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Deciding whether to provide single- or separate-sex services under the Equality Act 2010 ("EqA"): a framework

The EqA

The EqA applies to service providers (**s29**), associations (**s101**), and public authorities and organisations exercising a "public function" (**s150**). The Equality and Human Rights Commission (**EHRC**) produces the Services Code, statutory guidance summarising the provisions relevant to those bodies which – while not the law – must be taken into account by the courts and tribunals.[1]

(The EqA also applies to employers, as summarised in the EHRC's Employment Code. Employment is not covered in this checklist.)

The EqA makes it unlawful to discriminate on the basis of nine protected characteristics, including sex and gender reassignment (**s4**). It prohibits:

- direct discrimination (**s13**) – which is only lawful if a statutory exception applies;
- indirect discrimination (**s19**) – only lawful if it is a "*proportionate means of achieving a legitimate aim*";
- harassment (**s26**) and victimisation (**s27**) – never lawful.

Providing separate- or single-sex services or facilities is on its face direct sex discrimination. But the EqA contains specific exceptions confirming that it is lawful to limit provision on the basis of sex in various scenarios (**schedule 3, paras 26-27**) (see below). *For Women Scotland v the Scottish Ministers* held that "sex" in this context means "biological sex" (or sex assigned at birth).[2]

The EqA also contains general exceptions allowing direct discrimination - for example: it is lawful to take a proportionate "positive action" to help a group with a particular protected characteristic (**s158**); an association is allowed to limit its membership to people with a certain protected characteristic (**schedule 16, para 1**); and sporting competitions are allowed to be divided on the basis of sex where one sex has a particular advance (a "gender-affected" sport) (**s195**).

If you are considering providing a service or facility on a single- or separate-sex basis, the below framework will help to direct your thinking as to whether or not doing so is lawful.

Q1: are you a service provider and/or a body exercising a public function?

Are you an individual or organisation providing a service to the public (or a section of the public), whether for payment or for free? "Service providers" is interpreted broadly and includes e.g. pubs, restaurants, shops (including online), hotels, private educational establishments, entertainment venues, professional or trade services, and providers of goods and facilities (including any ancillary facilities connected to a main service – including e.g. scholarships and the awarding of grants). The EHRC's Services Code discusses "what a service is" at s11.4 – 11.12.

[1] EHRC: Statutory Code of Practice
[2] For clarity we have adopted that language in this note.

And/or are you a public body / providing a service on behalf of the state - e.g. are you central Government, a local authority, an NHS Trust, a regulator, or commissioned by one of those to provide a service on their behalf?

If you are acting in one (or both) of those capacities, you are bound by the EqA and must not discriminate in the way you provide the service.

Q2: is this the kind of service that can, in principle, be provided on the basis of biological sex?

The EqA sets out (at schedule 3) various scenarios in which it will be lawful to provide a service to one sex only, or to both sexes separately (i.e. where it will not be unlawful discrimination to exclude the opposite sex).

The exceptions apply where:

- a mixed-sex service would be less effective, or there are different levels of demand between men and women (s26);
- only one sex needs the service (s27(2));
- the service is provided at a hospital or in another care setting (s27(5));
- service users might reasonably object to the presence of a person of the opposite sex (s27(6));
- there is likely to be physical contact between the service user and another person (s27(7)).

In all cases, the limited provision must be a proportionate means of achieving a legitimate aim.

For Women Scotland confirmed that:

- all of these conditions should be assessed on the basis of biological sex – a trans-inclusive service is not single-sex for these purposes; and
- in some cases it might be not just permissible, but required, to provide a service on the basis of biological sex – e.g. it might unlawfully discriminate against cis women to provide such services on a trans-inclusive / mixed-sex basis (see Q3).

If none of the schedule 3 exceptions apply, providing a service on the basis of biological sex would likely be unlawful discrimination against the excluded sex, and it would be safer to provide it on a mixed-sex basis.

Q3: what does proportionality require?

Even if the schedule 3 exceptions do apply (in principle) to your service, your approach still has to be a proportionate means of achieving a legitimate aim. It will be necessary to consider and weigh various factors, e.g.:

- what will the impact be on cis members of the opposite sex who are excluded (e.g. cis men who are excluded from a women's service)? Do they need this kind of service, and if so is alternative provision available to them?

- is this a "sensitive" service where women's privacy, dignity or safety are considered to be engaged - like a toilet, a changing room, a refuge, or a hospital ward? For "sensitive" services, it is likely that biologically single-sex provision will be considered proportionate by the Court – and indeed might be considered necessary, to avoid discriminating against cis women – though you will also need to consider making additional provision for trans people. (A similar analysis would apply if the service constitutes a "gender-affected sport".)

- what will the impact be on trans people? Will additional provision be made, so that trans people are not left with no (or no appropriate) provision?[3] If not, the arrangements may not be proportionate. Even where some form of biologically separate- or single-sex provision is required, it is a floor not a ceiling – providers can go beyond it (for example by providing additional trans-inclusive / mixed-sex facilities, or individual lockable rooms available to all.)

- what will your policy be in relation to trans people of the included biological sex? E.g. will you reserve the right to exclude trans men from a service for (biological) women, on the basis that their presentation is likely to cause discomfort or distress (an issue most likely to arise in relation to the kind of "sensitive" services discussed above)?

- will there be any impact on people with other protected characteristics – e.g. an impact on disabled people if you repurpose an accessible toilet to use as a gender-neutral toilet?

- how realistic is it - in terms of your financial resources, space, control over the physical estate, etc - for you to offer a range of provision? It is, in general, accepted that compliance with the EqA will look different for smaller organisations than for large ones, and we expect that Courts / Tribunals will try to take a pragmatic approach.

- what are the views / preferences of your current service users? Again, the Courts' approach to this is yet to be tested, but this factor may be particularly significant where organisations are forced – due to insurmountable restrictions on space, funds etc – to risk discriminating against someone, e.g. because they cannot provide both biologically separate-sex retail changing rooms and additional facilities for trans people. In that scenario, it may be relevant if e.g. the provider had surveyed their service users and found that the majority were happy with a trans-inclusive approach.

You may conclude – particularly if the service in question is a "sensitive" one – that you are allowed, or required, to make some form of biologically separate- or single-sex provision in accordance with schedule 3, potentially alongside additional mixed-sex / trans-inclusive provision (for example, men's and women's changing rooms provided on the basis of biological sex, with additional individual lockable rooms available to all).

[3] It appears that non-binary people do not, after *For Women Scotland,* have the protected characteristic of gender reassignment, so are not protected from discrimination on that basis, but you can still consider their needs as part of this assessment.

In some cases it may be proportionate for the main service to be trans-inclusive / mixed-sex, with a smaller additional service provided on a biological sex basis for those who want it (for example, a daily trans-inclusive yoga class for women, with a weekly class for biological women only).

Alternatively, you may conclude that you cannot, or are not required to, make any provision on the basis of biological sex, and choose instead to provide fully trans-inclusive services for men and women (which for EqA purposes will be mixed sex), or a fully inclusive, mixed-sex service for everyone.

Q4: additional considerations

- If you are providing a biologically separate- or single-sex service, consider how it will be explained to staff / service users, and how it will be monitored. It is unlikely to be lawful to ask someone to confirm that they are of the eligible sex, unless there is clear evidence that persons of the ineligible sex are using the service. In relation to ancillary facilities such as toilets, it is unlikely ever to be appropriate to ask (and doing so may constitute discrimination / harassment). But staff (and service users) should be clear on what the policy is.

- How will you record / act on complaints or concerns? It will be important to be able to track, and act on, issues that arise, both in relation to alleged use of the service by the ineligible sex, and in relation to alleged harassment of service users.

- Charities will be subject to particular duties to comply with their objects, and will need to give careful consideration to their approach if their objects mention sex or gender.

These assessments will turn on their own facts, and will often be finely-balanced. There is no outcome that is guaranteed to be lawful or to carry no legal risk. The chances of achieving such an outcome are, however, substantially improved by following a thorough process, considering all of the questions outlined above and recording your analysis.

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