



## **Discrimination Law Review**

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

---

Response by Stonewall  
September 2007

Consultation response

## Introduction

1. Stonewall welcomes the Discrimination Law Review consultation paper as a step to reforming a currently complex, and in many cases uneven, framework of anti-discrimination legislation. Stonewall is a national organisation that has campaigned for equality for the 3.6 million lesbian, gay and bisexual people across Britain since 1989. We currently work with some 300 partner organisations including a wide range of public bodies.
2. Stonewall is strongly committed to legislative simplification making it easier for individuals and organisations both to access and understand the law. The Discrimination Law Review, and the proposed Single Equality Bill, presents an opportunity to 'level-up' legislative protections, extending protection from discrimination in areas such as employment and the provision of 'goods and services' to those groups currently without such safeguards. Our default position is that protections should be extended across the board, both for reasons of equity and transparency, unless there are compelling reasons for doing otherwise.
3. It is essential that there is no regression from the levels of protection already established in existing legislation. The Government should set its sights on the 'highest common denominator' to ensure no dilution of existing rights.
4. An area which Stonewall believes to be particularly important is widening the current equality duties on public bodies to create a **single, integrated duty** – including sexual orientation equality - which will oblige publicly-funded bodies and the providers of public services to promote equality across the board. We have set out our views on how such a duty should work in more detail below. Essentially, we believe that a single public duty could have a transformative effect on gay people's lives in areas where they have often faced discrimination, by encouraging public bodies to actively accommodate the needs of lesbian and gay service-users in the design and delivery of public services. Such an extension would be welcomed by many of the public bodies we work with.
5. The Discrimination Law Review also presents a welcome opportunity to revisit some of the exemptions written into anti-discrimination legislation. Many of the current exemptions reflect the social and political context in which our existing legal framework was developed and we see no case for preserving what is essentially a 1970s model. Stonewall has concerns about the way in which some exceptions in more recent legislation, such as Regulation 7(3) of the Employment Equality (Sexual Orientation) Regulations 2003, have been abused in a way which the Ministers who introduced them certainly never intended.
6. The Government has presented its Discrimination Law Review and the proposed Single Equality Bill as a 'once in a generation' opportunity. At Stonewall, we're concerned that this representation risks pitting communities of interest against each other. Other areas of the law, such as criminal justice, are amended and updated at regular intervals. We see a very strong case for adopting the same approach towards anti-discrimination legislation to ensure Britain has laws that are relevant and fit for purpose.
7. We have not responded to every question in the consultation paper but have focused on key areas where we can offer an informed contribution. If you would like to discuss any aspect of this response further, please contact either Jonathan Finney, Parliamentary Officer, 020-7593 1855 ([jonathan.finney@stonewall.org.uk](mailto:jonathan.finney@stonewall.org.uk)) or Alan Wardle, Director of Parliamentary Affairs, 020-7593 1854 ([alan.wardle@stonewall.org.uk](mailto:alan.wardle@stonewall.org.uk)).

## **PART 1 – HARMONISING AND SIMPLIFYING THE LAW**

***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?***

8. We agree that the existing approach in relation to discrimination on the basis of perception and association on grounds of sexual orientation should be retained. This is important in both employment and 'goods and services' protections. Removing it would leave some people without protection from discrimination. For example, a man perceived to be gay can be subjected to homophobic bullying and verbal abuse by work colleagues, regardless of his actual sexual orientation.
9. We welcome the Government's proposal to legislate to outlaw discrimination on the basis of association with transsexual people. However, we disagree with the Government's assessment that there is no case for legislating on the basis of perception in this area. Stonewall is committed to a levelling-up of equality provisions to make the understanding of protections for all communities simpler. We believe that 'goods and services' protections for transsexual people should include discrimination on the grounds of the perception that an individual may be planning to undergo, be undergoing or have undergone gender reassignment. It would be possible to build in a 'reasonableness' test so that the law is able to protect those who have suffered a detriment without becoming unwieldy.

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

10. We agree with the proposal to harmonise the definition of indirect discrimination where it applies across the protected grounds. This would extend the wider meaning of indirect discrimination, with the wording 'provision, criterion or practice' across all protected grounds. This approach already exists in sexual orientation legislation, specifically the Employment Equality (Sexual Orientation) Regulations 2003 and the Equality Act (Sexual Orientation) Regulations 2007.

***Do you agree with our proposal to harmonise the objective justification test?***

11. Similarly, we agree with the proposal to harmonise the objective justification test. The same approach across the board will create a set of legal protections which will make it easier for individuals and organisations to access and understand the law.

***Do you agree that a genuine occupational requirement test should be introduced for all grounds of discrimination with the exception of disability (where it is not necessary)?***

12. We do not agree. We are not convinced of the benefit of application of a test across all grounds of discrimination. In the unusual case cited by the Review, of a gay equality organisation recruiting a chief executive, we believe it would be essential for the credibility of such an organisation that its chief executive, as the public face of such an organisation, can speak confidently and with authority on discrimination issues that affect lesbian and gay people, not necessarily that he or she be of a particular sexual orientation.
13. We see a strong case for repealing Regulation 7(3) of the Employment Equality (Sexual Orientation) Regulations 2003. It has been used to unfairly discriminate against gay people in a way that the Ministers who introduced it never envisaged, as demonstrated by their statements at the time. Listing specific genuine occupational exceptions, for example on grounds of gender, could suffice.

***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? Please give your reasons and examples of what it might cover.***

14. We note that if a genuine service requirement test were to be adopted, it would not apply across all the protected grounds which could make the law in this area more difficult for service providers to understand. Stonewall strongly supports harmonisation and simplification of the law and for this reason we oppose such a test.
15. Under the Equality Act (Sexual Orientation) Regulations 2007, service providers may offer targeted services. The objective of such service provision is to encourage take-up by people who may not otherwise access them, due to apprehension about revealing their sexual orientation. Where such services are targeted towards lesbian and gay people it should be emphasised that they are not the subject of 'special treatment'. The services are offered elsewhere but evidence now demonstrates that take-up of health and support services improves when directed towards specific groups rather than to the majority population. This arrangement applies across equality 'strands' – e.g. the provision of separate services for men and women is now widely accepted as an effective mechanism for increasing access to such services. This currently works in practice. Consequently, we are not convinced of the case for introduction of a genuine service requirement.

***Do you agree with the proposal for a unified approach where exceptions apply to more than one protected ground, where this is appropriate?***

16. We are not convinced of the need for exceptions in areas such as national security and Parliamentary sovereignty. However, where exceptions have no adverse effects on particular groups or communities, we agree with the proposal to adopt a unified approach in the interests of legislative simplification.

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

SO Regulation 7(3) – Organised religion

17. We do not believe that Regulation 7(3) of the Employment Equality (Sexual Orientation) Regulations 2003 should be retained. It has been flagrantly abused by some organisations who have used it to unfairly discriminate against gay employees in a way which was certainly not envisaged when it was introduced.

Small dwellings

18. Stonewall has previously expressed concern about the retention of an exemption from all anti-discrimination legislation for small dwellings. We disagree with the principle which lies behind it. Although the scope of the exception is narrow, the reasoning behind it reflects the social and political context in which much of our existing anti-discrimination legislation – particularly that for race and gender – was framed some decades ago. In 2007, it is no longer appropriate for the law to condone a landlord or one of his/her relatives objecting to sharing a bathroom or kitchen with someone on grounds of their race or sexual orientation. We do not believe that this exemption should be retained.

SO Regulation (GFS) 14 – Organisations relating to religion or belief

19. We maintain our support for the Government's position that there is no case whatsoever for exempting any public, community or commercial services provided by religious groups from the Equality Act (Sexual Orientation) Regulations 2007. Only where an activity is clearly central to the doctrines of a faith, such as a religious service, should this be permitted.

20. Some recent employment cases highlight the very real problem of continuing discrimination within some religious organisations. There is ongoing concern that some faith organisations may seek to extend or exploit existing narrow exemptions for doctrinal activities to actively discriminate against all lesbian and

gay people in recruitment or promotion as well as in the provision of 'goods and services'. The Government should take proactive steps to discourage this as well as taking opportunities to reiterate the narrow scope of the Equality Act (Sexual Orientation) Regulations 2007 exemption for organisations relating to religion or belief.

#### SO Regulation (GFS) 17 - Private clubs and associations

21. Where a private members' club or association wants to be permitted to include a particular sexual orientation as a membership criterion, the key issue should be whether the **primary purpose** of the group or club justifies it doing so. The primary purpose of a lesbian football club in Doncaster, for example, is clearly to enable lesbians to meet other lesbians and to socialise and form friendships in a safe space, which otherwise they might struggle to do. The fact that the group bases this function around a sport, in this case football, is secondary. Provided such a criterion is explicitly and justifiably connected to the purpose for which the club has been established, this exception should be retained.
22. However, if a football club largely attended by heterosexual men or women attempted to ban gay people from attending its weekly meetings on the grounds that the club's primary purpose was to enable heterosexual people to meet and socialise, this would be difficult to justify (there are manifest opportunities for heterosexuals to do this) and it should fall foul of the law.

***Do you agree that the exceptions listed in Table 2 in Annex A should be removed? If not, please explain why.***

23. We agree that an exception from equality legislation for the **sale or letting of owner-occupied premises** should be removed. As noted above, we think there is a case for also removing the small dwellings exemptions.

***Is there any need to retain an exception to allow insurers to treat people differently on grounds of sexual orientation, where supported by sound actuarial evidence, beyond the end of 2008? If yes, what should this seek to achieve and why?***

24. The exception for insurers from the Equality Act (Sexual Orientation) Regulations 2007 was unexpected and had not been consulted on by the Secretary of State for Communities & Local Government prior to its introduction. We do not think it is appropriate that insurers should continue to benefit from such an exemption, given concerns at their apparent recent history of exploiting gay men for commercial gain. We welcome the 'sunset' assurance given by ministers that the current exemption will not last beyond December 2008 without good reason

and we do not believe that any exemption should be preserved beyond that date.

25. Stonewall believes that the approach adopted in the Association of British Insurer's (ABI) Statement of Best Practice on HIV and Insurance, implemented in October 2005, takes the correct approach by requiring insurers to calculate premiums based on behaviour rather than sexual orientation. Repealing the current exception would enshrine that approach on a statutory footing. We support the announcement issued by the ABI on 30 August 2007 which proposes the abolition of the exemption and call on the Government to follow suit.

***Do you agree that there would be benefits in adopting a harmonized approach to the way goods, facilities and services and public functions provisions are structured across all protected grounds?***

26. We support this. We are committed to legislative simplification.

## **PART 2 – MORE EFFECTIVE LAW**

### ***Chapter 4: Balancing measures***

27. Chapter 4 of the consultation asks whether organisations should be allowed to introduce 'balancing measures' to tackle inequalities. Stonewall recognises that this sort of 'positive action' is different from positive discrimination and is intended to secure fairer outcomes.
28. Where positive action is justified and necessary, it can help tackle under-representation and disadvantage, not just in employment but in the efficient delivery of targeted public services too.
29. One example would be a health service which takes steps to meet the needs of different groups, such as lesbians, gay men or bisexual people. The Department of Health, for example, has long recognised the advantage of targeting campaigns to minimise the spread of HIV and sexually transmitted infections, delivering messages in different ways for different audiences. Increasingly there is evidence of other similar measures proving successful. It is now understood that lesbians are more likely to smoke, and are more likely to smoke for longer, than heterosexual women. This is influenced by a variety of factors, including the fact that lesbians are less likely to give up smoking before or during pregnancy. Islington Primary Care Trust has introduced smoking cessation programmes targeted at lesbian and bisexual women, offering advice and support in an environment where women who may otherwise be reluctant to attend such a group can be confident of participating without the fear of discrimination.

30. It would be helpful for organisations to be able to use a wider range of voluntary measures to make progress in tackling inequality and promoting diversity. Positive action should include all equality 'strands'.
31. It has been suggested that the Commission for Equality & Human Rights could have a role in approving all positive action programmes. Stonewall believes that this would be impractical and unmanageable. It should be easy, rather than cumbersome, for employers to tackle under-representation and disadvantage. An approval scheme perceived as excessively bureaucratic could discourage employers from adopting such measures. Instead, we agree that the Commission could offer helpful guidance in this area.
32. Stonewall believes the Government should widen the scope of voluntary positive measures political parties can take to target the selection of candidates and appointees beyond gender. However, while we welcome such an expansion of voluntary measures in principle, we note that the existing arrangements have not resulted in wider diversity, such as on grounds of sexual orientation, race or disability. Fifteen years after the introduction of women-only shortlists in the Labour Party, they have not resulted in a single open lesbian being elected to the House of Commons. There are still no women in the House of Lords able to talk with the lived experience of being a lesbian, and just two openly gay men out of its 747 members. Any positive action measures to be permitted by political parties should seek to address under-representation across the board.

### **Chapter 5: Public sector duty**

33. Stonewall believes that the existing race, disability and gender equality duties should be replaced with a single duty on public authorities to promote equality across the board, which extends protection to **all** grounds including sexual orientation. This approach is supported by many of the public bodies we work with.
34. A single, integrated public duty – which we believe should apply to all public bodies - will help public authorities deliver better, more customer-focused services while ensuring equality of access to publicly-funded services for all, including lesbian and gay people. Such an approach would make delivery of a public duty much easier for the staff of such authorities. Public services are funded by lesbian and gay taxpayers – accordingly service providers should be expected to provide similar levels of fair treatment for all.
35. An integrated public sector duty should apply to all public bodies. We strongly disagree that certain smaller public bodies, such as small schools or GPs surgeries, should be exempted. There is significant evidence of discriminatory practice within such bodies.

36. Organisations should be required to take a proportionate approach to tackling inequalities. Clearly the obligation on a central Government department would be different in scale from a small school, however both should be covered. We are aware of some schools already considering adopting a single equality scheme, recognising the benefits that this approach would deliver as well as the less burdensome impact on resources, compared to producing several separate equality schemes.
37. A single public duty would make a significant beneficial difference in the delivery of services such as **education, policing, health services and housing**, ensuring that existing barriers that gay people may encounter are identified and removed. For example, it would mean schools being required to actively address the widespread prevalence of homophobic bullying rather than waiting until children have necessarily been disadvantaged as a consequence, as often happens at present.
38. A number of public bodies, including the Crown Prosecution Service (CPS) and the Learning and Skills Council, have already adopted an across-the-board, single equality scheme – including sexual orientation - as best practice and support an integrated duty. This has resulted in benefits such as the CPS reviewing and updating guidance on prosecuting cases of homophobic crime. Stonewall works with a wide range of public sector organisations including local authorities, police forces, fire and rescue services and NHS primary care trusts. Many of those organisations already anticipate the introduction of a single public duty and recognise the benefits that such an approach could offer, helping them deliver more effective services.

### Scope

39. An integrated public duty should extend to **all publicly-funded services contracted-out by public bodies** to the private sector or charities. Stonewall hopes that the Government will take the opportunity to remedy the legal loophole which persists in the definition of a public authority, where private and voluntary sector care homes and others provide services under contract to a local authority. Decisions by the House of Lords in two key cases, *R (H) v. Leonard Cheshire Foundation* and *YL v. Birmingham City Council* have undermined the Government's declared intention that functions carried out by private and third sector bodies under contract to public sector organisations should be covered by a duty to promote equality for all potential service users. This should be remedied by legislation.
40. We believe there should be no 'watering down' of existing protections. The Government should opt for a 'highest common denominator' approach, keeping the **maximum level of protection** enshrined in existing law and extending this to all communities. The Government should identify the strongest and most

effective features from the three current public duties and level up protection across the board.

41. We can see no reason for preventing public authorities from implementing any new approach in advance of it becoming a legal requirement and are surprised that this should even be countenanced by the Government. Such an approach should be welcomed and encouraged. Not allowing this option would discourage those organisations who are taking effective steps to promote equality across the board and consequently already delivering more effective public services.
42. Stonewall believes that inspectorates have an important role to play in assessing compliance with public sector equality duties. For example, we support Ofsted addressing the effectiveness of schools in tackling homophobic bullying, as well as other forms of bullying.
43. We do not support the proposal that there should be a single enforcement mechanism operated by the CEHR. This would be unsustainable in practical terms and there is no reason why other bodies or individuals should not have appropriate opportunities to scrutinise effective delivery of a public duty to promote equality.
44. We believe that a 'proportionate approach' would be simpler than developing and maintaining a list of public bodies encompassed by a single public duty. We see potential difficulties in developing and maintaining such a list. A single public duty should recommend steps, focused on delivery and performance, which can be applied proportionately by different types of organisations. Clear guidance for public bodies operating in specific sectors, such as health or education, would ensure that a new single duty is not excessively cumbersome.
45. There is already good practice being delivered on how **public sector procurement** can be used to achieve equality outcomes in the delivery of public services by the private sector. We are surprised that a Review as extensive as this did not seek evidence on and cite the work currently being undertaken by Transport for London, the Greater London Authority and others. We believe that the Government should consult these organisations before developing guidance on this area, specifically seeking their expertise on ensuring that any guidance works well for business.
46. Stonewall is not convinced of the case for introducing a duty to promote equality on the private sector. We believe it risks being unenforceable. As noted above, however, we believe that a single public sector duty should encompass private sector organisations engaged in the delivery of public services through procurement. This could certainly be helpful in securing equality outcomes, but the Government should not legislate more widely than this.

## ***Chapter 6: Promoting good equality practice in the private sector***

47. The consultation asks for views on an 'Equality Standard' and whether this would be beneficial to businesses, employees and customers. In spite of the lengthy period that the Review was in preparation, it is not clear from the proposals who would accredit an independently assessed and certified scheme. We believe that this could be unwieldy. There are existing good practice forums which are well-established and delivering demonstrable outcomes for participants, including Stonewall's Diversity Champions programme, which enables employers to work with Stonewall and each other, across sectors, to promote lesbian, gay and bisexual equality in the workplace.

## ***Chapter 7: Effective dispute resolution***

48. Stonewall would welcome consideration of ways in which people who have experienced discrimination in the provision of 'goods and services' can bring cases more swiftly and simply without going through the County Court system. In our view, existing mechanisms for bringing cases are not conducive to good development of the law, especially in relation to sexual orientation where both the court and tribunal systems are dealing with new areas of law and where there have been attempts to weaken and undermine the legislation, as seen with Regulation 7(3) of the Employment Equality (Sexual Orientation) Regulations 2003.

## **PART 3 – MODERNISING THE LAW**

### ***Chapter 8: The grounds of discrimination***

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

49. Stonewall highlights the fact that both parents and carers may be lesbian or gay. Many lesbian and gay people depend on networks of friends and 'families of choice', rather than those people recognised under the legal definition of 'relative'. We assume that the Government will be mindful of this when addressing the needs of people with caring responsibilities.

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

50. We note that this provision is no longer required for its original purpose, which was to ensure that women forced to resign from employment upon marriage would be able to claim discrimination. This provision was extended to civil

partners by the Civil Partnership Act 2004, to ensure parity of treatment between spouses and civil partners.

51. Stonewall is aware of cases of civil partners being treated less favourably than married people. The Employment Equality (Sexual Orientation) Regulations 2003 were amended so that a civil partner who is treated less favourably than a married person by their employer can bring a claim of discrimination. For example, if married employees are offered benefits such as time off before or after their wedding, similar benefits must be made available to civil partners. The Equality Act (Sexual Orientation) Regulations 2007 expressly forbid businesses and public authorities from discriminating against civil partners. For example, a venue which accepts bookings for wedding receptions cannot refuse to take bookings for civil partnerships. The Government should ensure that repealing this provision would not inadvertently expose anyone to unfair discrimination.

### **Chapter 10: Gender reassignment**

52. Stonewall is committed to a levelling-up of equality provisions to make protections for all communities simpler. Chapter 10 states that the Government will legislate to outlaw direct discrimination in the provision of goods, facilities and services on grounds of gender reassignment. We strongly urge the Government to do this before the end of this year, the deadline for implementing the EU Gender Directive being 21 December 2007.
53. In addition, the Government should ensure that the Single Equality Bill addresses wider issues, such as indirect discrimination and the exercise of public functions, to give transsexual people the same level of protection as other groups. As noted above, we believe that the Government should make sure that 'goods and services' protections for transsexual people cover discrimination on grounds of the perception that an individual may be planning to undergo, be undergoing or have undergone gender reassignment.

### **Chapter 14: Harassment**

54. Chapter 14 of the consultation asks about harassment which may occur on grounds of sexual orientation and which falls outside existing legal protections.
55. The Employment Equality (Sexual Orientation) Regulations 2003 outlaw harassment on grounds of sexual orientation. We believe that this established level of protection is necessary and should be retained. In the area of employment, harassment on grounds of sexual orientation is likely to be the most common type of discrimination reported.
56. The Equality Act (Sexual Orientation) Regulations 2007 do not include explicit harassment provisions. Stonewall's view, based on legal advice, is that the

existing direct and indirect discrimination provisions protect a person where it is demonstrated that they have suffered a detriment on grounds of their sexual orientation. We have been unable thus far to substantiate examples of 'harassment' which would not be caught by the protections against direct and indirect discrimination.

57. However, if such cases were found we would be happy to discuss this issue in more detail. The Government should consider whether any cases identified by the consultation exercise from other equality grounds could apply to other equality 'strands', including sexual orientation.

ends