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Equal Opportunities Commission

# **Gender Equality Duty Draft Code of Practice Scotland**

**This is a draft Code for Consultation purposes only**

**February 2006**

## **Foreword**

The new gender equality duty has the potential to be the most revolutionary change in sex equality legislation in 30 years, since the introduction of the Sex Discrimination Act itself. This duty will be a key tool for public sector managers to help them make the public sector more efficient, effective and responsive to different needs. It can and should be a catalyst to real change in the way that public policy and public services are designed and delivered. Both politicians and those who deliver services are realising that a one-size-fits-all approach no longer meets the needs of 21<sup>st</sup> century Britain. The gender equality duty will help you understand and address the sometimes different needs of men and women and make better use of the talents of both women and men in your workforce.

This law will only work if you make it work. We want to hear your views on this draft Code of Practice, either online at [www.eoc.org.uk/genderduty](http://www.eoc.org.uk/genderduty) or at our regional events, details of which can be found at the same URL. Our public consultation will be open until 15 May.

The duty will come into legal force on 06 April 2007, and on that date, all listed public authorities will be expected to have developed their gender equality schemes, containing clear goals for action, based on solid evidence and decided in consultation with stakeholders. Public authorities therefore need to start thinking now about how they will implement the duty – by assigning responsibility, starting to gather data and consulting stakeholders. We need to hear your views, so that we can make the Code as helpful as possible to public authorities and bring about better outcomes for end users and gender equality in the workplace.

**Jenny Watson**  
**Chair**  
**Equal Opportunities Commission**

This draft Scottish Code of Practice has been developed to set out for Scottish public bodies how you can meet the demands of the gender equality duty. We have done our best to provide practical examples and case studies, to illustrate the good work which is already being done in different parts of Scotland, by different sectors.

The new duty will be a challenge to the public sector. It will require public bodies to re-assess your planning, consultation, employment and service delivery procedures. But understanding and tackling gender inequality will put public bodies at the forefront of good practice in accessible public service delivery, meaning public services really are available to everybody.

Please give us your views on the Scottish Code, by logging on to the website above, or coming to our events in Edinburgh, Glasgow, Dundee or Inverness. A strong response from Scotland will help us make sure that the gender duty really does make a difference for Scotland.

**Rowena Arshad**  
**Equal Opportunities Commissioner for Scotland**

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## Chapter 1 : Introduction to the gender equality duty

### What this code is and how to use it

- 1.1. This Code of Practice gives practical guidance to Scottish public authorities on how to meet the gender equality duty. The Equal Opportunities Commission (EOC) has prepared and issued this Code under the Sex Discrimination Act, as amended by the Equality Act 2006. It applies to devolved authorities in Scotland. A similar but separate Code applies to public bodies in England and Wales, and GB-wide public bodies. The Code will take effect from (date to be inserted in final Code).
- 1.2. This Code of Practice is a 'statutory' code. This means that it has been approved by the UK Parliament. It also means that the code is admissible in evidence in any legal action under the Sex Discrimination Act 1975, the Equal Pay Act 1970 or Equality Act 2006 in criminal or civil proceedings before any court or tribunal. A court or tribunal must take into account any part of the Code that appears to the court to be relevant to any question arising in the proceedings. On its own, the Code does not impose any legal obligations on public authorities. If a public authority has failed to follow recommendations in the code, however, a tribunal or court may draw an adverse inference from such a failure. The Code is not a complete statement of the law - only the courts can give this. References to the Sex Discrimination Act 1975, Equal Pay Act 1970 and Equality Act 2006 are shown in the margins.
- 1.3. Where examples are used, they are intended to illustrate the ways in which different types of public authorities can comply with the duty. They should be read in that light, and not as complete or authoritative statements of the law.

### What is the gender equality duty?

- 1.4. The Equality Act of 2006 amends the Sex Discrimination Act 1975 to place a statutory duty on all public authorities, when carrying out their functions, to have due regard to the need:
  - to eliminate unlawful discrimination and harassment
  - to promote equality of opportunity between men and women
- 1.5. This is known as 'the general duty' and will come into effect on 6 April 2007.
- 1.6. The duty applies to public authorities in respect of all of their functions, that is, as service providers, policy makers and employers. It also applies to services and functions which are contracted out. Public authorities are expected to pay 'due regard' to the provisions of the duty in all of their functions. The concept of 'due regard' is based on the concepts of proportionality and relevance. The weight which public authorities give to gender equality should therefore be proportionate to its relevance to a particular function. The greater the relevance of a function to gender equality, the greater regard which should be paid to it, and vice versa.
- 1.7. The requirements of the general duty - to eliminate unlawful discrimination and harassment and to promote equality of opportunity between women and men - are the core of the gender duty. To support progress in delivering these, there is also a series of

'specific duties' which apply to major public authorities. These set out the exact steps those authorities should take to help them meet the general duty.

### **Why has the duty been introduced?**

- 1.8. The gender equality duty aims to make gender equality central to the way that public authorities work, in order to create:
- better-informed decision-making and policy development
  - a clearer understanding of the needs of service users
  - better-quality services which meet varied needs
  - more effective targeting of policy and resources
  - better results and greater confidence in public services
  - a more effective use of talent in the workforce
- 1.9. The duty is intended to address the fact that, despite 30 years of individual legal rights to sex equality, there is still widespread discrimination - sometimes intentional, sometimes unintentional - and persistent gender inequality. Policies and practices that seem neutral can often have a significantly different effect on women and on men, often contributing to greater gender inequality and poor policy outcomes. Individual legal cases have not been enough to change this.
- 1.10. The duty is intended to improve this situation, both for men and for women, for boys and for girls. Women are frequently disadvantaged by policy and practices that do not recognise their greater caring responsibilities, the different pattern of their working lives and their more limited access to resources. Men are also disadvantaged by workplace cultures that do not support their family or childcare responsibilities, by family services that assume they have little or no role in parenting, or by health services which do not recognise their different needs. The duty should help the public sector to identify and respond to those differences, resulting in improvements for all.
- 1.11. The duty requires public authorities to identify and tackle discrimination, to prevent harassment, and to ensure that their work promotes equality between men and women. It is a form of legally enforceable 'gender mainstreaming'<sup>1</sup> – building gender equality into the core business thinking and processes of an organisation. It is different from previous sex equality legislation in two crucial respects:
- the positive requirement for the organisation itself to take action, rather than waiting for individuals to take cases against them.
  - the requirement to act to promote equality, not just to avoid discrimination.
- 1.12. The general duty is enforced by judicial review. In addition, from 2007, the Commission for Equality and Human Rights (CEHR) will have the power to issue compliance notices in connection with a breach of the general duty and these are enforceable in the courts. The CEHR and EOC also have the power to issue compliance notices in respect of the specific duties. For more detail, see Chapter 5.

### Clause 84 Equality Act

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<sup>1</sup> Gender mainstreaming means systematically identifying and addressing gender equality issues throughout policy development, service design and delivery, monitoring and employment.

## **Which organisations have to take action on the general duty?**

- 1.13. The general duty applies to all functions of every public authority (bar the exceptions listed in Appendix B). The definition of a public authority is 'any person who has functions of a public nature'. Despite a slight difference in the wording, this is intended to have the same application as the definition of public authorities covered by the Disability Discrimination Act 2005 and the Human Rights Act 1998<sup>2</sup>.
- 1.14. There is no definitive list of public authorities to which the general gender duty applies, (unlike the otherwise similar race duty) but the duty would apply to all of the authorities listed in Schedule 1A of the amended Race Relations Act.
- 1.15. The gender duty also applies directly to certain private or voluntary sector authorities when they are carrying out public functions (the private functions of such bodies being excluded). Further details of who is affected by this are contained in Appendix A.

## **Which organisations have to take action on the specific duties?**

- 1.16. Most major public authorities are subject to the more detailed specific duties. The proposed duties, as set out in a recent consultation by the Department of Trade and Industry and Scottish Executive, require those authorities to:
  - produce and publish an equality scheme identifying their gender equality goals and action to meet them, in consultation with employers and stakeholders
  - monitor and review progress
  - review the scheme every three years
  - develop, publish and regularly review an equal pay policy, including measures to address promotion, development and occupational segregation
  - conduct and publish gender impact assessments of all legislation and major policy developments, and publish their criteria for conducting such impact assessments
- 1.17. To find out whether your organisation is subject to the specific duties, check the draft list at Appendix C. The list and the specific duties for Scotland will be finalised by the Scottish Executive in summer 2006.
- 1.18. This document contains guidance on how to meet both the general and the specific duties in chapters 2 and 3. Even if your organisation is not subject to the specific duties, you will still be expected to provide clear evidence of meeting the general duty and the interpretation of the law in chapter 3 is intended to be useful to you as guidance.

## **What is unlawful sex discrimination?**

- 1.19. Unlawful discrimination in the SDA and the gender duty means:
  - direct and indirect discrimination against women and men, in employment and education; in goods, facilities and services and in the exercise of public functions;

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<sup>2</sup> See Meg Munn, Col 249-250 Hansard Standing Committee A, 8 December 2005. See also *Aston Cantlow and Wilmcote with Billesley Parish Council v Wallbank and another* (2004) 1 AC 546, per Lords Hope, paragraph 41, and *Hobhouse*, para 85



- harassment, sexual harassment and discrimination on the grounds of pregnancy and maternity leave;
- discrimination on the grounds of gender reassignment in employment and vocational training;
- direct and indirect discrimination in the employment field on the grounds that a person is married or a civil partner;
- victimisation.

Further details of the above definitions can be found in Appendix E

### **To what extent does the duty apply to transsexual and transgender people?**

- 1.20. Transsexual people are protected from discrimination and harassment on the grounds of gender reassignment in employment and vocational training under existing sex discrimination legislation<sup>3</sup>. Public authorities are legally required to take this into account when addressing that part of the gender duty which requires the elimination of unlawful discrimination and harassment. More detail on this is contained in Chapter 2.
- 1.21. Gender reassignment discrimination and harassment in access to goods and services will also be unlawful from late 2007, under the European Goods and Services Directive. Public authorities will also be legally required to take this into account under the duty, from the date that government regulations are introduced.
- 1.22. There is no current legal requirement under the gender duty for public authorities to take action for those people who may define themselves as transgender but do not meet the current legal definition of transsexual. This would include, for example, those who choose to live as a member of the opposite sex without intending to undergo medical gender reassignment. Although they fall outside the current legal definition, they nonetheless experience significant harassment and discrimination on grounds of their identity.
- 1.23. There is also no current legal requirement under the gender duty for public authorities to take action to promote equality between transsexual or transgender people and non-transsexual or transgender people.
- 1.24. The Government's Discrimination Law Review will examine extending protection against transsexual and transgender people and public authorities should keep up-to-date with developments in this area. Information will be available on the EOC website and, from 2007, the CEHR website.

### **How the gender equality duty fits into the broader equality picture**

- 1.25. Women and men, including transsexual people, will experience different forms of disadvantage depending on their age, ethnicity, colour, religion and belief, sexual orientation, marital or civil partnership status and whether or not they have a disability. In order to understand and address questions of gender equality under the duty, public

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<sup>3</sup>S2A SDA prohibits discrimination in employment and vocational training against individuals who intend to undergo, are undergoing or have undergone gender reassignment.

authorities may need to consider that complexity and whether particular groups of women or men are experiencing particular disadvantages.

Only 47% of disabled women are in employment, compared with 53% of disabled men. Of the disabled women in employment, only 52% work full time. This compares with an employment rate of 75% for non-disabled women and 86% for non-disabled men. (EOC Facts about women and men in Great Britain 2005).

- 1.26. The gender equality duty is similar to the existing duties on race and disability equality and all three have the same spirit and intention behind them, requiring public authorities to take action to tackle discrimination, to prevent harassment, and to ensure that their work promotes equality in policy, service provision and employment. The Commission for Racial Equality, the Disability Rights Commission and the Equal Opportunities Commission have all stated in their codes of practice and public documents that it is acceptable for public authorities to produce one set of planning documentation (single equality schemes and/or action plans) which covers the three duties, provided that the requirements of the three duties are met, and that it is clear to people what action they can expect to see on each of the three equality issues.

#### **How the gender equality duty fits into the wider Scottish public service reform agenda**

- 1.27. The promotion of equal opportunities is already central to the duty of Best Value that applies to local authorities and which is being refreshed for all other bodies delivering public services in Scottish central government. The Best Value duty requires public service organisations to secure continuous improvement in the performance of their functions. A duty to comply with the equal opportunities requirements contained in UK legislation, and the Scotland Act 1998, is central to Best Value, covering all aspects of equalities and strengthening existing equality duties for public service organisations. Detailed guidance on Best Value and equal opportunities assists local authorities in discharging their duties. Refreshed guidance on Best Value for other Scottish public service organisations, including a detailed advice note on how to meet the equal opportunities requirements, will be published during 2006. Best Value is an auditable requirement on all public sector organisations and this strengthens the Scottish Executive's commitment to ensuring the highest standards in equal opportunities across the Scottish public sector.

#### **Future changes in the legislation**

- 1.28. There may be changes in the future to the sex equality legislation which will affect the definition of unlawful discrimination and harassment under the duty. Public authorities will need to ensure that they keep up to date with any developments which affect the duties explained in this Code. Relevant information will be publicised by the EOC on the gender duty section of their website, and will be available from the Commission for Equality and Human Rights in the future.

#### **Where to obtain further information now and in the future.**

- 1.29. Copies of the Equality Act and regulations made under it by the Scottish Parliament can be obtained from the Stationery Office. The text of this Code and of the Equal Pay Code of Practice can be downloaded free of charge from the EOC's website on [www.eoc.org.uk](http://www.eoc.org.uk)

- 1.30. The EOC is also proposing to produce guidance on a number of aspects of the duty and a list of the topics to be covered is at Appendix D. This will all be available on the EOC website.
- 1.31. Free information on the duty in Scotland is available through the EOC Scotland helpline on 0845 601 5901 or by email on [info@eoc.org.uk](mailto:info@eoc.org.uk)
- 1.32. The Equality Act also provides for the dissolution of the EOC and the passing of its functions to the new Commission for Equality and Human Rights. This is currently expected to happen in late 2007. Once this transition has been effected, guidance on and enforcement of the duty will pass to the new Commission.

## Chapter 2 : How to meet the general duty

- 2.1. All public authorities and private and non-governmental bodies carrying out public functions on behalf of a public authority<sup>4</sup> are subject to the general duty, and this chapter explains how to meet it.
- 2.2. All public authorities are legally required, when exercising their functions, to pay due regard to the need:
  - to eliminate discrimination and harassment that is unlawful under the Sex Discrimination Act and discrimination that is unlawful under the Equal Pay Act
  - to promote equality of opportunity between men and women
- 2.3. This means that the duty is not a passive one, but requires public authorities to take action to meet the duty. When the Equal Opportunities Commission (and subsequently the Commission for Equality and Human Rights) and public sector inspectorates are monitoring and evaluating compliance with this duty, they will be looking for evidence of action and positive change. Without such evidence, it will be difficult to establish that the authority is paying due regard to the gender equality duty.

### **How will you know when you are meeting the gender duty?**

#### Section 76 SDA

- 2.4. Public authorities will be expected to provide evidence that due regard has been paid to the duty in relation to their core functions of policy development, service design and delivery, and employment. This includes services and functions which have been contracted out.
- 2.5. Paying due regard means that the weight given to gender equality should be proportionate to its relevance to a particular function. In practice, this approach will mean giving greater consideration and resources to functions or policies that have most effect on the public, or on the authority's employees. The authority should ask whether particular policies could affect men and women in different ways, and whether policies will promote equality of opportunity.
- 2.6. Where changing a function or proposed policy would lead to significant benefits to men and women, including transsexual men and women, public authorities should give greater weight to the case for change.
- 2.7. It is not acceptable for a public authority to claim that it does not have enough resources to meet the duty. This is because meeting the general duty is a statutory requirement. Existing resources may need to be reprioritised to meet the duty. In practice this may mean that public authorities will use their existing administrative systems and processes, adjusting their plans and priorities where necessary.

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<sup>4</sup> For the rest of this chapter the term 'public authorities' should be taken to include private and non-governmental organisations carrying out public functions

- 2.8. For example, a primary school may wish to train its staff in gender equality in order to meet the duty, but does not have sufficient budget to meet this training need alongside other competing needs. It decides to meet the duty by arranging gender equality training for the head teacher, who then runs a feedback session for staff at the next in-service training day. This could be a proportionate means of meeting the duty.
- 2.9. The general duty requires authorities not only to have due regard to gender equality when making decisions about the future but also to take action to tackle the consequences of decisions in the past which failed to give due regard to gender equality. This will entail working towards closing the gaps in service or employment outcomes.
- 2.10. Public authorities will not be able to take action to improve all of their functions in a single cycle. They have, however, a continuing duty of improvement which will require them to prioritise functions with the most relevance to gender equality.
- 2.11. Gender equality will be more relevant to some functions than others. Relevance is about how much a function affects people, as members of the public or as employees of the authority. For example, an authority may decide that gender equality is more relevant to the way that bus routes are planned to meet the different needs of men and women than to its work on highway maintenance. Public authorities should therefore assess whether, and how, gender equality is relevant to each of their functions. A public authority may decide that the general duty does not apply to some of its services, for example, those that are purely technical, such as traffic control or weather forecasting. It will always be relevant, however, to the employment side of these functions.
- 2.12. Public authorities' discharge of the gender duty is likely to be assessed by the EOC, the CEHR and public sector inspectorates/audit bodies on the following criteria:
- Information: do you have the information which allows you to understand the impact of your work on women and on men, including transsexual women and men?
  - Involvement: have the relevant people inside and outside the organisation been involved in providing information and identifying gender equality priorities?
  - Transparency: has information on decision-making processes, priorities, actions and progress been widely available through appropriate channels and in a variety of formats?
  - Proportionality: in addressing the duty, has the public authority put its effort and resources where they will have most impact on gender equality (and have they done enough to find out what the most significant issues are)
  - Effectiveness: has the action delivered the required outcomes and led to greater gender equality?

### **Outcomes – the changes to which the duty should lead**

- 2.13. The aim of the duty is not to establish processes but to make visible and faster progress towards gender equality. Indicators of progress might include:

- Gender equality issues, and their budgetary implications, are considered at the beginning of policy making
- It is easy to find a wide variety of data and information to assess effectively how certain actions will affect women and men
- Women and men from all groups of the community feel effectively engaged in decision and policy making around issues that have a direct effect on them
- Service users notice that services are delivered more appropriately and service outcomes by gender begin to improve
- Women and men are making greater use of services that their sex had previously under-used
- Women and men are represented at all levels of the workforce and in all areas of work
- Sexual and sexist harassment of staff and service users is dealt with promptly and systematically, according to agreed procedures, and tolerance of harassment drops within the organisation as a whole
- There is no discrimination against pregnant women and women returning from maternity leave
- The gap between women and men's pay narrows and is eventually eliminated
- Employees and service users with caring responsibilities are receiving greater support from your organisation, including flexible and part-time working opportunities at all levels of work
- Transsexual people feel supported and valued as employees and potential employees
- Barriers to the recruitment and retention of transsexual staff have been identified and removed
- Employees are aware of the gender equality duty, understand how it will affect their work, and are trained in gender equality issues at a level appropriate to their role and responsibilities

## **Action to ensure the duty is implemented**

### **Establishing accountability and encouraging leadership**

- 2.14. Legal responsibility for meeting the duty lies with those individuals who are legally liable for an authority's acts or failure to act. This includes, for example, Scottish Ministers, Accountable Officers, elected leaders and members of local government, Chief Executives, board members and public appointees. Much of the success of the duty will depend on the leadership shown by those people.
- 2.15. As a matter of best practice, it is recommended that all such individuals should be briefed on their responsibilities under the duty and given regular reports on progress. They should be encouraged to build the duty into strategic planning, keynote speeches and organisational development work, so that a consistent message is given that gender equality is integral to the core business of the organisation.

## **Ensuring delivery and developing expertise**

- 2.16. All relevant staff across the organisation should have some understanding of the duty, its meaning for their work and the organisation's priority goals in gender equality. Consideration should also be given to recognising progress in gender equality when rewarding individual and team performance.
- 2.17. It is recommended as a matter of good practice that a senior person should be given strategic responsibility for ensuring the duty is implemented. They will need to work with a group of colleagues from policy development, service delivery, employment and, where contracted-out services form a part of your functions, procurement staff. This working group may also be working on the wider equality agenda, including the race and disability duties, but will need to pay specific attention to meeting gender equality goals. In local authorities, a senior elected member could be given responsibility for overseeing this process.
- 2.18. Many larger organisations employ specialist equality staff to steer the process; smaller ones may make it part of a person's responsibilities. Specialist posts are best placed in the heart of the policy, performance management, planning or strategy function. The human resources function will have to play a crucial role in the employment aspects but is not best placed to lead overall, as service delivery and policy making are critical to the gender duty.
- 2.19. Internal expertise is crucial to an organisation's ability to address gender equality, and steps may need to be taken to build that up. In some areas, such as understanding the needs of transsexual people, public authorities may wish to obtain external assistance.
- 2.20. Wherever they are situated, equality staff cannot be expected to bear all responsibility for the successful implementation of the duty. That will require ownership, action and culture change across the organisation as a whole. Designating a senior person with significant strategic or management responsibilities, supported by designated key staff, should contribute to change across the organisation. Delivering the necessary culture change is an exercise in change management, and the usual principles of effective change management apply.

## **Processes and systems**

- 2.21. The working group will need to develop and drive forward a specific and meaningful plan of action, which allows effective monitoring and review of progress.
- 2.22. You will need to set up systems for ensuring that you have the right data to determine gender equality priorities and monitor progress towards gender equality goals. This data should include data on the gender profile of your service users and potential service users, and on your staff and potential employees in the area. It may be that some groups have been excluded by existing policies and practices, hence the need to look at a wider pool of potential stakeholders. Your data systems should also include information on service user needs, satisfaction and outcomes by gender. In most cases this should involve disaggregating existing data; in some cases you may need new data. This should then be analysed and, where possible, integrated into the standard performance monitoring of your organisation. You will also need to use it to assess the potential gender impact of your policies. Setting up these systems will be a significant task initially but will become easier after the initial work. It will also have major benefits in improving the performance management of the organisation overall.

- 2.23. Reporting on progress to senior management team meetings should help increase their understanding that gender equality can and should be a core part of their business and of their policy development and service delivery objectives, not just a marginal issue or a small part of human resources work.
- 2.24. Effective communication and training are recommended so that all staff across the organisation are aware of the duty and of what it means for their work.

#### Edinburgh University Gender Equality Duty Pilot

Having good data collection processes already in place, a pilot project enabled the University to build on existing work by giving it an opportunity to look more closely at the evidence and develop an action plan for priority areas. The team at Edinburgh University, led by the Senior Vice-Principal and other senior staff, intend to translate these into further identified priorities over the next few years.

The Equal Opportunities Technical Advisory Group (EOTAG) within the University produces annual reports examining staff and student data. This process enables the University to monitor its own performance, which it does against appropriate benchmarks. It also allows the University to identify any existing gaps in evidence.

The reports are discussed by the Equality and Diversity Committee and by the Staff Committee. Some identified gaps have been subject to further in-depth qualitative research, for example, of the academic promotions process, and gender inequalities amongst contract research staff in science, engineering and technology.

The pilot working group felt that this strong emphasis on data and evidence was very important. They also recognised that to use an evidence-based approach like this one, it is essential that data is collected over a significant period of time and that the organisation has the capacity and skills to be able to interrogate and understand the data. It also requires clear leadership and a willingness to act on research findings.

### **Critical success factors in gender mainstreaming**

- 2.25. Research on gender mainstreaming in organisations has demonstrated that there are common success factors:
- ongoing top-level commitment and willingness to commit resources to achieving gender equality
  - developing a shared understanding of the problem, and a shared vision of what gender equality would look like for your organisation, which links directly to organisational objectives
  - board level leadership and accountability (with engagement of elected representatives where applicable)
  - senior management support and accountability
  - specialist staff to steer the process and develop the gender awareness and analysis skills of key staff throughout the organisation
  - good systems for disaggregating new and existing data by gender
  - developing staff understanding of gender equality and skills in analysing the gender impact of policy



- involving staff, service users, unions and voluntary sector organisations
- building gender equality standards and objectives into routine organisational procedures such as policy and budget approval documentation, organisational and departmental targets and objectives, and individual job descriptions, objectives and appraisals.

2.26. These processes are needed to make the duty work, but they are not an end in themselves. The purpose of the duty is to eliminate unlawful discrimination and harassment and achieve equality between women and men. Ultimately, the key to the success of the duty is achieving culture change in organisations, a process which will take time and commitment. An organisation which makes the effort to meet the needs of women and of men will see the benefits, however, through delivering better quality services and having a more productive workforce.

The new Scottish Equalities Unit (SEU) will be the mechanism for taking forward the Scottish Further and Higher Education sectors' work on equalities issues when it becomes operational in Spring 2006. It is likely that it will structure its work across the thematic strands of teaching and learning, curriculum, assessment, policy, IT, and estates to ensure that equalities thinking is mainstreamed.

One of the key lessons which has emerged from the implementation of the race equality duty in further and higher education is that Colleges and Universities would benefit from support to develop their equality schemes at an early stage. The new unit plans to gear up to provide this support and ensure that further and higher education bodies in Scotland are well prepared for the implementation of the disability and gender equality duties.

### **Meeting the duty in policy development**

2.27. To meet the duty effectively, public authorities must ensure that their policies are not discriminating against either women or men, or maintaining or leading to gender inequality. To do this, they will need to:

- collect evidence on the impact of core policies on women and men
- when major new policies are being developed, assess their likely consequences for women and men
- alter or amend proposed policies so that they promote gender equality and eliminate discrimination
- resource those changes appropriately

2.28. Not all policies will be equally relevant to gender equality. It is recommended that you prioritise policies through 'initial 'screening'. You should ask yourself:

- Is there any evidence that women and men have different needs, experiences, concerns or priorities in relation to the issues addressed by the policy?
- Of those affected by the policy, what proportion are men and what women?

- If more women (or men) are likely to be affected by the policy, is that appropriate and consistent with the objective of the policy?<sup>5</sup>
- Where the policy is intended to achieve a particular outcome, what is the evidence on the likely outcomes of the policy for men and for women?
- Could the policy unintentionally disadvantage people of one sex of the other? It is essential to consider not just the intended consequences of the policy but also any unintended consequences and barriers that might prevent the policy being effective for one sex or the other.

2.29. The best way to find out if a policy is likely to have a negative or a positive impact on gender equality is to:

- find out if research or data already exist and analyse it
- take action to develop relevant information if it doesn't exist
- ask and involve external and internal stakeholders, such as women's and men's voluntary sector groups, service user and consumer groups, trades unions and employee or staff networks.

2.30. Going through this process brings significant benefits to the effectiveness of policymaking. Developing a good base of evidence about differences in the impact of policies on women and men will avoid resources being misdirected and potentially wasted.

The Scottish Executive has undertaken work towards equality proofing the budget and has initially concentrated its work on gender. The Executive's work in this area is done in a partnership approach via the Equality Proofing Budget and Policy Advisory Group. It has undertaken a pilot study to identify a working method for assessing the equality impact of budgets and spending plans. The study looked at the broad question of health inequalities and focussed on two pilot studies in the areas of smoking cessation services and sport. It analysed the needs of men and women for a particular service, identified which of those needs the existing policy is intended to meet, to what extent the policy works in practice, how much is spent on providing the service and whether there are barriers to access for women and men.

2.31. Once you have evidence from this initial screening process that a policy is likely to have an unintended or negative differential impact on women or on men, or on specific groups of women or of men, a more detailed impact assessment must be undertaken. More detail on this process is available in Chapter 3.

### **Meeting the duty in service design and delivery**

2.32. Men and women often have different needs from services, and use them in different ways. There may also be different groups of men and of women who have specific needs or face particular barriers in taking up services. Understanding and tackling these barriers will put public authorities at the forefront of good practice in accessible public service delivery, meaning public services really are available to everyone.

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<sup>5</sup> An authority might expect some policies to affect women and men equally but might legitimately expect some policies to have a greater impact on one gender or the other.

2.33. To meet the gender duty in service delivery and design you will need to check the available information on who is using your services.

- Is the information disaggregated by sex?
- Do men and women use the service in different ways?
- Do women and men have different needs from the service?
- Are there particular groups of women or of men (for example, disabled women, or men from particular ethnic groups) who do not use or under-use a service or who are less satisfied with it?
- Is there evidence that a one-size-fits-all service is not appropriate?
- Are there big discrepancies in the service outcomes by gender?

Greater Glasgow NHS Board has carried out a range of work on gender equality, having adopted a gendered health policy some years ago. They have established a Women's Health Team and subsequently a Men's Health Team. This work has led GGNHSB to conclude that both the inequality faced by women and the expectations placed on men in society have an impact on health and health care on five levels. These are:

- Determinants – women experience greater poverty and less control over economic circumstances, power in personal and public life
- The experience of being unequal or discriminated against acts as a pathway into poor health for women especially - in relation to poor mental health but also as a consequence of gender based violence
- Male populations have generally formed the baseline for study of major diseases and such sex differences have not always been recognised e.g. heart disease
- In terms of assessment of health problems, patients are generally seen as asexual (except for reproductive health) and the role played by gender is ignored e.g. the effect of masculinity on men's involvement in their own health and that of others has only recently been considered

The majority of the workforce in GGNHSB is female, which reflects the gendered nature of caring, and this has HR implications

In 2004, the police recorded 43,678 incidents of domestic abuse in Scotland, a 10% increase since 2003; in 88% of recorded cases the victims were women and the perpetrators were male. 52% of cases involved known repeat victimisation. The gendered nature of the issue was evident in the data, and a focussed response was required. In September 2005 ACPOS and The Crown Office and Procurator Fiscal Service produced a joint protocol for dealing with domestic abuse. The protocol defines domestic abuse as:

“Any form of physical, sexual or mental and emotional abuse which might amount to criminal conduct and which takes place within the context of a close relationship. The relationship will be between partners (married, cohabiting or otherwise) or ex-partners. The abuse can be committed in the home or elsewhere. While available evidence suggests that the most prevalent instances of domestic abuse are male violence towards women, this definition acknowledges and includes female violence towards men and violence between partners or ex-partners in close, same-sex relationships.”

The protocol serves not only as a guide for police and prosecution staff on how to respond to

domestic abuse, but as a guarantee of a level of service which victims can expect from the police and procurator fiscal service.

### **Making decisions on changing design or delivery of services**

2.34. Because the duty requires authorities to take active steps to promote equality between women and men, it requires more than an acceptance of the status quo. For example, a gender analysis of enrolment on courses in further education might show that more men than women access engineering and IT courses and that women are 'choosing' not to apply. If the college is to challenge gender inequality and give women access to the greater benefits of technical qualifications, it may decide to take action to increase women's enrolment – e.g. by targeting groups of women with information, offering help with childcare, explaining the lower pay which comes with work traditionally associated with women. In this way, women's choices will not be constrained by lack of information or obstacles such as caring responsibilities. It is also usually the case that men are under-represented in the caring professions, such as nursing or childcare. As good practice, public authorities should consider existing research and examples of good practice to assist them in analysing the reasons for this and taking steps to address it, such as actively promoting the advantages of work in this area to boys in school.

There is evidence of gender difference in attainment in schools throughout primary and secondary education. Statistics from the Scottish Executive Education Department show that in 2004, at the age of 13, 70% of girls and 59% of boys reached their expected reading age and 61% of girls and 43% of boys reached their expected writing age.

**Vale of Leven Academy Gender and Attainment Group** – this school, with support from the school's senior managers, has done a great deal of work on gender and education including producing information for parents, pupils and teachers; statistical analysis of attainment data; supported learning for boys; in-service staff training on gender issues. It has encouraged every department in the school to examine its practices and change them where necessary, by requiring them to produce annual action plans for tackling gender differences in attainment.

2.35. You will not meet the gender equality duty if your authority:

- ignores the impact of caring responsibilities on the opportunities available to people who undertake them, the majority of whom are women.
- assumes that only women take responsibility for parenting and caring. Enabling men who want to do so to take on a greater role in caring both as service users and as professional care workers will lead in the long run to greater gender equality.

The One Parent Families Support and Information Network, based in York, is a leading organisation working on behalf of separated families, with a focus on gender and poverty. They reviewed their services to identify gaps in service provision and realised that, although 9% of their registered lone parents were male, only 2% of those using their services were male. The organisation reviewed their structures and outputs and, as a result, reserved a place for a male

lone parent on the board of trustees, and actively recruited male members of staff and volunteers. They also changed their recruitment and interview procedures to screen out assumptions about men. The work stemmed from their commitment to equal opportunities and was supported by strong leadership. Everyone from trustees to service users took part in training and was supported throughout it.

The project set up a men's project with the support of Oxfam. At the beginning, the men wanted to meet other men bringing up children on their own, but they also did not want to impose upon the women's space. The men's project was able to provide them with space and reassurance when some of the men were uncomfortable or nervous about asking for help, about the risk of being seen to fail, or about social services involvement.

The overall outcome of the work has been to challenge the way the Network views parenting. They had assumed that only resident parents needed help and had excluded non-resident parents from their services, but have now opened up their services to non-resident parents with caring responsibilities, who are usually fathers. They recognised a number of institutional barriers to men accessing caring support services. Their work with young mothers also identified the lack of support services for young fathers who wanted to be involved with their children.

### **Ensuring single-sex services comply with the law**

2.36. In certain circumstances, public authorities may wish to address gender inequality by developing policies or providing services on a single-sex basis. This might mean providing services to one sex only, providing a similar service separately to each sex or providing a service in different ways to women and men. This could be an appropriate and sometimes even a necessary way of complying with the gender duty if evidence shows that single-sex approaches are needed to allow both women and men to access public services equally or in order to deliver equality of outcomes. The most common examples of this in practice are rape crisis centres or refuges for women who are victims of domestic violence. Public authorities might also wish to consider providing single-sex family support or health services, under certain circumstances. However, public authorities must satisfy themselves that any approach to single sex services complies with the Sex Discrimination Act.

The number of women prisoners in Scotland has increased 3 fold in the last 15 years to approximately 340. 90% of female prisoners have addiction problems, 80% have mental health problems and 60% have a history of abuse.

In 2002 the Ministerial Group on Women Offenders produced "A Better Way" which addressed ways to reduce the number of women in receipt of custodial sentences, particularly those who were imprisoned for minor offences and who posed no threat to society. Additionally, it was recognised that the backgrounds of women who offend and the circumstances which lead to their offending meant that prison was often inappropriate and potentially damaging for these women. The report recognised the need to address the issue of the growing number of women who were imprisoned for short periods of time either for fine defaulting, on remand or for short custodial sentences. It produced a number of recommendations aimed at keeping women out of prison where possible and at improving the conditions for those who were detained. In 2000, at the time of the study, 64% of women who received custodial sentences received less than 3 months and 84% received less than 6 months.

218 Time Out is a Scottish Executive and Glasgow City Council funded initiative based in Glasgow, which provides an alternative to custody for women. It takes an holistic approach to women's circumstances, needs and experiences and provides support for dealing with their substance misuse problems and addressing their offending behaviour. It can accommodate 135 women in the course of a year in the residential units and 400 will be able to use the day facilities annually.

- 2.37. The circumstances in which single-sex provision is lawful vary depending on whether the activity in question is classed as education, as goods, facilities and services, or as a public function. Each type of activity is dealt with under a separate part of the SDA, and has different provisions, and different circumstances under which a single-sex approach is lawful. Public authorities will therefore need to take particular care to determine whether any proposed single-sex approach is lawful. The following paragraphs summarise the main considerations to be taken into account, although they are not a full statement of the law in this area. More detail on this issue is contained in Chapter 4, with supporting detail in Appendix F.
- 2.38. Sex discrimination is unlawful in education, in goods, facilities and services and (since the Equality Act of 2006) in the performance of public functions. The SDA specifies, however, certain legally permitted exceptions to that general principle of non-discrimination. These can be summarised as follows:
- The exceptions for education are very limited. Single-sex schools are permitted, and vocational training can be provided on a single-sex basis to encourage women or men to take up particular work in areas where they are currently under-represented.
  - The permitted exceptions for goods, facilities and services are more detailed, but are mostly related to questions of privacy or decency.
  - The permitted exceptions for public functions are quite broad, allowing single-sex provision where the activity would be more effectively delivered, or in order for one sex to overcome disadvantage or discrimination.
- 2.39. Public authorities should note, however, that relatively few of their day-to-day services to the public will fall under the category of public functions, and therefore the broader category of exceptions is not likely to be applicable in many cases.

### **Meeting the duty in employment**

- 2.40. To meet the gender equality duty as an employer you will need to ensure that you eliminate discrimination and harassment in your employment practices and actively promote gender equality within your workforce. In practice this will involve a cyclical process of: data collection, analysis of data, developing an action plan, implementing the plan and monitoring the outcomes to inform further action. You will need to involve the workforce in the process and you will also need to agree a timescale over which you will take action. Doing this will not only enable you to meet your obligations under the duty, but will also improve your ability to recruit and retain staff and improve service delivery.

The Inland Revenue has been able to extend the hours when taxpayers can contact it by introducing better flexible and family-friendly policies. The Revenue used surveys and focus groups to establish what staff wanted before matching staff preferences with business needs.

64% of IR staff are women. Three pilot projects used a variety of flexible working models that gave staff more choice about how to balance work and family life while enabling services to be offered at weekends and outside 9-5 on weekdays.

2.41. The duty also requires you to take action to eliminate discrimination and harassment against transsexual people in employment and vocational training. Of the following sections of the Code, data collection, recruitment and promotion, harassment, grievance and disciplinary procedures, redundancy and reporting are particularly relevant to eliminating discrimination and harassment against transsexual people.

### **Collecting data on your workforce**

2.42. You will not be able to meet the duty effectively unless you collect information about where the men and women are within your organisation (i.e. what levels of seniority they are at and what areas of work they undertake) and what they are paid. You will also need to ensure that you can assess the take-up and impact of your employment practices on men and women. If you do not already have the processes to do this you will need to set them up. It is recommended that you ensure your systems allow you to cross-reference data by ethnicity, disability and other categories, so that you know what the issues are for different groups of women and men.

2.43. Quantitative monitoring is likely to be difficult in relation to sexual orientation and to transsexual women and men, because of relatively low numbers and privacy concerns. Staff should be told why the information is being collected and what it will be used for and be assured of confidentiality and genuine anonymity. They should also be told that they are under no obligation to give such information. Further advice can be sought from ACAS, Stonewall and transgender groups.

2.44. The duty is not just about collecting data, however, but using the data so you know where you are being successful and where you need to take action. For example, your data may indicate that very few men are accessing your flexible working policies, relative to the proportion of women staff who do so, so you may want to take steps to encourage more men to work on a flexible basis.

2.45. The following key employment issues are the ones that you should consider when deciding what your priorities for action are:

- Recruitment
- Concentration of women and men into particular areas of work
- Managing flexible working
- Part-time work
- Managing leave for parents and carers
- Managing pregnancy and return from maternity leave
- Sexual and sexist harassment
- Transsexual staff and potential staff

- Grievance and disciplinary procedures
- Redundancy
- Retirement
- Equal pay
- Work based training opportunities

In April 2004, the Association of Chief Police Officers in Scotland (ACPOS) launched their Gender Agenda Action Plan. Historically the police service has been a male dominated service and although there has been a significant increase in the number of women joining the service in the last 15 years women still only account for 18.83% of police officers. In 2003 women made up 30% of all new applicants.

ACPOS recognised that although more women were now joining the police service they were still proportionately under-represented at management level, with only 8% of promoted posts across Scotland being held by women. This could not be explained simply by length of service although there is a higher turnover for female officers. They were also aware that the minimum cost of replacing an officer after five years investment in their training and development was approximately £150,000.

The Gender Agenda focuses on all areas of employment including recruitment and selection, retention and fair employment practice, training and career development, work-life balance and communication and is a strategic attempt to address specific aspects of employment to ensure policies, practice and procedures across the all of Scotland's police services are fairly designed and implemented.

## **Recruitment**

2.46. You will need to ensure that your recruitment processes are fair and that all staff involved in recruitment receive training in interviewing and equal opportunities. In order to ensure that you are opening up your vacancies to the widest pool of applicants the EOC recommends that you think about where you advertise and consider using a variety of different methods. You may need to be more flexible about the dates and times you offer for interviews to enable people to attend. The lack of flexible working at management and senior levels and the restricted promotion and training opportunities available to part-time workers (who are overwhelmingly female) are two of the most significant causes of inequality in the workplace. It is recommended that you think about ways of opening up jobs at all levels to part time working, job-sharing and flexible working.

Bishop Burton College in East Yorkshire has reformed its staff recruitment to tackle concerns about subjective short listing and a poor audit trail of recruiters' decisions. It has revised its application form, and put all personal details onto a tear-off strip that is removed before the forms are passed to recruiters. The new form encourages applicants to include relevant skills from their voluntary work, domestic responsibilities and spare-time activities, as well as from paid employment. These changes, together with providing recruitment training for managers, have helped improve the college's access to potential recruits.



## **Concentration of women and men in particular areas of work (occupational segregation)**

2.47. Occupational segregation occurs when men or women predominate in a particular job. Horizontal segregation can crowd women into female-dominated occupations and industries, often at lower rates of pay than men who have similar levels of skill but have jobs in a different type of work. Vertical segregation limits career development that would enable women to progress up career structures and to earn more. Horizontal and vertical segregation are widespread in the British economy and are major causes of the substantial pay gap between women and men and thus of gender inequality<sup>6</sup>. High levels of job segregation can also adversely affect the quality of services you deliver and your ability to fill vacancies. Employers who have strongly segregated workforces may also be at higher risk of having equal pay claims taken against them. In a highly segregated workforce it can be easy for pay arrangements to evolve in which women are paid less than men when they are doing work of equal value, giving rise to equal pay tribunal claims.

### Section 47 and Section 48 SDA

2.48. To tackle segregation, look at the types of jobs that men and women do within the organisation. If you have identified skills shortages, you might want to consider changing how you advertise vacancies to attract candidates from the non-traditional sex or offer re-training to existing members of staff who work in other occupations. The Sex Discrimination Act allows you to take positive action by providing women-only training which would help fit women for particular work or encourage women to apply for opportunities to undertake particular work in the organisation, where in at any time in the previous 12 months the number of staff of that sex doing such work is comparatively small. (Similar action can be taken in relation to men where the number of men in particular jobs is comparatively small at any time in the previous 12 months.)

Leicester City Council has made a concerted effort to encourage women from all communities and ethnic minority men to take up careers in building trades that are traditionally dominated by white men. In particular the Council offers apprenticeships targeted at women, including help with childcare costs, and it now employs 35 women in its housing maintenance team. Benefits of this policy include a repairs service that is quicker to respond, and a service that better meets the needs of tenants. For example, female tenants can request that repairs are undertaken by women-only teams, and this has been of particular value to older women living alone, some ethnic minority women, and women who have been victims of domestic violence. The Audit Commission praised this initiative when awarding Leicester's housing department top marks in an inspection.

Kibble Education & Care Centre in Paisley run the Men Can Care project. The objectives of the project are to:

- To tackle gender imbalanced sector of childcare and youth care by providing a bespoke training and work programme to 34 men
- To raise awareness of the under representation of men within childcare and youth care
- To address wider perceptions of masculinity in a changing society and identify barriers that exist for men who wish to enter the sector.

Over the life of the project more than 2000 men have made serious enquiries about the 34 training places available and more than 700 men have submitted applications.

<sup>6</sup> The hourly gap in pay between men and women in the public sector is currently 13.3% for full-time workers and 33.5% for part-time workers.

- 2.49. Look at the proportion of men and women at senior levels in your organisation. Do men predominate because of a lack of opportunities for part-time or flexible work at higher levels? Are there any senior female role models? Do your development policies succeed in bringing talented women up the career ladder? Is the organisation's culture a male-dominated one? You can change your recruitment policy and procedures so that all jobs are assumed to be available on a part-time or job-share basis, unless there are compelling business reasons against this. When vacancies arise, take the opportunity to review the post and encourage managers to open it up to people working on a part-time basis. You need to ensure that in practice women and men genuinely have the same access to training and to promotion prospects regardless of the hours they work. If some groups of workers find it difficult to access training you might want to consider running training at different times or in different locations. You might also want to set up management development training targeted at women. Look at the informal networking opportunities that operate within your organisation – are these genuinely open to both men and women – would it be useful to set up a women's network?

There is substantial evidence of under representation of women in managerial positions in organisations throughout Scotland. The Scottish Leadership Foundation has the specific remit to develop leadership across Scotland's public services, and has developed a number of programmes to address gender imbalance in management. Recent work has included research into key sectors (health, voluntary, retailing, financial services & manufacturing). This work identified key barriers for women and best practice for employers. The SLF also manage *Sharing for Success*, a forum which brings women together for seminars on a range of issues including leadership and management skills, and provides an informal learning network.

### **Managing flexible working**

- 2.50. Examine how you have been able to accommodate requests for flexible working and whether you respond in the same way to men and women. Are you able to go further and offer flexible working for all carers or all staff? Do you provide training for your managers on how to manage flexible workers and deal with requests for flexible working? Are staff working flexibly as likely as others to gain promotion? Do you have senior members of staff working flexibly who could act as role models to encourage the take up of flexible working?

The Scottish Legal Aid Board has developed a team-based approach to flexible working, involving employee consultation and measurement gathering by employees, throughout the piloting of this approach to achieve significant results.

In a sector and size of organisation that cannot always compete on salary and career opportunities, flexible working - in particular the introduction of flexi-time with no core hours - was seen to be key, both to helping the organisation reduce staff turnover and to making services more accessible.

### **Part-time workers**

- 2.51. Far more women than men work on a part-time basis<sup>7</sup>, usually because they take a greater share of domestic and family responsibilities than men. Unfavourable treatment of part-time workers can therefore constitute unlawful sex discrimination.

<sup>7</sup> 44% of women in employment work part-time, as opposed to 11% of men (EOC Facts about women and men in Great Britain 2005).

People who want to work part-time usually have to settle for low-paid work with poor prospects. The lack of good quality part-time work is a major cause of the gender pay gap and of gender inequality more broadly.

- 2.52. To meet the gender duty it is therefore important to measure the impact of your employment practices on both full and part-time workers. Are you limiting the potential of your part-time workers by not widening access to part-time work across the organisation or by restricting part-time opportunities to lower grade jobs? Do not assume that employees working on a part-time basis will want to do so for the rest of their working lives – what opportunities exist for enabling part time workers to move to full-time posts when they are available and vice versa?

### **Managing carers' leave**

- 2.53. How do you promote the right to take parental leave to your staff? Do you apply your policies equally between men and women? Is there more you can do to encourage the take-up of paternity leave and parental leave amongst fathers? Do you monitor those within the organisation who have caring responsibilities for an adult friend or family member? What can you do to raise awareness of your carers' policies?

Five Boroughs Partnership NHS Trust has increased the number of men working part-time from 2 to 61. It has looked at the interests of different groups, such as new fathers, flexible workers, non-resident dads (including custody and guardianship issues). They have a member of staff dedicated to supporting staff on these issues and are determined to promote childcare responsibilities to male colleagues. Everything has to be evidence-based – they have clear data on improved recruitment and retention of employees, improved staff morale and improved service delivery to patients and their relatives. Since April 2003 there have been 21 applications for paternity leave. The first week of paternity leave for employees with between 1 and 5 years' service is paid at full pay; for employees with more than 5 years of service, 2 weeks at full pay are available. The Worklife Balance Manager supports fathers in addressing custody and guardianship matters.

"Unless we get parity of childcare for men, we'll never get equality for women" the Trust says.

### **Managing pregnancy and return from maternity leave**

- 2.54. Discrimination against pregnant workers and women returning to work after maternity leave is widespread in Britain: around 45% of pregnant women experience dismissal or disadvantageous treatment at work (such as being threatened with dismissal, denied pay rises or opportunities for promotion or training). Tackling discrimination against pregnant workers is thus a vital element of eliminating unlawful discrimination.
- 2.55. Good management of pregnancy in the workplace provides business benefits, including better staff retention rates and higher staff motivation. As a matter of good practice, it is recommended that employers introduce and maintain a culture that is positive towards pregnancy and family responsibilities at all levels of management, and back this up with written guidance on managing pregnancy and maternity. Return-to-work rates can provide a good indicator of how well your organisation is managing pregnancy, with some employers achieving rates of over 90%. Look at your return rate from maternity leave and consider what can be done to improve it. Recommended steps include:
- training line managers to manage pregnant employees effectively

- ensuring all pregnant workers are consulted on their health and safety needs and receive a written risk assessment which is reviewed regularly
- planning well in advance for periods of maternity leave, for example, by upgrading the skills of other staff to cover the duties
- keeping in touch with women on maternity leave and keeping them informed of any vacancies or training opportunities
- providing opportunities to work flexibly on return
- organising a thorough induction on their return

2.56. There is significant evidence that many women who return after maternity leave are obliged to take jobs at lower levels of pay and responsibility in exchange for a move to part-time working. You should monitor the extent to which this is happening and take steps to address and prevent it, for example, by encouraging more part-time work at higher levels in the organisation. Failure to address this problem could lead to a widening of the gender pay gap within your organisation.

The University of Glasgow and Equal Scotland have developed the Gender Action Project (GAP) to pilot an initiative with female academics and research staff. GAP focuses on women returning from maternity leave and the subsequent effect this has on their career progression. Vertical segregation exists in academia and many women who enter the profession are hindered by maternity breaks, subsequent family responsibilities, and the existing dominant male culture within Higher Education. GAP looks to develop practical solutions including career development initiatives, a network, a mentoring programme as well as reviewing policy and practice and raising the profile of the skills women develop whilst on maternity leave.

### **Sexual harassment and harassment on grounds of sex**

- 2.57. Sexual harassment and harassment on the grounds of sex remain widespread. Tackling harassment is thus an important element of discharging the general duty. You need to develop and regularly review a clear policy for preventing and tackling sexual harassment of employees and service users. You should also actively promote the policy to ensure that everyone is aware of and understands it.
- 2.58. Sexual harassment occurs when there is unwanted conduct which is sexual in nature – such as a person making unwelcome sexually explicit comments or giving verbal sexual abuse, sending sexually explicit emails or inappropriate physical contact.
- 2.59. Harassment on grounds of sex is less favourable treatment which takes place simply because someone is a woman (or a man) – such as refusing to work with a woman simply because she is a woman. It is unwanted conduct related to a person's sex that is not "of a sexual nature".
- 2.60. It is also unlawful to treat someone less favourably because they have rejected or submitted to harassment as defined above - for instance refusing someone a job because they would not submit to particular unwanted conduct, or refusing someone promotion because they did submit to it.

- 2.61. The SDA also prohibits harassment in relation to employment or vocational training due to the gender reassignment of a person and not just their gender. This is the case whether a man or a woman is intending to undergo gender reassignment, is going through the process or has undergone gender reassignment in the past.
- 2.62. See Appendix F for further details on the legal definitions of harassment and sexual harassment.
- 2.63. Sexual harassment can have a serious impact on the physical and mental well-being of victims and so you should treat the prevention of sexual harassment as part of your health and safety duties. It may be appropriate to carry out risk assessments for groups of staff who are particularly vulnerable. Research<sup>8</sup> has found that the following groups are particularly vulnerable to sexual harassment: women in non-traditional areas, divorced and separated women, those with irregular or precarious contracts, women with disabilities, women from racial minorities, lesbians, young women and new entrants to the labour market are disproportionately at risk. Gay men and young men are also vulnerable to harassment, as are transsexual people.
- 2.64. It is recommended that you encourage line managers to lead by example, and provide training so that they are equipped to deal with instances of harassment should they occur. You should also adopt complaints and investigations procedures for dealing both informally and formally with sexual harassment. You should monitor the number of complaints of harassment and their outcome. You should also review practices and procedures to ensure they are working effectively.
- 2.65. It is recommended that your procedure for investigating sexual harassment complaints should be linked to your grievance and disciplinary procedures and should conform to the accepted standards for disciplinary action in the ACAS Code of Practice. Serious sexual harassment (including the victimisation of someone who has made a sexual harassment complaint) should normally be treated as gross misconduct. You should monitor the number of complaints of harassment and their outcome; you should also review practices and procedures to ensure they are working effectively.

### **Transsexual staff and potential staff**

- 2.66. Discrimination on the grounds of sex includes discrimination on the grounds of gender reassignment in employment and vocational training. You should review all your employment policies and procedures to ensure that they adequately cover transsexual employees – especially those dealing with confidentiality, harassment, access to development, occupational pensions and insurance.
- 2.67. It is important to remember that the law covers those who intend to undergo gender reassignment as well as those who have done so, and your legal obligations to prevent discrimination in employment and vocational training therefore cover that group also. It is often at the point of transition that transsexual people are subject to the most discrimination and harassment, and you have a statutory duty as an employer to prevent this.

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<sup>8</sup> 'The dignity of women and men at work: A report on the problem of sexual harassment in the Member States of the European Communities', Oct 1987.

## **Grievance and disciplinary procedures**

2.68. You need to ensure that you apply both grievance and disciplinary procedures equally to men and women.

## **Redundancy**

2.69. You need to ensure that you apply redundancy policies equally to men and women and check that the redundancy selection criteria do not impact more adversely on one sex, for example if they are based on length of service or hours worked.

## **Retirement**

2.70. Ensure that your retirement policy is applied equally to men and women. Look at the proportion of male and female staff that are members of your pension scheme. What can you do to encourage take up amongst staff who may be under-represented within the scheme e.g. part-time workers, who are more likely to be women?

## **Meeting the duty for equal pay**

2.71. The requirement to have due regard to the need to eliminate unlawful discrimination means that public bodies will need to take steps to ensure that they are complying with the Equal Pay Act. The Equal Pay Act, as amended, entitles women doing equal work with a man in the same employment to equality in pay and terms and conditions. Equal work is work that is the same or broadly similar, work that has been rated as equivalent, or work that is of equal value.

2.72. 'Like work' means work which is the same or broadly similar. Work rated as equivalent means work that has been rated using a non-discriminatory job evaluation scheme as equivalent. Work of equal value is where the work done is different but considered to be of equal value or worth in terms of demands such as effort, skill and decision-making. You can find more detail on this in the Code of Practice on Equal Pay and the EOC website.

2.73. The Code of Practice on Equal Pay recommends an equal pay review as the best means of ensuring that a pay system delivers equal pay. Completing an equal pay review is, therefore, the best way of ensuring that you are complying with the need to eliminate unlawful discrimination in your pay system. Whatever kind of equal pay review process is used it should include:

- Comparing the pay of men and women doing equal work. Here employers need to check for one or more of the following: like work, work rated as equivalent; work of equal value - these checks are the foundation of an equal pay review.
- Identifying any equal pay gaps.
- Eliminating those pay gaps that cannot satisfactorily be explained on grounds other than sex.

2.74. These features are the same, regardless of the size of the public body and a pay review that does not include these features cannot claim to be an equal pay review. Equal pay reviews are not simple a data collection exercise but entail a commitment to put right any sex-based pay inequalities. It is recommended that public authorities consult with employees and, where possible, should work in partnership with trade unions when carrying out equal pay reviews.

- 2.75. As a matter of good practice when undertaking an equal pay review public bodies may also want to look at ethnicity, disability or age to the extent that they interact with gender.
- 2.76. You can find the code of practice on equal pay at:  
[http://www.eoc.org.uk/PDF/law\\_code\\_of\\_practice.pdf](http://www.eoc.org.uk/PDF/law_code_of_practice.pdf).

A public sector organisation with over five hundred staff undertook an equal pay review. Just under half the workforce was female. Part-time work was fairly common and this group was slightly more likely to be female than male. Prior to the review, the organisation had a fairly complicated pay structure which was felt to have too many grades for the number of staff. There were also several people outside of the pay structure. The organisation began a pay and grading exercise in 1999 and this eventually evolved into a full Equal Pay Review (EPR). There was significant union involvement throughout the process and members of each staff grade were also involved in the working group. The working group used consultants to help them draft the job evaluation system and set up the EPR. The review was thorough and included data on every aspect of recruitment, pay and progression. The review found that women were earning 81% of men's basic hourly wages, but only 71% once additional allowances were taken into account. Since action was taken, the pay gap has reduced to 13 per cent for total pay – i.e. women are now earning 87% of men's total hourly pay.

## Chapter 3 : How to meet the specific duties

- 3.1. This chapter is based on the draft specific duties proposed by the Scottish Executive in a joint consultation carried out with the DTI between October 2005 and January 2006. The chapter will be amended to reflect the final specific duties agreed by the Scottish Parliament.
- 3.2. All the public authorities that are listed in Appendix C are subject to the specific duties described in this chapter (appendix C will be amended in the final version of this Code to reflect any changes made to this list by the Scottish Executive). Further orders may be made from time to time which will add new authorities to the list and remove others.
- 3.3. Private and voluntary sector organisations that exercise public functions will be subject to the general duty but not to the specific duties.
- 3.4. The specific duties set out actions which authorities must take in order to plan, deliver and evaluate action to meet the general duty, and to report on those activities. The main means of recording this is the gender equality scheme. When developing and implementing this scheme, authorities should bear in mind, however, that producing the scheme is not an end in itself – it is a means of taking action to meet the general and the specific duties. When public authorities are being assessed on whether or not they have met the duty, the existence of the scheme will not in itself be enough. They will have to demonstrate what action they have taken and the outcomes they have achieved.
- 3.5. The specific duties are intended to provide a flexible framework to guide public authorities to meet their general duty in the most appropriate way. The exact way in which public authorities implement the specific duties may vary, depending on the size and nature of the organisation, although all public authorities listed in the regulations will be expected to show that they have met them.

### **What do the specific duties require authorities to do?**

- 3.6. The Scottish Executive's proposed specific duties require authorities to set gender equality goals, produce and publish a gender equality scheme containing an action plan and to report on progress. The gender equality scheme may form part of another document, such as a general equality (or equality and diversity) scheme or a business plan. The full text of the Scottish regulations will be included in the Scottish Code before it is laid before the UK Parliament. In summary the proposed specific duties require Scottish public authorities to:
  - draw up a scheme identifying gender equality goals and showing the action it will take to implement them.
  - consult employees and stakeholders as appropriate in drawing up their gender equality schemes.
  - publish the scheme setting out goals and planned outcomes.
  - monitor progress and publish annual reports on progress.
  - review their gender equality scheme every three years.
  - develop and publish a policy on developing equal pay arrangements between women and men – including measures to promote equal pay, ensure fair



promotion and development opportunities and tackle occupational segregation – which must be reviewed at regular intervals (for example every three years).

- conduct and publish gender impact assessments, consulting appropriate stakeholders, covering: all primary legislation and significant secondary legislation, and all major proposed developments in employment, policy and services.
- develop and publish arrangements for identifying developments that justify conducting a formal gender impact assessment.

3.7. All public authorities listed in Appendix C must ensure their gender equality scheme is in place and published no later than 06 April 2007. Most of those listed public authorities are required to comply with the same specific duties. Unlike the race duty under the Race Relations Act, there are no separate requirements for employment.

### **Producing a gender equality scheme and action plan – gathering information**

3.8. In order to draw up an equality scheme identifying gender equality goals and showing the action it will take to achieve them, public authorities will have to undertake a rigorous process of reviewing their core business functions in order to understand which are the major areas that affect gender equality. The end result of this should be a set of agreed priority goals, selected according to the principle of proportionality – which are the issues which have the greatest effect on gender equality? Public authorities are expected to focus on the issues of greatest importance and impact.

3.9. In order to do this, public authorities should consider gathering information on key issues, including:

- The national level gender equality policies and issues which relate to their business –national policy frameworks or existing national research which indicates the major gender issues in their area of work.
- The different impact which their core business and service provision has on women and on men.
- The extent to which women and men use their services, their satisfaction rates, and any information they can collect on who is not using their services when they might be expected to do so and why.
- Service outcomes broken down by sex.
- The gender profile of their staff – this is likely to include data on recruitment, promotion, the distribution of women and men in the workforce by seniority and by types of work ('vertical and horizontal segregation'), harassment, an analysis of training opportunities, grievance and disciplinary procedures, and redundancy. This data also needs to be analysed for part-time staff, and those with caring responsibilities, because women are disproportionately represented in those groups. Where possible, external organisations providing services under contract should be asked for similar information on their staff.
- Information on the extent of sexual and sexist harassment of staff and service users and the effectiveness of any procedures enabling them to raise allegations of harassment.

- Return rates of women on maternity leave and whether they are returning to jobs at the same level of responsibility and pay.
- Issues and barriers affecting transsexual staff and potential staff.
- Information on the size and causes of the gender pay gap in the organisation, including the impact of occupational segregation, of discrimination and of women's disproportionate share of caring responsibilities.

3.10. Some of this data should be available already, but will need to be collected and analysed. In all of the areas, data systems should be set up to allow a breakdown of data about women and men by ethnicity, disability and, where possible, sexual orientation, age and religion. If you do not have those data systems in place, you should take steps to set them up within a reasonable timescale.

Scottish statistics show that women are at greater risk of poverty than men and are likely to remain in poverty for longer periods than men. Two groups particularly vulnerable to poverty and which are predominately made up of women are lone parents, over 90% of whom are women, and pensioners. Households headed by a female are over-represented amongst those households experiencing poverty. For example, 50% of all households receiving income at or below income support level are female while only 30% of all households are headed by a female. Households with a female Highest Income Householder (HIH) are less likely than those with a male HIH to have a bank account, savings and investments, or home contents insurance. The EOC has calculated that average hourly earnings for women working full time are 15% lower than for men working full time. For women working part time hourly earnings are 38% lower. Women's average income in retirement is 53% of men's average retirement income.

A statistical approach to measuring poverty by households, without considering gender, can mask women's experiences of poverty.

- 3.11. In analysing this data to come to conclusions about the priorities for action, the emphasis should be not just on the numbers of women or men who are affected, but on the extent of their disadvantage, and the effort which it will take to redress that disadvantage. For example, the fact that a workforce is imbalanced with 70% women and 30% men would need to be considered alongside the fact that women are only 10% of senior management, and the context of the overall pay gap within the workforce. Only a small number of fathers may be complaining about exclusion from maternity services but they may feel significantly disadvantaged and it may take only minor adjustments to services to redress that. It may be reasonable to schedule more extensive adjustments over a longer timescale.
- 3.12. When making decisions on which are the most significant issues to be addressed under the duty, the numbers of transsexual people affected by an employment policy or function may be very small. The extent of the harassment or disadvantage being experienced by them, however, may merit significant action, in keeping with the principle of proportionality.

### **Producing a gender equality scheme and action plan – deciding on goals**

3.13. The purpose of producing the scheme and action plan is to bring about change. It is therefore important that the action plan focuses on outcomes – specific identifiable improvements in policies, in the way services and outcomes are delivered and in the outcomes for employees.

- 3.14. The duty does not prescribe which goals should be chosen and it is up to the authority, in consultation with service users and employees, to select the priorities for action. The action plan should make clear, however, that the decisions on priorities are grounded in a strong evidence-base, drawn from national and local sources.
- 3.15. When choosing their priorities, public authorities should also take into account national priorities, set by their relevant co-ordinating bodies in their field, and the gender dimensions of mainstream policy priorities. These would include any sector specific strategies and targets set by central government departments. This should maximise the strategic impact of the duty on gender equality nationally.
- 3.16. It is recommended that public authorities should synchronise their annual business planning process with the development of their gender equality action plan. This should ensure that thinking on gender equality priorities takes place across the organisation, and that the highest level policy-making in the organisation pays due regard to the gender duty.
- 3.17. In deciding priorities for action, you will also need to consider the resource implications – a major deep-seated inequality may take significant staff and cash resource to correct but it may be so clearly a gender inequality issue that not to address it could lay your organisation open to individual claims or to enforcement of the duty by the CEHR. Proportionality implies major action for major problems.

### **What should be in a gender equality scheme and action plan?**

- 3.18. Schemes should contain:
  - A number of high-priority gender equality targets for action, arrived at through consultation and involvement of relevant internal and external stakeholders, such as employees, service users and potential service users, partner agencies and community groups
  - A clear indication of what action will be taken to meet those goals and how progress will be monitored – i.e. an action plan, with assigned and named individuals, and deadlines and review points.
  - Evidence of who has been consulted and involved in determining these goals
  - Details of how the public authority will ensure all its relevant policies are assessed for their potential impact on women and men
  - Details of the pay policy and action plan
- 3.19. The scheme will be strengthened if it includes clear evidence of why these goals have been selected in preference to others – for example, evidence of maximum positive impact on service users, evidence of a major disadvantage being suffered by a group of employees. It will also benefit from an indication of how these goals relate to the core business priorities of the organisation and to relevant national level goals.

### **Consulting stakeholders and employees**

- 3.20. Consultation with stakeholders and employees is needed to ensure that the gender equality goals chosen by public authorities are chosen with the support of those most likely to be affected by them. This is especially important where one sex is under-

represented in the formal decision-making processes of the organisation. It will also support transparency in the implementation of the duty, allowing staff and service users to know what their organisation has undertaken to do.

- 3.21. Women and men should both be consulted but care should be taken to understand any differences in those views by gender. Where one sex has been under-represented or disadvantaged in a policy area, service or employment issue, you may want to consult that group in a single-sex environment and to make special efforts to encourage participation. This may be especially the case where a minority group has experienced multiple disadvantages, for example, on the grounds of ethnicity and sexual orientation. It is recommended that separate consultation with the transsexual community be held.

One problem that has been faced in the implementation of positive equality duties in Northern Ireland is "consultation fatigue", with community and voluntary groups being overloaded with lengthy consultation documents. In its review of the implementation of the duties, the Equality Commission for Northern Ireland (ECNI) stated that there was "consensus that blanket mail shots to everyone on a public authority's consultation list are rarely appropriate and should not be routinely advocated."

One means of tackling "consultation fatigue" is to ensure that consultation is 'joined-up' within organisations, so that there can be one consultation exercise on related policies with affected groups. The ECNI has also recommended that "a number of public authorities should consolidate consultation exercises where possible on the same, or similar, policies." The authorities in the health family in Northern Ireland undertake a region-wide equality impact assessment (EQIA) timetable so that each policy area is subject to equality impact assessment by all health family authorities at the same time. This joined-up approach enables one consultation exercise for each EQIA.

### **Publishing the scheme setting out goals and planned outcomes**

- 3.22. There is no set requirement for how the scheme should be published – it could form part of a wider business plan or strategy. It should, however, contain very clear goals and outcomes, so that all stakeholders are clear on what action they can expect the public authority to take and how it will be monitored. Publication is key to the transparency which should govern the implementation of the duty and so the scheme should be easily available and readily identifiable to all stakeholders, for example posted on a public website and available in other formats on request.

### **Monitoring progress and publishing annual progress reports**

- 3.23. Public authorities are free to choose how they monitor progress but will be expected to demonstrate that they have taken targeted and systematic action to achieve their goals and be able to report on the extent to which they have achieved the planned outcomes. Where good data collection and analysis systems have been set up, this should allow them to track progress.
- 3.24. Publication of an annual progress report is central to developing stakeholder confidence that meaningful action is being taken. This does not have to be a free-standing document and might in fact be more effective if contained in, for example, the main annual report of the organisation. It must be clear from the report, however, exactly what action has been taken and what progress has been made towards the authority's

gender equality goals. Where progress has not been as good as expected, there should be an indication of action to be taken to remedy this.

### **Reviewing the equality scheme**

- 3.25. The equality scheme must be reviewed every three years to set a new agenda for action. This should provide a good opportunity to assess progress and ensure that the organisation is responding appropriately and proportionately to the major issues. Employees and stakeholders should be involved in this process, and good data should be collected on progress and on new and continuing gender issues within the organisation.
- 3.26. Once again, the EOC would recommend that this process takes place, if possible, in synchronisation with other reviews of organisational achievement such as strategic corporate planning or, within central government, comprehensive spending reviews.

### **Developing a policy on equal pay**

- 3.27. In order to meet the requirements of the specific duty on equal pay you will need to develop and publish a policy on developing equal pay arrangements between men and women. Your policy should clearly identify what your priorities are and what action you are taking against these priorities. Your aim in doing this is to ensure that you have the processes in place and are taking the necessary steps to reduce any gender pay gap within your organisation.
- 3.28. In order to promote equal pay you will need to consider all the issues discussed under employment in Chapter 2, and formulate a policy that addresses all the issues that might potentially cause a gender pay gap. If you do not already do so you will need to gather sufficient evidence about where the men and women in your organisation work and what they are paid, and also assess the gender impact of your employment policies. The EOC will produce separate guidance on how you can carry out a diagnostic gender equality check on your employment practices. This will enable you to formulate a policy and action plan that targets action where it is most needed and takes account of any steps that you have already made to promote equal pay.
- 3.29. You should consult with your employees and trade unions in the development of your policy, the ensuing action plan and its publication. It is recommended that your policy is formally reviewed every three years.

### **Conducting and publishing gender impact assessments**

- 3.30. As briefly outlined in Chapter 2, public authorities will need to assess the likely impact of relevant new policies in order to meet the general gender duty. This requirement is formalised under the specific duties as an obligation to 'conduct and publish gender impact assessments, consulting appropriate stakeholders, covering: all primary legislation and significant secondary legislation, and all major proposed developments in employment, policy and services'. The aim of this is to take proportionate action to ensure all policies eliminate discrimination and harassment and to adapt them in order to promote gender equality.
- 3.31. The EOC will publish detailed guidance on conducting gender impact assessment (GIA). The outline of the initial screening process is, however as follows:

- identifying the key stages of policy development within the organisation, and ensuring appropriate individuals are briefed and trained on the process of GIA
- collecting data – both quantitative and qualitative
- preliminary screening of policies to establish priorities for further analysis and action

3.32. The screening process is likely to cover questions on the following issues:

- Is there evidence that women and men have different needs, experiences, concerns or priorities in relation to the issues addressed by the policy?
- Of those affected by the policy, what proportion are men and what are women?
- If more women (or men) are likely to be affected by a policy, is that appropriate and consistent with the objective of the policy?
- Where the policy is intended to achieve a particular outcome, what is the evidence on the likely outcomes of the policy for men and for women?
- Could the policy unintentionally disadvantage people of one sex or the other? It is essential to consider not just the intended consequences of the policy but also any unintended consequences and barriers that might prevent the policy being effective for one sex or the other.
- Where there seems to be a difference in the impact on women or on men, or on particular groups of women or men, how serious is that disadvantage likely to be?
- Is the policy likely to further gender equality? Will it increase access to resources for the disadvantaged sex? Will it reinforce gender stereotypes?

3.33. The answers to these questions should provide initial information on the priority issues which require a full gender impact assessment. The process of a full gender impact assessment will consist of following up and obtaining further information on the likely impact of a policy. This is best done through research, including data analysis, and consulting relevant stakeholders.

3.34. Decisions on whether to alter the policy should be based on an informed assessment about the extent of the disadvantage to one sex, and the likely impact on gender equality.

#### Glasgow City Council Gender Action Plan

This three year Action Plan on Gender Equality will provide an opportunity to test a model of gender impact assessment developed within the Social Work Services team. Increasingly, the planning and delivery of social care services is undertaken in partnership with other agencies, therefore the team in Social Work Services considered it crucial that gender sensitivity is embedded into the joint planning frameworks at both city and local level. The action plan should help both employers and employees within Social Work Services to meet the standards of practice set down in the Scottish Social Services Council Codes of Practice particularly as they relate to equality, harassment and discrimination. Most importantly, progressing this work should also allow the service to fully comply with National Care Standards in terms of the equality agenda.

The aims of the action plan are to: -

- embed gender equality within the organisational culture of the service
- increase awareness and understanding of gender inequality
- reflect gender sensitivity in policy development
- further introduce gender considerations into service planning and delivery
- promote equality between women and men in the workforce.
- evidence progress made in mainstreaming gender equality within the service.

The Plan has a clear set of actions, responsibilities, timescales and expected outcomes in respect of the pilot work using the gender impact assessment tool. Lessons from this work and the race impact assessment work will be evaluated with a view to considering the development of a model for Equality Impact Assessment in the future.

### **Developing criteria for conducting formal gender impact assessments**

3.35. Government bodies are obliged to conduct full gender impact assessments for all primary and secondary legislation. All public authorities are required to set criteria for deciding which of their policies will be subject to impact assessments. These criteria will vary, depending on the size and functions of an organisation. The criteria should ensure that any major developments which are likely to have a significant impact on gender equality are subject to an initial screening.

The Greater London Authority (GLA) has developed an Equality Impact Assessment Tool. It is part of the GLA's project management methodology that projects with a budget of over £100k must go through an equality impact assessment (EQIA). In addition, the GLA has identified the following projects and policies as requiring an EQIA:

- All Mayoral strategies and all best value reviews
- Policies and projects that each of the GLA's directorates identify as requiring an EQIA, as part of the business planning process each year. These should be policies and projects that:
  - are of relevance to the GLA's duty to promote race equality (because of the statutory duty)
  - **and** are primary high level functions, rather than support functions or sub-projects
  - **and** are in their initial planning stage or undergoing a revision.

Although only the projects and policies that meet these criteria **must** have an EQIA, GLA staff leading on **any** project, including those with budgets below £100k, are told seriously to consider carrying out an EQIA at the planning stage.

## Chapter 4 : Complex legal issues: procurement, partnerships and single-sex services

### Procurement

- 4.1. Procurement is the process by which a public authority enters into a contract with an external supplier to carry out works or provide goods, services or staff. The term encompasses the full range of public authority contracts, including private finance initiative (PFI) projects and public private partnerships (PPP). It does not include the internal process by which a public authority decides to not provide the service directly itself.
- 4.2. The gender equality duty applies to those functions which are carried out through procurement as well as those which are carried out directly by the public authority itself. The procurement process is important to the effective implementation of the general duty because public authorities enter into large numbers of contracts with private and voluntary organisations for goods, works, services and staff.
- 4.3. Where a contractor is carrying out a public function on behalf of a public authority, the legal liability for the gender duty in relation to that function remains with the public authority which contracts out the function. (For details of when contractors are also subject to the duty see Appendix A.) This means that public authorities will need to build relevant gender equality considerations into the procurement process, to ensure that all the public authority's functions meet the requirements of the statutory duty, regardless of who is carrying them out.
- 4.4. The duty requires public authorities to pay due regard to the need to eliminate unlawful discrimination and harassment and to promote equality between men and women. This means that the weight given to gender equality should be proportionate to its relevance to a particular procurement<sup>9</sup>. It is recommended that public authorities take the following steps to assist them in meeting the gender equality duty where contractors provide goods, works, services and staff on their behalf:
  - Provide training for all staff involved in procurement work so that they fully understand the provisions of the Sex Discrimination Act and Equal Pay Act, where relevant to their work, and what they need to do to ensure compliance.
  - Use resources within your department, such as equality teams and tools and information from the EOC's website (including guidance on Gender Equality Impact Assessment) to ensure that all procurement is conducted consistently with the public authority's statutory gender equality duty.
  - The relevance of gender equality issues to a specific procurement contract, from the point of view of the contracting authority, should be identified and reflected in the technical specifications and the terms and conditions of the contract, in accordance with UK and EC procurement rules.
  - Regulation 38 of The Public Contracts(Scotland) Regulations<sup>10</sup> provides that contracting authorities may inform candidates or tenderers where to obtain information on the obligations relating to employment protection which will apply

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<sup>9</sup> see Chapter 2 for more information on relevance and proportionality.

<sup>10</sup> which implements Article 27 of Directive 2004/18/EC



to the work carried out or services provided. It is recommended that contracting authorities implement this provision by revising any standard Invitations to Tender to include information about contractors' obligations under the Sex Discrimination Act, the Equal Pay Act and the gender equality duty.

- If the above information has been provided, public authorities must<sup>11</sup> request in the contract notice that tenderers or candidates indicate, when drawing up their tender, that they have taken into account their obligations under the Sex Discrimination Act and Equal Pay Act.
- Ensure that steps to eliminate discrimination and harassment and promote equality between men and women are appropriately reflected and given due weight in the selection and award criteria<sup>12</sup>.
- Consider the technical skills and capabilities of tenderers where they are relevant to the contract and linked to gender equality e.g. staff management training.
- Regulation 23 The Public Contracts (Scotland) Regulations 2006<sup>13</sup> permits the exclusion of tenderers at the selection stage for relevant convictions or findings of grave misconduct (e.g. findings against them in an Employment Tribunal or County Court under the Sex Discrimination Act or Equal Pay Act). With a view to discharging the gender duty, it is recommended that public authorities exclude such tenderers, unless they can show effective steps have been taken to resolve the issue. For example, they could be requested to set out what action they have taken to ensure that the discrimination is not repeated, such as amendment of discriminatory policies or practices.
- Include in every contract a performance condition that the contractor must comply with the anti-discrimination provisions of the Sex Discrimination Act and Equal Pay Act.
- Include performance conditions with which the contractor must comply to ensure that the public authority is able to discharge its general gender equality and specific duties.
- Where relevant, specify in the contract what evidence the contractor needs to gather for the contracting-out authority to demonstrate the authority's own compliance with the general or specific duties.
- Ensure that the contractors fully understand any gender equality requirements of the contract.
- Monitor contractor performance against those requirements.
- Seek legal advice if there is uncertainty as to how the duty might affect the design and process of a particular procurement.

4.5. In certain circumstances, a private contractor may also be deemed to be providing a service of a public nature and therefore bound by the general duty<sup>14</sup>. In such a case,

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<sup>11</sup> in accordance with Regulation 38 The Public Contracts (Scotland) Regulations 2006 and Article 27 Directive 2004/18/EC.

<sup>12</sup> In doing this a public authority must ensure that the criteria are linked to the subject matter of the contract; that such criteria are mentioned in the contract document or tender notice; that the criteria do not confer unrestricted freedom on the authority and that the criteria comply with all the fundamental principals of UK and EC law, particularly the principle of non-discrimination (between Member States).

<sup>13</sup> which implements Article 45 Directive 45 2004/18/EC.

<sup>14</sup> See Appendix A for further details on when a private contractor would itself be bound by the general duty. In such cases, the private contractor should follow the procedures and guidance set out in Chapter 2.

the public authority which is contracting out services will nonetheless remain subject to the duty and can discharge this duty by:

- ensuring that due regard is paid to the need to eliminate discrimination and harassment and promote equality of opportunity in the procurement process
- ensuring that contractors adequately discharge the duty on behalf of the public authority
- monitoring the contract

## Partnerships

- 4.6. Public authorities may be involved in partnerships in order to better deliver their services – for example, community planning partnerships or regional transport partnerships. Where those partnerships do not have a separate legal identity in their own right, they will not be bound collectively by the gender equality duty. However, individual public authorities will have to comply with the general and, where applicable, specific duties. Those bodies with duties under the Sex Discrimination Act must ensure that they give due regard to gender equality in relation to the work of the partnership by ensuring that it takes forward work to promote gender equality. We recommend that the lead partner takes responsibility for ensuring this happens.

South Lanarkshire Council has entered into a partnership with Oxfam's UK Poverty Programme and Engender to pilot a project on gender and regeneration, within the new context of community planning. This project, called Genderwise, aims to maximise the positive impact of regeneration policies and community planning practices on the lives of women, men, boys and girls. As a means of strengthening its commitment to gender equality, South Lanarkshire Council will lead the Community Planning Partnership on best practice approaches to gender mainstreaming. This will be achieved in two ways: by focusing on specific regeneration programmes to practically demonstrate how gender mainstreaming can improve local people's access to services and increase efficiencies in delivery, and, by working with a group of key community planning leaders to lead and promote gender mainstreaming across the remit of community planning.

The Dundee Community Planning Partnership has emphasised the importance of equalities directly, including it as one of its core strategies and activities. The partnership has also specifically set a strategic regeneration objective to:  
'Ensure that every individual and family has the chance to play a full part in the life of the city regardless of social or economic background, by tackling poverty and discrimination.'  
This commitment is further emphasised by setting a 'Regeneration Outcome' that aims to increase engagement with minority, vulnerable excluded groups.

The Partnership identifies lone parent status as an indicator of low income. Lone parents are predominantly women (around 90%) and there are higher numbers of lone parents living in areas of deprivation. They also identify a specific outcome for supporting this target group into employment:

"Since efforts to get people into work and education/training will be a key part of the Partnership's strategy, a related outcome must be to increase the availability of affordable and accessible childcare."

## **The legal status of single-sex services**

- 4.7. As mentioned in Chapter 2, public authorities must satisfy themselves that any approach to single-sex services complies with the Sex Discrimination Act. The provisions are different for education, for goods, facilities and services, and for public functions. The following paragraphs set out the main considerations, with additional supporting detail at Appendix F.

### **Single-sex provision in education**

#### Section 22 and Section 26 SDA

- 4.8. It is unlawful for schools, colleges, universities or any other educational establishments to discriminate, either directly or indirectly, in the way they treat or admit pupils (subject to the exceptions listed below). This means, for example, that in mixed schools, it is unlawful to provide classes for only one sex where this would amount to less favourable treatment of the other sex.
- 4.9. Single-sex educational establishments are legal, however, and may discriminate in admissions.
- 4.10. Sex segregation is not expressly prohibited by the SDA and it is therefore potentially lawful to provide separate lessons in single-sex groups for boys and girls in a mixed school provided that there is no question of one sex receiving 'less favourable treatment'. Denying girls the same opportunities as boys, and vice versa, will usually amount to less favourable treatment. Therefore any facilities, benefits, or services provided must ordinarily be available to both sexes and provide equal opportunities. Provided that this test is met, it would be legally possible to provide segregated classes on, for example, sex education.
- 4.11. The provision of additional classes for one sex only in a mixed school is unlikely to be lawful, however, if the opposite sex does not have access to equivalent facilities, benefits or services. This is because it can amount to less favourable treatment, even if the motive behind the idea is well intentioned, because it denies opportunities to the opposite sex.
- 4.12. This means, for example, that remedial classes in English for underperforming boys alone would not be lawful, unless the same help or opportunity is being given to any girls who are also underperforming. Participation in remedial classes to address underperformance would have to be based on objective criteria unrelated to sex, such as the previous test results of participants. If a school wished to run two sets of classes segregated by sex, however, one for underperforming boys, and one for underperforming girls, this would be permissible provided they were of like quality, in like manner and on like terms.
- 4.13. Where vocational training is being offered it is unlawful to offer different options to girls or to boys, as denying either sex the choice of all options is likely to amount to discrimination (unless covered by the positive action provisions detailed below).
- 4.14. The overriding consideration in all cases must be to ensure that girls and boys are not disadvantaged because of their sex and that they are provided with equal opportunities.

Where public authorities are unclear on the legality of their proposed approach, it is recommended they seek legal advice.

- 4.15. See also Appendix F for further details of the above education provisions and related sports provisions under s44 SDA.

#### Section 47 SDA

#### **Positive action in training**

- 4.16. There are limited exceptions under the SDA to allow women only (or men only) access to facilities for training. Under those provisions, it is permissible to restrict access to training to women alone (or men alone), to fit them for particular work, or encourage women only to take advantage of opportunities for doing that work, where nationally the numbers of women doing such work were comparatively small at any time during the preceding twelve months. Where the numbers of women undertaking particular work in a local area is comparatively small, single-sex training may also be provided to women who are likely to take up that work in that area to help fit them for that work.
- 4.17. It is also lawful to provide single-sex training to women or men who have a particular need for training to fit them for employment, because they have been out of full-time employment while carrying out domestic or family responsibilities. It is also lawful to take those special training needs into account when selecting applicants for training in mixed-sex classes to fit them for employment.
- 4.18. Training includes any form of education or instruction, and positive action courses can be provided in schools as well as in adult training providers.
- 4.19. Providing the above criteria are met, positive action in relation to access to facilities for training may include:
- training which is based on job sampling, work experience, "taster" days with employers, work shadowing experience
  - training in a skill, e.g. carpentry, computer programming
  - career counselling and guidance for working women, or for those wishing to return to work
  - retraining into areas of skills shortage - especially suitable for women returners who did not have the opportunity of obtaining these qualifications at a school
- 4.20. The positive action exception does not, however, permit discrimination prohibited by S6 of the SDA relating to applicants or employees and therefore it is not lawful to discriminate in recruitment. Any training actually regarded as employment is excluded from the positive action provisions.

Community Connections is based mainly in Greater Easterhouse area of Glasgow and works in partnership with John Wheatley College and the Greater Easterhouse Social Inclusion Partnership Board. Together they deliver a range of courses aimed at members of the community who would not usually sustain a college course, namely the long term unemployed, women returners and lone parents. There is a high success rate amongst students and in 2005 over 85% of course completers moved on into further education or training. The success of Community Connections courses and their students is due to provision of different courses, services and support for men and women. One example is the Voyager Course, which is

designed especially for men. Students participate in a local community environmental project and complete a short work placement; this gives them an opportunity to reflect on their own roles in the community and a new experience of the labour market. The course also helps to develop local services for men, such as men's support groups which children can attend with their fathers. Voyager is also planning to develop a men's centre in the area.

## **Single-sex provision of goods, facilities and services**

### Section 29 SDA

4.21. It is unlawful to refuse to provide goods, facilities or services on the grounds of sex, or to provide services that are not of a similar quality to those for the opposite sex. This includes entertainment and recreation; professional services; the services of any local or other public authority; facilities for transport or travel; facilities for grants; and access to, and use of, public places<sup>15</sup>.

### Section 35 SDA

4.22. It is permissible, however, to limit provision of goods, facilities and services to one sex in the following circumstances:

- Hospitals or establishments providing special care, supervision or attention. This would apply to nursing homes or other psychiatric institutions. Women's refuges might fall within this exception if they were providing 'special care, supervision and attention' comparable to that provided at a hospital, as would rape crisis centres if they were providing medical or psychiatric care.
- Facilities or services where female users are likely to suffer serious embarrassment at the presence of a man (or vice versa). This exception potentially covers services such as group counselling or advice about matters such as sexual health, sexual offences or intimate personal health or hygiene; rape crisis centres and women's refuges may fall within this exception if they involve group provision of services involving intimate personal matters.
- Places where the users are likely to be in a state of undress and might reasonably object to the presence of the opposite sex, such as facilities for separate male and female changing rooms and any group service involving intimate personal health and hygiene.
- Where physical contact is likely and people may reasonably object to contact with opposite sex. This exception is likely to cover sports sessions involving a high degree of physical contact such as judo or wrestling or group sessions in massage.

## **Additional permitted exceptions to the non-discrimination provisions**

### Section 44 SDA Sport

4.23. Competitive sporting activities can be restricted to one sex, where the average women's physical strength puts them at a disadvantage to an average man. This is intended to allow separate sporting events where the physical differences between women and men

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<sup>15</sup> See s29(2) SDA for non exhaustive list

render competition unfair. Where the sports sessions are not related to participation in competitions, it is not lawful to restrict them to one sex (unless another exception applies, eg on the grounds of reasonable objection to physical contact, as detailed above).

#### Section 46 SDA Communal Accommodation

- 4.24. In certain circumstances it is lawful to discriminate in admission to communal accommodation, for reasons of privacy and decency related to the sleeping accommodation or the sanitary facilities. In considering whether this amounts to fair and equitable treatment of men and women, however, account must be taken of whether it is reasonable to expect the accommodation to be altered or further accommodation provided, and the frequency of demand or need for the accommodation.

### **The exercise of public functions outside employment**

#### Section 21A(1) SDA

- 4.25. Discrimination law has always applied to public authority providers of employment, education, housing and other services, *as long as* these services are of a similar kind to those that may be supplied by a private person. However, case law established that the Sex Discrimination Act did not apply to acts done on behalf of the Crown that were of an *entirely different kind* from any act that would ever be done by a private person. Section 21A amends the Sex Discrimination Act so that discrimination or harassment by public authorities when carrying out such exclusively public functions is now also prohibited.

- 4.26. Section 21A applies to acts that a private person cannot do, such as:

- formulating or carrying out public policy (for example, devising policies and priorities in health, education and transport etc or making decisions on the allocation of public money).
- exercising regulatory or law enforcement powers (for example: police powers relating to stop and search, arrests and detection of suspects; the regulatory and law enforcement powers of bodies such as Her Majesty's Revenue and Customs; local authority licensing functions; tax inspection and collection; trading standards activities).
- the exercise of statutory duty or statutory powers or discretion in certain circumstances (for example, a Secretary of State refusing to give leave to enter or remain under immigration provisions).

- 4.27. Where the exercise of a statutory duty also entails providing a service (such as a local authority looking after children) it would not usually fall within s21A.

### **The relationship between SDA s21A (public functions) and s29 (goods, facilities and services)**

- 4.28. It can sometimes be difficult to discern if a particular activity falls within s29 (goods, facilities and services) or s21A (public functions) and therefore it can be difficult to assess what exceptions apply. Very fine distinctions have been drawn in case law.

- 4.29. In order to determine whether a particular activity falls within s29 the crucial test<sup>16</sup> is whether it can truly be said that the function in question constitutes a 'service to the public' (as opposed to, for example, discharging a statutory duty such as controlling immigration or collecting tax). The direct provision of services such as transport or recreational facilities clearly fall within s29.
- 4.30. Case law has indicated, however, that in certain circumstances a public authority may be performing a public function *and* providing a service at the same time. For example, it has been established that the Inland Revenue performs two separate activities – first a statutory duty of collecting tax and secondly a service of providing taxpayers with information regarding their entitlement to tax relief. Further, case law has found that the police are, in certain circumstances, providing a service (as opposed to discharging their statutory duty) when assisting or protecting victims of crime.
- 4.31. Public authorities may need to obtain legal advice if they are unclear whether a particular service falls within s29 or s21A SDA, and therefore which exceptions apply. Each case should be assessed on its own particular circumstances. This is important because a public authority must ensure that it is acting lawfully before providing a service on a single-sex basis.

### **Exceptions which allow a single-sex approach to public functions**

#### Section 21A(3) – (4) and (9) SDA

- 4.32. The key areas where the prohibition on discrimination and harassment in the exercise of public functions, in non-employment areas, carried out on behalf of the Crown does not apply are set out below (the remainder are in Appendix F):
- the provision of a service<sup>17</sup> for only one sex 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 to one sex only where: it is also provided jointly, and if it were provided jointly only 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 it 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.
  - Action taken for the purpose of assisting one sex to overcome: a disadvantage (as compared with the other sex) or the effects of discrimination.

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<sup>16</sup>Lord Justice Hutchinson, in *Farah v Commissioner of Police for the Metropolis* [1996] EWCA Civ 684, CA

<sup>17</sup> Although the exceptions within s21A refer to 'services', the vast majority of what public authorities think of as their services will fall within s29 or s22, not s21A.

- 4.33. In the EOC's view, the occasions when a public authority is likely to be justified in exercising s21A functions on a single-sex basis will be very limited. If a public authority thinks that exercising public functions for one sex only is appropriate, it is recommended as good practice that the public authority ensures that this approach is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary<sup>18</sup>. This means that the aim should be sufficient to justify a breach of the principle of equal treatment and that the means (separate, different or single-sex-only provision) are an appropriate way to achieve that aim. Examples of legitimate aims include: protection of victims of sex-related violence; reasons of privacy and decency; promotion of gender equality; and freedom of association.
- 4.34. It is recommended that public authorities assess whether the difference in effectiveness between exercising a public function in relation to both sexes jointly or on a single-sex basis is significant enough to justify any negative outcomes from separate provision. Negative outcomes might include reinforcing gender stereotypes and/or preventing gender mainstreaming. In determining whether the proposed means of achieving their aim are appropriate and necessary, public authorities should consider whether the means are sufficiently likely to achieve the aim in question and whether there are alternative means of meeting the need by adjustments to the way the activity is currently carried out.
- 4.35. In the EOC's view, the exercising of public functions in relation to one sex where only one sex requires the service (i.e. section 21A(9) paragraph 8) should be read as encompassing only those situations where the physical differences between men and women mean that only persons of one sex *can* require the service. If this provision were read to permit a public authority to exercise a public function on a single-sex basis only because current demand suggested, or the authority assumed, that only one sex were interested in it, that could undermine the gender equality aims of the SDA.
- 4.36. In relation to s21A(9) paragraph 13 (which provides that it is permissible for a public authority to take action which discriminates on gender grounds for the purpose of overcoming a disadvantage or the effects of discrimination) the EOC recommends that public authorities should ensure that such positive action is appropriate and necessary to achieve the aim in view. Public authorities should be able to provide evidence to support the contentions that such positive action is: necessary; focused on overcoming a specific disadvantage; and limited in time, being in force for no longer than necessary to deal with the problem identified.

### **Developments in the law**

- 4.37. The Discrimination Law Review may lead to changes in the exceptions outlined in the sections above, and public authorities should keep up-to-date with changes in the law. Such information will be on the Women and Equality Unit website, the EOC website and, from 2007, on the CEHR website.
- 4.38. The government will also transpose the European Goods and Services Directive into domestic legislation in late 2007. This will implement the justification test outlined above in relation to goods and services falling within s29 SDA. Public authorities should inform themselves about the implications for their services of these regulations when

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<sup>18</sup> This test is taken from the Goods and Services Directive 2004/113/EC which will apply to goods and services covered by s29 SDA; the extent to which it will be applied to s21A is not clear.



they are finalised. Information will be available on the EOC website once the regulations have been finalised (and from 2007, the CEHR website).

## **The employment implications of providing single-sex services**

### Section 7 SDA

- 4.39. If a public authority makes a judgement that there is a legal case for providing services to one sex only or providing services to each sex on a separate basis it should not automatically follow, however, that those services should be supplied only by staff of that same sex as the users. In certain cases, the SDA does allow the employment of staff of one sex only under a Genuine Occupational Qualification (GOQ). Cases decided by the courts have concluded, however, that those instances should be extremely limited. Even where an employer could apply a GOQ to a job, they are not obliged to do so.
- 4.40. The most common reason for restricting a job to one sex only is to preserve decency and privacy – for example, where the job is likely to involve physical contact or where men are in a state of undress or using sanitary facilities and might reasonably object to the job being carried out by a woman (or vice versa). It can also apply where the holder of the job provides individuals with personal services promoting welfare, education or similar personal services and those services can most effectively be provided by a man (or woman as the case may be).
- 4.41. There are also other exceptions listed in the SDA: where a job is likely to involve working or living in a private home and a man might reasonably object to a female job holder due to the degree of physical or social contact with, or knowledge of intimate details available to, the job holder; where staff are required to live in single-sex accommodation because of the location or nature of the establishment it would be impracticable to live elsewhere and where it would not be reasonable to expect the employer to provide premises equipped with separate sleeping and sanitary facilities which could be used in privacy for both sexes or to provide alternative accommodation; where the essential nature of the job requires a man for reasons of physiology (excluding physical strength or stamina) or authenticity in dramatic performances or other entertainment; where a job is likely to involve duties outside the UK where local law or custom prevent the duties being performed by a woman (or vice versa); or where the job is one of two to be held by a married couple.
- 4.42. Employers wishing to apply a GOQ should first consider their staffing situation overall - it may be that the needs of service users can be adequately met through a reasonable redistribution of duties among existing staff. GOQs should only be applied on a post-by-post basis and not on a blanket basis. The EOC recommends that expert advice is obtained before applying a GOQ. Further guidance on the requirements and procedure for employers for claiming a GOQ is available on the EOC website or through the Helpline and from late 2007, the CEHR website.

## Chapter 5 : Enforcement

### **The role of the EOC and the Commission for Equality and Human Rights**

- 5.1. The Equal Opportunities Commission was set up as an independent statutory agency under the Sex Discrimination Act of 1975. The duties of the EOC as set out in the Act, include to:
- work towards the elimination of discrimination.
  - promote equality of opportunity between men and women generally.
  - promote equality of opportunity, in employment and vocational training, for persons who intend to undergo, are undergoing or have undergone gender reassignment.
- 5.2. Once established, the Commission for Equality and Human Rights<sup>19</sup> will have duties to:
- Promote understanding of the importance of equality and diversity.
  - Encourage good practice in relation to equality and diversity.
  - Promote equality of opportunity.
  - Promote awareness and understanding of rights under the equality enactments.
  - Enforce the equality enactments.
  - Work towards the elimination of unlawful discrimination.
  - Work towards the elimination of unlawful harassment.
- 5.3. The EOC and CEHR will use our promotional and enforcement powers to ensure authorities meet the duty. This chapter explains these powers in more detail.

### **Helping public authorities meet the duty**

- 5.4. The EOC will work with major players in the public sector, particularly key intermediary bodies and inspectorates, to:
- Develop guidance and good practice
  - Monitor and spread good practice
  - Provide practical guidance
  - Monitor progress and compliance with the duty
- 5.5. The EOC will be issuing non-statutory guidance to supplement this code, to cover particular parts of the public sector, and aspects of the duty such as gender impact assessment and procurement. Details of the guidance planned are contained in Appendix D.

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<sup>19</sup> In line with the 2006 Equality Act, the CEHR is expected to take over the EOC's functions in late 2007.

## **The role of audit and inspection bodies**

- 5.6. Agencies that audit or inspect public authorities are bound by the duty to have due regard to the need to eliminate discrimination and harassment and promote equality between men and women in all aspects of their work. What would be required of an audit or inspection body in fulfilling this duty will depend upon the role and scope of that body, but bodies with a broad role will need to ensure that the duty becomes an integral part of the inspection/audit process, built into their inspection regimes and informing their judgements on what constitutes good performance. In particular they will need to:
- Review inspection and auditing methods and performance indicators, to ensure that they have due regard to the duty and enable judgements to be made as to whether public bodies are complying with the duty.
  - Advise public bodies on developing effective gender equality action plans and monitoring arrangements.
  - Identify and disseminate best practice in respect of the gender equality duty.
  - Improve research surveys and data collection in order to provide useful data for public bodies to consider when analysing their performance of the duty, and to improve accountability to the public.

## **What happens when authorities fail to meet the duty**

- 5.7. The EOC and CEHR have formal powers of enforcement which they will use if they have evidence that public authorities are not taking action required by the duty. Before undertaking either of the enforcement procedures set out below, the Commissions would expect to engage in informal correspondence and communication with the public authority concerned, giving non-compliant authorities the opportunity to comply without proceedings.
- 5.8. The procedures set out below are likely to be used when preliminary means of communication have resulted in no or insufficient progress.

## **Enforcement of the general duty via judicial review**

- 5.9. If a public authority (including a private or voluntary organisation exercising public functions) does not comply with the general duty, its actions or failure to act can be challenged by lodging a petition for judicial review to the Court of Session. A petition can be lodged by a person with sufficient interest in the matter, or by the Equal Opportunities Commission or (from late 2007) the Commission for Equality and Human Rights.

## **Enforcement of the general and specific duties via compliance notices**

Section 76D SDA and Section 33 Equality Act

- 5.10. If a public authority does not comply with its specific duties, it could face enforcement action by the Equal Opportunities Commission (and subsequently from late 2007 by the CEHR).

- 5.11. S76D SDA empowers the EOC to serve a compliance notice on an authority that is failing to comply. The notice will state that the authority must meet its duties and tell the EOC within 28 days what it has done so as to comply with the duties.
- 5.12. In the compliance notice, the EOC can also require the authority to give it written information showing that it has met its duty. The notice will state the time by which the EOC should receive the information (which should not be later than the end of the three months beginning with the day on which the notice is served). The EOC cannot ask for more information than a public authority would have to provide in the Court of Session. For example, information subject to legal privilege, such as correspondence between a public authority and its solicitor relation to a discrimination claim brought by an individual against the authority would not have to be provided.
- 5.13. If the EOC thinks that a public authority on which a notice has been served has failed to comply with the specific duty or provide the EOC with any information required by the notice, the EOC may apply to the sheriff court for an order requiring the authority to comply.

#### Section 33 Equality Act

- 5.14. The CEHR has similar powers to issue compliance notices in respect of a failure to comply with the general duty, as well as a failure to comply with the specific duties.
- 5.15. In relation to the requirement to provide the CEHR with information setting out how the public authority intends to comply with the general or specific duties, this can include steps taken or proposed for the purpose of complying with the duties.

#### Section 32 Equality Act

- 5.16. The CEHR may not issue a notice requiring a public authority to comply with the general duty unless it has carried out an assessment under s32 Equality Act and the notice relates to the results of that assessment. See Appendix G for details on the assessment process.
- 5.17. If the CEHR thinks that a public authority has failed to comply with a requirement of the notice either to comply with the duty or provide information it may apply for a court order requiring compliance. However, it may not apply to the court until a period specified in the original notice has expired.
- 5.18. The sheriff may grant an order in the terms applied for by the CEHR or in more limited terms. If the sheriff makes an order and it is not complied with, the sheriff may make a contempt of court finding.

## Appendix A: What is the definition of a public authority for the purposes of the general duty?

For the purposes of the gender duty, public authorities are bodies whose functions are governmental in a broad sense. The most obvious examples of this are government departments, local authorities, the police and the armed forces. They will generally possess special powers, be democratically accountable, be publicly funded in whole or in part, be under an obligation to act only in the public interest and have a statutory constitution. These bodies are sometimes referred to as 'pure public authorities'. The gender duty will therefore apply for example to:

- Scottish Ministers, government departments and Executive agencies (such as the Scottish Executive Justice Department and its Executive agencies, including the prison service);
- Army, Navy and Air forces of the Crown (subject to a limited exception relating to work with Government Communications Headquarters);
- Local government including local authorities, education authorities, fire authorities, passenger transport executives and licensing boards;
- Governing bodies of further and higher education institutions, colleges and universities;
- National Health Service including NHS Boards and special health boards;
- Police including Chief Officers of Police and police authorities;
- Inspection and audit agencies such as Audit Scotland, Her Majesty's Inspectorate of Constabulary (HMIC), Her Majesty's Inspectorate of Education (HMIE), or the Scottish Commission for the Regulation of Care;
- Non-departmental public bodies such as Historic Scotland, Scottish Natural Heritage, Sportscotland etc;
- Scottish Enterprise, Highlands and Islands Enterprise and the local enterprise companies;
- Other bodies such as the Criminal Injuries Compensation Authority, the Crown Office and Procurator Fiscal Service, Courts and tribunals (though not for judicial acts).

This is not an exhaustive list.

Equivalent public authorities in England and Wales are also covered by the general duty. Further detail is provided in the Code of Practice for England, Wales and GB-wide public bodies.

### **Private bodies carrying out public functions**

The Equality Act is designed to ensure that a wide number of authorities are subject to the gender duty in relation to the performance of public functions. This will also include private

bodies or voluntary organisations who are carrying out public functions on behalf of a public authority. An organisation will be exercising a 'public function' where it is in effect exercising a function which would otherwise be exercised by the state – and where individuals have to rely upon that person for the exercise of the government function. The bodies are sometimes referred to as 'functional public bodies'. Whether or not an organisation is exercising a function of a public nature will ultimately be a matter for the courts. As the law presently stands, a private body is likely to be held to be performing public functions and thus subject to the gender equality duty in relation to those functions if:

- it is publicly funded
- it is exercising powers of a public nature directly assigned to it by statute; or
- it is taking the place of central or local government
- it is providing a public service
- its structures and work are closely linked with the delegating or contracting-out state body
- there is a close relationship between the private body and any public authority

Additional factors which may be relevant in determining whether or not an authority is carrying out a function of a public nature include:

- The extent to which the private body is supervised by a state regulatory body
- The fact of supervision by a state regulatory body

The following bodies are likely to be deemed to be performing 'functions of a public nature' in relation to their public functions:

- the privatised utilities
- private security firms managing contracted out prisons
- The Faculty of Advocates/Law Society of Scotland
- the BBC

In relation to a particular act, a person is not a public authority if the nature of the act is private (for example, a private company running a prison will not be covered by the duty in relation to its private activities such as providing security guards for supermarkets).

A pure public authority contracting out services will always remain subject to the duty. It is possible that a 'pure' public authority which is subject to the duty could also be contracting out services to a 'functional' public authority (i.e. a private organisation providing a service of a public nature.) In this case, both bodies will be subject to the duty in their own right. If there is a breach of the general duty, the legal liability for this could rest, depending on the circumstances, with either body. Actual liability would depend on the act which is the subject of the complaint, who was responsible for it and who was in breach of their duty in respect of it. For example, a private prison might close down its childcare facilities for use by visitors, contrary to the terms of its contract with the Home Office. Whilst both the prison and the Home Office could be challenged in judicial review proceedings, the likelihood is that the Home Office

would establish they had discharged their duty if they had included a requirement for childcare facilities in the contractual specifications. The private prison would be more likely to have difficulty in establishing that they had discharged the duty.

It is recommended that those private organisations who may be carrying out functions of a public nature, but who are unsure whether they fall within the definition of a 'public authority' should safeguard their position by ensuring that they comply with the general duty in relation to those functions. It may also be advisable to seek legal advice on whether or not the gender equality duty applies in such a situation.

## Appendix B: Public bodies and functions which are exempt from the gender duty

### Section 76A(3) SDA 1975

The Act currently exempts the following public authorities from the gender duty:

- Both Houses of Parliament;
- The Scottish Parliament
- The General Synod of the Church of England
- The Security Service
- The Secret Intelligence Service
- The Government Communication Headquarters
- a part of the armed forces of the Crown which is, in accordance with a requirement of the Secretary of State, assisting the Government Communications Headquarters, or
- a person specified by order of the Secretary of State

### Section 76A(4) SDA 1975

In addition there are certain functions of public authorities which the Act excludes from being subject to the duties. The general duty does not apply to:

- a function in connection with proceedings in the House of Commons or the House of Lords
- a function in connection with the proceedings in the Scottish Parliament (other than a function of the Scottish Parliamentary Corporate Body)
- a judicial function (whether in connection with a court or tribunal)
- a function exercised on behalf of or on the instructions of a person exercising a judicial function (whether in connection with a court or a tribunal)
- a function specified by order of the Secretary of State



## Appendix C: Public authorities subject to the specific duties

This list of Scottish bodies is in practice identical to the one included in the government consultation of October 2005 'Advancing Equality for Men and Women: Government proposals to introduce a public sector duty to promote gender equality', available on [www.womenandequalityunit.gov.uk](http://www.womenandequalityunit.gov.uk). The final list of Scottish bodies subject to the duties will be set out in regulations laid before the Scottish Parliament and is likely to have some slight modifications.

- The Accounts Commission for Scotland
- Audit Scotland
- The Scottish Commission for the Regulation of Care (The Care Commission)
- A Chief Constable of a police force maintained under s.1 of the Police (Scotland) Act 1967
- The Common Services Agency for the NHS in Scotland
- A council constituted under section 2 of the Local Government etc. (Scotland) Act 1994
- The Criminal Injuries Compensation Authority in respect of its Scottish functions
- General Teaching Council for Scotland
- A Health Board constituted under section 2 of the National Health Service (Scotland) Act 1978
- A joint board within the meaning of section 235(1) of the Local Government (Scotland) Act 1973
- The Keeper of the Records of Scotland
- The Keeper of the Registers of Scotland
- A licensing board constituted under section 1 of the Licensing (Scotland) Act 1976
- Passenger Transport Executive within the meaning of Part II of the Transport Act 1968(d) for a passenger transport area within Scotland [by 30 November 2004]
- A police authority established under section 2 of the Police (Scotland) Act 1967
- The Registrar General of Births, Deaths and Marriages for Scotland
- Scottish Enterprise and Highlands and Islands Enterprise established under the Enterprise and New Towns (Scotland) Act 1990
- The Scottish Environmental Protection Agency
- The Scottish Further and Higher Education Funding Council
- The Scottish Legal Aid Board
- The Scottish Ministers
- The Scottish Qualifications Authority
- The Scottish Social Services Council
- Scottish Water
- The Service Authority for the National Criminal Intelligence Service in respect of its Scottish functions

- A Special Health Board constituted under section 2 of the National Health Service (Scotland) Act 1978
- Fundable bodies as listed in Schedule 2 of the Further and Higher Education (Scotland) Act 2005

**Scottish cultural and countryside bodies to be subject to specific duties to promote equality**

- The Loch Lomond and The Trossachs National Park Authority
- The Cairngorms National Park Authority
- National Galleries of Scotland
- National Libraries of Scotland
- National Museums of Scotland
- Scottish Arts Council
- Scottish Natural Heritage
- Scottish Screen
- Sportscotland
- Visitscotland
- Bòrd na Gàidhlig (Alba)

## Appendix D: list of EOC proposed guidance

The EOC proposes to produce the following guidance, in consultation with public sector stakeholders, for on-line publication by September 2006. Additional guidance may be added subsequently.

Scottish-specific guidance by sector:

- Education
- Health
- Local government
- Criminal justice
- Central government

(Equivalent guidance will also be produced for English, Welsh and GB-wide public bodies)

Guidance by topic:

- Employment
- Gender impact assessment
- Procurement
- Data collection

## Appendix E: The meaning of unlawful discrimination - A brief overview of the SDA

The Sex Discrimination Act 1975 (SDA) prohibits discrimination against individuals in the areas of employment, education, and the provision of goods, facilities and services and in the disposal or management of premises. It also prohibits discrimination in employment against married people. Victimisation because someone has tried to exercise their rights under the SDA or Equal Pay Act is prohibited.

The SDA applies to women and men of any age, including children.

The SDA applies to England, Wales and Scotland.

### **What is discrimination?**

The SDA prohibits direct and indirect discrimination. There are special provisions about discrimination on the grounds of gender reassignment. Part I of the SDA describes the forms of discrimination to which the SDA applies.

### **Direct discrimination**

This is where a woman (or man) is treated less favourably than a person of the opposite sex in comparable circumstances is, or would be, because of her (or his) sex. Types of direct discrimination include sexual harassment and treating a woman adversely because she is pregnant.

### **Indirect discrimination**

In the fields of employment<sup>20</sup>, discrimination in relation to barristers/advocates and discrimination in relation to vocational training as set out in Part 3 of the SDA indirect discrimination occurs where a person applies a provision, criterion or practice to both sexes but it puts or would put women at a particular disadvantage when compared with men (or vice versa); which puts the woman complainant at that disadvantage, and which he cannot show to be a proportionate means of achieving a legitimate aim.

In all other sections of the SDA - relating to the fields of education and goods, facilities and services (except those which relates to barristers/advocates or vocational training referred to above) - indirect discrimination occurs where a requirement or condition is applied to both women and men, but the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it, and it is not justifiable, irrespective of sex, to apply that requirement or condition, and it is to the woman's detriment because she cannot comply with it.

For example, an unnecessary requirement to be under 5' 10" would discriminate against men; a requirement to work full-time or refusal to allow flexible working might be unlawful indirect discrimination against women.

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<sup>20</sup> The SDA sets out particular provisions relating to the employment field covering: employers, partnerships, trade unions qualifying bodies, vocational training providers, employment agencies, training commissions, police, midwives and ministers of religion.

## **Discrimination on grounds of gender reassignment**

There are special provisions prohibiting discrimination on the grounds that a person intends to undergo, is undergoing or has undergone of gender reassignment. These prohibitions apply in relation to the employment field, discrimination by or in relation to barristers/advocates and in vocational training as set out in Part III of the SDA.

## **Discrimination on the ground of pregnancy or maternity leave**

Adverse treatment on the grounds of pregnancy, including pregnancy related sickness, and maternity leave has been found by the courts to amount to direct discrimination. In the employment field, in vocational training and in relation to barristers and advocates express provisions apply and these are set out in Part 1 of the Act. The test for direct discrimination continues to apply to discrimination on grounds of pregnancy and maternity leave in education, goods, facilities and services and premises.

## **Victimisation**

Victimisation occurs when a person is treated less favourably because:

- They have brought proceedings against the discriminator or any other person under the SDA, Equal Pay Act, Part 1 of Schedule 5 of the Social Security Act 1989 or sections 62 – 65 Pensions Act 1995.
- They have given evidence or information in connection with the above proceedings.
- They have done anything by reference to these enactments in relation to the discriminator or any other person.
- They have alleged that the discriminator or any other person has breached the relevant provisions of the above enactments.
- Or if the discriminator knows that she (or he) intends to do any of those things or suspects that she has done or intends to do any of those things.

The above protection applies only if the original allegation of discrimination was true and made in good faith.

## **Harassment**

The Employment Equality (Sex Discrimination) Regulations) 2005 amended the SDA to explicitly prohibit harassment and sexual harassment on the face of the Act for the first time. The new statutory definitions apply to harassment which occurs on or after 1 October 2005 in the fields of employment and vocational training.

Previously, courts had determined that harassment was a form of direct discrimination and therefore unlawful. The original test for harassment as a form of direct discrimination – i.e. whether someone has been treated less favourably on the grounds of their sex – will still apply to the rest of the SDA – i.e. education, goods, facilities and services and premises.

Under the new definition 'harassment' is conduct which takes place simply because someone is a woman/man, i.e. the situation where, for example, a man objects to a woman undertaking a particular type of work and therefore refuses to co-operate with her (or vice versa). Less

favourable treatment on the ground that someone has undergone, is undergoing or intends to undergo gender reassignment is also expressly prohibited.

Sexual harassment occurs where a person engages in any form of unwanted verbal, non verbal or physical conduct of a sexual nature.

Harassment and sexual harassment claims are made out where the conduct violates the claimant's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment for her (or him).

It is also prohibited to make a decision which is unfavourable to someone because they have rejected or submitted to harassment/sexual harassment.

### **Discrimination in the employment field**

In general, it is unlawful for an employer to discriminate directly on grounds of sex or against a married person or civil partner in:

- Recruitment (although in very limited circumstances discrimination will be lawful if one of the defined genuine occupational requirements applies e.g. the job needs to be held by a man to preserve privacy and decency, or a role in a performance needs to be held by a woman for reasons of authenticity).
- Treatment at work (but note that claims relating to discrimination in contractual pay and benefits are brought under the Equal Pay Act).
- Dismissal.

From the 19 July 2003, the SDA was amended to make it clear that discrimination against ex-employees is covered by the SDA where the discrimination complained of is related to the previous employment. Employees (and potential employees) have rights under the SDA whatever their length of employment and whatever hours they work.

The SDA also protects people who are not "employees" in the sense required for some other employment rights, such as the right not to be unfairly dismissed. It protects people engaged under a contract personally to execute work or labour. Contract workers whose labour is supplied by their employer to another person (the principal) are protected against discrimination by the principal. Special provisions apply the SDA to police officers, who are office holders rather than employees.

There are special provisions prohibiting discrimination:

- by firms against partners or potential partners.
- by trade unions and employers' organisations against members or potential members.
- by authorities or bodies in conferring authorisations or qualifications needed for or facilitating engagement in a particular profession or trade.
- by people providing vocational training.
- by employment agencies.
- by or in relation to barristers or advocates.

Part II of the SDA contains the provisions relating to discrimination in the employment field, except for the provisions about barristers, which are in Part III.

### **Discrimination in education**

Co-educational schools, colleges and universities must not discriminate directly or indirectly on grounds of sex in the way they treat or admit students. Single sex schools may restrict their intake to boys or girls (with very limited exceptional admissions of pupils of the opposite sex). Single sex schools which intend to change to co-educational admission, can get approval for a limited exemption from the SDA during the transitional phase.

Local education authorities must not discriminate in carrying out their functions under the Education Acts.

Part III of the SDA contains the provisions relating to discrimination in education.

### **Discrimination in the provision of goods, facilities and services and premises**

With a few exceptions, it is unlawful to discriminate directly or indirectly on grounds of sex in the provision of goods, facilities or services to the public, or a section of the public or in the disposal or management of premises. The main exceptions include:

- Discrimination by non-profit making voluntary bodies in restricting their membership to one sex or providing benefits to one sex only in accordance with their main object.
- Discrimination in the provision of facilities or services to avoid serious embarrassment to users which would be caused by the presence of members of the opposite sex.

Part III contains the provisions relating to discrimination in the provision of goods, facilities and services and premises.

### **Positive action**

Positive discrimination to favour one sex is unlawful. However, there are limited exceptions allowing positive action in training, or to encourage women (or men) to apply for work in which they are under-represented. These lawful exceptions are often referred to as positive action. The positive action provisions are contained in Part V of the SDA.

### **Equal Pay Act 1970**

The Equal Pay Act 1970 (EPA) gives an individual a right to the same contractual pay and benefits as a person of the opposite sex in the same employment, where the man and the woman are doing:

- Like work; or
- Work rated as equivalent under an analytical job evaluation study; or
- Work that is proved to be of equal value.

The employer will not be required to provide the same pay and benefits if it can prove that the difference in pay or benefits is genuinely due to a reason other than one related to sex.

The EPA has been interpreted to cover indirect sex discrimination as well as direct discrimination i.e. where the pay difference is due to a condition or practice which applies to men and women but which adversely affects a considerably larger proportion of one sex than the other and it is not justifiable, irrespective of sex, to apply that condition or practice. So, for example, the fact that a woman is paid a lower hourly rate than a man because she works part-time and he works full-time is unlikely to be a good defence to an equal pay claim. The EPA applies to England, Wales and Scotland.

### **To whom does the Act apply?**

The EPA applies to women and men of any age, including children.

The EPA applies to people who are "employees" in the sense required for some other employment rights, such as the right not to be unfairly dismissed, but also to other people who are engaged under a contract personally to execute work or labour.



## Appendix F: Further details of prohibition from discrimination in Parts III and IV SDA and the exceptions which permit discrimination on grounds of sex.

### Education

#### Section 22 SDA

It is unlawful for an educational establishment<sup>21</sup> to discriminate against a woman in the terms upon which it offers admission as a pupil; by refusing or deliberately omitting to accept an application for her admission; or in the way it affords access to any benefits, facilities or services or omitting to afford access to them, or by excluding her from the establishment or subjecting her to any other detriment.

*Sex segregation* is not expressly prohibited by the SDA and therefore providing separate lessons for boys and girls in co-educational schools is accordingly not unlawful, *unless* it also amounts to 'less favourable treatment' or arises because of an indirectly discriminatory practice. Any disadvantage, including a mere denial of choice may amount to less favourable treatment. Denying girls the same opportunities as boys (and vice versa) will usually amount to less favourable treatment. Therefore any facility, benefit or service must ordinarily be available to both sexes and provide equal opportunities.

Given the complexity of determining whether any proposed treatment may give rise to less favourable treatment, mixed sex education establishments should consider obtaining expert advice if they wish to provide segregated lessons to single sex groups or particular lessons to one sex only.

#### Section 23 and Section 23A - D SDA

It is unlawful for local education authorities to discriminate on grounds of sex in carrying out any of their functions (under the Education Acts<sup>22</sup>) which do not fall within section 22 above, such as in awarding discretionary educational grants. Similarly, it is unlawful for the following bodies to discriminate on grounds of sex in the carrying out of their functions under the Education Acts: the Higher Education Funding Councils for England and Wales respectively; the Scottish Further and Higher Education Funding Council; the National Council for Education and Training for Wales. Further, the Training and Development Agency for Schools may not discriminate in carrying out their functions under any enactment. Finally, it is unlawful for the Learning and Skills Council for England to discriminate in the carrying out of its functions under the Learning and Skills Act 2000.

#### Section 25 and Section 25A SDA

There is a duty on specified educational establishments<sup>23</sup> and local education authorities (and education authorities in Scotland) to ensure that facilities for education and ancillary benefits or services are provided without discrimination. This section aims to ensure that in planning for education pupils and applicants for admission have access to education provision irrespective of sex.

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<sup>21</sup> See section 22 SDA for list of educational establishments covered by this provision.

<sup>22</sup> Including the Education (Scotland) Act 1980

<sup>23</sup> See s25(6) SDA for list bodies affected.

The Learning and Skills Council for England and the National Council for Education and Training for Wales have a duty to ensure that facilities for post 16 education, training and organised leisure time occupation connected with such education and training and any ancillary benefits and services are provided without sex discrimination.

### **Exceptions to the prohibition of discrimination in education**

Section 26, Section 27 and Schedule 2 SDA

Single sex establishments are exempt from the prohibition on discrimination in admissions. A single sex establishment is one which admits pupils of one sex only, or whose admission of pupils of the opposite sex is 'exceptional', or whose numbers of pupils of the opposite sex are 'comparatively small' and whose admission is confined to particular courses or teaching classes.

If a co-educational school has boarders they may restrict boarding and associated boarding facilities to one sex<sup>24</sup>

Single sex establishments which are turning co-educational are also permitted to discriminate on grounds of sex in the admission of pupils if they have obtained a transitional exemption order (see Schedule 2 SDA for the appropriate procedure for application).

### **Positive action in access to facilities for training by certain bodies**

Section 47 SDA

- 5.19. There are limited exceptions under the SDA to allow women only (or men only) access to facilities for training. Under those provisions, it is permissible to restrict access to training to women alone (or men alone), to fit them for particular work, or encourage women only to take advantage of opportunities for doing that work, where nationally the numbers of women doing such work were comparatively small at any time during the preceding twelve months. Where the numbers of women undertaking particular work in a local area is comparatively small, single-sex training may also be provided to women who are likely to take up that work in that area to help fit them for that work.
- 5.20. It is also lawful to provide single-sex training to women or men who have a particular need for training to fit them for employment, because they have been out of full-time employment while carrying out domestic or family responsibilities. It is also lawful to take those special training needs into account when selecting applicants for training in mixed-sex classes to fit them for employment.
- 5.21. Training includes any form of education or instruction, and positive action courses can be provided in schools as well as in adult training providers.
- 5.22. Providing the above criteria are met, positive action in relation to access to facilities for training may include:
  - training which is based on job sampling, work experience, "taster" days with employers, work shadowing experience
  - training in a skill, e.g. carpentry, computer programming

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<sup>24</sup> Even where they admit comparatively small numbers of the opposite sex as boarders.

- career counselling and guidance for working women, or for those wishing to return to work
- retraining into areas of skills shortage - especially suitable for women returners who did not have the opportunity of obtaining these qualifications at a school

The positive action exception does not, however, permit discrimination prohibited by S6 of the SDA relating to applicants or employees and therefore it is not lawful to discriminate in recruitment. Any training actually regarded as employment is excluded from the positive action provisions.

## **Positive action in access to facilities for training by employers**

### Section 48 SDA

In certain circumstances the SDA allows employers to afford their female employees only access to facilities for training to help fit them for particular work with that employer. Also employers may *encourage* job applications from women for particular jobs which *are open to both sexes*. However, employers may only take these steps where the number of women doing that particular work was comparatively small at any time in the previous 12 months. This provision applies equally to men where they are underrepresented in particular work. This is a form of 'positive action' used to counteract the effects of past discrimination.

Before placing a 'positive action' advertisement to encourage one sex to apply for a job where that sex is underrepresented, employers need to be sure exactly what the balance of the sexes is among their employees who are doing the particular kind of job to be advertised. If the terms of section 48 are satisfied, any publishers asked to carry an advertisement which includes special encouragement for one sex should be informed of this - preferably in writing - so that they know it is lawful to publish.

It is important to remember that, while section 48 allows employers to encourage one sex to *apply for* certain jobs (for example, to encourage women for jobs as engineers, surveyors, technicians or mechanics), it does not allow anyone to discriminate by sex when it comes to *selecting* who will be recruited or promoted.

## **Goods, facilities and services**

### Section 29 SDA

It is unlawful to discriminate against a person who seeks to obtain or use goods, facilities or services by refusing or deliberately omitting to provide her with them or by refusing or deliberately omitting to provide her with goods, facilities or services of similar quality, in the like manner and on like terms as are normally offered to men (or vice versa) by the service provider in question.

This provision applies to goods, facilities and services provided for entertainment, recreation and education<sup>25</sup>; the services of any profession or trade, or any local or other public authority; facilities for transport or travel; or facilities for grants; and includes access to, and use of, a place where members of the public are permitted to enter<sup>26</sup>.

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<sup>25</sup> Excluding education services covered by s22 SDA as a benefit, facility or service provided at an educational establishment for pupils.

<sup>26</sup> See s29(2) for non exhaustive list

## Exceptions to s29 SDA which may be of assistance to public authorities in the discharge of their gender equality duty under s76A SDA<sup>27</sup>

It is permissible to restrict a service or facility to one sex only at a hospital or other establishment for persons requiring special care, supervision or attention. This would also cover establishments such as nursing homes or other psychiatric institutions, but would probably not cover women's refuges unless they were providing 'special care, supervision or attention' comparable to that provided at a hospital. Rape crisis centres might fall within this exception if they provided medical and psychiatric care and attention.

### Section 35(1)(c)(i) SDA

Providers of services or facilities may restrict access to one sex only where female users are 'likely' to suffer 'serious embarrassment' at the presence of a man, or vice versa. This section allows situations such as the provision of group counselling or advice service about matters such as sexual health or sexual offences or intimate personal health or hygiene<sup>28</sup>. Rape crisis centres and women's refuges may fall within section 35(1)(c)(i) if they involved group provision of services involving intimate personal matters. However, the criterion of 'embarrassment' is likely to restrict coverage of the exception to situations involving intimate personal matters. Single sex swimming or exercise sessions would be unlikely to be covered by this section, unless it could be shown that users are *likely* to suffer *serious* embarrassment if users of the opposite sex are present.

### Section 35(1)(c) (ii) SDA

Section 35(1)(c)(ii) allows the provision of services or facilities for one sex only where the facilities or services are likely to be used by two or more persons at the same time, and the facilities or services are such that the user is likely to be in a state of undress and a male user might reasonably object to the presence of a female user (or vice versa). This exception covers facilities such as separate male and female changing rooms or any group service involving intimate personal health and hygiene<sup>29</sup>

### Section 35(2) SDA

This section allows the provision of services or facilities restricted to one sex where physical contact between the user and another person is likely and that other person might reasonably object if the user were a woman (or man). This exception is likely to cover sports sessions involving a high degree of physical contact such as judo or wrestling<sup>30</sup>, self defence classes or group lessons in massage, where female users may reasonably object to physical contact with a male user (or vice versa). As stated, objection must be 'reasonable' and a low degree of physical contact is likely to be found to be unreasonable. For example, the fact that in first aid training there may be some physical contact between users is unlikely to mean that s35(2) permits the provision of single sex sessions.

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<sup>27</sup> See Part III for full details of exceptions to ss22 and 29 SDA

<sup>28</sup> See White Paper, Equality for Women, 1975

<sup>29</sup> see White Paper, Equality for Women, 1975

<sup>30</sup> if not already covered by s44

## **Further exceptions to prohibitions on discrimination in employment, education, goods, facilities and services and other unlawful acts (ie Parts II – IV SDA)**

### Section 44 SDA

It is permissible to confine any sport, game or other activity of a competitive nature to one sex where the physical strength, stamina or physique of the average woman puts her at a disadvantage to the average man. This covers single sex events, such as men's 100 m races. Thus a local authority or school holding separate football training sessions for boys and girls could rely on section 44 SDA, *provided* that these were held with the formation of a team and participation in matches in mind. Sports sessions which do not relate to participation in competitions restricted to competitors of one sex will not be covered by section 44 (unless another exception applies, eg a reasonable objection to physical contact). Swimming sessions held for pleasure/fitness purposes rather than group training for competitive events would appear to fall outside this exception. Further, sessions in physical activities such as yoga, pilates, aerobics or dance would appear not to be covered by s44 SDA.

### Section 46 SDA

It is lawful to discriminate in the admission to communal accommodation<sup>31</sup> if the accommodation 'is managed in a way which, given the exigencies of the situation, comes as near as may be to fair and equitable treatment of men and women'. In considering this, account shall be taken of whether and how far it is reasonable to expect that the accommodation should be altered or extended, or further alternative accommodation be provided, and the frequency of the demand or need for use of the accommodation by men as compared with women. Section 46(5) extends the scope of the exception to benefits, facilities and services which cannot properly and effectively be provided except for those using the communal accommodation (for example, the provision of breakfast to residents or cleaning services). Section 46 might thus permit the provision of women-only domestic violence refuges if these provided either shared sleeping accommodation or sanitary facilities and it is not reasonable to expect the local authority to provide separate sleeping accommodation or sanitary facilities considering (amongst other possible factors) the relative infrequency of male demand for the service.

### Section 30 SDA Discrimination in disposal or management of premises

It is unlawful to discriminate in the disposal or management of premises (unless it was previously wholly occupied by the owner).

Section 31 SDA - Discrimination: consent for assignment or sub-letting. It is unlawful to discriminate in granting licences or tenancies, unless the landlord or a near relative of his resides in the premises.

## **Further exceptions to the prohibition on public authorities discriminating and harassing when carrying out public functions in the non-employment fields**

### Section 21A(3) – (4) and (9) SDA

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<sup>31</sup> Being residential accommodation used by women only, or men only, for reasons of privacy and decency as it includes shared sleeping accommodation, or because of the nature of the sanitary facilities)

The prohibition on discrimination and harassment in the exercise of public functions in non-employment fields carried out on behalf of the Crown does not apply to the following areas in addition to those set out in Chapter 2.

- the House of Commons
- the House of Lords
- the Security Service
- the Secret Intelligence Service
- the Government and Communication Headquarters, or
- a part of the armed forces of the Crown which is, in accordance with a requirement of the Secretary of State, assisting the Government Communications Headquarters
- preparing, considering or approving legislation
- action necessary to comply with an Act of Parliament (or Scottish Parliament)
- a judicial function (including anything done on behalf of or on the instructions of a person exercising a judicial function);
- a decision not to institute or continue criminal proceedings (including anything done for the purpose reaching such a decision)

## Appendix G: Assessment of compliance with the general and specific duties

### **Assessment of General and Specific Duties**

#### Section 32 Equality Act

The EOC (and from 2007 CEHR) can assess what steps a public authority has taken to comply with the duties to eliminate discrimination and harassment, to promote equality between men and women and with any relevant specific duties.

### **Terms of Reference**

#### Schedule 2 paragraph 4, Equality Act

The commission will give the public authority under scrutiny the proposed terms of reference for the assessment (and any subsequently revised terms of reference) and will consider any representations from the authority on those proposed terms.

Once terms of reference are settled they will be published.

### **Representations**

#### Schedule 2 paragraphs 6 – 8, Equality Act

The Commission will make arrangements to enable third parties and public authorities under scrutiny the opportunity to make representations in relation to the assessment. Such arrangements may, but need not, include oral representations. The Commission will consider representations on assessments from the public authority under scrutiny and from third parties.

However, where appropriate, the Commission may refuse to consider representations from third parties and from the public authority under scrutiny itself (in the latter case, only where its representations were not made by a barrister, advocate or solicitor). The Commission will write to the third party/public authority to explain its reasons for these decisions.

### **Evidence**

#### Schedule 2 paragraphs 9 - 14, Equality Act

The Commission may send a notice to any person requiring them to provide information or documents in his or her possession or give oral evidence in the course of the assessment. The Commission may specify the form of the information, documents or evidence and stipulate a date by which the information must be provided. However, the Commission cannot ask a person to provide information which he is prohibited from disclosing by virtue of an enactment or to do more than they could be compelled to do in High Court proceedings in the England or in the Scottish Court of Session. The Commission can also require a person to attend a particular place to give evidence providing it undertakes to pay his or her expenses

A notice may be cancelled by a county court (or sheriff in Scotland), on the application of the recipient of the notice, if the court (or sheriff) decides that the requirements are unnecessary to the purpose of the assessment, or otherwise unreasonable.

If a person fails (or the Commission thinks that they are likely to fail), without reasonable excuse, to provide any information required in the notice it can apply to the county court (or sheriff in Scotland) for an order requiring the person to take specified steps to in order to comply with the notice.

It is an offence if, without reasonable excuse, a person fails to comply with a notice or order; falsifies any information, documents or evidence produced or makes a false statement in giving oral evidence. The penalty for such an offence is a fine not exceeding level 5 on the standard scale.

There are a number of specified exceptions from the requirement to disclose information to the Commission relating to the intelligence service and these are set out in Schedule 2, paragraph 14(1) Equality Act. This paragraph also sets out the procedure by which the Commission may challenge reliance on those exemptions in a tribunal. For all other grounds relating to national security (ie all other grounds apart from those set out in paragraph 14(1)) a person may apply to the High Court (or Court of Session in Scotland) to have a notice cancelled.

### **Reports and Recommendations**

Schedule 2 paragraph 17, Equality Act

The Commission will publish a report of its findings following an assessment and may also make recommendations in respect of the assessment and in respect of any matter arising in the course of the assessment. The recommendations may be addressed to the public authority assessed or to any class of person

### **Effect of a Report**

Schedule 2 paragraphs 17 – 18, Equality Act

Anyone to whom a recommendation is addressed must take it into account.

A tribunal or court may take into account the Commission's findings following an assessment, but will not treat those findings as conclusive.

### **Courts and Tribunals**

Schedule 2 paragraph 19, Equality Act

An assessment may not question, either expressly or by implication, the findings of a court or tribunal.