

Equality Bill

Submission to the Joint Committee on Human Rights

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

Tel: 07020 933 952

en@equality-network.org

www.equality-network.org

1. The Equality Network is a network of 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.

2. We would like to comment briefly on the human rights implications of three parts of the Equality Bill: the definition of gender reassignment, the exceptions in schedules 3 and 9 (in relation to gender reassignment), and the provisions on harassment.

The gender reassignment protected characteristic

3. The Equality Bill somewhat extends the scope of the present gender reassignment protected characteristic, by removing the requirement for a person to be medically supervised for their gender reassignment. It also extends the protection to cover those who are perceived to be transsexual, and those who associate with transsexual people. We welcome these changes.

4. 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 people 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.

5. 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).

6. 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.

7. The United Nations Economic and Social Council (ECOSOC) has recently 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.

(See www.yogyakartaprinciples.org for details)

8. The group who developed the Yogyakarta Principles state: "the Yogyakarta Principles reflect the existing state of human rights law in relation to issues of sexual orientation and gender identity". We therefore commend their definition of gender identity to the Committee.

9. 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 www.coe.int/t/commissioner/Viewpoints/090105_en.asp).

The exceptions in schedules 3 and 9

10. Schedule 9, paragraph 1, allows discrimination in employment if there is an occupational requirement, and the discrimination is a proportionate means of achieving a legitimate aim. We are very concerned that this is regression from the existing protection for transsexual people, in a way which breaches their human rights.

11. Employers are currently allowed to discriminate on grounds of gender reassignment for certain posts (such as posts involving living in someone else's private home), but only where the transsexual person concerned does not have a gender recognition certificate. Once the person does have gender recognition, no employment discrimination is allowed on grounds of gender reassignment.

12. The general exception in schedule 9, paragraph 1 is therefore a regression – it would allow discrimination on grounds of gender reassignment against transsexual people who have obtained gender recognition. In our view this undermines the core purpose of the Gender Recognition Act 2004, which is to ensure the privacy of transsexual people. We believe that the wider exception in the bill breaches transsexual people's article 8 right to privacy (*Goodwin v UK, I v UK*).

13. We have similar concerns about the exception in schedule 3, paragraph 25. While this appears to restate existing law, and is not a regression, it does provide that providers of single-sex and sex-segregated services can discriminate against transsexual people who have gender recognition, and so raises the same privacy concerns.

14. We are also concerned about the effects of schedules 3 and 9 on transsexual people who have transitioned to live full-time in their acquired gender, but have not yet obtained gender recognition. It is a requirement of the Gender Recognition Act 2004 that a person lives for at least two years in their acquired gender before they can obtain gender recognition.

15. We suggest that the article 8 privacy rights of transsexual people in that situation also need to be protected as far as possible. We would also suggest that if a person is living full-time in their acquired gender, then whether or not they have obtained gender recognition, there is no good reason for an employer or service provider to treat them less favourably on grounds of their being transsexual.

Harassment

16. We are very concerned about the missing harassment protections in the Equality Bill: for sexual orientation (and religion/belief) in clauses 27 (services), 31 to 33 (premises) and 80 (schools), and for gender reassignment in clause 80 (schools).

17. Sexual orientation harassment by service 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.

18. Concerns have been expressed about the effect of provisions on harassment related to gender reassignment, sexual orientation and religion/belief, on rights to freedom of religion, and freedom of expression, under ECHR articles 9 and 10. We suggest that similar issues could potentially arise for another protected characteristic, gender, where harassment provisions are already in place in the Equality Bill. This suggests to us that it should not be necessary to use a narrower definition of harassment for gender reassignment, sexual orientation and religion/belief, than for gender, to protect freedom of religion and expression.

19. The harassment provision in the bill, clause 24, includes a reasonableness test for deciding whether conduct is harassment (clause 24(3)(c)). We would suggest that that test can be, and therefore must be, interpreted compatibly with ECHR articles 9 and 10. If that is the case, the reasonableness test would ensure that the harassment provisions are used compatibly with the ECHR,

and it would not be necessary to restrict the definition of harassment to achieve this.

20. The importance of harassment provisions covering sexual orientation and gender reassignment is illustrated by the research. 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, as distinct from direct discrimination – they were abusive or derogatory language, humiliating 'jokes' and other bullying. The experiences covered a range of public and private sector services, including the NHS, prison, cafes and hotels.

21. 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).

22. 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).