

Discrimination Law Review

Submission to the Department for Communities and Local Government

4th September 2007

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The Equality Network is a network of lesbian, gay, bisexual and transgender (LGBT) organisations and individuals in Scotland working for LGBT equality. We welcome the opportunity to comment on the DCLG's consultation on discrimination law.

We have used the standard response form, with some additional comments in this introduction.

The basis for our response

The Equality Network's Your Scotland project aims to connect LGBT people and groups in Scotland with the national policy-making process. Our work in this area has been ongoing since 1997, and we have built up a clear understanding of the priorities of LGBT people in Scotland.

We produced several briefings on the Discrimination Law Review consultation. We distributed these through our network of 900 groups and individuals, on our website, and at events such as the LGBT Pride Scotia festival.

We also circulated a survey through our network and website. This asked three questions, related to questions in the consultation paper, which we believed from previous consultation would be of particular interest for improving the protection of LGBT people from discrimination:

- Do you think that the law should ban discrimination by schools on grounds of transgender identity and gender expression?

- Do you think that transphobic discrimination should be unlawful, if the victim is not actually transsexual?
- Do you think that equality law should be extended to ban harassment on grounds of sexual orientation by public services and by businesses?

The survey also asked about people's personal experiences of these kinds of discrimination.

99 survey responses were returned. Overwhelmingly, respondents answered yes to all three questions. Detailed results, and examples of respondents' experiences of discrimination, are quoted in our answers to questions 63, 65, and 73 below.

To check the diversity of survey respondents, we asked respondents to the postal version of the survey (n=88) to tell us their gender identity, sexual orientation, age and home location, on a voluntary basis.

46 respondents defined as female, 37 as male and 3 as other (2 did not answer). 4 answered yes to "Have you ever identified as transgender?" 68 respondents were fairly evenly spread through the 31 to 60 age range, with 12 younger than 31, and 6 older than 60 (2 did not answer).

30 respondents defined as lesbian, 31 as gay, 7 as bisexual, 14 as heterosexual and 3 as other (3 did not answer).

Of the 83 respondents who gave their home postcode, 72 were resident in Scotland, 8 in England and 3 in Northern Ireland.

We also conducted a smaller online survey of people's views on the retention of the ban on employment discrimination against people who are married or in a civil partnership. Results are given in our answer to question 56 below.

In addition to the surveys, we consulted directly with other major LGBT organisations in Scotland, and with organisations from the other equality strands.

Details of our briefings and our network consultation are available on our website here:

www.equality-network.org/YourScotland/Consultations/DLR

General principles

We would like to comment on some general principles, before answering specific consultation questions on the following pages.

Timescale

We very much welcome the Government's commitment to equality, including the Discrimination Law Review, the work of the Equalities Review, and the establishment of the Commission for Equality and Human Rights.

As many equality and human rights organisations have noted, the CEHR will be less effective until equality law is harmonised across the strands. The lack of harmonisation also leaves many people currently with insufficient protection from the discrimination they face. We therefore hope that the Government will prioritise the Single Equality Bill, and will bring forward legislation at the earliest opportunity.

The principle of harmonisation

The consultation paper discusses in detail issues of harmonisation between the equality strands. In a number of areas, the discussion seems to start from a position of requiring strong evidence that harmonisation is needed in that specific case.

In our view this is the wrong starting point. Harmonised law is simpler, clearer, more effective, and less of a regulatory burden. It is also fairer. In the context of equality law, we think that to give any strand less protection than other strands would require particularly strong justification – equality demands nothing less. The principle should be to harmonise the level of protection across the strands unless there are very compelling reasons for an exception.

We are also concerned that, in the proposals for the public sector duties, the harmonisation suggested seems to involve a reduction in the level of protection for the 'old' strands of race, gender and disability. We think that harmonisation should be upwards, to extend the best of the existing protection across all the strands.

Strands and intersectionality

Each of the equality strands involves particular experiences and forms of discrimination. We therefore support the continuation of strand-specific provisions where this deals proactively with issues specific to particular strands, and within the principle of harmonising upwards the level of protection. For example we support the continuation of the particular public sector specific duties, in secondary legislation, for each strand.

People are not 'single-strand' however. We would like to see more attention given to multiple discrimination, for example, through enabling complaints to be based on discrimination on a combination of grounds.

Purpose clause

We support the inclusion of a 'purpose' clause in the Single Equality Bill. Section 3 of the Equality Act 2006 specifies the general duty of the Commission for Equality and Human Rights in aspirational and inspirational terms. We would like to see something equally inspirational, which also sets out the fundamental principles of equality law, in the new legislation.

In the following answers, we have focussed particularly on issues that specifically affect LGBT people, which is our main area of expertise. However, we have also considered cross-strand issues (which obviously relate to LGBT equality alongside other strands), and other single strand issues such as age discrimination, all of which are of importance to LGBT people in Scotland.

We have deleted the questions that we have not answered.

**A Framework for Fairness:
Proposals for a Single Equality Bill for Great Britain**

Response Form

We welcome your views as part of the consultation. For convenience, this preformatted response form sets out all the questions in the main consultation document. It can also be downloaded from www.communities.gov.uk/index.asp?id=1017165.

Should you wish to use the form, it should be returned, once completed, to:

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The consultation closes on 4 September in 2007. Please let us have your response by that date.

When responding, it would be helpful if you could provide the following information.

Please fill in your name and address, or that of your organisation if relevant. You may withhold this information if you wish, but we will be unable to add your details to our database for future consultation exercises.

Name

Organisation (if applicable)

Address

Postcode

Confidentiality

Under the Code of Practice on Open Government, any response will be made available to the public on request, unless respondents indicate that they wish their views to remain confidential. If you wish your response to remain confidential, please

tick this box and say why. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

I would like my response to remain confidential:

Please say why

You or your organisation

Q(i) In what capacity are you responding?

As an individual (if so, please go to Q1 in the main comments section)

On behalf of an organisation (if so, please go to Q(ii) below)

As an employer (if so, please go to Q(iii) below)

Other (please specify)

Q(ii) Is your organisation

(please tick the boxes that apply to your organisation)

A local authority (including health authority) / organisation

An equality lobby group or body

A statutory body

An organisation representing employers

An organisation representing financial institutions

A professional association

A university

A college of further education

A trade union/staff association

Other – please specify

Q(iii) If responding as an employer, how many people do you employ?

Between 1 and 14 employees

Between 15 and 49 employees

Between 50 and 249 employees

250 employees or more

Q(iv) If responding as an employer please indicate which sector best describes you:

Legal services

Construction and/or building design

Communications

Wholesale and retail trade

Leisure – hotels, restaurants, pubs

Leisure – cinemas, theatres, museums

Leisure – other

Distribution/transport

Financial and/or business services

Electricity, gas and water supply

Advice and/or information services

Public administration

Education/training

Health and social work

Charity/voluntary work

Other (please tick box and specify)

Proposals for a Single Equality Bill for Great Britain

The main consultation document addresses various proposals and options for changing discrimination law in order to create a clearer, more streamlined equality legislative framework, which produces better outcomes for those who currently experience disadvantage. The following questions are reproduced from the main document, in the order and with the same numbering in which they appear there. In addition, you are asked for your comments generally on the estimated provisional costs and benefits, as shown in the Initial Regulatory Impact Assessment and the Equality Impact Assessment.

Part 1 – Simplifying the law

Chapter 1: Simplifying Definitions, Tests and Exceptions and Promoting Compliance

Simplifying Definitions and Tests

Direct Discrimination

Q1 Do you have any comments on our intention to keep the existing requirement for a comparator in direct discrimination claims?

Yes

No

If not, please give your reasons

We would like further consideration to be given to the possibility of discrimination law explicitly including a 'human rights' style guarantee of dignity – ie a minimum standard of treatment, not as an alternative to, but in addition to requiring no less favourable treatment on a comparator basis. We note that within the discrimination law, the provisions on harassment are on a non-comparator basis.

Q3 Do you agree that we should largely keep the existing approach in relation to discrimination on the basis of perception and association, except for an extension to protect against discrimination on the grounds of association with transsexual people?

Yes

No

Please provide:

Gender reassignment – perception and association

We agree with the extension of the law to protect against discrimination on the grounds of association with transsexual people.

Examples we are aware of include employment discrimination against spouses of transsexual people, and people whose property is vandalised because they have a transsexual relative.

However, we believe strongly that the law should also be extended to protect against discrimination on grounds of perceived transsexuality. As we have commented elsewhere (question 65) we also believe that the protection offered transgender people is too narrow, and should be based on actual or perceived gender identity, rather than gender reassignment.

However, even if the current basis of gender reassignment is retained, perception should be added. A person could be wrongly assumed to be transsexual, for example as a result of being a tall woman with a deep voice, or where it is known that an employee is transsexual and there is incorrect speculation about which employee that is, and that person could face discrimination or harassment as a result.

In goods and services provision, discrimination on grounds of perceived transsexuality is even more likely to occur, since providers of goods and services do not generally know details of customers' identities, and will discriminate based on the appearance of transsexuality.

For example, we are directly aware of a case where a man was subjected by a service provider to harassment on grounds of perceived transsexuality, because his voice sounded high-pitched on the phone.

Discrimination is rooted in the attitudes of the discriminatory person, not in the detail of whether the person discriminated against intends to undergo, is undergoing or has undergone medical treatment that amounts to gender reassignment. The discriminator does not stop to check the medical history of the victim.

Transphobic discrimination is equally wrong when perpetrated against someone who is not transgender, and should in our view be equally unlawful. Anti-discrimination law should protect everyone. If not, it is open to criticism that it creates 'special categories' of people with better legal protection, and it thereby risks encouraging the very discriminatory attitudes it should be helping to eliminate.

We also consider that European law requires perceived transsexuality to be covered by the UK's anti-discrimination law. EU law covers less favourable treatment "on grounds of sex" generally, not solely on grounds of the victim's own sex, and the judgment in *P v S & Cornwall County Council* established that "on grounds of sex" includes on grounds of transsexuality.

Gender reassignment harassment

Transphobic abuse (including so-called jokes and banter) may create an intimidating, hostile, degrading, humiliating or offensive environment for non-transsexual people (including for example relatives and friends of a transsexual person). This should constitute gender reassignment harassment in discrimination law, but at present it does not, because section 4A(3) of the Sex Discrimination Act only protects from transphobic harassment people who intend to undergo, are undergoing or have undergone gender reassignment.

The law should be changed to mirror the provisions of the Employment Equality (Sexual Orientation) Regulations 2003, which do not limit sexual orientation harassment to harassment of on grounds of the victim's own sexual orientation, but recognise that homophobic harassment can create an offensive environment for non-LGB people too.

Disability

For similar reasons, we believe that disability discrimination law should be extended to protect against discrimination by association and perception. At present, for example, employment discrimination against someone because they are living with HIV is unlawful, but discrimination against someone because they live with a person with HIV, or because they themselves are wrongly believed to have HIV, is not unlawful. That cannot be right – these forms of discrimination can be as harmful to the person concerned, to the organisation in which the discrimination occurs, and to wider society, and are based on the same incorrect prejudices.

As a general point, we consider that it is better to harmonise the law across the strands unless there are very good reasons not to. Harmonised law is fairer, and is simpler to understand for everyone concerned. The principle should therefore be to harmonise unless there are particularly strong reasons not to.

Indirect Discrimination

Q4 Do you agree with our proposal to extend indirect discrimination to cover gender reassignment but not explicitly introduce it to disability discrimination law?

Yes

No

Please say why:

We agree with the extension of gender reassignment protection to cover indirect discrimination. We do not have a view on its application to disability law.

Examples of indirect discrimination against transsexual people include policies and practices requiring the disclosure of former names, or of medical history (where this cannot be justified as a necessary means of achieving a legitimate aim).

However, we believe that this change to the law should be done in the Sex Discrimination Act (Amendment) Regulations this year, rather than later in the Single Equality Bill. The EU Gender Directive extends to indirect as well as direct discrimination. In our view, the judgment in P v S & Cornwall County Council clearly implies that the interpretation of sex to include gender reassignment extends to all forms of sex discrimination that are unlawful in EU law, including indirect discrimination.

Definition of indirect discrimination

Q5 Do you agree with our proposal to harmonise the definition of indirect discrimination where it applies across the protected grounds?

Yes

No

Please say why:

We agree with the Government's reasoning that, often, insufficient statistical data is available to enable use of the "smaller proportion" test. This would particularly be the case for sexual orientation and gender identity, where very little data is available.

Genuine service requirement test

Q12 Do you support or oppose the introduction of a genuine service requirement test for differentiation in the provision of goods, facilities or services, housing and the exercise of public functions?

Support

Oppose

Please give your reasons and examples of what it might cover:

There was a great deal of debate about some of the exceptions in the Equality Act (Sexual Orientation) Regulations 2007. We believe that, generally, those exceptions strike the right balance (apart from the insurance provision – see question 16 below).

We are concerned that the introduction of an additional ‘genuine service requirement’ test would reopen those debates, and would undermine the effect of the existing regulations in encouraging providers of goods and services to eliminate all sexual orientation discrimination.

Specific Exceptions

Q14 Do you have any comments on our proposals for retaining the specific exceptions set out in Table 1 in Annex A?

Yes

No

Please provide

Generally, we agree with the retention of the exceptions in Table 1, with the following comments:

The interpretation of regulation 7(3) (organised religion) of the Employment Equality (Sexual Orientation) Regulations 2003 has not yet been fully clarified through the tribunals and courts. On the introduction of the regulations, the Government stated that the exception was not intended to apply generally to non-clerical posts such as teachers in faith schools. We welcomed this.

We have some concerns over the recent Employment Tribunal decision in *Reaney v Hereford Diocesan Board of Finance*, in which the Tribunal stated that a post of Diocesan Youth Worker did fall within regulation 7(3), and that it was not discriminatory to require a gay man in that post to remain celibate. We ask the Government to follow closely further developments in case law, and if necessary to amend regulation 7(3), in the Single Equality Bill, to ensure that it has the effect originally intended.

We note that regulation 27 (insurance) of the Equality Act (Sexual Orientation) Regulations 2007 is included in Table 1. As noted below (question 16), we believe that this exception should be removed.

Q15 Do you agree that the exceptions listed in Table 2 in Annex A should be removed?

Yes

No

If not, please explain why.

Q16 Is there any need to return an exception to allow insurers to treat people differently on the grounds of sexual orientation, where supported by sound actuarial evidence, beyond the end of 2008?

Yes

No

If yes, what should this seek to achieve and why:

The Association of British Insurers (ABI) issued guidelines some time ago to end direct discrimination in insurance on grounds of sexual orientation. However, it is clear that discrimination in premiums often still occurs between a person in a civil partnership, and an otherwise equivalent married person.

We note that the ABI have just announced that, in their view, there is no need for insurers to differentiate between civil partnerships and marriages, and we understand that the ABI support the removal of the exception in regulation 27 of the Equality Act (Sexual Orientation) Regulations 2007.

We hope that the exception will be removed by the end of 2008, as promised by the Government when the Equality Act (SO) Regulations were introduced in spring 2007. If necessary to meet this timescale, this should be done using regulation under the Equality Act 2006, rather than the Single Equality Bill.

Part 2: More effective law

Chapter 4: Balancing Measures

Q23 What evidence is there of the extent to which the current “positive action” provisions are being used? Do you consider that the current provisions limit the actions that employers and others would like to take?

We are aware of targeted advertising in the LGBT media, by a range of employers, for example, police forces. We are not aware of other positive action measures, such as targeted training, for the sexual orientation or gender identity strands.

Q24 Do you agree that it would be helpful for organisations seeking to make progress towards their goals of tackling under-representation and disadvantage to be able to use a wider range of voluntary balancing measures?

Yes

No

Please explain:

We note that article 6 of the EU Gender Directive allows “specific measures to prevent or compensate for disadvantages linked to sex”. Regulation 26 of the Employment Equality (Sexual Orientation) Regulations 2003 limits positive action to access to training, and to encouragement to apply for employment or membership of trade organisations.

We think there would be value in allowing a broader range of positive action measures, within the scope of EU law.

Q25 Do you agree that measures to meet special needs in relation to education, training or welfare or any ancillary benefits should be permitted in respect of all protected groups?

Yes

No

Please explain why:

The law on positive action should be harmonised across the strands, to make it simpler, clearer and fairer.

Q26 Do you agree with these proposals for issuing of guidance by the Commission for Equality and Human Rights, but that the Commission should not have a role approving positive action programmes?

Yes

No

Please explain why:

Further guidance would be helpful in encouraging the use of positive action measures, and we agree that requiring CEHR approval would place too great a burden on the CEHR, and would be likely to discourage the use of measures.

Q27 Do you agree that we should have a power to continue the operation of the current provision beyond 2015, if this is still necessary and proportionate?

Yes

No

Please explain why:

It is clear that the UK Parliament will still be well short of gender balance by 2015. Unfortunately, the 2007 Scottish Parliament election has worsened the gender balance of that Parliament.

Q28 Do you agree that we should widen the scope of voluntary positive measures for political parties to target the selection of candidates beyond gender?

Yes

No

Please explain:

We agree that Parliaments should reflect the diversity of the population. Following the 2007 election, the Scottish Parliament has its first Asian MSP, but minority ethnic communities remain significantly under-represented.

Chapter 5: Public Sector Equality Duties

Q29 Do you agree that the race, disability and gender duties should be replaced by a single duty on public authorities to promote race, disability and gender equality?

Yes

No

Please state your reasons:

We do not disagree with the consolidation of the public sector duties into the Single Equality Bill. However, it is vital in our view that the specific duties are retained in secondary legislation for each equality strand. The specific duties are different for each of the three strands, and this reflects the different needs of each strand.

We believe that the gender equality duty, currently in section 76A of the Sex Discrimination Act, should be amended to include, as part of the second leg of the duty (s. 76A(1)(b)), the need to promote equality of opportunity between transgender persons and other persons. The first leg of the gender equality duty already implicitly includes the need to eliminate unlawful discrimination against transgender people.

Q30 Do you agree that it would be helpful to provide a clear statement of the purpose of a single public sector duty which public authorities should use as a foundation for taking action to promote equality and good relations?

Yes

No

Please state your reasons:

As noted in the introduction to this response, we would like to see a purpose clause for the Single Equality Bill as a whole. This could set out the principles and purpose of the equality legislation, including the public sector duty provisions, in terms as broad as those in section 3 of the Equality Act 2006.

Q33 Do you agree that a single public sector equality duty should require public authorities to identify priority race, disability and gender equality objectives and take proportionate action towards their achievement?

Yes

No

If not, please give your reasons and any alternative suggestions:

We are very concerned that the proposed approach could lead to a reduced commitment to promotion of equality across the functions of public bodies, and could undermine mainstreaming. In our view, equality impact assessment should be required across those functions, and across the equality strands.

Only after impact assessment should priority actions be identified, and authorities should be required to take action aimed at continuous improvement for each equality strand.

Q34 Do you agree that public authorities should be required to review their priority equality objectives at least every 3 years?

Yes

No

If not please give your reasons and alternative suggestions

See our answer to question 33 above. So long as prioritisation is done after impact assessment for all the strands, mainstreamed across the functions of the organisation, and so long as organisations are required to set priorities aimed at continuous improvement for every equality strand, we agree that it is sensible to review these priorities every three years.

Q35 Would it be helpful for strategic equality outcomes to be set by the appropriate national Government?

Yes

No

If so, what would be an appropriate way of doing this?

We agree that this would be helpful, and we very much welcome the proposal that in Scotland these outcomes should be set by the Scottish Government.

Q36 We would welcome views on the proposed new approach to supporting effective performance of a single public sector equality duty by requiring proportionate action towards the achievement of priority equality objectives, and on the four key principles we have identified. Do you prefer this approach, or an extension of the type of specific duties adopted so far in the race, disability and gender equality duties? Please give your reasons.

We disagree with the proposal that the specific duties be dropped. The disability and gender specific duties represent a step forward from the earlier race duties, and the proposals in the consultation paper in our view would be a big step back in ensuring mainstreaming of equality by public bodies.

We value the devolution of the specific duties for devolved public authorities in Scotland, so that appropriate specific duties can be applied, which may differ from those for England and Wales. This is the case, for example, for the gender duties, which include a requirement on larger bodies to publish an annual equal pay statement and three yearly reports on equal pay, and a requirement on the Scottish Ministers to publish reports.

Q37 If you prefer an extension of the type of specific duties adopted so far in the race, disability and gender equality duties, which elements of the specific duties do you think should be retained for a single public sector equality duty and why?

As noted above, we particularly value the devolution of the specific duties to the Scottish Government.

We would like to see the elements of the current gender and disability specific duties applied across the strands – these duties are more outcome-oriented than the race duties. These elements include the carrying out of impact assessments, the involvement of stakeholders, the publication of equality schemes, the gathering and publishing of data and information, the development, implementation and assessment of action plans, and the publication of reports.

As noted above, the gender and disability specific duties in Scotland require Scottish Ministers to publish reports, and we would like to see this extended across the strands.

We would like to see the retention of the Scottish specific duties relating to equal pay.

Q38 Do you think that the proposed single public sector equality duty should apply to all public authorities?

Yes

No

If not, please say how you think it should be targeted and give your reasons.

We think that the general duty should apply to all authorities. There may be a case for variation in the application of some of the specific duties, depending on the size of the authority, for example as is currently the case in Scotland for the equal pay reporting duty.

Q39 Do you think that a single public sector duty should be extended to cover:

a) age Yes No

a) sexual orientation; and/or Yes No

b) religion or belief; Yes No

Please state your reasons, including examples of the types of disadvantage you believe are experienced by people because of their age, sexual

orientation or religion or belief which could be addressed effectively through such a duty.

The reasons we support extension of the public sector duties across the strands are:

The principle of harmonisation requires that the public sector duty applies across the strands unless there is very good reason not to do so.

In Scotland, many public authorities are already under a statutory duty to encourage equal opportunities, as defined in section L2 of Part II of Schedule 5 to the Scotland Act 1998. That definition includes all six strands (plus other attributes such as language, social origin and political opinion).

This devolved Scottish duty applies, for example, to local authorities (s. 59, Local Government in Scotland Act 2003) and to NHS boards (s. 2D, NHS (Scotland) Act 1978, inserted by s. 4, NHS Reform (Scotland) Act 2004). However, it is a non-regulated duty, unlike the GB-wide disability, gender and race duties.

Our experience has been that public authorities naturally prioritise the regulated duties, and, as a result, the encouragement of age, religion/belief and sexual orientation equality suffers. See for example, 'Sexual Orientation Research Phase 3 – a Stocktake of Local Authority Policy and Practice', Scottish Executive, 2006, which found, for example (pages 2 and 28), that when asked to rank the priority given to the equality strands, the average ranking for sexual orientation was lowest of the six strands.

There is plenty of evidence which demonstrates that lesbian, gay, bisexual and transgender people still receive a worse service from many public bodies in Scotland. Discrimination and harassment are not uncommon, and services may be denied or offered in an inappropriate manner.

See for example:

'Sexual Orientation Research Phase 3 – a Stocktake of Local Authority Policy and Practice', Scottish Executive, 2006
Findings include that only a minority of Scotland's 32 local councils refer to or consider sexual orientation or gender identity issues in policies and service provision respectively, across a range of council functions (pages 24 to 28).

'Towards a healthier LGBT Scotland', Inclusion Project, 2003
Findings include that 25% of LGBT respondents had experienced inappropriate advice or treatment from the NHS in Scotland due to sexual orientation or gender identity, and 24% had experienced homophobic NHS staff (page 4).

'Guidance on dealing with homophobic incidents, phase 1', LGBT Youth Scotland, 2006
Findings include (pages 7 to 11) that 51% of schools and 84% of current or recent pupils were aware of homophobic bullying in their school. 52% of current or recent pupils surveyed had been homophobically bullied, and less than one in six of those reported it to school staff. None of those who did

report it were satisfied with the response. 77% of current or recent pupils said that discussion of homophobia or LGBT issues never or rarely took place in their school.

However, a number of public authorities in Scotland have recently extended their equality impact analysis and equality schemes to cover the six strands. These include, for example, the Scottish Government, including the Crown Office and Procurator Fiscal Service, the NHS (which has a major six strand 'Fair for All' diversity programme), and some local authorities.

Extending the regulated public sector equality duties across the six strands would be consistent with the current trend, and would encourage those authorities which currently resist taking action to promote equality for some of the strands, to do so.

However, it is vital that the extension to six strands is not at a cost of reducing the strength of the existing duties. We would want to see the new strands added with their own specific duties, devolved to the Scottish Government, like the existing race, disability and gender duties. The specific duties for the new strands should be modelled on the best of the existing specific duties.

Most importantly, the duties must include equality impact assessment across services, for all strands, and for priority actions to promote equality to be identified for every strand. Allowing prioritisation between strands would almost certainly lead to no action being taken for strands seen as low priority, which would be likely to include the sexual orientation strand, and, within the gender strand, equality for transgender people.

As noted above (question 29), we believe that the gender equality duty, currently in section 76A of the Sex Discrimination Act, should be amended to include, as part of the second leg of the duty (s. 76A(1)(b)), the need to promote equality of opportunity between transgender persons and other persons. The first leg of the gender equality duty already implicitly includes the need to eliminate unlawful discrimination against transgender people.

Q40 Might there be disadvantages in extending the duty to any of these groups?

Yes

No

If so please give examples

Q41 Over what timescale do you think a single public sector duty and any extensions to it should be implemented to ensure we have learned as much as possible from recently introduced duties on disability and gender?

Introducing provisions in the Single Equality Bill is likely to mean that specific duties secondary legislation will not be introduced before 2009 at the earliest. We think that that gives enough time to learn from the disability and gender duties.

Q42 Do you think public authorities should be given the option to implement any new approach in advance of it becoming a legal requirement, enabling these authorities who have already taken an integrated approach to build on existing work?

Yes

No

Please explain:

We very much support an option for authorities to work to a six-strand public duty in advance of this becoming a regulated statutory duty. As noted above in answer to question 39, in Scotland, many public bodies are already under a statutory duty, in devolved legislation, to encourage equality across all these strands, although this is a non-regulated duty.

Enforcements of Public Sector Duties

Q43 Do you think that there should be a single enforcement mechanism for the proposed single equality duty, enabling the commission for Equality and Human Rights to issue a compliance notice with or without an assessment, as appropriate in the circumstances, enforceable in the county court or Sheriff's court in Scotland?

Yes

No

If not, please give your reasons

We strongly support the role of the CEHR in enforcing the public sector duties through compliance notices and legal action if required.

However, we would also like to see individuals and organisations with an interest able to seek judicial review of a public body's failure to comply with the public sector duties.

Public Service Inspectorate

Q44 What do you think should be the role of the public service inspectorates in assessing compliance with public sector equality duties?

We think that the inspectorates have a key role in assisting and encouraging compliance with the duties. To that end, we would like to see the CEHR Scotland build on the relationship that the three existing equality Commissions have been developing with the inspectorates in Scotland.

Q45 What issues would you like to see included in practical guidance on how public sector procurement can be used to achieve equality outcomes in the delivery of public services by the private sector, whilst ensuring that the guidance works well for business?

It appears that many public bodies are not using to the full their powers to promote equality through procurement. This is despite guidance being available from the equality Commissions. We think therefore that there is a strong case for including, in the specific duties, a requirement relating to procurement.

Chapter 6: Promoting good equality practice in the private sector

Q46 Do you think that an "Equality Standard" would be beneficial to businesses, employees and customers?

Yes

No

Please give reasons for your answers

Stonewall's Diversity Champions scheme has had a significant impact in promoting sexual orientation equality within the private sector, and the Workplace Equality Index is an important element of that.

We would welcome the promotion of an Equality Standard, covering all the equality strands, for the private sector.

This could be a useful tool in the context of procurement by the public sector.

Compliance with the standard could be a requirement for contractors, and in that case, it might be necessary to have an element of independent assessment of compliance.

If yes, would you prefer an accredited or a non-accredited good practice and compliance tool?

Accredited

Non-accredited

Q47 We would welcome your suggestions for other ways in which good equality practice could be encouraged and embedded in the private sector

We suggest that companies could be required to report on their equality practice in their annual reports/accounts. The requirement could be tailored to the size of the company. We suggest that this requirement should not be restricted to plcs.

Chapter 7: Effective dispute resolution

Improving the handling of Discrimination Cases in the Courts

Q50 Do you have any views on our proposals for enhancing discrimination expertise in the county and sheriff courts?

Because of the small population of some sheriffdoms in Scotland, we think that the opportunities for developing goods and services discrimination expertise in the sheriff courts across much of Scotland are limited.

Since Employment Tribunals already have expertise in discrimination law (and in particular, the Tribunals Service in Scotland has made this a priority), we believe that goods and services discrimination cases should be heard by Employment Tribunals.

We do not agree with the suggestion in the consultation paper that this would create significant problems where there are multiple causes, for example combining a breach of contract and a discrimination claim. This already happens in some employment cases, and we understand that it is usually dealt with by staying the sheriff court action until the tribunal case is decided.

Multiple Discrimination

Q52 Can you provide us with evidence illustrating any difficulties of gaining legal redress in cases of multiple discrimination?

We are not aware of specific cases at the current time. However, we note that, for example, the discrimination faced by a disabled gay man can be different from the sum of the discrimination faced by a disabled heterosexual man, and that faced by a non-disabled gay man.

We believe that the current arrangements, which, in such a case, would require the use of a comparator differing only in disability or only in sexual orientation, could make it harder to prove the discrimination.

Q53 Are there particular issues you would want to see addressed in relation to multiple discrimination claims?

For the reasons given in our answer to question 52 above, we would like to see it possible to take action on claims for discrimination on a combination of grounds, with a comparator who differs from the claimant by the combined grounds, rather than by a single ground only.

Part 3 – Modernising the law

Chapter 8: The grounds of discrimination

Q55 Do you have any comments on our approach to addressing the needs of parents and carers?

Yes

No

Please provide:

We think that consideration should be given to extending the public sector duty to include the promotion of equal opportunities for carers, as is already the case in Northern Ireland under section 75(1)(d) of the Northern Ireland Act 1998 (equality of opportunity between persons with dependants and persons without).

Married Persons and Civil Partners

Q56 Do you consider that the protection for married persons and civil partners is still needed in the absence of a "marriage bar" in employment?

Yes



No



Please give your reasons for supporting/opposing its removal?

In our view, this protection should be retained. It is clear from comments from members of our network (see below) that some job applicants are still asked about their marital status, and that the view that a married woman may be a less useful employee because she might choose to have children is still common.

Although this particular example may also constitute sex discrimination, we are concerned that some employers may continue to discriminate against women and men who are married or in a civil partnership, on the basis that they are more likely to require time off for child care, and that they may be less flexible about working hours and locations than a person who is not married or in a civil partnership.

We consulted our network on this issue. 45 people responded, of whom 38 were in favour of retaining the protection and 3 against (the remaining 4 were 'Don't know's). Comments included:

"In response I think this regulation should remain as when attending job interviews I feel that my marital status makes potential employers assume I am more likely to have children than a non-married person."

"I have not personally been discriminated, but just over a year ago I was working as a diversity consultant and was delivering training for a local council. At some point during the training one of the delegates announced that he did not see why organisations could not refuse to hire married women of a certain age as they were bound to start having babies and leave the organisation with the cost of their maternity leave etc. I was astounded by this attitude and at the overwhelming level of support he received from around the room. Of the 17 delegates only one agreed with me that this kind of attitude was wrong."

"My employer assumes that if you're not married with kids you will be flexible about working elsewhere in the UK or abroad - people who are married with kids are not expected to do that stuff - the burden falls to those without such a good excuse."

Chapter 9: Age discrimination

Q58 What instances of unfair age discrimination outside the workplace against people of any age, are you aware of?

Please give details of any examples below:

Research by Communities Scotland, 'The housing and support needs of older lesbian, gay, bisexual and transgender people in Scotland' (Communities Scotland, 2005), found that LGBT respondents felt that age was more of a barrier to accessing services than sexual orientation or gender identity (page v).

Q59 Is legislation the most appropriate and proportionate way of tackling harmful age discrimination?

Yes

No

What would be the likely costs of legislation?

We strongly support the extension of goods and services discrimination legislation to cover the age strand.

Chapter 10: Gender reassignment

Q62 Do you agree that we should prohibit discrimination on the grounds of gender reassignment in the exercise of public functions?

Yes

No

What are your reasons for supporting/opposing this?

The principle of harmonising across the strands means that this protection should be added unless there are very good reasons not to.

There are very significant transgender equality issues in policing, and in public policy making, for example policy on funding for gender reassignment treatment.

Discrimination of which we are aware, against transsexual people in the prison service, includes, for example, systems which require the use of former names, and bans on the use of vaginal dilators.

Q63 Do you agree that it is unnecessary to include school pupils and education in any extension to protect on the grounds of gender reassignment?

Yes

No

What are your reasons for supporting/opposing this?

We strongly disagree with this proposal.

We very much disagree with the statement in the consultation paper that it will be very rare for a child to be planning to undergo gender reassignment. As the consultation paper makes clear, gender reassignment treatment can comprise counselling. There are many young people under 18 who are being counselled about gender dysphoria, who are already clear that their gender identity is opposite to their current legal gender, and who have already decided that they wish to transition.

The Gender Recognition Act 2004 recognises this, allowing a person to apply for gender recognition at 18, if they have been living in their acquired gender for at least two years. Clearly that provision makes no sense except where people transition from the age of 16.

Overall then, there are many young transsexual people who are school pupils, including some who have transitioned, and, given the predominance of transphobic bullying in schools (see below), they are in particular need of protection from discrimination.

In addition, young people face discrimination at school because they have a transgender parent.

We do not agree with the claim in the consultation paper that existing education law and the Human Rights Act provide sufficient protection. If that were the case, why have specific laws on discrimination in schools on grounds of sexual orientation or race?

Furthermore, as we have noted elsewhere, the principle of harmonisation requires the law to be harmonised across strands, including protecting all strands from discrimination at school, unless there is very good reason not to do so.

Transphobic discrimination in schools is widespread. See, for example, 'Engendered Penalties: Transgender and Transsexual People's Experiences of Inequality and Discrimination', S. Whittle, L. Turner, M. Al-Alami, Equalities Review, 2007.

Findings include (page 17) that 64% of young trans men and 44% of young trans women experienced bullying and harassment at school, some of which was by staff.

It is also important to note the very close connection between homophobic and transphobic bullying in schools – both are based on the same underlying attitudes to gender roles. (See, for example, ‘Sexual Bullying: gender conflict and pupil culture in secondary schools’, N. Duncan, 1999)

We consulted our network on this issue. Of the 99 people who responded, 95 thought that the protection of anti-discrimination law should extend to school, while 4 disagreed. People’s reports of their personal experiences included:

“Harassed for not appearing traditionally feminine at school.”

“I was often accused of being transgender at school, and the other pupils used to be very cruel to me. It was kind of a whispering campaign, and entirely based on my not being a ‘girly girl’. I was a goth in a private school uniform. My teachers were pretty blasé about it when it got shouted out in class. Then it changed to comments about my sexuality. I don’t know if that was better or worse.”

“Pupils bullying and harassing others because of ‘non-standard’ gender expression is so common in my experience as a primary teacher that specific incidents merge.”

“Bullied, called names and I presume classmates did not know of trans issues they assumed me to be sissy, gay etc.”

Schools should be a safe place for students, including transgender students. Of all public services, schools have a particular responsibility to look after their young service users. They should certainly not be the only public services allowed by equality law to discriminate against transgender people.

Q64 Are there any circumstances in which you consider that it is necessary for organised religions to treat people differently on grounds of gender reassignment?

Yes

No

Please explain what they are:

We are aware that some religious organisations do discriminate against transgender people. For example, the Roman Catholic Church has said that it will not marry a transsexual person who has a gender recognition certificate.

We very much regret this discrimination, but we feel that it would not be the right approach to ban it through the law.

We believe that the model for the law here should be regulation 14 of the Equality Act (Sexual Orientation) Regulations 2007. Religious organisations should be allowed to continue a discriminatory practice where required to comply with the doctrines of the religion, or to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers.

However, as in regulation 14, this exception should not apply to faith schools, nor to services that are provided by religious organisations under contract from public bodies, nor to religious organisations whose sole or main purpose is commercial.

As we have noted in our comments below (question 79) on the proposed implementation of the Gender Directive, we think that these provisions should be made via the religious exceptions in the draft Sex Discrimination Act (Amendment) Regulations, rather than waiting for the Single Equality Bill.

Q65 Do you agree that we should retain the existing definition of gender reassignment?

Yes

No

Please say why:

We think that the law should be widened to protect from discrimination on grounds of gender identity (defined to include gender expression).

The Equality Network, like many other LGBT and transgender organisations, uses the word transgender in a broad sense, to include not just transsexual people, but all those who experience discrimination because their gender identity or expression is perceived as "wrong".

The existing "gender reassignment" basis of the law does not protect many of the people who face this kind of discrimination, such as intersex people, and people who experience gender dysphoria but who do not transition full time to the opposite gender to their original birth certificate gender (including people whose self-perceived gender is neither male nor female).

It is important to note that transgender people do not fall neatly into

categories such as transsexual, transvestite etc. As the research report for the Equalities Review, 'Engendered Penalties: Transgender and Transsexual People's Experiences of Inequality and Discrimination', S. Whittle, L. Turner, M. Al-Alami, Equalities Review, 2007, notes (page 14):

"This research has found that trans people have complex gender identities, often moving from one 'trans' category into another over time. Our survey found that 44% of respondents not living permanently in their preferred gender (who would be understood as transvestites), intended to do so in the future. This has implications for current law which offers some legal protections only for those who are understood as transsexual."

All these people face transphobic discrimination – the person discriminating neither knows nor cares whether the victim intends to undergo, is undergoing or has undergone gender reassignment, only that there is something "wrong" about their gender identity.

For example, members of our network commented:

"When working in one of Scotland's busiest sheriff courts as a prison officer, I witnessed severe bullying of feminine men, mostly by other prisoners but also by prison officers (men!) No action was taken. Food was thrown at these men, they were called names (this was all by other prisoners) but prison officers laughed it off or ignored it."

"I'm intersexed and my partner is a transvestite. We frequently have empty taxis fail to stop for us, often slowing down and then speeding up again. This is a serious problem for us because I'm disabled."

"I was dismissed whilst on the probationary period of a job because I was a masculine-appearing female. The things that the person dismissing me said made it quite clear."

Our answer to question 63 above includes additional examples, of experiences of our network members of transphobic discrimination in schools, again motivated by the victim's gender identity generally, rather than the perpetrator's knowledge of the victim's gender reassignment status.

The Engendered Penalties report cited above contains more examples of transphobic discrimination that would not be covered by the existing gender reassignment provisions.

We asked our network whether the law should protect people who do not fall within the current definition of gender reassignment from transphobic discrimination. Of 93 people who replied to this question, 92 said yes, and 1 no.

When considering a broader transphobic discrimination provision, it is useful to look at laws which protect transgender people from discrimination in other jurisdictions. Most other countries with such laws use a broader definition

than the UK's one of gender reassignment.

Within the EU, other countries do not explicitly include transgender in their anti-discrimination law. Of course, *P v S & Cornwall County Council* applies across the EU to protect transsexual people under sex discrimination law. In at least one country, Denmark, discrimination on grounds of transvestism is also unlawful (Report of the European Group of Experts on Combating Sexual Orientation Discrimination, paragraph 5.2.2, European Commission, 2004).

It has been argued that it is likely that the European Court of Justice would classify discrimination against intersex people and other transgender people as forms of sex discrimination (Sexual orientation discrimination in the European Union: national laws and the employment equality directive, C. Waaldijk & M. Bonini-Baraldi, 2006, pages 96-98).

Several states and territories in Australia explicitly include intersex in their transgender discrimination laws, and use a broader definition of transgender than gender reassignment. For example, the Anti-Discrimination Act of New South Wales covers discrimination on grounds of being transgender, being perceived as transgender, and associating with a transgender person. Transgender is defined as living, having lived, or wanting to live as a member of the opposite sex. No medical diagnosis or treatment is required. Intersex people are also explicitly included.

The United States has the most experience with transgender anti-discrimination laws, at both state and municipal level. The oldest such laws date back to 1975. Most of these laws protect from discrimination on grounds of "gender identity" or "gender identity or expression". Definitions vary in detail. The federal Employment Non-Discrimination Act currently before the US Congress defines gender identity as "the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth".

California's Gender Non-Discrimination Bill of 2003 extended the coverage of sex discrimination law to include "a person's gender identity and gender related appearance and behaviour whether or not stereotypically associated with the person's assigned sex at birth".

Several other US states and many municipalities have similar provisions. Further details of transgender anti-discrimination laws in other jurisdictions are available in 'Discrimination Law Review consultation – transgender discrimination laws around the world', Equality Network, 2007, available on our website here:

www.equality-network.org/YourScotland/Consultations/DLR

In Scotland, the issue of discrimination against transgender people has been considered in the context of hate crime law, which is devolved to the Scottish Parliament. The Scottish Executive's Hate Crime Working Group recommended in 2004 that a statutory aggravation be introduced for offences motivated by malice and ill-will on grounds of transgender identity, and the present Scottish Government has committed to introduce this legislation.

The Hate Crime Working Group recommended the following definition: Transgender identity means those characteristics of a person’s identity, appearance or behaviour which are usually associated with the gender opposite to the person’s legal gender, and includes, if it is the case, that the person’s legal gender has become the acquired gender under the Gender Recognition Act 2004.

The last part of the definition is included to cover malice and ill will against a person on grounds that they have obtained a gender recognition certificate, and is needed because such a person’s identity, appearance and behaviour may fully match their new legal gender. It would be unnecessary to include this, if the reference in the first section of the definition were to the person’s gender as assigned at birth (as in the US examples), rather than to their current legal gender.

For anti-discrimination law, it may be more appropriate to protect from discrimination both on grounds of being, and of not being, transgender, just as the sexual orientation discrimination law protects heterosexual people as well as lesbian, gay and bisexual people.

We would therefore suggest that the anti-discrimination law protect from discrimination on grounds of “gender identity” (rather than “transgender identity”), and a suitable definition might be along the lines of:

Gender identity means whether or not a person’s gender-related identity, appearance or behaviour conform or are perceived to conform to the person’s legally or medically assigned sex at birth (or to the identity, appearance and behaviour traditionally perceived as associated with that sex).

Chapter 11: Pregnancy and maternity

Q66 Do you agree that we should make less favourable treatment of a woman on grounds of pregnancy and maternity unlawful in the exercise of public functions?

Yes

No

What are your reasons for supporting/opposing this?

We agree with this extension to the legislation, on grounds of consistency with other pregnancy discrimination law.

Chapter 12: Private clubs and associations

Q68 Do you agree that it is a positive benefit to have clubs which are set up for the purpose of offering the benefits of membership to a particular group, including single sex clubs catering for particular religions or beliefs or age ranges, along with those currently permitted under race, disability and sexual orientation law?

Yes

No

We would like to see the law continue to allow private clubs catering for the needs of people of particular sexual orientation. We would also like to see the law continue to allow private clubs catering for the needs of transgender people.

Q69 Do you agree with the proposal to make it unlawful for private clubs with 25 or more members (other than single sex clubs or those set up for members who are a particular religion or belief) to discriminate on grounds of sex and religion or belief?

Yes

No

If you do not, please explain why:

We agree, and we think that it should also be unlawful for private clubs with more than 25 members to discriminate against transgender people, except where the club is set up for the purpose of providing benefit specifically for transgender people.

Q70 Do you agree that private clubs with 25 or members should not be permitted to discriminate against guests on the grounds of sex, race, sexual orientation and religion or belief, as is already the case on the grounds of disability?

Yes

No

Please explain:

This change would remove an anomaly in the law, and would harmonise the provision for private clubs across the specific strands. Again, discrimination against transgender people should also be covered.

Q71 Do you think that the law should address unjustified age discrimination by private clubs with 25 or more members (other than those set up to cater for a particular age range) if age discrimination is made unlawful in the provision of goods, facilities and services?

Yes

No

If you do not, please explain why:

We support the harmonisation of age provisions here with the other strands.

Chapter 14: Harassment

Q73 Can you provide examples of harassment you think is occurring or could occur on grounds of religion or belief, sexual orientation, age or disability, which would fall outside the existing protections in discrimination and other law?

Please list examples below:

There are not yet any decided cases on direct discrimination under the Equality Act (Sexual Orientation) Regulations 2007. It is therefore unclear at present how far the direct discrimination provisions will protect people against harassment on grounds of sexual orientation.

We asked members of our network whether they felt that the law should be extended to explicitly cover harassment in the provision of goods and services. 96 people replied, of whom 95 said the law should be extended, and 1 disagreed. People also told us about their experiences of sexual orientation harassment in goods and services provision. Examples reported include:

“Yes, abusive language, pulling faces but did not actually ask me and my partner to leave the café (caused by us holding hands over the table)”

“Derogatory comments that clearly referred to an assumption of me (and on occasion, friends) being gay.”

“Yes – in a B&B – once landlady was aware of sleeping arrangements (2F + 2M) she became extremely impolite, banged breakfast down on table and did all in her power – short of throwing us out – to let us know she did not approve.”

“I told my gynaecologist that I didn’t use condoms because I don’t have sex with men. During our second consultation she pretended to have forgotten my disclosure and told me that my symptoms would disappear when I had children. When I told her I don’t plan to have kids she lectured me on the wonders of childbearing. I wished I hadn’t come out to her as I felt humiliated, as if my way life was being belittled.”

“I was the butt of homophobic jokes by a health service worker“

“Partner once had luggage rifled through at a B&B in Scotland after owner took exception to giving a double room to a gay couple.”

We think these experiences fall within the definition of harassment used in discrimination law. It is much less clear whether they could be successfully challenged as direct discrimination, especially given the need for a comparator, which is not needed to prove harassment.

We note that the majority of enquiries to ACAS about sexual orientation discrimination in employment are about harassment, and we think that this pattern of bad treatment is the same outside the employment field. In short, harassment of lesbian, gay and bisexual people is common, and exists in all spheres of life.

Part of the function of the law is to make clear what is unacceptable behaviour. The law should state that harassment in providing goods and services is not acceptable, and spell out what harassment means.

Finally, as we have noted in response to other questions, the principle of harmonisation requires the law to be harmonised across strands unless there is very good reason not to do so. Harmonised law is clearer and simpler to understand for all concerned. Entirely the wrong message is sent by excluding harassment from goods and services legislation for some strands, when it is included for other strands (and for employment legislation across the strands).

Q74 Do you think that express statutory protection against harassment on grounds of:

- religion or belief;
- sexual orientation;
- age; and
- disability

should or should not be provided in any of the following:

- (a) the provision of goods, facilities and services?

Yes

No

Please say why.

As noted above in our answer to question 73, harassment on grounds of sexual orientation by providers of goods and services is common, and would be better dealt with by an explicit harassment provision than by the direct discrimination provisions.

We have quoted examples of harassment experienced by members of our network in our answer to question 73 above.

- (b) education in schools?

Yes

No

Please say why.

Harassment, as defined in the anti-discrimination legislation, is by far the biggest problem faced by young lesbian, gay and bisexual people in schools, and by young people who have LGB parents.

See for example the findings in 'Guidance on dealing with homophobic incidents, phase 1', LGBT Youth Scotland, 2006. 84% of young people and over half of schools were aware of verbal homophobic abuse of pupils. The majority of this abuse is by other pupils, but there have also been reports of collusion, or actual abuse, by staff.

The same research found that only 15% of young people who had been homophobically bullied had reported it to staff, and none of those were satisfied with the outcome. Clearly schools are failing to deal with the epidemic of homophobic harassment.

While an explicit harassment provision would not apply to pupils themselves, it would apply to schools and would directly require them not to act in a way which violated pupils' dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for them. We believe that this would more directly help to ensure that schools take reasonable steps to address homophobic bullying, than the current direct discrimination provisions which are comparator based.

(c) the management or disposal of premises?

Yes

No

Please say why.

We believe that this should be covered in the same way as more general goods and services provision, for the reasons set out in the answer to question 73, above.

(d) the exercise of public functions?

Yes

No

Please say why.

There is clear evidence of sexual orientation harassment occurring in certain public functions, such as policing and the prison service. We therefore believe that public functions should be covered by harassment provisions in the same way as more general goods and services provision.

For example, a member of our network told us, about prison:

“Having spent three months on remand and a later 2 year sentence, I was stupid enough on my first time in prison in answer truthfully, the question all new inmates are asked during their induction. “Are you or have you ever been a homosexual?” I said yes. Stupid, stupid, stupid. The Scottish Prison Service have very firm views on this and they maintain a strict policy but when have inmates ever conformed to rules? My time in there was a nightmare. Between the constant harassment from some guys wanting to be my ‘boyfriend’ and do deals and the ‘straight’ ones trying to demonstrate how ‘straight’ they were by threatening me, trying to cut me, etc.”

Q75 Were statutory protection against harassment to be extended to one or more of the above grounds in one or more of the above areas, do you think that specific exceptions would be desirable?

Yes

No

If yes, please say why and the types of exceptions, if any, you would like to see in the legislation:

In our view, there is no case for allowing harassment in any circumstance in which discrimination is unlawful.

There may however be a case for exceptions paralleling some of the exceptions from discrimination legislation. For example, under regulation 14 of the Equality Act (Sexual Orientation) Regulations 2007, most functions of religious organisations are excepted from the sexual orientation goods and services discrimination provisions. We would hope that religious organisations would not engage in harassment on grounds of sexual orientation. However, there may be a case for an exception from the harassment provisions, which should be no wider than the existing discrimination exception in regulation 14.

Q77 Do you think there is a valid distinction to be made between harassment in an “open” and in a “closed” environment and that the approach to its prohibition should be differentiated accordingly?

Yes

No

Please say why:

We do not agree with the suggestion that there is a valid distinction to be made between “open” and “closed” environments. Firstly, it is not the case that there is always an element of choice in using a privately provided service. Often there is no effective choice: to mention just one example, there is no choice of train service provider on most routes.

Secondly, allowing harassment by private providers, where there is an element of choice of provider, does not of course enable people to avoid harassment. That would only be possible if the legislation required shops, pubs etc that engaged in harassment to put up warning signs outside! We think that it is not an appropriate response to someone who has suffered harassment by a provider of goods and services, for example on grounds of sexual orientation, to suggest that the remedy is to switch to a different provider.

Thirdly, it is important for the promotion of good relations and a society at ease with itself, that discrimination-based harassment is understood to be unacceptable from any provider of goods and services.

Q78 Do you have any evidence of harassment by third parties in the workplace in relation to protected grounds other than sex? If so do you consider that it should be dealt with in a similar way?

Yes

No

If so, please state your reasons why:

An example of this kind of harassment on grounds of sexual orientation is the case of Pearce v Governing Body of Mayfield School. Ms Pearce was a teacher harassed on grounds of sexual orientation by pupils at her school.

This case predated the introduction of the Employment Equality (Sexual Orientation) Regulations 2003, and the complaint was under the Sex Discrimination Act. However, it is very unlikely that the sexual orientation regulations would have helped, as the final judgment of the House of Lords in 2003 was based in part on the finding that the employer was not liable for third party harassment.

On the other hand, the recent judgment of the Employment Appeal Tribunal in Gravell v London Borough of Bexley points in the other direction.

To us, this indicates that the law needs clarification, and we think this should be by explicitly requiring employers to take reasonable steps to deal with harassment of their employees by customers, clients or service users.

We also suggest that consideration be given to requiring service providers to take reasonable steps to protect service users from harassment by other service users. This could include for example, users of public services such as the health service, and could also apply to private services such hotels. Clearly the service provider would not always be able to prevent third party harassment. The law could not require the supplier to take unreasonable action, for example action that involved risks to person, but could deal with the situation where the supplier takes no interest in the problem at all.

Annex B – Implementing the Gender Directive

Q79 Do you agree with the proposals in Table 1

Yes

No

If not, please give details of those you disagree with and your reasons for doing so.

Single sex services

We disagree with the proposals, and the provisions in the draft Sex Discrimination (Amendment) Regulations, applying to transsexual people and same-sex services.

We welcome the inclusion of the “proportionate means of achieving a legitimate aim” test in new section 35(2A) of the Sex Discrimination Act (SDA), inserted by regulation 12(c) of the draft SDA (Amendment) Regulations 2007. This is as required by recital 16 to the Gender Directive.

However, we are very concerned about the application of SDA section 35(1A), (1C) and (2) to transsexual people who have obtained a gender recognition certificate. It appears that SDA section 35 (amended as proposed) would allow a provider of single-sex services falling within these subsections to refuse the service to a transsexual person who has a gender recognition certificate, despite the person being of the correct legal sex for the service.

This is inconsistent with the treatment of transsexual people in the employment provisions of the SDA. Section 7A allows discrimination against transsexual people in single sex employment, on grounds of their transsexuality. Section 7B allows discrimination against a transsexual person where the employment involves certain issues of privacy or personal services. But sections 7A(4) and 7B(3) disallow such discrimination once the transsexual person has obtained gender recognition.

To allow single sex services to discriminate, on grounds of gender reassignment, against a person who has obtained gender recognition is in our view inconsistent with the spirit of the Gender Recognition Act 2004 and the European Court of Human Rights judgment in *Goodwin v UK* and *I v UK*. A key principle of the Gender Recognition Act is that it protects the privacy of a person who has obtained gender recognition, by removing any need for them to disclose that fact.

It would be wrong to pass new provisions that could encourage providers of single sex services to question people about whether they have a gender recognition certificate, before admitting them to the service. The fact that a person previously had a different legal gender is irrelevant. The fact that a person’s body may be different, as regards body shape and genitalia, from that of many other people of the same legal sex is not relevant either – people’s bodies come in all shapes and sizes for all sorts of reasons.

The issue is more complex for a transsexual person who has not obtained a gender recognition certificate. Such a person might or might not be living full time in their acquired gender, and that gender is different to their legal gender, which can create specific difficulties in some circumstances. We agree that in such a case it is reasonable to allow some flexibility in the provision of single-sex services, and that, where the person does not have a gender recognition certificate, discrimination on grounds of gender reassignment should be lawful for single sex services, but only where it is a proportionate means of achieving a legitimate aim.

We therefore believe that proposed new section 35(2A) of the SDA should

be amended to add the provision that the single-sex exceptions in subsections (1A), (1C) and (2) shall not apply to gender reassignment discrimination against a person who has obtained a gender recognition certificate. This would make the gender reassignment law for single-sex services consistent with the gender reassignment law for employment, and with the Gender Recognition Act and the Goodwin v UK and I v UK judgments.

Religious exceptions

We are concerned at the breadth of the religious exceptions in the draft Sex Discrimination Act (Amendment) Regulations. These exclude from protection the provision of all goods, facilities and services at a place (permanently or for the time being) occupied or used for the purposes of an organised religion.

It has been suggested that such goods, facilities and services are not within the scope of the Gender Directive because they are not “services” within the meaning of article 50 of the EU Treaty. However, such an interpretation of the Directive has been challenged on the basis that the European Court of Justice has ruled that services provided for remuneration do fall within article 50. Clearly some services provided at a place occupied or used for purposes of an organised religion could be paid-for services. Under that interpretation, the religious exceptions proposed in the draft SDA (Amendment) Regulations would need some adjustment to be compatible with the Directive.

In any case, we believe that the new religious exceptions for goods and services discrimination on grounds of gender reassignment should be as consistent as possible with the exceptions already in place, for employment discrimination on grounds of gender reassignment, and for employment and goods and services discrimination on grounds of sex and sexual orientation.

Those exceptions allow discrimination which is required either to comply with the doctrines of the religion, or to avoid conflicting with the strongly-held religious convictions of a significant number of the religion’s followers. We believe that, for reasons of consistency, simplicity, and resulting clarity, the same test should be applied to the religious exceptions for gender reassignment discrimination in the SDA (Amendment) Regulations.

To ensure compliance with the Gender Directive, it might in addition be necessary to provide explicitly that the discrimination also be a proportionate means of achieving a legitimate aim.

Finally, we note that there were many months of debate before the religious exceptions in regulation 14 the Equality Act (Sexual Orientation) Regulations 2007 were introduced. In our view, that regulation strikes a good balance between religious freedom and freedom from discrimination. It includes the doctrine or religious convictions test. Additionally, it provides that the exception does not apply to services provided by a religious organisation on behalf of and under contract from a public authority. We think that a consistent provision should apply to discrimination on grounds of gender reassignment. The same non-discrimination rule should apply to a religious organisation that is contracted to provide a public service with taxpayers’

money, as applies to any other contractor.

Q80 Do you have any comments on the likely impact of the Gender Directive's insurance provisions on providers and/or customers of insurance and related financial products?

Yes



No



Please provide:

We do not think that the proposed provisions regarding transsexual people and insurance are quite right. We welcome the intention behind the provisions, that, essentially, a "transitioned" transsexual person should pay the premium that is relevant for their transitioned gender, while a "pre-transition" transsexual person should pay the premium for the gender recorded on their original birth certificate.

We also welcome the recognition that the time of issuing of a gender recognition certificate is NOT the right time to switch the applying premium rate from one gender to the other. Such a rule would discriminate against someone who does not obtain a gender recognition certificate, for example because they do not wish to divorce their existing partner. A member of our network told us:

"I am transgender m2f have recently changed passport and driving licence, but I am married with 3 teenage children still at home. I would like to change my birth certificate but would have to get divorced first. While my wife is happy to be married to me as transgendered she does not want to divorce or be deemed to be in a same-sex partnership. Being married thus prevents me from changing my birth certificate to female, it remains male which means I remain male in the eyes of pension schemes and insurance companies."

As it stands, new section 2A(1A) of the Sex Discrimination Act (SDA), inserted by regulation 4(b) of the proposed SDA (Amendment) Regulations, requires a person who has "undergone gender reassignment" to be treated in their reassigned gender by insurance providers, and a person who is still "undergoing gender reassignment" to be treated in their original legal gender (unless they have a gender recognition certificate).

However, the difference between "undergoing gender reassignment" and "undergone gender reassignment" is not, we think, well defined. It would not be practicable or reasonable, for many insurance purposes, to require applicants to give details of their medical history. Even if they did, who decides that the gender reassignment process is complete, and on what basis?

We propose that a more practical, and fairer, solution would be for the switchover of premium rate from one gender to the other to happen at the time that the person transitions, in the sense of starting to live full time and permanently in the transitioned gender. This is what happens in practice in many cases, because once a person is living full time in their transitioned gender, they can obtain documentation such as a passport, driving licence, utility bills, etc in that gender, and this can often be used to apply for insurance.

We therefore suggest that the new section 2A(1A) of the Sex Discrimination Act could be rewritten along the lines of (where B is a person who intends to undergo, is undergoing or has undergone gender reassignment):

- (a) where B is living in the gender to which B intends to undergo, is undergoing or has undergone gender reassignment, and B intends to continue so living for the rest of B's life, insurance providers shall not treat B less favourably on grounds of gender reassignment than other persons whose sex corresponds to that gender
- (b) in other cases, insurance providers shall not treat B less favourably on grounds of gender reassignment than other persons of B's (current) legal sex.

Thank you for completing this response form.