

Discrimination Law Review

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

Submission to the Department for Communities and Local Government

4th September 2007

Scottish Transgender Alliance

30 Bernard Street
Edinburgh
EH6 6PR



We have used the standard response form. Please note that we have deleted the questions upon which we had no comment we wished to make, but we have ensured that we have kept the same numbering of the questions upon which we have commented.

Response Form

Name

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Organisation (if applicable)

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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

Background information about the Scottish Transgender Alliance:

The Scottish Transgender Alliance is an organisation funded by the Scottish Executive to consult transgender groups and individuals in Scotland on transgender equality issues and to provide good practice guidance on transgender issues to Scottish public sector bodies.

The Scottish Transgender Alliance works to and promotes an inclusive model of transgender equality: which encompasses any person whose has a **Gender Identity** (meaning the characteristics of a person's gender-related self-identity, physical appearance and behaviour) not perceived to match up with their legal gender, and also includes, if it is the case, that the person has received gender recognition under the Gender Recognition Act 2004.

A few examples of some of the transgender people included within the above description are: transsexual people, intersex people, androgyne people, gender dysphoric people, and cross-dressing people.

How we determined the content of this response:

To develop this Scottish Transgender Alliance response to the Discrimination Law Review Green Paper 'A Framework For Fairness', the Scottish Transgender Alliance Development Worker (James Morton), held several meetings and email discussions with representatives of the various groups and organisations engaged in providing transgender support services and equality work within Scotland. The Scottish Transgender Alliance highlighted to these groups the key transgender issues contained within the Discrimination Law Review Green Paper 'A Framework For Fairness'. It then listened to, and discussed, the viewpoints of the groups on these issues; and worked with the representatives of these groups to enable a consensus to be reached on the content of the Scottish Transgender Alliance response.

The Scottish organisations and groups brought together by the Scottish Transgender Alliance to inform this response were:

- Equality Network
- Fair For All – LGBT
- Glasgow LGBT Centre
- LGBT Centre for Health & Wellbeing
- LGBT Youth Scotland
- MCC Edinburgh
- Polygender Scotland
- T-Time
- Trans Men Scotland Edinburgh Group
- Trans Men Scotland Glasgow Group
- Sandyford Initiative
- Sandyford Trans Women Support Group
- Stonewall Scotland
- West Lothian TV/TS Group

The Scottish Transgender Alliance Development Worker also created an online survey for transgender people living in Scotland which ran throughout July and August 2007. This trans survey gathered information on the following topics from 54 transgender individuals in Scotland:

- a) their gender identity, gender role presentation and gender reassignment status (if applicable)
- b) any comments they wished to make on discrimination and harassment they had personally experienced in employment or while using various service providers in Scotland (NHS, Local Council, Social Housing, Private Landlords, Sports Facilities, Organised Religions, LGBT Organisations, DWP, Police & Education)

Finally, the Scottish Transgender Alliance Development Worker also assisted the Equality Network to design a short paper survey for distribution by post to the Equality Network's 900 strong LGBT Network. This paper survey included two trans-specific questions:

- 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?

99 responses to the short Equality Network survey were returned. Only 4 of the respondents stated that they identified as transgender in any way. Overwhelmingly, the respondents answered yes to both of these two trans-specific questions.

Proposals for a Single Equality Bill for Great Britain

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

The Scottish Transgender Alliance is of the view that the existing requirement always to have to use a comparator in direct discrimination claims is too restrictive. Therefore, we would prefer UK discrimination law to also provide an additional mechanism for people to take a direct discrimination claim under a minimum treatment 'human rights' style dignity guarantee without having to use a comparator. This would mean that provisions for direct discrimination would become more harmonised with provisions for harassment (which already avoid requiring people to use a comparator in harassment claims).

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:

The Scottish Transgender Alliance agrees with the proposal for the law to be extended to protect against discrimination on the grounds of association with transsexual people.

However, we believe strongly that the law should also be extended to protect against discrimination on grounds of perception as a transsexual person.

Elsewhere in this consultation response, in our answer to Q65, we explain our view that the current definition of gender reassignment is too narrow and would be better to be replaced with protection based on actual or perceived gender identity. However, even if the definition used remains that of gender reassignment, perception should be added as well as association.

The EU Equal Treatment Directive provides that direct discrimination occurs “where one person is treated less favourably on grounds of sex”. Therefore, the concept of direct discrimination under EU law means that discrimination connected with perceived gender reassignment should be protected against as well as actual gender reassignment. This is because it formulates direct discrimination as regulating less favourable treatment “on grounds of sex” generally, **not** simply on grounds of the victim’s sex. The P v S & Cornwall County Council judgement established that grounds of transsexualism are included within “on grounds of sex”. Less favourable treatment because someone does not conform to a gender stereotype and therefore is mistakenly perceived to be a transsexual person should therefore be covered.

The Equal Treatment Directive, therefore, protects against discrimination connected with sex (that is, wider than just based on membership of one sex or another) which undermines dignity. In the view of the Scottish Transgender Alliance, this means that the government ought to extend protection to cover gender identity discrimination in its broadest sense, including perceived transsexualism and association with transsexual people.

Examples of why protection is needed for those who are discriminated against or harassed because of their association with a trans person:

The partners, relatives and friends of trans people frequently face discrimination and harassment because of their association with a trans person. For example, the Scottish Transgender Alliance has been advised of relatives (particularly partners) being subjected to degrading, intimidating and offensive comments from work colleagues because they are known to be associated with a person undergoing gender reassignment. At present this

does not constitute gender reassignment harassment in law because section 4A(3) of the Sex Discrimination Act only protects people who themselves intend to undergo, are undergoing or have undergone gender reassignment. Yet, the harm such transphobic harassment causes to the person targeted, to the organisation in which the hostile environment occurs, and to wider society is exactly the same regardless of whether it is the person targeted or their relative/partner/friend who is transsexual. Therefore, the law should be changed to parallel the Employment Equality (Sexual Orientation) Regulations 2003 provisions, which recognise that homophobic harassment is wrong regardless of whether the person experiencing the harassment is homosexual or not.

Those associated with transsexual people also experience discrimination in the provision of goods, facilities and services:

“I lost a private let because of the landlord's phobic reactions. My partner lost a room because of me and we likewise lost the shared accommodation we moved into after this.”

Male-to-female transsexual woman (with non-transsexual female partner) in response to Scottish Transgender Alliance question about their experiences of transphobic discrimination from landlords in Glasgow

Examples of why protection is needed for those who are discriminated against or harassed because they are perceived to be a transsexual person:

As in the case of association with transsexual people, the damage caused by transphobic discrimination and harassment can be just as severe when it is directed against someone who is mistakenly perceived to be transsexual but in actuality is not intending to undergo, is not currently undergoing and has not previously undergone gender reassignment. In carrying out training with employers and service providers, the Scottish Transgender Alliance has repeatedly noted significant confusion by participants about the possible stages and results of the gender reassignment process and mistakes about whether or not someone is transsexual appear to happen quite frequently.

For example, physically intersex people who remain living in the gender they were registered as at birth are not covered by the current definition of gender reassignment. However, due to various visible physical variations which they will often have (particularly in relation to aspects such as height, bone structure and genitals), they are highly likely to experience the same discrimination and harassment as transsexual people experience. The vast majority of people simply automatically assume any person with non-typical genitals for their legal gender must be a transsexual person and subject them to the same types of transphobic discrimination and harassment. It is unacceptable for the government to fail to provide intersex people with any legal protection for having been discriminated against due to perception as transsexual.

The Scottish Transgender Alliance has learned, through its current policy and guidance work with the Scottish Prison Service, that the highest risk for a gender variant person in custody experiencing discrimination and harassment occurs when their genitals do not conform to the 'norm' for the gender in which they live. Intersex people in custody are therefore at a similar risk as transsexual people of experiencing discrimination and harassment: for example, during searches. Similarly, physically intersex

women with Complete Androgen Insensitivity Syndrome will often have undergone genital surgery similar to trans women and therefore also need to use dilators to maintain post-operative physiology and would also be indirectly discriminated against by a ban on pieces of plastic in a prison context. But under the current proposals from the government, such an intersex woman will not have any protection against such discrimination.

The Scottish Transgender Alliance is strongly opposed to the government's statement that it does not wish to extend protection on grounds of perceived gender reassignment in case this had "the effect of extending protection to people who choose to adopt the appearance of the opposite sex on a temporary basis as a matter of lifestyle choice". The current gender reassignment definition, because it includes those intending to undergo gender reassignment, already gives protection to some transsexual people who are only adopting the appearance of the opposite sex on a temporary basis or perhaps not even adopting it at all if the time the discrimination actually occurs is at the point of them initially expressing their intention to undergo gender reassignment. Therefore, the Scottish Transgender Alliance is at a loss to understand the government's concern over protecting a small number of further people with part-time or temporary expressions of their gender identity.

The reference to "life-style choice" is most inaccurate, even for transgender people who do not intend to undergo gender reassignment and instead intend to remain (for the foreseeable future) only expressing their gender identity on a part-time basis. The Harry Benjamin International Gender Dysphoria Association Standards of Care for Gender Identity Disorders are followed by the UK NHS Gender Specialists. These Standards of Care explicitly state that people experiencing the medical condition of Gender Dysphoria may in some cases be able to be helped to find a way of coping with their Gender Dysphoria in a manner short of living full-time as their acquired gender. Therefore, temporarily adopting the appearance of a different gender is a medically recognised method of coping with the medical condition of Gender Dysphoria and not simply a matter of 'lifestyle choice':

"Options for Gender Adaptation. The activities and processes that are listed below have, in various combinations, helped people to find more personal comfort. These adaptations may evolve spontaneously and during psychotherapy. Finding new gender adaptations does not mean that the person may not in the future elect to pursue hormone therapy, the real-life experience, or genital surgery.

Activities:

Biological Males:

1. **Cross-dressing:** unobtrusively with undergarments; unisexually; or **in a feminine fashion;**
2. Changing the body through: hair removal through electrolysis or body waxing; minor plastic cosmetic surgical procedures;
3. Increasing grooming, wardrobe, and vocal expression skills.

Biological Females:

1. **Cross-dressing:** unobtrusively with undergarments, unisexually, or **in a masculine fashion;**
2. Changing the body through breast binding, weight lifting, applying theatrical facial hair;
3. Padding underpants or wearing a penile prosthesis.

Both Genders:

1. Learning about transgender phenomena from: support groups and gender networks, communication with peers via the Internet, studying these Standards of Care, relevant lay and professional literatures about legal rights pertaining to work, relationships, and **public cross-dressing;**

2. Involvement in recreational activities of the desired gender;

3. **Episodic cross-gender living."**

Page 12, The Harry Benjamin International Gender Dysphoria Association's Standards Of Care For Gender Identity Disorders, Sixth Version, February, 2001

In addition to intersex people and gender dysphoric people who have decided they do not intend to undergo gender reassignment, people who are not transgender in any way can also be discriminated against due to being mistakenly perceived to be transsexual. The Scottish Transgender Alliance has been advised of the following examples:

A non-trans man with a high feminine sounding voice was mistakenly perceived to be a female-to-male transsexual person when phoning a service provider's call-centre and as a result was mocked by the call-centre operative and provided with an inadequate level of service.

A tall non-trans woman with a large bone structure gets repeatedly thrown out of public toilets and changing areas due to staff mistakenly perceiving her to be a male-to-female transsexual person.

Transphobic discrimination is equally wrong regardless of whether the victim is transsexual or not, and in our view should be equally unlawful. Anti-discrimination law needs to protect everyone from discrimination, otherwise it creates special categories of people who have more legal protections than others and this risks increasing hostility and discrimination towards such groups.

For similar reasons, we also support extending disability discrimination law to protect against discrimination by association and perception in relation to disability. The number of people potentially covered by a protection should be immaterial – discrimination is wrong regardless of the exact number of people discriminated against. The law should be harmonised across the strands with all protected grounds also being protected in relation to association and perception.

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:

The Scottish Transgender Alliance welcomes the proposal to extend indirect discrimination to cover gender reassignment. However, we warn that, in our opinion, the proposed delay in this extension until the Single Equality Bill breaches the EU Gender Directive. The extension should be part of the Sex Discrimination Act (Amendment) Regulations in 2007.

Examples of why Indirect Discrimination protection is needed by trans people:

Trans people in Scotland have advised the Scottish Transgender Alliance of frequent instances of indirect discrimination involving organisations (most commonly banks, universities and NHS medical services) refusing to update their records to reflect their new name, title and gender. A typical example is quoted below:

“Practice initially changed only my forename [to male name], leaving the title as MISS which appeared on a flashing LED screen in the waiting room & on prescriptions. They initially refused to change it because of the automated reminders for gender specific screening but eventually did.”

Female-to-Male Trans Man

When the Scottish Transgender Alliance surveyed a group of 19 fully transitioned transsexual people about employment problems, 21% stated their previous employers had refused to provide them with references using their acquired gender. When this is combined with new employers unjustifiably demanding in job applications the contact details of past employers over many years, this is clearly a significant barrier to recruitment for trans people and there is an urgent need for protection from this indirect discrimination.

Why it should be part of implementation of EU Gender Directive:

We feel very strongly that this extension should be done as part of the Sex Discrimination Act (Amendment) Regulations this year, rather than needlessly delayed until the Single Equality Bill (a few years away at least, or which may perhaps not even occur if there is an early election and a change of government). We consider that the P v S & Cornwall County Council judgement, which interpreted sex to include gender reassignment, implicitly extends to all forms of sex discrimination that are unlawful in EU law. As the EU Gender Directive prohibits direct and

indirect discrimination on the grounds of sex, it will only be fully and correctly implemented by regulations which include the extension of indirect discrimination to cover gender reassignment.

Failure to include this extension in the regulations could leave the government open domestically to a judicial review or to infringement proceedings by the EC. Given that advances of trans equality have traditionally been achieved by trans people challenging the UK government through the courts, trans individuals in the UK are highly likely to take legal cases to clarify any such inconsistency of domestic law with European requirements. Simply doing the extension earlier as part of the Sex Discrimination Act (Amendment) Regulations will remove the risk of legal costs and time-consuming hearings about this matter.

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:

The Scottish Transgender Alliance is of the view that the use of the “smaller proportion” test is unfair to those minority groups, such as trans people, where it is particularly difficult to gather statistical data. We also consider that it is better to harmonise the law across the strands unless very good reason can be shown not to do so. Therefore, we agree strongly with the proposal to harmonise the definition of indirect discrimination using “provision, criterion or practice” and “particular disadvantage” in all cases. This will be fairer for all and simpler to understand.

Simplifying Exceptions

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:

We are alarmed that the introduction of an additional 'genuine service requirement' test could restart the fraught debates about religious exemptions seen to occur previously in relation to the Equality Act (Sexual Orientation) Regulations 2007. This could undermine the suitable balance which had finally ended up being implemented in those regulations and destabilize the elimination of discrimination in goods and services.

We are also extremely concerned that the introduction of a genuine service requirement test would lead to services (especially single sex services) feeling further justified in simply discriminating against trans people rather than giving any consideration of how to successfully include trans people. Where exemptions are kept to an absolute minimum, then providers of goods, facilities and services will be obliged to think seriously about how to ensure equal access free from discrimination for trans people and the Scottish Transgender Alliance, having worked with various service providers, is confident that this is actually easier for service providers to achieve than people may anticipate. However, if given loopholes such as a genuine service requirement test to gain extra exemptions, transphobic service providers will be more likely to spend time and money on instead finding ways to legitimately exclude trans people.

We are also concerned that introducing a genuine service requirement test will also make the law harder for the general public to understand and lead to additional cases of dispute about which services should be granted exemption via the test.

Specific Exceptions

Q13 Do you agree with the proposal for a unified approach where exceptions apply to more than one protected ground, where this is appropriate?

Yes

No

Please give your reasons:

A unified approach harmonising across the strands should be taken unless there is a very good reason not to. In this case it seems clear that it will simply make the legislation easier to follow.

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

Yes

No

If not, please explain why.

Chapter 2: Public Functions

Q17 Do you agree that there would be benefits in adopting a harmonised approach to the way goods, facilities and services and public functions provisions are structured across all protected grounds?

Yes

No

Please say why:

The Scottish Transgender Alliance believes that, as the main purpose of the Single Equality Bill is to create a clearer and more streamlined equality legislation framework, a unified approach harmonising across the strands should always be taken unless there is a very good reason not to.

Part 2: More effective law

Chapter 4: Balancing Measures

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:

A unified approach harmonising across the strands should be taken unless there is a very good reason not to. Where people have special needs arising due to them being part of the protected strands, then measures should be taken to meet these needs in order to provide greater equality of opportunity in relation to education, training and welfare.

The Scottish Transgender Alliance considers that this is especially important in the case of trans people who may have special needs. For example, trans people may have special needs such as:

- greater privacy needs in terms of interviews for education and training places which could require taking measures to reduce the number of different people involved in interviewing the trans person;
- trans people in early stages of gender reassignment may experience greater social anxiety so may need measures to build self-confidence and training in assertiveness skills.

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:

The Scottish Transgender Alliance agrees that further guidance would be useful in encouraging appropriate use of positive action measures. We also agree that too great a workload would be placed upon the CEHR if it had to give approval to positive action programmes.

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:

The Scottish Transgender Alliance does not disagree with the idea of including the public sector duties within the Single Equality Bill. What we oppose is any loss of the provision of specific duties for each equality strand. We believe that it is vital that secondary legislation is provided for each of the equality strands, setting out clearly the specific duties for each strand. We feel this is the only way to properly and fully reflect the different needs of each strand and avoid a hierarchy of equality strands being left to develop according to random public service priorities.

Further more, we would like to see seven equality strands to the public sector duties – separating trans equality into its own strand rather than simply having it subsumed within the gender strand. Although the Scottish Transgender Alliance views discrimination on the grounds of gender reassignment (or more widely on our preferred ground of gender identity) as a form of sex discrimination, for the purposes of clarity of duties, we feel that public sector bodies would be assisted if a trans equality public duty was created taking it out of the shadows of the gender duty.

During the Scottish Transgender Alliance's work on trans inclusion in the gender duty, we have seen clearly the benefits for trans equality of it being considered through public sector duties and we have drawn our ideas (regarding how best the public sector duties should be expanded and developed) from seeing how many Scottish public sector bodies are carrying out multi-strand equality impact assessments. Many are using equality impact assessment forms which provide tick box and problem grading scales for the various equality strands. Where organisations have used only six strands (including trans issues under gender rather than as a seventh strand) there have been difficulties experienced in clearly flagging up trans-specific issues as the gender issue boxes are so strongly associated with being used to flag up inequality between men and women rather than ever between trans people and non-trans people. Where trans issues are considered as a seventh equality strand, the equality impact assessments are much more easily filled in and understood in terms of showing where there are trans-specific issues with a policy or procedure rather than inequality between men and women.

We would like to see the provisions for all of the public sector equality duties levelled up to the strongest sections of each of the current three duties. Most importantly, we want to see all the duties containing the requirement to 'involve' members of that equality strand, in the manner that the Disability duty currently requires, rather than just 'consultation'.

We feel strongly that there is a need to ensure that, as part of the public sector equality duties, not only are public authorities obliged to take steps to reduce discrimination and harassment of transsexual people but also that they are obliged to promote equality of opportunity between transgender people and other persons.

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.

The Scottish Transgender Alliance is strongly opposed to the proposal that the specific duties be dropped. The Gender Equality Duty, even though it only covers trans people in a limited way, has been very useful in getting Public Sector Bodies to improve their treatment of trans people in employment and vocational training. We particularly value that the Scottish Executive has the ability to issue different specific duties for Scotland. We are particularly concerned that the proposed new approach would lead to Public Sector Bodies prioritising the easiest and most familiar of equality objectives leaving transgender equality ignored.

We are keen to see a seven strand model of public sector equality duties where transgender equality is a specific strand with its own specific duties. We want all seven strands to have secondary legislation detailing the specific duties for each strand and levelling up the duties (for example, requiring “involvement” of members of each protected ground in the manner of the disability equality duty rather than just “consultation”). Public Sector Bodies should be obliged to do select at least one key priority for each of all the seven strands in order to reduce the risk of creating a hierarchy of the strands, we feel this is the best way that transgender equality issues can be highlighted clearly as an obligatory area to which Public Sector Bodies must give due regard. We want to keep the determination of the specific duties devolved to the Scottish Executive.

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 Scottish Transgender Alliance supports the principle of harmonisation of all equality legislation across all equality strands unless there is good reason not to do so in any particular case. Therefore, public sector duties should be created for all the strands including: age, sexual orientation and religion or belief. Transgender equality should become a seventh strand with its own set of specific duties in order to ensure that transgender equality issues are highlighted clearly as an obligatory area to which Public Sector Bodies must give due regard.

Within Scotland, the Scotland Act 1998 already requires many public authorities (including Local Authorities and NHS Boards) to encourage equal opportunities for all the strands through a non-regulated duty. A number of public sector bodies in Scotland (including NHS Scotland, a significant number of Local Authorities, the Scottish Executive and the Procurator Fiscal Service) have therefore implemented already equality impact assessments and equality schemes which apply to all the strands. Therefore, extending the regulated public sector equality duties to cover all the strands would be in keeping with the current direction in Scotland.

However, it is extremely important that the extension to all the strands does not reduce the strength of the existing duties. We want to see the new strands added with their own specific duties, devolved to the Scottish Executive and modelled on the best of the existing specific duties. Even more vitally, given the difficulty of ensuring transgender equality issues are not forgotten as a result of any expansion of the public sector duties, we want to see that transgender equality is given the appropriate level of attention by becoming an equality strand with public sector duties in its own right. The transgender equality general duties should include the need to promote equality of opportunity between transgender people and other persons as well as the need to eliminate unlawful discrimination and harassment against transgender people. Equality impact assessments for all strands must be included, and public bodies should be obliged to agree priority actions for each of the seven strands must without prioritising between strands.

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?

As it does not appear that any Single Equality Bill would be implemented before 2009 at the earliest, the Scottish Transgender Alliance is of the view that this would give enough time for evaluation of the learning points of 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:

The Scottish Transgender Alliance is keen for public authorities to get the option to work to a seven-strand public sector equality duty (the seventh strand being trans equality) before it is fully implemented as a regulated duty. This would match up very well with what has already been starting to happen in Scotland.

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

The Scottish Transgender Alliance has grave concerns over the proposed reduction in who can take forward enforcement of the Public Sector Duties. We strongly believe that the only way to ensure that no strand ends up overlooked is to enable individuals, and also equality groups focussed on a particular strand, to be able to seek judicial review of a public sector body's failure to comply with the Public Sector Duties. Otherwise, pressures and lack of knowledge about transgender issues within the CEHR, for example, could lead to the CEHR not taking much needed enforcement steps to ensure compliance with trans sections of the Public Sector Duties and leaving trans equality groups and individuals with no way of helping to ensure compliance.

Part 3 – Modernising the law

Chapter 8: The grounds of discrimination

Disability

Q54 Do you have any comments on whether we should remove the list of 'capacities' from the definition of disability?

Yes

No

Please provide:

The Scottish Transgender Alliance strongly supports removing the list of 'capacities' from the definition of disability. The capacities cause confusion to people trying to determine whether or not they are considered to be disabled. Also, the over emphasis on physical-impairment related capacities in the list at the expense of a sufficient range of mental-impairment capacities being listed, make the capacities list discriminatory to people who have a mental impairment. The term 'substantial and long-term adverse effect on their ability to carry out normal day-to-day activities' is perfectly sufficient for the purposes of ensuring minor or short-term impairments are not misclassified as disabilities. Therefore, the best way to resolve these problems is simply to remove the list of 'capacities'.

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 Scottish Transgender Alliance strongly agrees that discrimination on the grounds of gender reassignment in the exercise of public functions should be prohibited. We see an urgent need for this. Our consultation of the Scottish transgender support groups and of trans individuals throughout Scotland show that trans people are experiencing a wide range of discrimination in the exercise of public functions, particularly regarding the criminal justice system and national health service policy and practice. Many public functions are currently failing to treat trans people with dignity and are not adequately providing for the needs of trans people. The principle of harmonising across the strands also supports the need to legislate to prohibit discrimination against trans people in the exercise of public functions.

The following examples illustrate some of the kinds of discrimination trans people are experiencing in the exercise of public functions. The examples are all problems brought directly to the attention of the Scottish Transgender Alliance by trans people in Scotland and include some quotes received from trans people in Scotland via our online survey during July and August 2007:

Legal & Criminal Justice System, Police Service & Prison System):

“Prejudice at all levels of legal system, especially members of Childrens Panel and Reporters when considering a case against my 20yr old daughter when she was a teenager, brought against her by her own mother.”

Trans woman who had her transsexual status used as a reason to call into question her upbringing of her daughter

There is inconsistency across police forces and prisons regarding how intimate searches of transsexual people are carried out (even when the trans person proves they have a full Gender Recognition Certificate). Many officers are currently unwilling to recognise the acquired gender of trans people for the purposes of intimate searches. This can cause extremely distressing loss of dignity for trans people due to their gender identities and lives being completely disrespected through inappropriate searching (for example, due to officers using an ill-conceived and intensely humiliating practice of involving twice the normal number of people in the search and treating the trans person as one gender for the first half of the search above their waist and then the opposite gender during the second half of the search below their waist).

Trans women in prison can suffer physical harm through not being allowed access to vaginal dilators needed to maintain their genital

surgery result. The problem is caused by the policy of non-negotiable bans in prisons against any items which are not already on a general list of permitted items for personal use. Also, trans prisoners are currently very likely to be inappropriately placed in prisons of their birth gender rather than their acquired gender. These are problems in Scotland which the Scottish Transgender Alliance is currently working with the Scottish Prison Service to try to reduce in occurrence, greater legal protections for trans people in the exercise of public functions would help assist in resolving these problems.

Access to Health Services:

“They laughed at me and told me I couldn't have gender issues while also having physical health problems and depression. They refused to help me and refused to investigate my leg & back pain. They didn't listen to me - they crumpled up and binned a letter I gave them. They told people that I was ‘just playing games’.”

Disabled trans man's experience of trying to use his local GP service.

“I had problems with the NHS computers when printing out my prescriptions. They came out as Mr XXX XXX ie with the wrong pronoun. This was very embarrassing for me in the Pharmacy!”

Trans woman's experience of trying to change her name and gender at her GP practice as part of her gender reassignment process.

“I wasn't allowed to use men's toilets despite living as a man fully and having my name legally changed. They made me wear a bra and called me 'she' and wouldn't use my male name. This caused my mental health to get even worse.”

Trans man's experience during several weeks on a psychiatric inpatient ward for treatment of depression after a suicide attempt.

The most common complaints which transsexual people undergoing gender reassignment in Scotland have highlighted to the Scottish Transgender Alliance, relate to trying to access hormone treatment and surgery on the NHS. Trans people have complained to the Scottish Transgender Alliance about experiencing NHS surgery funding refusals and delays lasting most commonly at least between one and two years, but even (in a small number of cases notified to us) up to seven or eight years:

“Problems getting NHS funding. There was meant to be funding [by local Health Board] for surgery of one patient with gender dysphoria per year, and none had been referred for years. However when the funding application was put in, there was no funding, and not likely to be any.”

Trans man's experience of seeking chest reconstruction surgery in Ayrshire

Welfare Benefit Services:

“Until October I had no problems as such but since then I have suffered bullying, harassment and intimidation from the staff at one of the central admin offices. I have been lied to time and time again; called a liar; called 'sir' repeatedly; had my claim suspended several times; had my claim stopped (I am currently appealing this); labelled an aggressor on the

internal computer system and my notes have been inaccessible for long periods. This all began - surprise, surprise - when a note was put on the system saying I was going in for GRS [gender reassignment surgery]."
Trans woman's experiences when claiming benefits

Therefore, the Scottish Transgender Alliance agrees there is an urgent need for trans people to be given protection from discrimination in the exercise of public functions.

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?

The Scottish Transgender Alliance strongly disagree with this proposal.

We strongly disagree with the consultation paper statement that it is unnecessary to include school pupils and education in any extension to trans protections due to the government's belief that it will be very rare for a child to be planning to undergo gender reassignment. In his P v S & Cornwall County Council judgement, the European Court of Justice's Advocate General clarified that the relatively small size of a population alone cannot be a sufficient reason to deny a minimum of protection against treatment that undermines their dignity.

Although the exact numbers of school-age transsexual people in the UK are under-researched, a number certainly do exist. During our meetings with transsexual men and women via the Scottish transgender support groups, the overwhelming majority stated that they had been aware of their gender identity issues from very early pre-pubertal ages and that they formulated a personal intention to undergo gender reassignment while still at school particularly as a result of experiencing severe distress about unwanted physical changes at the time of puberty (i.e. around age 12 to 14). There was an approximately equal split between those who had been able to hide their intention to undergo gender reassignment from others while at school and those who were noticeably gender dysphoric to others and had therefore disclosed to other pupils or teachers while at school their intention to undergo gender reassignment,

For those who did not reveal their gender identity issues to other until adulthood, the primary reason given was fear of harassment from parents, teachers and other young people. It is certainly not that young transsexual people do not exist, but rather they exist but are so vulnerable to harassment and discrimination that often they have had to hide their future intentions to

transition from others. The Scottish Transgender Alliance's consultation with trans people gathered evidence that trans people's fears of the consequences of trying to seek gender reassignment services before adulthood are sadly based on the actual experiences of young trans people:

"Spent about 18 months in temporary homeless hostels for young people after the relationship with my family broke down due to my gender dysphoria and I was thrown out of my parental home for not conforming to their gender expectations. I was threatened a few times with being stabbed for 'being a freak' when I was in the early stages of my transition from female to male. The threats were made by a group of other teenagers (who were known to have a history of violence) and I had to modify my travel routes and use of homeless youth services in order to try to avoid them having any opportunity to get me on my own to attack me without being witnessed."

Survey response from a young trans man who started planning to undergo gender reassignment at the age of 15 and started receiving counselling at age 16.

The consultation paper makes clear that gender reassignment does not refer purely to receiving hormonal or surgical treatment but can also include simply counselling for gender dysphoria in preparation for the transsexual person changing the social gender role in which they live. The Scottish Transgender Alliance has had direct contact with several young trans people in Edinburgh who received such counselling for gender dysphoria while at primary and secondary school (the ages at which they first accessed counselling for gender identity issues ranged from 8 years old to 17 years old) and would definitely be covered by the current gender reassignment definition. Due to a lack of knowledge by local doctors about where to refer on to, the vast majority of these young trans people were counselled by generic child & adolescent mental health teams rather than by either of the two specialist NHS services for gender dysphoric children (London and Glasgow). Therefore, we consider that significantly more young trans people exist than the numbers attending these two specialised gender clinics may suggest.

The average age of new members of Trans Men Scotland has decreased over the last couple of years from being mid-twenties to being mid-teens as more and more young teenagers gain access to information on gender identity issues via the internet and digital television programming and therefore gain the confidence and terminology needed to establish and assert their intention to undergo gender reassignment at ever earlier ages. This is likely to be the case in all UK cities, combining to a small but significant, and rapidly rising, population of young school-age transsexual people.

Transphobic discrimination in schools is rampant. The findings of the research 'Engendered Penalties: Transgender and Transsexual People's Experiences of Inequality and Discrimination', S. Whittle, L. Turner. M. Al-Alami, Equalities Review, 2007 include that 64% of young trans men, and 44% of young trans women, experienced bully and harassment at school, some of which was by staff. Examples provided directly to the Scottish Transgender Alliance include young trans people being verbally and physically assaulted by other pupils; problems participating in school sports activities due to sports being a highly gender stereotyped area of the curriculum with single-sex facilities; and humiliation by comments on clothing

and appearance by teachers or suspension from class for repeatedly wearing the school uniform of the opposite gender from that which the young person was labelled at birth.

“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.”

Comment by non-trans member of the Equality Network

In addition to the young people who would meet the current gender reassignment definition, there is also a much larger number of gender variant children and adolescents who would not meet the current gender reassignment definition because they have not formed an intention to undergo gender reassignment or sought any counselling or hormone treatment while at school. Schools should be a safe place for all students to learn and grow in self-discovery but currently schools are often still too rigid about enforcing traditional gender stereotypes. Consequently, many young people who are gender variant in terms of the perceived masculinity or femininity of their interests, physical appearance and personality traits are subjected to harassment and discrimination within their schools. Young people displaying less clear-cut gender variance while at school could ultimately grow up to be a transsexual adult; or a different type of transgender person such as an androgyne person or a cross-dresser; or simply a ‘butch’ woman or a ‘camp’ man as an adult. Their ultimate adult identification should be irrelevant in terms of ensuring that as a gender variant child or adolescent that person is protected from having their education, mental well-being and life chances damaged through transphobic discrimination and harassment in school. Similarly, the children of trans people need to be protected from discrimination and harassment due to their association with their trans parent.

The Scottish Transgender Alliance also disagrees strongly with the second part of the government’s argument for not extending protections to cover transgender young people in school education. The consultation paper proposes that education law and human rights law already provides sufficient protections against discrimination and harassment on grounds of transgender status in schools. However, none of the current education law provisions are specifically in relation to gender identity or transgender status and the same educational provisions also cover the race and sexual orientation equality strands to the same level as they cover the trans equality strand.

In the view of the Scottish Transgender Alliance, the fact that the government has previously legislated for protection in schools on grounds of race and sexual orientation through equalities legislation reveals that without specific discrimination law protections added, the education law provisions, common law duty of care and human rights act are not sufficient to fully protect young people in schools for the various equality strands. The principle of harmonisation supports that young people should be provided with the same legal protection and rights to take forward a discrimination case on the basis of transphobic discrimination and harassment as they have on the basis of homophobic discrimination. Without discrimination law provisions, young people will continue to be less protected on the grounds of gender identity or gender reassignment than on the ground of sexual orientation.

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 by refusing to carry out religious marriage ceremonies for transsexual people who have received gender recognition. While the Scottish Transgender Alliance is saddened that some religious organisations act in such a manner, we accept that it would be inappropriate to ban completely all such discrimination by organised religions as some of the discrimination is carried out specifically in order to comply with the established doctrines of the religion. Meanwhile, we are pleased that an increasingly wide range of religions are moving gradually to a better understanding of trans people and some are starting to reinterpret more favourably how trans people fit within their doctrines.

The Scottish Transgender Alliance views the development of better dialogue between trans people of faith and the religious leaders of those faiths as the best approach for doctrinal issues. We believe that the model for where the line of balance should be between freedom of religion and protection of trans people from discrimination is regulation 14 of the Equality Act (Sexual Orientation) Regulations 2007.

Religious organisations should be permitted to continue a discriminatory practice only 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. Implementing the same balancing line position for organised religions in regard to discrimination on grounds of gender reassignment (or gender identity) as is already in place for them in regard to sexual orientation discrimination laws is also in keeping with the principle of harmonisation and will help ensure greater clarity for everyone.

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:

The Scottish Transgender Alliance strongly holds the view that the law should be widened to protect from discrimination on grounds of gender identity (defined to include gender expression). All the transgender and LGBT groups and organisations involved in the Scottish Transgender Alliance agree unanimously that the ground should be gender identity not gender reassignment because transphobic discrimination is wrong regardless of the actual life circumstances of the victim.

In the UK, most LGBT and transgender organisations, uses the words 'trans' and '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 atypical.

It is important to note that many 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."

This was also found to be the case by the Scottish Transgender Alliance when it surveyed 54 transgender people about their identities, gender reassignment status (if applicable) and experiences of transphobic harassment and discrimination. Below are some of the responses received by the Scottish Transgender Alliance when we asked transgender people in Scotland whether their ways of expressing their gender identities had changed during their lives:

"As a child I identified as a tomboy. As a young teenager I identified as an 'invert' or lesbian because I didn't know any trans terms and I had read the 1920's novel 'The Well of Loneliness' which had a lead character who was female-bodied but felt like a man and was described in the novel as an 'invert' and on the backcover as a lesbian. I thought at that time that perhaps all people called lesbians felt like they were men and wanted to live as men but couldn't. When I discovered that lesbians didn't feel this way, I ended up self-identifying as a freak and weirdo. In my late teens I learned about transgender people and the various terms and I identified as FTM Genderqueer for a couple of years while I investigated what was involved in

transitioning. I then started my transition and began identifying as a transsexual man at age 22.”

This trans man has now undergone gender reassignment and has received gender recognition but he experienced most discrimination at the earlier points in his life where his intention to undergo gender reassignment was at the time still not established.

“I always felt intergendered but didn't know I was intersexed until I was 28. At 14 I thought seriously about transitioning to male, but concluded that it wouldn't suit me any better than being female.”

Intersex person assigned female at birth and not intending to undergo gender reassignment so does not have any legal protection from the transphobic discrimination she experiences.

“Since about the age of five I always knew my gender identity was not quite the same of the average male. I always knew I had a very strong feminine side which needed to be expressed.”

Bi-gendered transgender person who is not currently intending to undergo any medically supervised gender reassignment process or live as a woman permanently so has no protection in law.

“From trying to conform as male when I was younger, I now have a much more fluid gender identity. I move between genders depending on how I need to express myself at different times.”

Androgyne identified transgender person.

“As a child (5-14) I knew I was a 'girl' but did boy's activities and always wanted to wear boys clothes. 14 and onward I was just confused - I felt I wasn't female or male. From age 20 or so I have been considering myself as male.”

Female-to-male trans man

“I was brought up [by family] almost entirely as a girl until age 17, so I presented as a girl and hated any time as a boy (thought I was being punished if I had to wear boy's clothes. When the truth came out [of being legally male] I was given 3 choices - remain in a dual world - go for a full sex change (not advisable for many reasons in the 60s) - or try to reverse the hormone changes. I chose the last option because I was so angry.”

Man with a trans background due to family raising him as female until age 17

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. There is likely to be no prior relationship between a customer and a service provider such as an owner of a hotel or a manager of a restaurant or leisure centre. Therefore, the current definition is unworkable as the service provider will not know for sure when the customer is legally protected from discrimination and when the customer is not protected. The most workable solution is to change the definition used to one that protects all people from discrimination on the grounds of gender identity – i.e, whether or not their gender-related self-identity, physical appearance and behaviour correspond or not to the gender stereotypes often expected for their legal gender or sex at birth.

Please also see our answers to questions 3 and 63 above as these include

examples of transphobic discrimination motivated by the victim's gender identity generally, rather than the perpetrator's knowledge of the victim's gender reassignment status.

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.

It is the view of the Scottish Transgender Alliance that the European Court of Justice would classify discrimination against intersex people and other transgender people as forms of sex discrimination. This view is also supported in pages 96-98 of 'Sexual orientation discrimination in the European Union: national laws and the employment equality directive', C. Waaldijk & M. Bonini-Baraldi, 2006.

In collaboration with the Equality Network, the Scottish Transgender Alliance has looked at world-wide transgender discrimination law definitions. The Scottish Transgender Alliance and the Equality Network found that several states and territories in Australia explicitly include intersex people in their transgender discrimination laws, and also 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 since 1975 been implementing transgender anti-discrimination laws at both state and municipal level. The United States has build up the most experience in transgender equality issues and discrimination protections. Most of the laws in the USA protect from discrimination on grounds of "gender identity" or "gender identity or expression". Although the definitions vary slightly in terms of the exact wording used, they are similarly seeking to protect people from discrimination wherever the various gender-related characteristics of a person are seen as variant from stereotypical gender 'norms'. One major example definition which has incorporated the extensive transgender discrimination law knowledge built up in America is the federal Employment Non-Discrimination Act currently before the US Congress. It 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".

Another example is California's Gender Non-Discrimination Bill of 2003 which 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".

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 Scottish Executive 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.

The Scottish Transgender Alliance is of the view that since everyone (whether or not they identify themselves as a trans person) has a gender identity (in the form of gender-related characteristics such as their self-identity, appearance and behaviour), the definition of gender identity should be symmetrical in covering both trans people (where their gender identity does not conform to 'norms' for their birth sex) and also non-trans people (where their gender identity conforms to the 'norms' for their birth sex). A symmetrical definition would be in harmony with the symmetrical definition in sexual orientation discrimination law which protects heterosexual people as well as LGB people.

The Scottish Transgender Alliance would therefore suggest that the anti-discrimination law protect from discrimination on grounds of **gender 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 associated with that sex).

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 transgender people in general, and also private clubs catering specifically for female-to-male trans men and private clubs catering specifically for male-to-female trans women.

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. We also strongly believe that it should be made unlawful for private clubs with 25 or more members to discriminate against transgender people, except where the club is set up specifically for the purpose of providing benefit 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:

We agree as this change is in keeping with the principle of harmonisation and will resolve a legislative anomaly. We also want discrimination against transgender guests to be covered (further following the harmonisation principle).

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.

Religious exceptions:

The Scottish Transgender Alliance are unhappy at the extent of the proposed religious exceptions. These exclude from protection the provision of all goods, facilities and services at a place occupied or use for the purposes of an organised religion (whether the place has that status permanently or just for the time being). This is wider than the religious exceptions for goods and services sex discrimination (SDA s.35(1)(b)), for sex and gender reassignment discrimination in employment (SDA s.19(1)), and for sexual orientation discrimination law.

The European Court of Justice has ruled that services provided for remuneration fall within article 50. Therefore, as services provided at a place occupied or used for the purposes of an organised religion could be paid-for services, we are of the view that they come within the scope of the Gender Directive and thus the proposed religious exceptions require to be modified. To ensure compliance with the Gender Directive, we consider that it is necessary to explicitly provide that the discrimination has to be a proportionate means of achieving a legitimate aim.

We believe that a good model for the appropriate balance to strike between the competing rights to religious freedom and protection from discrimination are the religious exceptions which were introduced in the Equality Act (Sexual Orientation) Regulations 2007 after many months of debate and consideration. We want any religious exceptions in relation to trans people to have the same doctrine and religious convictions tests. We want discrimination law to be harmonised as much as possible for the sake of clarity and consistency. Therefore, the religious exceptions for goods and services discrimination on grounds of gender reassignment ought to be as similar as possible to the existing exceptions for employment discrimination on grounds of gender reassignment and for goods and services discrimination on grounds of sex and sexual orientation. This would mean that the discrimination would have to be either in order 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 also strongly oppose any religious exemption in regard to any services provided under contract to public bodies (for example, a homeless accommodation service or an adoption service). This is consistent with the current style of religious goods, facilities and services exemptions for sexual orientation. We are of the view that if an organised religion decides that due to its religious beliefs it would not be willing to provide a publicly funded service in a non-discriminatory manner then they should not be funded from

the public purse to provide that service – a different organisation which is willing to provide the publicly funded service in a non-discriminatory manner should be funded to do so instead.

Single sex services:

We strongly disagree with the proposals in Annex B, and the provisions of the draft Sex Discrimination Act (Amendment) Regulations regarding discrimination by single sex services towards transsexual people.

While we are glad there is the “proportionate means of achieving a legitimate aim” test in the regulations as required by the Gender Directive, we are extremely concerned about the application of SDA section 35(1A), (1C) and (2) to transsexual people who have obtained a gender recognition certificate. We consider it unacceptable that SDA section 35 indicates that a provider of a single-sex service falling within these subsections could refuse the service to a person who has a gender recognition certificate, despite the person being of the correct legal sex for the service. This is completely against the purpose of the Gender Recognition Act 2004 and contrary to the European Court of Human Rights judgement in *Goodwin v UK* and *I v UK*. Once people have obtained full Gender Recognition, they should be treated fully as their acquired gender for all purposes such as single sex services and it is, in our view, a violation of their dignity & privacy for the government, through these provisions, to encourage providers of single sex services to question people about their bodies and gender recognition histories when they are legally the sex appropriate for the service.

It is immaterial whether the person has ever previously had a different legal gender and it is also irrelevant that their body may be different in some way. A person’s body could differ from the ‘norm’ for their gender for all kinds of medical / biological reasons or due to an injury. It is not acceptable for service providers to make aesthetic judgements about the masculinity or femininity of service users. Allowing service providers to interrogate people to determine whether they are undergoing or have undergone gender reassignment and then making subjective judgements about their physical appearance is comparable with the “Gays in the Military” cases which the Government lost such as *Lustig-Prean v. United Kingdom* and *Smith & Grady v. United Kingdom*.

We accept that the issue is more complicated for a trans person who has not obtained a gender recognition certificate (GRC). As there is not necessarily the same level of existing relationship between the service provider and the service user as there would be between an employer and an employee, there is likely to be a problem determining whether or not a service user living fully in their acquired gender has a GRC or not. Where such a person is living permanently in the acquired gender (and perhaps has simply not applied for gender recognition due to wishing to remain in an existing marriage or civil partnership) they will be indistinguishable from a trans person with a GRC other than by asking them invasive and offensive questioning about whether they have a GRC or not. It is not acceptable for trans people to end up having to carry their GRC with them at all times in case a service provider decides to interrogate them. Therefore, we are of the view that wherever a transsexual person has changed their name and gender on their day-to-day items of identification such as their driving licence and passport (as part of living fully and permanently in their acquired gender

for the rest of their life) then they should be protected from discrimination in accessing goods, facilities and services at the single sex services for the sex/gender in which they are permanently living.

Where a trans person is not living permanently full-time in their acquired gender but instead is still entirely pre-transition or living only part-time in their acquired gender then their passport, driving licence and other identification will still be in their original gender as one of the requirements to change the gender on items such as passports and driving licences is a medical letter confirming that the person is living fully and permanently in their acquired gender. Consultation carried out by the Scottish Transgender Alliance indicates that it is very rare for a person who is not yet living permanently full-time in their acquired gender to try to use single sex services of their anticipated future acquired gender. Indeed, rather the opposite is true – with several long-term transitioned transsexual people with gender recognition certificates avoiding using any single sex services due to fear of service providers discriminating against them and harassing them.

In any rare occurrence where a trans person seeks provision from a single-sex service while not living permanently full-time as that sex/gender (with living permanently as a particular gender being evidenced simply and inoffensively by showing any identification such as a driving licence) then we accept that, depending upon the circumstances of the service, it may be a proportionate means of achieving a legitimate aim for the service provider to discriminate against the trans person.

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 making them legally the appropriate sex for the service or who has established that they have undertaken a gender reassignment process and live fully and permanently in the appropriate gender/sex for the service. This would make the gender reassignment law for single-sex services consistent with the Gender Recognition Act 2004 and the Goodwin v UK and I v UK judgements.

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:

The Scottish Transgender Alliance think that the proposed provisions regarding transsexual people and insurance need to be improved a bit. We welcome the intention evident in the provision – which is to try to ensure that transsexual person who has transitioned is not discriminated against in terms of their transitioned to gender and pays the new premium level for their transitioned to or acquired gender, while a pre-transition transsexual person pays according to their original birth certificate gender.

We also welcome the government's proposal not to tie a change of gender for the purposes of insurance premiums to the issuing of a gender recognition certificate. Requiring a trans person to have to show their Gender Recognition Certificate to insurance companies would have been an invasion of privacy and requiring a full Gender Recognition Certificate to be issued before allowing a change of gender for insurance purposes would have unfairly discriminated against transsexual people who wish to remain in an existing marriage or civil partnership and who therefore cannot at present get a full Gender Recognition Certificate.

However, regulation 4(b) of the proposed Sex Discrimination Act (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). The problem is that there is no clearly agreed point at which someone can be classed as switching from undergoing to undergone – especially in the case of Female-to-Male trans men. It is not reasonable to expect insurance providers, with only limited knowledge of gender reassignment procedures and options, to try to determine whether or not someone has completed the process. For example, many trans men do not have any surgery beyond mastectomy to remove their breasts while others may have several stages of operations to create a penis and others will not get a full-size penis created but will get some of their female reproductive system removed. What would count as complete? As the regulations are currently proposed they are likely to cause huge confusion, disagreement, upset and expense for all concerned – trans people and insurance providers alike.

The only obvious, universally understood, non-privacy-invasive and easily defined point in the gender reassignment process is the point at which the person changes their legal name and commences living full-time in their acquired gender. This is the point at which they can get the gender on their UK driving license and UK passport changed and it is also the point which is of importance in any potential Gender Recognition Application later. The point at which the transsexual person changes their name in order to start

living full-time in their acquired gender is also the point at which they will have to contact their existing insurers to explain the name change. Therefore, it will be the simplest, most easily established (by way of showing change of name deed poll or new identification such as passport in new gender) and also most cost-efficient point for the insurance company to change the person's gender for the purposes of their premiums. Changing the gender for insurance purposes from the time of starting to live full-time in the acquired gender also enables the trans person to later change insurance provider without having to worry about privacy issues as they will simply be assessed by a new insurance provider as the gender in which they live full-time and will not have to reveal their trans status for insurance policies (such as car insurance) which do not require extensive medical histories.

We therefore suggest that the new section 2A(1A) of the Sex Discrimination Act could be rewritten in the manner 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 to do so for the rest of B's life, insurance providers should not treat B less favourably on grounds of gender reassignment than other persons whose sex corresponds to that gender.
- (b) In other case, insurance providers should not treat B less favourably on grounds of gender reassignment than other persons of B's (current) legal sex.