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3 February 2020

Dear Rebecca,

I have been instructed to write on behalf of the LGB Alliance (LGBA) following your exchange of letters with the LGBA's Kate Harris on 23 October and 14 November 2019. I would be grateful if you could send your reply to lgballiancefuture@gmail.com, copying me in at the address above.

In her letter of 23 October 2019 Kate suggested that Stonewall might be in breach of the duty imposed by s149 of the Equality Act 2019 to foster relations between groups of people defined by reference to characteristics protected by the Equality Act 2010. The letter stated that Stonewall's "most recent Chief Executive and current Chair have dismissed out of hand the widespread concerns of thousands of other lesbians at the erosion of their most basic rights and dignities" and suggested that the Commission "might want to review the neglect of lesbians in all areas of the work of Stonewall with often catastrophic consequences for young lesbians". The letter of 23 October also expressed concern about the definition adopted by Stonewall of sexual orientation which makes reference to the gender, rather than to the sex, of the individual's preferred sexual/ romantic partner. This definition has obvious implications for the perceived legitimacy of lesbian women's choices as regards sexual partners.

In your response of 14 November you stated that the Commission "support[s] a trans-inclusive approach" but "recognize[s] concerns about the balancing of rights in this area", referring to the "interplay between the 2010 Act and the Gender Recognition Act 2004" as "an especially complex area of law". You indicated that the Commission did "not control, or have

responsibility for, policy positions taken by Stonewall or any other third sector organization [or ... for ... how [any such] third sector organization [] decides to allocate its funding”. You further stated that none of the matters raised in the letter of 23 October “is capable of forming the basis of the deployment of any of the Commission’s statutory powers, which do not apply in these circumstances”, going on to state that Stonewall is a private body which does not carry out any public function to which the PSED applies.

I have been asked to write to set out the LGBA’s concerns on a number of matters, and to request that the Commission take a fresh decision as to appropriate action to take in response to LGBA’s concerns. The specific action that the LGBA requests that the Commission take at this point is an inquiry under s16 of the Equality Act 2006 in the form of a thematic review of the evolution and adoption of policy by public sector organisations in relation to transgender rights.

The LGBA is of course aware of the very significant resources the Commission is currently deploying on its formal investigations into the BBC and the Labour Party. It is also aware, however, of your indication to the Women and Equalities Committee in evidence to its recent inquiry into the enforcement of the Equality Act 2010 that the Commission had the capacity to undertake inquiries as well as the formal investigations which are currently under way.¹ The LGBA is also mindful of the comments made by the WEC in its Summary of the report on that inquiry, that:

- “We want to see a model that can act as a sustainable deterrent to achieve system-wide change that tackles institutional and systemic discrimination”;
- the Commission should be “ensuring that all who have powers to change the way in which employers, public bodies and service providers operate use those powers to eliminate discrimination and to advance equality”;
- the Commission should increase its enforcement activity “for example by making regulators, inspectorates and ombudsmen not only key partners in creating a critical mass of enforcement action but also key targets for enforcement action when those same regulators, inspectorates and ombudsmen fail to meet their own equality duties”.

The inquiry that the LGBA seeks is precisely one which has the capacity to achieve system-wide change and facilitate the appropriate use by public bodies of their powers. It is not the case that Stonewall, to which the LGBA’s concerns relate, is a regulatory body. It is, however, an organization which wields very significant influence over employers, including many public sector employers, and in the sphere of education, as well as over the public discussion of transgender rights.

¹ Answer to Q574

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It is arguable that Stonewall carries out some functions of a public nature. Even if that is not the case, its approach to matters with which the LGBA is concerned is extremely influential on public bodies including the Government Equalities Office, the Department for Education and many local authorities, schools and colleges.

Stonewall operates the Diversity Champions Network and the associated annual Workplace Equality Index which it states is “The definitive benchmarking tool for employers to measure their progress on lesbian, gay, bi and trans inclusion in the workplace”. Among the top 100 workplaces listed in the 2019 Index were MI5 and MI6, the National Assembly for Wales, the Welsh and Scottish Governments, the MOJ, the Environment Agency, the Royal Navy and Royal Marines, British Army and Royal Air Force, the National Crime Agency, the Crown Office and Procurator Fiscal Service; multiple universities, councils, police services and NHS bodies. Most if not all of these bodies will have received training from Stonewall, and all of them will have made financial contributions to the organization. Stonewall’s views have the potential to have a significant impact on what public bodies do and how they understand their legal obligations.

Stonewall also runs an annual Education Equality Index which it describes as “a comprehensive benchmarking exercise for local authorities, showcasing how well they’re celebrating difference and tackling homophobia, biphobia and transphobia in schools as well as supporting LGBT young people in their local communities”. In 2019 it reported that 28 local authorities had taken part in the index, described by Leicestershire County Council as “Britain’s definitive auditing tool for local authorities to benchmark their success in tackling homophobia, biphobia and transphobia in local schools and supporting LGBT young people in their local communities”. The Government’s Equalities Office funds Stonewall training on gender in the classroom which is delivered free to primary schools in England serving disadvantaged pupils.² And Stonewall states that it has trained over 2300 teachers and distributed its first guide for practitioners working in early years foundation stage.³

Stonewall’s characterization of the existing law is at times misleading. Its materials frequently state that the Equality Act 2010 protects from discrimination on the basis of “gender identity” (defined as “A person’s innate sense of their own gender, whether male, female or something else ... which may or may not correspond to the sex assigned at birth”⁴). The characteristic protected by the Equality Act is, of course, that of “gender reassignment”, which is expressly defined by reference to a process of transition (whether undertaken or intended).

² <https://www.stonewall.org.uk/gender-classroom>

³ <https://stonewallimpact.org.uk/transforming-institutions/>

⁴ See e.g. <https://www.stonewall.org.uk/harassment-workplace>,
https://www.stonewall.org.uk/sites/default/files/Sexual_Orientation_The_Equality_Act_Made_Simple_.pdf,
<https://www.stonewall.org.uk/help-advice/discrimination/discrimination-consumer>

Stonewall's advice on "Discrimination as a consumer" states that "Schools must respect a student's gender identity. They should use their preferred pronouns and allow them to use the toilets and single sex facilities appropriate to the gender they identify with". It also states that "A clothes shop must allow trans women to use the female changing room".⁵ The first is inaccurate as a statement of law because it conflates gender identity with gender reassignment. The second is inaccurate because it uses the term "trans women" to denote a protected class ("trans" being defined elsewhere by Stonewall as "An umbrella term to describe people whose gender is not the same as, or does not sit comfortably with, the sex they were assigned at birth. Trans people may describe themselves using one or more of a wide variety of terms, including (but not limited to) transgender, transsexual, gender-queer (GQ), gender-fluid, non-binary, gender-variant, crossdresser, genderless, agender, nongender, third gender, bi-gender, trans man, trans woman, trans masculine, trans feminine and neutrois"⁶).

Further, the "Discrimination as a consumer" guidance misrepresents the exceptions set out in paragraph 28 of Schedule 3 of the Equality Act 2010. That paragraph provides that the prohibition on discrimination in relation to facilities and services (s29 of the Act) is not breached "because of anything done in relation to a matter within sub-paragraph (2) if the conduct in question is a proportionate means of achieving a legitimate aim", the matters being "(a) the provision of separate services for persons of each sex; (b) the provision of separate services differently for persons of each sex; (c) the provision of a service only to persons of one sex". Stonewall's advice on "Discrimination as a consumer" states that "The Equality Act does allow for LGBT people to be treated differently in certain, very limited and exceptional circumstances. In general, these exceptions only apply in situations where full inclusion has been sought but is not possible and the decision to exclude an LGBT person must be clearly justified ...". The reference to "full inclusion ha[ving] been sought" is not to be found in the statutory provision.

Stonewall's (mis)statement of the legal position appears to be driven by its views on what the law should be. Its document *A Vision for Change 2017-2022* states that the Equality Act 2010's provisions on genuine occupational requirements, "participating in sport, accessing single-sex services, serving in the Armed Forces, or attending school" have the effect that "a trans person's rights are not the same as everyone else's [and] ... trans people in these areas are not protected from discrimination and harassment in the way other people are". The document calls for the reform of the Act to "protect all trans people" with a redefinition of the protected characteristic from "gender reassignment" to "gender identity" and the removal of the terms "gender reassignment" and "transsexual". And in its 2015 written evidence to the Women and Equalities Committee Inquiry into Transgender Equality Stonewall had expressed:

⁵ <https://www.stonewall.org.uk/help-advice/discrimination/discrimination-consumer>

⁶ <https://www.stonewall.org.uk/help-advice/glossary-terms>

“deep[] concern that exemptions within the Act actively remove protections for trans people. Schedule 3, Part 7, permits service providers to deny ‘transsexual’ people access to separate or single-sex spaces. Exemptions in Schedule 9 in the area of occupational requirements allows employers to have a requirement for employees ‘not to be a transsexual person’, including in the Armed Forces. In addition, Part 14 permits differential treatment in ‘gender-affected sport’. Stonewall also believes that these exemptions sit in contention with the Gender Recognition Act as they imply that being a ‘transsexual person’ supersedes a person’s legal gender”.⁷

Stonewall’s position is one which, in the view of the LGBA, prioritises the rights of trans people over those of others. It is not possible for LGBA to assess whether and to what extent Stonewall misrepresents the law in relation to its Education or Workplace Equality Indices as neither the questions nor the scoring are available to the LGBA. Nor is it clear to the LGBA what approach Stonewall takes in its schools training. There is cause for concern, however, that the approach which Stonewall advocates, and represents in its published material as being the current law, forms the basis of its training and assessment of organisations and will impact on the attitudes and actions of those organisations, many of them public bodies.

There is evidence that the stance advocated by Stonewall has already had an impact on the policies adopted by public bodies. One example has arisen in relation to single-sex accommodation in the NHS, a policy adopted to safeguard the safety and dignity of patients, in particular women. The Eliminating Mixed Sex Accommodation Guidance (2010)⁸ made it clear that “NHS organisations are expected to eliminate mixed-sex accommodation, except where it is in the overall best interest of the patient, or reflects their personal choice... mixing in bathrooms or WCs is still unacceptable, as is requiring patients to pass through opposite-sex areas to reach their own facilities”. The Mental Health Act 1983: Code of Practice (updated 2017) states that:

“All sleeping and bathroom areas should be segregated, and patients should not have to walk through an area occupied by another sex to reach toilets or bathrooms. Separate male and female toilets and bathrooms should be provided, as should women-only day rooms. Women-only environments are important because of the increased risk of sexual and physical abuse and risk of trauma for women who have had prior experience of such abuse. Consideration should be given to the particular needs of transgender patients”.⁹

By contrast, the NHS England and NHS Improvement’s recently issued *Delivering same-sex accommodation* document (September 2019) now states that, while:

⁷ <http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Women%20and%20Equalities/Transgender%20Equality/written/20371.html>

⁸ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/215932/dh_121860.pdf

⁹ Mental Health Act 1983: Code of Practice. Department of Health. 2015. <https://www.gov.uk/government/publications/code-of-practice-mental-health-act-1983>

“Under the Equality Act 2010, individuals who have proposed, begun or completed reassignment of gender enjoy legal protection against discrimination ... good practice requires that clinical responses be patient-centred, respectful and flexible towards all transgender people whether they live *continuously or temporarily*^[10] in a gender role that does not conform to their natal sex. General key points are that:

- Trans people should be accommodated according to their presentation: the way they dress, and the name and pronouns they currently use.
- This may not always accord with the physical sex appearance of the chest or genitalia.
- It does not depend on their having a gender recognition certificate (GRC) or legal name change.
- It applies to toilet and bathing facilities (except, for instance, that pre-operative trans people should not share open shower facilities)...

Non-binary individuals, who do not identify as being male or female, should also be asked discreetly about their preferences, and allocated to the male or female ward according to their choice”.

Whatever position an individual may adopt as to the correct balance between the rights of trans people and those of other NHS users, it cannot be denied that the position asserted in the *Delivering same-sex accommodation* document marks a profound change from that in the 2010 and 2017 documents, and that it rests upon a particular view of the Equality Act 2010 which appears to be consistent with that advocated by Stonewall. It is far from clear what bodies were consulted by NHS England and NHS Improvement in connection with the *Delivering same-sex accommodation* document.

The Women and Equalities Committee dealt in its report on enforcing the Equality Act 2010 with the lack of clarity concerning single-sex services, including questions of gender and sex and the interplay between such services and the rights of trans people. It recommended that the Commission develop a statutory Code of Practice:

“with case studies drawn from organisations providing services to survivors of domestic and sexual abuse. This Code must set out clearly, with worked examples and guidance, (a) how the Act allows separate services for men and women, or provision of services to only men or only women in certain circumstances, and (b) how and under what circumstances it allows those providing such services to choose how and if to provide them to a person who has the protected characteristic of gender reassignment”.

The Commission would be assisted in its drafting of any such Code of Practice if it were to carry out the inquiry that the LGBA seek.

That there is a large degree of confusion in this area is indicated by the Commission’s own publication *Protecting Human Rights: Key Challenges for the UK’s third Universal Periodic Review* (2016),

¹⁰ Original emphasis.

which stated that the Equality Act included “gender” and “transgender status” as protected characteristics (in place of “sex” and “gender reassignment”). While these misstatements of the law may appear trivial, their implications may be profound when it comes to determining the relationship between the rights of trans individuals to be treated in accordance with their self-identified gender identity, and the sex-related rights of others.

There is legitimate cause for concern that a single organisation, Stonewall, is driving much of the policy development in a difficult and contested area. Whether or not there is a sufficient basis on which the Commission could take a view that unlawful discrimination has occurred or the PSED been breached, the LGBA’s view is that it would be appropriate for the Commission to adopt a broad approach and to launch a s16 inquiry in the form of a thematic review of the evolution and adoption of policy by public sector organisations in relation to transgender rights. The LGBA further request that if, during the course of that inquiry, it appears that any organisation has failed to comply with the requirements of the Equality Act including, where relevant, the PSED, the Commission consider carrying out assessments investigations under s20 Equality Act 2006 and/or assessments under s31 Equality Act 2006 as appropriate, with a view to making recommendations for future action.

Finally I wish to convey the hopes of the LGBA that an inquiry along the lines proposed might contribute to constructive and respectful dialogue about a matter of profound public interest.

Yours sincerely,



Aileen McColgan