definitions. However, we are concerned that the draft disability regulations allow for justification of less favourable treatment for reasons relating to a person's disability. We do not feel that there should be any justifiable reason for less favourable treatment, unless it can be shown that a person is not competent, capable or available to perform the essential functions of a job, even where reasonable adjustments have been taken into account.

### Indirect Discrimination

While the STUC welcomes the prohibition of indirect discrimination contained within the draft regulations on sexual orientation and religion and beliefs, which is in accordance with the definition in the Directives, it is disappointing that other areas of equality legislation are not being fully harmonised to this definition. We are disappointed that the SDA is not being amended and that the RRA is only being partially amended to cover race, but not nationality. Furthermore, we are concerned that the disability regulations do not include a concept of indirect discrimination, but simply rely on the current reasonable adjustment approach.

### Harassment

The STUC welcomes the standard definition of harassment across sexual orientation, religion and belief, race and disability regulations. However, we believe that current case law and the Equality Employment and Race Directives go further in their definition in favour of the complainant. We do not believe that the introduction of a “reasonability” factor in what amounts to harassment is helpful and would prefer to see more weight being given to what amounts to harassment in the perception of the complainant. Furthermore, we are again concerned that there is no change to the SDA and only partial change to the RRA.

### Discrimination after employment

The STUC welcomes the limited protections being introduced on grounds of race, religion and belief, sexual orientation and disability for post employment discrimination. However, once again, there is no change to the SDA and only partial change to the RRA, so disparities remain.

### Office and postholders

The STUC would urge the Government to apply protection from discrimination to all office bearers and postholders in its widest possible sense and across all equality strands. At present, there are wide differences in current UK legislation relating to voluntary work and service in public appointments. This needs to be urgently addressed.

### Victimisation

While the STUC welcomes the drafting of provisions for victimisation in a way that is common to the RRA and SDA, we believe that the interpretation in the Equal Employment and Race Directives was wider than current UK provisions. In particular, we do not believe that there remains a need to establish a comparator under the Directives. We will continue to argue that the definitions of victimisation should not require a comparator.

### Genuine occupational requirements and positive action

We feel that there are opportunities within the Directives for the Government to go much further with their regulations to make provision for positive action.

## **Key Issues For Specific Equality Strands**

### Race

The STUC believes that the main benefit of the draft regulations on race is that they will implement a change in the burden of proof in race discrimination cases. This will be extremely helpful in practice and will improve upon the position in current UK case law from the complainant's point of view. We welcome the fact that once the complainant has proven initial facts from which a tribunal or court could conclude that race discrimination or harassment has occurred, that the complaint would then be upheld, unless the alleged discriminator proves that they did not in fact commit an offence.

However, the STUC is concerned that in cases of indirect discrimination and harassment, difficulties may arise with the draft regulations, because they create a complicated and unfair two-tier scheme, where discrimination on grounds of colour and nationality will not be subject to the new definitions and reforms in the RRA.

So, for example, harassment because someone is Black is not specifically prohibited by the new regulations, but harassment on grounds of African Caribbean origins would be expressly outlawed.

### Sexual Orientation

Although we very much welcome the introduction of legislation that protects workers on grounds of sexual orientation, the STUC is highly concerned that a key area of protection is missing. The draft regulations state that discrimination will not be unlawful that "prevents or restricts access to a benefit by reference to marital status". This will mean that pensions and other workplace benefits, such as death benefits, can continue to discriminate in favour of married people. We believe that this may be unlawful, as it amounts to indirect discrimination against LGBT people by the Government insofar as they are not able to marry. We would also urge the Government to ensure that the protections for LGBT people against discrimination apply to insurance providers and pension trust managers in the same way as women and the disabled are covered in this area.

### Religion and Belief

The STUC welcomes the introduction of new protections from discrimination for employees on grounds of religion and beliefs. However, we are concerned that the provision within the regulations for genuine occupational requirements mean that there are exceptions to the protections afforded to potential employees on the grounds of religion. This exemption applies to employers with an ethos based on religion or belief. We would wish to see a need for this requirement to be justified by employers, both in terms of the role being performed and in terms of the ethos requirement of an organisation.

Furthermore, we strongly recommend that the provision within the draft regulations for this religious requirement by some employers should not in any way justify discrimination on any other grounds. This should be explicit within the regulations on religion and beliefs.

### Disability

The STUC in particular welcomes the following specific changes contained within the draft disability regulations:

- the removal of DDA exemption for employers with fewer than 15 employees
- the broad prohibition on advertisements which discriminate against disabled people, to be enforced by the DRC
- improvements to protections for disabled people against indirect discrimination in occupational pensions, group insurance and performance related pay
- the implementation of changes to the burden of proof that will assist disabled applicants in tribunal cases

It is, however, unfortunate that the Government has not expanded the definition of disability to comply with the intentions of the Equality Employment Directive, such as taking account of HIV and cancer from the point of diagnosis. Furthermore, issues such as alcohol or drug dependence are not included and the requirement that, to qualify a disability must last or be likely to last for at least 12 months, we believe is questionable.

### Equal Pay

The STUC welcomes the introduction of new regulations relating to the Equal Pay Act. In particular, the changes relating to time limits and arrears of back pay are welcome. However, we would ask the Government to look again at their original consultation document and revert to their original proposals to give a general power to tribunals to extend the time limit if it is “just and equitable” to do so. This we feel was a stronger proposal than the one set out within the draft regulations.

Also welcome is the removal of the powers of tribunals to reject cases on the basis that there are no reasonable grounds to determine that the work of the woman and the man are of equal value, as well as the guidelines suggesting that a tribunal should assess whether or not a job evaluation scheme that values the male and female jobs differently is discriminatory in its value judgements and, therefore, is not fit to be relied upon.

Rozanne Foyer  
Assistant Secretary, STUC  
January 2003