

Judicial Review involving issues of the SDO

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Equal Opportunities Commission v Director of Education HCAL 1555/2000

◆ Background

Since 1978, gender scaling, separate queues in banding for boys and girls, and fixed gender quotas in co-educational schools had been used as criteria in the Government's Secondary School Places Allocation System (SSPA System). In its Formal Investigation Report issued in 1999, the EOC advised that these elements were discriminatory as individual boys and girls received less favourable treatment purely on the basis of sex. After the decision by the Director of Education to continue to maintain the discriminatory aspects of the SSPA System, the EOC applied to the High Court for judicial review to challenge the legality of the System.

✓ The Court's decision

The Court held that the operation of the SSPA System amounted to unlawful direct sex discrimination against individual pupils under the Sex Discrimination Ordinance (SDO) in all three gender-based elements challenged by the EOC:

First, there was a scaling mechanism which adjusted the scores of students from different schools so as to enable comparison between them. Boys and girls were treated separately in the scaling process

with different scaling curves. This meant that the eventual priority in school placement depended in part on gender.

Second, there was a banding mechanism which put all students into bands based on their adjusted scores. Different band cutting scores were used for boys and girls, so that, for example, girls needed a higher score for the top band than boys. This again meant that priority for placement depended in part on gender.

Third, there was a gender quota in co-educational secondary schools to ensure that a fixed ratio of boys and girls would be admitted to each school. This meant that admission might depend on gender.

The Government tried to rely on the special measure exception under the SDO in its defence. It argued that the discriminatory elements of the System were not unlawful because they were reasonably intended to ensure that boys had equal opportunities with girls by reducing the advantage girls enjoyed through their better academic performance. The Court rejected this argument for two reasons. First, there was no firm evidence of any developmental difference inherent in gender, and second, the discriminatory elements were disproportional to the objective of ensuring equal opportunities for the boys.