

# Consultation Response

## Discrimination Law Review



### 1. Background

- 1.1 Galop is London's lesbian, gay, bisexual and transgender (LGBT) community safety charity. We are a driving force in changing the way the police work with our communities and give advice and support to those affected by homophobic and transphobic violence or hate crime.

### 2. Introduction

- 2.1 Galop welcomes the Discrimination Law Review, and is firmly in favour of the proposal to draft a single Equalities Act, which will bring the many disparate areas of discrimination and equalities law into line. We believe that this is a once in a generation opportunity for the government to take a fresh look at equalities and discrimination, and to design a legal framework which is fit for our modern understanding of equality and diversity. However, we are also disappointed that the proposals in the review have failed to take this fresh approach, instead being focused on a narrow understanding of equality.
- 2.2 Galop is disappointed that the Review does not even consider extending the protected grounds beyond the six identified equality strands. We believe that a clear case exists for gender identity to become a seventh protected strand, and we say more about this in section 12. Beyond this however, we also believe that there are a number of other groups who also experience significant discrimination and inequality, and who deserve the protection of the law. These groups include:
  - refugees and asylum seekers
  - carers
  - children and young people.

## Part One – Harmonising and Simplifying the Law

### 3. Chapter 1: Promoting compliance and good practice, simplifying definitions, tests and exceptions

- 3.1 Galop believes that the requirement for a comparator in cases of indirect discrimination is limited and inflexible. A direct comparator makes it almost impossible for cases of indirect discrimination to be brought in areas of multiple or intersectional discrimination. Instead we believe that the more flexible approach recommended in the Discrimination Law Review (1.60-1.62) relating to

- the proposal to no longer require a comparator in cases of victimisation, would be appropriate in this case also.
- 3.2 Galop agrees that the law would be simplified and easier to understand and apply, if the separate definitions of disability were replaced with one simple definition. We caution however that in doing this, it is important that the new definition is the most inclusive, and that it does not exclude anyone who may have been included in any of the definitions that are abolished.
  - 3.3 Galop agrees with the proposal to protect from discrimination on the grounds of perception and association, and also agrees with the proposal to extend protection from discrimination to those associated with transsexual people. However we strongly disagree with the proposal not to extend protection against discrimination to those perceived to be transsexual. We say more about this, and other issues relating to the Review's approach to gender identity issues, in section 12.
  - 3.4 Galop strongly agrees with the proposal to extend indirect discrimination to cover gender reassignment; however we believe that the phrase gender reassignment demonstrates a limited and inappropriate understanding of gender identity issues. We say more about this in section 12.
  - 3.5 Galop does not agree that there is no need to introduce protection from indirect discrimination to disability discrimination law. As a matter of principle, the same levels of protection should be available to all equality strands. Beyond this however, the argument put forward in the Review, that reasonable adjustments do the same job as indirect discrimination protection, are not accurate. Reasonable adjustments rely on an individual to bring a case, and are based on an understanding of discrimination against the individual. Any benefits to a group, based on reasonable adjustments for a particular individual are coincidental and secondary to the intention. In fact, many reasonable adjustments, would only apply to the individual concerned (for example allowing the individual to work more flexible hours, or providing software to allow a partially sighted person to use a computer). Indirect discrimination provisions are based on an understanding of the structural nature of inequality and discrimination. Introducing protection against indirect discrimination for disabled people would allow cases to be brought against policies and practices which discriminate against a group of people because of their disability, rather than simply preventing an individual from accessing the job or service. Both reasonable adjustment and protection from indirect discrimination are necessary to fully protect disabled people from discrimination.
  - 3.6 We agree with the proposal to harmonise the definition of indirect discrimination where it applies across the protected grounds, we also agree with proposals to harmonise the objective justification test in the way outlined by the review.
  - 3.7 We agree with the proposal to align the approach to victimisation in discrimination law with the approach in employment law. We also note the willingness of the Government to consider the benefits of ending the requirement for a comparator in cases relating to victimisation. We agree with the benefits of

this approach and argue that this would be extended to the need for a comparator in cases of indirect discrimination, as discussed in paragraph 3.1.

- 3.8 We agree with the proposal to introduce a genuine occupational requirement test across all protected areas. We believe that the most helpful approach would be to include an indicative list of examples, but to make clear that this list is illustrative and not exhaustive.
- 3.9 We agree with the proposal to introduce a genuine service requirement test that mirrors the genuine occupational requirement test. This test would be easier for service providers to understand, because it mirrors the genuine occupational requirement test that has existed for some time. There may be a number of occasions when a service provider may have a genuine reason for limiting their service, for example:
- A local authority may wish to restrict a homelessness hostel to lesbian, gay, bisexual and transgender young people. This could be justified under a genuine service requirement because young LGBT people experience high levels of harassment in mainstream hostels, and because they would be able to provide one another with particular support in coming out and related issues.
  - A local authority may wish to restrict a session at the local swimming pool to transgender people, therefore allowing them access to appropriate changing facilities, free from harassment.
- 3.10 Galop firmly believes that there is no justification for extending the exception relating to insurers and sexual orientation, beyond 2008.

#### **4. Chapter 2: Goods, facilities and services, and public functions**

- 4.1 We agree with the proposal to adopt a harmonised approach to the way that goods, facilities and services, and public functions are structured across all protected grounds. Once again however, we make the proviso that any harmonisation exercise should involve levelling up protection, rather than levelling down.
- 4.2 We agree that exceptions in this area should be streamlined. Any exceptions should be clearly identified, and explanations included in the law so that any challenge can take account of the intention of the exclusion.

#### **5. Chapter 3: Equal pay**

- 5.1 We strongly disagree with the decision not to mandate equal pay reviews. These reviews are an important tool in identifying and eradicating gender inequalities in pay. Despite the progress towards equal pay outlined in the Review, the pay gap is still significant and urgent action is now needed to narrow this. The burden on employers is proportionate, in comparison to the affect on unequal pay for women employees, which persists despite more than thirty-five years of equal pay legislation.

- 5.2 We do not agree that the distinction between contractual and non-contractual approaches to equal pay should be retained. From the perspective of the employee, unequal pay or benefits on the basis of gender are experienced in the same way and a simplified and harmonised process for bringing cases would be more effective and in line with the stated aims of the Review. If the legislation is carefully worded, issues relating to caselaw can be minimised, however in the long run, delays while new caselaw is established will be justified if a more effective and appropriate system exists as a result.
- 5.3 Galop also strongly believes that the best way to achieve a simplified system will be to amalgamate new equal pay legislation into the new Single Equalities Act. Galop also believes that the Review has missed an opportunity to consider whether the current model of Equal Pay legislation is the most appropriate to the modern world. Galop is in favour of the equal pay recommendations made as part of the Equal Opportunities Commission's submission to the Discrimination Law Review.
- 5.4 Galop is strongly in favour of the use of hypothetical comparators in cases of equal pay. We do not agree that these comparators would not give any benefits in practice. We refer to the submissions by the Equal Opportunities Commission for further details on this issue, which we endorse.

## Part Two – More Effective Law

### 6. Chapter 4: Balancing measures

- 6.1 Galop endorses the proposal that the legislation should include a purpose clause. Such a clause has not caused confusion where it has existed in other legislation, rather it serves to frame and give context to the legislation that follows. This increases the accessibility of the law to the public, and clarifies purpose and intention in the case of litigation.
- 6.2 Once again, Galop is disappointed at the narrow approach taken to considering the future of British equality law. The structure of current law is unable to recognise the complexity and intersectionality of people's lives, instead approaching things in an overly simplistic way. This is demonstrated, for example, in the inability of the law to reflect people's multiple identities and the ways in which discrimination cannot sometimes be separated into neat separate equalities strands. The Review reads as an unimaginative housekeeping exercise, to tidy up current legislation, rather than a genuine attempt to reconsider and reframe equalities legislation for the modern day.
- 6.3 Galop is in favour of the type of balancing measures described in the Review. Where these measures are not being used, we suggest that this may be because the availability of these measures is under-advertised, and that they are overly complex. This should not be a reason to get rid of them, but to clarify them. The measures available need to be flexible, and able to meet the needs of all equality strands and those who experience multiple discrimination.

- 6.4 We are concerned that equality legislation needs to be enforced appropriately and that the CEHR should have a role in this enforcement, the organisation needs to have teeth if it is to be effective. We think that it would be helpful for the CEHR to have an approval role in positive action programmes. We do not believe that this would be an additional hurdle, but on the contrary, if the CEHR has a clear approval role, this should more quickly provide consistency of approach and reduce the number of schemes that are eventually challenged in the courts.

## **7. Chapter 5: Public sector equality duties**

- 7.1 We agree that all public sector equality duties should be replaced with a single duty, however we caution that this new duty should represent a levelling-up of the duties.
- 7.2 We agree that a clear statement of purpose would be a useful tool, and support the statement as outlined in the Spencer and Fredman report.
- 7.3 We are concerned that the proposal for public authorities to identify priorities in race, gender and disability, and suggest proportionate action towards these aims, could lead to a less thorough and strategic approach. Instead, we believe that it remains important that local authorities should have specific responsibilities, which should include gathering evidence, consulting and involving affected communities, setting out priorities in an action plan, implementing the plan, assessing the impact of the plan, and monitoring and making public the baseline evidence. We endorse the detailed outline of this approach laid out in the Equality and Diversity Forum's consultation response.
- 7.4 We believe that it is vital that the monitoring of client groups, and the publicising of this information, remains a duty for public authorities. Without this basic monitoring data, it will not be possible for authorities to track their progress, or for them to remain accountable to the public. Specific duties such as making evidence and progress public, involving and consulting communities and monitoring are vital in any equalities scheme, and we therefore opposes any proposal to replace these with general, and therefore unenforceable principles.
- 7.5 We are firmly in favour of applying the single public sector duty to all public authorities. This would remove any confusion regarding which duties apply to which authorities.
- 7.6 We are strongly in favour of extending the public sector equality duty to cover age, sexual orientation and religion or belief. We also strongly believe that this duty should also cover gender identity, and say more about this in section 12.
- 7.7 We are concerned that the tone of the Review is apologetic when explaining the potential need to extend the public sector duty to sexual orientation. We note that this tone is not reflected in other sections. We would welcome a more positive tone in the final Act when it is drafted.
- 7.8 We are able to provide examples of times when a public sector equality duty for sexual orientation would be helpful, as this is our particular area of expertise:

- Currently, many LGBT people experience harassment from neighbours in local authority housing, on the basis of the sexuality or gender identity. However many local authority harassment and antisocial behaviour policies fail to take account of this. We have found that in many local authorities, policies are called 'Racial harassment policies', and treat racist harassment more seriously than homophobic or transphobic harassment. This is because of the legal duties relating to racist harassment, which are not mirrored for homophobic and transphobic harassment.
- Many Crime and Disorder Reduction Partnerships fail to consider or prioritise homophobic and transphobic hate crime.
- Some GPs refuse to offer lesbians smear tests
- Many schools do not have policies in place for dealing with homophobic and transphobic bullying.

7.9 We would argue that any new public authority equality duties should become law immediately upon passage of the bill, with an 18 month lead in time for new equality schemes to be created and approved.

7.10 We believe that the CEHR cannot be effective if it does not have enforcement powers. We are therefore in favour of the CEHR drawing up a statutory code of practice which works side by side with the new Act. In addition, the CEHR should be able to issue compliance notices, following assessment.

7.11 Public service inspectorates have an important role to play in enforcing the act, especially because the capacity of the CEHR will be limited. We note that whilst some inspectorates have made the inspecting of progress on equalities a part of their inspections, others have not. The Act will be ineffective if it is not enforceable, we therefore believe that public service inspectorates should have a duty to inspect compliance with the public sector equality duty.

7.12 We disagree that having specific public sector duties relating to procurement would create confusion. Procurement is a central and vital part of the work of public authorities, and if there has been confusion in the past relating to whether the public sector duty applies to procurement, it is vital that this is made very clear in any new legislation. Confusion can be avoided if the Act, and any accompanying Code of Guidance, is clearly drafted. If the Act continues to have specific, rather than general duties, then there is no reason why having procurement as one of these, should necessarily create confusion relating to weight.

## **8. Chapter 6: Promoting good equality practice in the private sector**

8.1 We are in favour of a private sector equality standard, and such a standard could be an excellent way for both customers and employees to have confidence in the practices of private sector organisations. We are firmly in favour of the standard being externally assessed for accreditation. External accreditation would ensure that the standard retained confidence, and could be a second stage following the organisation preparation using a good-practice and compliance tool. An eternally accredited standard would also be more meaningful for private sector

organisations, as it would carry more status, and this would encourage organisations to participate in the scheme.

- 8.2 Galop also believes that discrimination should be prohibited in private sector procurement. The arguments in the Review, that there is no evidence of discrimination and therefore no need for the additional legislation, are not convincing. There is significant evidence of discrimination in all areas of life – hence the need for equalities legislation in the first place. It is unlikely in the extreme that this discrimination, though pervasive in society, is not reflected in the procurement practices of the private sector. Once the argument for legislation regarding discrimination in goods and services has been won (and it surely has), then the logical extension of this is that this legislation should also apply to private sector procurement.

## **9. Chapter 7: Effective dispute resolution**

- 9.1 Galop agrees that in many cases, litigation is an expensive and inappropriate resolution to discrimination cases. We therefore welcome any attempt to increase access to non-litigant solutions.
- 9.2 We note the new power for the CEHR to provide voluntary conciliation in some cases. We suggest that these powers could be extended further, to allow the CEHR to provide binding dispute arbitration of the same type provided by ACAS, where both parties agree to this in advance, in cases of non-employment discrimination.
- 9.3 We also believe that there is scope for the role of Ombudsmen to be extended. Ombudsmen can sometimes provide effective resolution to disputes without the need for litigation, and the fact that they are free means that they are more accessible than the courts for many of Galop's clients. However, Ombudsmen are also often overworked and therefore slow to respond to cases, and their expertise in the area of diversity is limited. Galop would support extending the role of the Local Government Ombudsman, and the Independent Housing Ombudsman to cover diversity issues, providing these services were given the additional resources and training needed to adequately fulfil this role.
- 9.4 Galop is firmly in favour of the proposals to enhance discrimination expertise in the county courts, and also the suggestion that assessors can be used in discrimination cases across all protected grounds.
- 9.5 We disagree with the decision not to allow representative actions in cases of non-employment discrimination. Discrimination can work on both an individual and a structural basis. The legal system as it is currently set up, responds to individual cases, and makes it particularly difficult to challenge structural discrimination. Bringing representative cases on behalf of a group, would allow this to be more easily challenged. Legal action is expensive, and the types of bodies that may bring representative actions (such as the CEHR, or a trade union) are unlikely to have the resources to make frivolous claims. We do not accept therefore that the possibility of representative actions would create an excessively litigious climate.

- 9.6 Many of Galop's clients experience violence and harassment. In addition to being lesbian, gay, bisexual and transgender, our clients are also sometimes Black, Asian, disabled, old, young, women etc. These identities cannot be separated in different boxes, and when clients experience harassment, it is often not possible to distinguish the prime motivation of the perpetrator – it may be a mixture, for example, of racism and transphobia. The current legal system means that an individual has first to experience discrimination, then must identify the exact reason, and if there is a mixture of reasons, pick one, as though that one part of their total identity is somehow more important than others. In some cases the client must then find a comparator, based on this one part of their identity, despite the fact that this reduces the weight of the case. We feel that it is one of the greatest failings of the Review to propose a way for cases of multiple discrimination to be heard, and in many ways this failing perpetuates this lack of acceptance of our client's whole identities. We refer to the Equality and Diversity Forum's response for specific cases where individuals have struggled to gain redress in cases of multiple discrimination.

## Part Three – Modernising the Law

### 10. Chapter 8: The grounds of discrimination

- 10.1 We agree that the list of capabilities should be removed from the definition of disability. However we also disappointed that the Review has retained a medical model of disability, which is not supported by those who work in the discrimination field. Galop believes that the Act is an opportunity to reframe our understanding of disability, based on the social model advocated by groups that represent disabled people. We also endorse the recommendations made in the consultation submission by the Disability rights Commission.
- 10.2 We believe that perception and association should be included in the protection for all protected groups. This would provide protection for carers on the basis that they are associated with disabled people, or older or younger people. However, carers experience discrimination in their own right, and we support the proposal that they should be an additional protected group.
- 10.3 We believe that the provision protecting married persons and civil partners should be extended to protect everyone on the basis of their relationship status, including single people and unmarried/unregistered couples.

### 11. Chapter 9: Age discrimination beyond the workplace

- 11.1 We are in favour of legislating to protect against discrimination on the basis of age. We also agree that there are times when it is appropriate to provide age-appropriate services and distinctions. However this is the case with all protected areas, and could be covered with clear rules relating to genuine occupation and service occupations.
- 11.2 We are firmly opposed to the proposal that any new protection would not include those under eighteen. In fact, in our experience, young people experience significant negative stereotyping and discrimination, and any new protections on

the basis of age, which do not include children and young people, would be discriminatory in itself.

## 12. Chapter 10: Gender reassignment

- 12.1 Galop strongly urges the government to reconsider its approach to protecting people from discrimination on the basis of gender identity.
- 12.2 The understanding of sex and gender demonstrated in the Review is outdated and unnecessarily restrictive. It illustrates a lack of understanding about the nature of gender identity and experiences of transphobia, and compromises the ability of the Act to effectively address heterosexism in its widest sense (i.e. to promote trans gender, sexual orientation and gender-based equality).
- 12.3 The definition of gender reassignment is incorrect because it is based on the mistaken assumption that knowledge of a person's sex produces an understanding of someone's gender; this is inadequate for modern equalities law. The person discriminating can never know what sex a person is (i.e. what chromosomes, hormones or genitalia they have), and neither knows or cares how much counselling or medical treatment someone has had. It is the perception that someone does not 'pass for normal', (based on a person's *gender* presentation), that causes confusion about what sex or sexuality someone might be, and this leads to the discrimination.
- 12.4 The definition as it stands does not challenge transphobic discrimination, but perpetuates it by assuming that the point at which one's sex is changed (through gender reassignment) is the point at which trans gender identification arises – as the current definition stands it could not be taken as being before this date.
- 12.5 The definition is inaccurate and offensive for three reasons:
- because it denies trans people's experiences
  - because it implies that all trans identities are a 'lifestyle choice' (if this were not the case, there would not be no need to stress the 'permanence' of transition)
  - because it pathologically defines (transsexual) identity as a 'mental health problem' – the social model of disability illustrates the flawed nature of this assumption.
- 12.6 Instead of the approach described in the paragraphs above, Galop proposes that 'gender identity' should become a seventh protected strand in the new Act. This would protect people from discrimination and harassment because of any reason related to their gender identity. Galop proposes the following definition of gender identity:
- Gender identity is a term which describes the extent to which a person's sense of self, appearance or behaviour conform, or are perceived to conform to the person's legally or medically assigned sex at birth (or to the identity, appearance or behaviour traditionally associated with that sex).*

- 12.7 Galop works with all LGBT people. Like many other LGBT and trans organisations, we use trans as an umbrella term to include not just transsexual people, but all those who experience discrimination because they don't 'pass for normal' - i.e. their gender identity or expression does not match up with stereotypical assumptions about what sex, gender and sexuality 'should look like'. This includes 'transsexual' people, as well as those who are not protected by the medicalised definition currently found within the law (including intersex people, people who experience gender dysphoria but who do not transition full time to the 'opposite' gender, and people whose self-perceived gender is neither male nor female). All these people face transphobic discrimination – the person discriminating neither knows nor cares whether the victim intends to undergo, is undergoing or has undergone gender reassignment, only that there is something 'wrong' about their gender identity. The fact that all transphobia is based on the perception of the perpetrator further emphasises the need to include perception in the protection.
- 12.8 It is vital that this protection is also available on the grounds of association and perception. The same protections should be available to transgender people, as are available to people in the other protected groups. If the government persists with the current definition 'gender reassignment', the argument to include perception becomes, if anything, stronger. The perception clause would mean that transgender people who are not planning to undergo surgery, or alternatively who are not receiving medical attention, but who are perceived to be transgender (which is likely, due to clear visibility issues), would be protected from discrimination and harassment.
- 12.9 The case for these protections is made out clearly in '*Engendered Penalties: Transgender and Transsexual People's Experiences of Inequality and Discrimination*', by Stephen Whittle, Lewis Turner and Maryam Al-Alami, published by Press for Change, and available from its website. This document gives thorough examples of the ways in which transsexual and transgender people experience discrimination, and makes a compelling case for including gender identity as a seventh protected area.
- 12.10 For the reasons outlined above, Galop also believes that it is vital that the public sector equality duty should also apply to gender identity.
- 12.11 Similarly, Galop strongly urges the Government not to perpetuate discrimination against young people by not including trans children within the protection of the law. It is vital that young trans people are protected from transphobic bullying in schools. The case for these protections is set out in the publication references above (*Engendered Penalties*), and further examples of good practice and the need for these provisions can be found in the Sci:identity report (<http://goldsmiths.ac.uk/cucr/publications.php>), a report which gives details of a project which worked with a number of trans people who had been disenfranchised through transphobia in schools.
- 12.12 Galop also believes that the exceptions detailed in Appendix B (B25, B26, Table One: ss35(1)(a), ss35(1)(c) and ss46) are inappropriate and perpetuate discrimination against trans people. These exceptions rely on an understanding of trans in which trans people have to reach a certain 'stage' in their transition so

that other people can accept them in their 'acquired gender'. Galop proposes an understanding of trans in which the trans person themselves identifies their own gender, and are treated accordingly. Any deviation from this approach risks exacerbating the discrimination and violence that many trans people already face on a day to day basis' for example:

- some women-only sexual health clinics refuse to treat trans women
- many rape crisis services refuse to support or employ trans women, despite the fact that trans women experience a disproportionately high levels of sexual violence.

### **13. Chapter 11: Pregnancy and maternity**

- 13.1 Galop agrees with the proposals to make less favourable treatment of a woman on grounds of pregnancy and maternity unlawful in the exercise of public functions.
- 13.2 Galop does not agree with the proposal to exclude school pupils and education from these protections. The Review provides a range of examples where it may be appropriate to provide different services to pregnant schoolgirls, however, this in itself does not preclude them from being protected. The new Act is an opportunity to equalise the level of protection across all protected groups, and this should include pregnancy and maternity. All protected groups will include exceptions (for example the exception for certain religious activities in the protection on the basis of sexual orientation), these exceptions are not a reason in themselves not to legislate. The Act should ensure that exceptions are included where necessary and others will be possible using genuine service requirements. Beyond this, all groups should be protected equally.

### **14. Chapter 12: Private clubs and associations**

- 14.1 Galop agrees that there can often be a benefit for allowing clubs which are set up for the purpose of offering benefits of membership to a particular group. This may be for a number of positive reasons, such as to allow mutual support for people who have had similar experiences. It is important that discrimination law allows these groups to continue.
- 14.2 We also agree with the proposal to make it unlawful for private clubs with 25 or more members to discriminate on the basis of sex and religion or belief, and to make discrimination against guests unlawful on all protected grounds, in line with current disability law. This is in line with the purpose of a single equality act, to harmonise equality law, as well as being an appropriate and proportionate response to discrimination faced by members of groups.
- 14.3 We support extending protection against discrimination to age, and therefore also support extending this protection to clubs and associations.

## **15. Chapter 13: Improving access to and use of premises for disabled people**

15.1 We are firmly in favour of the proposals relating to disability-related changes in common parts of premises.

## **16. Harassment**

16.1 If there is ever a case for legislating against harassment outside of employment situations, then the case is made equally for all protected areas. We believe strongly that this is a matter of principle, and that the existing protection against harassment should therefore be extended to include all protected areas, and also gender identity. This should be within all the areas identified in section 14.25 of the Review.

16.2 An examples of when this protection would be appropriate on the grounds of sexual orientation or gender identity:

- Where a young person in school is subject to persistent homophobic or transphobic bullying and teachers consistently fail to challenge this behaviour. In this case the school would be guilty of creating an intimidating, degrading, humiliating and offensive environment.

16.3 The distinction between open and closed environments made in the review is not valid. This distinction relies on the concept that discrimination is somehow the responsibility of the victim – which s/he should have to police their own behaviour and limit the places where s/he can go, in order to avoid harassment. This approach is inappropriate and the responsibility is on the service provider to ensure that harassment does not take place within the premises.

16.4 As an employer, Galop is aware that our own clients have at times been racist, homophobic and transphobic towards our staff. We ensure that we respond appropriately and protect our employees' right to work free from harassment. However, given that we are a small organisation providing services to the public, we find it impossible to believe that this type of harassment from customers and clients does not occur in other workplaces. We therefore consider it appropriate that this should be dealt with in the new Act.