

Women's Legal Landmarks

*Celebrating the History of Women and Law
in the UK and Ireland*

Edited by
Erika Rackley
and
Rosemary Auchmuty

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Sex Discrimination Act 1975

ANNE MORRIS*

It would seem axiomatic that a collection of Women's Legal Landmarks would include the Sex Discrimination Act 1975. The Act is undoubtedly of symbolic and legal significance for women but it is not without its critics. Indeed, even the White Paper that preceded the Act, *Equality for Women*, cautioned against expecting too much:

It is important to recognise the inevitable restraints on what can be achieved by legislation, so that it is seen in proper perspective, without arousing false expectations or encouraging a sense of complacency.¹

Despite its limitations, the Sex Discrimination Act 1975 (SDA) deserves its place as a landmark both as a valuable measure in its own right and as an important marker on the road to modern anti-discrimination laws. It is, moreover, another example of what can be achieved when campaigners and law-makers are united in the desire to produce social change.

I. Context

When the Sex Discrimination Act was passed in 1975 it was intended to counteract the pervasive and blatant discrimination that women faced in all aspects of their lives including employment, education, finance and housing. In employment, discrimination against women extended through pay, recruitment, training, promotion, and dismissal.² The number of women (particularly married women) in employment had been steadily increasing, but they remained concentrated in lower-paid occupations and most worked part-time with all the adverse consequences that had for pay and pensions.³ The expectation that men were the breadwinners persisted, and a woman could be refused a job simply because the employer would prefer a man.⁴ There were still laws that restricted women's permissible occupations and hours of work,⁵ while the professions remained hostile to women: *Equality*

* The author would like to thank Susan Atkins for her insightful comments on an earlier draft.

¹ Home Office, *Equality for Women* (Cmnd 5724, 1974) [21].

² *ibid* [8]–[9].

³ Gill Court, *Women and the labour market: two decades of change and continuity* (Institute of Employment Studies, 1995).

⁴ For an example of this after the Act see *Whitehouse v Highland Regional Council*, S/4479/77.

⁵ See eg section 86 of the Factories Act 1961.

for Women noted that there had been little improvement in the proportion of women in the professions since the **Sex Disqualification (Removal) Act 1919**.⁶

Outside of paid work, a woman seeking financial independence would discover that if she was single it was difficult to get a loan because of the assumption that she did not have long-term job prospects. If married she would find that she needed her husband's signature to guarantee even minor hire purchase payments⁷ and her income was unlikely to be considered equally with her husband if they were seeking a mortgage.⁸ The attitude that women were subordinate to men in financial affairs – indeed, hardly to be trusted – is evident in a decision made just before the Sex Discrimination Act 1975 came into force. In a case concerning a property purchase, the judge, Caulfield J (as summarised by the *Times Law Reports*), held that

Even in present times, when there was a movement by women for equality with men, a sensible wife did not generally make the major decisions. Most wives sensibly left such decisions to their husbands. A solicitor should not take instruction from a wife where a husband was available.⁹

It was against this background that demands grew for legislation to combat sex discrimination. Although not everyone was (or is) convinced by the usefulness of legislation to achieve equality,¹⁰ the 1960s witnessed new attempts at using law to prohibit discrimination. The initial focus was race discrimination¹¹ and in some ways this worked to the advantage of those campaigning for sex equality laws. Lessons were learned from the shortcomings of the earlier race legislation and some of the prime movers in the political sphere, such as Roy Jenkins (Home Secretary 1965–67 and 1974–76) and Anthony Lester (Jenkins' special adviser at the Home Office with responsibility for equality legislation), were able to capitalise on that experience. A number of factors contributed to the willingness to legislate. The imminent entry of the United Kingdom into the European Economic Community (EEC) meant, for example, that the campaign for the Equal Pay Act 1970 was helped on its way by the need to comply with Article 119 of the Treaty of Rome, requiring pay equality between the sexes.¹² The Equal Pay Act did not, however, address the inequalities arising outside contractual terms of employment, and the EEC was turning its attention to a broader Directive calling for equal treatment between the sexes in areas including employment and training, promotion and working conditions.¹³ Quite apart from the European influence, pressure for legislation wider in scope than the Equal Pay Act was growing, not least from the Women's Liberation Movement (WLM). Two of the four initial demands of the first WLM conference in 1970 were for equal pay and equal educational and employment opportunities.¹⁴ In March 1971, in what was described as the first national women's

⁶ n 1 above, [11].

⁷ See eg 'Sex Discrimination in practice' (1974) 28 *Spare Rib* 20.

⁸ n 1 above, [15].

⁹ *The Times*, Law Report, 21 November 1975, 14.

¹⁰ For a contemporary view see Elizabeth Vallance, 'Equality for Women: a note on the White Paper' (1975) 46(2) *Political Quarterly* 201.

¹¹ Race Relations Acts 1965 and 1968.

¹² See further **Dagenham Car Plant Strike, 1968**.

¹³ Eventually, Council Directive 76/207/EEC (Equal treatment of men and women).

¹⁴ See British Library, 'Women's liberation: a national movement' (Sisterhood and after, 8 March 2013): <https://www.bl.uk/sisterhood/articles/womens-liberation-a-national-movement>.

demonstration since the suffragettes, 4,000 WLM supporters marched through London and presented a petition to Downing Street, outlining their demands.¹⁵

In Parliament, Private Members' Bills were unsuccessfully attempted by Joyce Butler, William Hamilton and Baroness Seear, but the referral to a House of Lords Select Committee of Baroness Seear's Bill meant that the then Conservative Government was presented with compelling evidence of widespread sex discrimination, and the Government drew up its own proposals in 1973.¹⁶ The Labour Government that came to power in 1974 took up the proposals and widened them. In 1974 it produced the White Paper, *Equality for Women*. Between its publication and the introduction of the Sex Discrimination Bill the proposals had been widened further in response to public consultation and, crucially, included reference to 'indirect' discrimination. Introducing the second reading of the Bill, the Secretary of State for the Home Department, Roy Jenkins, stated: 'The unequal status of women in our society is a social evil of great antiquity. Its causes are complex and rooted deeply in tradition, custom and prejudice.'¹⁷ In seeking to address that evil, the Sex Discrimination Act was, clearly, an ambitious measure.

II. The Landmark

The Sex Discrimination Act 1975 came into force along with the Equal Pay Act 1970 on 29 December 1975. Within its scope were employment, education, goods, facilities, services and premises. In the employment context, it extended to employers and to bodies such as trade unions, employment agencies and vocational training bodies. It outlawed certain discriminatory practices such as advertisements using job descriptions with a sexual connotation (such as waiter, salesgirl or stewardess).¹⁸ The Act also set up mechanisms for enforcement of the law. These included the right of an aggrieved individual to take a complaint to an Industrial (now an Employment) Tribunal. Significantly, however, enforcement was also to be in the hands of a new body, the Equal Opportunities Commission (EOC). The Commission's duties included working towards the elimination of discrimination and the promotion of equality between men and women. In order to fulfil those duties, it was given a number of powers including providing assistance to those bringing a complaint, but the power that initially appeared to offer a real opportunity for the promotion of sex equality was the ability of the EOC to conduct formal investigations and where appropriate to issue legally enforceable non-discrimination notices.¹⁹ The Act thus relied on a two-pronged approach: individual complaints and institutional enforcement.

In pursuit of equality, the Act set out the kind of behaviour that would be unlawful. It applied equally to men and women, making it unlawful to discriminate against either sex 'on the ground of' sex. It extended its coverage to 'marital status' but only in the employment field and only to those who were married, not those who were single.²⁰ It established

¹⁵ (1978) 69 *Spare Rib* 41.

¹⁶ See WB Creighton, *Working Women and the Law* (Mansell, 1979) 152.

¹⁷ HC Deb, 26 March 1975, vol 889 col 511.

¹⁸ SDA 1975, s 38.

¹⁹ SDA 1975, ss 57–61.

²⁰ SDA 1975, s 3. Thus in *Bick v Royal West of England School for the Deaf* [1976] IRLR 326, it was not unlawful to discriminate against a woman who was about to be married.

three statutory forms of discrimination which came to be known as direct and indirect discrimination and victimisation. Direct discrimination occurred where a person treated a woman less favourably than he treated or would treat a man, on the ground of her sex.²¹ A person would *indirectly* discriminate against a woman if he applied to her a requirement or condition which applied equally to a man but which was such that the proportion of women who could comply with it was considerably smaller, which could not be justified, and which was to her detriment.²² Victimisation occurred where a person treated another less favourably because the victim had alleged a breach of the Act, brought proceedings under the Act or assisted someone else to do so.²³ Having set out the meaning of discrimination, the Act then went on to set out when it would be unlawful in the different areas covered by the law. In employment, for example, section 6 made it unlawful to treat women less favourably in recruitment, terms of employment, and opportunities for training. It was unlawful to refuse to employ someone because she was a woman, or to dismiss her for that reason.

It seemed that the Act had the potential to make a real difference. It must be borne in mind, however, that it contained a number of important exceptions. It excluded, for example, employers with fewer than five employees.²⁴ More significantly it did not cover employment benefits relating to death and retirement meaning that sex discrimination in social security benefits and pensions was, for the time being, untouched.²⁵ The Act also contained an exemption where it could be shown that being a man was a 'genuine occupational requirement' for the job.²⁶ This included jobs restricted to men because of laws regulating the employment of women. In other words the SDA left in place, for the time being, the 'protective' legislation that restricted the job opportunities of women.²⁷

III. What Happened Next

Nobody would expect the Sex Discrimination Act to have had an immediate effect. Prejudices were too deeply ingrained to expect that they would vanish with Royal Assent. Nevertheless, the pace of change was still a disappointment to many. The Act's shortcomings also became apparent. Its underlying principle was that women should be treated in the same way as a man in the same circumstances,²⁸ an approach that ignores the systemic inequalities in education and in family structures which prevent women competing on equal terms with men. It also ignores that fact that only women experience pregnancy and childbirth. The SDA had no provisions dealing specifically with pregnancy and the courts initially held that a woman who was dismissed because she was pregnant could not bring a sex discrimination claim because there was no man with whom she could be compared.²⁹

²¹ SDA 1975, s 1(1)(a).

²² SDA 1975, s 1(1)(b).

²³ SDA 1975, s 4.

²⁴ SDA 1975, s 6(3)(b). This was subsequently repealed in the SDA 1986.

²⁵ SDA 1975, s 6(4).

²⁶ SDA 1975, s 7.

²⁷ This was not addressed until the Sex Discrimination Act 1986.

²⁸ SDA 1975, s 5.

²⁹ *Turley v Allders Department Stores* [1980] IRLR 4. But see: Case C-177/88 *Dekker v VJV Centrum* [1992] ICR 325; *Webb v EMO Air Cargo (UK) Ltd* [1995] ICR 1021. See now section 18 of the Equality Act 2010.

Another omission was that the Act did not refer to sexual harassment and so it was necessary to bring a complaint within direct discrimination: that is, less favourable treatment on the ground of sex. This could be problematic, as seen in a case where a woman objected to a display of 'pin-ups'. It was held that a man might have been equally offended and therefore there was no sex discrimination.³⁰ Perhaps, however, one of the greatest disappointments in the aftermath of the legislation was the ineffectiveness of the legal powers of the EOC to conduct formal investigations.³¹ There are many reasons why the EOC failed to seize the opportunity granted by the SDA, including the complexity of such investigations, although that complexity was largely foisted on them by the procedural requirements imposed by judges who were hostile to the idea of institutional enforcement,³² preferring to leave the implementation of the law to individual claimants who were subjected, without legal aid, to the vagaries of the tribunal and courts system.³³

Despite these problems, however, the Sex Discrimination Act, in conjunction with European Law,³⁴ began to make a real difference. Indirect discrimination cases in particular had an impact that extended far beyond the particular complainant and her place of work. Although proving indirect discrimination was complex and the courts unpredictable, decisions had far-reaching effects. Moreover, they emphasised that discrimination does not always stem from the intentional prejudice of those guilty of sexism: it can result from the unthinking application of long-standing practices that can no longer be justified. Unlawful indirect discrimination was found, for example, in relation to age limits for jobs in the civil service (applicants had to be aged between 17½ and 28), a condition that adversely affected women who may have been out of the job market because of child-care responsibilities; and in cases where part-timers (the majority of whom were women) were treated less favourably than full-timers.³⁵ A particularly significant case brought by way of judicial review by the EOC successfully challenged legislation that required part-timers to have worked longer than full-timers in order to qualify for statutory redundancy pay and protection from unfair dismissal.³⁶

Cases involving direct discrimination, though often difficult to prove,³⁷ helped to underline the message that women were now entitled to demand equal treatment. Successes were not confined to employment. In a ground-breaking case concerning education, the House of Lords held that it was unlawful sex discrimination to demand higher scores from girls applying to selective schools. One of the crucial aspects of this case was the statement by Lord Goff that unlawful direct discrimination does not depend on motive:

if [it did] it would be a good defence for an employer to show that he discriminated against women not because he intended to do so but (for example) because of customer preference, or to save money, or even to avoid controversy.³⁸

³⁰ *Stewart v Cleveland Guest Engineering Ltd* [1996] ICR 535. See now section 26 of the Equality Act 2010.

³¹ For a critique of the EOC generally, see Vera Sacks, 'The EOC ten years on' (1986) 49 *Modern Law Review* 560.

³² Lord Denning compared the formal investigation to the Spanish Inquisition: *Science Research Council v Nassé* [1979] 1 QB 144 at 172. See also George Appleby and Evelyn Ellis, 'Formal Investigations: The CRE and EOC as Law Enforcement Agencies' [1984] *Public Law* 236.

³³ Alice Leonard, *Judging Inequality: The Effectiveness of the Industrial Tribunal System in Sex Discrimination and Equal Pay Cases* (Cobden Trust, 1987).

³⁴ Especially the Equal Treatment Directive 1976, 76/207/EEC.

³⁵ *Price v Civil Service Commission* [1978] ICR 27; *Clark v Eley (IMI) Kynoch Ltd* [1983] ICR 1.

³⁶ *R v Secretary of State for Employment, ex parte Equal Opportunities Commission* [1995] 1 AC 1.

³⁷ Susan Atkins, 'The Sex Discrimination Act 1975: The End of a Decade' (1986) 24 *Feminist Review* 57.

³⁸ *R v Birmingham City Council, ex parte Equal Opportunities Commission* [1989] AC 1155, 1194.

Bearing in mind that sex discrimination is often based on unthinking stereotypical assumptions about what women should do, how they should look, and where they should work, such cases were instrumental in signalling the need for changing attitudes.

IV. Significance

For all the criticisms levelled at it, the Sex Discrimination Act 1975 was immensely significant for a whole generation of women who needed no longer to accept that sexism was just the way of the world. They could point to the Sex Discrimination Act and challenge the discrimination they faced. It is important to remember that decided cases, however numerous, are the tip of the iceberg: some complaints settle before getting to court and sometimes the mere existence of a law is enough to provoke changes, not simply because of any deterrent value (although there is that) but rather because it indicates how society is supposed to operate. Cases decided after the Act came into force illustrate the ways in which women had routinely been treated in all walks of life. When Belinda Shortt unsuccessfully applied for a job as a painter and decorator she was told that her application had been ‘a “brave” venture into the usually male-dominated place of work.’ The fact that a building site was not women-friendly was ‘of course sexist, but that is how they are run.’ It was suggested that she might like to consider interior design instead. Because it was 1995 and not 1975, Ms Shortt succeeded in showing unlawful discrimination.³⁹

Despite the daunting prospect of a court case, many women faced the challenges and secured victories not only for themselves but for many others who benefited from the changes that came along, slowly but surely. Sex discrimination has not been eradicated – far from it – but the Sex Discrimination Act did alter the landscape for the better. Over the years there was a series of amendments, many necessitated by European Law (which played a crucial part in achieving improvements for women), until finally, the Act was repealed and the laws on sex discrimination were included with other ‘protected characteristics’ in the Equality Act 2010. On 29 December 1975, as the Sex Discrimination Act came into effect, Ronald Bell, QC, Conservative MP for Beaconsfield said of it that it exposed Parliament to ridicule: ‘The good it will do will be microscopic and the harm will be immense’.⁴⁰ History proves him wrong on both counts.

Further Reading

- Susan Atkins and Brenda Hoggett, *Women and the Law* (Blackwell, 1984).
- WB Creighton, *Working Women and the Law* (Mansell, 1979).
- Bob Hepple, *Equality: The New Legal Framework* (Hart Publishing, 2011).

³⁹ *Shortt v Shaylor* Case No 5926/95, Equal Opportunities Review Case Law Digest No 28, Summer 1996.

⁴⁰ Anon, ‘Cinderella outlawed from today’, *The Guardian*, 29 December 1975, 18.