



Women. Men. Different. Equal.
Equal Opportunities Commission Scotland

Gender Equality Duty Code of Practice Scotland

Laid before both Houses of Parliament under section 56A(4)(a) of the Sex
Discrimination Act 1975 (as applied by section 76E(2) of that Act)

gender
equality duty

Foreword

This is an exciting time for equality in Scotland and across Britain, and the Equal Opportunities Commission (EOC) welcomes the new gender equality duty as a powerful tool that will deliver real change and practical improvements in the lives of women and men, through helping public services to tackle gender inequality, which remains persistent and widespread.

We particularly welcome Scottish Ministers' commitment to developing specific duties that fit the context of devolution and drive forward the equality agenda in an appropriate way for Scotland.

The duty will be a key tool for public sector managers to make the sector more efficient, effective and responsive to the realities of how we live our lives. It should be a catalyst for real change in the way that public sector organisations think about their work, and 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 to design and delivery no longer meets the needs of 21st century Scotland. I hope the duty will help the public sector understand and address the different needs of women and men, leading to more user-friendly services, as well as making better use of the talents of both women and men in the workforce.

The gender equality duty comes into force in April 2007 and is the biggest change in sex equality legislation in thirty years, since the introduction of the Sex Discrimination Act itself. It has been introduced in recognition of the need for a radical new approach to equality – one which places more responsibility with service providers to think strategically about gender equality, rather than leaving it to individuals to challenge poor practice.

This Code will help Scottish public authorities meet the duty. The Code will remain in force after the EOC has been dissolved and the Commission for Equality and Human Rights (CEHR) takes over responsibility for promoting and enforcing sex equality legislation.

This Code reflects the Sex Discrimination Act 1975 (SDA) and Equal Pay Act 1970 (EqPA) as at March 2007, incorporating amendments made through the Equality Act 2006. It is likely that there will be changes to that legislation in the near future, however, and public authorities should keep up-to-date with changes in the law through consulting the website of the EOC and, from late 2007, the CEHR.

This includes the transposition into domestic legislation of the European Council Goods and Services Directive by December 2007 which will require amendments to the SDA. In particular there will be express prohibitions on discrimination and harassment on the grounds of gender reassignment in the provision of goods and services. There will also be express prohibition of sexual harassment and harassment on the grounds of sex in the provision of goods and services.

The current Discrimination Law Review, which will inform the development of a Single Equality Act, will be looking at simplifying provisions between all forms of discrimination law, and may result in an integrated public sector equality duty covering not just the current duties for race, disability and gender but also sexual orientation, religion or belief and age.

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Equal Opportunities Commissioner for Scotland

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Chapter 1: Overview of the gender equality duty

What this code is and how to use it

- 1.1. This Code of Practice (the Code) gives practical guidance to Scottish public authorities on how to meet the legal requirements of the gender equality duty. The Equal Opportunities Commission (EOC) has prepared and issued this Code under the Sex Discrimination Act 1975, as amended by the Equality Act 2006. It applies to Scottish public authorities. A similar but separate Code applies to public authorities in England and Wales, and to British public authorities.
- 1.2. Those parts of the Code (primarily Chapter 3) which deal with the specific duties imposed by the Sex Discrimination Act 1975 (Public Authorities) (Statutory Duties) (Scotland) Order 2007 (the Scottish Order) apply only to the public authorities listed in the Schedule to that Order.
- 1.3. The general duty comes into force on 6 April 2007. The Scottish Order setting out the specific duties comes into force on 9 April 2007. This contains an obligation for listed public authorities to publish a Gender Equality Scheme no later than 29 June 2007, and (where they have 150 or more full time equivalent staff) an equal pay statement no later than 28 September 2007.
- 1.4. This Code of Practice is a 'statutory' code and has been laid before Parliament before taking effect. This means that the Code is admissible in evidence in any legal action under the Sex Discrimination Act 1975 or the Equal Pay Act 1970, in criminal or civil proceedings before any court or tribunal.
- 1.5. A court or tribunal must take into account any part of the Code that appears to them to be relevant to any question arising in the proceedings. This includes the question of whether public authorities have breached the law. A tribunal or court may draw an adverse inference that a breach of the law has occurred if a public authority has failed to follow relevant provisions in the Code. If a public authority does not follow the Code's provisions, it will need to show how it has otherwise met its legal obligations under the general duty and any specific duties.
- 1.6. On its own, the Code does not impose any legal obligations on public authorities. The Code is not a complete statement of the law.
- 1.7. References to the Sex Discrimination Act 1975 (SDA), the Equal Pay Act 1970 (EqPA) and the Equality Act 2006 are shown in the margins.
- 1.8. 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 authoritative statements. Where examples are taken from the voluntary sector, they are intended to illustrate gender equality issues and possible means of addressing them, not necessarily to imply that those bodies are covered by the gender duty.

- 1.9. The EOC will be issuing non-statutory guidance to supplement this Code, to cover particular parts of the public sector, aspects of the duty such as gender impact assessment and how the duty applies to procurement.

What is the gender equality duty?

- 1.10. The Equality Act 2006 amends the SDA 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.
- 1.11. This is known as the 'general duty' and comes into effect on 6 April 2007.
- 1.12. The duty applies to all public authorities in respect of all of their functions (with limited exceptions described in Appendix B). This means it applies to policy-making, service provision, employment matters, and in relation to enforcement or any statutory discretion and decision-making. It also applies to a public authority in relation to services and functions which are contracted out. In addition, it applies to private and voluntary bodies which are carrying out public functions, but only in respect of those functions. For examples of the kind of public authorities which are covered, see Appendix A.
- 1.13. Public authorities are expected to have 'due regard' to the need to eliminate unlawful discrimination and harassment and promote equality of opportunity between men and women in all of their functions. Due regard comprises two linked elements: 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. For more detail on due regard and the component parts of the duty, see Chapter 2, paragraphs 2.1–2.16 and 2.21-2.32.
- 1.14. As part of the duty, public authorities are required to have due regard to the need to eliminate unlawful discrimination and harassment in employment and vocational training (including further and higher education), for people who intend to undergo, are undergoing or have undergone gender reassignment. For the purposes of this Code, the expression 'transsexual people' is used to refer to the people who are covered by those provisions. For more detail, see Chapter 2, paragraphs 2.17–2.20.
- 1.15. To support progress in delivering the general duty, there is also a series of 'specific duties' which apply to listed public authorities as laid out in the Scottish Order in Appendix C. The Order, which comes into force on 9 April 2007, sets out steps those authorities must take to help them meet the general duty.
- 1.16. Those specific duties, in brief, are:
- **To prepare and publish a gender equality scheme**, showing how it will meet its general and specific duties and setting out its gender equality objectives.
 - In formulating its overall objectives, **to consider the need to include objectives to address the causes of any gender pay gap.**

- **To gather and use information** on how the public authority's policies and practices affect gender equality in the workforce and in the delivery of services.
 - **To consult stakeholders (i.e. employees, service users and others, including trade unions) and take account of relevant information** in order to determine its gender equality objectives.
 - **To assess the impact of its current and proposed policies and practices** on gender equality, and to have due regard to the results of those impact assessments.
 - **To implement the actions set out in its scheme** within three years, unless it is unreasonable or impracticable to do so.
 - **To report** against the scheme every year and **review** the scheme at least every three years.
- 1.17. The first scheme must be published by 29 June 2007.
- 1.18. In addition, listed public authorities which have at least 150 full time equivalent staff, must publish a statement which outlines their policy on equal pay between men and women, no later than 28 September 2007. They must review this statement and publish a report on their equal pay policy within three years of its publication, and at least every three years thereafter.
- 1.19. Education authorities will be required, as well as publishing their own scheme, to ensure that the schools they manage gather information on the effects of their policies and practices on gender equality, assess the impact of those policies and practices on gender equality, carry out steps to meet the duty, and report on these activities.
- 1.20. Scottish Ministers have an additional duty to publish reports every three years. These reports must set out the priority areas they have identified for public authorities in the advancement of equality of opportunity between men and women, and provide a summary of progress made. The first report must be published by 1 July 2010.
- 1.21. For more detail on these specific duties and how to meet them, see Chapter 3.
- 1.22. This document contains guidance on how to meet both the general and the specific duties in Chapters 2 and 3. Even if a public authority is not subject to the specific duties, it will still be expected to provide clear evidence of meeting the general duty. The specific duties laid out in Chapter 3 can act as a framework to assist authorities in complying with the general duty.

Why has the gender equality duty been introduced?

- 1.23. 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.

- 1.24. 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 have a significantly different effect on women and on men, often contributing to greater gender inequality and poor policy outcomes. Individual legal rights have not been enough by themselves to change this.
- 1.25. The duty is intended to improve this situation, both for men and for women, for boys and for girls. Gender roles and relationships structure men’s and women’s lives. Women are frequently disadvantaged by policies and practices that do not recognise their greater caring responsibilities, the different pattern of their working lives, their more limited access to resources and their greater vulnerability to domestic violence and sexual assault. 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. Both sexes suffer from stereotyping of their roles and needs. The duty should help the public sector, and those working with it, to identify and respond to stereotyping, sex discrimination and sexism, resulting in improvements for all.
- 1.26. The duty requires public authorities to identify and tackle discrimination, to prevent harassment, and to ensure that their work promotes equality of opportunity between men and women. It is a form of legally enforceable ‘gender mainstreaming’ – 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:
- public authorities have to be proactive in eliminating discrimination and harassment, rather than waiting for individuals to take cases against them.
 - public authorities have to be proactive in promoting equality of opportunity, and not just avoiding discrimination.

Outcomes – the changes to which the gender equality duty should lead

- 1.27. 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:
- Service-users notice that services are more accessible and better tailored to their needs, and service outcomes by gender begin to improve.
 - Women and men are making greater use of services that their sex had previously under-used.
 - Service-users with caring responsibilities are receiving appropriate support, such as better pushchair access on public transport and creche facilities for trainees.
 - Fathers receive greater recognition and support for their childcare responsibilities from public services and employers.
 - Girls have higher aspirations for their future careers.
 - Women and men from all groups feel effectively engaged in decision and policy-making around issues that have a direct effect on them.

- Public authorities take the necessary steps to prevent gender-based violence from occurring and provide support to those affected.
- Women and men are represented at all levels of the workforce and in all areas of work.
- Harassment and sexual harassment of staff, service users and others is dealt with promptly and systematically, according to agreed procedures, and staff understand that harassment will not be tolerated.
- The reported level of discrimination experienced by pregnant staff and staff returning from maternity leave reduces significantly and is eventually eliminated.
- The gap between women and men's pay narrows and is eventually eliminated.
- Employees with caring responsibilities are receiving greater support from the public authority, including flexible and part-time working opportunities at all levels of work.
- Transsexual people feel supported and valued as staff and potential staff.
- 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 have the skills to implement the duty in their work.
- 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.

How the gender equality duty fits into the broader equality picture

- 1.28. Women and men, including transsexual women and men, will experience different forms of disadvantage depending on their age, ethnicity, religion or 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 authorities may need to consider that complexity and whether particular groups of women or men are experiencing particular disadvantages.

Multiple discrimination in the labour market

In Scotland the labour market is currently split almost evenly between women and men. However, this fact masks a range of effects of multiple discrimination. For example, only 45% of disabled women and 48% of disabled men are in employment. This compares with an employment rate of 79% for non-disabled women and 86% for non-disabled men.

Overall only 52% of ethnic minority women and 63% of ethnic minority men are in employment, though employment rates vary greatly between different ethnic groups and in different parts of Scotland.

(EOC Facts about women and men in Scotland 2006).

- 1.29. 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 of opportunity across all their functions. The gender equality duty has fewer requirements to set up processes than the race duty, however, in order to ensure that public authorities focus on the achievement of outcomes.

- 1.30. The gender equality scheme, which is a requirement for listed public authorities under the specific duties, can be published as part of an overall equality scheme, covering the requirements of all three duties. There are, however, slight differences in the requirements of the three duties. Public authorities which choose to take the overall equality scheme approach must ensure that they clearly meet the requirements of the gender equality duty, including specific objectives on gender equality. The scheme should show clearly and specifically which elements of the overall equality scheme refer to gender equality.

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

The promotion of equal opportunities is central to the duty of Best Value which applies statutorily to local authorities and which has been extended administratively (May 2006) to other public service organisations. The Best Value in Public Services non-statutory regime is derived from the Accountable Officer arrangements for the Scottish Administration, set up under the Public Finance & Accountability (Scotland) Act 2000. Best Value applies to all public service organisations with accountable officers and to those subject to audit by the Auditor General for Scotland.

Best Value is about continuous improvement in performance taking into account the balance of quality and cost. The duty to comply with the equal opportunities requirements contained in UK legislation, and the Scotland Act 1998, is central to Best Value. Detailed guidance on Best Value and equal opportunities (available at <http://www.scotland.gov.uk/Topics/Government/14838/12310>) assists public service organisations in discharging their duties. Best Value in Local Government is an auditable requirement as it is on all public service organisations with accountable officers. This strengthens the Scottish Executive's commitment to ensuring the highest standards in equal opportunities across the Scottish public sector.

Which organisations have to take action on the general duty?

S76A Sex Discrimination Act (margin note)

- 1.31. 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 the same approach as the definition of public authorities covered by the Disability Discrimination Act 2005 and the Human Rights Act 1998.
- 1.32. Because the duty is based on this definition, public authorities covered by the general gender duty are not individually listed. The duty would apply to all of the authorities listed in Schedule 1A to the amended Race Relations Act 1976. Further details on the definition of a public authority are contained in Appendix A.

- 1.33. The gender duty can also apply directly to certain private or voluntary sector bodies 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 public authorities have to take action on the specific duties?

- 1.34. To find out whether a public authority is covered by the Scottish specific duties, check the list at Appendix D. The list will be subject to periodic updating by Scottish Ministers, the relevant Scottish order being available on the Stationery Office website. British public bodies, which may be operating in Scotland, are covered by the equivalent Westminster order with its slightly different duties, and are listed in the Code of Practice for England and Wales.

How will the gender equality duty be enforced?

- 1.35. The general duty is enforceable by judicial review. Any person or body affected by a failure to comply with the general duty by a public authority may take action through judicial review proceedings.

S32 Equality Act (margin note)

- 1.36. From October 2007, the Commission for Equality and Human Rights (CEHR) will have the power to conduct formal assessments and to issue compliance notices in connection with a breach of the general duty which will be enforceable in the courts.

S76D SDA (margin note)

- 1.37. The EOC and, from October 2007, the CEHR will have the power to issue compliance notices in respect of the specific duties. For more detail see Chapter 4.

- 1.38. In addition it is likely that relevant inspection bodies will require evidence of compliance with the general and specific duties.

Future changes in the legislation

- 1.39. 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 CEHR in the future. This Code will remain in force after the dissolution of the EOC, however, until the CEHR updates it.

Where to obtain further information now and in the future

- 1.40. Copies of the Sex Discrimination Act, the Equal Pay Act, the Equality Act and the orders or regulations made under them can be obtained from the Stationery Office or downloaded from www.opsi.gov.uk. 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. There is also supporting guidance available on the EOC website.

- 1.41. Free information on the duty is available through the EOC Scotland Helpline on 0845 601 5901 or by email on info@eoc.org.uk until 1 October 2007 (see below).

- 1.42. The Equality Act also provides for the dissolution of the EOC and the passing of its functions to the CEHR. This is currently expected to happen in October 2007. Once this transition has occurred, promotion and enforcement of the gender equality duty will pass to the CEHR.

Chapter 2: How to meet the general duty

Introduction

- 2.1. All public authorities and private and voluntary bodies carrying out public functions on behalf of a public authority 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 have due regard to the need:
 - to eliminate discrimination and harassment that is unlawful under the Sex Discrimination Act 1975 (SDA) and discrimination that is unlawful under the Equal Pay Act 1970 (EqPA)
 - to promote equality of opportunity between men and women.
- 2.3. This means that the duty is not a negative or passive one, but requires public authorities to adopt a proactive approach to meeting the duty. When the EOC (and subsequently the CEHR) 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 meeting the gender equality duty.
- 2.4. Smaller public authorities will have fewer resources and this will affect the steps which they take to ensure compliance with the general duty.

How the different parts of the duty work together

- 2.5. As stated above the general duty has three parts:
 - eliminating unlawful discrimination
 - eliminating harassment
 - promoting equality of opportunity between men and women.
- 2.6. These three parts support each other, and in practice may overlap. For example, promoting equality of opportunity may also eliminate or prevent unlawful discrimination and harassment. It is important to remember, however, that the three parts are different, and that work on one part may not lead to achieving all three. Public authorities should consider and deal with all three parts of the gender duty.

Unlawful discrimination

- 2.7. Unlawful discrimination includes discrimination as defined by the SDA, and discrimination that is unlawful under the EqPA. Public authorities are legally required to have due regard to the need to eliminate both forms of discrimination.
- 2.8. In the SDA, unlawful discrimination is defined as:
 - direct and indirect discrimination on grounds of sex
 - discrimination on the grounds of pregnancy and maternity leave

- discrimination on the grounds of gender reassignment
- direct and indirect discrimination against married persons and civil partners
- victimisation
- harassment and sexual harassment.

2.9. Further details of the above definitions and where they apply can be found in Appendix E.

2.10. In the employment field, the SDA prohibits discrimination in non-contractual pay and benefits, such as discretionary bonuses. Sex discrimination related to contractual pay and benefits is dealt with under the EqPA.

2.11. The EqPA (read in the light of article 141 of the Treaty establishing the European Community) gives an individual a right to the same contractual pay and benefits as a person of the opposite sex in the same employment, or where the source of the pay is the same, where the man and the woman are doing:

- the same or broadly similar work
- work which has been rated as equivalent under an analytical job evaluation study
- work that is of equal value (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).

2.12. A public authority can pay a man more than a woman (or vice versa) in such circumstances if there is a genuine and material factor for doing so which is not attributable to direct or indirect sex discrimination.

Harassment and sexual harassment

2.13. Harassment and sexual harassment are unlawful under the SDA and the duty requires public authorities to have due regard to the need to eliminate them. The duty to have due regard to the need to promote equality of opportunity between men and women is also relevant to ensuring that harassment is prevented before it occurs.

2.14. Different legal definitions apply, depending on whether the harassment occurs in:

- employment and related fields, vocational training (including further and higher education) and in the exercise of public functions; or
- schools, the provision of goods, facilities or services, or in the disposal or management of premises.

2.15. Appendix E explains the definitions of harassment. Paragraphs 2.74–2.82 provide information on how to meet the duty to have due regard to the need to eliminate harassment.

The promotion of equality of opportunity between men and women

- 2.16. The term 'sex' is used to describe biological differences between women and men. The term 'gender' refers to the wider social roles and relationships which structure men's and women's lives. Gender inequality exists in all aspects of society and refers to lasting and embedded patterns of advantage and disadvantage.
- 2.17. The duty on public authorities to have due regard to the need to promote equality of opportunity between men and women is a new aspect of the SDA. In order to achieve actual equality of opportunity, it is necessary to recognise that in certain circumstances women and men, because of their sex or gender roles, are not in the same position. In some circumstances it may therefore be appropriate for public authorities to treat women and men differently, if that action is aimed at overcoming previous disadvantage.
- 2.18. For example, where one sex is under-represented in particular work, a public authority could promote equality of opportunity by taking positive action to encourage members of the under-represented sex to apply for such work, or to provide training to equip the under-represented sex for such work. It would not, however, be lawful to discriminate in favour of one sex in the actual appointments procedure. See Chapter 6 for more detail.
- 2.19. As another example, women make up the substantial majority of victims of domestic violence and rape. It would not be appropriate, therefore, for a local council to seek to fund refuge services on a numerically equal basis for men and for women. The promotion of equal opportunities between men and women requires public authorities to recognise that the two groups are not starting from an equal footing and identical treatment would not be appropriate.
- 2.20. In some instances, promoting equality of opportunity may require separate provision to be offered, as an alternative approach to improve take-up of services by the under-represented sex, where this is permitted under the SDA. An example of this might be to encourage men to increase their low take-up of primary health care services. For more detail, see Chapter 6 on single-sex activities.

Making health promotion services more accessible to men

NHS Shetland tries to make its condom distribution service as comprehensive as possible and free condoms are available in a variety of places including GP practices and village halls. The latest venue is barber shops. The health promotion clinical specialist in sexual health explains; 'Availability and accessibility are what's important. Condoms are available in GP practices but how accessible are they to people like young men, who don't go to see their GP. So, we tried to be a bit more imaginative and make sure condoms were available where men actually go'.

Shetland's barber shops were happy to display information and make free condoms and lubricant available, and have requested further supplies.

Making health services work for women

In NHS Greater Glasgow and Clyde, there is a dedicated project to support midwives in identifying & responding to abuse, which has been very successful in changing practice. They have implemented routine enquiry of domestic abuse at the booking visit in maternity services

since 2005 which has been well received by women. In the evaluation interviews, 94% thought it acceptable and appropriate to ask directly about abuse at the booking visit.

The gender equality duty and gender reassignment

2.21. The gender equality duty requires public authorities to have due regard to the need to eliminate unlawful discrimination and harassment against transsexual people in the fields of employment and vocational training (including further and higher education). This section gives further details on issues relating to the gender duty and gender reassignment.

S2A SDA (margin note)

2.22. The SDA provides that people who intend to undergo, are undergoing or have undergone gender reassignment are protected against discrimination and harassment in the fields of employment and related areas and in vocational training (including further and higher education). This means that public authorities must have due regard to the need to eliminate unlawful discrimination and harassment in those fields against transsexual people when discharging their gender duty.

2.23. The scope of legal protection against discrimination on grounds of gender reassignment will be extended in the SDA, by 21 December 2007, by the implementation of the Goods and Services Directive 2004/113. As a matter of domestic law, as a consequence, by that date (or the date of implementation if earlier), public authorities will be under a duty to have due regard to the need to eliminate unlawful discrimination and harassment on grounds of gender reassignment in the provision of goods and services.

2.24. Public authorities may wish to take into account the need to have due regard to the need to eliminate gender reassignment discrimination and harassment when discharging their gender equality duty in relation to the provision of goods and services, before they are required to do so following the implementation of the Goods and Services Directive.

What does the general duty mean? Due regard, proportionality and relevance

S76A SDA (margin note)

2.25. Public authorities will be expected to have due regard to the need to eliminate unlawful discrimination and harassment and promote equality of opportunity between women and men in relation to all their functions and to provide evidence that they have done so. This includes their core functions of policy development, service design and delivery, decision-making and employment, the exercise of statutory discretion, enforcement and any services and functions which have been contracted out. For details on contracted-out services see Chapter 5 on procurement.

2.26. Having due regard means that the weight given to the need to promote gender equality is **proportionate** to its **relevance** to a particular function. In practice, this principle will mean public authorities should prioritise action to address the most significant gender inequalities within their remit, and take actions which are likely to deliver the best gender equality outcomes. This is likely to mean focussing on functions or policies that have most effect on the public, or on the authority's employees, or on a section of the public or on a section of the authority's employees. The authority should ask whether

particular functions could affect women and men in different ways, and whether functions can be carried out in a way which promotes equality of opportunity between men and women.

- 2.27. The general duty applies to public authorities whatever their size, but the way in which it is implemented should be appropriate to the size of the authority and its functions. For example, a small non-departmental public body 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 management team, who then run a feedback session at the next staff training day. This could be a proportionate means of meeting the duty.
- 2.28. Gender equality will be more relevant to some functions than others. Relevance is about how much a function affects people's gender equality, as members of the public or as employees of the authority. For example, a university may decide that gender equality is more relevant to the way that it designs its teaching methods than to its building maintenance work. Public authorities should therefore assess whether, and how, gender equality is relevant to each of their functions. A public authority may decide that little or no action is required to discharge the gender equality duty in some of its services, for example those which are purely technical, such as weather forecasting. Gender equality will always be relevant, however, to the employment side of any of a public authority's functions.
- 2.29. The requirement for proportionality and relevance should not be interpreted, however, as a simple question of the numbers of people affected. Public authorities should also take into account the seriousness or extent of the discrimination, harassment or gender inequality, even if the number of people affected is small. This would often be the case where, for example, transsexual people were affected, as their numbers would be likely to be small but the seriousness or extent of discrimination and harassment might be significant.
- 2.30. Where changing a function or proposed policy would lead to significant benefits to the gender equality of men and women, (or, in employment and vocational training - including further and higher education - for transsexual men and women), public authorities should give greater weight to the case for change and take steps accordingly.
- 2.31. For example, a local authority and its community planning partners have a target of increasing employment rates in a particular district. When developing this policy, they discover that women are less economically active than men in that district but the employment services and training opportunities which they are providing are not being accessed by women, because of lack of childcare support. They decide to adjust their policy and resource allocations to provide childcare advice and support.
- 2.32. It will not be 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 therefore 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.

- 2.33. The general duty does not only require authorities to have due regard to gender equality when making decisions about the future. It also requires them to take action to tackle the ongoing consequences of decisions made in the past which failed to give due regard to gender equality. This will entail identifying and addressing any significant inequalities resulting from policies currently in place.
- 2.34. For example, previous organisational policy may have given training allowances to full-time staff but not to part-time staff, resulting in more men than women taking up the benefit and improving their qualifications. The public authority may need to consider what action it can take to redress this balance, in order to meet the duty.
- 2.35. Public authorities are not likely to be able to take action to improve all of their functions in a single cycle, for example during the three year life of a gender equality scheme. They have, however, a continuing duty which requires them to prioritise for review functions with the most relevance to gender equality. Consulting male and female employees and service users will be helpful to this process of prioritisation and review, and is a legal requirement under the specific duties.
- 2.36. The technique of impact assessment, discussed in detail in Chapter 3, is designed to assist authorities in ensuring that they have due regard to gender equality in all their decisions and functions.

How to meet the general duty

- 2.37. The steps which will assist a public authority to comply with the duty are as follows:
- gathering and analysing information
 - consulting stakeholders
 - carrying out impact assessments
 - prioritising and implementing gender equality objectives
 - reporting and reviewing.
- 2.38. These steps are covered in more detail in Chapter 3. Although they are a legal requirement for listed public authorities, they can also assist those authorities which are only covered by the general duty.
- 2.39. Other important mechanisms for successful compliance with the duty include:
- accountability and leadership
 - mainstreaming the duty into core functions
 - ensuring implementation through clear staff roles
 - staff expertise and training.

Accountability and leadership

- 2.40. Public authorities are responsible for meeting their general and specific duties. Within each public authority, this responsibility will rest with the groups or individuals who are liable (legally responsible) for the authority's acts or failure to act.
- 2.41. As well as being legally responsible for meeting the duty, these individuals and senior staff have an important leadership role to play in ensuring the success of the duty. As a matter of good 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 to staff and stakeholders that gender equality is integral to the core business of the authority.
- 2.42. Senior management will be responsible for ensuring that the necessary resources and expertise to meet the duty are made available within the organisation.

Mainstreaming the duty into the core functions of a public authority

- 2.43. The duty requires public authorities to have due regard to the need to eliminate unlawful discrimination and harassment and to promote equality of opportunity in all their functions. This includes the high-level functions of a public authority such as business planning, budget allocation, annual reporting and organisational development. These will be particularly important in ensuring that the duty is mainstreamed into the day-to-day workings of the public authority, is not marginalised, and results in changes in the most relevant areas of the authority's work.
- 2.44. Reflecting the duty in the mainstream business plan will also have practical benefits, through bringing together the planning processes of the public authority as a whole with those required under the duty. Having clear gender equality objectives in the organisational business plan, and reporting against them in the annual report could also improve staff ownership, and transparency and accountability to stakeholders.

Ensuring implementation through clear staff roles

- 2.45. It is recommended as a matter of good practice that a senior member of staff should be given strategic responsibility for ensuring the duty is implemented. In larger authorities, 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 the authority's 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. The working group will need to develop and drive forward a specific action plan, which allows for effective monitoring and review of progress.
- 2.46. Smaller authorities will also need to ensure one person is given responsibility for ensuring the duty is implemented, that all functions of the authority are appropriately dealt with, and that there is an action plan.
- 2.47. Many larger authorities employ specialist equality staff to steer the process of implementing equality; smaller ones may make it part of a person's responsibilities. It is recommended that specialist equality posts should be located in a strategic part of the public authority such as policy, performance management, planning or strategy. The

human resources function will have to play a crucial role in the employment aspects but is not best placed to lead overall, as the duty requires due regard in all functions of a public authority, including service delivery and policy-making.

- 2.48. Wherever they are situated, equality staff or lead individuals 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.
- 2.49. 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.

Staff expertise and training

- 2.50. In addition to any specialist equality staff, it will also be necessary to build the skills and understanding of relevant staff within the public authority, for example policy and service managers, procurement staff, and human resource managers. Where an authority is subject to the specific duties, relevant staff throughout the organisation will have to have the skills to collect and analyse gender data, to ensure that stakeholders are consulted effectively and to undertake gender impact assessments. These skills will also be useful for authorities which are subject to the general duty only. In some specialist areas, such as understanding the needs of transsexual people, public authorities may wish to obtain external assistance.
- 2.51. It is recommended that all relevant staff in the public authority should have some understanding of the duty, its meaning for their work and the authority's priority goals in gender equality. This can be achieved by staff briefing, and where relevant, training programmes, and by building goals and targets relevant to the duty into individual personal development plans across the organisation. It can also be supported by recognising progress in achieving gender equality when rewarding individual and team performance.

Success factors in gender mainstreaming

- 2.52. When planning for implementation of the duty, and reviewing progress, public authorities may wish to consider the factors commonly associated with successful gender mainstreaming in organisations:
- 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 the authority, 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 support staff capacity
 - 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.

2.53. 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 promote equality of opportunity between women and men. Ultimately, the key to the success of the duty is achieving culture change in public authorities, a process which will take time and commitment. An authority 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.

Meeting the gender equality duty in policy development

2.54. To meet the duty effectively, public authorities must ensure that they have due regard to the need to eliminate unlawful discrimination and harassment against either women or men, (and, in employment and vocational training - including further and higher education - against transsexual men and women) and that their policies are not maintaining or leading to gender inequality. To assist public authorities to do this, it is recommended that they should:

- collect evidence on the impact of core policies on women and men
- when new policies are being developed, assess their likely consequences for women and men
- alter or amend proposed policies so that they have due regard to the need to promote gender equality and eliminate unlawful discrimination and harassment
- resource the above changes appropriately.

2.55. Conducting impact assessments on policies is a useful way of demonstrating that public authorities have had due regard to the need to eliminate unlawful discrimination and harassment and to promote equality of opportunity when developing policy. It is also a legal requirement if a public authority is subject to the specific duties. Even for those public authorities which are not, however, it can be a useful tool for meeting the duty. For more detail on conducting gender impact assessments, see Chapter 3.

2.56. 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 exists, and if so, analyse and apply it
- take action to develop relevant information if it does not exist
- ask and involve external and internal stakeholders, such as women's and men's voluntary sector groups, service user and consumer groups, trade unions and employee or staff networks.

- 2.57. 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.

Gender equality in pensions policy

Women's current and future entitlement to pensions is significantly lower than men's. The DWP produced a report 'Women and Pensions – The Evidence' that specifically investigated the gender differences in pension provision between men and women. It showed that only 24% of recently retired women were entitled to a full Basic State Pension in their own right. Even when looking at working-age women, 2.2 million women are not building up rights to even the Basic State Pension.

Women's greater likelihood of undertaking unpaid parenting and caring commitments, and the subsequent impact on their ability to engage in paid employment, were identified as the key causes of the gender differences.

The subsequent DWP White Paper 'Security in retirement: towards a new pensions system' put forward several changes to the recognition of unpaid caring work within the state pension system that will mean for the first time paid work and unpaid care will be equally recognised within the state pension system.

This will benefit not just women, but also the increasing number of men undertaking unpaid care and help produce a pensions system that fully reflects working lives both now and in the future.

Gender-proofing the Scottish budget

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.

Meeting the gender equality duty in services

- 2.58. Women and men 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.
- 2.59. There are some groups of women and men who are not traditionally thought of as service users, such as prisoners, asylum seekers or migrants. As they may be

particularly vulnerable or dependent on the actions of public authorities, it is important not to overlook them when deciding priority services for action under the duty.

2.60. To meet the gender duty in service delivery and design, public authorities will need to check the available information on who is using their services. They may want to consider:

- Is the information disaggregated by sex?
- Do women and men 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 sex?

Service re-design - transport

In response to the Irish National Development Plan commitment to mainstream gender equality in all programmes and projects, Dublin Buses surveyed non-users as well as users in order to identify unmet needs. The results were used to develop a number of pilots. Women make multiple trips on public transport facilities, bringing children to school or care, shopping, visiting older or sick relatives, as well as travelling to work. For men, the main journey is commuting to the workplace. There are specific factors (such as income and caring responsibilities) that limit women's transport choices and therefore entry into the labour market, education and training opportunities as well as leisure opportunities. The pilots focused on the afternoon period of 2-6pm when Dublin Buses had spare capacity. The pilots:

- extended existing bus routes
- provided cheaper multi - trip fares
- targeted women and older people

There was excellent take up of the new routes (35% increase in usage) particularly by older women. There was also an increase in city centre economic activity (13% in 2002) that was believed to be directly linked to the increasing numbers of people coming into the city centre during the day.

Service re-design – physical activity

Research shows that girls become much less active than boys in their teenage years and drop out of physical activity altogether at an alarming rate. The 'Girls on the Move' programme is in response to this research and aims to pilot new initiatives to see if this trend can be reversed.

Designed and funded by a partnership of The Robertson Trust and the Health Improvement Department of the Scottish Executive, the key objectives of 'Girls on the Move' are three-fold: to improve the physical activity levels of girls and young women in Scotland; to engage harder to reach groups including girls with disabilities or mental health problems, young mothers and girls from disadvantaged communities and to involve more young women as leaders in physical activities.

'Stramash' is an example. A project based in Lochgilphead working to develop out of school activities, Stramash has successfully encouraged older girls to gain basic level coaching awards. For younger girls a very successful girls' sports club has been established after school enabling girls to try a wide range of activities in a safe environment. Older girls take part in a Bodyworks programme where local fitness instructors run lunch-time girls only sessions and the girls are then given vouchers which they redeem at evening classes run by the same instructor.

<http://www.girlsonthemove.org.uk>

Making decisions on changing design or delivery of services

2.61. Because the duty requires public authorities to have due regard to the need to promote equality of opportunity 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. The reasons for this will be complex and varied. If a college wishes to challenge gender inequalities and facilitate women's access to technical qualifications, then it may decide to take action which could potentially increase applications from women. For example the college could take positive action by targeting women with relevant information or offering help with childcare. 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.

Service re-design - health

NHS Greater Glasgow and Clyde 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 them 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 in a number of ways, and that health services must be designed to reflect these issues. 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.

Ensuring single-sex activities comply with the law

2.62. The gender equality duty requires public authorities proactively to address the individual needs of women and men in all their functions. In certain circumstances, they may therefore 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 equality 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. Public authorities must satisfy themselves, however, that any approach to single-sex activities complies with the SDA.

Single sex activities – domestic violence

In 2005/06 there were 45,796 cases of domestic violence recorded by the police¹. 88% of these were with a female victim and a male perpetrator, where this information was recorded. 55% of cases involved known repeat victimisation. 52% of these led to the recording of one or more criminal offences. 90% of all recorded incidents took place in the home.

In 2000 the **Scottish Executive** published its National Strategy to Address Domestic Abuse in Scotland, explicitly recognising its gender-specific nature. The purpose of the strategy is to address and prevent domestic abuse, and to identify the ways in which services should develop, as well as raising awareness of the nature of domestic abuse.

The Scottish Executive has committed £3 million between 2006-08 to fund 87 local projects which work to address violence against women across the three themes of protection, prevention and provision. Many of these projects are being taken forward in partnership between voluntary and statutory organisations, for example, the **Tayside Domestic Abuse Initiative** run by Barnardo's and Tayside Police which supports women and children affected by domestic abuse.

Fife Council and NHS Fife have both appointed co-ordinators to address domestic abuse and violence against women. Agencies across Fife have signed up to a 'Shared Understanding' written by the multi-agency partnership, which highlights the gendered nature of domestic and sexual abuse. This underpins the work of all agencies working in this field in Fife. It is recognised that to meet the needs of women experiencing domestic abuse, specialist services such as Women's Aid must be available.

2.63. 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

¹ Criminal Justice series CrJ/2006/07 Sept 2006

whether any proposed single-sex approach is lawful. More detail on this issue is contained in Chapter 6 and Appendix F.

Meeting the gender equality duty in public functions

S21A SDA (margin note)

- 2.64. The duty to have due regard to the need to eliminate unlawful discrimination and harassment and promote equality of opportunity between men and women applies when public authorities are carrying out public functions.
- 2.65. The following are examples of public functions to which the duty applies:
- formulating or carrying out public policy (for example, devising policies and priorities in health, education and transport 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, or Scottish Ministers placing a person on the list of individuals who are considered to be unsuitable to work with children).
- 2.66. A fuller description of public functions and exceptions can be found in Chapter 6 and further exceptions to these provisions are set out in Appendix F.

Protocol for dealing with domestic abuse – ACPOS and Crown Office Procurator Fiscal Service

In September 2005 ACPOS and The Crown Office and Procurator Fiscal Service (COPFS) produced a joint protocol for dealing with domestic abuse. The protocol aims to identify best practice and to ensure a consistent approach to reporting, investigating and prosecuting in order that cases are dealt with fairly and sensitively.

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.

Meeting the gender equality duty in employment

- 2.67. To meet the gender equality duty as an employer, a public authority will need to ensure that it has due regard to the need to eliminate unlawful discrimination and harassment in its employment practices and actively promotes gender equality within its workforce. This includes discrimination and harassment of transsexual people on grounds of their gender reassignment.
- 2.68. 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. It is recommended that the public authority involves the workforce in the process and agrees a timescale over which it will take action. Doing this will not only enable that authority to meet its obligations under the duty, but will also improve its ability to recruit and retain staff and improve service delivery. For more detail on data collection, see Chapter 3.
- 2.69. The following issues are usually the most common ones to be considered when a public authority is deciding employment priorities for action:
- ensuring fair recruitment processes
 - avoiding concentration of women and men into particular areas of work and addressing it where it already exists ('occupational segregation')
 - promoting and managing flexible working
 - ensuring high-level part-time work and supporting part-time workers
 - managing leave for parents and carers
 - managing pregnancy and return from maternity leave
 - eliminating harassment including sexual harassment
 - eliminating discrimination against, and harassment of, transsexual staff and potential staff
 - grievance and disciplinary procedures
 - redundancy
 - retirement
 - equal pay
 - work-based training opportunities.

Women in the police – the Gender Agenda

In April 2004 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 all of Scotland's police services are fairly designed and implemented.

Transsexual employees and potential employees

- 2.70. Discrimination on the grounds of sex includes discrimination on the grounds of gender reassignment in employment and vocational training (including further and higher education). Public authorities should review all employment policies and procedures to ensure that they adequately cover transsexual employees – especially those dealing with recruitment, confidentiality, harassment, access to training and development, occupational pensions and insurance.
- 2.71. It is important to remember that the legal obligation to prevent discrimination against transsexual people in employment and vocational training (including further and higher education) covers not only those who have undergone gender reassignment in the past but also those who intend to undergo gender reassignment and those who are undergoing it.

Meeting the gender equality duty for equal pay

- 2.72. Public authorities are required to comply with the EqPA. The requirement to have due regard to the need to eliminate unlawful discrimination includes discrimination that is unlawful under the EqPA.
- 2.73. The right of an individual under the EqPA is set out in paragraph 2.9 above. '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. More detail on this can be found in the Code of Practice on Equal Pay and the EOC website, at www.eoc.org.uk.

Equal pay review

A public sector organisation based in Wales, with over five hundred staff undertook an equal pay review (EPR). 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 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% for total pay – i.e. women are now earning 87% of men's total hourly pay.

Equal Pay Reviews in Practice, IES for EOC 2005

Meeting the duty to eliminate harassment

- 2.74. Having due regard to the need to eliminate harassment, including sexual harassment, is a legal requirement under the general duty. The duty to have due regard to the need to promote equality of opportunity between men and women is also relevant here as this may help eliminate harassment. A public authority should consider the steps it needs to take to ensure that harassment is prevented across all its activities before it occurs.
- 2.75. In order to discharge this duty, it is recommended that public authorities develop and regularly review a clear policy for preventing and tackling harassment across all of their functions where relevant. This would include, for example:
- in employment, education and service delivery
 - in relation to those not traditionally thought of as receiving a service, such as those who are subject to state powers, for example prisoners or asylum seekers
 - in regulatory and enforcement functions
 - in management of premises.
- 2.76. It is recommended that public authorities actively promote the policy to ensure that everyone is aware of and understands it. It is also recommended that public authorities provide training so that their managers and staff are equipped to deal with instances of harassment should they occur.
- 2.77. Public authorities should also adopt and communicate complaints and investigations procedures for dealing both formally and informally (as appropriate) with harassment, in a supportive manner. In the employment context, it is recommended that procedures for investigating harassment complaints should be linked to grievance and disciplinary procedures and should conform to the accepted standards for disciplinary action in the Acas Code of Practice on Disciplinary and Grievance Procedures.
- 2.78. Public authorities will need to determine the effectiveness of their policy and procedures. They can do this by monitoring the number of complaints of harassment and their outcome, and by reviewing policies and procedures periodically to ensure they are working effectively and that those who have made complaints are not victimised.
- 2.79. Where complaints of harassment are upheld, there should be a consistent and proportionate relationship between the severity of the harassment and the penalty imposed on the harasser. In the case of harassment by an employee, this may include disciplinary action and, in severe cases, dismissal. In the case of harassment by service users, tenants, pupils etc, public authorities should ensure that they deal with complaints of harassment by male and female employees consistently to avoid any direct discrimination. Appropriate action may involve warnings as to the consequences

of repeated acts of harassment and, in serious cases, the withdrawal of services or the withdrawal of normal services.

- 2.80. 'Sexual Harassment: Guidance for Managers and Supervisors' explains how to prevent harassment taking place and how to handle complaints. It is available, along with other information and guidance on harassment, on the EOC website www.eoc.org.uk.
- 2.81. A public authority is liable for any acts of harassment carried out by its employees in the course of their employment, or by any other person over whom the public authority has direct control and therefore for whose conduct it could reasonably be held responsible. This is the case, in most circumstances, even where those acts are carried out without either the knowledge or approval of the public authority. Public authorities will have a defence to claims of harassment which has been committed by their employees or agents if they have taken such prior measures as are reasonably practicable to prevent harassment taking place.
- 2.82. The harassment provisions in the employment and vocational training sections of the SDA do not expressly extend to harassment of employees by someone who is *not* under the direct control of the employer. An employee who has been subjected to serious harassment, however, which the employer could have prevented but did not, may be entitled to resign and claim constructive unfair dismissal.

Chapter 3: How to meet the specific duties

Introduction

- 3.1. All the public authorities listed in Appendix D are subject to the specific duties described in this chapter. Further orders may be made by Scottish Ministers from time to time to update the list of authorities.
- 3.2. The duties set out a framework to assist listed public authorities in planning, delivering and evaluating action to meet the general duty and to report on those activities. At the heart of this framework is the Gender Equality Scheme (the scheme), which is explained below. When developing and implementing the scheme, however, public authorities should bear in mind the scheme is a means of meeting the three elements of the general duty, not an end in itself. 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.
- 3.3. The duty to publish a scheme applies to all listed authorities whatever their size, but the way in which this is implemented should be appropriate to the size of the authority and its functions. A large NHS board, for example, may have the capacity to undertake a significant change project to implement the duty. A small FE college, while still obliged to implement the duty, will do so on a scale appropriate to its size and resources.
- 3.4. There are additional duties for public authorities with 150 full-time equivalent staff or more, for education authorities and grant-maintained schools, and for the Scottish Ministers. These are set out below.

What do the specific duties require public authorities to do?

- 3.5. The full text of the Scottish Order is set out at Appendix C, but in summary it provides that every listed public authority should:
 - **prepare and publish a Gender Equality Scheme** showing how it intends to fulfil the general and specific duties and setting out its gender equality objectives
 - **in preparing a scheme:**
 - **consult staff, service users and others** (including trade unions)
 - **take into account any information it has gathered or considers relevant** as to how its policies and practices affect gender equality in the workplace and in the delivery of its services
 - in formulating its overall gender equality objectives, **consider the need to have objectives to address the causes of any gender pay gap**
 - **ensure that the scheme sets out the actions** the authority has taken or intends to take to –
 - gather information on the effect of its policies and practices on men and women, in employment, services and performance of its functions

- use the information to review the implementation of the scheme objectives
 - assess the impact of its current and future policies and practices on gender equality, and have due regard to the results of impact assessments
 - consult relevant staff, service users and others (including trade unions)
 - ensure implementation of the scheme objectives
 - **implement the scheme and their actions for gathering and using information** within three years of publication of the scheme, unless it is unreasonable or impracticable to do so
 - **review and revise the scheme** at least every three years
 - **report on progress annually.**
- 3.6. All listed public authorities must publish their schemes no later than 29 June 2007.
- 3.7. In addition, listed public authorities which have at least 150 full time equivalent staff, must publish a statement which states their policy on equal pay between men and women, no later than 28 September 2007. They must review this statement and publish a report on their equal pay policy within three years of its publication, and at least every three years thereafter. For more details, see paragraphs 3.61-3.67.
- 3.8. The term “staff”, in the context of the Scottish Order, includes any person treated as an employee for the purposes of Part 2 of the Sex Discrimination Act 1975 (Employment Field).
- 3.9. Education authorities will be required, as well as publishing their own scheme, to ensure that the schools they manage gather information on the effects of their policies and practices on gender equality, assess the impact of those policies and practices on gender equality, carry out steps to meet the duty in line with the education authority scheme, and report on these activities. For more details, see paragraphs 3.93-3.96.
- 3.10. Scottish Ministers have an additional duty to publish reports every three years. These reports must set out the priority areas they have identified for public authorities in the advancement of equality of opportunity between men and women, and provide an overview of progress made. The first report must be published by 1 July 2010. For more details, see paragraphs 3.97-3.109.

Preparing and publishing a gender equality scheme

- 3.11. In order to prepare a scheme identifying gender equality objectives, and setting out the actions it intends to carry out to achieve them, each public authority will have to develop an understanding of the major gender equality issues in its functions. This should be based on a good evidence base and developed through consultation with stakeholders, and the specific duties set out these elements of the process as a legal requirement. Public authorities are then required to commit to a set of priority objectives, selected according to the principles of proportionality and relevance. Public authorities have discretion to decide those priorities themselves, but the priorities which they select should reflect the evidence. The general duty requires public authorities to focus on the issues within their remit which have the greatest importance and impact on gender equality.

- 3.12. The scheme should be published in a readily accessible format, for example, in a clearly signposted part of the public authority's website. It can be published as part of another published document or within a number of other published documents, for example within the business plan of a public authority or within a general equality scheme. Public authorities will have to ensure, however, that the individual elements of the scheme are easily identifiable, in order to show evidence of meeting the gender duty. This is also recommended in order to assure accountability to stakeholders.

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

- 3.13. The gender equality scheme is legally required to contain the public authority's overall objectives for meeting the duty (see paragraphs 3.37–3.42) including any pay objectives (paragraphs 3.43–3.60). To demonstrate that the public authority is meeting the duty in full, it is recommended that the scheme should also contain a rationale for the choice of those objectives, based on:
- an overview of the remit and functions of the authority, including functions carried out through partnership and procurement
 - the major findings of the information-gathering exercise
 - the major findings of the consultation exercise.
- 3.14. Schemes are legally required to contain information on how the public authority will take action to:
- collect information (paragraphs 3.16–3.26)
 - use this information, and any other relevant information, to meet the general and specific duties
 - use the information to review the effectiveness of its implementation of the duty and to prepare subsequent schemes (paragraphs 3.91–3.22)
 - assess the impact on gender equality of its existing and new policies and practices, and have due regard to the results of impact assessments (paragraphs 3.68–3.85)
 - consult relevant staff, service users and others (including trade unions) (paras 3.27–3.36)
 - achieve fulfilment of the objectives (paras 3.86–3.89)
- 3.15. Although not a formal legal requirement, evidence of effective practice which could usefully be included in the scheme might be:
- evidence of commitment from senior leaders
 - evidence of the link to the authority's priorities and business plans
 - the identification of individuals with clear responsibilities for taking action on the scheme or elements of the scheme
 - the allocation of specific budgets, for example, for consultation or information gathering
 - measurable and time bound indicators of progress towards the objectives

- measures to strengthen the capacity of the authority to meet the duty
- separate action plans for individual identifiable departments
- details of how impact assessment will be incorporated into the authority's decision-making process
- details of how the public authority will ensure the duty is met in procurement and partnerships.

Gathering and using information

- 3.16. In order to understand which of its functions have the greatest relevance to gender equality, a public authority will need to gather and use information on how women and men are affected by its activities. A public authority may already have this information, disaggregated by gender. This information will have a crucial role in helping the public authority to determine its gender equality priorities, conduct effective gender impact assessments of policies and practices, and monitor progress towards its gender equality objectives. Information can be both quantitative and qualitative, and from a variety of sources.
- 3.17. The specific duties require each listed public authority to gather information on the effect of its policies and practices on men and women, and in particular:
- the extent to which they promote equality between male and female staff
 - the extent to which the services it provides and the functions it performs take account of the needs of women and men.
- 3.18. Policies and practices are very broad terms, and cover every aspect of a public authority's activities and functions.
- 3.19. The specific duties also require the public authority to take into account any other information which it considers relevant. This might include, for example, any national level gender equality policies and documents which relate to their business – for example, the priorities which Scottish Ministers must set for the advancement of gender equality, national policy frameworks in their sector, or existing research which indicates the major gender issues in their area of work.
- 3.20. In order to meet the gender equality duty, public authorities will have to set up systems, or adapt existing systems, to ensure they obtain and monitor the relevant information. In many cases this should involve disaggregating existing information; in some cases this may require the collection of new information. Information should be collected on the gender profile of service users, on staff, and on any other people, such as tenants, who may be affected by decision-making and policy functions.
- 3.21. Information may also need to be collected to compare the profile of potential staff or service users with actual staff or service users. For example, to analyse the gender aspects of an employment scheme, a public authority would have to compare the percentage of women in the scheme with the pool of economically inactive or unemployed women relative to men.
- 3.22. Setting up these systems or adapting existing systems may be a significant task initially, in order to develop the evidence base for the initial scheme. It will, however, have major benefits in improving the performance management of the organisation overall. It

is recommended that public authorities ensure their systems allow them to cross-reference information by ethnicity, disability, age and other categories, so that there is evidence of any issues for different groups of women and men.

- 3.23. Public authorities which do not already have data might look at collecting information in the following areas:
- gender differences in service use – needs, expectations, barriers, satisfaction rates, outcomes
 - balance of women and men in key decision-making bodies, including public appointments
 - the gender profile of their staff, including analysis of patterns for part-time staff and those with caring responsibilities
 - the extent and causes of the gender pay gap in the authority for full-time and part-time staff – including data on pay systems, the impact of caring responsibilities and occupational segregation (see paragraphs 3.43–3.60)
 - the prevalence of harassment and sexual harassment of staff and service users, the number of formal complaints and the outcome of complaints
 - 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.
- 3.24. Quantitative monitoring is likely to be difficult in relation to transsexual staff or job applicants because of very low numbers and privacy concerns. Staff and job applicants 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 and transsexual groups.
- 3.25. Quantitative data can be supplemented by qualitative information from consultation with stakeholders, including voluntary sector groups and trade unions, and from focus groups or other sources.
- 3.26. The duty is not just about collecting information, however, but analysing and using it, so that public authorities know where they are being successful and where they need to take action. For example, information may indicate that very few men are accessing flexible working policies, relative to the proportion of female staff who do so, so a public authority may want to take steps to support more men to work on a flexible basis. Once enough information has been collected to give a picture of gender equality priorities across the public authority, priority indicators in key areas should be identified for annual monitoring to allow the public authority to meet the specific duty to review progress.

Consultation

- 3.27. The specific duties require listed public authorities to consult stakeholders when preparing a scheme. The requirement is to consult staff, service users and others (including trade unions) who appear to the authority to have an interest in the way the authority carries out its functions.

- 3.28. In addition, the scheme itself must include an outline of the actions which the authority intends to take or has taken in order to consult.
- 3.29. By consulting stakeholders, public authorities will be able to:
- build up a better picture of the most important gender issues in their work
 - gather evidence to use in determining priorities and in the gender impact assessment process
 - get feedback on their initial draft objectives
 - develop greater ownership and understanding of their gender equality objectives
 - improve accountability to their staff, service users and the general public.
- 3.30. Consultation will be especially important where one sex is under-represented in the formal decision-making processes of the public authority.
- 3.31. Using the information gathered during consultation will also be beneficial in conducting impact assessments, gathering evidence and monitoring progress. Public authorities may choose to consult stakeholders again at any relevant stages of the implementation or review process, although there is no legal requirement to do so.
- 3.32. The extent of consultation should be appropriate to the size, remit and resources of the authority and there is no prescribed means of carrying it out. Public authorities are free to adapt their existing processes of public consultation. It is important to remember, however, that the duty is to consult on gender equality. Women and men (and, where appropriate, girls and boys) should both be consulted, but public authorities will have to ensure that the consultation process gives adequate attention to issues of gender equality, and any questions are structured in such a way as to bring out any potential differences in views between women and men, or between groups of women and men.
- 3.33. It is also important that women and men are enabled to participate fully in a consultation process, in order to get a full picture of their concerns. Some women may be less likely to attend, or to speak out at a traditional public meeting if they do not feel sufficiently confident, if their community discourages women taking up public roles, or if there are language barriers.
- 3.34. Where one sex has been under-represented or disadvantaged in a policy area, service or employment issue, public authorities may need to make special efforts to encourage participation. For example, women have rarely been involved in decision-making on regeneration. Similarly, men may not have been previously included in discussions on childcare services. There may also be particular barriers to participation where a minority group has experienced multiple disadvantages, for example, on the grounds of ethnicity and sexual orientation. Public authorities may wish to consult such groups in a single-sex or group-specific environment.
- 3.35. It is recommended that consultation on employment issues with the transsexual community is conducted separately, although they should also be actively encouraged to participate in mainstream consultation processes.
- 3.36. Voluntary sector organisations, such as women's groups and men's groups, are likely to be useful sources of information through consultation. Public authorities should bear in mind, however, that such organisations may have limited capacity and resources and may need support to develop their capacity to engage with the process.

Overcoming consultation fatigue

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". Health authorities 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 authorities at the same time. This joined-up approach enables one consultation exercise for each EQIA.

Edinburgh Women's Equality Forum (EWEF)

City of Edinburgh Council provides an opportunity for women living and working in Edinburgh to challenge the discrimination women face in their jobs, at home, in their communities and when accessing public services from the council, health board and police.

The forum membership is open to all women in Edinburgh and there are co-opted members from the public service teams of the council, NHS and police.

The EWEF holds four open meetings a year on themes that reflect the priority areas of members. The mechanisms are in place to feedback the outcomes of the meetings to the relevant decision makers.

The council recognises EWEF can only be effective if the structures are in place to enable their views to be heard and to be taken into account in the policy making process. This requires more than encouraging women's participation: it requires that officers and politicians within the council are informed by the exercise and that their priorities are shaped by the involvement of the EWEF (and the other similar fora for other equalities strands). It is the outcomes of the process that are of significance – not just the process itself.

Prioritising and setting gender equality objectives

- 3.37. The purpose of producing the scheme is to bring about change. It is therefore important that public authorities focus on achieving outcomes – specific identifiable improvements in policies, in the way services and functions are delivered and in the gender equality outcomes for employees. Focussing on outcomes rather than processes will be of benefit to smaller public authorities, which may not necessarily have the resources to undertake large-scale processes.
- 3.38. The specific duties require listed public authorities to ensure that their schemes set out overall objectives that the authority has identified for meeting the duty.

- 3.39. The duty does not prescribe which objectives should be chosen and it is up to the authority to select the priorities for action, in consultation with service users and employees, and taking into account all relevant information.
- 3.40. In deciding priorities for action, public authorities will also need to consider the resource implications – a major deep-seated inequality may take significant staff and cash resource to correct. It may be, however, that it is so clearly a significant gender inequality issue that not to address it could lay the public authority open to enforcement action by the EOC or CEHR.
- 3.41. The priorities are intended to cover a three-year period. It will clearly not be possible to address and resolve all issues of gender inequality in that three-year period, but the requirement to have due regard means that public authorities are expected to begin to address the most significant problems.
- 3.42. Appropriate weight must be given to the three elements of the duty, as set out in Chapter 2, across all of the authority's functions. In determining priorities, therefore, public authorities must review questions of harassment, discrimination and the promotion of gender equality across employment, service provision, public functions and any other functions. In addition, they must take into account services and functions that are contracted out.

Objectives to address the gender pay gap

- 3.43. The general duty includes a requirement to have due regard to the need to eliminate discrimination that is unlawful under the EqPA. The specific duties require listed public authorities, when setting their overall objectives, to 'consider the need to have objectives that address the causes of any differences between the pay of men and women that are related to their sex'. There is an additional duty for listed authorities with 150 or more full time equivalent staff. These bodies are required to publish an equal pay policy statement. This statement does not need to form part of a gender equality scheme, although public bodies can choose to publish their statement as part of their scheme if they so wish. More detail on this additional duty is set out at paragraph 3.61.
- 3.44. These requirements, taken together with the specific duty to collect and make use of information on gender equality in the workforce and the duty to assess the impact of policies and practices, mean that listed public authorities have to undertake a process of determining whether their policies and practices are contributing to the causes of the gender pay gap. This should be done in consultation with employees and others, including trade unions.
- 3.45. The gender pay gap is determined by calculating women's overall average pay as a percentage of men's. The main factors which contribute to this gap are:
- discrimination, including pay discrimination (which is often inadvertent, but nonetheless unlawful)
 - the impact of women's disproportionate share of caring responsibilities (which often results in women undertaking part-time work which is often poorly paid and often restricts career continuity and progression)

- the concentration of women in particular occupations ('occupational segregation'), usually characterised by lower levels of pay than in those numerically dominated by men.
- 3.46. The first step for a public authority considering the need for pay objectives should be to gather information to ascertain if there is a gender pay gap in its workforce. If there is, the authority should gather the information needed to identify the main cause or causes of that gap. These steps will enable it to give proper consideration to whether pay objectives are needed, and help it identify the causes those objectives may need to address. The size of the pay gap and the relative significance of each of the three causes will vary between different public authorities.
- 3.47. If a public authority fails to demonstrate that it has adequately collected and analysed information to establish whether or not there is a gender pay gap in its workforce, or fails to take action if there is a problem, it risks non-compliance with the duty, and subsequent enforcement action. Public authorities that do not set their own pay systems will still be expected to gather information and take appropriate action on any causes of the gender pay gap within their organisation which remain within their control.
- 3.48. Public authorities must be able to demonstrate that they have considered the need to have objectives that address the gender pay gap. For this reason, if a public authority does not include such objectives it should give reasons for that decision in its scheme. This might include providing evidence that there is no gender pay gap within its workforce, or within any wider group of women and men who are affected by its functions as an organisation, or that the alternative objectives which it has chosen have greater significance for gender equality. Public authorities should bear in mind, however, that pay discrimination is unlawful, and the general duty requires them to have due regard to the need to eliminate unlawful discrimination.

Pay discrimination

- 3.49. In order to fulfil the general duty to have due regard to the need to eliminate discrimination that is unlawful under the EqPA, a public authority must be able to demonstrate that it has considered the need to take action on pay discrimination.
- 3.50. The gender equality duty does not require public authorities to undertake equal pay reviews. No specific course of action is prescribed to tackle pay discrimination. The statutory Code of Practice on Equal Pay recommends, however, that the most effective way of establishing whether a public authority's pay policies and pay systems are discriminatory is to undertake an equal pay review.
- 3.51. The fundamental components of an equal pay review are:
- comparing the pay of women and men 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, including by differences between part-time and full-time workers' pay
 - eliminating those pay gaps that cannot satisfactorily be explained on grounds other than sex.
- 3.52. The Code of Practice on Equal Pay and supporting toolkits are the recommended tools for undertaking this process. These can be found at www.eoc.org.uk.

- 3.53. A public authority that has undertaken a pay review, containing the elements described above, in the preceding four years may not need to repeat it, unless it has undergone significant changes to its workforce, as it should already have evidence of the situation in its organisation and should be taking action.
- 3.54. Public authorities may also choose to collect pay information across a selected sample of their staff, for example administrators, manual workers, or departments or units such as IT or physiotherapy, to see if women and men carrying out the same jobs or jobs of equal value are receiving equal pay. Given the requirement to consult, any such approach should be discussed with the relevant trade union. Sampling may indicate a problem which suggests the need to proceed to a full pay review.
- 3.55. If a public authority decides not to undertake a full pay review, it may be appropriate for it to carry out a screening process, for example, to address areas known to pose a high risk of pay discrimination. These will include:
- starting salaries: checking whether women and men who have been recruited to the same jobs or jobs of equal value are being appointed on the same starting salary and whether any patterns are related to sex-based factors
 - progression: whether unjustifiably long pay scales are inadvertently discriminating against women (who may be less likely to have continuous service)
 - bonus payments: whether bonuses are paid, or higher bonuses are paid, in jobs where men predominate.
- 3.56. Many public authorities, such as NHS boards, do not set their own pay systems. They are legally liable, however, under the EqPA, for the implementation of those pay systems. Some are likely to find the screening of high-risk factors, as set out above, which they, as employers, have control over, particularly useful in complying with the duty. Where a public authority does not set its own pay system, any pay review of that system would often be more appropriately carried out at a higher level (for example Scottish Executive Health Department for health boards). Where public authorities do not set their own pay systems, but an authority becomes aware that there are elements in that system which are causing, or risk causing, pay discrimination, it is recommended that the public authority should alert the relevant pay body. The remit of pay review bodies in Great Britain includes a requirement to seek to ensure non-discriminatory pay systems, and to develop systems that support diversity.

Caring responsibilities and occupational segregation

- 3.57. Public authorities should also gather evidence on the impact of caring responsibilities on their workforces. Based on that evidence and on consultation with employees and trade unions, they should consider whether it is appropriate to set objectives to address any relevant issues. Women are significantly more likely than men to work part-time, often because of childcare and other caring responsibilities. Part-time work in Britain is characterised by particularly low rates of hourly pay and reduced access to promotion and development opportunities. In addition, lack of availability of suitable childcare restricts women's employment choices. Support to female and male employees with childcare responsibilities, through providing more flexible working and training opportunities or childcare provision or subsidy, will also contribute to the promotion of equality of opportunity between women and men.
- 3.58. Public authorities should also collect evidence on the extent of occupational segregation in their workforces. Based on that evidence and on consultation with employees and

trade unions, they should consider whether it is appropriate to set objectives to address it. Employers who have strongly segregated workforces may 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.

- 3.59. Public authorities can check which issues are relevant to any gender pay gap in their organisation by:
- monitoring where women and men work in their organisation, what hours they work and at what grade. This will map any segregation by seniority and by types of work and will alert public authorities to the possible impact of caring responsibilities.
 - using any annual staff monitoring exercise to ask staff if they have caring responsibilities, and whether this is for children or for older people.

Tackling vertical segregation

The University of Glasgow and Equal Scotland have developed the Gender Action Project (GAP) to pilot an innovative 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.

Closing the gender pay gap within the wider remit of a public authority

- 3.60. In addition to its functions as an employer, a public authority may have functions which have the potential to address the gender pay gap in a wider policy sense. This would be the case, for example, for the enterprise networks, an FE college or an education authority. If this is the case, the public authority should also be considering whether it can address the causes of the gender pay gap within that wider remit where appropriate. This might include reviewing the high-level policy priorities of the authority overall, for example setting local economic objectives that address the under-utilisation of the skills of part-time women workers. It might also include specific measures such as improving school careers advice so that boys and girls consider a wider range of career options, training women to fill areas of skills shortage in traditionally male-dominated areas and vice versa, or providing childcare support for male and female students in vocational training.

Family Friendly Colleges

Family Friendly Colleges is a partnership between Adam Smith College, Fife, One Parent Families Scotland, Rosemount Lifelong Learning, Glasgow and Glasgow Caledonian University.

The programme aims to identify and overcome the barriers faced by disadvantaged women with children who wish to enter higher and further education. The partnership focuses on female lone parents. Interventions address the specific barriers faced by female lone parents and

include providing and funding childcare facilities, timing of courses during school hours, and availability of part-time courses. A best practice guide is being produced along with an annual award for colleges that demonstrate the most family friendly policies, with nominations invited from students and staff members.

Publishing an equal pay policy statement

- 3.61. Listed public authorities with 150 or more full time equivalent staff are required to publish an equal pay statement which states the authority's policy on equal pay between men and women. Those public authorities subject to this duty will also be required to review and report on this equal pay statement every three years, starting from three years after the publication date of the equal pay statement. This duty is separate, and complementary to, the requirement above to consider including an equal pay objective in the gender equality scheme.
- 3.62. Much of the work to develop an equal pay statement will already have been done by a public authority which has taken the steps outlined above, to consider equal pay issues in formulating its gender equality scheme.
- 3.63. The duty does not set out how public authorities should set out their equal pay statement or what information should be contained within that statement. However, while no specific approach to developing an equal pay statement is prescribed within the duty, it is suggested that public authorities follow the good practice guidance set out within the EOC's Code of Practice on Equal Pay.
- 3.64. In formulating an equal pay statement, public authorities would be recommended to consider each of the causes of the gender pay gap set out at paragraph 3.45 above.
- 3.65. Where a public authority has set itself equal pay objectives within its gender equality scheme, these would most effectively be actioned in tandem with the public authority's equal pay statement.
- 3.66. It is recommended that public authorities consult with employees and trade unions in the development of the policy.
- 3.67. The equal pay statement can be set out as part of another published document, for example, an authority's equal opportunities policy. A suggested model for an equal pay policy is set out below. This model forms part of the EOC's guidance on equal pay and is not a mandatory model.

A model equal pay policy

We are committed to the principle of equal pay for all our employees. We aim to eliminate any sex bias in our pay systems.

We understand that equal pay between men and women is a legal right under both domestic and European law.

It is in the interest of the organisation to ensure that we have a fair and just pay system. It is important that employees have confidence in the process of eliminating sex bias and we are

therefore committed to working in partnership with the recognised trade unions. As good business practice we are committed to working with trade union/employee representatives to take action to ensure that we provide equal pay.

We believe that in eliminating sex bias in our pay system we are sending a positive message to our staff and customers. It makes good business sense to have a fair, transparent reward system and it helps us to control costs. We recognise that avoiding unfair discrimination will improve morale and enhance efficiency.

Our objectives are to:

- Eliminate any unfair, unjust or unlawful practices that impact on pay
- Take appropriate remedial action.

We will:

- Implement an equal pay review in line with EOC guidance for all current staff and starting pay for new staff (including those on maternity leave, career breaks, or non-standard contracts)
- Plan and implement actions in partnership with trade union/employee representatives
- Provide training and guidance for those involved in determining pay
- Inform employees of how these practices work and how their own pay is determined
- Respond to grievances on equal pay as a priority
- Implement an equal pay review in line with EOC guidance for all current staff and starting pay for new staff (including those on maternity leave, career breaks, or non-standard contracts)
- Plan and implement actions in partnership with trade union/employee representatives
- Provide training and guidance for those involved in determining pay
- Inform employees of how these practices work and how their own pay is determined
- Respond to grievances on equal pay as a priority
- In conjunction with trade union/employee representatives, monitor pay statistics annually.

From the EOC's Code of Practice on Equal Pay, December 2003 www.eoc.org.uk

Gender impact assessment

- 3.68. A listed public authority must ensure that its scheme sets out the actions it has taken or intends to take to assess the impact of its policies and practices, or their likely impact, on gender equality. 'Policies and practices' covers all the proposed and current activities which the authority carries out, including its employment and service delivery functions.
- 3.69. The purpose of an impact assessment is twofold:
- to ensure that neither sex is disadvantaged by an authority's decisions and activities
 - to identify where public authorities can promote equality of opportunity between men and women.
- 3.70. Where a negative impact or a missed opportunity to promote equality of opportunity is identified through an impact assessment, public authorities must, as far as is reasonable and practicable, pay due regard to the results. This means that authorities must factor the results of each impact assessment into the planning and delivery of any

policy or service, and amend their plans accordingly, unless the costs of doing so significantly outweigh the benefits to gender equality. If an authority is genuinely unable to amend their policy as suggested by the results of their gender impact assessment, they must ensure that action to remedy the inequalities set out in their gender impact assessment is factored into their longer term planning and delivery of the relevant policy or service.

- 3.71. The specific duty requires the assessment of existing policies and practices as well as ones which are developed subsequently. There will clearly be a significant number of current policies and practices which will need to be assessed, not all of which can be assessed in the early stages of the duty. It is recommended that public authorities set a timetable for assessing the impact of their principal activities over the period of the first three-year scheme.
- 3.72. For new policies and practices, impact assessments are most effective when they are carried out early in the decision-making process, in order to inform the process of policy-making and enable any necessary changes to the policy or practice.
- 3.73. Impact assessment is not an end in itself, but is merely the process which a public authority will go through in order to identify issues and act on the gender equality duty. As well as being a legal requirement for listed public authorities under the specific duties, gender impact assessment is also a useful technique for the implementation of the duty overall, because it allows public authorities to assess the relevance of gender equality to each of their functions.

Gendered impact of poverty

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. Average hourly earnings for women working full time are 12% 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.

An approach to tackling poverty which does not actively assess its impact on gender equality, could fail to understand and address women's experiences of poverty.

- 3.74. Not all policies and practices will be equally relevant to gender equality. It is recommended that public authorities undertake impact assessment as a two-stage process, prioritising through initial 'screening' in order to identify the most relevant policies and practices to gender equality. Where remedial action may be needed, public authorities can take action to eliminate discrimination and harassment or promote equality of opportunity, based on the initial evidence from the screening, or may need to subject the policy to a more detailed assessment.
- 3.75. The specific duties do not prescribe a particular method of impact assessment – approaches are likely to vary depending upon the nature of the public authority and the

degree of relevance to gender equality of each of its functions. Where the relevance of a function is high, the authority will have to take particular care to be able to demonstrate that it has met the general duty in exercising that function. Where evidence suggests the relevance is low, public authorities may not need to take further action.

- 3.76. Impact assessment does not necessarily have to be an onerous process, and smaller authorities, such as schools, should be able to set up small-scale and flexible processes. The key to the effectiveness of the process is good information and staff in relevant posts with the skills to be able to analyse the implications for gender equality.
- 3.77. The initial screening process could include:
- identifying the aims of the policy or practice – for most policies or practices this should be straightforward
 - considering the evidence – based on existing knowledge and data, will the policy or practice have a differential impact on women and men? Absence of data should not be a justification for assuming there is no differential impact
 - deciding whether to take remedial action based on available evidence, or to proceed to a full impact assessment.
- 3.78. Public authorities may wish to develop criteria for screening and for proceeding to full impact assessment, depending on the scale of their organisation, their remit and the aims of their gender equality scheme. Core questions could include:
- Is the policy or practice a major one in terms of size and significance for the authority's activities?
 - Is there any indication that, although the policy or practice is minor, it is likely to have a major impact on gender equality? This is not only a question of the numbers of people affected but of the seriousness of the potential impact, whether negative or positive.

Equality impact screening process

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 to seriously

consider carrying out an EQIA at the planning stage.

3.79. Additional useful screening questions might include:

- Is there any evidence that women and men have different needs, experiences, concerns or priorities in relation to the issues addressed by the policy or practice?
- Is there evidence that particular groups of women or men have particular needs etc. in relation to this policy or practice? For example, women from a particular ethnic group or men from a particular age group or, for employment functions, transsexual staff or job applicants.
- Of those affected by the policy or practice, what proportion are men and what proportion are women?
- If more women (or men) are likely to be affected by the policy or practice, is that appropriate and consistent with its objective?
- Where the policy or practice is intended to achieve a particular outcome, what is the evidence on the likely outcomes for men and for women?
- Could the policy or practice unintentionally disadvantage people of one sex or the other or, for employment functions, could it disadvantage transsexual women and men? It is essential to consider not just the intended consequences of the policy or practice but also any unintended consequences and barriers that might prevent it being effective for one sex or the other.

3.80. Consulting stakeholders will be of assistance to the public authority in determining criteria for proceeding to a full impact assessment and in conducting the full process.

3.81. For full gender impact assessment, public authorities are likely to need more detailed baseline data. It will also be useful to have a process for consulting on the policy or practice. The EOC has produced guidance on the full process of impact assessment.

Equality Impact Assessment Process (EQIA)

The Scottish Executive has developed a 10 step equality impact assessment tool (EQIA). The tool has been developed as an on-line resource, in an attempt to make it as easy as possible for policy makers to complete.

The EQIA covers 6 equality strands (age, disability, faith/religious belief, gender, race and sexual orientation). The EQIA process does not include an initial screening stage; if policies, functions or strategies impact on people, then everyone will carry out this assessment (with a further assessment carried out if necessary). As part of the process of prioritisation, all new and emerging policies will be equality impact assessed. Departments should also consider carrying out an EQIA on those policy areas which are key to delivering on their objectives.

The ten steps are:

- | | |
|--------|--|
| Step 1 | Define the aims of your policy |
| Step 2 | What do you already know about the diverse needs and/or experiences of your target audience? |
| Step 3 | What else do you need to know to help you understand the diverse needs and/or experiences of your target audience? |

Step 4	What does the information you have tell you about how this policy might impact positively or negatively on the different groups within the target audience?
Step 5	Will you be making any changes to your policy?
Step 6	Does your policy provide the opportunity to promote equality of opportunity or good relations?
Step 7	Based on the work you have done – rate the level of relevance of your policy – High, Medium or low
Step 8	Do you need to carry out a further impact assessment?
Step 9	Please explain how you will monitor and evaluate this policy to measure progress
Step 10	Sign off and publish impact assessment

View the tool at <http://www.scotland.gov.uk/Topics/People/Equality/18507/EQIAtool>

- 3.82. When making decisions on whether to amend a policy or practice to prevent unlawful discrimination or promote equality of opportunity, it is important to remember that a policy or practice may have a differential impact on women and men but that in itself is not enough to require amendment. The test of whether action needs to be taken is whether there is an adverse impact on one sex, and how serious that adverse impact may be. For example, a public authority might expect women to access its childcare services more than men do – a differential impact – but would need to consider whether this was having an adverse effect on men. It might do this by obtaining information on the extent of demand or need for those services from men.
- 3.83. Public authorities should expect to find evidence of differential impact on women and men, given the extent of differences in how women and men work and access services. In their analysis of action which needs to be taken, however, public authorities may need to question and challenge stereotypes, to ensure that they have due regard to the need to promote equality of opportunity between women and men.

Impact assessment leading to service re-design

The One Parent Families Support and Information Network (now known as the Centre for Separated Families), 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.

- 3.84. Impact assessment is a requirement for the race and disability duties also, and public authorities may wish to bring the three processes together. To meet the requirements of the gender duty, however, public authorities will need to pay specific attention to developing the evidence base on gender, and to ensuring effective analysis of the implications for gender equality.
- 3.85. Public authorities will need to ensure the effectiveness of their impact assessment process for providing due regard to gender equality. They will need to review the effectiveness of this process when revising their scheme every three years, and should consider doing this on a more regular basis, particularly in the early stages. It will be particularly important to demonstrate that the system is leading to changes in the way in which policy and practices are developed where necessary. Publishing this information, for example in reporting on the gender duty in the public authority's main annual report, will build the confidence of stakeholders in the robustness of the authority's approach to gender equality.

Implementing the scheme

- 3.86. Listed public authorities are expected, within the three year period, to implement:
- their actions for gathering and using information
 - the objectives in their scheme
- 3.87. If a public authority does not comply with any specific duty imposed by the Order, including implementing the elements indicated above, the EOC or CEHR may issue a compliance notice (see Chapter 4 for further information about enforcement).
- 3.88. The public authority will not be under an obligation to implement their actions for gathering or using information or to implement the scheme objectives if, in all the circumstances of the case, it would be unreasonable or impracticable for it to do so. The words 'unreasonable' and 'impracticable' are intended to relate to particular and unforeseen circumstances. For example:
- where there are particular difficulties with implementing objectives in the scheme but these difficulties could not have been foreseen, then it is likely to be unreasonable to have to implement them
 - where costs associated with an action unexpectedly escalate so as to be out of proportion to the duty, then it is unlikely to be practicable to implement the duty.
- 3.89. It is important, however, that public authorities consider other solutions where it is not reasonable or practicable for them to carry out a particular part of the scheme. They may choose to revise part or all of the scheme before the three year minimum, if this will help them meet the general duty more effectively. Once barriers to equality have been identified, an authority will need to address them, considering alternative methods of overcoming them if those proposed originally are not practicable or reasonable.

Annual reports

- 3.90. Listed public authorities must publish a report annually, summarising the actions they have taken to implement their scheme objectives. This report can be published as a separate document or within another published document, for example, the public authority's main annual report.

Reviewing and revising the scheme

- 3.91. Listed public authorities have an obligation to review and revise the scheme every three years. It is recommended that this should involve a review of progress to date and of the appropriateness of the previous scheme objectives, with a view to continuous improvement in the implementation of the duty. Evidence for this process would include the information gathered to date, the results of impact assessments, and any feedback from stakeholders on the effectiveness of the preceding scheme.
- 3.92. In preparing the new scheme, public authorities are required to collect and make use of information, and to consult stakeholders as before. Stakeholders can also usefully be involved in the review of the previous scheme, although this is not a legal requirement.

Schools

- 3.93. As local authority schools are not legal bodies, they are not referred to in the Schedule to the Scottish Order, and are therefore not directly covered by the specific duty. However, education authorities, as well as being covered in their own right by the specific duty and required to produce their own gender equality scheme and equal pay statement, also have a duty in relation to the schools under their management.
- 3.94. The duty is to make arrangements for each school to:
- gather information on the effect of its policies and practices in relation to the extent to which they promote equality between male and female pupils;
 - assess the impact of its policies and practices, or the likely impact of its proposed policies and practices, on equality between male and female pupils;
 - provide the education authority with an annual report in respect of the information the school has gathered and the impact assessments it has conducted;
 - carry out such steps which the education authority proposes to take toward the fulfilment of its general duty; and
 - maintain a copy of the Scheme.
- 3.95. These arrangements will ensure that schools are fully involved in working with education authorities to meet both the authorities' general and specific duties. They will also ensure that the impact of the gender equality duty will be felt directly both by schools and by pupils.
- 3.96. The information contained in this Code in relation to impact assessment, information gathering and reporting are as relevant in assisting schools to meet the education authorities' requirements, as they are to the education authorities themselves.

How the Gender Equality Duty fits with equality requirements for education

Education authorities are required to meet the race, disability and gender equality duties. These duties underpin a range of existing equalities requirements for education in Scotland:

The Standards in Scotland's Schools etc Act 2000 requires that school education is to be directed towards the development of the personality, talents and mental and physical abilities of the child or young person to their fullest potential.

In their annual statements of 'improvement objectives', Education Authorities are required to include an account of the ways in which they will, in providing school education, encourage equal opportunities and in particular the observance of the equal opportunity requirements.

Equal opportunities has therefore to be included in local authority planning and improvement and is also promoted both through teacher training and the national priorities for education. The benchmark for Initial Teacher Education includes that students should be able to demonstrate an understanding of the principles of equality and social justice and of the need for anti-discriminatory practices (Quality Assurance Agency, Benchmark for Initial Teacher Education, 2000).

The five National Priorities for education are established under the Standards in Scotland's Schools etc Act 2000. They are:

- Achievement and Attainment
- Framework for Learning
- Inclusion and Equality
- Values and Citizenship
- Learning for Life

(Source: Equal Opportunities Scottish Executive Policy Overview, Scottish Parliament SPICE Briefing 06/90, October 2006)

Scottish Ministers' Duty

- 3.97. The Scottish Order introduces a new duty on the Scottish Ministers. From 1 July 2010, Scottish Ministers will have to publish reports every three years that:
- set out the priority areas that Ministers have identified for the advancement of gender equality by public authorities in Scotland; and
 - provide an overview of progress made by public authorities in these priority areas.

What is the purpose of this duty?

- 3.98. The purpose of this duty is to prompt leadership on gender equality across key elements of the public sector. The object is to ensure that a strategic view is taken, by identifying gaps in provision or particular trends, and opportunities for public authorities to work more effectively in partnership with each other to achieve nationally-set priorities.
- 3.99. The reports will also improve transparency by providing information summarising the progress made by the public sector in delivering gender equality. This will enable the wider community to judge more easily whether public services are improving, and assist bodies subject to the duty to identify the priorities that they should address in their improvement work.
- 3.100. This duty is additional to the responsibility of the Scottish Executive under the specific duties to produce a gender equality scheme.

- 3.101. The scheme will focus on specific actions to be taken by Scottish Executive departments and agencies in relation to the gender equality duty. Scottish Ministers' reports will look beyond the Scottish Executive, be broader in focus and will focus on achieving improved equality of opportunity for women and men across the public sector. This will involve consideration of the progress made across key Scottish public bodies.
- 3.102. The Scottish Executive will need to ensure that it makes suitable arrangements for supporting Ministers in their reporting duty. These arrangements will need to take proper account of the differences between this duty and the Executive's own responsibility to implement and report on a gender equality scheme.

Setting priority areas

- 3.103. Ministers are required to set out the priorities they have identified for the advancement of equality between men and women in Scotland. In order to identify these priorities, it will be important for Ministers to review current national evidence, to consult relevant stakeholders, and to identify key strategic areas where progress is required.
- 3.104. In setting out these priority areas, Ministers could outline how the identified priorities fit with existing public sector priorities, for example the high level targets in the Scottish Budget. Ministers should consider how progress in these priority areas will be measured, and how appropriate indicators of success might be developed for the public sector as a whole.
- 3.105. In order to be able to make their first report on progress against their chosen priority areas by 1 July 2010, Scottish Ministers will need to set out these priorities well in advance of this date.

Providing an overview of progress

- 3.106. The duty requires the Scottish Ministers' reports to give a summary of progress made by public authorities in relation to the priority areas set.
- 3.107. Ministers will already have access to information collected by some departments or other organisations, which will provide the necessary evidence of progress in some areas. In other situations there may be a requirement for improved mechanisms to review progress, such as the Ministers providing guidance to standardise the mechanisms within an area for collecting evidence, or establishing new mechanisms for this.
- 3.108. The Ministers are likely to find it easier to produce reports every three years if gender equality is built into departmental and public authority evaluation strategies across all departments.
- 3.109. The purpose of collecting information and summarising progress is in order to inform the identification of future priorities for the public sector in Scotland to advance equality of opportunity between men and women.

Chapter 4: Enforcement

Helping public authorities meet the gender equality duty

- 4.1. The EOC and subsequently CEHR 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.
- 4.2. The EOC will be issuing non-statutory guidance to supplement this Code, to cover particular parts of the public sector, aspects of the duty such as gender impact assessment and how the duty applies to procurement.
- 4.3. The extent to which public authorities have complied with the duty is likely to be assessed by the EOC on the following criteria:
 - Information: does the public authority have the information which allows it to understand the impact of its work on women and on men (including transsexual women and men in respect of employment and vocational training – including further and higher education.)?
 - Involvement: have the relevant people inside and outside the authority 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 action been taken and has it delivered the required outcomes, leading to less discrimination and greater gender equality?
- 4.4. The EOC and CEHR will use their promotional and enforcement powers to ensure public authorities meet the gender duty. This Chapter explains the relevant powers in more detail.

The role of scrutiny bodies

- 4.5. Agencies that audit or inspect public authorities are bound by the duty to have due regard to the need to eliminate unlawful discrimination and harassment and promote equality of opportunity 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, where appropriate, they will need to:

- Review inspection and auditing methods and performance indicators, to ensure that they meet the duty and enable judgements to be made as to whether public authorities are complying with the duty.
- Ensure that appropriate actions on progressing gender equality are contained in any Improvement Plans that emerge from scrutiny processes.
- Advise public authorities on developing effective gender equality schemes, 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 authorities to consider when analysing their performance of the duty, and to improve accountability to the public.

What happens when public authorities fail to meet the gender equality duty

- 4.6. The EOC and CEHR have formal powers of enforcement which they will use if they have evidence that public authorities are not complying with 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.
- 4.7. 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 and specific duties via compliance notices

S76D SDA (margin note)

- 4.8. If a public authority does not comply with its specific duties, it could face enforcement action by the EOC (and subsequently from late 2007 by the CEHR).
- 4.9. S76D of the Sex Discrimination Act empowers the EOC to serve a compliance notice on an authority that is failing to comply with the specific duties. The notice will state that the authority must meet its duties and tell the EOC within 28 days what it has done to comply with the duties.
- 4.10. In the compliance notice, the EOC can also require the authority to give it written information of steps taken for the purpose of complying with the 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 relating to a discrimination claim brought by an individual against the authority, would not have to be provided.

4.11. If the EOC thinks that a public authority on which a notice has been served has failed to comply with the specific duties or to provide the EOC with any information required by the notice, the EOC may apply to the sheriff for an order requiring the authority to comply.

S32 Equality Act 2006 (margin note)

4.12. The CEHR has 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:

- These notices can require public authorities to provide information on how they intend to comply with the general or specific duties, including information on what steps they intend to take or propose to take to comply with the duties.
- CEHR may not issue a notice requiring a public authority to comply with the general duty unless the CEHR has carried out an assessment and the notice relates to the results of that assessment. See Appendix G for details on the assessment process.
- If a public authority has failed to comply with a requirement of the notice either to comply with the duty or provide information, the CEHR may apply for a court order requiring compliance. It may not, however, apply to the court until a period specified in the original notice has expired.

4.13. The court may grant the order in the terms that the EOC or CEHR applied for or in more limited terms. If the court makes an order and the authority does not abide by it, the authority may be found to be in contempt of court.

S31 Equality Act (margin note)

4.14. In addition to these powers, the CEHR will have the power to conduct an assessment to determine whether a public authority has complied with the specific duties. It may choose to do so before issuing a compliance notice, but is not obliged to do so.

Enforcement of the general duty via judicial review

S30 Equality Act 2006 (margin note)

4.15. 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 through an application to the Court of Session for judicial review. An application could be made by a person or group of people with an interest in the matter, including by the EOC or (from late 2007) the CEHR.

Chapter 5: Procurement and partnerships

Procurement

- 5.1. Procurement is the process by which a public authority enters into a contract with an external contractor to carry out works or provide goods or services. The term encompasses the full range of public authority contracts, including private finance initiative (PFI) projects and public private partnerships (PPP).
- 5.2. 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 and services.
- 5.3. 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.
- 5.4. The duty requires public authorities to have due regard to the need to eliminate unlawful discrimination and harassment and to promote equality of opportunity between men and women. This means that the weight given to gender equality should be proportionate to its relevance to a particular procurement. (See Chapter 2 for more information on proportionality and relevance.) The EOC will produce supporting guidance on procurement.

Example procurement policy – when is equality likely to be relevant?

Scottish Parliament Corporate Body

It is SPCB policy that appropriate equality considerations be incorporated into the production of specifications, evaluation of tenders, and Contractor Performance Management.

The principle of equality of opportunity is one of the four founding principles of the Scottish Parliament, as such, the SPCB will:

- Comply with all relevant statutory regulations that relate to equal opportunities, racial equality and disability and insist that suppliers (and their supply chain) do the same.
- Wherever possible and appropriate, include equalities issues within specifications.
- Include equalities criteria in the process for supplier appraisal, contract award and Contractor Performance Management, as appropriate.

Equalities considerations will be particularly relevant when a contract requires, or is likely to require:

- A supplier to provide staff to work on SPCB premises.
- Supplier's staff to interact with Members, Member's staff or SPCB staff on a frequent or on-going basis.
- A supplier to provide services to members of the public, or to other organisations, on behalf of the SPCB.

NB the SPCB is not subject to this Code, since it has reserved functions. This example is intended simply to reflect useful current practice within Scotland.

5.5. It is recommended that public authorities take the following steps to assist them in meeting the gender equality duty where contractors provide goods, works or services on their behalf.

5.6. **Preliminary stages: identifying need, setting specification and invitations to tender:**

- Provide training for all staff involved in procurement work so that they fully understand the provisions of the SDA and Equal Pay Act 1970 (EqPA), including the duty, where relevant to their work, and what they need to do to ensure compliance.
- Use resources such as departmental equality teams, the Office of Government Commerce's 'Social Issues in Purchasing' guidance and tools and information from the EOC's website (including guidance on Gender 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 should be identified at the beginning of a procurement, when identifying need and setting the business case, and reflected as necessary in the contract notice and contract documents, including the technical specifications and the terms and conditions of the contract, in accordance with UK and EC procurement rules.
- Where appropriate, relevant stakeholders should be invited to feed into the process of drawing up the specification to help inform and define the requirement.
- It is recommended that public authorities seriously consider including, in works or services contract documents, information as to where contractors may obtain details of their employment and working conditions obligations² under the SDA, the EqPA and the gender equality duty.
- If the above information has been provided, public authorities must request that tenderers or candidates indicate, in preparing their tenders or in negotiating the contract, that they have taken into account their employment obligations³ under the SDA, EqPA or equivalent European legislation. Public authorities may wish to refer contractors to where they may obtain advice in this regard.

Example standard equalities clause in call to tender

Health Scotland believes that equality will always be relevant to research procurement exercises and includes this standard clause in its research calls to tender:

"The importance of mainstreaming equalities in research cannot be overstated. Research informs policy and programme development which subsequently informs the national actions and policies that emerge. The more that we can take account of experiences and perspectives

² As permitted by regulation 38 of the Public Contracts (Scotland) Regulations 2006 and Article 27 Directive 2004/18/EC

³ In accordance with regulation 38 of the Public Contracts (Scotland) Regulations 2006 and Article 27 Directive 2004/18/EC.

of different equality groups, the more that those perspectives can be integrated into policy and practice. If these issues and perspectives continue to be missed in research, there is a danger that we continue to reinforce existing inequalities and discrimination by failing to account for the diversity of experiences and needs in Scotland today.

Researchers should consider how equalities issues and groups should be incorporated into the research where appropriate. Equalities and social inclusion issues should be given due consideration at all stages of the research process."

Selection stage and award stage

- Consider the technical skills and capabilities of candidates where they are relevant to the contract and linked to gender equality, for example staff management training.
- It is recommended that public authorities exclude candidates or tenderers at the selection stage for relevant convictions or findings of grave misconduct (for example, sufficiently serious findings against them in an Employment Tribunal or Sheriff Court under the SDA or the EqPA)⁴, unless they can show, where appropriate, that 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.
- Ensure that the duty to have due regard to the need to eliminate unlawful discrimination and harassment and promote equality of opportunity between men and women is appropriately addressed and given due weight in the selection⁵ and award⁶ criteria in a way which is consistent with European Union procurement rules.
- Ensure that the candidates who are awarded the contract fully understand any gender equality requirements within the specification.

Terms and conditions

- Include conditions that the contractor must comply with the anti-discrimination provisions of all equalities legislation.
- Include conditions to ensure compliance with the anti-discrimination provisions of all equalities legislation where contractors sub-contract the work to third parties.

Sample clause illustrating how equalities considerations could be incorporated into

⁴ This is permitted by Regulation 23 of the Public Contracts (Scotland) Regulations 2006 and Article 45 of Directive 2004/18/EC

⁵ in accordance with regulations 23-29 of the Public Contracts Regulations 2006 and Articles 45-52 of Directive 2004/18/EC.

⁶ Article 53 of European Council Directive 2004/18/EC and regulation 30 of the Public Contracts Regulations 2006 state that the award of a public contract must be made on the basis either of the most economically advantageous tender from the point of view of the contracting authority based on criteria linked to the subject matter of the public contract in question, or the lowest price. The earlier judgement of Case C-513/99, *Concordia Bus Finland v Helsinki* must, in accordance with normal practice, be read in light of Directive 2004/18/EC. The case provides that, in awarding a contract, a public authority must ensure 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 principles of UK and EC law, particularly the principle of non-discrimination (between Member States).

contract conditions in appropriate contracts

Equalities Considerations

We are an equal opportunities employer and service provider. You must also be an equal opportunities employer and service provider and comply fully with equal opportunities legislation.

You will ensure that you do not discriminate against anyone unlawfully, or treat anyone unfairly, on the grounds of their sex, gender identity, marital, family or part-time status. You will also make sure that anyone acting on your behalf, your employees and sub-contractors involved in the Contract do not do so either, and that those involved in the management or operation of the Contract receive appropriate training on equal opportunities legislation and associated good practice.

- Where relevant to the contract, include performance conditions with which the contractor must comply to ensure that the public authority is able to discharge its general gender equality duty and, where applicable, specific duties.
- Where performance conditions as referred to above are specified in a contract, include performance conditions to ensure compliance where contractors sub-contract the work to third parties.
- 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 duty or specific duties.
- Include terms of contract providing for measures to address breaches of the gender equality conditions. These might include a requirement to develop an action plan to address any shortcomings. Stronger sanctions could include cancellation of the contract, or disqualification from future contracts or from the list of eligible tenderers until remedial action has been satisfactorily demonstrated.

Monitoring and review

- Monitor contractor performance against any gender equality requirements set within the specification, the contract or any supporting documentation.
- Where breaches or underperformance are identified, for example, in reviews, ensure that the contractor agrees and implements an action plan to rectify the issue, or consider other sanctions as above.

General

- Seek legal advice if there is uncertainty as to how the duty might affect the design and process of a particular procurement and to ensure compliance with developments in case law.

Where contractors are subject to the gender duty directly, in tandem with the public authority

- 5.7. 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 duty⁷. In such a case, the public authority which is contracting out services will nonetheless remain subject to the duty and can discharge this duty by:
- ensuring that it has due regard to the need to eliminate unlawful 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

- 5.8. Public authorities may be involved in partnerships in order to better deliver their services – for example, community planning partnerships or regional transport partnerships.
- 5.9. 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. Nevertheless, public authorities that are involved in partnership work with other public authorities, or with private or voluntary sector organisations, are still responsible for meeting their gender duty and any specific duties.
- 5.10. In practice, this will mean that a public authority working within a partnership will need to secure agreement from its partners to arrangements for planning, funding and managing joint work that will allow it to meet its statutory gender duty. Those bodies with duties under the SDA 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.

Gender equality within partnerships

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

⁷ 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.

planning.

The Dundee Partnership is a joint venture that pools together the strengths of key City agencies including Dundee City Council , Scottish Enterprise Tayside, Communities Scotland, Tayside Police, and NHS Tayside.

The partnership has emphasised the importance of equalities by including it as one of its core strategies and activities. The partnership specifically sets 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.'

The partnership uses disaggregated data to inform target setting; for example by identifying lone parent status as an indicator of low income. Lone parents are predominantly women (around 90%) and women generally earn less than men. They found evidence that there are higher numbers of lone parents in their areas of deprivation and therefore this is one of their target groups. They also identify a specific outcome for supporting this target group into employment, with a related outcome of increasing the availability of affordable and accessible childcare.

Chapter 6: Single-sex activities

The legal status of single-sex activities

- 6.1. As mentioned in Chapter 2, public authorities must satisfy themselves that any approach to single-sex activities complies with the Sex Discrimination Act 1975 (SDA). The legal provisions are different for education, for goods, facilities or services, and for public functions. The following paragraphs set out the main considerations, with additional supporting detail in Appendix F.

Single-sex provision in education

S22 and S26 SDA

- 6.2. 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 and students (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.
- 6.3. Single-sex educational establishments are legal, however, and may discriminate in admissions.
- 6.4. 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.
- 6.5. 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.
- 6.6. 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.
- 6.7. Where curriculum choices are 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).

- 6.8. 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.

S47 SDA (margin note)

Positive action in training provided by certain training bodies

- 6.9. 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 the numbers of women doing such work in Great Britain 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.
- 6.10. 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.
- 6.11. 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, for example 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.
- 6.12. The positive action exception does not, however, permit discrimination prohibited by S6 of the SDA relating to applicants or employees and therefore it does not make it lawful to discriminate in recruitment. Any training actually regarded as employment is excluded from the positive action provisions.
- 6.13. See appendix F for positive action provisions relating to training by employers.

Positive action

Breaking the Mould is run by the Raploch Regeneration Project within Stirling Council. It aims to tackle gender imbalance within the construction industry. The initiative is based in the Raploch area of Stirling and aims to encourage women who have experienced long periods of unemployment, or who have been on an extended career break to retrain in plumbing, joinery or painting. The scheme provides 12 unemployed women in the area with 'trade taster' sessions and work experience with a local employer. Women are provided with childcare and one to one support throughout their training.

Kibble Education & Care Centre run the **Men Can Care** project. More than 700 men submitted applications for the 34 training places available. Men Can Care is a 9 month programme of work balanced with a bespoke programme of training in child and youth care designed for men who are interested in working in this sector but who may not have the skills, qualifications or experience to enter the field. The training is delivered by the Scottish Institute for Residential Child Care at Strathclyde University with other elements provided by Kibble Education & Care Centre.

Single-sex provision of goods, facilities or services

S29 SDA (margin note)

- 6.14. It is unlawful for a provider of goods, facilities or services to the public, or a section of it, to discriminate, either directly or indirectly, in the way it treats women or men (subject to the exceptions listed below) by refusing to provide goods, facilities or services, or by providing services that are not of a similar quality, in like manner or on like terms as are normally offered by the provider in question. For example, 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.

S35 SDA (margin note)

- 6.15. It is permissible, however, to limit the provision of facilities or services to one sex in the following circumstances:
- Hospitals or establishments providing special care, supervision or attention. This would apply, for example, to nursing homes or psychiatric institutions. Women's refuges might fall within this exception if they were providing 'special care, supervision or attention' comparable to that provided at a hospital, as would rape crisis centres if they were providing medical or psychiatric care. The provision of housing for women with specific care support needs might also fall within this exception.
 - 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. The criterion of 'embarrassment' is likely to restrict coverage of the exception to situations involving intimate personal matters. Single-sex swimming or exercise sessions could potentially be covered by this section if it could be shown that users are likely to suffer serious embarrassment if users of the opposite sex are present.
 - 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 the opposite sex. This exception is likely to cover sports sessions involving a high degree of physical contact such as judo or wrestling, self-defence classes or group sessions in massage. The 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.

Single sex services

EVA is a multidisciplinary service funded by NHS Lanarkshire to improve service responses to women who have experienced violence at any time in their lives. The service is attached to a Community Health Partnership and provides direct services to women, training and consultancy for staff in the NHS and partner agencies, and contributes to local strategic initiatives to tackle violence against women.

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 provides women with support to deal with their addictions and addresses their offending behaviour. 218 Time Out receives referrals from the courts, procurators fiscal, social workers and the police. It combines a detox facility, residential unit and day programmes, provides support and outreach to health, social work and housing services. 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.

218 Time out was established in recognition of the different pattern of male and female offending and of the lack of success of short prison sentences in tackling offending behaviour and its causes.

Sport and communal accommodation

S44 SDA Sport (margin note)

- 6.16. Competitive sporting activities can be restricted to one sex, where the average woman's physical strength puts her at a disadvantage to the average man. This is intended to allow separate sporting events where the physical differences between women and men 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, for example on the grounds of reasonable objection to physical contact, as detailed above).
- 6.17. 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 s44 and will not be excluded (unless another exception applies, for example a reasonable objection to physical contact).

S46 SDA Communal Accommodation (margin note)

- 6.18. In certain circumstances it is lawful to discriminate in admission to communal accommodation, for reasons of privacy or 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

S21A(1) SDA (margin note)

- 6.19. 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. Case law established, however, that the SDA 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. The law has now changed, and Section 21A amends the SDA so that discrimination or harassment are prohibited when public authorities are carrying out public functions as well as when they are providing services to the public.
- 6.20. 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 a 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 or Scottish Ministers placing a person on the list of individuals who are considered to be unsuitable to work with children).
- 6.21. 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 but will fall under the 'goods, facilities or services' provisions (see above and further below).

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

- 6.22. It can sometimes be difficult to discern if a particular activity falls within s29 (goods, facilities or 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. Although the exceptions within s21A refer to 'services', the vast majority of a public authority's services will fall within s29 (goods, facilities or services) or s22 (education), not s21A. Therefore, public authorities should note that the exemptions below for single-sex provision do not apply to services which fall within s22 or s29 SDA.
- 6.23. In order to determine whether a particular activity falls within s29, the crucial test 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.
- 6.24. 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.

- 6.25. 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.

Single-sex approaches to public functions

S21A(9) (8-13) SDA (margin note)

- 6.26. Discrimination in the exercise of public functions is lawful for:
- the provision of a service 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.
- 6.27. In practice, however, there will only be very limited occasions when a public authority is likely to be justified in exercising s21A functions on a single-sex basis. These might include for example, central government determining policy to address a single-sex issue, such as making policy decisions on allocation of resources for single-sex prisons.

The employment implications of single-sex provision

S7 SDA (margin note)

- 6.28. 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 does not automatically follow that those services should be supplied only by staff of the same sex as the users. In certain cases, the SDA does allow the employment of staff of one sex only as 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.

6.29. The most common reason for restricting a job to one sex only is to preserve decency or privacy because 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).

6.30. Jobs may also be restricted to one sex:

- 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 (or vice versa) due to the degree of physical or social contact with, or knowledge of intimate details available to, the job holder
- where, because of the nature or location of the establishment, it is impractical for the job holder to live elsewhere than in premises provided by the employer, and the only such premises available are lived in, or normally lived in, by men and are not equipped with separate sleeping accommodation for women and sanitary facilities which could be used by women in privacy (or vice versa), and it is not reasonable to expect the employer either to equip the premises with such accommodation and facilities or to provide other premises for women
- where the nature of the place of work requires the job holder to be a man (or woman) because it is part of a hospital, prison or other establishment for men (or women) requiring special care, supervision or attention and it is reasonable having regard to the nature of the establishment that the job should not be held by a woman (or man)
- 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 and the essential nature of the job would be different if it were carried out by a woman (or vice versa)
- 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)
- where the job is one of two to be held by a married couple or civil partners.

6.31. Public authorities wishing to apply a GOQ should first consider their staffing situation overall as the exceptions outlined above will not be available when filling a vacancy if the authority already has sufficient male (or female) employees who are capable of fulfilling the duties in question, whom it would be reasonable to employ on those duties, to meet their requirements without undue inconvenience. GOQs may only be applied on a post-by-post basis and not on a blanket basis. It is recommended 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.

Developments in the law on single-sex activities

6.32. 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 www.womenandequalityunit.gov.uk , the EOC website and, from late 2007, on the CEHR website.

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 those of a public nature. 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 and the HMI inspection agencies);
- 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;
- Independent inspection and audit agencies, such as Audit Scotland, or the Scottish Commission for the Regulation of Care;
- Non-departmental public bodies, such as Scottish Natural Heritage, Sportscotland etc;
- Scottish Enterprise, Highlands and Islands Enterprise and the local enterprise companies.

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 and Wales.

Private bodies carrying out public functions

The Equality Act 2006 is designed to ensure that a wide number of authorities are subject to the gender duty in relation to the performance of public functions. 'Public authority' therefore includes any person who has functions of a public nature. This will 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 that function. These 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 may 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 a body 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.

For example, the following bodies are likely to be deemed to be performing 'functions of a public nature' in relation to their public functions, and therefore subject to the gender equality duty in relation to those functions:

- the privatised utilities
- private security firms managing contracted-out prisons
- GPs when providing services under contract to a Health Board.

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 responsibility for this could rest, depending on the circumstances, with either body. Actual responsibility would depend on the act which is the subject of the complaint, who was responsible for it and who was in breach of the general 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 Scottish Prison Service. Whilst both the prison and the Scottish Prison Service could be challenged in judicial review proceedings, the likelihood is that the Scottish Prison Service 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 it had discharged the duty.

It is recommended that those authorities 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**

S76A(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 Communications 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.

S76A(4) SDA 1975

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

- a function in connection with proceedings in the House of Commons or the House of Lords
- a function in connection with 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.

SCOTTISH STATUTORY INSTRUMENTS

2007 No. 32

EQUAL OPPORTUNITIES

The Sex Discrimination (Public Authorities) (Statutory Duties) (Scotland) Order 2007

<i>Made</i>	<i>30th January 2007</i>
<i>Laid before the Scottish Parliament</i>	<i>1st February 2007</i>
<i>Coming into force</i>	<i>9th April 2007</i>

The Scottish Ministers, in exercise of the powers conferred by section 76C(3) and section 81(4) of the Sex Discrimination Act 1975, and all other powers enabling them in that behalf, having consulted with the Equal Opportunities Commission in accordance with section 76C(5) of that Act, hereby make the following Order:

Citation, commencement and interpretation

1. —(1) This Order may be cited as the Sex Discrimination (Public Authorities) (Statutory Duties) (Scotland) Order 2007 and shall come into force on 9th April 2007.

(2) In this Order—

"education authority", "grant-aided school", "independent school", "pupil", "school age" and "school education" have the meanings respectively given by section 135 of the Education (Scotland) Act 1980;

"listed authority" means a public authority listed in either of Parts I or II of the Schedule to this Order;

references to "150 full-time staff" are references to such number of staff as would, if the hours they work were aggregated, amount to 150 staff working on a full-time basis;
"relevant Scottish authority" has the meaning contained in section 76C(9) of the Sex Discrimination Act 1975;

"Scheme" means a gender equality scheme prepared in accordance with article 2;
"school" has the meaning given by section 135 of the Education (Scotland) Act 1980, and includes a place (other than a school as so defined) at which an education authority provides school education for pupils who are under school age, but excluding—
(a) any independent school; and

(b) such a place (other than a school as so defined) at which school education is being provided by a person with whom that authority has, by virtue of section 35 of the Standards in Scotland's Schools etc. Act 2000 entered into arrangements for the provision of that education; and

"section 76A(1) duty", in relation to a public authority, means its duty under section 76A(1) of the Sex Discrimination Act 1975 (public authorities: general statutory duty);

"staff" includes any person treated as an employee for the purposes of Part 2 of the Sex Discrimination Act 1975 (Employment Field).

Preparation and publication of a gender equality scheme

2. —(1) A listed authority shall, on or before 29th June 2007, prepare and publish a Scheme which shows how it intends to fulfil its section 76A(1) duty and its duties under this Order.

(2) In preparing a Scheme, a listed authority shall consult staff, service users and others (including trade unions), who appear to that authority to have an interest in the way the authority carries out its functions.

(3) In preparing a Scheme, a listed authority shall take into account any information it has gathered of the kind described in paragraph (6)(a) and any other information the authority considers to be relevant to the performance of its section 76A(1) duty and its duties under this Order.

(4) A listed authority shall ensure that its Scheme sets out the overall objectives which that authority has identified as being necessary for it to perform its section 76A(1) duty and its duties under this Order.

(5) A listed authority shall, when formulating its objectives for the purposes of paragraph (4), consider the need to have objectives that address the causes of any differences between the pay of men and women that are related to their sex.

(6) A listed authority shall ensure that its Scheme sets out the actions which that authority has taken or intends to take to—

(a) gather information on the effect of its policies and practices on men and women and in particular—

(i) the extent to which they promote equality between male and female staff, and

(ii) the extent to which the services it provides and the functions it performs take account of the needs of men and women;

(b) make use of such information, and any other information the authority considers to be relevant, to assist it in the performance of its section 76A(1) duty, its duties under this Order and in particular its regular review of—

(i) the effectiveness of the actions identified for the purposes of sub-paragraph (e), and

(ii) its arrangements for the preparation of subsequent Schemes;

(c) assess the impact of its policies and practices, or the likely impact of its proposed policies and practices, on equality between women and men and (so far as reasonable and practicable to do so) to have due regard to the results of such assessments of impact;

(d) consult relevant staff, service users and others (including trade unions); and

(e) achieve the fulfilment of the objectives set out for the purposes of paragraph (4).

Implementation of the gender equality scheme

3. —(1) A listed authority shall within the period of three years beginning with the date when a Scheme or a revised Scheme is prepared and published for the purposes of articles 2 or 4 put into effect the actions identified for the purposes of article 2(6)(a), (b) and (e).

(2) Nothing in this article imposes any requirement on a listed authority where, in all the circumstances, it would be unreasonable or impracticable for it to perform the requirement.

Review of a gender equality scheme

4. A listed authority shall review its Scheme and prepare and publish a revised Scheme—
(a) not later than the end of the period of three years beginning with the date of publication of its first Scheme; and

(b) subsequently at intervals of not more than three years beginning with the date of publication of the last revision of a Scheme.

Annual reporting

5. —(1) A listed authority shall publish reports summarising the actions that the authority has taken towards the achievement of the objectives identified for the purposes of article 2(4)—
(a) not later than the end of the period of one year beginning with the date of publication of its first Scheme; and

(b) subsequently at intervals of not more than one year beginning with the date of publication of the last report.

(2) Such an authority may comply with the duty to publish under paragraph (1) by setting out its report within another published document.

Preparation and publication of an equal pay statement

6. A listed authority which has at least 150 full time staff in total shall, on or before 28th September 2007, prepare and publish an equal pay statement which states that authority's policy on equal pay between men and women.

Review of an equal pay statement

7. Where a listed authority is required to publish an equal pay statement in terms of article 6, the authority shall review its equal pay statement and publish a report on its equal pay policy—
(a) not later than the end of the period of 3 years beginning with the date of publication of its first equal pay statement; and

(b) subsequently at intervals of not more than 3 years beginning with the date of publication of the last revision of the equal pay statement.

Publication of a gender equality scheme and equal pay statement

8. A listed authority may comply with the duties to publish under articles 2, 4, 6 and 7 by setting out its Scheme or equal pay statement as part of another published document or within a number of other published documents.

Duty on the Scottish Ministers

9. —(1) The Scottish Ministers shall publish reports—

(a) not later than 1st July 2010; and

(b) subsequently not later than the end of each successive period of 3 years beginning with 1st July 2010.

(2) These reports shall—

(a) set out the priority areas across the functions and activities of relevant Scottish authorities that the Scottish Ministers have identified for the advancement of equality of opportunity between men and women in Scotland; and

(b) provide an overview of progress in those priority areas toward equality of opportunity between men and women.

School education bodies and persons

10. A body or person specified in Part II of the Schedule shall make arrangements for each school under its management to—

(a) gather information on the effect of its policies and practices in relation to the extent to which they promote equality between male and female pupils;

(b) assess the impact of its policies and practices, or the likely impact of its proposed policies and practices, on equality between male and female pupils;

(c) provide such a body or person with an annual report in respect of the matters contained in paragraphs (a) and (b);

(d) carry out such steps which that body or person proposes to take toward the fulfilment of its section 76A(1) duty; and

(e) maintain a copy of the Scheme.

RHONA BRANKIN

A member of the Scottish Executive

St Andrew's House, Edinburgh

30th January 2007

Appendix D: **Public authorities subject to the specific duties**

As set out in the Schedule to the Sex Discrimination Act 1975 (Public Authorities) (Statutory Duties) (Scotland) Order 2007:

PART I

The Accounts Commission for Scotland

Audit Scotland

The Board of Trustees for the National Galleries of Scotland established under section 3 of the National Galleries of Scotland Act 1906

The Board of Trustees of the National Museums of Scotland established by the National Heritage (Scotland) Act 1985

Bòrd na Gàidhlig

The Cairngorms National Park Authority established under section 6 of the National Parks (Scotland) Act 2000

A Chief Constable of a police force maintained under section 1 of the Police (Scotland) Act 1967

A Chief Officer of a relevant authority appointed under section 7 of the Fire (Scotland) Act 2005

A council constituted under section 2 of the Local Government etc (Scotland) Act 1994

Fundable Bodies as specified in schedule 2 to the Further and Higher Education (Scotland) Act 2005

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

A joint fire and rescue board constituted by a scheme under section 2(1) of the Fire (Scotland) Act 2005

The Keeper of the Records of Scotland

The Keeper of the Registers of Scotland

The Law Society of Scotland, in respect of its public functions

Learning and Teaching Scotland

A licensing board constituted under section 1 of the Licensing (Scotland) Act 1976

The Loch Lomond and the Trossachs National Park Authority established under section 6 of the National Parks (Scotland) Act 2000

The managers of a central institution within the meaning of section 135 of the Education (Scotland) Act 1980

The Mental Welfare Commission for Scotland

NHS National Services Scotland

A police authority established under section 2 of the Police (Scotland) Act 1967

The Registrar General of Births, Deaths and Marriages for Scotland

The Scottish Arts Council

The Scottish Commission for the Regulation of Care

Scottish Enterprise and Highlands and Islands Enterprise established under the Enterprise and New Towns (Scotland) Act 1990

The Scottish Further and Higher Education Funding Council

The Scottish Legal Aid Board

The Scottish Ministers

Scottish Natural Heritage

The Scottish Qualifications Authority

Scottish Screen

The Scottish Social Services Council

The Scottish Sports Council

The Scottish Tourist Board

Scottish Water

A Special Health Board constituted under section 2 of the National Health Service (Scotland) Act 1978

Transport Partnerships established under section 1 of the Transport (Scotland) Act 2005

The Trustees of the National Library of Scotland, constituted under section 1 of the National Library of Scotland Act 1925

PART II

Education authorities

The managers of a grant-aided school

Appendix E: The meaning of unlawful discrimination - a brief overview of the Sex Discrimination Act 1975 and Equal Pay Act 1970

The Sex Discrimination Act 1975 (SDA) prohibits discrimination against individuals in the areas of employment and vocational training, education, in the provision of goods, facilities or services, in the disposal or management of premises and in the exercise of public functions. It also prohibits discrimination in employment and vocational training against married people and civil partners, and people who have undergone, or who are undergoing or are intending to undergo, gender reassignment.

Victimisation because someone has tried to exercise their rights under the SDA or the Equal Pay Act 1970 (EqPA) 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?

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 have been treated, because of her (or his) sex.

Indirect discrimination

In the fields of employment and related fields⁸, in relation to barristers/advocates and in relation to vocational training (as set out in Part III of the SDA), indirect discrimination will occur 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); it puts the particular woman complainant at that disadvantage, and is such that the discriminator cannot show it to be a proportionate means of achieving a legitimate aim.

In all other sections of the SDA - relating to the fields of the exercise of public functions, education and goods, facilities or services (except those which relate 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 (or vice versa), and it is not justifiable, irrespective of sex, to apply that requirement or condition, and it is to the particular 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.

⁸ The SDA sets out particular provisions relating to the employment field covering: employers, contract workers, office holders, 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 gender reassignment. These prohibitions apply in relation to employment and related fields, discrimination by, or in relation to, advocates, and in vocational training (including further and higher education) as set out in Part III of the SDA. From December 2007, the SDA will be amended to implement the Goods and Services Directive 2004/113 and discrimination on the grounds of gender reassignment will then be expressly prohibited in goods and services.

Discrimination on the grounds of pregnancy or maternity

Less favourable treatment on the grounds of pregnancy, including pregnancy-related sickness, and maternity has been found by the courts to amount to direct discrimination. In the employment field, in vocational training and in relation to advocates, express provisions apply and these are set out in Part I of the SDA. From December 2007, the SDA will be amended to implement the Goods and Services Directive 2004/113 and discrimination on the grounds of pregnancy or maternity will then be expressly prohibited in goods and services.

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, EqPA, Part 1 of Schedule 5 to 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.
- 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 whether or not the original allegation of discrimination was true. The protection will not apply, however, if the allegation was false and not made in good faith. Victimisation is prohibited across all the activities covered by the SDA.

Harassment and sexual harassment in employment and related fields, and in vocational training (including further and higher education)

The SDA expressly prohibits harassment on grounds of sex, harassment on grounds of gender reassignment and sexual harassment in employment and related fields and in vocational training (including further and higher education). This includes, for example, harassment of employees, contract workers, office holders and students; harassment by qualifying bodies in relation to qualification or disqualification; and harassment by trade unions. This applies whether the harassment occurs before (in the case of applicants for work etc.), during or after the relationships between individuals and these bodies have come to an end.

'Harassment' is defined as unwanted conduct which takes place simply because someone is a woman or a man, and has the purpose or effect of violating that woman's (or that man's) dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her (or him). An example of this might be a man who objects to a woman undertaking a particular type of work that has traditionally been done by men and who continually belittles her ability to do the job. It is conduct on the ground of a person's sex which is not necessarily of a sexual nature. Harassment on the grounds that a person intends to undergo, is undergoing or has undergone gender reassignment is also expressly prohibited.

'Sexual harassment' occurs when a person engages in any form of unwanted verbal, non-verbal, or physical conduct of a sexual nature, which has the purpose or effect of violating that woman's (or that man's) dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her (or him). This would include a person making unwelcome sexually explicit comments or being verbally abusive in a sexually charged way, sending sexually explicit emails, displaying sexually explicit posters or inappropriate physical contact.

Unwanted conduct is only regarded as violating someone's dignity or as creating an intimidating, hostile, degrading, humiliating or offensive environment if, having regard to all the circumstances, including in particular the perceptions of the woman or man claiming that they have been harassed, it should reasonably be considered as having that effect. It has been recognised that it is of particular importance to take account of the reasons why a person is claiming they have been harassed, and in the majority of circumstances, the complainant's view will be the key factor. The complainant's perception will not be the only factor, however, and a tribunal will consider all the facts in the case before deciding whether unlawful harassment has in fact taken place.

The SDA also makes it unlawful to treat someone less favourably because they have rejected or submitted to harassment as defined above - for instance, refusing someone a job or a housing benefit application because they would not submit to particular unwanted conduct, or refusing someone promotion or a visiting order while in custody because they did submit to it.

Harassment and sexual harassment in the exercise of public functions

The express harassment and sexual harassment definitions in the SDA (apart from those relating to gender reassignment) also apply in the prohibition on harassment in the exercise of public functions.

Harassment and sexual harassment in schools, the provision of goods, facilities or services, and in the disposal or management of premises

The express provisions described above, addressing harassment in the areas of employment and vocational training (including further and higher education), do not apply to harassment in schools, in the provision of goods, facilities or services, or in the disposal or management of premises. However, the courts have determined that harassment is a form of direct discrimination (where the offending conduct constitutes less favourable treatment on the ground of sex than that which has or would have been afforded to someone of the opposite sex) and therefore it is also prohibited in these areas.

A school, provider of goods, facilities or services or public authority landlord etc. will be liable for any acts of unlawful sex discrimination done by its employees in the course of their employment or by its agents, whether or not they were aware of such acts, unless they have taken such preventative measures as are reasonably practicable.

In addition, where harassment is carried out by a person who is not an employee or agent of such a body, in circumstances closely connected to their activities (for example, a student harassing a fellow student or tenant harassing his neighbour, where both are tenants of the same public authority landlord), such a body may in some circumstances be liable for the harassment, in failing to take steps to prevent the recurrence of known harassment, if they did or would have taken action in relation to harassment of a complainant of the opposite sex.

From December 2007, harassment, sexual harassment and gender reassignment harassment will be expressly prohibited in relation to the provision of goods and services when the Goods and Services Directive 2004/113 is implemented into domestic legislation. Public authorities will need to ensure that their policies and procedures take these new provisions into account.

Discrimination in the employment field against married persons or civil partners

It is unlawful for an employer to discriminate against a married person or civil partner in relation to:

- recruitment (although in very limited circumstances discrimination will be lawful if one of the defined genuine occupational requirements applies, for example the job needs to be held by a man to preserve privacy or 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 EqPA)
- dismissal.

Discrimination against non-employees and ex-employees

The SDA was amended in July 2003 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 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.

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 or 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 and 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 or services and premises.

Positive action

Positive discrimination to favour one sex is unlawful. There are limited exceptions, however, 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 (EqPA) (read in the light of Article 141 of the Treaty establishing the European Community) gives an individual a right to the same contractual pay and benefits as a person of the opposite sex in the same employment, or where the source of the pay is the same, 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 material factor other than one which is attributable to direct or indirect sex discrimination.

Indirect sex discrimination would occur where the difference in pay and benefits is due to a condition or practice which applies equally 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 EqPA applies to England, Wales and Scotland.

To whom does EqPA apply?

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

The EqPA 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 the legal position on single-sex activities

Education

S22 SDA (margin note)

It is unlawful for an educational establishment⁹ to discriminate against a woman (or man) in the terms upon which it offers admission as a pupil or student; 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.

S23, S23A, S23BA and S23D SDA (margin note)

It is unlawful for education authorities to discriminate on grounds of sex in carrying out any of their functions under the Education Acts¹⁰ which do not fall within section 22 above, such as in awarding discretionary educational grants. The Scottish Further and Higher Education Funding Council may not discriminate in its functions.

S25 and S25A SDA (margin note)

There is a duty on specified educational establishments¹¹ and education authorities 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.

Exceptions to the prohibition of discrimination in education

S26, S27 and Schedule 2 SDA (margin note)

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.¹²

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).

⁹ See section 22 SDA for list of educational establishments covered by this provision.

¹⁰ Including the Education (Scotland) Act 1980

¹¹ See s25(6) SDA for list of bodies affected.

¹² Even where they admit comparatively small numbers of the opposite sex as boarders.

Positive action in access to facilities for training by employers

S48 SDA (margin note)

In certain circumstances the SDA allows employers to afford only their female employees 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*. Employers may only take these steps, however, where the number of women doing that particular work was comparatively small at any time in the previous twelve months. This provision applies equally to men where they are under-represented 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 under-represented, 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.

Exceptions in communal accommodation and management of premises

S46 SDA (margin note)

It is lawful to discriminate in the admission to communal accommodation¹³ 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 or 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.

Section 31 SDA - Discrimination: consent for assignment or sub-letting.

¹³ Being residential accommodation used by women only, or men only, for reasons of privacy or decency as it includes shared sleeping accommodation, or because of the nature of the sanitary facilities.

It is unlawful to discriminate in granting licences or tenancies. This does not apply, however, where the landlord or a near-relative of his resides in the premises.

Public authorities which are excluded from the prohibition on discrimination and harassment when carrying out public functions

Section 21A(3) SDA (margin note)

The prohibition on discrimination and harassment in the exercise of public functions does not apply to the following areas, in addition to those set out in Chapter 6:

- the House of Commons
- the House of Lords
- the Security Service
- the Secret Intelligence Service
- the Government Communications 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.

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

Assessment of compliance

S32 Equality Act 2006 (margin note)

From late 2007, the CEHR can assess what steps a public authority has taken to comply with the duty to eliminate unlawful discrimination and harassment, to promote equality of opportunity between men and women and with any relevant specific duties.

Terms of reference

Schedule 2 paragraph 4, Equality Act 2006 (margin note)

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 2006 (margin note)

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.

Where appropriate, however, 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 2006 (margin note)

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. The Commission cannot, however, 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 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 sheriff, on the application of the recipient of the notice, if the 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, the Commission can apply to the county court (or sheriff in Scotland) for an order requiring the person to take specified steps 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 (i.e. all other grounds apart from those set out in paragraph 14(1)) a person may apply to the Court of Session to have a notice cancelled.

Reports and recommendations

Schedule 2 paragraphs 15 - 16, Equality Act 2006 (margin note)

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 2006 (margin note)

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 2006 (margin note)

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