



**Getting Equal: Proposals to Outlaw Sexual
Orientation Discrimination in the Provision of
Goods and Services**

**Response by Stonewall Cymru
May 2006**

Consultation response

Introduction

Stonewall Cymru is pleased to respond to the UK government's proposals for tackling discrimination in the provision of goods, facilities and services on grounds of sexual orientation. Stonewall Cymru works to promote equality for lesbian, gay and bisexual (LGB) in Wales by offering evidence based information and advice to the National Assembly for Wales (NAW), Welsh Assembly Government (WAG), local authorities, and public service providers.

Stonewall Cymru works within the unique legislative context for equality in Wales. The Government of Wales Act (s.120 1998) requires the National Assembly/ Welsh Assembly Government to:

.... make appropriate arrangements with a view to securing that its functions are exercised with due regard to the principle that there should be equality of opportunity for all people

This duty and the similar duty placed upon local authorities, both of which include lesbian, gay, and bisexual people, has led to range of 'equality reforms' in education, health, local government and economic development (Chaney and Fevre 2002).

For example, *Respecting Others: Anti-Bullying Guidance* (National Assembly, 2003), advocates a whole school approach to tackling bullying including discussing sexual-orientation in Personal and Social Education. This has cross-party support. A recent review of the implementation of this guidance was commissioned by the Education Minister. The evaluation found that those policies which identified and tackled bullying across all 'strands' including those that specifically discussed how homophobic bullying is manifest and how it should be addressed, were consistently the most effective (Epstein *et.al.* 2006).

The distinct government inspectorates in Wales are required to audit the success of policies to promote equality. ESTYN, the schools inspectorate, consider anti-bullying policies and implementation, with particular reference to how homophobia is addressed. These approaches exceed interventions elsewhere in GB.

Given this example, Stonewall Cymru's main concern is to ensure that the new GFS regulations do not prevent Wales' service providers from continuing to meet the equality needs of LGB people through specific provision within and without mainstream services.

A small number of religious groups are calling for sweeping exemptions to be carved into the sexual orientation regulations. We strongly emphasise our view that faith groups should have no more right than anyone else to deny someone access to commercial or public services simply because of their sexual orientation.

Stonewall Cymru therefore calls upon the government to resist providing such exemptions within the regulations. Given the powers in the Government of Wales Act to modify UK acts of parliaments where the Assembly Government has a delegated role in their implementation (Chaney and Fevre 2000), this could mean that certain exemptions would not be enforceable in Wales.

In particular, there can be no question of homophobic discrimination by any organisation that receives funding or subsidy from the public purse, especially in Wales where using that purse means promoting equality for all. Permitting some people to discriminate, whether in the name of religious belief or otherwise, would weaken and undermine these important measures. A key rationale behind any anti-discrimination law must be to try to change discriminatory behaviour and to send out a clear message that this sort of behaviour is always unacceptable.

Rather than allow exemptions, the regulations should be exemplar in anticipating that a public duty to promote equality for lesbian, gay and bisexual people will soon exist throughout the UK, leading to the adoption of such approaches as outlined above, throughout GB.

This response addresses each of the 21 questions raised in the consultation document in turn. If you would like to discuss any aspect of this response further please contact Alison Parken, Director, Stonewall Cymru, Tel: 029 20 237744, email: alison.parken@stonewall.org.uk

Q1: Do you agree that the new sexual orientation regulations should apply to goods, facilities and services?

1. Yes. It is absolutely essential that the new regulations ensure protection from discrimination in the provision of goods, facilities and services on grounds of sexual orientation, including **all** publicly funded services.
2. Protection from discrimination in goods and services is vital if we are to ensure equality for everyone in our society. Without statutory protection for sexual orientation, legislative advances already secured, such as protection from homophobic discrimination in the workplace and partnership rights for same-sex couples, are undermined if discrimination continues unchecked in education in schools and healthcare.

Q2: Should the concept of goods, facilities and services have the same scope as in other equality legislation, in particular Part 2 of the Equality Act 2006?

3. Yes, except where Part 2 of the Equality Act 2006, which deals with discrimination on grounds of religion or belief, contains exceptions. We see no case for replicating in the sexual orientation regulations. We urge the government to resist calls to do so. For this reason, we cannot say that the sexual orientation regulations should have the same scope as Part 2 of the Equality Act 2006.
4. **It is essential that the exercise of public functions is covered by the regulations.** We strongly believe that there can be no question of discrimination by any organisation that receives funding or subsidy from the public purse, including contracted out and procured services. This includes the NHS and schools. Given the duty upon the National Assembly for Wales to promote equality for all people, exceptions which are discriminatory would be unlawful.
5. The importance of covering education in schools has been addressed in the introduction to this paper but to reiterate, it is crucial that education falls within the scope of these regulations. The sexual orientation regulations represent a key opportunity for the government to emphasise its serious commitment to tackling homophobia and homophobic bullying in schools, to complement other steps being taken to undo the damaging legacy of Section 28 of the Local Government Act 1988. This piece of

legislation was effectively repealed in Wales by the actions required under *Respecting Others* (National Assembly for Wales, 2003) but still today, teachers are uncomfortable with speaking out against homophobia for fear of censure, and even more insidiously because they are afraid they will be subject to homophobic harassment should they stand up against it. This is indicative of the culture in some schools - this legislation should reinforce policies being adopted in Wales which send a strong signal that such cultures must change.

Q3: Do you agree that we should provide an exemption from the prohibition on sexual orientation discrimination so that services to meet a specific and justified need can be provided separately to different groups on the basis of their sexual orientation? What specific activities would such an exception need to apply to?

6. There are many groups across the country who provide social and support services targeted towards LGB people and it is essential that these important services are allowed to continue after the introduction of the regulations.

7. These services include health services, counselling services, lesbian and gay switchboards and advice lines, as well as social groups which enable lesbian and gay people to meet in a safe space which they might otherwise struggle to do.

8. As the consultation document notes, the aim of targeted services is to encourage improved take-up of those services by lesbian and gay people who might otherwise not access them, due to apprehension about revealing their sexual orientation. Where services are targeted towards lesbian and gay people, it should be emphasised that this is not an issue of 'special treatment'. The services provided are available elsewhere, but evidence shows that take-up of public services can improve when directed to meet the specific needs of groups rather than to the general population. This arrangement applies on other grounds - such as the provision of separate services for men and women - and is widely accepted as an effective mechanism for increasing access to, and effectiveness of, public services.

9. Many lesbian and gay social support groups are created for activities such as a peer support, sports or hobbies. There has been concern amongst some of these groups that their activities will be affected once the regulations take effect. Stonewall Cymru understands that these groups will be able to continue given that their primary function is to provide social

support to a minority group, in response to a clear need, but we think that it is important that guidance makes this clear. (This point is discussed in more detail below in relation to private members' clubs and associations in response to question 7).

It is extremely important that this exemption is not exploited by any individual or group to justify discrimination against people of a particular sexual orientation. Clear guidance from the government will be crucial in this area in order to avoid misinterpretation, whether intentional or accidental.

10. There has been some concern about how the sexual orientation regulations will impact on businesses aimed predominantly at LGB customers, particularly gay bars and pubs. The regulations will make it illegal to refuse entry to someone to a bar or pub simply because of their sexual orientation. However landlords and pub staff, in common with anyone running a licensed business, will still have the legal right to reject anyone who they believe may cause trouble or is causing disruption. In reality, lesbian and gay people go to gay venues with straight friends all the time and we understand that this change in the law will not force businesses to change the way in which they currently operate.

Q4: Do you agree that premises should be covered by the sexual orientation regulations?

11. Yes. There have been cases of discrimination against lesbian and gay people in this area and this will form an important part of the protections. Stonewall Cymru has heard from lesbian and gay couples who have been refused rented property together, sometimes directly by the owner of the property or via a letting agency acting on the landlord's behalf. The measures which will make it illegal to publish discriminatory advertisements (see our response to Question 17 below) or to give instructions to discriminate (see Question 18) will be particularly important in relation to premises.

12. Our understanding is that the sexual orientation regulations will not make it illegal to express a preference for a gay-friendly flatmate or someone of a particular sexual orientation. Many lesbian and gay community websites feature adverts along these lines. What is important is that while such adverts indicate certain preferences, they do not expressly prohibit people of any particular sexual orientation from applying.

Q5: Do you agree that an exemption should be provided for selling or letting of private dwellings as described in this consultation paper?

13. Stonewall Cymru recognises that this exemption would parallel some existing equality legislation, but we disagree with the principle that lies behind it. Although the scope of the exception is narrow, the reasoning behind it reflects the particular social and political context in which our existing anti-discrimination legislation - particularly that for race and gender - was framed some decades ago. In 2006, it seems no more acceptable that the law intentionally provides for a landlord or one of their relatives to object to sharing their bathroom or kitchen with a black person than it does for them to object to sharing with someone who is lesbian or gay.

14. This aspect of the proposals seems vastly outdated and Stonewall Cymru sees no reason for preserving an essentially 1970s model in the sexual orientation regulations. We recommend that the inclusion of this measure in existing legislation for race and gender be addressed as part of the government's discrimination law review, currently underway. The government, and in due course the Commission for Equality for Human Rights, must be at pains to ensure that our anti-discrimination legislation keeps abreast of changing social attitudes so that the law in itself does not reinforce inequalities. Maintaining compatibility across defective legislation is not in itself a sufficient reason for extending this exemption, particularly when the discrimination law review is already well advanced and the government has made a commitment to bring forward a single equality bill in the life of this parliament.

15. There is a risk that an exemption such as this could be exploited in certain situations. There have been many cases of bed and breakfast owners refusing accommodation to lesbian and gay people with the justification that the B&B doubles as their home as well as their business premises. The Christian Institute, an evangelical lobby group, is demanding that some businesses and service providers be entitled to turn away lesbian or gay customers simply on the basis that they are run by Christians. We trust that the government will resist calls from religious groups to widen this proposed exemption even further. **We do not see a case for any business turning away customers simply because they are lesbian or gay.** Should individuals wish to go into business for commercial gain, they should no more be able to exempt themselves from anti-discrimination legislation than they should be entitled to exempt themselves from health and safety laws of which they might disapprove.

Q6: Do you agree that private members clubs should be included in the sexual orientation regulations?

16. Yes.

Q7: What is your view on our proposal that both private members' clubs and associations should be permitted to include having a particular sexual orientation as a membership criterion, but only where this criterion is explicitly connected to the purpose for which the club has been established?

17. We agree that private members' clubs should be included in the sexual orientation regulations. In terms of whether a private members' club or association should be permitted to include a particular sexual orientation as a membership criterion, the key issue must be whether the primary purpose of the group or club justifies it doing so.

18. The primary purpose of a lesbian football club 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. If a football club attended by straight 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 straight people to meet and socialise, this would be difficult to justify and should fall foul of the law. The primary purpose of such a football club is to enable people to meet and play football together rather than enabling straight men to meet other straight men, or straight women to meet other straight women.

19. Many clubs state in their constitution or membership criteria that while their group is predominantly aimed at lesbians or gay men, people of other sexual orientations are welcome to participate. Again, clear guidance will be essential in clarifying how this part of the regulations is intended to work in practice.

Q8: Do you agree that the new sexual orientation regulations should apply to public functions as well as to goods, facilities and services? Do you think that any specific additional exceptions might be needed from a prohibition on sexual orientation discrimination in the exercise of public functions?

20. It is absolutely essential that the regulations apply to the exercise of public functions given the widespread evidence that lesbian and gay people encounter discrimination not only from businesses in the private sector but also from organisations in the public sector. See also the introduction to this response, which details the distinct legal equalities context pertaining in Wales. This requires the National Assembly to promote equality for all people, including through the provision of public services.

21. Stonewall Cymru heard recently from one woman who was denied a smear test on the basis that she was a lesbian. Understandably, this left her feeling upset and distressed.

22. **There can be no question whatsoever of discrimination by an organisation which receives funding or subsidy from the public purse.** This includes direct funding, such as the funding of NHS Wales and contracted-out services, such as companies or voluntary organisations who are awarded contracts to provide services on behalf of a public body.

23. Page 16 of the consultation document details certain activities undertaken by public bodies which will be exempted from the regulations. Stonewall Cymru is not convinced that all activities given in the list are currently exempt in Wales. For example, the conduct of Assembly business currently falls within the scope of s120 of Government of Wales Act. The new regulations must not have a deleterious effect on this good practice.

24. We understand that local authority powers under section 2 of the Local Government Act 2000 are exempted so that where a local authority takes steps to promote the well-being of particular members of the community, perhaps in this instance the local lesbian and gay community, there is no risk of equality legislation interfering with those activities. We appreciate the good intentions behind this but we would have concerns about it being exploited in a negative way. We hope that the government will provide further detail on this in their consultation response. In addition, s48 of the Government of Wales Act 1998 places a duty to promote equality for all upon local authorities, meaning specific equality actions might be necessary to overcome past disadvantage.

Q9: Do you agree that schools should be covered by the sexual orientation regulations?

25. Yes. We strongly support the government's proposal to extend protection to include access to, and the provision of, education in schools in both the maintained and independent sectors. It is crucial that all schools are covered by the regulations. Please see introduction to this response for information concerning positive steps in Wales to promote equality for LGB people in education.

26. The best interest of a child should be the priority for all schools. Every individual should feel valued. If a school wishes to lay emphasis on 'stable relationships' in order to uphold its ethos, there is no reason why this should not include same-sex relationships as well as opposite-sex relationships. We strongly believe that teaching in schools should reflect the real world in which young people will one day live as adults. All children, both those growing up to be gay and those growing up to be heterosexual, will benefit from understanding that people make serious commitments to each other through both marriages and civil partnerships.

27. Homophobic bullying is endemic in schools and causes permanent damage. In one survey (*Bullying – don't suffer in silence*, DfES, 2002), **82%** of secondary school teachers said they were aware of verbal homophobic bullying and **26%** were aware of physical homophobic bullying. However, only **6%** of schools in England and Wales had anti-bullying policies that dealt specifically with homophobic bullying.

28. It is encouraging to see that the prohibition on discrimination will apply regardless of whether discrimination takes place because of a person's own sexual orientation or that of a person they know, such as a relative. Homophobic bullying affects children and young people from all backgrounds, in all schools and blights the schools and colleges where it takes place. As the consultation paper notes, schools will have a duty to ensure that their bullying policy tackles homophobic bullying with the same seriousness as bullying motivated by other factors. This is vital.

Q10: Are there any circumstances in which you consider that schools, or a part of the schools sector, should be exempted from the regulations?

29. There are absolutely no circumstances in which any schools should be exempted from these protections. All children deserve protection from discrimination, regardless of which school they happen to attend. Including some schools within the scope of the regulations while exempting others would be entirely illogical – homophobia is never acceptable. We should

be doing everything that we can to stamp out homophobia in our schools, not legislating to cultivate it.

30. We are pleased to see that the regulations will apply to the selection of pupils for admission, so that a child or young person can not be turned away by a school because of their own perceived sexual orientation or that of someone they know.

31. We believe that teaching in schools must be covered by the regulations. Developing teaching policies that meet the needs of all young people, whatever their sexual orientation, is essential. There can be no case for legitimising homophobia in any area of the curriculum.

Q11: Are there any areas of activity for schools for which you consider special provision needs to be made?

32. No. The sexual orientation regulations must apply to all schools, including faith schools. Any exemptions in this area would send out a damaging message that in certain situations homophobia is permissible and serve to validate wider discrimination against lesbian and gay people. The failure of any school to address the issues of homophobia and bullying is to risk compromising the life chances of children forever.

Q12: Do you consider that an exemption should be provided from the regulations for some of the activities of religious organisations?

33. We strongly agree with the government that there is no case whatsoever for exempting any community or commercial services which are provided by religious groups.

34. Any exemptions which do apply for religious organisations must be carefully drafted to ensure that they can not be used to justify wider discrimination. Only where an activity is clearly central to the central doctrines of a faith should this be permitted. Clear guidance will be critical in this area.

Q13: Do you agree that these exemptions should be restricted to activities that are primarily doctrinal? If there are any other activities that you consider should be covered by an exemption, what are these and why do you consider that they need to be exempted?

35. We strongly agree. There are no other activities that should be exempted. The government must do everything that it can to guarantee that this exemption applies exclusively to doctrinal activities and to ensure that no faith groups are able to exploit it in order to discriminate more widely. A peer in the House of Lords has called for 'religious hospitals' to be given the right to refuse treatment to people who happen to be lesbian or gay. We find that suggestion deeply disturbing. It is essential that the government firmly opposes any such demands.

36. It would be helpful if the government could clarify exactly what is meant by 'doctrinal' in its consultation response. We do not believe, for example, that it should extend to religious assemblies in schools. The guidance will also need to make this very clear.

Q14: Do you agree that an exception should be provided for charities that provide services specifically to people because of/ according to their sexual orientation?

37. Provided that this is intrinsic to their charitable objectives, then yes. As with other areas, care must be taken in the regulations themselves and particularly in guidance that a charity cannot be allowed to build discrimination into its activities and justify this as a charitable purpose. This is particularly important in the case of faith organisations, who may seek to argue that for religious purposes, they should be able discriminate against people on the grounds of their sexual orientation. In some areas in Wales the only access to services to address homelessness are provided by religious organisations; they cannot be allowed to turn people away or insist on 'conversion' to access services.

Q15: Do you agree that the sexual orientation regulations should include direct and indirect discrimination as well as victimisation? Are there any particular considerations or situations that should be taken into account in how such provisions are drafted?

38. We agree that the regulations should include direct and indirect discrimination, as well as victimisation. Including these types of discrimination will be essential in order to tackle the types of discrimination which we know are taking place.

Discrimination against civil partners

39. We are pleased that the government has made specific reference to discrimination against civil partners. Stonewall Cymru has heard from many couples who having entered into civil partnerships since December 2005 have met with discriminatory treatment. This includes situations where couples have been turned away from venues where they hoped to celebrate their civil partnership.

40. We very much welcome the fact that local authorities will no longer be able to discriminate against lesbian and couples in the provision of registration services. While the vast majority of councils and register offices have been extremely supportive of civil partnership, some councils such as Bromley council in south east London have publicly indicated their opposition to performing civil partnership ceremonies. Most of those councils who spoke out against civil partnership have since backed down and agreed to conduct civil partnership ceremonies, although not all have fallen into line with the legislation. Councillors in the Western Isles in Scotland have backed their registrars in their continued refusal to conduct civil partnership ceremonies. Including registration services within the scope of the regulations will send out an important message that same-sex couples should be treated no differently to opposite-sex couples.

Discrimination by association

41. It is important that discrimination by association is included in the regulations. This is particularly important in relation to discrimination in schools, where a child might be refused admission to a school because of the sexual orientation of a relative, or where a school fails to tackle bullying against a child because of the sexual orientation of someone they know rather than their own perceived sexual orientation.

Harassment

42. Stonewall Cymru believes that harassment, as commonly understood, should be effectively addressed by the direct discrimination provisions in the regulations. We are not aware of any cases having been brought under the race harassment provisions relating to goods, facilities and services and public functions.

43. The government must address and clarify the issue of harassment within equality legislation in the green paper of the discrimination law review, due to be published shortly, before the summer parliamentary recess.

Q16: Do you agree that discriminatory practice should be included in the scope of the sexual orientation regulations?

44. Yes. There is evidence of discrimination in this area and it should be included in the scope of the regulations. This measure is particularly important in the context of education, where a school may adopt a different policy in response to behaviour by a straight pupil compared to that of a lesbian or gay pupil, or a pupil perceived to be lesbian or gay.

Q17: Do you agree that discriminatory advertising should be included in the scope of the sexual orientation regulations?

45. Yes. As noted above this is particularly important in the context of premises, as well as in other areas.

Q18: Do you agree that instructions to discriminate should be covered by the sexual orientation regulations?

46. Yes.

Q19: Do you agree that validity of contracts should be covered by the sexual orientation regulations?

47. Yes. This is particularly important for services which have been contracted out to an external company or organisation whether by a private, public or third sector organisation.

Q20: Do you agree that the enforcement provisions for the sexual orientation regulations should match those for the other Equality Enactments?

48. The enforcement provisions must match corresponding legislation for race, gender and the forthcoming provisions on religion and belief in order to avoid the suggestion that any one form of discrimination is more serious than another.

49. We agree with the statement in the consultation that the main aim of the sexual orientation regulations will be to change behaviour and to eliminate discriminatory practice, by businesses and organisations in the public and private sector. Provided that the government implements full and robust protections, it will send out an important message that homophobia is unacceptable and that lesbian and gay people are entitled to fairness and respect just like anyone else.

Q21: Do you have any comments on the Government's plans for how the sexual orientation regulations will be enforced and supported by the CEHR?

50. Stonewall Cymru warmly welcomes the CEHR as it will provide a statutory institution to protect Britain's lesbian, gay and bisexual populations. Effective protection will best be secured for lesbian, gay and bisexual people - as for all other citizens - by a commission that focuses on cross-strand working to promote equality working across traditional boundaries of delivery.

51. The CEHR will have a key role in providing guidance on the regulations. Clear and detailed guidance from the government will also be essential when the regulations come into force. Some areas of the regulations are potentially confusing and explaining them will require careful thought. Successful awareness-raising of the new laws will be essential if the government is to achieve its aim of changing discriminatory behaviour and discouraging bad practice.

52. It will be important for the CEHR to bring strategic cases where necessary, in order to test the regulations as well as to raise awareness of them.

53. The current lack of an evidence base of inequalities that LGB people face in employment, income, education, health and housing etc. is limiting for public service providers who often need to use 'the numbers game' to argue for resource allocation. Stonewall Cymru believes that the 2011 Census, with its national coverage, and potential for multivariate analysis cross-strand, is the best source for identifying the equalities needs of the

various populations of the UK. This will enable better needs analysis and fairer service design. If sexual orientation is omitted from the Census 2011, it will seriously hamper the CEHR's capacity to understand the socio-economic demographic of its citizens, limiting its ability to assess priorities for promoting equality on grounds of religion, gender, disability, sexual orientation, race and age. We urge the government to address this issue as a matter of urgency.

Conclusion

54. Stonewall Cymr urges the government to implement full and robust protections against discrimination in the provision of goods, facilities and services on grounds of sexual orientation. Some religious groups are demanding broad exemptions in the regulations, leaving lesbian and gay people exposed to continued discrimination. To allow such exemptions would undermine existing legislation and policy initiatives to promote equality in Wales.

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