

Gender reassignment

European Court of Justice ruling and the effect on State Pension claims

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Equality impact assessment for gender reassignment: European Court of Justice ruling and the effect on State Pension claims

Introduction

The Department for Work and Pensions (DWP) has carried out an equality impact assessment on the proposal to introduce processes and procedures to enable transsexual women entitled under European law to recognition of their acquired gender prior to the introduction of the Gender Recognition Act 2004 to apply for increased weekly State Pension, assessing the proposal in line with the current public sector equality duties.

The equality impact assessment process will help to ensure that the Department has paid due regard to the need to:

- eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Equality Act 2010;
- advance equality of opportunity between people from different groups; and
- foster good relations between people from different groups.

The equality impact assessment will show how the Department has demonstrated it has paid due regard when developing new services or processes and considered protection against discrimination on the grounds of the protected characteristics. These are; race, disability, gender, age, gender reassignment, sexual orientation, pregnancy and maternity, religion or belief and marriage and civil partnerships (in terms of eliminating unlawful discrimination only).

Brief outline of the policy or service

The purpose of this initiative is to provide a means whereby transsexual women meeting the specified qualifying criteria can apply for increased State Pension in recognition of having deferred their entitlement in respect of periods prior to the implementation of the Gender Recognition Act (GRA) on 4 April 2005. Currently State Pension age for a man born before 6 April 1959 is 65, for a woman born before 6 April 1950 it is 60. Therefore prior to the Gender Recognition Act a transsexual

woman would be treated for Social Security purposes in her birth gender and could only receive State Pension from age 65.

In April 2006, in reply to questions posed to it by a Social Security Commissioner, the European Court of Justice (ECJ) held that it was discriminatory under the Social Security Directive (Dir.79/7 EEC, effective in the UK from 23 December 1984) not to recognise the acquired gender of transsexual people who had undergone gender reassignment for State Pension age purposes. The Department is obliged to give effect to the ruling. Since the ruling there has been mounting pressure from transsexual lobby groups for the Department to pay arrears of State Pension to eligible transsexual people.

The Court of Appeal decided that a transsexual person seeking rights to equal treatment under the Directive does not need to satisfy similar conditions to those defined in the GRA. Instead the Court decided that for periods before the GRA was in force a transsexual woman who had undergone gender reassignment surgery would be entitled, under the Directive, to recognition of her acquired gender for State Pension age purposes.

The Department's view which has been supported in the domestic courts is that the discrimination identified by the ECJ ruling was remedied by the implementation of the GRA. Therefore, the ruling is in effect limited to transsexual women who were of pensionable age in their acquired gender but not their birth gender and had gender reassignment surgery at some point during the period between the implementation of the Directive on 23rd December 1984 and the GRA on 3rd April 2005 i.e. those born between 23 December 1919 and 3 April 1945.

The Ministry of Justice (MOJ) leads on matters relating to the GRA. The Department, Her Majesty's Revenue and Customs (HMRC) and MOJ have agreed that applications for increased State Pension should be assessed on the basis of the Court of Appeal's decision.

The Department has to adhere to statutory provisions that prevents the payment of arrears following a ruling of an Upper Tribunal or Court that reveals an error of law, such as occurred in the ECJ ruling. For the majority of transsexual people affected by the ruling the EC law rights gained will cover a past period so very few of those eligible would have seen any financial gain. However, where a person claims their State Pension some time after reaching State Pension age the rules allow for the weekly rate to be increased by a set percentage. Therefore, where a person establishes entitlement to recognition of their acquired gender for a past period they would be entitled to increased weekly State Pension payments on the basis of having deferred entitlement from the later of age 60 or the date they had gender reassignment surgery.

These payments are caught by the statutory provisions on non-retrospection therefore the date from which increased payments are made to this group will be the date of the ECJ's ruling.

The Department's objectives are to design, develop and implement a supporting business process, procedures, guidance, learning and development, forms and

communications material to enable eligible customers to make an Expression of Interest and subsequent formal application for recognition of their acquired gender for State Pension purposes in line with the ECJ ruling.

The Directgov website will provide detailed instructions on how applicant's should contact the Department. Transsexual women who wish to make a formal enquiry will be able to do so through the existing channels. The Department will also write to lobby group organisations asking them to cascade to their members relevant details on how to approach the Department for advice.

A specialist team based in the National Pension Centre (NPC) will handle expressions of interest from those potentially affected and subsequent equal treatment applications on behalf of both DWP and HMRC. DWP will co-ordinate the re-assessment of applicant's State Pension claims and the refund of any National Insurance Contributions paid for both UK based applicants and those living outside of the UK. It is anticipated that the majority of claims will be received within the first 6 months and the specialist team will be in place for this period. After 6 months, this process will be managed as part of 'business as usual' procedures. All support products including guidance and learning and development will be in place to equip staff members to effectively manage all applicants expressions of interests and applications for equal treatment.

Currently there are 750 pensioners identified who will benefit from this initiative.

Consultation and involvement

Stakeholder consultation:

The following internal stakeholders have been consulted as part of this initiative and have been fully involved in all stages of design and development to date.

State Pension Directorate, Pension Credit Policy – State Pension Division, Diversity and Equality, DWP Security, HR Change, Decision Making & Appeals (Legal Group), Legal Group (Information, Devolution & Governance) Data Protection and Freedom of Information, Pension, Disability & Carers Service (PDCS) Strategy (Impact, Design & Assurance), PDCS Learning Design, PDCS Operational Business Improvement and Change, PDCS Internal Communications team, DWP External Communications Team, NISSA Pension Service, Risk Assurance Division, Policy and Analysis Division, Strategy Directorate, PDCS Customer and Partnerships Directorate, PDCS Customer Materials and Procedures, Debt Management, DWP Commercial Gateway Team

External stakeholders are:

- Her Majesty's Revenue and Customs
- Ministry of Justice
- ATOS Medical Services.

All stakeholders will continue to be fully consulted in line with their requested level of involvement as the initiative proceeds towards implementation.

Impact of the Gender Reassignment: ECJ Ruling and the effect on State Pension Claims

This initiative is specifically targeted at those customers affected by the ECJ ruling, i.e. those transsexual women born between 23.12.1919 – 03.04.1945 and who have undergone gender reassignment surgery.

The initiative does not discriminate against a person's race or disability but is specific to transsexual women. This will therefore enable the Department to meet its obligations under EC law to remove discrimination in terms of the pensionable age of transsexual women for periods before the GRA was in force.

Only a small number of transsexual women will be impacted. Currently there are 750 pensioners identified who may benefit from this initiative. Whilst this is a very specific measure and these cases will be technically complex and need to be sensitively managed the extended protected characteristics of race, disability, gender, age, gender reassignment, sexual orientation, pregnancy and maternity, religion or belief and marriage and civil partnerships will be considered throughout implementation in line with legislative requirements.

The available evidence shows that the processes and procedures to be implemented will introduce a positive effect for those eligible pensioners.

There is no evidence to indicate that the changes will have any adverse impact on customers or staff, based on race, disability, gender, age, gender reassignment, sexual orientation, pregnancy and maternity, religion or belief and marriage and civil partnerships.

Monitoring and evaluation

Management Information will be gathered from the point of implementation that will allow PDCS to monitor customer interest and to determine the extent to which an individual's claim to extra State Pension has been affected. This data will be used to determine the overall effectiveness of the initiative, highlight lessons learned and inform the Department of any necessary follow-up actions required to manage the expectations of this specific customer group.

Next steps

This is the final assessment of the EIA before the initiative will be implemented and has been considered against the agreed processes, procedures and products identified to date to support this exercise.

The processes and procedures implemented will only be applicable to those transgender customers that fall within the defined eligibility criteria. There will be no new customers that will fall within the eligibility criteria at a later date and therefore no further impact. It is anticipated that the majority of customers will have expressed an interest within the first 6 months of go-live and will be addressed via the specialist team specifically set up to action these cases. Following this 6 month period, any residual cases will be managed via business as usual until all cases have been cleared.

DWP will review this EIA 12 months following publication.

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