AHRC Research Centre for Law, Gender and Sexuality

RESPONSE TO

GETTING EQUAL: PROPOSALS TO OUTLAW SEXUAL ORIENTATION DISCRIMINATION IN THE PROVISION OF GOODS AND SERVICES

June 2006

CentreLGS is the Arts and Humanities Research Council Centre for Law, Gender and Sexuality.

The purpose of CentreLGS is to act as a national and international focal point for academics, practitioners and policy-makers who work in the area of gender, sexuality and the law. It consists of about 70 scholars in three institutions: the Universities of Kent, Keele and Westminster.

CentreLGS aims to support current research and develop new initiatives in this field through regular policy forums and conferences, the publication of books and articles, exchange and visiting scholar programmes, and the supervision of postgraduate research students.

SUMMARY AND RECOMMENDATIONS

Centre LGS welcomes the government's proposals to extend the law to include protection from discrimination on grounds of sexual orientation in the provisions of goods and services. We agree with the government that LGB people still face 'unacceptable discrimination… in their everyday lives', including being 'subjected to hostility and abuse' (p. 19) and strongly endorse the government's resolution to tackle such 'unfair treatment' (ibid) in the context of goods and services provision. However, noting too that the proposals are offered as a 'benchmark for… fair treatment' (p. 20), we urge the government:

- to ensure that the benchmark is not set too low;
- to enact proposals that are sufficiently responsive to the needs of LGB communities whose struggles for recognition have taken place against the background of a legacy of social and legal exclusion;
- to reject religious belief as a basis for discrimination
- to ensure that if religious-based exemptions are included, they are confined as narrowly as possible to directly doctrinal activities.

CONSULTATION RESPONSE

Centre LGS addresses the individual questions posed by the Consultation below. However, we have some general observations about the proposals which inform our answers and, we hope, may be of some broader use to the Discrimination Law Review.

A The concept of equality

Notwithstanding the recent introduction of a positive duty to promote equality in some contexts, the concept of equality informing current law is largely a negative one, enacting a requirement that people refrain from discriminating against other individuals on the basis of legislatively prohibited grounds. This is generally presented as a form of equality of opportunity. By prohibiting public and private decision-makers from taking particular grounds into account, inequality of opportunity based upon those grounds is wiped out. It has long been accepted at a policy level that the problem of inequality is not so simple as this crude version of equality of opportunity would suggest.[1] Hence, the shift toward more proactive policies and adoption of a strategy of social inclusion as a response to inequality issues.

[1] We consider concepts of equality more fully in our *Centre LGS Response to the Equalities Review: Interim Report* available at www.kent.ac.uk/clgs.

However, notwithstanding these shifts away from equality of opportunity in its barest sense, the core of our legislation is indeed based on the assumption that if we treat people in the same way, inequality will eventually disappear. Sameness of treatment is the essential norm underpinning anti-discrimination law. Hence, indeed, the focus on *discrimination.* While the inclusion of indirect discrimination (or, as it is known in the US, 'disparate impact') has the potential of shifting the emphasis away from differential treatment and towards differential outcomes, the overriding rubric of 'anti-discrimination' arguably constrains this potential in various ways. A particular difficulty is the symmetrical nature of most of the anti-discrimination legislation (the Disability Discrimination Act 1995 is the only legislative enactment without a built in symmetry.) Because the legislative approach is oriented around the prohibition of difference, it is equally applicable to those have enjoyed the historical privileges of group-based oppression as to those who have suffered from historical disadvantage and, if past experience is anything go to go by, legislative rights are as likely to be invoked as much if not more by those in the historically privileged group.

Our concern is with the difficulties this poses for the implementation of strategies to combat group-based disadvantage. Because LGB people have long suffered from social and legal exclusion as well as acute cultural marginalisation, they have devised their own strategies to counter these difficulties, the development of their own safe spaces, communities and commercial relationships. If the effect of the legislation is radically to limit the ability of LGB people to initiate, foster or secure these spaces, communities and relationships, the legislation is likely to *increase* rather than decrease the quality and degree of inequality which LGB people experience. There may be a time when such strategies are less necessary; but in this period of social, cultural and political transition which legal recognition of sexuality-based equality is initiating, it is crucial that measures can be taken to ensure that the past effects of historical disadvantage can be adequately countered.

The sameness model of equality inherent in the legislation raises a related concern, namely by what standard are sameness and difference measured? A core difficulty with sameness/difference approaches to inequality is that they tend to assume a hidden norm which is based on the experiences of the historically privileged group. This serves as a measure of sameness or difference. LGB people are encouraged to *be the same* as straight people, to model their relationships, their social, cultural and commercial activities on the heterosexual norm. A sameness/difference model of inequality is insufficiently attentive to its implicit hierarchies and to the privilege and disadvantages which result. This critique of sameness/difference models has been present in feminist scholarship for some time (see e.g., MacKinnon, 1987) and has encouraged exploration of conceptions of equality which are focused not on difference but on disadvantage. Difference becomes relevant and problematic

when disadvantage results. This enables the adoption of policies which are tailored to groups with specific needs, e.g., pregnant workers. It also sanctions strategies of difference which are expressly designed to tackle historically entrenched disadvantage. The development of what is known in some jurisdictions (e.g., Canada and South Africa) as 'substantive equality'[2] is not an endorsement of a world view in which everyone ends up in the same position. A commitment to substantive equality means a commitment to strategies which acknowledge and address the many ways in which institutionalised power disparities produce concrete group-based inequalities. A commitment to equality as sameness does not have the sufficient potency to tackle these problems. It is crucial that the enactment of the proposed legislation does not serve as an obstacle to the realisation of substantive equality for LGB people.

B Modelling new law on existing legislation

For some of the reasons outlined above, we have difficulty with the tendency of the Consultation Paper to use existing anti-discrimination legislation as the model for the development of new protections. However, at the same time, we endorse the view expressed in the Paper that sexual orientation discrimination should be treated with 'the same seriousness' afforded to other grounds of discrimination (pp. 19-20). We also accept the need for greater coherence across the legislative provisions than is currently the case. Nevertheless, after 30 years of operation, there is now a strong body of evidence highlighting the strengths and weaknesses of the legal model adopted in the 1970s. Some of the weaknesses have been addressed via interventions in European law (for example, the definition of indirect discrimination). However, the remedial framework remains more or less intact notwithstanding concerns about the extent to which it places reliance on individual adversarial claims to forward collective equality goals (see further Fredman, 2002). While our interim position with relation to these proposals is that LGB people should be entitled to at least the same scope of protection as other disadvantaged groups, we would encourage a closer look at the remedial framework and at the potential role of the CEHR in this context. We would also urge the Discrimination Law Review to consider the provision which these proposals make for intersectional anti-discrimination claims, that is, claims which are based neither on one ground or another but on a unique combination of two or more. (See further Crenshaw 1989; Grabham, 2006.)

C Sexuality and Religious Belief

[2] For further consideration of legal developments in the equality field in these jurisdictions, see .e.g., Fredman 2003; Baker et al 2003, chapter 7. For an analysis of some of the theoretical and strategic difficulties accompanying equality claims in a gay and lesbian context, see Herman 1994.

The Consultation Paper raises questions about the potential impact of the proposed regulations on religious organisations and activities (para. 3.32). The Paper invites comment in this context but emphasises that 'any exceptions from the regulations for religious organisations would need to be clearly defined … and limited to activities closely linked to religious observance or practices (para. 3.33). Implicit here is an assumption that some sort of balance must be struck between the equality rights of LGB people and those of religious groups. However, we reject the idea that equality rights can and should be balanced and challenge the apparent 'conflict' which the Consultation Paper implicitly poses.

What precisely are the issues at stake here, legally, morally and politically? In particular, what is the scope of the state's legal obligation with regard to religious rights? There is of course the legal commitment to protection from discrimination on the grounds of religion and belief.[3] There is also the right to freedom of thought, conscience and religion under Article 9 of the European Convention of Human Rights, including the freedom 'to manifest… religion or belief, in worship, teaching, practice and observance' (ECHR Art 9(1)). However, this is not an unlimited freedom. As Article 9(2) states, it can be 'subject to such limitations as are prescribed by law and are necessary in a democratic society … for the protection of the rights and freedoms of others'. Underpinning both these legal initiatives is a moral or ethical commitment to human dignity, equality and respect for diversity. In the context of Britain's modern multicultural society, these values have clear political resonance and relevance.

The question then becomes what is the proper scope of the ethical and legal commitment here? The freedom to manifest religious belief cannot, of course, be unlimited. In many countries and in many times religious belief has been the basis upon which the human rights of countless others have been violated.[4] Given the ethical values which underlie a commitment to religious freedom – dignity, equality and respect for difference – we believe that the freedom to manifest religious belief should not include conduct which directly denies the dignity, worth and personhood of another. It may be argued that the discriminatory treatment of LGB people (for example, by a bed and breakfast proprietor) is not a comment on the *person* but on the *practice* of homosexuality.[5] We disagree: sexuality is a fundamental dimension of personhood. To deny or abuse someone's sexuality is to violate their dignity, to

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[3] Specifically, a commitment not to treat people less favourably on the basis of religion or belief; not to apply neutral provisions, criteria or practices which place people at a particular disadvantage because of their religion or belief and, in an employment context; not to harass people on the basis of religion or belief.

[4] Hence the power to place limits on the freedom to manifest religious beliefs in ECHR Art 9(2).

[5] See, e.g., *Response from Evangelical Alliance* response to this Consultation Paper: 'Our focus is not on human beings who experience same sex attraction but on homosexual practice which we regard as a behaviour choice, together with associated attempts to normalise it' (www.eauk.org).

negate their intrinsic worth.[6] To discriminate against people - in any circumstances - because of their sexuality is to violate the principles upon which the right to religious freedom, among many other freedoms, rest.

The Evangelical Alliance comment: 'One cannot separate religious belief and practice'. We agree; but it does not follow that freedom of religious belief requires *unlimited* freedom to practice. They continue:

> 'Not only must it continue to be lawful to *believe* that homosexual practice is wrong and contrary to the common good of society, but in addition believers must not be forced to *act* in ways that may be interpreted as facilitating, encouraging or permitting homosexual practices or way of life.'

The argument that anti-discrimination norms violate individual freedom by requiring people to refrain from discriminatory treatment has been made since anti-discrimination law was first introduced. It relies on a notion of negative freedom – on the idea of freedom from state intervention. This is a narrow view of 'freedom from…' not 'freedom to…',[7] a conception of freedom which anti-discrimination law, by its very nature, rejects. Nor is it an idea of freedom which is compatible, for example, with most theoretical models of equality, for example, equality of capabilities in which equality and freedom work *for* not against each other.[8] We would agree that there are spheres of personal activity from which the state should, as far as possible, refrain from intervening. However, in the conduct of public affairs, including the commercial provision of goods and services to the public, there are compelling equality and freedom-based reasons for requiring adherence to anti-discrimination laws even by those who, for religious or other reasons of belief, object to them.

In sum, if we accept that the freedom to manifest religion belief is not unlimited, if we accept that sexuality is fundamental to personhood and falls within the sphere of equality protection, if we accept that freedom and equality working together properly compel certain constraints on individual action, for example, the requirement that people refrain from discriminatory acts, we cannot see any moral, legal or political basis for exempting people from anti-discrimination law on the basis of their religious beliefs.

D Individual Questions

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[6] This is why sexual abuse is such a powerful weapon of torture in the context of war, evidenced most recently in the shocking events at Abu Ghraib prison.
[7] Isaiah Berlin identified these two forms of liberty as 'negative liberty' and 'positive liberty' (Berlin 1969).
[8] See *Equalities Review: Interim Report* (2006, www.theequalitiesreview.org.uk).

1. **Do you agree that the new sexual orientation regulations should apply to goods, facilities and services?**

Yes.

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

Yes unless there are good equality-seeking grounds for variation (see Section A above).

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

Yes we do. Aside from the example provided in the Consultation Paper (clinical effectiveness in the context of health care, para 3.11), LGB people have specific needs which are derived from a legacy of social and legal exclusion and cultural marginalisation and which have shaped and informed their individual and collective experience. It is important to devise strategies which are tailored both to meet these specific needs *and* to tackle longstanding patterns of disadvantage and exclusion. We note that similar exemptions already operate in relation to protection on other grounds and we see no reason why they should not apply here.

The sorts of activities such an exemption might cover include the provision of a wide range of services to LGB people. These include heath care, legal advice, social welfare and interface with broader social/public services. Such services may target the needs of LGB people generally, or specific groups therein, for example lesbian healthcare or counselling and advice services for LGB people of particular ethnic minorities.

4. **Do you agree that premises should be covered by the Sexual Orientation Regulations?**

Yes. We see no reason - equality, religious or privacy-based - for excluding premises from the scope of protection. It is difficult to see how a government commitment to protection from discrimination on the basis of sexual orientation in the provision of services could possibly

coexist with such an exclusion; nor does it violate any right of privacy. The provision of commercial accommodation has an inevitably public character: it entails the provision of a service to the public which is, to a significant extent, publicly regulated and enabled. Although the service may be privately owned and run, its quasi-public dimension places its operation sufficiently within the sphere of public policy initiatives to justify the imposition of appropriate legal duties and prohibitions.

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

We agree in relation to the letting of part of a private dwelling which the owner also occupies. We do not agree in relation to sellings or lettings of whole dwellings.

6. **Do you agree that Private Members' Clubs should be included in the sexual orientation regulations?**

Yes.

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

We agree with this proposal.

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

We agree the regulations should apply to public functions. We do not think any specific additional exceptions are needed. Indeed we query the width of the exceptions proposed. The list provided is described as 'in line with the provisions on public functions in other main equality enactments' (para. 3.23). However, we do not see this as a persuasive case, in and of itself, for their application in this context. The individual justifications offered are so broad/vague as to allow little room for examination. They are based on an assumption that certain kinds of decision-making to be effective must be immune from

scrutiny. But no justification is offered for this assumption. We would welcome closer scrutiny of these proposed exemptions and fuller debate about their justification.

9. Do you agree that schools should be covered by the sexual orientation regulations?

Yes. If the commitment to equality of opportunity is to be taken seriously, schools must be a sphere is which principles of non-discrimination on the basis of sexuality are respected and fully upheld. This is important both to create a positive learning environment for all children and to ensure that some children are not subject to homophobic bullying or abuse. We agree with the proposed width of protection in para. 3.26, i.e., protection from discriminatory action whether the sexual orientation is that of the child/pupil or his or her parents', siblings, carer or friend.

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

No. Specifically, we reject any argument in favour of wide-ranging exemptions for faith schools and/ or private educational establishments. We think that the purpose of prohibiting discrimination on the basis of sexual orientation would be significantly undermined if any parts of the school sector were exempted.

11. Are there any areas of activities for schools for which you consider special provision needs to be made?

A public commitment to sexualities equality should inform the curriculum, including, but not limited to, sex education (other obvious areas of curricular relevance here include sociology, biology, English, general studies, history and PHSE). If law is to play a role in combating sexuality-based discrimination, then it must do so in alliance with education and public awareness strategies. In any case, it is imperative that schools provide a safe and supportive environment in which young people can develop and grow, intellectually, emotionally, physically and sexually.

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

No: we don't agree with any exemptions which go beyond the scope of upholding the right to personal freedom of belief. In the course of daily life, individuals and

organisations, particularly where their activities have a substantial public interface, should be bound in the conduct of their affairs by the same egalitarian principles which inform public life more generally. Personal belief should not be a permissible ground for denying in one's public/civil practices others, on the basis of their sexuality, the right to dignity and respect (any more than it would be in relation to, for example, race).

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

Any exemptions should be confined as narrowly as possible to doctrinal activities. However, we do not see even this as straightforward. Aspects of religious doctrine are often a matter of internal contestation and shift over time (for example, US 'White Supremacy' arguments were for a time closely associated with Christian beliefs). We do not see why law should favour some doctrinal interpretations over other or empower some to make decisions about other people's rights. This is why we would prefer to see the scope of exemptions strictly confined even in a doctrinal context. We cannot envisage any circumstances in which religious activities more broadly should be exempted from the scope of anti-discrimination regulation.

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

Yes, particularly where the object of the charity includes tackling problems which are the produce of historic disadvantage of LGB people or building confidence and community for people isolated as a result of homophobia/ heterosexism.

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

Yes. We agree that LGB people need protection from discrimination on grounds of marital status (para. 4.4). However we would point out that the reason such protection is necessary is because LGB people are legally prohibited from getting married. It seems to us somewhat absurd that the law needs to protect people from the inequalities of the law

itself. A parallel would be the legal entrenchment of differential sex-based pension ages, highlighted in the case of *James v Eastleigh Borough Council* [1990] IRLR 298 (HL). Just as the government has now addressed the sex-based discrimination inherent in legally sanctioned differential pension ages, it should also address the sexuality-based discrimination inherent in legally sanctioned differential family forms.

We accept the need to address the issue of harassment more generally across the equality provisions (para. 4.16). However, we do think issues of harassment pertain to the delivery of goods and services and are closely linked to homophobic spaces and experiences and we urge clarification of the issue. We also consider that the sexuality - based hostility and abuse in the context of the delivery of goods and services could well constitute less favourable treatment i.e., direct discrimination on the ground of sexual orientation.

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

Yes in so far as it is consonant with the regulations more broadly. Advertisements relating to circumstances which are not in themselves a violation of the regulations should be permitted, for example, advertising in the gap press for a gay flatmate.

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

Yes.

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

Definitely.

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

Yes.

20. Do you agree that the enforcement provisions for the sexual orientation regulations should match those for the other equality enactments?

They should certainly be no less. However, there are well established critiques of anti-discrimination enforcement mechanisms and we hope these will be taken into consideration in the broader context of the Discrimination Law Review**.**

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

We recognise that it takes time to set up the new CEHR but we do have obvious concerns about the absence of public institutional support for sexuality claims, in the context of employment, from their implementation in 2003, and in relation to goods and services, from their intended enactment later this year until the CEHR begins functioning in late 2007. Perhaps some interim additional provision could be made by the proposed regulations.

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FURTHER INFORMATION

Method of Consultation

This response is the result of collaboration between Centre members across the three participating institutions in the UK. Members were invited to send their comments on the consultation to the response co-ordinator, Professor Joanne Conaghan (Kent).

The final response was written by Joanne Conaghan with valuable input from:

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