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**by the Women and Equality Unit: *Getting Equal***

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### Introduction

1. The Society was founded in 1866 and current Honorary Associates are listed below. We were closely involved with the consultation over the Employment Equality (Sexual Orientation) Regulations 2003. Honorary Associates: Graham Allen MP, Robert Marshall-Andrews QC MP, Prof. Peter Atkins, Iain Banks, Lorraine Barrett AM, Edward Bond, Michael Cashman MEP, Colin Challen MP, Nick Cohen, Prof. Richard Dawkins, Lord Desai, Rt. Hon. Michael Foot, Prof. A C Grayling, Dr. Evan Harris MP, Patrick Harvie MSP, Christopher Hitchens, Paul Holmes MP, Prof. Ted Honderich, Kelvin Hopkins, MP Sir Ludovic Kennedy, Graham Linehan, Baroness Massey of Darwen, Lord McIntosh of Haringey, Jonathan Meades, George Melly, Sir Jonathan Miller, Maryam Namazie, Taslima Nasrin, Lord O'Neill of Clackmannan, Lord Peston, Harold Pinter, Philip Pullman, Lord Raglan, Claire Rayner, Martin Rowson, Joan Ruddock MP, Joan Smith, Dr. David Starkey, Lord Taverne QC, Polly Toynbee, Baroness Turner of Camden, Gore Vidal Sophie in 't Veld MEP, and Prof. Lord Wedderburn of Charlton QC.

2. The NSS approves the Government's decision to use the power contained in The Equality Act 2006 to prohibit sexual orientation discrimination in the provision of goods, facilities and services, education, the exercise of public functions and other areas by the introduction of regulations. As the Partial Regulatory Impact Assessment at Annex B recognises, sexual orientation is alone amongst the equality strands in that it has only partial protection at present, and consequently doing nothing is not a tenable option.

3. We regret, however, that provisions about Sexual Orientation have not been included in the main body of the Act that the Government tabled, because it had no option as a result of pressure applied in the House of Lords. Lord Lester's earlier Equality Bill included sexual orientation discrimination provisions,<sup>1</sup> and as early as 15 June 2005 he called for it in connection with the current bill<sup>2</sup>.

4. We understand that the omission from the Government's Bill was as a result of pressure from religious organisations. The Government's failure to include sexual orientation in the main Bill gives out an unfortunate signal, to say the least. It is lamentable, but not altogether surprising, that the Government should have caved into this pressure – rather than stand out to protect the disadvantaged (especially when the main source of oppression comes directly or indirectly from religious organisations).

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<sup>1</sup> Lords Hansard 14 Jan 2003 : Column 136

<http://www.publications.parliament.uk/pa/ld200203/ldhansrd/vo030114/text/30114-04.htm>

<sup>2</sup> 15 Jun 2005 : Column 1234

<http://www.publications.parliament.uk/pa/ld200506/ldhansrd/vo050615/text/50615-09.htm>

5. The late inclusion of Sexual Orientation protection has materially adverse consequences. The practical consequences of the inclusion coming at such a late stage are much more regrettable still. It meant that it was not practical to include detailed wording in the main Bill and subject it to the rigours of debate. It was only as a result of the rigours of debate that some of the more extreme religious exemptions in part 2 of the Equality Bill were moderated, and even then not to the extent we would have hoped. Instead, Sexual Orientation discrimination is to be dealt with as a statutory instrument. The relevant SI will be drafted by the Government only subject to cursory debate, amendments are not permissible and the only option Members have is whether to accept or reject the Affirmative Resolution.

6. The previous legislative provisions to outlaw discrimination on grounds of sexual orientation, the Employment Equality (Sexual Orientation) Regulations 2003, were also made by a Statutory Instrument (S.I.2003/1661). Our experience on that occasion was that religious demands for broad exemptions were largely acceded to, while calls for exemptions to be minimised were completely ignored.

#### Religious pressure

7. The historical record of how the Church of England succeeded in its objective of obtaining wide exemptions to the operation of the Employment Equality (Sexual Orientation) Regulations 2003 gives us no confidence that the Government will resist similar pressure in respect of the proposed secondary legislation. The Church of England Archbishops' Council pressurised the DTI into giving a wide exemption to organised religion on the grounds of Sexual Orientation Regulation 7(3). It is bitterly ironic and deeply revealing of official attitudes that this wide ranging exemption:

- a) was granted after the public consultation closed
- b) without any reference to any group representing those who would be disadvantaged by it.
- c) was exemption to religious organisations, the ones most likely to discriminate, and through their doctrine (and similar doctrines by other religious bodies) have historically created much of the prejudice which has caused much suffering and makes such legislation necessary even now.
- d) was sought by a church whose clerics are widely thought to have a very much higher proportion of homosexuals in their ranks than the population as a whole.
- e) the wording of Regulation 7(3) followed almost verbatim the wording demanded by the Church.

We therefore urge those drafting the current SI to err on the side of protecting the vulnerable, rather than give unwarranted religious exemptions.

8. A brief critique of The Christian Institute and Evangelical Alliance's publications about the forthcoming Sexual Orientation Regulations<sup>3</sup> is included below, because we believe the assumptions underlying the positions they take deserve careful scrutiny. We comment on three common themes we found (quotes are from either organisation's publications on the forthcoming regulations):

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<sup>3</sup> [http://www.christian.org.uk/soregs/sornewsletter\\_apr06.pdf](http://www.christian.org.uk/soregs/sornewsletter_apr06.pdf) and <http://www.eauk.org/public-affairs/humanrights/upload/GettingEqualPreamble.doc> , both extracted on 4 June 2006

- “Homosexuality is not a fixed trait like race or sex” and therefore “sexual orientation human rights are to be regarded as on a par with religion and belief human rights – not with rights relating to race, sex and disability” (our emphasis). We believe their contention on the “trait” is unsupported by the overwhelming weight of medical evidence. Despite its presentation as a fact, it is an opinion and a contested one. To propose that LGB people, who as a group suffer substantial prejudice, should be afforded a diminished protection to those afforded on grounds of race or sex, would appear grotesque to most fair-minded people.
- Overstating the threat of the legislation: “The potential criminalisation of the major part of the religious community in the UK is obviously not conducive to the public good.”
- Equating calls for some limitation on religious exemptions to outright discrimination: “each strand wishes to exercise its rights to discriminate legally against the other”. The implied equivalence is false: We can imagine the uproar from either of these bodies to a proposal that anyone LGB could refuse services to anyone on the grounds that they were religious. Historically, religion has played a significant role of in the discrimination faced by LGB people. In our view, it is unchallengeable that religion is the major source of discrimination encountered by homosexuals. Furthermore, religion acts as a brake on the removal of forms of discrimination by its disproportionate influence on the formation of policy and legislation.

9. This religious influence extends much further than the enforcement among adherents of religious doctrine, much of it rooted in the social fabric thousands of years ago. It extends also to current social attitudes influenced by religious teaching and attitudes in recent centuries even among those who are no longer under the direct influence of religious bodies. Such religious influence can also affect all citizens when it is reflected and perpetuated in legislation, or as a motivation in those seeking to obstruct changes to legislation. In the NSS’s campaigns for equality, it is our experience that we are frequently able to make common cause with groups representing other strands, particularly in the field of sexual orientation, in opposition to the demands of religious organizations.

10. *Getting Equal* identifies a series of very important new protections and rights for LGB people in para.2.1. It is noteworthy in this context that of the four new protections and rights, the equalisation of the age of consent for gay men, the repeal of s.28 and the Civil Partnership Act 2005 were vociferously opposed by religious groups, and those groups also sought amendments to limit the application of rights (and thereby weaken protection) contained within the Employment Equality (Sexual Orientation) Regulations 2003. The role religion has played in seeking to limit these rights and in fostering negative attitudes to LGB people should be borne in mind when considering submissions seeking alterations to of exemptions from these regulations.

11. Effective regulations will indicate that the Government treats sexual orientation discrimination with the same seriousness afforded to discrimination on the grounds of disability, sex, race and religion or belief. In particular, we commend the approach that the regulations should apply generally to goods, facilities and services, using similar definitions and approaches to those contained in the Equality Enactments as described in para 3.6 n.1 and the limited approach to exemptions to their application.

12. We anticipate that this Consultation exercise will attract a significant number of submissions from religious organisations which will argue for more and wider exemptions to those outlined in Getting Equal. The Foreword states that the reason for the introduction of these regulations is to ensure that gay men, lesbians and bisexual people should have the same basic rights and freedoms as heterosexual people. In order to ensure that this intention is carried forward into real change, we urge the Government to resist the calls of religious organisations for wider exemptions, and to stand firm with its proposals.

Part one is a summary of our replies to the consultation, and part two expands on some of the replies.

### Part One: Summary Table

A simple one-word answer is given to each question: [E] refers to an expansion in part two.

Q.1 Do you agree that the new S. O. regulations should apply to goods, facilities and services?	Yes
Q.2 Should the concept of goods, facilities and services have the same scope as in other equality legislation, in particular Part 2 of the Equality Act 2006?	Yes
Q.3 a: 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?	yes [E]
Q.3 b: What specific activities would such an exception need to apply to?	[E]
Q.4: Do you agree that premises should be covered by the sexual orientation regulations?	Yes
Q.5 Do you agree that an exemption should be provided for selling or letting of private dwellings as described in this consultation paper?	No
Q.6 Do you agree that private members clubs should be included in the sexual orientation regulations?	Yes
Q.7 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?	Approve [E]
Q.8 a: Do you agree that the new sexual orientation regulations should apply to public functions as well as to goods, facilities and services?	yes
Q.8 b: Do you think that any specific additional exceptions might be needed from a prohibition on sexual orientation discrimination in the exercise of public functions?	no [E]
Q.9: Do you agree that schools should be covered by the sexual orientation regulations?	yes
Q.10: Are there any circumstances in which you consider that schools, or a part of the schools sector, should be exempted from the regulations?	no [E]
Q.12: Do you consider that an exemption should be provided from the regulations for some of the activities of religious organisations?	yes
Q.13 a: Do you agree that these exemptions should be restricted to activities that are primarily doctrinal?	yes
Q.13 b: 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?	none
Q.14: Do you agree that an exception should be provided for charities that provide services specifically to people because of/according to their sexual orientation?	yes [E]
Q.15 a: Do you agree that the sexual orientation regulations should include direct and indirect discrimination as well as victimisation?	yes
Q.15 b: Are there any particular considerations or situations that should be taken into account in how such provisions are drafted?	yes [E]
Q.16: Do you agree that discriminatory practice should be included in the scope of the sexual orientation regulations?	yes

Q.17: Do you agree that discriminatory advertising should be included in the scope of the sexual orientation regulations?	yes
Q.18: Do you agree that instructions to discriminate should be covered by the S O regulations?	yes
Q.19: Do you agree that validity of contracts should be covered by the sexual orientation regulations?	yes
Q.20: Do you agree that the enforcement provisions for the sexual orientation regulations should match those for the other equality enactments?	yes [E]
Q.21: Do you have any comments on the Government's plans for how the sexual orientation regulations will be enforced and supported by the CEHR?	yes [E]

## **Part two: Commentary on Marked Questions**

**Q.1 Do you agree that the new Sexual Orientation regulations should apply to goods, facilities and services?**

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

We have already noted our approval of the scope of the regulations and the aim to provide protection from discrimination which accords with that provided for other strands. Adopting a different model for these regulations would fail to provide a coherent approach to equality and could hamper the development of a Single Equality Bill. If a more restricted model were adopted, it would also fail to deliver equal rights for LGB people.

**Q.3 a: 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?**

**Q.3 b: What specific activities would such an exception need to apply to?**

Exemptions should include sexual health clinics (as suggested in note 3.11) and counselling groups.

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

There has been much opposition from some owners of B&Bs to these proposals. In our view, those who open their houses to the general public to make a living are running businesses not manifesting their religious belief and should be no more entitled to turn away people under sexual orientation discrimination legislation than they would be under, for example, racial discrimination legislation..

**Q.7 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?**

In spite of the recent legal reforms which have benefited LGB people, they are still subject to threats, harassment and attacks. Until these dangers have passed, we recommend that the regulations should permit the existence of clubs and associations where LGB people can meet and relax without fear under positive discrimination provisions.

**Q.8 b: Do you think that any specific additional exceptions might be needed from a prohibition on sexual orientation discrimination in the exercise of public functions?**

As stated above, we consider that the scope of the regulations should mirror that of the other equality enactments which do include public functions. We strongly support the statement that the prohibition will apply to anyone exercising a public function, including where a public function is being undertaken by a private or voluntary body on a public authority's behalf.

Any exemption for private or voluntary bodies acting on a public authority's behalf could be a major source of discrimination and one aimed at people who are already vulnerable. What concerns us particularly in this context is the emergence of faith-based welfare and social services which involves the delivery of sometimes essential services via religious organizations. Such discrimination is even more objectionable and unacceptable if it is funded by the public purse, as much faith based welfare will be. One of the major sources

of discrimination against LGB people has been religion, and religious organizations have sought to justify their right to discriminate; religious organizations sought and obtained significant exemptions to The Employment Equality (Sexual Orientation) Regulations 2003.

If, as *Getting Equal* proposes, it would be unacceptable for a public authority to provide a public function without a prohibition on discrimination, it is, in our view, unconscionable for the regulations to allow that authority to step around its responsibilities by delegating its functions to a private or voluntary body without an identical safeguard for the ultimate recipients of the service.

In general we consider that the prohibition should apply as widely as possible but we accept that some limitations as set out in 3.23 may apply.

We should have liked for some explicit examples to have been given of the sort of exceptions needed for government bodies, rather than terse but unhelpful “to safeguard national security”, for example.

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

We support the statement at 3.24 that the new regulations should extend current protection to include access to and the provision of education in both the maintained and independent sectors. We are concerned, however, by the suggestion in 3.31 that there will be consideration of special provision to enable faith schools to “balance the new obligations with their need to operate in a way that is consistent with their school’s ethos”.

The use of the apparently neutral word “balance” implies that there is a way to resolve this issue which does not involve capitulation on one side or the other. This is not the case. In fact, this is the sort of issue which goes to the heart of the regulations’ purpose. Special provision for faith schools would, in our view, result in the propagation of beliefs such as those of the Catholic Church which teaches that homosexuals are “intrinsically disordered”, and some Islamic scholars who still support criminalising homosexual behaviour with the death penalty attached; the context for such propagation is classes from which individual pupils, who may be homosexual themselves, have no right to withdraw. In effect, the state would be conniving with certain faith groups in continuing to spread prejudice against LGB people. It seems to us that no reasonable parent should object to impartial, non-confessional presentation of information about the religions of humanity and how human beings reproduce and relate to each other sexually. Where there is a clash between the ethos of a faith school and the intentions of the proposed regulations, there is an ancient religious teaching which over the centuries has created the prejudice and ignorance which have necessitated the legislation in the first place.

Therefore to suppose that it is possible to “balance the obligations” is to suppose one can square the circle. In effect, the state would be conniving with certain faith groups in continuing to spread prejudice against LGB people. Any “special provision” will once again give special privilege to faith groups. We therefore expect at the very least that there is no movement from the position stated in note 3.33.

Furthermore, any “special provision” will grant special privilege to faith groups which should alert us to the need for caution. There is no suggestion that the propagation of sincerely held beliefs that homosexuality is morally wrong and should be punished by death should be

allowed to be taught *unless* founded in religious belief or doctrine. Since it is felt necessary to prohibit such behaviour when it emanates from simple bigotry, then this underlines the undesirability at which the prohibition is aimed. In fact the pernicious effect of special provision for (only) faith schools may be even greater since arguments against bigotry may be countered by appeals to reason and evidence whereas this will not work against doctrine and belief which stand apart from rational analysis.

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

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

We recognise that there are claims that the regulations could impact on “aspects of religious activity or practice” in the light of doctrine or the beliefs of followers of a religion. We have no wish for the regulations to “impede religious observances or practices that arise from basic doctrines of a faith” (para.3.33) but we suspect that these will be comparatively rare occurrences in any event.

Our far greater concern is that religious organizations will exert enormous pressure for exceptions to the regulations to be defined in the widest possible terms and that this will harm (if not invalidate) the purpose of the regulations in the first place. We strongly agree with the starting point as set out in para. 3.33 that exceptions should be limited to “activities closely linked to religious observance or practices that arise from the basic doctrines of a faith”.

We note with approval in particular the absence from this formula of a reference to “strongly held religious convictions of a significant number of the religion’s followers” as contained in Reg.7(3) of the Employment Equality (Sexual Orientation Regulations 2003. We have criticized the wording in that legislation on the basis that it offers too wide a scope for discrimination. It is inappropriate for an exception granted to an organization (as opposed to an individual) to offer protection for both sanctioned and unsanctioned opinions. We think that excepting strongly held belief would allow bigotry to flourish even if doctrine officially opposed it.

Whilst doctrine is associated with an organization as a whole, the views of a sub-section of any such organization, by definition, cannot be and therefore do not represent its ethos. On occasion, significant numbers (which we could envisage constituting just a few hundred people in a small independent congregation or small minority faith community) of the membership of a religion hold very extreme views on issues such as sexuality which are not necessarily matters of doctrine. It is, in our view, objectionable that such views are given protection in existing legislation when they are not even recognized doctrine, and may fly in the face of recognized doctrine. Whilst we agree that the scope of these regulations should reflect that of existing legislation, we do not agree that they should be drafted in identical terms where existing legislation is unfair. We strongly urge that the starting point in 3.33 is adopted without revision or extension.

We also agree strongly that there is no case for exempting religious organizations providing wider services to the community with a social or welfare aspect (para.3.34). As commented above under Public Functions, many of the recipients of such services are already vulnerable and could be doubly disadvantaged and isolated among their communities by the operation of such exemptions if allowed. Similarly, we agree that there should be no exemptions to organizations that are contracted by a public authority to deliver a service on its behalf (para.3.36) again for the reasons set out above under Public Functions.

**Q.15 a: Do you agree that the sexual orientation regulations should include direct and indirect discrimination as well as victimisation?**

**Q.15 b: Are there any particular considerations or situations that should be taken into account in how such provisions are drafted?**

Care should be taken that there are no uncertainties allowing religious leaders to instruct the faithful to discriminate in ingenious/disingenuous ways.

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

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

We agree that discriminatory practice should be included in the scope of these regulations and that this should also be extended to other equality enactments, so that the CEHR can exercise its enforcement powers without discrimination across all the strands.

We also agree that discriminatory advertisements should be within the scope of these regulations.

We note that there is no proposal to include harassment in these regulations at this stage (para.4.18). We await the conclusions of the Discrimination Law Review. As a preliminary comment, however, we do not accept that the benefits and disadvantages of harassment law apply with equal force for all the strands and would in theory support the concept of legislation to make harassment on grounds of sexual orientation unlawful.

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

We note the expectation that the CEHR will be a body that provides expert information, advice and guidance on all areas of discrimination law. (para.5.8). The difficult interplay between religion and sexual orientation discrimination requires special caution in the delivery of advice to people experiencing problems with sexual orientation discrimination. The structures of the CEHR must reflect the fact that both religious and non-religious people may face such discrimination, and that discrimination may come from a complainant's own religion or from a religion with which they have no connection. The CEHR must have robust practices in place to deal with conflict of rights and to deal with conflict within and between strands.

We note that the CEHR's ability to issue a Code of Practice. It is our recommendation that a single Code is issued to deal with the provision of goods, facilities and services across several grounds where discrimination is unlawful. This is in our view preferable to separate codes of practice. This is partly to reflect reality; employers and service providers will not experience each set of legislation in isolation but through real life situations in which employees or customers have multiple identities which give rise to cumulative rights and protections. It is also to preserve a sense of coherence throughout the equality enactments, both current and proposed, and avoids the inference of special treatment for any strand or section within a strand.