

Equality Bill

Submission to the Public Bill Committee

1st June 2009

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1. The Equality Network is a network of lesbian, gay, bisexual and transgender (LGBT) organisations and individuals in Scotland, working for LGBT equality. The Equality Network's Scottish Transgender Alliance Project is the first government funded transgender-specific equality project within Europe. Our position on the bill is informed by survey research between 2007 and 2009 investigating the experiences and views of LGBT people in Scotland, and is focused on two of the equality 'strands' covered by the Equality Bill: sexual orientation and gender reassignment.

I. Summary of submission

2. We very much welcome most of the measures in the bill, and consider the bill to be a hugely important and timely improvement to equality law.

3. We do however have concerns about some provisions of the bill, which we think undermine the objective of providing the same level of protection from discrimination and harassment for all equality strands, including for LGBT people. This submission focuses on those concerns, but this should not be taken to indicate anything less than our strong support for the majority of the bill.

4. We are concerned that **protection from harassment on grounds of sexual orientation** has been specifically excluded from the provisions on goods, services and public functions (clause 27), premises (clauses 31 to 33) and school education (clause 80). This exclusion means that there will be less protection on grounds of sexual orientation, than for race, gender, disability, age and gender reassignment, and implies that harassment on grounds of sexual orientation in these settings is acceptable.

5. We are concerned about a number of provisions relating to the **gender reassignment** strand:

- That the protected characteristic “**gender reassignment**” is **too narrow**, and fails to protect many transgender people who face discrimination and harassment. In our view this protected characteristic should be replaced by “**gender identity**”.
- That the provisions banning **harassment by providers of school education** do not cover harassment on grounds of gender reassignment (clause 80). Transphobic harassment is common in schools and equal protection should be given for this as for harassment on other grounds.
- That the rules for **insurance services** will place transsexual people’s privacy at risk (schedule 3, paragraph 21(5)). Insurance premiums for people living permanently in their acquired gender should be based on that gender, whether or not the person has a gender recognition certificate.
- That the exception allowing **single-sex services** to discriminate on grounds of gender reassignment is too wide (schedule 3, paragraph 25). Discrimination should not be allowed where a transsexual person is living permanently in their acquired gender.
- That the exception allowing **employers** to discriminate on grounds of gender reassignment if there is an occupational requirement is too wide, and may allow more discrimination than the law currently does (schedule 9, paragraph 1). The bill should not increase the scope for discrimination to occur.

6. Finally, we welcome the reformulation of the exception allowing **charities** to discriminate (clause 186), but we believe that this exception should be restricted to discrimination for the purpose of preventing or compensating for a disadvantage linked to the ground on which the discrimination occurs (clause 186(2)(b)).

II. Sexual orientation harassment by services, schools etc. should be unlawful

7. The provisions of the bill that ban discrimination and harassment by providers of goods, services and public functions (clause 27), premises (clauses 31 to 33) and school education (clause 80), do **not** ban harassment on grounds of sexual orientation or religion or belief, while banning harassment on grounds of other protected characteristics.

8. Sexual orientation harassment by such providers is just as commonplace as harassment related to other protected characteristics. The Explanatory Notes to the bill provide examples of harassment which is made unlawful by the bill, including harassment on grounds of race in a pub (paragraph 116, final bullet point), and harassment on grounds of disability by a schoolteacher (paragraph 284, final bullet point). Both are examples that are just as likely to occur on grounds of sexual orientation, but the bill does not make this unlawful.

9. The Equality Network's 2007 survey of 97 lesbian, gay and bisexual (LGB) people in Scotland found that one in five had experienced sexual orientation discrimination or harassment by providers of services, and just under half of those experiences were clearly harassment – that is, unwanted behaviour by service staff that violated their dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for them. The experiences covered a range of public and private sector services, including the NHS, prison, cafes and hotels.

10. Stonewall's survey of LGB school pupils across Britain found that 65% had experienced homophobic bullying, and 97% had experienced homophobic language, in school. 30% said that adults were responsible for homophobic incidents in their school ('The School Report', Stonewall, 2008).

11. It is sometimes claimed that a harassment provision is not needed to protect against harassment by providers of services and education, because harassment can always be dealt with under the direct discrimination provision. We disagree with this. If it were true, why have an explicit harassment provision for any of the equality strands? The proof requirements for harassment and direct discrimination are very different. Experience with employment discrimination law shows that many claimants seek

justice under the sexual orientation harassment provision, rather than as sexual orientation direct discrimination.

12. The law should set out clearly what behaviour is unlawful. If it is intended that sexual orientation harassment by providers of services and education should be unlawful, that should be explicit in the bill, rather than relying, for sexual orientation and religion/belief only, on a roundabout ban on harassment via the direct discrimination provision. Indeed, as the Government's own Impact Assessment on the bill states (page 117 – Risks), excluding sexual orientation and religion/belief from the protection from harassment by providers of services and education “could be seen as creating a hierarchy of rights, and could give the impression that harassment of people due to their religion or belief or sexual orientation was acceptable”. The Impact Assessment goes on to say “we do not believe that this is a major risk, as we have not received a high level of support for an extension of protection against harassment to include religion or belief or sexual orientation”.

13. We think that the risk identified is major, and we can certainly report that there is a high level of support amongst LGBT and other equality groups and practitioners in Scotland for removing the exclusion of sexual orientation from the harassment protections in clauses 27, 31 to 33 and 80.

III. Gender reassignment is too narrow a protected characteristic

14. The bill somewhat extends the scope of the present gender reassignment protected characteristic. It removes the requirement for a person to be medically supervised for their gender reassignment, and it extends the protection to cover those who are perceived to be transsexual, and those who associate with transsexual people. We welcome these changes. We also welcome the addition of protection from indirect discrimination on grounds of gender reassignment.

15. However, the bill still only protects **transsexual** people who propose to transition, are transitioning, or have transitioned to live full time in the gender opposite to that on their original birth certificate. Many **transgender** people do not fall within this definition. For example, for a number of reasons such as family

commitments, a transsexual person may not be able to transition full time. Intersex people often face discrimination as a result of their intersex status, and most do not transition from one sex to the other and so would not be protected under the gender reassignment definition in the bill. And those who face discrimination because they are seen as expressing a gender identity different from the norms are not protected – this is a particular problem for pupils in schools.

16. 24% of respondents to a 2008 Scottish Transgender Alliance survey were transgender people who were not undergoing gender reassignment and instead had an ambiguous gender presentation ('Transgender Experiences in Scotland', Equality Network, 2008). Only 57% of 248 transgender respondents to our most recent survey identified the bill's definition of "gender reassignment" as applying to them ('Equality Bill Survey – Scottish Transgender Alliance & Gender Spectrum UK', Equality Network, 2009). 83% of respondents to that survey stated that the protected characteristic should be "gender identity" rather than "gender reassignment".

17. The Government's Equality Impact Assessment for the bill states (at paragraph 2.20) that the extension of gender reassignment protection to include protection on the basis of perceived gender reassignment will provide new protection for people who "are considered as being transvestite", and "will also cover some people with intersex conditions" as well as "others who may have an ambiguous gender appearance". We welcome the Government's acceptance that all these transgender people face discrimination and need protection. However, we do not believe that they will be adequately protected on the basis of perceived gender reassignment, because to rely on that provision would require proof that the discriminator wrongly perceived the person to be transsexual, as opposed to knowing that they were transvestite, intersex or androgyne.

18. All transgender people are at serious risk of discrimination, and all should be protected explicitly. We believe therefore that the protected characteristic should be **gender identity**, rather than gender reassignment.

19. The United Nations Economic and Social Council (ECOSOC) has this month recommended that states should prohibit discrimination on grounds of gender identity (ECOSOC General Comment 20, 25th May 2009). ECOSOC use the definition of

gender identity adopted in 2007 by an international group of human rights lawyers and experts, as part of the 'Yogyakarta Principles' on the application of international human rights law in relation to sexual orientation and gender identity:

'Gender identity' refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.

20. The Council of Europe's Commissioner for Human Rights has called on European countries to address discrimination against transgender people, based on the same definition of gender identity (Thomas Hammarberg, 5th January 2009). Gender identity is also widely used as a protected characteristic in anti-discrimination law in US jurisdictions (in 13 states and over 100 localities).

21. Adopting gender identity as the protected characteristic would also be consistent with new hate crime legislation for Scotland, which uses a similarly inclusive definition to ensure that all transgender people are equally protected from hate crime (the Offences (Aggravation by Prejudice) (Scotland) Bill is expected to be passed by the Scottish Parliament at its final stage on June 3rd).

IV. Transphobic harassment by schools should be unlawful

22. The bill extends the current gender reassignment protections to cover direct and indirect discrimination against pupils by schools. However, the provisions in the bill covering schools (clause 80) specifically exclude protection for pupils from harassment on grounds of gender reassignment (as well as on grounds of sexual orientation and religion/belief), while protecting from harassment on all the other grounds. We have set out above why we believe that protection from direct discrimination cannot be relied on to protect from harassment – the harassment protection needs to be explicit.

23. Research for the Equalities Review found that 64% of young trans men, and 44% of young trans women, experienced bullying

and harassment at school, some of which was by staff ('Engendered Penalties', Equalities Review, 2007). Examples provided directly to us include young transgender people being verbally and physically assaulted, and humiliated by teachers commenting on clothing and appearance. A teacher told us "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."

24. We can see no reason why harassment of pupils by schools on grounds of gender reassignment should be lawful, when harassment on other grounds is banned. There are certainly transsexual pupils who are already proposing, while still at school, to undergo gender reassignment, and bullying and harassment are an almost guaranteed experience for those pupils. We therefore believe that the exclusion, in clause 80(10), of protection from harassment by schools on grounds of gender reassignment, sexual orientation, and religion/belief, should be removed from the bill.

25. Many non-transsexual, but gender variant, pupils also face transphobic bullying and harassment at school, and they would best be protected by using gender identity as the protected characteristic instead of gender reassignment, as we have proposed above, and banning harassment by schools on that ground.

V. Insurance services for transsexual people

26. The effect of paragraph 21(5) of schedule 3 to the bill is that insurance services are required to charge transsexual people the premium that applies to people of the same legal gender. This could cause major difficulties for transsexual people who have undergone gender reassignment, but have not yet obtained gender recognition under the Gender Recognition Act 2004. Such people remain for the time being the legal gender allocated to them at birth – the opposite to their lived and presenting gender.

27. Gender recognition is only available when a person has lived full time for at least two years in their transitioned gender. It is vital that during that period they are able to live fully as their transitioned gender, and for that reason, they can obtain a passport, driving licence and other documents in that gender.

Requiring insurance companies to charge transsexual people the premium relating to their legal gender, as opposed to their lived and presenting gender, drives a coach and horses through the privacy right for transsexual people under article 8 of the European Convention, because it would require insurers always to ascertain a person's legal gender.

28. We therefore believe that insurance companies should be allowed the discretion to charge the premium based on the person's lived and presenting gender, for example as evidenced by driving licence or passport, rather than requiring companies to base the premium on legal gender.

VI. Single-sex services for transsexual people

29. Paragraph 25 of schedule 3 to the bill allows a provider of any single-sex service, including for example a provider of any separate facilities for men and women, to discriminate on grounds of gender reassignment if the discrimination is a proportionate means of achieving a legitimate aim.

30. We are very concerned at the potential breadth of this exception to the anti-discrimination law. It appears to allow wide scope for service providers to identify people they 'suspect' to be transsexual, question them about their gender identity, and then discriminate against them. This would breach transsexual people's privacy right under article 8 of the European Convention.

31. We therefore believe that the provisions dealing with single-sex services and gender reassignment should be amended to ensure that service providers cannot discriminate on grounds of gender reassignment against a transsexual person who is living permanently in their transitioned gender, but must treat them as that transitioned gender.

VII. Occupational requirements and transsexual people

32. Paragraph 1 of schedule 9 to the bill allows an employer to discriminate on grounds of gender reassignment if being non-transsexual is an occupational requirement for the job, and the discrimination is a proportionate means of achieving a legitimate aim.

33. This seems to us to provide substantially wider scope for discrimination than the Sex Discrimination Act 1975, as amended, (SDA) currently does. The SDA sets out particular kinds of employment where gender reassignment discrimination is allowed – for example, employment where being of a particular sex is a genuine occupational requirement, or where there are specific privacy issues such as a requirement to carry out intimate searches. However, under the SDA, such discrimination is **not** allowed against a transsexual person who has obtained gender recognition under the Gender Recognition Act 2004.

34. To avoid reducing the protection currently provided by the SDA, the bill should, as a minimum, completely exclude gender reassignment discrimination in employment against people who have obtained gender recognition. In addition, in order to protect the privacy of transsexual people who have transitioned to live permanently in their preferred gender, but have not yet received gender recognition, we believe that no gender reassignment discrimination in employment should be allowed against any transsexual person who has permanently transitioned, whether or not they have obtained gender recognition. They should be treated as their transitioned gender.

VIII. The exception for charities should be more narrowly defined

35. Under regulation 18 of the Equality Act (Sexual Orientation) Regulations 2007, charities are allowed to discriminate on grounds of sexual orientation, in providing services, if the discrimination is done on grounds of the provisions of the charitable instrument establishing the charity. In the Explanatory Memorandum to the Regulations, the Government stated that this exception was to allow charities to provide services to a specific group based on their sexual orientation.

36. However, some charities (for example, some adoption agencies controlled by the Roman Catholic Church) are attempting to rely on regulation 18 to **deny** services to people based on their sexual orientation, by writing such discrimination into their charitable objects.

37. Clause 186 of the bill tightens up the exception for charities so that discrimination is only allowed where it is a proportionate means of achieving a legitimate aim (clause 186(2)(a)) or for the purpose of preventing or compensating for disadvantage linked to the ground for discrimination (clause 186(2)(b)).

38. While we welcome the tightening of the exception, we remain concerned that clause 186(2)(a) could still allow inappropriate discrimination. We believe that charities should only be allowed to discriminate when they are providing benefits for the purpose of compensating for disadvantage, as allowed by clause 186(2)(b), and so we think that 186(2)(a) should be deleted.