

STONEWALL LECTURE  
NEW LABOUR'S EQUALITY LAWS: SOME ARE MORE EQUAL THAN OTHERS  
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I am delighted to give this lecture, in the wake of so many distinguished Stonewall lectures given for almost a decade. This lecture honours the memory of Peter Duffy – a dedicated and outstanding advocate for the vulnerable and the oppressed outside and within the courts. Peter and I worked together in *Laskey, Jaggard and Brown*, the sado-masochist case, in which the European Court of Human Rights was distinctly less liberal than Lord Mustill and Lord Slynn of Hadley had been in their dissenting speeches in the House of Lords in that case, favouring the appellants' right to conduct their private life undisturbed by the criminal law. Peter's untimely death robbed us of a courageous champion of human rights and a loyal and generous friend. He was a pioneer in the use of European human rights law to protect the fundamental right to private life and non-discrimination for gay men and lesbian women. How much we miss him this evening when we look back to his 1997 lecture and review what has since occurred.

I am also delighted to give this lecture for another reason. That is, because it is given at Stonewall's invitation. I have been privileged to work with Stonewall in presenting my Civil Partnerships Bill and Equality Bill, in the long struggle for the equal protection of all without discrimination.

In my case, that struggle began some forty years ago when I helped found the Campaign Against Racial Discrimination, and later the Runnymede Trust, and began a lifelong friendship with Roy Jenkins. It was he, more than any other senior Minister in my lifetime, who understood the meaning of equality and of liberty, and fought, with some success, to persuade his colleagues in both Wilson administrations to take those concepts seriously and to translate them into practical reality.

I have chosen as my topic New Labour's Equality Laws, because it gives us the opportunity to survey the real achievements as well as the serious shortcomings of the Blair administration. Peter Duffy's optimistic Stonewall lecture was given in December 1997, a year which he described as extraordinary, in which openly gay and Lesbian Ministers had been appointed by Tony Blair, and the New Labour Government, with the enthusiasm of constitutional reforms in his party and in mine, had committed itself to introduce the Human Rights Bill. I note that Mr Justice Anthony Hooper, in his introduction to Peter's fine lecture, said that although he shared Peter's excitement about the changes that were happening, there had to be a word of caution because of every government's wish not to become ideologically too far removed from the public at large.

Before turning to the present Government's record, I should mention recent achievements made by the judiciary in securing privacy and equal protection against discrimination for gay and lesbian men and women. For me, it was the majority

decision of the American Supreme Court on 26<sup>th</sup> June 2003, in *Lawrence et al. v Texas* that is most memorable and significant this year. The Opinion of the Supreme Court, given by Justice Kennedy, overruled the Court's decision only seventeen years before, in *Bowers v Hardwick*<sup>1</sup>. In *Bowers*, the Supreme Court had upheld Georgia's sodomy law by a narrow majority on the ground that the United States Constitution does not guarantee a fundamental right to respect for the private life of adult male homosexuals. In a lecture I gave at Columbia Law School a year after *Bowers* had been decided<sup>2</sup>, I pointed out that no one had drawn the attention of the Supreme Court to the landmark decision of the European Court of Human Rights four years previously in *Dudgeon v United Kingdom*, and I suggested that *Bowers* illustrated the continuing isolation of American constitutional law from international human rights law. In *Bowers* Chief Justice Burger opined that to "hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching." Justice White even characterised *Bowers*' claim that his right was "implicit in the concept of ordered liberty" as being "at best facetious".

It is encouraging not only that a majority of the American Supreme Court have now overruled this reactionary decision, but that they have done so for the first time in the Court's history by referring to international human rights law and practice. Justice Kennedy observed "When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and private spheres. The central holding of *Bowers* has been brought into question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons."

The furious and characteristically caustic dissenting opinion of Justice Scalia, with whom Chief Justice Rehnquist and Justice Thomas agreed, shows the true significance of the Court's decision. Justice Scalia complained that:

Today's opinion is the product of a Court which has largely signed up to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.

Earlier Justice Scalia said, of the reference to European human rights jurisprudence,

The Court's discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is ... meaningless dicta. Dangerous dicta, however, since 'this Court ... should not impose foreign moods, fads, or fashions on Americans.' *Foster v Florida*, 537 U.S. 990, n. (2002) (THOMAS, J, concurring in denial of certiorari).

Justice Scalia was especially dismissive of another remarkable recent decision – the unanimous judgment of the Court of Appeal for Ontario earlier this year, in *Halpern*

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1 478 U.S. 186 (1986).

2 Anthony Lester QC, *The Overseas Trade in the American Bill of Rights*, Vol 88 *Columbia Law Review* (1988) 537, at 560.

*v Attorney General of Canada*<sup>3</sup> holding that the common law definition of marriage as being between one man and one woman offended unjustifiably against the equality rights of same-sex couples.

I cannot let this necessarily brief and selective overview of remarkable judicial decisions go by without a mention of *Mendoza*<sup>4</sup>. The Court of Appeal was asked to determine whether, on the death of a protected Rent Act tenant, that tenant's same-sex partner was entitled to claim a statutory right to succeed to the tenancy. The Rent Act 1977 would only allow the tenancy to pass to a surviving spouse or those who live with the deceased 'as his wife or husband'. In a unanimous decision, assisted by an able intervention on behalf of Stonewall, the Court found for Mendoza. The statutory phrase 'as his or her wife or husband' was to be read under section 3 of the Human Rights Act 1998 'as if they were his or her wife or husband'. This decision is notable not only for the extension of the Human Rights Act's interpretative provisions to the private sphere but also for the boldness of the Court's stance when faced with a discriminatory provision.

Within this context of enlightened judicial decision making, let us turn to the record of the Blair government in legislating to tackle unjustifiable discrimination. I will begin with some of the Government's achievements for which they should be given credit. The first significant achievement in this area was the equalisation of the age of consent. At the time of New Labour's election in 1997 the age of consent had already been successfully reduced, with much lobbying and support from Stonewall, from the age of 21 to 18. By 1996 Stonewall were involved with the case of Euan Sutherland, a 16 year old gay man who wanted to claim before the European Court of Human Rights that the unequal age of consent was a breach of his right to privacy. Following the May 1997 election, Jack Straw MP, the then Home Secretary, gave an undertaking to introduce legislation in Parliament and Mr Sutherland's case was stayed before the ECHR to allow Parliament time to legislate. In 1998 Ann Keene MP moved an amendment to equalise the age of consent. The amendment passed in the Commons but was defeated in the Lords by an alliance of Peers headed by the late Baroness Young. The Government, however, were not to be defeated. They tried again in 1999 in the Sexual Offences Bill. Again, this passed in the Commons, but was defeated in the Lords. On the next occasion, the Government decided to use the Parliament Act and in 2000 a new Sexual Offences Bill was successfully enacted. The equal age of consent became law in January 2001. I commend the Government for their commitment.

Then there was the ferocious battle to repeal section 2A of the Local Government Act 1986, better known as section 28 of the Local Government Act 1988. This insulting piece of legislation prohibited local authorities in England and Wales from 'promoting' homosexuality as a 'pretend' family relationship. Peter Duffy observed in his lecture that the Stonewall equality campaign grew out of the campaign against Section 28. Peter continued: "Whether through the courts or through Parliament, my

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<sup>3</sup> (2003-06-10) ONCA C39172

<sup>4</sup> *Mendoza v. Ghaidan* [2003] 2 W.L.R. 478

message in 1997 is that the days of Section 28 are numbered. It should soon be expunged from the statute book.”

The word 'soon' was over-optimistic. The battle to repeal section 28 was hard-fought and protracted. The opportunity finally to repeal section 28 came in the form of the Local Government Bill 2003. The Government intended to repeal section 28 through this Act and were eventually successful in a famous victory in the House of Lords on 10 July 2003<sup>5</sup>. The Government and their cross-party supporters faced opposition from Baroness Blatch who tabled a wrecking amendment. Thanks to the Government's persistence and the crucial support of the Liberal Democrats, she was defeated. The Act will come into force on 1 December 2003, almost exactly six years after Peter's original prediction.

I should also mention the commendable action of the Government in introducing the Adoption and Children Act 2002. Whilst no legislation has ever prevented a gay person from adopting a child, it was almost impossible for both same-sex partners to adopt jointly. This had significant implications for the welfare of the adopted child and was extremely detrimental if anything happened to the only registered parent. The Adoption and Children Act now allows unmarried couples, including same-sex couples, to adopt jointly, providing that their partnership is an 'enduring family relationship'. Again despite vocal opposition in the House of Lords<sup>6</sup> the Government, with the firm support of the Liberal Democrats, persisted and ensured that this Bill became law.

I must now come to the serious failings of the Blair Government, especially in fulfilling the 1997 Election Manifesto promise to eliminate unjustifiable discrimination 'wherever it exists'.

The narrow and intolerant message of Section 28 was that a relationship between gay or lesbian couples is a “pretended family relationship”; it is no more a pretended relationship than is a caring, sharing and loving relationship between two heterosexuals who live together in a stable long-term relationship.

That is why Stonewall, led by Angela Mason, campaigned for a Civil Partnership Act to give legal recognition and protection to unmarried couples (same-sex and opposite-sex in stable relationships). This was and is core Liberal Democrat policy, and I introduced a Private Member's Bill to achieve these important objectives. After an impressive Second Reading debate on 25<sup>th</sup> January 2002<sup>7</sup>, in which there was support for the Bill from all sides of the House of Lords, we decided to give the Government breathing space to decide whether to adopt our proposals. We did not expect them to need almost eighteen months to publish their Consultation Paper<sup>8</sup>.

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<sup>5</sup> 10 July 2003 Hansard (HL) Cols 496 - 525

<sup>6</sup> See for example the debate on the House of Commons Amendments on 5 November 2003 Hansard (HL), vol. 640, cols. 567 - 621.

<sup>7</sup> 25<sup>th</sup> January 2002, Hansard (HL), vol. 630, cols 1691 - 1746.

<sup>8</sup> *Civil Partnership: A framework for the legal recognition of same-sex couples*, June 2003.

When it was published, it was rightly welcomed by Stonewall as an important step forward, but it proposes only a half measure. The Government have rejected our proposed law which would give full partnership rights and responsibilities to mature adults, whether same-sex or opposite-sex, to enter into a binding legal compact to organise their common life together. Instead, the Government have done as the Conservative Opposition and some religious leaders have advocated, confining their proposals only to same-sex couples.

The Government relies on the argument that opposite-sex couples are entitled to marry. That is not always the case, and it is not in any event a good reason for depriving them of effective legal protection. Many people in loving long-term relationships choose not to marry; some cannot do so. Why should they be denied legal protection of the kind available in other comparable countries in Europe or the Commonwealth? The Government's approach creates a new form of legal inequality. Individual men and women should be encouraged by the legal system to form stable and enduring relationships for the sake of their children as well as themselves, without being coerced into marrying to obtain proper legal protection. There is no evidence that a civil registration scheme for opposite-sex couples undermines marriage. To the contrary, registered couples who have lived happily together may be encouraged to take the further step of a religious or civil marriage. The consultation exercise which ended on 30<sup>th</sup> September 2003 did not invite comments on whether the scheme should apply to opposite-sex couples, even though it recognised<sup>9</sup> that other Commonwealth and European countries have done so, and even though it recognised that same-sex unmarried couples may suffer from what the Government euphemistically describe<sup>10</sup> as "difficulties". I very much hope that Stonewall will continue to press for coherent legislation applying to couples irrespective of their sexuality. That is the policy of my Party, and it was strongly supported by Angela Mason when she was Director of Stonewall. St Paul's command that it is better to marry than to burn<sup>11</sup> is surely not an appropriate basis for Government policy.

Of course, a more straightforward strategy altogether would be to allow same-sex partners to enter into civil marriage. This is not a step that the Government, with its intrinsic fear of upsetting the religious establishment, is prepared even to contemplate. This may have devastating consequences not only for same-sex couples who wish to marry, but also now for trans people who wish to remain married but also have their acquired gender recognised. The draft Gender Recognition Bill is designed to rectify the incompatibility of UK law with the ECHR in respect of official recognition of a trans person's acquired gender. The Government have finally been persuaded that this legislative change is overdue as a result of such unanswerable cases as *Goodwin v. United Kingdom* and *Bellinger v. Bellinger*. In order for a person's acquired gender to be recognised, a trans person must apply for a certificate of recognition before a Gender Recognition Panel. Under

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<sup>9</sup> White Paper, Table 1.

<sup>10</sup> White Paper, paragraph 2.8.

<sup>11</sup> 1 Corinthians, Chapter VII, Verse 9.

the terms of the Bill, a person who otherwise meets the strict criteria of the panel will not be granted a full certificate if this means that she would effectively be married to someone of the same sex. The person will be granted only an interim certificate, with none of the legal benefits of a full certificate, until the couple divorce. One can only imagine the emotional and financial pain this provision will bring to a small but significant number of trans people. Long and loving marriages, often with children, that have survived almost insurmountable challenges will now be ripped apart by a cold and incompassionate Government policy. The trans people involved will be forced to choose between their basic human right to be recognised in their true gender and their marriage. For some trans people their religious belief in the sanctity of marriage will mean that they will choose not to divorce and so continue to face the indignities of being treated as someone of the opposite gender.

What then of the Government's new legislation to combat discrimination? "We will seek to end unjustifiable discrimination wherever it exists." That, as I have already said, was New Labour's promise in its 1997 manifesto. More than six years later, Tony Blair's Government have not kept their promise. The Government's commitment to equality is as weak as is its respect for civil liberty. So, far from ending unjustifiable discrimination "wherever it exists", what the Government have done denies equal protection under law to victims, making the present legal regime still more complex, incoherent and ineffective. The legislation is botched, and the results please no one except Ministers and their business managers. Apart from the Race Relations (Amendment) Act 2000, the Government's 'Equality Agenda' has so far consisted of little more than reacting to EU Directives and implementing them restrictively.

There was nothing inevitable about this failure of will. In the mid-Seventies I took leave of absence from the Bar to work as Roy Jenkins' Special Adviser at the Home Office, developing policy on laws to combat sex and race discrimination. We were part of Government with a commanding majority in the Commons, but a minority Government. We were faced by a formidable Opposition. Yet we persuaded Parliament to enact robust wide-ranging measures. Our White Paper, *Equality for Women*<sup>12</sup>, contained a detailed account of our legislative proposals on sex discrimination. It was published in September 1974. They were radical proposals for their time, but we were able to develop them within only a few months of my arrival at the Home Office, and to develop them further a year later in what became the Race Relations Act 1976.

It was not easy to develop the policy during those few hectic months between March and September 1974 because, as Roy Jenkins noted in his memoirs<sup>13</sup>, we encountered so much opposition among senior Home Office Officials on the team that I was sent home to write the first draft of the White Paper on my own. We overcome opposition within Whitehall and Westminster because of Roy Jenkins' unswerving

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<sup>12</sup> Cmnd. 5724. (September 1974)

<sup>13</sup> Roy Jenkins, *A Life at the Centre* (Macmillan: 1991), p.376

determination to introduce effective legislation and to promote a culture of respect for the dignity and equality of every human being.

Thirty years later, Britain's equality code is a tangled thicket of inconsistent and incomplete legislation in urgent need of coherent reform. Its complexity makes it especially difficult for small businesses to comply with their legal obligations, and hinders victims in their access to justice. Even the basic concepts of discrimination differ, without rhyme or reason, in the hotchpotch of different statutes. The equality agencies that were created to tackle entrenched discriminatory practices by means of strategic law enforcement have never treated that as their main priority.

246 MPs signed an Early Day Motion supporting my single Equality Bill. But the Government does not recognise the pressing need for a coherent, user-friendly framework covering all the main types of unjustifiable discrimination; on grounds of gender, sexuality, ethnicity, disability, religious belief (or lack of it), and age, not only in employment, but in education, housing, goods and services. The Government does not recognise that, instead of relying upon a negative duty not to discriminate, a new Equality Act needs to place positive equality duties on public bodies and to require large employers to introduce equity plans. The Government does not recognise the need to create an Equality Commission with the resources and professional expertise to act as a one-stop shop tackling the different strands of discrimination, carrying out strategic law enforcement and monitoring compliance with equality duties, without imposing costly and excessive bureaucratic burdens.

The Government's short-term vision of equality legislation has displayed a poverty of ambition and imagination. Putting cart before horse, it seeks to set up a single Equality Commission<sup>14</sup> without reforming the substance of the underlying Equality legislation. Rather than introduce an Equality Bill to clarify and simplify the law, it has used cramped delegated legislation to give effect to the EC equality directives. By deciding not to bring in primary legislation, it has fettered Parliament's ability to legislate to tackle unjustifiable discrimination "wherever it exists".

New Labour's EC equality regulations have not created legal protection beyond the employment field for the elderly, the disabled, gay and lesbian victims, or for the victims of religious discrimination. This is not because such protection is unnecessary. It is merely because of the narrow reach of the EC directives that prevented the Government from going further without a proper Bill.

Not only does the existing patchwork of law remain unwieldy and ineffective, but the law's reach is too short. Women continue to face a heavier burden of proof in discrimination cases outside the employment field; a homosexual or a Muslim denied a service because of sexuality or religion is and will remain unable to obtain legal redress; an elderly person, denied essential services by a health authority or local council on the ground of age will continue to be denied legal redress; and

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<sup>14</sup> See the Government Consultation Paper 'Equality and Diversity: Making it Happen' (Department of Trade and Industry: 2002)

(except in the field of race relations) there is no positive duty on public authorities or large employers to make general progress towards equality of opportunity for other vulnerable groups.

The Government has failed at every opportunity to deal with these discrepancies in primary legislation. As the Discrimination Law Association has pointed out, trans people are only protected from discrimination in employment and then only from direct discrimination<sup>15</sup>. A hairdresser can still refuse to cut a trans person's hair because she is transgendered. A hotel can refuse a room to a trans person and a home for the elderly can refuse care to someone on the grounds that she is a trans person. The Government were presented with an ideal opportunity to deal with these obvious injustices in the draft Gender Recognition Bill. They have failed to do so. Whilst a male to female trans person will now be able to avail themselves of the protection of the Sex Discrimination Act as a woman, one must question the value of such protection if it is still lawful to discriminate against someone not because she is a woman but simply because she has acquired a new gender. We can only speculate as to the reasons for this inaction. Perhaps even the Government would be too embarrassed to legislate for the trans person who is refused an essential service having recently refused to legislate for the gay man who is refused the same.

Even on the Government's narrowly restrictive terms, the regulations introduced to give effect to the EU equality directives are seriously flawed. A few examples will serve for all.

The Race Relations Act 1976 (Amendment) Regulations 2003 were made to implement the UK's obligations to prohibit discrimination on grounds of racial or ethnic origins under Council Directive 2000/43/EC - the Race Directive. The Regulations exclude discrimination based on colour so that the added protection provided by the Directive would cover racial discrimination against someone because of Afro-Caribbean or Asian origins, or Jewish ethnicity, but not because of that person's colour. The Government have explained that they do not consider that the references in the Race Directive to "discrimination based on racial or ethnic origin" and to "discrimination on the grounds of racial or ethnic origin" include colour<sup>16</sup>. The Government have also explained that they believe that the concept of racial discrimination in the Race Directive "appears to be expressed more narrowly than the concept of racial discrimination in the International Convention on the Elimination of All Forms of Racial Discrimination (referred to in recital (3) of the directive)<sup>17</sup>. Whereas the latter refers to 'racial discrimination' as meaning 'any distinction, restriction or preference based on race, colour, descent or national or ethnic origins', the former refers to 'the principle of equal treatment' as meaning 'that there shall be no direct or indirect discrimination based on racial or ethnic

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<sup>15</sup> The Sex Discrimination (Gender Reassignment) Regulations 1999, SI 1999/1102 amended the Sex Discrimination Act 1976 to apply to discrimination against trans people in the employment sphere.

<sup>16</sup> 24<sup>th</sup> June 2003, Written Answer of Baroness Scotland, Hansard (HL), vol. 650, WA 10.

<sup>17</sup> 24<sup>th</sup> June 2003, Written Answer of Baroness Scotland, Hansard (HL), vol. 650, WA 11. See also the Lords debate on the Motion for Approval, 11<sup>th</sup> June 2003, Hansard (HL), Vol. 649, cols 314-37.

origin'. The elements of race and ethnicity appear to be common to both concepts, but not colour."

It is difficult to understand how the Government could have adopted such a blinkered, literal and purposeless interpretation of the Race Directive. Ever since the first Race Relations Act of 1965, our legislation has forbidden discrimination based on colour, as an example of discrimination on racial grounds. The definition of racial discrimination in the Race Relations Acts derives from the broad definition in the International Convention on the Elimination of All Forms of Racial Discrimination. Every EU Member State is party to that Convention. Recital (3) of the Race Directive specifically refers to the Convention in the context of what it describes as the "universal right" to equality before the law and protection against discrimination for all persons.

The purpose of the Race Directive is described as being "to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment."<sup>18</sup> The principle of equal treatment is defined in equally broad terms as meaning that "there shall be no direct or indirect discrimination based on racial or ethnic origins." Surely, it cannot have been deliberately intended to introduce European legislation that fails to give full effect to the universally recognised concept of what constitutes racial discrimination, and to exclude from legal protection the best-known example – a colour bar. What conceivable reason of public policy could there have been for such an exclusion? The Government's position is especially bizarre since it was British race relations legislation that was one important model for the European legislation, and our legislation follows the UN Convention definition and covers discrimination based on colour. The net result is that some victims of racial discrimination are now more equal under law than others.

It would be unfair to the Home Office to suppose that it is uniquely culpable. It was decided at the highest level of government to proceed piecemeal by means of delegated legislation; it was the Prime Minister and his advisers who decided to defer to the Evangelical Right when it came to sexual orientation discrimination; and it was the DTI that made a mess of the regulations dealing with discrimination based on religion, belief and sexual orientation.

The Employment Equality (Religion or Belief) Regulations 2003 are meant to give effect to the so-called Framework Directive for equal treatment in employment and occupation<sup>19</sup>. The Directive's purpose is to lay down a general framework for combating discrimination on the grounds of religion or belief, as well as disability, age, or sexual orientation. Regulation 2 (1) defines "religion or belief" to mean "any religion, religious belief, or similar philosophical belief." What is meant by "a similar philosophical belief" – words not found in the Directive itself? During the

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<sup>18</sup> Article 1.

<sup>19</sup> Council Directive 2000/78/EC.

Lords debate on the Motion for Approval<sup>20</sup>, the Minister was repeatedly asked how atheists and agnostics could be protected against discrimination when they have no similar philosophical belief to a religious belief, but, on the contrary, positively disbelieve or have no belief. The Minister replied: "It is clearly the intention that where people have strongly held views, which include humanism, or atheism or agnosticism, they would be covered under the phrase 'or similar philosophical belief'." It is difficult to understand how someone who denies or doubts the existence of the Divinity, or who has no belief, can be described as having a similar philosophical belief to someone who believes in God or some Divine Power. Once more, the Courts may have to rescue the Regulations from incompatibility with human rights law.

Perhaps the worst example of the Government's flawed approach is what happened when they came to implement the Framework Directive in the Employment Equality (Sexual Orientation) Regulations 2003. Article 4 (1) of the Directive allows in very limited circumstances that a difference of treatment may be justified when a characteristic related to sexual orientation constitutes what it describes as a "genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate." This means that an employer who wishes to impose a requirement relating to sexuality must demonstrate that being lesbian or gay is essential for the kind of work which is to be undertaken; that there are good reasons for imposing the requirement; and that the requirement is an appropriate one to apply given those reasons. The burden of proof lies with the employer.

Regulation 7 deals with the genuine occupational requirement exception. Paragraph (1) sets out the circumstances in which the anti-discrimination provisions contained in Regulation 6 do not apply. Paragraph (2) sets out the genuine occupational requirement exception in broad but acceptable terms. It is paragraph (3) which is objectionable. It concerns employment for the purposes of an organised religion. It does not contain a genuine occupational requirement provision. Instead it creates a broader exception which allows the employer to impose a requirement relating to a person's sexual orientation either in order to comply with the doctrines of the religion, or because of the nature of the employment and its context, "so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers". Paragraph (3) goes on to provide that the exception applies either if the person to whom the sexual orientation requirement is applied does not meet it, or if on reasonable grounds the employer is not satisfied that the requirement is met.

Regulation 7 (3) was added, apparently on instruction from the Prime Minister's Office, at a very late stage, because of lobbying by evangelical right-wing elements especially within the Church of England who feared that the new Archbishop of Canterbury would condone the appointment of a gay Bishop. My staff were recently granted access to the responses to the draft regulations of 16 religious organisations who campaigned for the insertion of such a provision. The wording they proposed

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<sup>20</sup> 17<sup>th</sup> June 2003, Hansard (HL), Vol. 649, cols785-94.

is almost identical to the language eventually adopted in Regulation 7 (3). It was clear from the responses that these organisations made no distinction between those employed in an evangelical or ministerial role and support staff such as secretaries, accountants or cleaners. I quote from the response of The Bible and Christian Heritage Centre:

The document, when it comes to the matter of sexual orientation is greatly flawed in respect of Christian teaching and morals, as no Christian Church or Organisation that holds to biblical principles and teaching would even consider employing a homosexual or lesbian *in any position whatsoever*. [My emphasis.]

The sixteen responses were vociferous in their support for a clause to allow dismissal to take place where a person is no longer of the same sexual orientation as when recruited. Despite Government assurances that this will not result, one can only imagine the 'witch hunt' amongst existing employees that Regulation 7 (3) may bring about.

The political influence wielded by religious organisations such as these is striking. The Free Church of Scotland, for example, threatened to “mobilise public opinion in a country-wide campaign to oppose the implementation of these regulations” if their proposals were not accepted. The Archbishop's Council of the Church of England went further and demanded the “opportunity for discussions at a very senior level of Government” if a satisfactory solution cannot be found.

On its face, Regulation 7 (3) applies not only to senior appointments but to any employment, provided that the other conditions are satisfied. It applies not only where religious doctrine requires such discrimination, but also to comply with strongly held religious convictions of a significant number – including a bigoted minority – of the religion's followers.

In its report to Parliament<sup>21</sup>, the Joint Select Committee on Statutory Instruments doubted the compatibility of this provision with the Directive, and also criticised the uncertainty created by the wording of Regulation 7 (3). I introduced a motion seeking to persuade the Government to withdraw the Regulations and to lay new Regulations that would comply with the Directive. I hoped and believed that, especially in the light of the Joint Select Committee's report, the Government would agree to this course. They refused to do so. During an important debate<sup>22</sup> there was near universal criticism of Regulation 7 (3) from all sides. The Bishop of Worcester made a particularly memorable speech in which he warned that phrases such as 'beliefs' and 'significant number' opened the door to

... some kinds of campaigning about which all of us would wish to be ashamed ... It is not only in religious communities that such campaigns can be mounted. In Worcester I watched the British National Party clothe itself in religion, precisely for the purpose of undertaking campaigns of that kind. Therefore, I find it extremely difficult to accept that we should be advancing, with the support

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<sup>21</sup> Twenty-first Report of Session 2002-03, HC Paper 116 (incorporating HL Paper 113)..

<sup>22</sup> 17<sup>th</sup> June 2003, Hansard (HL), Vol.649, cols. 751-85.

of religious communities, a regulation that includes such an open-ended licence for people to advance things that are not the doctrines of the Church and may not be the doctrines of any religion. Frankly, they are their own gut reactions, which they clothe in those doctrines because they believe that it will advance their cause. That concerns me very greatly indeed.

The Minister did his best to defend Regulation 7 (3), arguing (contrary to its language) that it contains what he described as “strict tests”<sup>23</sup>, and the Government whips overcame our opposition by 85 votes to 50. That was scarcely a famous victory, given the extent of the whipping. Very many Labour and other peers abstained or stayed away in dismay at what was happening. In my view, Regulation 7 (3) is as offensive in the message it conveys as was Section 28. That message cannot be altered by any Departmental guidance. I hope that Stonewall will campaign for its repeal with the same enthusiasm that it campaigned for the repeal of Section 28. I was pleased to read that, as I predicted during the debates, seven trade unions including Unison, Amicus and the Public and Commercial Services union are mounting a High Court challenge to Regulation 7 (3) as being both incompatible with human rights law and outside the scope of the EU Framework Directive<sup>24</sup>.

I also hope that Stonewall will join with other NGOs in the campaign for a single Equality Act of which we can at last be proud. It is unjust and unacceptable that victims of sexual orientation discrimination in housing, education, or the provision of goods, facilities and services, should continue to be denied legal protection, and that public authorities should have no positive duties to eliminate sexual orientation discrimination, on the lines of the positive duties contained in the Race Relations (Amendment) Act 2000. My Private Member’s Bill to implement the admirable Hepple report<sup>25</sup> was intended to show what is needed and what can be done. It was passed by the Lords<sup>26</sup> but has died in the Commons because of the Government’s refusal to give it Parliamentary time.

The mess made by the Blair administration of anti-discrimination legislation and the ham-fisted and narrow way in which this has been done recalls TS Eliot’s bleak poetry:

Shape without form, shade without colour,  
Paralysed force. Gesture without motion.<sup>27</sup>

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<sup>23</sup> See also his Written Answers of 17<sup>th</sup> June 2003, Hansard (HL), vol. 649, cols WA 93 and WA 94.

<sup>24</sup> Financial Times 'Unions mount court challenge' (26.9.03)

<sup>25</sup> Bob Hepple QC, Mary Coussey, Tufyal Choudhury, Equality: A New Framework. Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation (University of Centre for Public Law and the Judge Institute of Management Studies: Hart Publishing 2000).

<sup>26</sup> 28<sup>th</sup> February 2003, Hansard (HL), vol. 645, cols 525-594, 14<sup>th</sup> March 2003, Hansard (HL), vol. 645, cols 1631 - 1647, 5<sup>th</sup> April 2003, Hansard (HL), vol. 402, cols 1629 - 1636. For further information about the campaign for a single Equality Act see the website of the Odysseus Trust at [www.odysseustrust.org](http://www.odysseustrust.org).

<sup>27</sup> TS Eliot *The Hollow Men* (1925)..

We may ask, with Eliot,

What are the roots that clutch, what branches grow  
Out of this stony rubbish?<sup>28</sup>

Orwell's 'fairy story', *Animal Farm*, from which I took my title, aptly describes the 'Third Way' of promoting equality under law. In place of the commandment that "all animals are equal." What has been written in our statute book by Tony Blair's Government is Napoleon's distorted version of that commandment: "all animals are equal but some animals are more equal than others." Let us work together for legislation that provides equal protection and effective remedies for everyone.

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<sup>28</sup> TS Eliot, *The Wasteland* (1922).