

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

## **Explanation of the wider context for the consultation and what it seeks to achieve**

The Equality Act 2006 included a power that allows the Government to prohibit discrimination on the grounds of sexual orientation in the provision of goods, facilities and services, in education and in the exercise of public functions. The Government intends to use this power to make Regulations that take effect in October 2006.

This consultation paper describes the approach proposed for these regulations. They are intended to bring protection from sexual orientation discrimination into line with existing legislation that prohibits discrimination on the grounds of race, sex and for reasons related to disability. Legislation prohibiting discrimination on the grounds of religion or belief will come into effect at the same time as the Regulations described in this consultation.

This consultation paper seeks views on specific points about the range of activities that should be covered by the Regulations, and on whether any exceptions should be provided from them to ensure that the protection provided is effective and appropriately targeted.

**Issued**

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**Respond by** 5 June 2006

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## Foreword

The Government's vision is for a fair society founded on equal opportunities for all, respect for the dignity and worth of each person and mutual respect between communities. Significant progress has been made over the past forty years – since the first anti-discrimination legislation was introduced – towards achieving such a society in which everybody can achieve their full potential, unfettered by prejudice or discrimination.

Anti-discrimination legislation has played a crucial role in driving this progress and setting the benchmark for acceptable behaviour in many areas of our everyday lives. We have just celebrated the thirtieth anniversary of the Sex Discrimination Act and will celebrate the fortieth anniversary of the first Race Relations legislation later this year. It is unlikely that British society would be as diverse and successful as it is today without these landmark pieces of legislation.

More recently, we have made significant strides towards achieving equality for lesbian, gay and bisexual people. Since 1997, we have equalised the age of consent, repealed section 28 and outlawed discrimination on the grounds of sexual orientation in the workplace. And just three months ago, we witnessed the first civil partnerships taking place across the United Kingdom.

These changes represent a significant step towards making Britain a much fairer and more equitable place for lesbians, gay men and bisexual people to live. However, lesbian, gay and bisexual people can, and do, still face unacceptable prejudice in their everyday lives. Same-sex couples can find themselves turned away from hotels, or getting a raw deal from some other service providers, simply because of their sexual orientation.

This situation is unfair and outdated. Gay men, lesbians and bisexual people should have the same basic rights and freedoms as heterosexual people. For this reason we intend to introduce regulations in October this year that outlaw sexual orientation discrimination by goods and services providers in both the public and the private sectors.

This consultation document explains the areas that we propose to cover in these new laws, outlines how we propose that these laws should work in each area and seeks your views on how to achieve protection from discrimination based on sexual orientation. We look forward to hearing your views on our proposals, so that we can take these into account and bring regulations into force later this year that prohibit unfair sexual orientation discrimination in a way that is workable and effective.

**Meg Munn MP**

**Rt Hon Alan Johnson MP**





## **1. Purpose of the Consultation Paper**

1.1 The Equality Act 2006 included a power that allows the Government to prohibit sexual orientation discrimination in the provision of goods, facilities and services, education, the exercise of public functions and other areas by making regulations. The Government intends to use this power to introduce regulations in October 2006. This consultation paper describes the sort of discrimination that we propose to make unlawful through these regulations.

1.2 Our broad intention is to extend Great Britain's current anti-discrimination laws to cover people facing unfair treatment because of their sexual orientation. The scope of the protection proposed is explained more fully in Chapter 3. Sexual orientation means an individual's sexual orientation towards:

- People of the same sex as him or her (gay or lesbian);
- People of the opposite sex (heterosexual); or
- People of both sexes (bisexual).

1.3 This protection will therefore apply to everyone, whether they are lesbians, gay men, heterosexual or bisexual.

1.4 Chapter 4 describes the sorts of discriminatory behaviour that we are proposing to make unlawful. Chapter 5 describes our proposals for how the regulations will be enforced and

the role that the new Commission for Equality and Human Rights will take on in relation to the regulations when it opens its doors in October 2007.

1.5 Examples of the sort of situations where some organisations or individuals might currently operate or act in ways that would be unlawful once the regulations take effect are included throughout the document. We have also asked specific questions about the best way to ensure that the proposed regulations are balanced and effective.

1.6 The DTI will be holding consultation events around the country during the consultation period, so that groups and individuals who are particularly interested in how the regulations are written will have the opportunity to put their views to Ministers and officials, as well as respond in writing.

### **How to respond to this consultation**

1.7 Responses to this consultation should be sent to the address below by 5 June 2006.

1.8 When responding to this consultation please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.

An electronic version of this publication is also available at [www.dti.gov.uk](http://www.dti.gov.uk) or [www.womenandequalityunit.gov.uk](http://www.womenandequalityunit.gov.uk).

A response can be submitted by letter, fax or email to:

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Consultation

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1 Victoria Street

London SW1H 0ET

Fax: 0207 215 2826

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### **Additional copies**

- 1.8 You may make copies of this document without seeking permission. Further printed copies of the consultation document can be obtained from:

DTI Publications Orderline

ADMAIL 528

London SW1W 8YT

Tel: 0845-015 0010

Fax: 0845-015 0020

Minicom: 0845-015 0030

[www.dti.gov.uk/publications](http://www.dti.gov.uk/publications)

- 1.9 A summary of the document in Welsh can be found at [www.dti.gov.uk](http://www.dti.gov.uk) or [www.womenandequalityunit.gov.uk](http://www.womenandequalityunit.gov.uk).
- 1.10 Other versions of the document in Braille, large print, other languages or audio-cassette are available on request.

### **Confidentiality & Data Protection**

- 1.11 Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). If you want other information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.
- 1.12 In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. 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.

- 1.13 The Department will process your personal data in accordance with the Data Protection Act and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

### **Help with queries**

- 1.14 Questions about the policy issues raised in the document can be addressed to:

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- 1.15 If you have comments or complaints about the way this consultation has been conducted, these should be sent to:

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Fax: 020 7215 8303

A copy of the Government's Code of Practice on Consultation is in Annex A.

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## **2. Sexual Orientation Discrimination: The Case for New Rights**

2.1 In the past decade, the rights of lesbians, gay men and bisexual (LGB) people to fair and equal treatment have increasingly been recognised by society at large. Changes to the law have been an important factor in this movement and, since 1997, the Government has introduced a number of very important new protections and rights for LGB people:

- The age of consent for gay men has now been equalised with that for heterosexuals across the whole of the UK;
- Section 28 of the Local Government Act in England and Wales and Section 2A in Scotland were repealed;
- In December 2003, sexual orientation discrimination was made unlawful in the workplace and in respect of the provision of vocational training, giving LGB people the right to take a case to an Employment Tribunal or the County Court where appropriate;
- In 2004, the Civil Partnership Act was passed, with the first civil partnerships taking place in December 2005.

- 2.2 These steps have firmly established the principle that, in a modern and diverse society, it is not acceptable for someone to be discriminated against because of their sexual orientation.
- 2.3 However there is clear evidence that LGB people are still facing unacceptable discrimination – whether deliberate or inadvertent – in their everyday lives. There have been several accounts in our national newspapers of same-sex couples being turned away from hotels, bed and breakfasts or by tour operators, or who are refused shared accommodation when they request it. In the past year, some lesbians and gay men have been refused access to basic healthcare. In addition to straightforward discrimination, LGB people are often subjected to hostility and abuse in many areas of their everyday lives.
- 2.4 This sort of unfair treatment, experienced by lesbians and gay men purely because of their sexual orientation, has a significant negative impact, limiting their right to access essential services and the opportunity to play a full role in society. It is an experience that is entirely at odds with a modern Britain whose values are founded on equal opportunities for all, respect for the dignity and worth of each person, and mutual respect between individuals and communities.
- 2.5 By introducing these regulations, we will be treating sexual orientation discrimination with the same seriousness afforded

to discrimination on the grounds of disability, sex, race and religion or belief. The new regulations – which we intend to bring into effect in October 2006 alongside new protection from discrimination on the grounds of religion or belief – will provide individuals with the right to protection from discrimination and the right to challenge discriminatory treatment. They will also clearly establish a benchmark for the sort of fair treatment that everyone should rightfully expect when accessing services in their everyday lives.

### **3. The Scope of the Regulations**

- 3.1 The Government intends to introduce regulations that prohibit discrimination on the grounds of someone's sexual orientation in the provision of goods, facilities and services and in the exercise of public functions. It is also intended that the prohibition will apply to housing, education in schools, advertising, and clubs, where those activities are not otherwise caught by the general goods, facilities and services provisions. Broadly speaking, the aim is to provide protection from sexual orientation discrimination which generally accords with the approach taken in the Sex Discrimination Act, the Race Relations Act and the religion and belief provisions in the Equality Act 2006 in respect of goods, facilities and services, public functions, education and premises.
- 3.2 This chapter describes the areas that will be covered by the regulations, with examples of why this protection is needed. It also sets out areas where we may need to consider in particular detail the way in which the regulations will apply, and whether or not there are good reasons to consider excluding certain activities from the scope of the regulations.
- 3.3 The proposed regulations described in this consultation paper will apply to anything done in Great Britain (England,

Scotland and Wales). They will not make it unlawful to do anything in another country in order to comply with its laws.

- 3.4 Separate regulations are proposed for Northern Ireland which has a different legislative framework covering anti-discrimination. A consultation paper setting out the proposed scope and effect of the regulations in Northern Ireland will be published shortly by the Office of the First Minister and the Deputy First Minister. Information about this can be found at [www.ofmdfmni.gov.uk/equality](http://www.ofmdfmni.gov.uk/equality).

### **Goods, Facilities & Services**

- 3.4 The term 'Goods, Facilities and Services' is used in anti-discrimination legislation in Great Britain to denote a very wide range of activities carried out by organisations in both the public and the private sector. However, this term is not specifically defined in legislation. Instead a broad indication of the range of goods, facilities and services that will be covered is given through the inclusion of an illustrative list of examples in the legislation. For instance, in the Equality Act 2006 it is described as applying to:

- Access to and use of a place which the public are permitted to enter;
- Accommodation in a hotel, boarding house or similar establishment;

- Facilities for banking, insurance or for grants, loans, credit or finance;
- Facilities for entertainment, recreation or refreshment;
- Facilities for transport or travel; and
- The services of a profession or trade.

3.5 In practice, courts have interpreted the scope of goods, facilities and services quite widely, ruling in individual cases that a very diverse range of activities, including many public services provided by government, are caught by the term. Goods, facilities and services provisions apply regardless of whether or not a charge is made for the service or facility being provided.

***What sort of sexual orientation discrimination are we aiming to tackle?***

*A same-sex couple reserve a double room in a hotel. When they arrive and go to the hotel reception to check in, they are told that the hotel will not provide a same-sex couple with a double room because this might cause offence to other customers.*

*A bisexual woman requests a cervical smear test at her local surgery. She is told that she cannot be given an appointment unless she is currently in a heterosexual relationship, because the surgery receptionist mistakenly assumes that she would not otherwise have any medical need for a smear.*

**3.6** We propose that the regulations should apply generally to goods, facilities and services, using similar definitions and approaches to those contained in the other main pieces of anti-discrimination legislation (sometime known as the Equality Enactments<sup>1</sup>). Descriptions of direct and indirect discrimination and the other sorts of discrimination that we propose to cover in the regulations can be found in Chapter 4.

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

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

**3.7** Certain services and activities currently provided by organisations currently are targeted at customers or users on the basis of their sexual orientation.

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<sup>1</sup> These pieces of legislation are the Sex Discrimination Act 1975 (as amended); the Race Relations Act 1976 (as amended); the Disability Discrimination Act 1995 (as amended); the Employment Equality (Religion or Belief) Regulations 2003; the Employment Equality (Sexual Orientation) Regulations 2003; and the Equality Act 2006 that prohibits discrimination on the grounds of religion or belief.



3.8 For example, in the private sector, there are some gay bars and clubs, travel and financial service companies that design their products for lesbian, gay and bisexual customers. Providing goods or services likely to be of more interest to LGB people would not be unlawful if these goods or services are also made available to people of any sexual orientation. Those who provide such goods or services would not therefore be obliged to provide new services of interest to heterosexual customers.

*A travel company provides holiday packages to gay-friendly destinations (e.g. places with a local gay scene) that include flights and accommodation. They also take bookings from heterosexual customers on the basis that they are happy to stay in accommodation that is likely to be gay-owned, with a majority of gay customers. This would not be discrimination.*

*A department store provides a gift registration service for couples planning to marry. They refuse to offer a similar service to couples planning a civil partnership. This would be discrimination.*

*Some gay bars employ door staff who may screen potential customers wishing to enter by asking them questions designed to establish their sexual orientation, or familiarity with the local gay scene. If customers were turned away only because their answers to these questions indicated that they were straight, this could be discrimination. However, a gay bar would still legitimately be able to turn away customers who they believed might be disruptive, or might wish to enter the bar to cause trouble.*

- 3.9 We do not intend to provide an exception from the prohibition on sexual orientation discrimination to allow businesses to limit access to their goods and services on the basis of an individual customer's actual or perceived sexual orientation.
- 3.10 Providing a general exception of this sort would allow businesses that might currently discriminate against gay customers to continue this practice. Providing an exception that was limited to gay businesses would undermine the general principle that discrimination on the grounds of sexual orientation is wrong.
- 3.11 In the public sector, we have identified some services, in particular health services, where provision is currently targeted towards lesbians and gay men on the basis of their sexual orientation because treatment is more likely to be taken up, or to be more effective when provided in a supportive environment. For example, some hospitals run sexual health clinics that only offer their services to lesbians or bisexual women or to gay or bisexual men. Such service provision is designed to ensure that clinical effectiveness is the key factor in determining how an individual service is provided.

- 3.12 Our view is that such services should be allowed to continue. In order to do this, it may be necessary to provide an exemption from the general prohibition on sexual orientation discrimination to allow services to be provided separately for different groups on the basis of their sexual orientation, where this is the best way to meet a specific need facing people of a particular sexual orientation or to overcome discrimination or disadvantage.
- 3.13 A precedent for this approach can be found in the Sex Discrimination Act 1975 (SDA) goods, facilities and services and public functions provisions that allow separate facilities and services to be provided to men or women in certain circumstances without this being unlawful discrimination.
- 3.14 We envisage that any exception on these lines would be carefully defined to allow separate services only where there is a clear and widely accepted justification, and where these separate services are limited to what is needed to achieve this purpose. Otherwise there is a risk that the general prohibition on discrimination may be undermined.

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

## Premises

- 3.15 In line with other anti-discrimination legislation, we propose a general provision to make it unlawful for anyone selling or letting premises to discriminate against potential buyers or tenants because of their sexual orientation.

*A same-sex couple are looking for a one-bedroom flat to rent together. When they approach local letting agencies to register their interest in leasing this type of property, some refuse to keep their details on file, saying that their clients would not want to let a property to a gay couple. This would be discrimination.*

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

- 3.16 In the other main equality enactments, an exception is provided to this general prohibition on discrimination in the letting of premises. The exception allows people to choose whom they live with in their private home. . A landlord can therefore discriminate against a potential tenant of a part of their premises if they, or a near relative, live in another part of those premises, provided that they do not use an estate agent or place an advertisement for the purposes of the

disposal. This exception only applies where parts of the premises – such as the kitchen or bathroom – will be shared by all residents, or if the size of the property means that no more than two households or six individuals can be accommodated in the property in addition to the landlord or their near relative.

- 3.17 This exception is provided to preserve an individual's right to privacy. It would not apply to the letting of rooms in a private home which is being used as a commercial business, such as in a bed and breakfast or guesthouse. Including it in the new Sexual Orientation Regulations would maintain their compatibility with the other equality enactments which currently all have similar exceptions.

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

### **Members Clubs**

- 3.17 There are many social clubs and associations that offer membership and opportunities particularly to lesbians, gay men and bisexual people. In line with the other equality enactments, these can be defined as either informal

associations<sup>2</sup> or private members clubs<sup>3</sup>. The activities of informal associations will be covered by the general goods, facilities and services provisions in the Regulations. We are proposing to also cover Private Members Clubs in the Regulations.

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

3.18 A range of specific provisions dealing with clubs and associations are found in the other equality enactments. For example, in the Race Relations Act, private members clubs are allowed to limit their membership to particular national or ethnic groups, for example ex-patriates clubs, but are not allowed to limit membership on the grounds of colour. Clubs that exist for the benefit of certain groups of disabled people, such as deaf people, are able to confine their membership to that group of people. In the context of sex discrimination, our policy is that single-sex clubs should be permitted to continue providing activities people may reasonably wish to pursue on a single-sex basis, such as sports. However, our

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<sup>2</sup> Informal Associations are clubs that offer services to the public or a section of the public (whether for profit or not) but do not operate a policy of membership selection.

<sup>3</sup> Private members clubs are defined in the other equality enactments as any incorporated or unincorporated association with 25 or more members where admission to membership is regulated by a constitution – either written or oral.

view is that clubs offering membership or services to both sexes should not be permitted to discriminate in how those services are offered to both sexes.

3.19 In these regulations, we propose that clubs or associations which exist in order to provide a genuine benefit or opportunity to a group linked to their sexual orientation, should be permitted to include the sexual orientation of a person in their membership criteria. This would allow such clubs to establish that prospective members had a reasonable interest in the activities of the club as part of their membership screening process. For example a gay men's social and support group which exists particularly to enable gay and bisexual men to form friendships and provide mutual support would be allowed to require that its members be gay or bisexual.

3.20 However, clubs or associations that do not – and cannot for a legitimate reason explicitly connected with their purpose - include the sexual orientation of a prospective member as a membership criterion will not be able discriminate on the grounds of sexual orientation. For example, a golf club that existed to provide members with access to a golf course, whose only membership criterion was having a certain golfing handicap, would not be able to turn down prospective members on the grounds of their sexual orientation.

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

## **Public Functions**

3.21 It is now becoming usual for anti-discrimination legislation to apply to the exercise of public functions, meaning the activities carried out by public bodies that are not otherwise caught by general goods, facilities and services provisions<sup>4</sup>. In line with this, we propose to include the exercise of public functions in the new sexual orientation regulations.

3.22 In practice, this means that the scope of the prohibition on anti-discrimination will extend to most activities in the public sector, including the decisions of Ministers and the work of local authorities, the police and other governmental organisations. The prohibition will apply to anyone exercising a public function, including where the function is being undertaken by a private or voluntary body on a public authority's behalf.

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<sup>4</sup> The Race Relations (Amendment) Act 2000, extended the scope of the original 1976 Act to cover public functions. The Government has also extended the Disability Discrimination Act 1995 (DDA) (the relevant provisions will come into force in December 2006) and the SDA to cover public functions, and included public functions in the prohibition on discrimination on the grounds of religion or belief contained in the Equality Act 2006.



3.23 In line with the provisions on public functions in the other main equality enactments, we propose not to include some bodies when they exercise certain constitutional or judicial functions to allow their independence to be fully preserved. These are described in the table below.

<b>Activity</b>	<b>Justification</b>
All activities of either House of Parliament, including House authorities	Parliamentary sovereignty
Security Service, Secret Intelligence Service, the Government Communications Headquarters (GCHQ), Servicemen assisting GCHQ as required by SoS	To safeguard national security.
Judicial functions (including things done on the instruction of those exercising such functions)	Constitutional independence of judiciary
Legislating (whether by Westminster, devolved bodies or Church Synod)	Legislative independence and freedom to debate frankly
Making secondary legislation whether UK, GB or Scottish	Executive freedom
Decisions not to prosecute etc.	Excluded so that decisions made by the Criminal Prosecution Service in relation to individual cases can continue to be made on the basis of the facts of the case alone.
Local authority powers under s. 2 LGA 2000	To enable Local Authorities to have appropriate freedom in deciding the best way to promote well-being in their area, taking into account the

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

## **Education**

3.24 Discrimination on the grounds of sexual orientation is already unlawful in relation to education in Further and Higher Education (colleges and universities) under the Employment Equality (Sexual Orientation) Regulations 2003. We consider that the new Regulations should extend this protection to include access to, and the provision of, education in schools in both the maintained and independent sectors.

3.25 In Scotland, education is devolved to the Scottish Executive and legislation and practices are, in some respects, different from those in England and Wales. However the sexual orientation regulations will apply to education throughout Great Britain.

3.26 As set out in Chapter 4, we are proposing that the prohibition on discrimination will apply regardless of whether discrimination takes place because of an individual's own sexual orientation or that of a person that they are associated with. In the context of schools, this means that a pupil will be protected where the cause of discriminatory action by a school is the sexual orientation of their parents, or of a sibling, carer or friend, rather than the pupil's own sexual orientation.

3.27 Any bullying, including bullying of lesbian, gay or bisexual pupils, in schools is clearly unacceptable. Head teachers have a legal duty to take measures to prevent all forms of bullying among pupils. Guidance issued by the Department for Education and Skills(DfES)<sup>5</sup> is clear about the duties of teaching and non-teaching staff, including lunchtime supervisors, to be alert to signs of bullying and to act promptly and firmly. The recent *White Paper Higher Standards, Better Schools For All* (DfES, October 2005) also committed the Department to issue further advice on tackling bullying motivated by prejudice, specifically including homophobia.

3.28 The behaviour of pupils towards each other will not be caught directly by this legislation. However if a school failed to deal with homophobic bullying as firmly as any other kind of bullying, for example racist bullying, they may be

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<sup>5</sup> 'Don't Suffer In Silence' Teacher Pack, DfES, 2000.

vulnerable to a claim of discrimination under the new Regulations.

***Examples of how the Regulations will apply in schools:***

- *When selecting pupils for admission, schools would not be able to treat a prospective pupil differently because of his or her sexual orientation, or that of their parent or another person associated with them;*
- *Pupils should not be denied certain privileges or opportunities because of their sexual orientation - for example, the chance to be a prefect or to take part in a school trip;*

- *Schools will need to ensure that their current bullying policy takes proper account of the need to tackle homophobic bullying with the same seriousness given to bullying motivated by other factors;*
- *If disciplinary policies were applied differently to homosexual pupils or behaviour than to heterosexual pupils or behaviour, this would be discrimination on grounds of sexual orientation.*

3.29 We need also to consider whether teaching in schools should be covered by the Regulations. Requirements are already placed on maintained schools in relation to the subjects that are taught to children at different stages of their education. For example, at Key Stage 4 (taught in maintained schools to pupils aged 14-16 in England and

Wales), schools are obliged to provide education in a range of subjects including citizenship, religious education, and sex education, although parents may choose to withdraw their children from religious education and sex education.

3.30 Guidance is provided on what should be taught in these subjects and, to some extent, how that teaching should be delivered. This makes clear that teaching, particularly in subjects such as Personal, Social and Health Education, should meet the needs of all young people whatever their developing sexuality. The guidelines also allow schools to exercise appropriate flexibility to ensure that the subjects they are obliged to teach can be taught in a way that is relevant and appropriate to the school's ethos and with which the individual teacher feels comfortable. In the context of the new regulations, we intend to use the current statutory and non-statutory framework to ensure that schools in the maintained sector deal appropriately with subjects and situations where sexual orientation is a relevant issue.

3.31 We will also consider whether any special provision needs to be made to enable faith schools in both the maintained and the independent sectors to balance the new obligations that they will have under these regulations with their need to operate in a way that is consistent with their school's ethos.

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

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

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

## **Religious Organisations**

3.32 Churches, mosques and many other religious organisations advance their faith or belief through activities such as worship, teaching and preaching, officiating in marriage, conducting baptisms and giving sacraments to members of their religious community. We recognise that there may be circumstances where the new regulations could impact on aspects of religious activity or practice in the light of the doctrines of some faiths concerning sexual orientation and the beliefs of their followers. We need to consider therefore the application of the regulations in these areas.

3.33 We are interested to hear views on the impact that the regulations may have in these areas, particularly where the regulations may impede religious observance or practices

that arise from the basic doctrines of a faith. Any exceptions from the regulations for religious organisations would need to be clearly defined and our starting point is that these should be limited to activities closely linked to religious observance or practices that arise from the basic doctrines of a faith. .

3.34 Religious organisations also have a role in providing wider services to the community with a social or welfare aspect such as organising social groups for the elderly or for parents and toddlers. We do not see a case for exempting such services provided by religious organisations from the general prohibition on sexual orientation discrimination.

3.35 In line with the Equality Act 2006 provisions in relation to discrimination on grounds of religion or belief, we are not proposing to exempt activities that are provided by an organisation related to religion or belief, or by a private individual who has strongly held religious beliefs, where the sole or main purpose of the organisation offering the service is commercial.

3.36 Similarly, we propose to apply the prohibition on sexual orientation discrimination to organisations – including churches, a charities or other similar groups with a religious ethos – that are contracted by a public authority to deliver a service on its behalf.

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

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

## **Charities**

3.37 We propose to provide an exception to the goods, facilities and services prohibition in the sexual orientation regulations to allow charities that have been legitimately established to provide services, to specific groups with an identifiable need on the basis of their sexual orientation. This would allow such charities to operate in line with the provisions of the charitable instrument through which they were established. If a charity's objectives do not specify a beneficiary group on the basis of sexual orientation, then the charity should not be able to discriminate on the grounds of sexual orientation and the exception should not apply.

3.38 There are clear examples of specific needs arising for LGB beneficiaries and for which charities have been established



and are on the Charity Commission's register. We believe it is right that these charities should be able to continue to focus on LGB beneficiaries where there is an identified need that affects those groups and the charity's objectives identify that group as the beneficiary class.

3.39 In particular, such charities often play an important role in tackling the historic disadvantage of groups who have experienced discrimination, or in tackling problems faced by a specific group. For example, charities that promote LGB rights or provide counselling services for LGB victims of domestic abuse would be covered by such an exception.

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

## 4. Types of Discrimination

- 4.1 The Government proposes to make two key types of discrimination – direct discrimination and indirect discrimination – unlawful through the sexual orientation regulations.

### Direct Discrimination

- 4.2 Direct discrimination is the simplest form of discrimination to recognise and understand. Direct discrimination takes place when a person treats another person less favourably on the grounds of his or her sexual orientation (or what is believed to be his or her sexual orientation) than he treats or would treat others and as a result a person suffers a detriment.

***Direct Discrimination:*** *A lesbian, or a woman believed to be a lesbian, is refused entry to a bar on those grounds. This is direct discrimination.*

*A same-sex couple is asked to leave a restaurant because they are holding hands and the restaurant manager says their behaviour is making his other customers uncomfortable. Heterosexual couples who are holding hands are not asked to leave. This is less favourable treatment and would constitute discrimination.*

- 4.3 The Employment Equality (Sexual Orientation) Regulations were amended last year to make the status of a civil partner comparable to that of a spouse. The effect is to enable a civil partner who is treated less favourably than a married person in similar circumstances to bring a claim for sexual orientation discrimination under the Employment Regulations.
- 4.4 We propose to include a similar provision in the new sexual orientation regulations. This would enable civil partners to bring a direct discrimination claim against a provider of goods and services who denied them access to a benefit or service that was being offered to a married person in a similar situation.
- 4.5 There is a particular issue around the ceremonies and services provided specifically for marriages and civil partnerships. Under the proposed regulations councils and others would have to offer comparable treatment.

***Discrimination against civil partners: A health club offers married couples joint membership at reduced rates. They do not offer this rate to civil partners. This would be discrimination on the grounds of sexual orientation.***

- 4.6 We also intend to make unlawful discrimination against a person where it is motivated by the sexual orientation, or

perceived sexual orientation, of another person with whom they are known to associate, for example by sharing accommodation or engaging in social activities.

***Discrimination by association:*** A bar refuses entry to a gay man because he is in the company of a heterosexual man. This would be direct discrimination on grounds of association.

- 4.7 In making decisions about direct discrimination cases, courts will usually consider how another individual with a different sexual orientation would have been treated in the same circumstances.

### **Indirect Discrimination**

- 4.8 Indirect discrimination is more complex and often not as obvious as direct discrimination, although the detriment suffered by a victim of indirect discrimination will be no less real.
- 4.9 Indirect discrimination occurs in circumstances in which provisions, criteria, practices or any other treatment such as requirements or conditions are applied generally to a group. Although not directly discriminatory and often apparently neutral, discrimination will occur if a particular disadvantage is suffered or there is a disproportionate adverse effect on persons of a particular sexual orientation as compared to

persons who are not of that orientation, and the individual bringing the claim of indirect discrimination has suffered a detriment as a consequence of the provision, criterion or practice being applied. Sometimes indirect discrimination is deliberate, while at other times it may be unintentional.

## **Victimisation**

4.10 It is important that people who believe they have suffered discrimination on grounds of sexual orientation should not be inhibited from making a complaint because they are afraid that this will lead to adverse consequences for them. This is known as victimisation. In line with the other equality enactments, we propose to protect individuals from any adverse treatment or consequence that they might experience as a reaction to their complaining of discrimination, or initiating legal proceedings under the Sexual Orientation Regulations, or taking any other action to assert their rights under these Regulations. Individuals will also be protected if they have supported another person taking such action, for example by giving evidence in relation to a complaint.

4.11 We propose that it would be unlawful for a service provider or public authority to treat a person less favourably because they:

- Have brought, have intended to bring, or intend to bring, proceedings under the sexual orientation regulations;
- Have given, have intended to give, or intend to give, evidence or information in connection with such proceedings or any investigation;
- Have alleged, have intended to allege or intend to allege, that a person contravened the regulations; or
- Have done, have intended to do, or intend to do, any other thing in connection with the regulations.

4.12 A person who makes an allegation which is untrue and not made in good faith will not be protected against adverse consequences.

### ***Victimisation***

*A bisexual woman agrees to give evidence in a case being taken by a lesbian who has been repeatedly refused appointments at a women-only health spa. When the bisexual woman next tries to make an appointment for herself, her request is refused by the manager who says that they don't offer their services to troublemakers. This is victimisation.*

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

## Harassment

- 4.13 The Employment Equality (Sexual Orientation) Regulations 2003 make harassment unlawful on grounds of sexual orientation in the workplace and in institutions of further and higher education. Harassment is defined as where one person's unwanted conduct violates another's dignity, or creates an intimidating, hostile, degrading, humiliating or offensive environment for that person.
- 4.14 There has been significant debate, both in Parliament and among other interested parties, about the issues that arise in extending protection from harassment beyond the employment sphere. The arguments around this question are complex. In the House of Lords, there was considerable concern during the passage of the recent Equality Act 2006 about the difficulty in establishing the threshold for what would constitute harassment by a goods or services provider. The importance of balancing an individual's basic human rights to freedom of speech and expression with the need to protect individuals from acts that violate their dignity is an important element in this debate.
- 4.15 Case law in relation to other equality enactments shows that the courts have been prepared to address harassment as a

form of discriminatory behaviour without a specific legislative prohibition. With this in mind and in the light of concerns that separate harassment provisions could increase the risk of cases being brought in inappropriate circumstances, we accepted that new harassment provisions should not be brought forward until more work can be done to define what acts would constitute harassment outside the Employment context.

4.16 This was the reason why harassment – as a separate instance of unlawful discrimination – was not included in the religion and belief provisions in the Equality Act 2006 that make unlawful discrimination on the grounds of religion or belief in the provision of goods, facilities, services, premises and public functions. Harassment is included in the other equality enactments to varying degrees.

4.17 We have indicated our intention to consider how harassment should be applied across all the different equality areas as part of the current Discrimination Law Review. This will ensure that proper consideration can be given to the issues that arise where harassment provisions apply or are proposed in relation to several different anti-discrimination grounds so that a coherent approach can be proposed. The review – which is looking at how the anti-discrimination framework can be made more straightforward and effective – will lead to proposals for a Single Equality Bill before the end of this Parliament.



**4.18** Consequently we do not propose, at this stage, to make harassment on the grounds of sexual orientation unlawful in relation to goods, facilities, services, premises and public functions. We intend to publish a consultation paper setting out the initial conclusions of the Discrimination Law Review – including potential approaches to harassment across all discrimination grounds – in summer 2006.

### **Discriminatory Practice**

4.19 A discriminatory practice is a policy, requirement or condition which would be likely to result in unlawful discrimination if applied to persons of a particular sexual orientation. It applies in circumstances where there is not an individual victim of the discriminatory practice in question.

***Discriminatory Practice:*** *A club informally bans lesbians, has done so for many years, and is well known for this practice. In this case, it is unlikely that any lesbian would apply to join, so there might never be a victim of this discriminatory practice.*

4.20 We propose to make it unlawful for a person to adopt or maintain a practice or arrangement that would be discriminatory. The Commission for Equality and Human Rights (CEHR) will exercise enforcement powers in relation to discriminatory practices prohibited in the other equality

enactments, and we propose that it should also take on this power in respect of sexual orientation.

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

## **Discriminatory Advertisements**

4.21 The Employment Equality (Sexual Orientation) Regulations 2003 made it unlawful to publish an advertisement, or to cause an advertisement to be published, which indicates (expressly or by implication) an intention by any person to discriminate. We intend to maintain this approach in the new regulations, making it unlawful to publish an advertisement that can reasonably be understood to indicate the intention to act in a way that is discriminatory.

***Discriminatory advertising:*** *An advertisement appears in a magazine seeking a gay decorator. This is unlawful and the publisher would have committed an act of unlawful discrimination, just as he would if he had carried an advertisement seeking a female decorator or a white decorator.*

4.22 As with similar provisions in other equality enactments, the publisher will not be held liable if he can prove that he relied on a statement from the person who placed the

advertisement that it was not discriminatory. However we propose to create a criminal offence for the person placing the advertisement if he makes a false statement as to the lawfulness of the advertisement.

4.23 Without a prohibition on unlawful advertising, someone could advertise a flat for rent, but explicitly state that members of a certain sexual orientation need not bother to respond, or to specify the required sexual orientation of potential applicants. This act of discrimination would render irrelevant the protections against discriminating when actually letting a property.

4.24 We are proposing therefore to provide protection against discrimination on grounds of sexual orientation in the *advertising* of goods, facilities, services and premises<sup>6</sup>.

4.25 It is usually difficult and sometimes impossible to find an individual who has been a victim of a discriminatory advertisement. Consequently, we propose that enforcement action in relation to discriminatory advertisements should be pursued by the CEHR exclusively, rather than by an individual through the courts.

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

## Instructions to discriminate

4.26 There may be circumstances where an act of unlawful discrimination on the grounds of sexual orientation will be committed by someone on the instructions of a superior, or because they have been persuaded or encouraged to do so – perhaps by financial reward, or the prospect of promotion. In cases such as these, we would want to make sure the provisions of the sexual orientation regulations apply to the person who gives the instructions for, or causes or induces, the unlawful act, as well as the person committing the act.

***Instructions to discriminate:*** *An employer instructs an employee not to provide services to gay customers, and offers the employee a financial inducement, such as a promotion or an extended contract, for following those instructions.*

4.27 We propose, therefore, to make unlawful the act of instructing another to discriminate or causing another to discriminate.

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

## Validity of contracts

4.28 We propose to ensure that a term of a contract is void where it provides for doing an act which is made unlawful by the regulations and where it is included to further an act which is unlawful under the regulations. There will also be a provision making unenforceable any contractual term that seeks to exclude or limit the requirements of the regulations. These provisions reflect those in the other equality enactments.

***Validity of contracts:*** *A DIY store has a contractual arrangement with a building company that provides a fitting service for kitchens and bathrooms bought at that store. This contract has a clause that requires the store to refuse to offer the builder's services to gay customers. This would be an unlawful requirement and the term of that contract would be invalid.*

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

## **5 Enforcing the sexual orientation regulations**

- 5.1 One of the key aims of making sexual orientation discrimination unlawful in the provision of goods, facilities, services, premises and public functions is to change behaviour and common practice. However individual acts of unlawful discrimination will inevitably occur.
- 5.2 In line with the non-employment provisions of the equality enactments generally, we intend to provide that a person who is a victim of discrimination may bring proceedings before a court to get a ruling on whether discrimination has occurred and to seek a remedy for the wrong doing (which is usually in the form of financial compensation).
- 5.3 An individual victim of discrimination on the grounds of sexual orientation would bring proceedings to a county court in England and Wales or to the Sheriff's Court in Scotland.

### **Time Limits**

- 5.4 We propose to place a time limit on bringing proceedings under the sexual orientation regulations. Under the other equality enactments, proceedings can only be brought within a period of 6 months from when the act of alleged unlawful discrimination occurred and we propose to apply the same time limits here. However this time limit may be waived with the permission of the court.

## Questionnaires

5.5 In line with the provisions of the other equality enactments, we propose that a person who is a victim of alleged discrimination and is considering bringing proceedings under the regulations should have the benefit of a standard form by which to question the alleged discriminator. We are proposing a similar form for the response.

***Q20: Do you agree that the enforcement provisions for the sexual orientation regulations should match those for the other equality enactments?***

## The role of the Commission for Equality and Human Rights

5.6 The Commission for Equality and Human Rights (CEHR), will provide institutional support for the Sexual Orientation Regulations when it begins operations in October 2007 as it will in respect of discrimination legislation relating to sex, disability, religion and belief and age (regulations outlawing age discrimination in employment and vocational training are due to come into force in October this year). The CEHR will take on its role in relation to race discrimination legislation by the end of March 2009.

5.7 We intend to provide guidance and information on the sexual orientation Regulations when they come into force in October

2006. The CEHR will take on this role when it is launched in October 2007.

- 5.8 The CEHR will provide **advice and guidance** on these regulations. We expect it to be a body that works with business, service providers and the public sector to promote good practice and compliance with the legislation. Business and the public sector will benefit from receiving expert information, advice and guidance on all areas of discrimination law – in one place. The CEHR will help business and the public sector comply with the law - reducing the chances of costly litigation.
- 5.9 The CEHR will also have an enforcement role. It will be able to provide **legal assistance** to an individual bringing proceedings before a court, when those proceedings are consistent with the CEHR's objectives. We expect it to use its resources sparingly and strategically, supporting those cases likely to clarify the law.
- 5.10 The CEHR will be able to issue a **Code of Practice** to ensure or facilitate compliance or to promote equality of opportunity in respect of the sexual orientation regulations. Codes of practice are clear, straightforward guidance on the obligations of the law. They help employers and service providers understand what the law means, and how they can comply with it. Codes of practice may also contain useful practical examples.



- 5.11 The CEHR might choose to issue a Code of Practice specifically in respect of these regulations, or may issue a code in respect of the provision of goods, facilities and services across several grounds where discrimination is unlawful.
- 5.12 The CEHR will also have a suite of enforcement powers, which it will be able to deploy with a view to eliminating discrimination. These include a power to conduct an **investigation**, where it suspects that a person or organisation may have committed an act made unlawful by any of the equality enactments including the sexual orientation regulations.
- 5.13 The CEHR will also be able to apply to a court for an injunction in England and Wales or an interdict in Scotland if it suspects that a person, or organisation, unless stopped, will commit an act of discrimination which is made unlawful by the Sexual Orientation Discrimination Regulations.
- 5.14 The CEHR will also be able to make arrangements for the provision of conciliation services for disputes in relation to the equality enactments and this will also apply to proceedings that could be brought under the Sexual Orientation Discrimination regulations.

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

## **Annex A: The Code of Practice on Consultations**

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

The complete code is available on the Cabinet Office's web site, address

<http://www.cabinetoffice.gov.uk/regulation/consultation/index.asp>

## **Comments or complaints**

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

Nick Van Benschoten,  
DTI Consultation Co-ordinator,  
1 Victoria Street,  
London  
SW1H 0ET

Telephone Nick on 020 7215 6206  
or e-mail to: [nick.vanbenschoten@dti.gsi.gov.uk](mailto:nick.vanbenschoten@dti.gsi.gov.uk)

# **Proposal for Regulations to Prohibit Discrimination in the Provision of Goods, Facilities, Services, Premises, Education and Public Functions on the grounds of Sexual Orientation.**

## **Annex B: Partial Regulatory Impact Assessment**

**March 2006**

### **Purpose of Regulatory Impact Assessment**

This Regulatory Impact Assessment sets out and assesses options to achieve the objective of protecting individuals from discrimination the provision of goods, facilities, services, (“GFS”) premises and public functions on the grounds of sexual orientation.<sup>7</sup> It accompanies the consultation document *Getting Equal: Proposals to Outlaw Sexual Orientation Discrimination in the Provision of Goods & Services*.

### **Objective**

The policy objective is to protect individuals from discrimination in the provision of goods, facilities, services, premises and public functions on the grounds of sexual orientation and to widen up

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<sup>7</sup> The statutory provision for making these regulations is section 81 of the Equality Act , and “sexual orientation” is defined as an individual’s sexual orientation towards –

- (a) persons of the same sex as him or her,
- (b) persons of the opposite sex, or
- (c) both.

markets for both suppliers and consumers.

## **Background**

### ***Discrimination on the grounds of sexual orientation in GB***

The Equality Act 2006 provides new protection from discrimination in goods, facilities and services on the grounds of religion and belief. Ministers have made clear that they intend to commence these provisions by October 2006. When this protection comes into effect, there will be a statutory prohibition on discrimination in goods, facilities and services; premises; and public functions on the grounds of race, sex, disability and religion or belief alongside the existing prohibitions in relation to employment and vocational training<sup>8</sup>. Discrimination on the grounds of sexual orientation and age<sup>9</sup> will be confined to employment and vocational training.

Whilst it is widely acknowledged that extending protection on the grounds of age beyond employment and vocational training is complex – and it is being considered as part of the on-going Discrimination Law Review – there is no such parallel complexity in relation to sexual orientation. There is no objective justification not to extend protections available on the grounds of religion and belief to sexual orientation. The regulations will establish a

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<sup>8</sup> Employment Equality (Religion or Belief) Regulations 2003.

<sup>9</sup> Employment Equality (Age) Regulations 2006 will come into effect in October 2006 to prohibit discrimination in employment and vocational training.

proportionate, fairer and more equitable legal position in respect of sexual orientation.

### ***The Current Legislative Framework***

Since December 2003 it has been unlawful under the Employment Equality (Sexual Orientation) Regulations 2003 [SI 2003/1661] to discriminate against a person on the grounds of their sexual orientation in employment and vocational training (including further and higher education). The regulations prohibit direct discrimination<sup>10</sup>, indirect discrimination<sup>11</sup>, victimisation<sup>12</sup> and harassment<sup>13</sup> on the grounds of a person's sexual orientation.

Discrimination in the provision of goods, facilities and services, premises and public functions is, or will shortly be, unlawful on the grounds of sex<sup>14</sup>, race<sup>15</sup>, disability<sup>16</sup> and religion or belief<sup>17</sup>.

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<sup>10</sup> In other words where a person, on grounds of sexual orientation, is treated less favourably than other people.

<sup>11</sup> In other words where a provision, criterion or practice has the effect of putting people of a particular sexual orientation at a disadvantage which cannot be justified as a proportionate means of achieving a legitimate aim.

<sup>12</sup> In other words where someone is treated less favourably than others because, for example, they have complained of discrimination or have assisted someone else in a complaint

<sup>13</sup> In other words where a person engages in unwanted conduct that has the purpose or effect of creating a humiliating, intimidating or offensive environment for another person on the grounds of their sexual orientation.

<sup>14</sup> Sex Discrimination Act 1975

<sup>15</sup> Race Relations Act 1976.

<sup>16</sup> Disability Discrimination Act 1995.

<sup>17</sup> Part 2 of the Equality [Bill] [Act].

The Equality Act attracted several amendments during its passage through Parliament which sought to add substantive provisions to provide protection from discrimination in goods, facilities and services, premises and public functions on the grounds of sexual orientation. The Government expressed concern that such provisions should be added without the opportunity for detailed policy work and proper consultation with those who would be affected by the new measures. Section 81 of the Act instead provides a power for the Secretary of State to make regulations to prohibit discrimination on the grounds of sexual orientation.

### ***Options***

There are 3 options for dealing with sexual orientation discrimination at this stage.

- (i) Do nothing. The Government has committed to providing full rights for gay men, lesbians and bisexual people, including protection from unfair discrimination on the grounds of sexual orientation at the earliest possible opportunity. Sexual orientation is alone amongst the equality strands in that it has only partial protection (in employment and vocational training). The inclusion of a regulation making power in the Equality Bill has raised expectations that a widening of the protections to other areas is imminent and cannot await the Discrimination Law Review which is expected to lead to a single equality act. Doing nothing is not therefore a tenable option;



(ii) Extend the protection on the grounds of sexual orientation to goods, facilities, services, premises and public functions to the full extent of the enabling legislation with no exemptions. This approach, which was proposed by stakeholders during the parliamentary process of the Equality Act, would meet the basic objective of protecting individuals from discrimination. However difficulties would be likely to arise in the implementation of the regulations in several areas and would result in inappropriate regulation of some sectors. For example, the Government would not wish to prevent religious organisations from maintaining their religious observances and or practices that arise from the basic doctrines of their faith. The Government also does not wish to stop targeting of some public services towards particular groups defined by sexual orientation where such an approach is a key factor in ensuring that such services are widely taken up;

(iii) Extend the protection on the grounds of sexual orientation to goods, facilities, services, premises and public functions in respect of direct and indirect discrimination, victimisation, discriminatory advertisements and practice with appropriate and proportionate exemptions in line with the proposals set out in the Consultation Document. This approach would meet the overall objective of prohibiting unfair discrimination, while ensuring that where appropriate,

proportionate exemptions are provided for specific services or activities. For example, these would ensure that activities such as the debate and passage of legislation are exempted in line with the other equality enactments. It will also allow a balanced approach to be taken to how religious organisations which may have doctrinal objections to homosexuality should be covered by the prohibition.

In tackling discrimination on the grounds of sexual orientation, the government intends to take a similar approach, where appropriate, to that taken in other legislation in the provision of goods, facilities, services, premises and public functions; and in the Employment Equality (Sexual Orientation) Regulations 2003.

The new protections are intended to capture direct discrimination, indirect discrimination and victimisation. In essence, the new legislation will make it unlawful for businesses or public functions to discriminate in the provision of the goods, facilities or services on the grounds of his or her sexual orientation. For instance, it would become unlawful to:

- Refuse a same-sex couple a double room in a hotel because this might cause offence to other customers;
- Refuse to provide a gift registration service for couples planning a civil partnership where such a service was offered to couples planning a wedding;
- Refuse admission to a bar because they were not gay.

However, certain services and activities provided by organisations currently are targeted at customers or users on the basis of their sexual orientation. For example, in the private sector, there are some gay bars and clubs, travel and financial service companies that design their products for lesbian, gay and bisexual customers. Providing goods or services likely to be of more interest to lesbians, gay men or bisexuals would not be unlawful if these goods or services are also made available to people of any sexual orientation. Those who provide such goods or services would not therefore be obliged to provide new services likely to be of particular interest to heterosexual customers.

It will be made explicit in the regulations that civil partners must not be refused services offered to married couples on the grounds of their sexual orientation. This would enable civil partners to bring a direct discrimination claim against a provider of goods and services who denied them access to a benefit or service that was being offered to a married person in a similar situation.

Similarly, where mixed-sex unmarried couples are offered a particular services or benefit, it would be expected that these should also, where appropriate, be made available to same-sex couples who are not in a civil partnership.

### ***Exceptions***

We are proposing that certain bodies will be exempt from the regulations, consistent with exemptions from other equality legislation. In relation to public functions, these exceptions are expected to apply to the areas described in the table below.

<b>Activity</b>	<b>Justification</b>
All activities of either House of Parliament, including House authorities	Parliamentary sovereignty
Security Service, Secret Intelligence Service, Government Communications Headquarters (GCHQ), Servicemen assisting GCHQ as required by the Secretary of State.	To safeguard national security.
Judicial functions (including things done on the instruction of those exercising such functions)	Constitutional independence of judiciary
Legislating (whether Westminster, devolved bodies or Church Synod)	Legislative independence and freedom to debate frankly
Making secondary legislation whether U.K. or Scottish	Executive freedom
Decisions not to prosecute etc.	To ensure that decisions made in relation to individual cases are determined on the basis of the facts of the case alone.
Local authority powers under s. 2 LGA 2000	To enable Local Authorities to have appropriate freedom in deciding the best way to

	promote well-being in their area, taking into account the needs of the local population.
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We are also considering and consulting on the need to exempt religious organisations from the requirements of the regulations when carrying out some activities closely associated with theology or doctrine in some circumstances where there is a doctrinal objection to homosexuality.

In addition, it may be necessary to provide an exemption from the general prohibition on sexual orientation discrimination to allow services to be provided separately for different groups on the basis of their sexual orientation, where this is the best way to meet a specific need facing people of a particular sexual orientation or to overcome discrimination or disadvantage associated with it. We are consulting on these matters.

### ***Health Impact***

We expect there to be a positive impact on health and an improvement in the level of healthcare and uptake of health services by lesbians, gay men and bisexual people. For example, Stonewall report that gay men may be anxious about disclosing their sexual orientation to their GP because they fear that the GP will only consider the needs of the patient in the context of their sexual health.

## ***Rural Impact***

There is no anticipated differential impact on rural areas.

## ***Environmental Impact***

There is no anticipated impact of these proposals on the environment.

## ***Costs and benefits***

### ***Benefits***

The proposed change is designed to make unfair discrimination on the grounds of sexual orientation unlawful. But there will also be economic benefits.

It is difficult to quantify the benefits. Due to the “hidden” nature of sexual orientation, there are few authoritative surveys. For example, the Census does not collect data on sexual orientation. However, there has been some research carried out. It is estimated that approx. 6% of Great Britain’s population are lesbians, gay men and bisexual people. Recent surveys<sup>18</sup> concluded that the average annual salaries of lesbians and gay men are up to £10K higher than the national average with a greater proportion of salary being spent on disposable items and leisure, including holidays. There is some evidence that

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<sup>18</sup> Published by Out Now marketing consultancy and Diva Magazine, January 2006.

discrimination currently leads some gay men and lesbians to reduce their use of some types of service or else to direct their business towards known 'gay friendly' service providers, leading to a lack of choice and higher prices. Even service providers that do not discriminate themselves can lose custom if the perceived risk of discrimination leads potential clients restrict themselves to designated gay-friendly establishments.

So making discrimination on the grounds of sexual orientation unlawful in the provision of services is likely to bring financial benefits to the wider business community as greater numbers of lesbians, gay men and bisexual people take up a wider range of services across the country.

Businesses can expect extra revenue from the extra trade that will take place as a result of business no longer being lost due to discrimination (or the perceived risk of experiencing it). Markets will open up as market segmentation diminishes and barriers fall away.

Although it is difficult to quantify many of the benefits of this legislation, in promoting business with a significant proportion of the population, with above-average incomes means that in some sectors (notably the hospitality and leisure sectors) the effect could be significant. And of course, these economic benefits are in addition to the contribution that the regulations will make towards achieving the desired levels of equity and fairness in our society.

## **Costs**

### ***Implementation Costs***

We anticipate that only a very few businesses will need to change their existing practices or policies in order to comply with the new regulations. In these cases, the requirement to stop discriminating in order to comply with the law is unlikely to be costly - indeed stopping refusing to offer their services to potential customers on the grounds of their sexual orientation would be likely to increase rather than decrease business. It is difficult therefore to meaningfully quantify the likely costs to service providers of implementing the new sexual orientation regulations.

It is intended that costs of producing on-going guidance for the sexual orientation discrimination regulations will be fully met from within the budget of the new Commission for Equality and Human Rights (CEHR) which will begin operating in October 2007. However, the government intends to produce and distribute introductory guidance covering the sexual orientation discrimination regulations and the new religion and belief protection in October 2006 when these laws come into effect.

Where appropriate, the intention is that this guidance will be sector specific and build on existing proven mechanisms for reaching certain sorts of organisations, for example by expanding the package of information on equality and diversity issues already provided for small businesses. The Department for Education and Skills intends to publish specific guidance for schools.



The Home Office Regulatory Impact Assessment on the new religion and belief provisions published last year provided estimates of the implementation costs for these measures. These estimates were based on the expectation that each service provider that will be affected by the new laws in relation to religion and belief would have access to a leaflet that explains the changes in the law that would take approximately 5-10 minutes to read depending on the size of the organisation in question. The new sexual orientation regulations will apply to the same group of service providers. The sexual orientation regulations will, in most respects, be very similar to the religion and belief discrimination measures and both measures will come into force on the same date in October 2006. The Government proposes therefore to publish joint guidance covering both the new areas of law, which – given the two sets of provisions cover very similar ground will reduce the total amount of reading required. The cost estimates in this RIA are based on the assumption that this guidance will be no more than 50% longer than guidance which addressed the new religion and belief provisions alone.

It is estimated that the total cost of production and distribution of guidance that covers the new sexual orientation regulations in addition to the religion and belief measures will be no more than £75K<sup>19</sup>.

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<sup>19</sup> The Home Office RIA for the Religion & Belief provisions estimated that the costs of guidance for these measures would be £50K. It is anticipated that the new additional cost accruing from the addition of guidance on the sexual orientation regulations to this document will bring the total cost to no more than £75K.

There will be costs for businesses and the public sector associated with the assimilation of new guidance. The amount of time spent reading the guidance, and number of providers spending time doing so, is dependent upon the current equal opportunity policies of that business and the awareness of the managers towards these issues.

It is envisaged that each service provider covered by the new regulations will have access to a leaflet that explains the changes covering both the new protection being introduced in relation to religion and belief as well as those proposed for sexual orientation.

Providers may be expected to spend an additional 2.5 minutes extra reading and understanding the sexual orientation aspects of the combined guidance. Medium to large employers, those with 50 or more employees, will be expected to take an additional 5 minutes to read and consider the aspects of the combined guidance relating to sexual orientation, as some of them may produce and disseminate guidance for personnel departments and other staff. These are assumptions of the average time spent dealing with the guidance.

There are about 4.11 million businesses in Great Britain<sup>20</sup> of which about 4.07 million are small employers or businesses with no

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<sup>20</sup> There are 3,989,435 small businesses (businesses with less than 50 employees) and a further 31,950 small to large business (businesses with over 50 employees) in the UK, Source: Small Business Service Statistic (SBS) 2003. There were 88, 940 small businesses

employees at all. Just over 32,000 are medium to large employers.

The extra costs for each small business arising from the sexual orientation regulations will be a little over £1.00<sup>21</sup>. The total marginal cost for small businesses of reading and understanding the combined guidance is, therefore, about £4 million<sup>22</sup>. The cost for medium to large business arising from the sexual orientation regulations is about £2.00<sup>23</sup> each. The total marginal cost for medium to large businesses of reading and understanding the guidance is, therefore, about £0.2million<sup>24</sup>.

There are approximately 43,000 public authorities, of which around 2,000 could be classed as larger authorities (central government, local government authorities, higher and further education authorities, strategic health authorities etc.) Reading time for the guidance will be the same as for the private sector so the total cost to larger public authorities is expected to be about £80k and about £40k for the smaller authorities.<sup>25</sup> The total anticipated new cost to

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and 925 medium to large businesses in Northern Ireland in 2000 (the latest date for which regional information is available), Source: SBS 2001

<sup>21</sup> In 2003, the average hourly pay, excluding overtime, of a manager /administrator (1 digit SOC90) was £19.58. Source: New Earnings Survey (NES) 2003 from NOMIS. The cost of a manager's time includes non-wage costs and overheads, estimated at 30% of wage costs. The hourly cost of a manager's time is, therefore, £19.58 x 1.3 = £25.45. Two and a half minutes reading and understanding the guidance is, therefore, about £1.

<sup>22</sup> The cost for small firms is 4.07m x £1 = £4m

<sup>23</sup> £25.45 divided by 60 x 5 = £2

<sup>24</sup> The cost for medium to large firms is 32,000 x £2 = £64,000

<sup>25</sup> In 2003, the average hourly pay, excluding overtime, of a manager / administrator in the public sector was £18.10. Source: New Earnings Survey (NES) 2003 from NOMIS. The cost

public authorities as a result of information on the sexual orientation regulations being included in the guidance on the religion and belief provisions would therefore be approximately £120k.

The total extra costs for awareness and guidance for the sexual orientation provisions could, therefore, be up to £4.3 million in the first year and thereafter minimal. These are one-off implementation costs, with no ancillary ongoing costs attached. Even if the business-promoting effects discussed in the previous section applied on a very modest scale they would be likely to outweigh these costs.

### ***Costs to Service Providers***

The essence of the protection would be to require providers of goods, facilities, services and premises, not to refuse to provide services or sell their products to customers on the grounds of their sexual orientation. This will not extend to any requirement to consider reasonable accommodation or adjustment, so it is expected that the costs to providers will be negligible.

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of a manager's time includes non-wage costs and overheads, estimated at 30% of wage costs. The hourly cost of a manager's time is, therefore,  $£18.10 \times 1.3 = £23.53$ . Two and a half minutes reading and understanding the sexual orientation aspect of the guidance is, therefore, about £0.98. The cost to smaller authorities would be  $£0.98 \times 41,000 = £40k$ . Five minutes reading time would cost about £1.96 so the cost to larger authorities would be about £80k.

## ***Costs to police/Criminal Prosecution Service (CPS)***

The only criminal offences to be included in the sexual orientation regulations will be summary offences, (i) when someone knowingly or recklessly misleads a publisher into placing a discriminatory advert, and (ii) when someone knowingly or recklessly makes a false statement to someone else whose assistance they seek that proposed action is not discriminatory. These offences currently exist in relation to racial and sex discrimination and have rarely, if ever been used. We therefore assess that the costs to the police and CPS will be negligible, if any.

## ***Cost to the Courts***

There may be a cost associated with extra court cases as a result of the proposal. Most cases will be heard in county/sheriff courts but a small number of cases may be heard in the High Court. Our current estimate is that it is very unlikely that there will be more than 10 cases per year which require court action<sup>26</sup>.

## **How much will each case cost to the courts?**

A service provider taken to court by an alleged victim of discrimination on the grounds of sexual orientation will be

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<sup>26</sup> As with other discrimination legislation, the regulations will include a provision reserving the right to bring judicial review proceedings in the High Court. Only certain acts of public authorities will be susceptible to judicial review and so only a very small number of cases will require High Court action

expected to meet their own legal costs. However, it is open to a court to make a costs award against the plaintiff and in favour of the respondent if it rules that no discrimination took place. Equally, if the court rules that discrimination did take place, a service provider may be ordered to pay the costs of the victim.

Insurance is available to organisations to cover the costs of legal action.

In many cases, legal proceedings are settled out of court. The CEHR will have powers to make arrangements for a conciliation service for both parties to come to an out of court arrangement.

### ***Costs to the Insurance Sector***

Pre-consultation soundings with the insurance industry indicate that they do not anticipate that significant additional costs will be imposed on insurance and assurance companies as a result of the sexual orientation regulations. In the past, sexual orientation was sometimes taken into account by insurers when seeking to establish an individual's risk of being, or becoming, HIV positive. The Association of British Insurers (ABI) has issued guidance for insurers on best practice in relation to HIV and insurance with the most recent Statement of Best Practice coming into effect on October 2004. This provides insurers with guidance on what questions can reasonably be asked when assessing insurance applications in order to establish the risk of HIV infection. For example, it makes it clear that questions should not be asked about an individual's sexual orientation but can be asked about

behaviour that might have put an individual at risk of exposure to HIV (for example through having had unsafe sex, intravenous drug abuse, or having had surgery outside the EU).

The ABI has formed an expert working group on HIV and insurance to provide ongoing advice on and the Code of Practice will be reviewed in 2007. At this stage, we anticipate that the new regulations are likely to reinforce the practice recommendations made in the ABI Code of Practice. We therefore think that it is very unlikely that new changes to current practice will need to be made as a result of the regulations.

### ***Costs to the hospitality sector***

There is some evidence of some hotels and bed and breakfasts having turned away, or failed to offer like services, to same-sex couples on the grounds of their sexual orientation. However, the British Hospitality Association have indicated in pre-consultation soundings that they do not consider the proposals for the regulations will have a significant effect on the hospitality sector.

### ***Small Firms' Impact Test***

Small to medium size enterprises are less likely to have procedures relating to provision of services. However, most would recognise that avoiding discrimination in any form is in line with best business practice. We do not anticipate that any action will be needed beyond the familiarisation already identified under costs earlier in this document. Apart from managers reading the

awareness raising literature, small businesses are unlikely to provide formal training or guidance for staff as a result of these changes. We have carried out a pre-consultation sounding with small business (CBI Small Business Forum, Federation of Small Business and the British Hospitality Association) on the impact on small business of the proposed regulations. The indication is that a large number of small firms operate in the service sector and initial soundings have indicated that the proposed regulations will not pose a significant problem. The Small Business Service does not believe these proposals will have a significant adverse effect on small firms.

### ***Compensatory measures***

The measures proposed in the consultation document *Getting Equal: Proposals to Outlaw Sexual Orientation Discrimination in the Provision of Goods & Services* are additional to the current body of discrimination law. They will not replace other measures.

However, they will ensure consistency of protection across the equality strands. Race, sex, and disability already enjoy statutory protection from discrimination in the provision goods, facilities, services, premises and public functions. Similar protection is being introduced to outlaw discrimination on the grounds of religion and belief by October 2006.

We do not consider that these regulations will have a big impact on the provision of goods, facilities, services, premises and public functions in either the private or public sectors. However, clear



and simple guidance will be provided - in line with good practice for better regulation – to ensure that the new law is easy to comply with.

These regulations will be included in the suite of legislation that is being considered by the Discrimination Law Review to simplify equality legislation across the piece.

### **Equity and Fairness**

The Equality Employment (Sexual Orientation) Regulations 2003 and the Equality Employment (Religion or Belief) Regulations 2003 both came into effect in October 2003, affording protection in employment and vocational training from discrimination on the grounds of sexual orientation or religion or belief. The Equality Bill extends this protection to goods, facilities, services, premises and public functions for religion and belief.

It is fair and equitable to extend similar protections against discrimination on the grounds of sexual orientation.

### **Competition Assessment**

Due to the minimal effect on the private sector, there will be no effect on competition. A competition filter has been performed that indicated a competition assessment is unnecessary.

### **Enforcement and Sanctions**

Enforcement of these regulations will normally be by a victim of unlawful discrimination bringing proceedings through the courts (ie county court or sheriff court). The new Commission for Equality and Human Rights (which will begin operating in October 2007) will be able to support to some victims to pursue strategic cases. In addition, the Commission for Equality and Human Rights will have powers to conduct formal investigations – if it suspects that a person has committed an act of unlawful discrimination - and issue unlawful act notices if the investigation finds that discrimination has taken place.

The Commission for Equality and Human Rights will be the only party able to enforce provisions on discriminatory practices and discriminatory advertisements, pressure and instructions to discriminate. These will be brought before an employment tribunal for matters which fall within its jurisdiction and to a county or Sheriff's court for other matters.

The Commission for Equality and Human Rights will have a total budget (when fully operational) of £70m a year to cover six equality grounds (including sexual orientation) and human rights. This overall budget will cover work on promoting equality and diversity, promoting human rights, working with communities, as well as enforcement. Decisions about what proportion of the CEHR's budget will be dedicated to enforcement activity will not be made until its Chair, Chief Executive and Commissioners are appointed later this year. However, we do not anticipate that a significant proportion of the new Commission's would be dedicated exclusively to enforcing sexual orientation discrimination cases.

## **Consultation**

The government consultation document *Getting Equal: Proposals to Outlaw Sexual Orientation Discrimination in the Provision of Goods & Services* is asking for views on the policy to be covered by the proposed regulations. We propose to hold several events around Great Britain where participants will be invited to give their views to officials during the consultation period. The responses will be collated and analysed before the regulations are drafted. A full RIA will be drawn up at that stage before the final Regulations are laid before Parliament.

## **Monitoring and Review**

The new Commission for Equality and Human Rights will have a responsibility to keep the working of discrimination legislation and the Human Rights Act under review, including the sexual orientation regulations. It will need to consider the effectiveness and adequacy of statutes and, if necessary, make recommendations or proposals to the relevant Secretary of State for changes.

## **Summary and recommendation**

The government believes that the nature of the protection envisaged will have a minimal impact upon costs for the business, public and voluntary sectors.

The implementation costs of the sexual orientation provisions regulations are estimated at £4.3 million in the first year, and minimal thereafter. While it is not possible to provide a precise estimate of the benefits that are likely to accrue from these regulations in a defined time span, we anticipate that the advantages to both Government and business from increased take-up of services are likely to exceed the costs of implementation.