

EC proposal for an Equal Treatment Directive

Response to the Government Equalities Office consultation
28th July 2009

Equality Network, 30 Bernard St, Edinburgh, EH6 6PR

Tel: 07020 933 952

en@equality-network.org

www.equality-network.org

1. The Equality Network is a network of over one thousand individuals and organisations in Scotland working for lesbian, gay, bisexual and transgender (LGBT) equality. We welcome the opportunity to respond to the GEO's consultation on the EC proposal for an Equal Treatment Directive.
2. We have focussed primarily on the provisions of the proposed Directive that relate to sexual orientation.

Harassment

3. In answering GEO's questions 1 to 3, we believe there are two issues to be considered:

- Whether harassment on grounds of sexual orientation by providers of goods, facilities and services (GFS) is a significant problem;
- Whether an explicit harassment provision is needed in the law to address this problem.

We believe the clear answer to both these questions is yes.

Incidence of harassment

4. A number of surveys have highlighted the extent of harassment on grounds of sexual orientation by GFS providers in Scotland. Similar evidence exists for the rest of the UK and for the EU generally.

5. The Equality Network surveyed members of our network of LGBT people in Scotland, in summer 2007, in preparation for our

response to the UK Government's Discrimination Law Review consultation. 97 people participated in the survey. 18% had experienced sexual orientation discrimination or harassment in the provision of GFS, and more than half of those experiences (10% of respondents) were clearly harassment – that is, degrading, humiliating etc treatment which violated their dignity. These experiences included harassment by public and private service providers. Details are included at Annex 1.

6. Further examples that Equality Network members have told us about, during 2009, include:

- “My daughter was bullied at school and when I went to ask for it to be addressed we were told ‘we are only used to dealing with normal families here’.” (Lesbian mother)
- “A taxi driver asked me where I worked, and when I said it was an LGBT organisation, he started saying that homosexuality was abhorrent and unnatural which made me feel angry and upset but I felt trapped in his taxi as it was late at night and I didn't want there to be any further problems.”
- “I was admitted to hospital and a friend brought a copy of Gay Times for me to read, and I was advised that it would not be a good idea to read the magazine in the day room or on the ward.”
- “We were dancing together at a wedding ceilidh and we got looks and muttered unpleasant comments from the band who later made unnecessary comments about male/female partnerships when calling later dances.” This person went on to note, “I think it is low-level, constant instances such as this, which we all naturally brush off and accept as a fact of life, which are the most damaging in the long run. They perpetuate the climate in which hate crime develops.”

Imagine any of these examples happening on grounds of race (for example to a mixed-race couple), and the unacceptability is clear. It is a demonstration of how pervasive such harassment is that the last quoted respondent noted that lesbian, gay and bisexual people accept this kind of harassment as a fact of life.

7. LGBT Youth Scotland recently asked young LGBT people in Scotland their experiences of harassment. Many reported

harassment in schools. In some cases, staff failed to help; in others, the harassment included staff:

- “I was made by the boys in my class to get changed for PE in the toilets as they didn’t want to get changed in front of a gay guy. I told my PE teacher but he agreed with them and sent me to the toilet.”
- “I was bullied by about 200 people at the same time; it was mainly verbal and other stuff. Boys used to walk out the toilet when I walked in and teachers did nothing to help.”
- “In sex education class I asked if we could talk about gay relationships too but was told no as ‘it isn’t normal’.”
- “At school my PE teacher told me I had to get changed in the toilets, he implied that the other boys had a problem with me changing in the communal area. I decided to go and ask the other boys in my class and they all said they didn’t have a problem at all. I then approached my teacher and said to him that none of the other boys had a problem but did he, and he replied ‘what if I do?’.”

8. Other young people reported to LGBT Youth Scotland that they had been harassed in youth groups:

- “I have not been able to discuss it [sexual orientation / gender identity], and I have felt uncomfortable when workers and other young people have made homophobic comments.”
- “In a non-LGBT [youth] group I would never come out as it wouldn’t be safe at all.”

9. Stonewall Scotland surveyed LGBT people in Scotland about their treatment by public services (“Service with a smile”, Stonewall Scotland, 2009). Reported experiences included:

- “I was recovering in hospital after an operation. My boyfriend came to visit me regularly and an old man opposite me in the ward regularly swore at me and made homophobic comments. When I told the nurse that I didn’t like his behaviour, she said ‘maybe he doesn’t like your behaviour’.”

- “I was in hospital and my girlfriend came to visit and one of the nurses said we were acting inappropriately when we kissed whereas they left another heterosexual couple well alone.”
- “Council – was spoken about within earshot and could hear what was said.”
- “Social worker in Kilmarnock allowed a verbal homophobic attack in a meeting.”
- “My sister’s friend came out to her guidance teacher and the reaction she received was very negative. She was basically told it was wrong and she should get a boyfriend.”

10. Surveys across Britain reveal similar levels of harassment. For example Stonewall’s “School Report” (2008) surveyed LGB pupils and found that 65% had experienced homophobic bullying and 97% homophobic language, with 30% saying adults were responsible for homophobic incidents in their schools.

11. The problem is also clear at EU level. The European Union Agency for Fundamental Rights (FRA) reports, about education:

“Incidents of bullying and harassment of LGBT persons are reported in educational settings across the EU. Verbal homophobia and transphobia are commonplace, and the word ‘gay’ is commonly used in a derogatory way.

“Bullying and harassment have significant consequences for LGBT youth, affecting school performance and well-being. Such experiences can lead to social marginalisation, poor health or dropping out of school. Existing research and interviews with LGBT NGOs demonstrate that school authorities across the EU pay little attention to homophobia and LGBT bullying”

(“Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States, Part II: the Social Situation”, Summary Report, European Union Agency for Fundamental Rights, March 2009, page 12)

12. The FRA also note that LGBT people across the EU experience discrimination in health care, tend to conceal their sexual orientation from health care providers, and can experience negative reactions if they do disclose their sexual orientation (ibid., page 13).

The need for an explicit provision on harassment

13. We believe that the evidence of widespread sexual orientation harassment¹ by providers of goods, facilities and services, is overwhelming, and is not seriously questioned by any equality practitioner. However, it has been suggested that it is not necessary to legislate against such harassment, because it is said that any example of harassment can always be dealt with under other law, primarily as unlawful discrimination (less favourable treatment because of sexual orientation). We strongly disagree with that view.

14. The proof requirements for direct discrimination and harassment are different. To prove direct discrimination requires a comparator, of different sexual orientation, who is treated better. To prove harassment, no comparison is required – it is sufficient that the conduct was unwanted and had the specified purpose or effect. It is very unlikely for example that homophobic behaviour directed generally at service users, regardless of their actual or perceived sexual orientation, would be direct discrimination, but it could certainly be harassment.

15. Even if it could be demonstrated that every case of harassment was in theory covered by provisions on direct or indirect discrimination, other issues remain. The first is ease of access to justice – incidents of harassment fit more naturally under the definition of harassment, and clear evidence is more likely to be available to prove harassment, than to prove discrimination.

16. Employment equality law across the EU covers harassment as well as direct and indirect discrimination, and there is a body of case law relating to harassment, that will not be available to draw

¹ As defined by the proposed Directive, as unwanted conduct related to sexual orientation that has the purpose or effect of violating a person's dignity and of creating an intimidating, hostile, degrading, humiliating or offensive environment

upon if GFS harassment cases have to be pursued under direct or indirect discrimination provisions. An important UK example is *English v. Thomas Sanderson Ltd* ([2008] EWCA Civ 1421).

17. One of the key aims of the proposed Directive is to create greater legal certainty for GFS providers across the EU. To do that, the law must set out clearly what is unlawful. Judged against that aim, it would be very unsatisfactory to implement prohibition of harassment indirectly via the discrimination provisions. If the intention is that the kind of harassment examples set out in paragraphs 6 to 9 above, and in annex 1 below, should be unlawful, the Directive should state that directly. This is particularly important given that the Employment Equality Framework Directive does that. To omit explicit harassment provisions from the GFS Directive, when they are in the Employment Directive, will cause great confusion about whether harassment by providers of GFS is unlawful to the same extent as harassment by employers.

18. It has also been suggested that the harassment provision could extend to some of the four strands (eg, disability and age) while not extending to others (sexual orientation and religion / belief). In our view that would completely undermine the aims of providing equal protection for all the strands, and of simplifying the law. Even if it were true that all sexual orientation harassment incidents can be shoehorned under the direct and indirect discrimination provisions, it is quite inevitable that including explicit harassment protection for some strands and not others will clearly signal that the missing strands neither need, nor are provided with, as high a level of protection. The clear message will be that, for some reason, harassment related to the missing strands is acceptable in ways that it is not acceptable when related to for example race or disability. That would be a completely unsatisfactory and counter-productive message to send, especially when it is clear that sexual orientation harassment is at least as prevalent across the EU as harassment related to other strands. Because of its prevalence, sexual orientation harassment needs provisions that are just as clear and strong as the other strands.

19. Finally, it has been suggested that there is a reason why sexual orientation harassment should not be made unlawful in the same circumstances that, for example, race harassment is already unlawful across the EU. It is suggested that the rights to freedom of religion and freedom of expression (ECHR articles 9 and 10) mean that it would be wrong to give equal protection from sexual

orientation harassment as is already given from race harassment. We strongly disagree with this suggestion. All the EU equality laws are subject to compliance with the ECHR, and so article 9 and 10 rights are guaranteed. We think it is quite wrong to suggest that there are forms of intimidating, hostile, degrading, humiliating or offensive conduct which, when relating to sexual orientation, are legitimate free expression protected by the ECHR, but when relating to race, are not. The protection from harassment by employers, already provided by EU law for all the strands including sexual orientation, has not been found to breach ECHR articles 9 and 10; neither has the protection from race harassment by providers of GFS. There is therefore no reason at all to think that GFS harassment protection related to any of the other strands, including sexual orientation, will breach Convention rights.

Marital and family status and reproductive rights

20. We are concerned about the breadth of the exemption in article 3(2) and recital 17 of the proposed Directive, regarding national laws on marital and family status and reproductive rights. We accept that it is not appropriate for this Directive to impose requirements on EU countries to introduce registered same-sex partnerships or same-sex marriage. However, cases at the European Court of Human Rights have already established that discrimination between cohabiting same-sex and mixed-sex couples breaches the ECHR. It seems appropriate that the protection from sexual orientation discrimination provided by the Directive should extend to discrimination in these areas based on sexual orientation, but not on marital or registered partnership status. This would mean prohibiting discrimination between:

- People in cohabiting same-sex relationships and people in cohabiting mixed-sex relationships;
- People in same-sex registered partnerships and people in mixed-sex registered partnerships (where those are both provided on an equivalent basis by the country concerned); and between
- People in same-sex marriages and people in mixed-sex marriages (where those are both provided by the country concerned).

21. We also believe that it would be appropriate for the Directive to ban discrimination on grounds of sexual orientation in the provision

of reproductive services, within the framework expressed in the preceding paragraph (ie, allowing discrimination on grounds of marital or registered partnership status).

Health care, education and housing

22. Research across the EU (such as that quoted in paragraph 11 above) shows that, as in Scotland and the rest of the UK, education, health care and housing are all areas in which sexual orientation discrimination and harassment are common. We therefore believe it is vital that the Directive covers all three of these areas.

Perception and association

23. We welcome the intention that the Directive should extend to banning discrimination and harassment against a person because they are perceived to have a protected characteristic, or because of their association with a person who has a protected characteristic. We would like to see this made explicit in the text of the Directive.

Age and disability discrimination

24. We agree with the EC's proposal that the age discrimination provisions should extend to people under 18. The age discrimination provisions include a general exception for treatment that is, within the context of national law, justified by a legitimate aim and is an appropriate and necessary means of achieving that aim. We believe that this provides all the flexibility needed to treat young people in an age-appropriate manner. If discrimination against people under 18 is unlawful on grounds of gender, gender reassignment, race, sexual orientation, disability and religion/belief, it should be unlawful on grounds of age also, except where appropriately justified.

25. We agree with the EC's proposal that the disability protection in the Directive should extend to the manufacture and design of products, to transport vehicles, and to housing.

Annex 1: survey of sexual orientation discrimination and harassment by GFS providers in Scotland

During the summer of 2007, we consulted our network of LGBT people across Scotland, via postal and online surveys, about Britain's anti-discrimination laws. This included asking whether people thought that harassment on grounds of sexual orientation, by providers of goods, facilities and services, should be banned by anti-discrimination law.

We received 97 survey responses, 96 of which stated that harassment on grounds of sexual orientation by providers of goods, facilities and services should be banned by anti-discrimination law, and one of which stated that it should not be banned.

In the survey, we asked people to tell us about any personal experience they had had of harassment by providers of goods, facilities and services.

18 of the 97 respondents described personal experiences. Of those 18 experiences, eight were actually examples of clear direct discrimination rather than harassment. These included six examples of being refused a double room in a hotel or a bed and breakfast, one example of being refused a lease on a flat, and one example of being excluded from a pub.

Seven experiences were of harassment by providers of goods, facilities and services. The experiences described are quoted directly here:

- “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).”
- “Yes – in a B&B – once landlady was aware of sleeping arrangements (2F and 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.”

- “Derogatory comments that clearly referred to an assumption of me (and on occasion, friends) being gay.”
- “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.”
- “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.”
- “I was the butt of homophobic jokes by a health service worker.”
- “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.”

The remaining three experiences were of sexual orientation harassment by third parties, and not by providers directly: harassment of a community centre user by another user, harassment of a prisoner by other prisoners, and harassment of a university student by other students.

In summary, of 97 LGBT survey respondents, 8 described personal experiences of direct sexual orientation discrimination by providers of goods, facilities and services, 7 described experiences of sexual orientation harassment by providers, and 3 described experiences of harassment by third parties while being provided with goods, facilities or services.

This survey suggests that sexual orientation harassment by providers of goods, facilities and services has been as widespread as direct discrimination. Since the banning of such direct discrimination in the UK in April 2007, harassment may now be more widespread than direct discrimination.