



Women's Resource Centre

Briefing on legislation about Single-Sex Provision in the UK

July 2007

This briefing aims to inform the women's voluntary and community sector (WVCS) about the law relevant to single-sex service provision.

Introduction

The legislation itself can be confusing, due to the different rules for different areas (for example the exceptions which apply in the area of goods and services are not the same as those which apply in the employment field). This makes the law easy to misinterpret. This briefing aims to arm the WVCS with a basic understanding of the impact of current legislation on their continuing abilities to provide women-only services.

Persistent and systematic discrimination against women has motivated a range of domestic and international law. The legislation emphasises the illegality of discrimination on the basis of gender, while highlighting the need for certain exceptions based on single-sex provision in a variety of forms.

In April 2007 the **Gender Equality Duty** came into force. Under the Gender Duty, all public authorities must demonstrate that they are actively promoting equality for women and men, and that they are eliminating sexual discrimination and harassment. This means that public authorities must prepare and publish a Gender Equality Scheme, which should be designed in consultation with local employees, service users and other stakeholders.

The Gender Duty was created in response to the continuing presence of systematic gender discrimination. It aims to actively promote equality for women and men, and ensure that public authorities and bodies consider the effect of their decisions on women and men.

While the Gender Duty is written in gender-neutral language, organisations and funders will still be able to tailor their vital single-sex services to the needs of one gender, without being penalised for not allocating the same services to members of the opposite sex. A gender blind approach is not what the duty requires. What is required is for public authorities to shape the necessary levels of provision needed for both genders to counteract systematic discrimination and persistent patterns of advantage and disadvantage. The laws permitting single-sex provision will not be weakened or indeed abolished by the introduction of the Gender Duty; they can only be strengthened by it.

“The duty on public authorities to have due regard to the need to promote equality of opportunity between women and men is a new aspect of the Sex Discrimination Act. In order to achieve actual equality of opportunity, it is necessary to recognise that in certain circumstances women and men, because of their gender roles, are not in the same position. In some circumstances it may therefore be appropriate for public authorities to treat women and men differently, if that action is aimed at overcoming previous disadvantage”¹.

¹ Section 2.13, Equal Opportunities Commission Gender Equality Duty Code of Practice, 2007

The success of the Gender Duty depends on the extent to which it is understood by those affected by it and those implementing it. It is important for women's organisations to understand current legislation, not least to guard against possible misunderstandings by local authorities or funding bodies, who may base decisions to deny funding to exclusively single-sex services on misconceptions of the law. The example of Northern Ireland is a case in point.

Section 75 of the Northern Ireland Act 1998 imposed a statutory duty on public authorities to have regard to the need to promote equality of opportunity between people of different religious beliefs, political opinion or racial group, sexual orientation, marital status and age, between men and women generally, between people with disabilities and those without, and between people with dependents and those without².

In practice, however, this was interpreted to mean that it was a legal obligation to treat all these groups in the same way, without taking into account already existing differences and inequalities between them. For example, civil servants insisted that any definition of domestic violence (DV) had to be gender neutral and that they could not privilege the interests of female victims of DV above those of male victims, and that service delivery had to be 'equal'.³

The problems arose due to the 'gender blind'⁴ approach of officials, who believed that the Act assumed the existence of a level playing field. In reality, systematic discrimination leads to persistent patterns of advantage and disadvantage which shape the necessary levels of provision needed for both genders.

The Law – the European Dimension

As a member of the European Union, the laws of the United Kingdom must comply with the laws of the European Union. One key piece of European legislation in this context is **Council Directive 2004/113/EC of 13 December 2004**. It implements the principle of equal treatment of men and women in access to and supply of goods and services.

The Council Directive does permit exceptions where this is justified:

“With a view to ensuring full equality in practice between men and women, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to sex.” (Article 6)

The recital to the Directive states that differences in treatment may be accepted only if they are justified by a legitimate aim (recital 16). It gives examples of what a **'legitimate aim'** could be⁵:

² EVAW, 'End Violence Against Women coalition response to Gender Equality', www.thewnc.org.uk/pubs/evawresponsegenderduty060119.doc

³ EVAW, 'End Violence Against Women coalition response to Gender Equality', www.thewnc.org.uk/pubs/evawresponsegenderduty060119.doc

⁴ Fawcett Society, Response to the Draft Code of Practice, www.fawcettsociety.org.uk/documents/Response%20to%20Draft%20Code%20of%20Practice.doc

⁵ To be lawful, a 'legitimate aim' would need to be consistent with the decisions of the EU's court, the Court of Justice of the European Communities (ECJ).

- a) the protection of victims of sex-related violence (in cases such as the establishment of single-sex shelters and women-only rape crisis centres)
- b) reasons of privacy and decency (in cases such as the provision of accommodation by a person in a part of that person's home)
- c) the promotion of gender equality or of the interests of women or men (for example single-sex voluntary bodies)
- d) the freedom of association (in cases of membership of single-sex private clubs)
- e) the organisation of sporting activities (for example single-sex sports events)

The Domestic Law

The key domestic legislation for single-sex provision is the **Sex Discrimination Act 1975** (as amended) (the SDA). The SDA prohibits sex discrimination in 5 key areas:

- 1) the provision of goods, services and facilities
- 2) the exercising of public functions
- 3) education
- 4) employment, training and related matter
- 5) the disposal and management of premises

However, there are certain **exceptions** to these rules. These exceptions outline the circumstances in which it is legal to provide services for one sex only.

General exceptions which apply in all areas

There are some general exceptions which apply across the board. Those which may be relevant in this context are:-

Charitable purposes: under section 43 of the SDA, it will be lawful for a charity to provide in its charitable instrument for conferring benefits on one sex only and to take action to give effect to that provision.

Communal accommodation: The law recognises that it may be necessary for an organisation which provides residential accommodation to treat men and women differently, for reasons of privacy, decency or because of the nature of sanitary facilities. It is not unlawful for an organisation providing accommodation which includes shared sleeping accommodation to discriminate between men and women in the arrangements for the admission of people to the accommodation, provided that the accommodation is managed in as fair a way as possible in the circumstances (section 46 SDA).

Training: It is permissible in certain circumstances for an organisation to provide training (or other encouragement to take advantage of opportunities) to one sex only in relation to particular work in which that sex is under-represented in Great Britain as a whole.

It needs to be shown that the organisation reasonably believes that the number of, say, women, doing that work in Great Britain is either none, or is comparatively small.

Discriminatory training can also be provided if the organisation reasonably believes that the number of, say, women, doing particular work in *an area within* Great Britain is either none, or is comparatively small. In that case, training can only be provided to people of the sex in question *who appear likely to take up that work in that area* (SDA section 47).

Sports, games or other activities of a competitive nature may lawfully be confined to competitors of one sex if the physical strength, stamina or physique of the average women would put her at a disadvantage when compared with the average man (section 44 SDA).

Limited Exceptions

There are other exceptions which apply only in particular areas.

1) Goods, facilities and services

It is unlawful for anyone concerned with the provisions of goods, facilities and services to the public or a section of the public to discriminate on grounds of sex. This applies whether or not the service is provided for payment (section 29, SDA).

However, there is an exception which applies to the way in which voluntary bodies provide goods, facilities and services. A voluntary body is defined as a not-for-profit organisation which was not set up by statute. If the organisation was set up by statute, the charity or public authority exceptions may apply instead.

Under section 34, a voluntary body may restrict membership to one sex. If membership is restricted in this way, the body may also lawfully restrict the benefits, facilities and services it provides. As with the charities exemption, it is lawful for a voluntary body to have the provision of benefits to one sex as its main object, and to take steps to implement that object. In other words, organisations may exist and act solely to confer benefits on one gender.

This exception is obviously particularly important to voluntary and community groups who provide membership and services to one gender, and is often overlooked by those organisations to which it could be of most use.

A non profit making body, which was not set up by statute may lawfully restrict its membership, and the benefits, facilities and services it provides to members, to one sex. Moreover, whether or not membership is so restricted, if the main object of such a body is to confer benefits on one sex, it is not unlawful for the body to do anything which is necessary to give effect to that object.

2) Public Authorities

It is unlawful for anyone exercising functions of a public nature, including public authorities, to discriminate on the ground of sex (section 21A, SDA).

However, there are express exceptions which permit the provision of separate services by public authorities in some circumstances. The exceptions are quite widely drafted and are likely to be particularly relevant in the context of public authorities making funding decisions. The exceptions are set out in paragraphs 8-13 of subsection 9 of section 21A SDA. Note that some circumstances permit single sex service provision, and others permit the provision of separate services to both sexes. Provision of single sex or separate services is lawful in the following circumstances:-

- the provision of a service for one sex only where only persons of that sex require the service;
- the provision of separate services for each sex where a joint service would or might be less effective;
- the provision of a service for one sex only where the service is also provided jointly for both sexes, and if the service were provided only jointly it would or might be insufficiently effective;
- the provision of a service for one sex only where if the service were provided for both sexes jointly it would or might be less effective, and the extent to which the service is

required by the other sex makes it not reasonably practicable to provide separate services for that sex;

- the provision of separate services for each sex in different ways or to different extents where if the service were provided for both sexes jointly it would or might be less effective, and the extent to which the service is required by one sex makes it not reasonably practicable to provide the service for that sex in the same way or to the same extent as for the other sex.

“Women make up the substantial majority of victims of domestic violence and rape. It would not be appropriate, therefore, for a local council to seek to fund refuge services on a numerically equal basis for men and for women. The promotion of equal opportunities between men and women requires public authorities to recognise that the two groups are not starting from an equal footing and identical treatment would not be appropriate.”⁶

Finally, action taken for the purpose of assisting one sex to overcome a disadvantage (as compared with the other sex), or to overcome the effects of discrimination is lawful. This is highly likely to be of specific relevance to women’s organisations, many of whom are campaigning or lobbying against the persistent and systematic discrimination against women which has created gender inequality.

3) Education

It is unlawful for an educational establishment to discriminate on grounds of sex. An educational establishment is defined to include schools (whether state funded or independent), and universities and institutions of further education.

Sections 26 and 27 of the SDA outline the circumstances in which schools are legally allowed to discriminate in favour of one sex only. First, single-sex schools are exempt in terms of admissions. Second, co-educational schools with single-sex boarding accommodation are exempt in terms of admission for boarding. Lastly, there are special provisions to allow transitional arrangements for establishments which have been single-sex but are turning co-educational.

4) Employment

Recruitment: It is unlawful to discriminate directly or indirectly on the grounds of sex in the arrangements made for deciding who should be offered a job; in any terms on which employment is offered; or by refusing or omitting to offer a person employment (section 6 SDA).

Advertisements for recruitment should be promoted in such a way to encourage suitable applicants from both sexes, which includes consideration of the appropriate location/media for placing advertisements.⁷

Employment: It is also unlawful to discriminate on the grounds of sex in relation to those already in employment in the way in which opportunities for promotion, transfer or training, benefits, facilities or services are offered, or to dismiss an employee or subject them to any other detriment on the ground of sex.

Genuine Occupational Qualifications: For many women’s organisations, a key question is whether they can legally advertise jobs solely to female candidates. This may be seen as necessary for reasons of sensitivity or confidentiality or for health-related positions.

⁶ Depending on who the provider is, this could come under Section 34 or the public authority exceptions. Section 2.15, Equal Opportunities Commission Gender Equality Duty Code of Practice, 2007 http://www.eoc.org.uk/PDF/GED_CoP_Draft.pdf

⁷ Code of Practice: Sex Discrimination, EOC, <http://www.eoc-law.org.uk/default.aspx?page=2971>

There are instances in which the law recognises '**genuine occupational qualifications**' (**GOQs**) where a person's sex can be a qualification for a particular job. A GOQ will allow recruitment of a person of one sex and also promotion, transfer or training of a person already in a job. However, a GOQ cannot be relied on to permit employment being offered to one sex on different terms to the other, subjecting an employee to a detriment, or dismissing an employee.

A GOQ may arise for the following reasons only:-

- **physiology** (excluding physical strength and stamina) or authenticity - for example, a model or an actor;
- **decency or privacy** where the role is likely to involve physical contact with one sex, or circumstances where people are in a state of undress, or using sanitary facilities, for example, some changing room attendants, some self-defence trainers, some complimentary therapists;
- where the work is in a private home, **the degree of physical or social contact** with a person living within the home, or **the knowledge of intimate details** of such a person's life, which the holder of the job is likely to have because of the nature or circumstances of the job or of the home;
- where **the nature or location of the establishment** makes it impracticable for the jobholder to live in premises other than those provided by the employer (e.g. if the job is in a ship or on a remote site) and the only available premises for persons doing that kind of job do not provide both separate sleeping accommodation for each sex, and sanitary facilities which can be used in privacy from the other. In such a case, the employer may discriminate by choosing for the job only persons of the same sex as those who are already living, or normally live, in these premises. However, the exception does not apply if the employer could reasonably be expected either to equip the premises with the necessary separate sleeping accommodation and private sanitary facilities, or to provide other premises, for a jobholder of the opposite sex;
- **the fact that the establishment, or part of it, provides special care, supervision or attention** to people of one sex only - for example, some jobs in a single-sex hospital or prison;
- **the fact that the job involves the provision of personal services, promoting their welfare or education**, or similar personal services that are most effectively provided by people of one sex - for example, some probation officers or wardens of residential hostels;
- where **the laws and customs of the country in which part of the job is to be carried out** prevent it from being carried out effectively by people of one sex - for example, a job involving driving in a country where women are forbidden to drive;
- where **the job is one of two to be held by a married couple or civil partners**

Depending on the circumstances, the GOQ which may be relevant to WVCS may be if the job involves the provision of personal services, promoting their welfare or education or similar personal services, that are most effectively provided by people of one sex.

If the reason for the qualification only applies for certain duties, such as a sales' assistant's changing-room duties, and there are already sufficient numbers of staff to fulfil that duty, a GOQ will not justify employing all staff from one sex. If there are already sufficient staff to perform the duties for which the GOQ applies, the GOQ cannot be relied on in any future recruitment. Also, where a job which previously included a GOQ becomes vacant, there should be re-examination by employer to check that the GOQ still applies.

Training and other positive action: Section 47 contains an exception to permit employers to provide 'positive action' in areas where there is under-representation of one sex. Where at any time in the previous 12 months there are no women (or a comparatively small number of women) in a particular post, an employer may provide training for that post to women only, or encourage women to take advantage of opportunities for doing that work. This positive action also applies where there is under-representation of men.

Advertisements which state that 'Women are under-represented in this post and applications from female applicants are welcomed' are examples of this type of positive action. It is important to note that the steps which can be taken under this exception are limited to providing training and encouraging applications. It would be unlawful to decide to appoint a woman to a post to address under-representation. Appointments must be made on merit.

This briefing represents the views of the Women's Resource Centre (WRC) and is designed for reference purposes only. The information is general information only, based on the law of England and Wales as of April 2007. Laws and regulations may be different outside England and Wales. The information provided in this briefing is not intended to be legal advice.

We cannot be held responsible for any reliance placed on this briefing. The law in this area is both wide-ranging and potentially confusing. **Advice on particular issues if they arise should be sought from the Equal Opportunities Commission, and from October 2007, the Commission for Equality and Human Rights.**

Written and researched by Nikki Ridgewell with legal advice from Emma Hawksworth, Russell Jones & Walker, solicitors. If you have any comments about this briefing please email kiran@wrc.org.uk

For further information:

Equal Opportunities Commission: <http://www.eoc.org.uk/>
The Equal Opportunities Commission works to eliminate sex discrimination in Britain today and provides information on relevant UK legislation. It provides a helpline service to assist with queries..

Commission for Equality and Human Rights: <http://www.cehr.org.uk/>
From October 2007, the CEHR will take over responsibility from the EOC, as well as the Commission for Racial Equality and the Disability Rights Commission.

The Law Society: <http://www.lawsociety.org.uk/home.law>
Extensive legal information including details of policy, training, advice on dealing with solicitors