

Discrimination Law Review

What are the LGBT equality issues?

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See also our shorter introductory note: **Discrimination Law Review – the biggest LGBT issues**

The UK government are consulting on possible changes to equality and anti-discrimination law. Almost all of this law is reserved to Westminster, which means that the Scottish Parliament cannot amend it.

You can find the consultation paper, **A Framework for Fairness**, here: www.communities.gov.uk/index.asp?id=1511211

The deadline for responding to the consultation is September 4th 2007.

Some of the changes proposed in the consultation paper would specifically affect LGBT people, because they involve changes to the law about discrimination on grounds of sexual orientation or gender reassignment.

Other proposed changes would affect the law for all the equality strands, including sexual orientation and gender reassignment. Other changes would specifically affect other equality strands such as disability, race or age, and these changes too will affect many LGBT people.

Most of the changes proposed would be done in a 'Single Equality Bill' which would probably be considered by the Westminster Parliament in 2008 or 2009. But some limited changes to the law on gender and gender reassignment need to be made by December 2007, because they are required by the European Union 'Gender Directive'.

This paper outlines the issues identified so far by the Equality Network as most important for LGBT equality. It does not cover all the proposals in the consultation paper. This paper is in four parts, which cover:

1. LGBT-specific issues – proposed changes, in the Single Equality Bill, to the law on sexual orientation and gender reassignment

2. Proposals for the legislation later this year to implement the EU Gender Directive – this will make some changes to the law around gender reassignment discrimination
3. Cross-strand issues proposed for the Single Equality Bill
4. Issues specific to other equality strands, that could have a particular effect on LGBT people.

We have also indicated what our current thoughts are on some of the issues. We are consulting with LGBT people in Scotland, and with organisations from other equality strands, to develop our response to the consultation. We would welcome all comments and suggestions, to the postal or email addresses at the top of this paper.

For each proposal we have listed, we have provided a reference to the relevant paragraphs in the government's consultation paper (which can be got from the URL quoted above). We have also provided a reference to the relevant question(s) on the government's consultation response form, which can be used to respond to the consultation.

The response form can be found from a link at the bottom of this page:
<http://www.communities.gov.uk/index.asp?id=1511211>

LGBT-specific issues

Discrimination on grounds of transgender status, by association or perception

(consultation paper paragraphs 1.19-1.25, response question 3)

The government propose that the law on discrimination against transsexual people should be extended to cover discrimination against someone which happens because they **associate** with a trans person. We agree with this.

However, unlike the race, religion & belief and sexual orientation strands, the government propose not to extend the law to protect someone who is discriminated against because they are (wrongly) **perceived** to be transsexual.

The Equality Network disagree with this. We believe that such discrimination could easily occur. For example a rumour may start that an employee is transsexual, based on their appearance. Or it may become known that one employee is transsexual, but not known who,

and as a result other employees may be subject to speculative harassment.

In addition, non-transsexual employees may be harassed by transphobic language and 'jokes'. Transphobic discrimination and harassment are wrong, whatever the gender identity of the victim(s). The law should protect everyone from the effects of discrimination and harassment.

Indirect discrimination against trans people

(consultation paper paragraphs 1.26-1.35, response question 4)

The government propose to introduce explicit protection against **indirect discrimination** on grounds of gender reassignment (indirect discrimination on other grounds such as sexual orientation is already unlawful). The consultation paper gives a couple of examples where this could occur. We agree that indirect discrimination on grounds of gender reassignment should be banned, but we believe that this should be done in the legislation this year implementing the EU Gender Directive, rather than in the later Single Equality Bill, because protection from indirect discrimination is required by the Gender Directive.

Exceptions in the law, which the government intend to retain

(consultation paper paragraphs 1.77-1.81 and Annex A Table 1, response question 14)

Table 1 of Annex A of the consultation paper lists the special exceptions from anti-discrimination law, which the government intend to retain.

One of the exceptions from the sexual orientation goods, facilities and services equality law allows **blood donation** services to discriminate on grounds of sexual orientation, where this discrimination is based on epidemiological data analysis. We are currently considering and consulting on whether this exception should be retained.

Insurance exception allowing sexual orientation discrimination

(consultation paper paragraphs 1.82-1.85, response question 16)

At present there is a special exception from the ban on sexual orientation discrimination in the provision of goods, facilities and services, for the **insurance** industry. This allows discrimination on grounds of sexual orientation, where it is supported by actuarial data. In

practice, the Association of British Insurers have issued guidelines intended to end direct discrimination on grounds of sexual orientation in the setting of insurance premiums. However, discrimination in premiums still occurs, with, for example, married people sometimes offered lower premiums than people in civil partnerships.

When the UK government introduced the goods, facilities and services sexual orientation equality regulations earlier this year, they promised to end the exception for insurance by the end of 2008. We believe that the exception should be ended.

Duty on the public sector to promote transgender equality

(consultation paper paragraphs 5.21-5.24, response question 29)

The government ask whether the current duties on the public sector to promote race, disability and gender equality should be combined into a single duty covering all three strands. The current gender equality duty on the public sector includes a requirement to take steps to eliminate unlawful discrimination against transgender people, but does not include a specific duty to promote equality of opportunity for transgender people. We would want to see this added to the public sector equality duty.

Extending the public sector duties to other equality strands

(consultation paper paragraphs 5.57-5.72, response questions 39 to 42)

The government ask whether the current statutory duties on public bodies, to promote race, disability and gender equality, should be extended to other equality strands. We agree that the duty should be extended to the sexual orientation strand. We have not identified any disadvantages, and we think that public bodies should be given the option to (and in fact encouraged to) include sexual orientation in equality promotion even before it becomes a legal requirement to do so.

Discrimination against married persons and civil partners

(consultation paper paragraphs 8.21 and 8.22, response question 56)

The government ask whether the existing prohibition on discrimination in employment against a person because they are married or in a civil partnership is still needed. We believe that it is – we are concerned at the potential for discrimination against people, based on a stereotyped view that they will be less flexible about working hours or location if they

are married or in a civil partnership. We are also concerned that such people could be discriminated against because they are perceived as more likely to choose to become parents.

Discrimination against transgender people in public functions

(consultation paper paragraph 10.11, response question 62)

The government are required to ban gender reassignment discrimination in the provision of most goods, facilities and services by December 2007, thanks to the EU Gender Directive. But the Gender Directive does not cover 'public functions', which means functions that only a public body can carry out, like setting government policy or allocating public funds. The government propose that the Single Equality Bill should extend the gender reassignment protection to prohibit discrimination in public functions, in line with other equality strands. We agree.

Discrimination against trans people in schools

(consultation paper paragraph 10.12, response question 63)

The prohibition of gender reassignment discrimination in the provision of goods, facilities and services, coming in December 2007 as a result of the EU Gender Directive, will not cover discrimination by schools (because the Gender Directive does not cover schools). The government say that it is not necessary to ban discrimination against trans people in schools, because cases of this kind of discrimination will be very rare.

We disagree. Many trans people are aware of their gender identity at a young age. Significant numbers of transsexual people seek medical advice before the age of 18, and so fall within the legal definition of 'gender reassignment'. Trans young people often face bullying in schools. School should be one of the safest places for young people, not one of the few places where discrimination and harassment are lawful.

Discrimination against trans people by organised religions

(consultation paper paragraphs 10.13 and 10.14, response question 64)

The government ask whether there are any circumstances in which religious organisations should be allowed to treat transgender people less favourably. We are consulting on our response to this.

Which transgender people are protected by the law?

(consultation paper paragraph 10.15, response question 65)

The government propose to retain 'gender reassignment' as the basis for the equality law that protects transgender people.

We disagree with this. The existing definition of 'gender reassignment' does not even cover all transsexual people – it excludes those who identify as the opposite sex to that on their birth certificate but who do not seek medical intervention. The existing definition does not cover other transgender people at all, for example transvestite, intersex, polygender and androgyne people. All of these people currently face discrimination and harassment because of their transgender status, but are not protected by anti-discrimination law.

We have looked at the coverage of transgender anti-discrimination laws in other jurisdictions around the world. Most other countries with such laws use broader definitions of transgender that UK law does. We are consulting on a suitable definition. Anti-discrimination law in several US jurisdictions, for example, bans discrimination on grounds of 'gender identity or expression'. This is a similar definition to that proposed by the Scottish Executive's Hate Crime Working Group, for Scottish legislation against transphobic hate crime.

Discrimination by private clubs

(consultation paper chapter 12, response questions 68 to 70)

The government propose to continue the exception that allows private clubs that are set up for the purpose of providing benefit to people of a particular sexual orientation to discriminate in who they allow to become members. We agree with this.

The government propose to ban gender discrimination by private clubs with 25 or more members (except for single sex clubs). We agree with this, and we think the ban should also cover discrimination against transgender people, except where the club is set up for the purpose of providing benefit specifically for transgender people.

Private clubs with 25 or more members currently must not discriminate against members, on grounds of sexual orientation (unless the club is set up specifically to provide benefit for people of a particular sexual orientation). But clubs can discriminate against guests, on grounds of sexual orientation. The government propose to extend the ban on sexual

orientation discrimination to cover discrimination against guests also. We agree with this.

Harassment on grounds of sexual orientation

(consultation paper chapter 14, response questions 73 to 77)

The government ask whether the law which bans sexual orientation discrimination by providers of goods, facilities and services should be extended to ban harassment based on sexual orientation. This would cover for example harassment of customers by staff of hotels, pubs and shops, and by staff of public services such as the NHS and the police.

Harassment is defined as unwanted behaviour which has the purpose or effect of violating a person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. The government ask whether harassment based on sexual orientation should be unlawful in the provision of goods, facilities and services, in education in schools, in the management and disposal of premises, and in the exercise of public functions.

We are consulting with LGBT people about their experiences of such harassment – our current view is that harassment should be unlawful in all these areas, as it already is in the case of harassment based on race.

The government ask whether there should be any exceptions from a ban on harassment in the provision of goods, facilities and services. We do not think there is a case for allowing harassment in any of the circumstances where discrimination is already unlawful.

The government ask whether there is a case for banning harassment by public service providers, but not by private providers of goods and services, such as pubs and shops. We do not think so. There is not always a choice between private suppliers, and even where there is, we do not think there is a case for allowing harassment to continue simply on the basis that the victims could in future go to alternative suppliers.

Harassment at work by third parties

(consultation paper paragraph 14.30, response question 78)

At present, harassment of an employee at work is unlawful if it is done by the employer or by other employees. But there is no requirement for an employer to take any action to protect their employees from

harassment by third parties, such as customers or clients. The government intends to amend the law to require employers to take reasonable steps to protect their employees from sexual harassment by customers or clients.

The government ask whether there is evidence of harassment of workers, by customers or clients, on any other grounds, including homophobic, biphobic and transphobic harassment. The government ask whether employers should be required by law to take reasonable steps to protect their employees from these kinds of harassment.

Our initial view is that it is likely that such harassment does happen, and that it would be reasonable for the law to require employers to take action to protect employees.

Implementation of the EU Gender Directive, for gender reassignment

Annex B of the government's consultation paper covers the government's proposals for implementing the EU Gender Directive 2004/113/EC. The Gender Directive requires the government to improve the Sex Discrimination Act, by 21st December 2007. The government will do this with the Sex Discrimination Act 1975 (Amendment) Regulations 2007 (SDA(A)Regs), under the European Communities Act.

One result of using the European Communities Act is that the SDA(A)Regs can do no more than implement the Gender Directive – any changes to the law that are not part of the Gender Directive will have to wait for the Single Equality Act.

The government's proposed draft of the SDA(A)Regs can be found from a link at the bottom of this page:

<http://www.communities.gov.uk/index.asp?id=1511211>

Questions 79 to 82 of the government's consultation response form relate to the proposed implementation of the Gender Directive, but none of these questions asks about the parts of the implementation that relate to gender reassignment. We will therefore be making a separate response to the government about the gender reassignment proposals.

Indirect discrimination on grounds of gender reassignment

(consultation paper paragraph B.24)

The Gender Directive requires discrimination on grounds of gender reassignment, in the provision of most goods, facilities and services, to be made unlawful. However, the government intend only to ban direct discrimination and harassment on grounds of gender reassignment. They do not intend to ban indirect discrimination on grounds of gender reassignment, saying that they will leave that to be done later in the Single Equality Bill.

We believe that the Gender Directive requires the government to ban indirect discrimination on grounds of gender reassignment, and that this should therefore be done this year in the SDA(A)Regs.

Single sex services and transsexual people

(consultation paper paragraphs B.25 and B.26)

The government propose to allow single sex service providers to treat a transsexual person differently from other people. We are very concerned about this. We do not think that a single-sex service should be allowed to discriminate against a transsexual person who has obtained gender recognition in that sex under the Gender Recognition Act 2004. Such a person should be treated as their recognised gender for all purposes.

Transsexual people who have transitioned to live in their true gender, but have not obtained gender recognition, remain legally of the opposite sex. There may be very limited circumstances where their legal gender requires such a person to be treated differently from people of the same presenting gender who are not transsexual. Any exceptions here will need to be tightly drawn.

Sport

(consultation paper paragraph B.27)

The government propose to allow single-sex sporting competitions to discriminate against transsexual people where this is necessary to secure fair competition or the safety of competitors. This is in line with the provisions of the Gender Recognition Act 2004.

Insurance

(consultation paper paragraph B.28)

The government propose that discrimination in the provision of insurance, on grounds of gender reassignment, will be made unlawful. For this purpose, the government propose that the insurance premiums charged to a person who is transitioning would switch over, from the premium for a person of their legal birth gender, to the premium for a person of their transitioned gender.

The government proposes that this switch should happen when the person “has undergone gender reassignment”. However, this is not a well defined point in time. We agree that the switch should not be delayed until the person obtains gender recognition. We suggest that the switch could happen when the person is able to receive other documentation, such as passport and driving licence, in their transitioned gender.

Cross-strand issues

Listed here are some of the main issues raised in the consultation paper which apply across the equality strands. We would welcome any comments on how these issues might affect LGBT people.

Genuine service requirement exception

(consultation paper paragraphs 1.71-1.76, response question 12)

At present, the laws banning discrimination (including on grounds of sexual orientation) in the provision of goods, facilities and services contain exceptions which apply in specified circumstances. The government ask whether these specific exceptions in goods, facilities and services law should be complemented by a general ‘genuine service requirement’ exception. This would allow discrimination where it could be shown that the discrimination is a genuine requirement of the service, and a proportionate means of achieving a legitimate objective.

We are currently concerned that this could introduce uncertainty about the circumstances in which discrimination is permitted.

Balancing measures / positive action

(consultation paper chapter 4, response questions 23 to 28)

Balancing measures (positive action) are measures designed for particular groups of people, in order to address under-representation of those groups. An example is vocational training specifically aimed at groups that are under-represented in the workforce. The government ask what evidence there is of the use of the positive action measures currently allowed by the law, and whether a wider range of positive action measures should be allowed.

There is specific legislation to allow positive action by political parties to address gender discrimination, such as all-women short lists for election candidate selection. This has enabled some political parties to increase the number of women elected. The government asks whether this kind of positive action should be allowed for the other equality strands as well.

Public sector duties

(consultation paper chapter 5, response questions 30 to 38, 43 to 45)

Public authorities currently have duties, set out in the law, to promote equality. The government propose to make substantial changes to the way these work. There is widespread concern that the government's proposals will make the public sector duties less effective, for example by removing the more detailed requirements set out in the 'specific duties'.

Promoting equality in the private sector

(consultation paper chapter 6, response questions 46 and 47)

The government ask for suggestions of ways to promote equality, including LGBT equality, in the private sector. Stonewall's Diversity Champions programme is a good example of this. We are consulting on other ideas.

Effective resolution of disputes

(consultation paper chapter 7, response questions 48 to 53)

The government ask whether there are better ways to help resolve disputes about discrimination before they get to court, and also ask how discrimination expertise in the sheriff courts could be improved. The government also ask whether the current legal arrangements work

satisfactorily in cases where there has been discrimination on more than one ground (multiple discrimination), and if not, what changes need to be made.

Other strand issues

Many of the proposals in the consultation paper deal with other equality strands, and of course many LGBT people are affected by discrimination on other grounds also. Here we have listed a few of the consultation questions relating to other equality strands, focussing on ones where there might be specific issues for LGBT people.

Discrimination against people wrongly assumed to be disabled (consultation paper paragraph 1.22, response question 3)

The government propose not to ban discrimination against someone because they are wrongly thought to be disabled. We are concerned about this. At present, for example, it is unlawful to discriminate against an employee because they have HIV. But it is not unlawful to discriminate against an employee because they are believed to have HIV, when in fact they do not. We think this should be unlawful too.

Discrimination against carers (consultation paper paragraphs 8.7 to 8.20, response question 55)

The government do not propose to ban discrimination against people because they have caring responsibilities. It is possible that LGBT people would be particularly vulnerable to such discrimination because employers and others may not value and respect LGBT people's family and caring relationships.

Goods, facilities and services discrimination on grounds of age (consultation paper chapter 9, response questions 58 to 61)

The government ask whether and how the law should ban discrimination on grounds of age in the provision of goods, facilities and services, and ask for examples of such discrimination. We know that older LGBT people, and young LGBT people, face particular difficulties, and may face specific forms of age-related discrimination.