



## Sex Discrimination

### **Background**

Prior to April 2007, sex discrimination law in England and Wales was based on various items of primary legislation and statutory instruments, and a range of guidance documents. The primary legislation included the Equal Pay Act 1970 (EP 1970), the Sex Discrimination Act 1975 (SDA 1975), both as developed by case law and regulations, and the Equality Act 2006 (EA 2006) which came into force in April 2007. The SDA 1975 had been amended in certain respects in September 1986 (SDA 1986) following a European Court of Justice (ECJ) decision earlier that year in the Marshall case on the unequal compulsory retirement ages previously allowed for men and women. Allowable sex discrimination (or 'positive action') in training opportunities and in employment advertisements was confirmed at the same time.

This UK law was supplemented in certain ways by European law, eg. various Directives (including the key Social Security Directive 79/7/EEC (19 December 1978)), by the European Convention on Human Rights, ratified by the UK Government in 1966, which prescribed that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law, and similarly by the International Covenant on Civil and Political Rights.

The subsequent Equality Act 2010 (EA 2010) repealed the Equal Pay Act 1970, the Sex Discrimination Act 1975, and the Sex Discrimination Act 1986.

The SDA 1975 had covered essentially discrimination in employment, education, and the provision of goods, facilities and services to the public. It largely excluded other areas including other legislation which conflicts. The EA 2006 introduced a 'gender equality' provision and set up a new Equality and Human Rights Commission (EHRC), in place of the three previous commissions on Equal Opportunities, Racial Equality, and Disability Rights. The new Act imposed a more rigorous obligation on public authorities, and all organisations and private companies which work for them, to eliminate unlawful discrimination and harassment, and to promote equality of opportunity between men and women. The Human Rights Act 1998 prescribes certain rights pertaining to the liberty of a person, including a fair hearing of any civil or criminal charges, presumption of innocence until proven guilty, and non-discrimination on any ground in the enjoyment of such rights.

### **New Code of Practice**

In the wake of the EA 2006, the EOC produced a Code of Practice for the new 'Gender Equality Duty' under the Act, also to apply from April 2007. The Code is admissible as evidence in criminal or civil proceedings and can be taken into account if relevant when determining a case. The Code allows public service provision to take into account "the different needs of men and women" (as well as their 'differences'), a flexibility which, without strict control, can be exploited unfairly.

The EA 2010 introduced a new over-arching 'Public Sector Equality Duty', which can permit the unequal treatment of like persons similarly affected if they do not share the same protected characteristic. The Duty requires public authorities, in the exercise of their functions, and amongst other aims, to have due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it. Sub-section (6) of the Act indeed admits that compliance with the duties in this section may involve some persons being more favourably treated than others.

This is already evident in the different (and unequal) support services at present made available by public authorities for male and female victims of domestic violence, these based on claimed or perceived 'needs'. It appears that the particular 'needs' of women victims as a group are taken as 'self-evident', but not those of male victims, who form as many as one third of all such victims. In effect, the new Duty appears to change the emphasis in determining sex discrimination, since previously for individuals it was largely on a 'like-with-like' basis. Now, it appears that 'group needs', or indeed 'part of a group needs', could over-ride this comparison.

There could be thus a potential conflict between some applications of this public sector equality duty and the basic right that "equality" means "equality between individuals" as prescribed in EA 2006 (Section 8(2)).

The EA 2010 also introduced (in Section 158) the concept of 'positive 'action' to overcome or minimise disadvantage suffered by certain groups of persons sharing a protected characteristic. Much care will need to be taken by public authorities that any such positive action taken was essentially not the result of those who screamed loudest, but of rigorous appraisal.

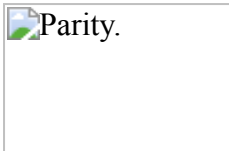
According to Section 19(2)(d) of the EA 2010, "*indirect discrimination could be held justifiable if it is a proportionate means of achieving a legitimate aim*".

By way of interest, Section 198 of the EA 2010 abolished a husband's duty to maintain his wife.

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### Types of sex discrimination

Sex discrimination can be statutory or non-statutory, and direct or indirect.

Statutory sex discrimination arises where one sex is specifically treated by law differently from the other. For instance, in protective legislation where women are barred from working manually in mines. However, it still also applies in other areas, such as child benefit provisions, where the main title is to the mother (unless she waives it in writing) and there is no provision to apportion the benefit when separated parents both care for the children. This is a direct discrimination.

Non-statutory sex discrimination arises where the law is sex neutral but the sexes are treated differently for particular reasons, for instance as a result of political or priority considerations, this resulting in one sex being treated less favourably than the other, regardless of equality considerations.

Both direct and indirect forms can occur in both statutory and non-statutory measures. Unequal state pension ages for men and women, and the associated basket of social security benefits which are pension age-related, is a statutory direct form. Family law provisions and benefits which are gender neutral in terminology, but are likely to affect many more fathers less favourably than mothers, are a form of statutory indirect sex discrimination. For instance, when determining child support payments by the non-resident parent (usually the father), the income of the resident parent (usually the mother) is not taken into account at all.

Non-statutory forms of sex discrimination include women-only sessions in public amenities, eg. swimming pools (which the EOC had believed were unlawful, unless there was evidence of 'severe embarrassment' to justify them, or comparable single - sex facilities were also available to men, but never legally challenged the practice

### Statutory sex discrimination

Other than protective legislation for women, most statutory sex discrimination is against men. Examples include:

- State pension and retirement ages - which have been unequal for men and women since 1941, and will not be fully equalised at 65 until October 2018
- Pension age-related social security benefits - the present inequality will continue similarly until October 2018

- Liability to national insurance contributions - the present inequality for employed people over state pension age (women are exempt from their present lower state pension age) will continue until October 2018
- Lump sum payments for deferred state pension - the present inequality (women start to qualify from their present lower state pension age, men from age 65) will continue until year 2018
- Widowers benefits - men widowed before April 2001 have no claim to any social security survivors benefits before that date
- Child benefit - wife or mother has priority of title over husband or father: there is also no mechanism for apportioning the benefit when both parents share care of the child(ren) after parental separation (as now happens in Sweden)
- Guardian's allowance - wife has priority of title over husband.
- Unmarried fathers - subordinate to mothers in obtaining parental responsibility and registration of their name on their child's birth certificate.
- Abortion - father has no legal right in respect of a mother's decision
- Paternity tests - it is a criminal offence for a father to take a sample of a child's DNA without the mother's prior consent. In contrast, it is not a crime for a woman to lie about who is the father of the child
- Imposition of all-women shortlists for parliamentary and other representative elections. The EA 2010 extended the period in which all-women shortlists may be used until 2030.
- Lifelong anonymity for alleged victims of sexual offences (usually female) but none for a defendant (usually male), nor his or her family, even if found innocent.

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### Non-statutory sex discrimination

Widespread discrimination or inequality arises also from policies, priorities, and prejudices, again much of this being against men. Examples include:

- Minimal public funding for male victims of domestic violence: government funding to local authorities in respect of domestic violence is essentially to help female victims [see Male Victims of Domestic Abuse] with relatively few authorities providing even emergency accommodation for male victims and almost none refuge or safe-house provision.
- An almost institutionalised bias against fathers in family law and in the 'closed' family courts [see Equal Parenting].
- A general assumption that the head of household is now the primary carer (usually the mother) rather than the main provider (in the past, usually the father), with family benefits and credits aimed accordingly. eg. child tax credit, working tax credit
- Homelessness - legal requirement for authorities to provide emergency accommodation immediately only to the primary carer. In some circumstances, the secondary carer may be offered low grade single room accommodation with shared facilities but totally unsuitable for visiting children
- Legal aid - primary carer more likely to be eligible, with child support payments made by the other parent not included in income calculations
- Often punitive treatment of fathers who do not strictly obey court orders, eg. the separated father who was jailed for waving at his daughter across the street, but usually no punitive measures applied against mothers who regularly defy court orders
- Greater difficulty faced by men than women in obtaining non-molestation orders or occupation orders against the other partner in situations involving family conflict
- Except for drug offences, more lenient treatment generally of women by the criminal justice system, including a higher proportion cautioned, a lower proportion charged, and for those convicted a higher proportion receiving noncustodial sentences, and a much lower proportion actually imprisoned
- Average prison sentences longer for men than for women for similar offences
- Particular offences for which women tend to be treated more leniently than men include: domestic homicide, child abduction, flouting of court orders (as above), sexual abuse of children, and as perpetrators of domestic violence
- More sympathetic treatment of women in prison, including wearing their own clothes ♦♦ as of right ♦♦ (whereas male prisoners have no such right unless transgender), and general recreational amenities
- Minimal public funding of research into male specific diseases compared to funding for research into female specific diseases.

Women also suffer discrimination or inequality, but in other ways which usually attract far more media and political attention

### **Gender conflict issues**

In gender conflict issues, such as family breakdown, sex offences, harassment, and domestic violence, there appears to be a disturbing trend, both in legislation and the criminal justice system, towards a form of feminist jurisprudence, now already well established in North America. Indeed, as one English woman journalist has put it, in such matters “the state is taking the side of women against men”.

Despite the present numerical male dominance in our parliament, it is most unusual for men’s issues to be raised, let alone properly debated. There is no specific ministerial or parliamentary spokesperson on men’s issues. Legislation hostile or discriminatory to men therefore does not get the scrutiny or critique that it deserves. Without such a political champion, therefore, men generally appear at present to be at a considerable disadvantage in gender conflict issues. As one senior woman MP observed in a published article “Men seem to be sleepwalking through the vast changes that are taking place”. Are we then in the UK on our way, not to a fully ‘equal’ society, but to a feminocracy?

### **Increasing imbalance**

The present imbalance between equitable and effective reconciliation of men’s and women’s issues, must either be addressed by extending the ministerial brief of present equality ministers specifically to represent both sexes, or by fielding key ministers and spokespersons on behalf of both sexes. Otherwise, generally, men will be increasingly marginalised

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