CB(2)480/00-01(02)號文件

2000 年 12 月 12 日

敬啓者：

對於立法禁止性傾向歧視的意見書

民政事務局在提交立法會民政事務委員會的文件中，雖然開宗明義的指出政府反對任何形式的的性傾向歧視(第 2 段)，但是，其結論卻是反對制訂禁止性傾向歧視的平等機會法律。這意見書將在第一部分討論該文件羅列的反對立法論點及當中謬誤，並於第二部分列出現時香港涉及歧視的條例，第三部份會說明修訂現行法律的建議。

(一) 反對立法的觀點及誤解

- *立法禁止性傾向歧視等於「逆向歧視」(Reverse Discrimination)？*

民政事務局在文件中指出，教育及宗教人士認爲立法禁止性傾向歧視會產生「逆向歧視」(第 11 段)。這種意見清楚顯示出部分教育及宗教人士不了解「平等機會(法律)」的含意。禁止性傾向歧視的「平等機會法律」是要剷除基於性傾向的不平等對待，而不是要特別優待某一種性傾向(例如：同性愛、雙性愛及異性愛) -- 難道，現行的《性別歧視條例》會特別優待某一性別嗎？反歧視條例的《僱傭結實務守則》強調的不是「真正的職業資格」及「劃一甄選準則」嗎？

- *法律不是禁止歧視的有效工具？*

民政事務局又指出，社會一致支持以非法律手段禁止性傾向歧視(第 13 段)。不容否定，法律不是仙丹妙藥，通過一條反歧視條例，不會令社會的(性傾向)歧視現象在一剎那消失；但是如果政府真的願意落實反歧視政策的話，我們有何妨多製造一件支持弱勢社群的武器呢？

- *現時只有少數地區立法禁止性傾向歧視？*

民政事務局文件第 14 段又指出，現時只有少數地區立法禁止性傾向歧視。這亦顯示了民政事務局對反性傾向歧視法律的不了解。倫敦大學英皇學院的 Robert

Wintemute 副教授在 2000 年 12 月 9 日給予本人的文件中，詳細列明了 34 個地區 88 條反性傾向歧視的法律(請參見附件 1)。這亦証明了，香港可以借通過一條反性傾向歧視的法律，和其他經濟發達的地區同步看齊。

- *中國傳統是否反對同性愛/同性性行爲？*

有社會人仕指中國傳統反對同性愛/性行爲，所以政府不應在華人爲主的香港落實反性傾向歧視的法律。金耀基教授在《「有關同性戀行爲之法律研究」報告書》(香港法律改革委員，1983) 已清楚指出中國沒有歧視同性愛的傳統。金教授也認爲這是當代華人社會沒有懲罰肛交/同性愛者法律的原因 -- 中國內地於 1997 年已取消了《刑法》的「流氓罪」，而台灣於 1998 年通過的《家庭暴力防治法》亦適用於「同性伴侶暴力」。

(二) 香港其他含歧視成份的法律

香港涉及歧視的法律主要有以下三條：

- 《刑事罪行條例》(香港法律第 200 章) 第 118C 及 118D 條 -- 這兩條列明，肛交同意年齡(Age of Consent)爲 21 歲；這和陰道交的同意年齡(16 歲)不同。請注意：英格蘭下議院剛於 2000 年 12 月 1 日通過修訂法例，把肛交的同意年齡降至 16 歲(詳見附件 2)。

- 《刑事罪行條例》(香港法律第 200 章) 第 118 J 條 -- 這一條列明，任何男子與另一男子在公眾地方作出嚴重猥褻作爲，即屬犯罪，可處監禁 2 年。請注意：(a)女子不能此罪行的主犯，(b)而雙方「同意」不能成爲辯護理由。歐洲人權法庭(European Court of Human Rights) 於 2000 年 7 月 31 日裁定，英格蘭同樣的法律條文違反《歐洲人權公約》(European Convention on Human Rights)第 8 條(詳見附件 3)。

- 《婚姻條例》(香港法律第 181 章) 第 40(1)條 -- 這一條文列明，只有一女一男的婚姻，才會獲法律承認；亦即法律不會承認同性婚姻。這亦間接使同性伴侶無法受惠於公共房屋政策、人工生殖技術及《家庭暴力條例》。若果婚姻的基礎是自由戀愛的話，爲什麼法律不承認兩個同樣性別的人之伴侶關係呢(詳見 David Bradley (1996) *Family Law and Political Culture*)？

換言之，如果政府要完全消除性傾向歧視，以上三項法律條文實有修改的必要。

(三) 建議

綜觀而言，我有以下兩個建議：

- 通過《性傾向歧視條例》；或
- 將現行《性別歧視條例》中「性別」一詞的涵義擴大 -- 2000 年 9 月 28 日，蘇格蘭愛丁堡「勞資上訴審裁處」(Employment Appeals Tribunal) 於 MacDonald v. Ministry of Defence [2000] IRIR 748 一案中， 裁定《性別歧視法例》適用於涉及性傾向歧視的案件，並指英國皇家空軍非法辭退一名同性愛軍官(詳見附件 4)。我們可以研究將此案例引入香港 -- 修改現行的《性別歧視條例》，把「性別身份」(Sexual identity)收入「性別」(Sex)一詞的涵義之內。簡易之，如任何人因「性別身分」(譬如，同性愛者、雙性愛者及異性愛者)受到歧視，便可按修訂後的《性別歧視條例》提出起訴。
- 研究修訂《刑事罪行條例》及《婚姻條例》當中涉及歧視的條文。

此致香港立法會民政事務委員會

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附件 1

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9 December 2000

LIST OF INTERNATIONAL TREATIES AND LEGISLATION AND NATIONAL CONSTITUTIONS AND LEGISLATION PROHIBITING DISCRIMINATION BASED ON SEXUAL ORIENTATION[1] (OR AUTHORISING SUCH A PROHIBITION)

1. INTERNATIONAL TREATIES AND LEGISLATION

European Union

Treaty establishing the European Community, Rome, 25 March 1957, Article 13 (inserted as Article 6a by Article 2(7) of the Treaty of Amsterdam, 2 October 1997, and renumbered as Article 13 by Article 12(1) and the Annex of the Treaty of Amsterdam) ("sexual orientation") (in force on 1 May 1999)

Council Directive 2000/78/EC of 27 November 2000 (under Article 13 of the EC Treaty) establishing a general framework for equal treatment in employment and occupation, [2000] Official Journal, series L, issue 303, p. 16, http://europa.eu.int/eur-lex/en/oj/index-list.html ("sexual orientation") (must be implemented by 2 December 2003 in all 15 European Union member states, and especially in Austria, Belgium, Germany, Greece, Italy, Portugal and the United Kingdom, which do not currently have any such legislation)

2. NATIONAL (AND STATE) CONSTITUTIONS

Brazil

Mato Grosso - Constitution, 1989, Article 10.III ("*orientação sexual*")
Sergipe - Constitution, 1989, Article 3.II ("*orientação sexual*")

Ecuador - Constitution, 1998, Article 23(3) ("*orientación sexual*")

Fiji Islands - Constitution Amendment Act 1997, s. 38(2)(a) ("sexual orientation")

Germany

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[1] Or a similar or broader ground which is intended to cover sexual orientation (or same-sex sexual orientation). This Appendix is an updated version of Appendix II in Robert Wintemute, *Sexual Orientation and Human Rights: The United States Constitution, the European Convention, and the Canadian Charter* (Oxford University Press, paperback edition, 1997), at x-xi, 265-267. Sexual orientation or a similar or broader ground was added by the later amending law, where more than one is listed, unless otherwise indicated.

Berlin - Constitution, 1995, Article 10(2) ("*sexuelle Identität*")
Brandenburg - Constitution, 1992, Article 12(2) ("*sexuelle Identität*")
Thuringia - Constitution, 1993, Article 2(3) ("*sexuelle Orientierung*")

South Africa - Constitution of the Republic of South Africa Act, No. 200 of 1993, Section 8(2) (transitional Constitution) ("sexual orientation")
- Constitution of the Republic of South Africa, 8 May 1996 (as amended on 11 Oct. 1996), Sections 9(3), 9(4) (final Constitution) ("sexual orientation")

Switzerland - Federal Constitution, adopted on 18 April 1999, Article 8(2) ("*Lebensform*", "*mode de vie*", "*modo de vita*", or "way of life")

3. NATIONAL (AND STATE, PROVINCIAL, TERRITORIAL, LOCAL) LEGISLATION

Australia

Federal (Commonwealth) Level - Workplace Relations Act 1996, s. 170CK ("sexual preference", dismissal only)
Australian Capital Territory - Discrimination Act 1991, No. 81, s. 7(1)(b) ("sexuality")
New South Wales - Anti-Discrimination Act 1977, No. 48, as amended by Anti-Discrimination (Amendment) Act 1982, No. 142, s. 5, Schedule 2, Anti-Discrimination (Amendment) Act 1994, No. 28, s. 3, Schedule 4 ("homosexuality" added in 1982)
Northern Territory - Anti-Discrimination Act 1992, No. 80, s. 19(1)(c) ("sexuality")
Queensland - Anti-Discrimination Act 1991, No. 85, s. 7(1)(l) ("lawful sexual activity")
South Australia - Equal Opportunity Act, 1984, No. 95, ss. 5(1), 29(3), as amended by Equal Opportunity Amendment Act, 1989, No. 68, Schedule ("sexuality" included in 1984)
Tasmania - Anti-Discrimination Act 1998, No. 46, s. 16 ("sexual orientation" and "lawful sexual activity")
Victoria - Equal Opportunity Act 1995, No. 42, s. 6(d), as amended by Equal Opportunity (Gender Identity and Sexual Orientation) Act 2000, No. 52 ("lawful sexual activity", 1995; "sexual orientation", 2000)

Austria - see European Union Directive of 27 November 2000 above ("*sexuelle Ausrichtung*")

Belgium - see European Union Directive of 27 November 2000 above ("*seksuele geaardheid*" or "*orientation sexuelle*")

Canada

Federal Level - Canadian Human Rights Act, R.S.C. 1985, c. H-6, ss. 2, 3(1), as amended by S.C. 1996, c. 14 ("sexual orientation")
British Columbia - Human Rights Act, S.B.C. 1984, c. 22, ss. 3-6, 8-9, as amended by S.B.C. 1992, c. 43, ss. 2-7 ("sexual orientation")
Manitoba - Human Rights Code, S.M. 1987-88, c. 45, s. 9(2)(h) ("sexual orientation")

New Brunswick - Human Rights Act, R.S.N.B. 1973, c. H-11, as amended by S.N.B. 1992, c. 30, ss. 1-8 ("sexual orientation")

Newfoundland - Human Rights Code, R.S.N. 1990, c. H-14, ss. 6-9, 12, as amended by S.N. 1997, c. 18, s. 2 ("sexual orientation")
Nova Scotia - Human Rights Act, R.S.N.S. 1989, c. 214, s. 5(1)(n), as amended by S.N.S. 1991, c. 12, s. 1 ("sexual orientation")
Ontario - Human Rights Code, R.S.O. 1990, c. H.19, ss. 1-3, 5-6 ("sexual orientation" originally added by S.O. 1986, c. 64, s. 18)
Prince Edward Island - Human Rights Act, R.S.P.E.I. 1988, c. H-12, s. 1(1)(d), as amended by S.P.E.I. 1998, c. 92, s.1 ("sexual orientation")
Québec - *Charte des droits et libertés de la personne*, R.S.Q. c. C-12, s. 10 ("*orientation sexuelle*" originally added by S.Q. 1977, c. 6, s. 1)
Saskatchewan - Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1, ss. 9-19, 25, 47(1), as amended by S.S. 1993, c. 61, ss. 4-15, 18 ("sexual orientation")
Yukon Territory - Human Rights Act, S.Y.T. 1987, c. 3, ss. 6, 34 ("sexual orientation")

Denmark - Law of 9 June 1971, nr. 289, as amended by Law of 3 June 1987, nr. 357; extended to private employment by Law of 12 June 1996, nr. 459 ("*seksuelle orientering*" added in 1987)

Finland - Penal Code (as amended by Law 21.4.1995/578), c. 11, para. 9, c. 47, para. 3 ("*sukupuolinen suuntautuminen*" or "sexual orientation")

France - Nouveau Code pénal, arts. 225-1, 225-2, 226-19, 432-7; Code du travail, arts. L. 122-35, L. 122-45 (originally added by Loi No. 85-772, 25 July 1985, Loi No. 86-76, 17 January 1986) ("*moeurs*" or "morals, manners, customs, ways")

Germany

Federal Level - see European Union Directive of 27 November 2000 above ("*sexuelle Ausrichtung*")
Saxony-Anhalt - Gesetz zum Abbau von Benachteiligungen von Lesben und Schwulen (Law on Reducing Discrimination Against Lesbians and Gay Men), 22 Dec. 1997 (public sector only) ("*sexuelle Identität*")

Greece - see European Union Directive of 27 November 2000 above ("sexual orientation")

Iceland - General Penal Code, No. 19/1940, s. 180, as amended by Act No. 135/1996, s. 1, and Act No. 82/1998, s. 91 ("sexual orientation" added in 1996)

Ireland - Unfair Dismissals Act, 1977, No. 10, s. 6(2)(e), as amended by Unfair Dismissals (Amendment) Act, 1993, No. 22, s. 5(a); extended to other aspects of employment by Employment Equality Act, 1998, No. 21, s. 6(2)(d) ("sexual orientation" added in 1993)

Israel - Equal Opportunities in Employment Act 1988, as amended by Book of Laws, No. 1377 of 2 Jan. 1992 ("*neti'ya minit*" or "sexual orientation")

Italy - see European Union Directive of 27 November 2000 above ("*tendenze sessuali*")

Lithuania - Penal Code, art. 169 (adopted 26 Sept. 2000) ("*lytinës orientacijos*" or "sexual orientation")

Luxembourg - Code pénal, arts. 454-457, added by Law of 19 July 1997 ("*orientation sexuelle*" and "*moeurs*")

Mexico

Mexico City - Penal Code, art. 281 (in force on 1 Oct. 1999) ("*orientación sexual*")

Namibia - Labour Act, 1992, No. 6, s. 107 ("sexual orientation")

Netherlands - Penal Code, arts. 137f, 429 *quater* (inserted by Law of 14 Nov. 1991, Staatsblad 1991, nr. 623); General Equal Treatment Act, arts. 1, 5-7 (Law of 2 March 1994, Staatsblad 1994, nr. 230) ("*hetero- of homoseksuele gerichtheid*" or "hetero- or homosexual orientation")

New Zealand - Human Rights Act 1993, No. 82, s. 21(1)(m); New Zealand Bill of Rights Act 1990, No. 109, s. 19, as amended by Human Rights Act 1993, No. 82, ss. 21(1)(m), 145, Second Schedule ("sexual orientation")

Norway - Penal Code, para. 349a, Law of 8 May 1981, nr. 14 ("*homofile legning, leveform eller orientering*" or "homosexual inclination, lifestyle or orientation")

Portugal - see European Union Directive of 27 November 2000 above ("*orientação sexual*")

Romania - Ordinance on Preventing and Punishing All Forms of Discrimination, 31 August 2000 ("*orientarii sexuale*")

Slovenia - Penal Code (1 Jan. 1995), art. 141; Law About Work Relations (in force 24 Oct. 1998), art. 6 ("*spolni usmerjenosti*" or "sexual orientation" added in 1995)

South Africa - Labour Relations Act, 1995, No. 66, s. 187(1)(f) (dismissal); extended to other aspects of employment by Employment Equity Act, 1998, No. 55, s. 6 ("sexual orientation" added in 1995)

Spain - Penal Code, Organic Law of 23 Nov. 1995, No. 10/1995, arts. 314, 511-12 (see also arts. 22(4), 510, 515(5)) ("*orientación sexual*")

Sweden - Criminal Code, c. 16, para. 9, Law of 4 June 1987, SFS 1987:610 ("*homosexuell läggning*" or "homosexual inclination"); extended to employment by Law of 11 March 1999, SFS 1999:133 ("*sexuell läggning*" or "sexual inclination")

United Kingdom - see European Union Directive of 27 November 2000 above ("sexual orientation")

United States

California - Fair Employment and Housing Act, Government Code, ss. 12920-12921("sexual orientation" originally added to Labor Code in 1992)
Connecticut - Conn. Gen. Stat. ss. 4a-60a, 45a-726a, 46a-81b to 46a-81r ("sexual orientation" added in 1991)
District of Columbia - D.C. Code Ann. ss. 1-2501 to 1-2533 ("sexual orientation" originally added in 1973)
Hawaii - Haw. Rev. Stat. ss. 378-1, 378-2 ("sexual orientation" added in 1991)
Massachusetts - Mass. Gen. Laws Ann. ch. 151B, ss. 3, 4 ("sexual orientation" added in 1989)
Minnesota - Minn. Stat. Ann. ss. 363.01(45), 363.03 ("sexual orientation" added in 1993)
Nevada - Nev. Rev. Stat. (e.g.) s. 613.330 ("sexual orientation" added in 1999)
New Hampshire - N.H. Rev. Stat. Ann. (e.g.) ss. 21:49, 354-A:7, 354-A:10, 354-A:17 ("sexual orientation" added in 1997)
New Jersey - N.J. Rev. Stat. ss. 10:5-5.hh.-kk., 10:5-12 ("affectional or sexual orientation" added in 1991)
Rhode Island - R.I. Gen. Laws (e.g.) ss. 11-24-2 to 11-24-2.2, 28-5-2 to 28-5-7.3, 28-5-41, 34-37-1 to 34-37-5.4 ("sexual orientation" added in 1995)
Vermont - Vt. Stat. Ann. tit. 1, s. 143; tit. 21, s.495 ("sexual orientation" added in 1991)
Wisconsin - Wis. Stat. Ann. ss. 101.22, 111.31 to 111.36 ("sexual orientation" added in 1982)

Major U.S. cities with prohibitions of sexual orientation discrimination extending to private sector employment include Baltimore, Boston, Chicago, Cleveland, Denver, Detroit, Kansas City, Los Angeles, Minneapolis, New Orleans, New York, Philadelphia, Phoenix, Pittsburgh, Portland, Saint Louis, San Diego, San Francisco, Seattle, and Tampa. See http://www.hrc.org/issues/workplac/nd/ndjuris.html.

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Gay campaigners celebrate legal milestone

Government uses Parliament Act to push through sex at 16 legislation despite last-ditch protests

Sarah Hall
Guardian

Friday December 1, 2000

Gay 16-year-olds will be able to have sex without fear of prosecution for the first time after controversial plans to lower the homosexual age of consent from 18 to 16 were finally pushed through Parliament yesterday.

Despite a last-ditch attack by religious leaders, family values campaigners and Tory MPs, the government used the rarely-invoked Parliament Act to put the sexual offences (amendment) bill on to the statute books after it was consistently rejected by the Lords.

The move - which will see the measures become law after being given royal assent before December 6 - was acclaimed by gay rights groups celebrating the 100th anniversary of the death of Oscar Wilde as "a great step towards equality.

"When the history books come to be written, I believe it will be seen as the moment when this country finally began to change, when lesbians and gay men started to take our place as equal members of society," said Angela Mason, executive director of

Stonewall.

"This is a welcome and historic milestone in the long struggle for gay human rights," said OutRage!'s Peter Tatchell. "My only regret is that it has taken 33 years, during which time hundreds of gay men have been unjustly jailed for victimless relationships."

Yesterday's decision to invoke the Parliament Act - only used twice in the last 10 years - means that men and women will legally be able to have anal sex at 16. Before, buggery between 16 and 18, even if consensual, could invoke a five-year prison sentence.

The Sexual Offences (Amendment) Act also creates a new offence of "abuse of trust", ensuring teachers and workers in children's homes, hospitals and care homes can be jailed for up to five years if they sexually abuse a child in their care, although critics have argued too few adults in positions of trust are covered.

The reduction of the age of consent - while voted through with three massive majorities in the Commons - provoked fierce opposition on moral and health grounds, with religious leaders yesterday writing a protest letter to the Daily Telegraph, and peers twice throwing it out of the Lords.

Yesterday the family values campaigner Lady Young, who has spearheaded the opposition, accused the government of treating Parliament in "a completely dictatorial manner" by ignoring the views of peers and denying MPs the chance to debate an amendment approved by peers to keep the law for anal sex for both men and women at 18 but lower the age for other sexual practices to 16. She added that it was "constitutionally quite wrong" to invoke the Parliament Act for a bill which had not completed all its stages in both houses, and which was not a central piece of government legislation but "a matter of conscience".

A spokesman for the staunchly Catholic Commons Speaker Michael Martin - who, as the servant of the house, has no discretion over whether to invoke the act - insisted: "Everything that has happened was absolutely in order."

The Parliament Act allows the government to present a bill for royal assent if it has been rejected in the Lords in one parliamentary session and has not been approved by peers by the end of the second session.

The decision to force through the act came as MPs ended their longest parliamentary session since the 1930s. Sessions typically end in mid to late November, with the Queen's speech on November 24 last year.

The reason for the late date of December 6 is the number of bills held up by defeats in the Lords.

Left on the shelf

Bills not in the Queen's speech:

• A consumers bill intended to outlaw the sale of insurance products linked to mortgages.

• A bill regulating mercenaries is likely to be offered only in the form of a green paper.

• A home office bill designed to crack down on psychopaths and paedophiles has also been shelved.

• The department of trade may publish in draft form a bill licencing the arms export industry.

• The Treasury is also not likely to go ahead with a bill cracking down on banks.

附件 3

Euro Court Nixes British Gay Law

BELGIUM, Brussels (AP): The European Court of Human Rights ordered Britain to pay a homosexual man US$50,000 in costs and damages Monday for convicting him under legislation that outlaws gay group sex.

不必 The man's 1996 conviction was "interference with the applicant's right to respect for his private life" as guaranteed by the European Convention on Human Rights, ruled European judges in Strasbourg, France.

The man, identified by his initials, A.D.T., took his case to the European court after he was convicted of gross indecency for having sex with four other men during a party at his house.

Police found a video of the party during a search of the man's home.

A provision of Britain's Sexual Offenses Act, enacted in 1956, states that homosexual sex is illegal if more than two people take part or are present.

The legislation includes a number of laws applicable to homosexuals or heterosexuals, but the provision A.D.T. challenged applied only to homosexual males.

A panel of seven judges at the European court ruled unanimously that A.D.T.'s prosecution violated Article 8 of the European Convention on Human Rights, which safeguards respect for private life.

"The activities in the case were purely and genuinely private," the European court said.

The decision was hailed by gay-rights campaigners.

"This judgment drives a coach and horses through the gross indecency laws," said Angela Mason, executive director of Stonewall, a British gay rights group.

The European ruling increases pressure on the British government to scrap the law and replace it with new legislation that deals even-handedly with both "offensive heterosexual and homosexual behavior in public," Stonewall said in a statement.

The European Court of human rights was set up in 1950 to enforce the human rights convention, which has been signed by all 41 nations of the Council of Europe.

A.D.T. v. THE UNITED KINGDOM - 31-07-2000

(Associated Press 31 July 2000 - Paul Ames
by way of Graham Underhill)

Available at: http://www.gaylawnet.com/ [date: 10 Dec 2000]

[2000] IRLR 743

MacDONALD (appellant) v. MINISTRY OF DEFENCE (respondents)

600 *Sex discrimination*
611 *Direct discrimination*
618 *Sexual harassment*
619.1 *Discrimination on grounds of sexual orientation*
1700 *Human rights*
1732.1 *Rights and freedoms – respect for family and private life – private life*
1738 *Principle of non-discrimination*

Sex Discrimination Act 1975 sections: 1(1)(a), 6(2)(b)
European Convention on Human Rights and Fundamental Freedoms: Articles 8, 14
Human Rights Act 1998

The facts:
Mr MacDonald joined the armed forces in 1986 and was subsequently commissioned in the Royal Air Force. When he arranged for a transfer to the Scottish Air Traffic Control Centre (Military), he was subjected to vetting procedures during which he declared that he was homosexual. He also made that declaration to his commanding officer. This admission of homosexuality led to his compulsory termination in March 1997.

Mr MacDonald complained that the termination of his employment by reason of his admitted homosexuality amounted to unlawful discrimination on grounds of sex, and that the questioning to which he was subjected during the vetting process about his sexual activities amounted to sexual harassment.

An employment tribunal dismissed his complaint. The tribunal took the view that it was bound to find that the Sex Discrimination Act, insofar as it refers to "sex", is concerned with gender and not sexual orientation. Therefore, the termination of the applicant's employment did not fall within the scope of the Sex Discrimination Act. The tribunal considered that this conclusion was unaffected by the decision of the European Court of Human Rights in *Smith and Grady v United Kingdom*, in which the Court held that the applicants' right to respect for their private lives under Article 8 of the European Convention on Human Rights was violated by the investigations conducted into their homosexuality and by their discharge from the armed forces pursuant to the policy of the Ministry of Defence. The tribunal noted that the European Court of Justice had human rights issues before it when it considered *Grant v South-West Trains Ltd* and held that discrimination based on sexual orientation did not constitute discrimination based on sex.

The Employment Appeal Tribunal sitting in Edinburgh (Lord Johnston, Dr A H Bridge, Dr W M Speirs) in a reserved decision given on 25 September 2000 allowed the appeal and declared that the appellant was discriminated against on grounds of sex. The case was remitted to the employment tribunal for the assessment of compensation.

The EAT held:
619.1, 1738
The employment tribunal had erred in law in finding that the appellant's dismissal from the armed forces on grounds of his sexual orientation was not on grounds of "sex" within the meaning of the Sex Discrimination Act.

The word "sex" in the Sex Discrimination Act is ambiguous and should be interpreted to include "on grounds of sexual orientation" as well as meaning "gender".

Although the word "sex" has been clearly interpreted by the English courts as being restricted to a gender interpretation and not a sexual orientation interpretation, the opposite interpretation has been tion against a homosexual was contrary to the prohibition of discrimination in Article 14 of the Convention. These decisions have put the focus on an ambiguity in the word "sex" found in both the Sex Discrimination Act and the Convention, that it can refer to homosexuality in both men and women, as well as referring to gender. Since the European Court of Human Rights has expressly included sexual orientation in the definition of the word "sex" as found in the Convention, there is a classic example of a statutory ambiguity.

If United Kingdom domestic legislation is ambiguous in the context of a potential Convention right, the interpretation consistent with the Convention should be favoured. On that basis, the EAT would favour the wider interpretation. *Grant v South-West Trains Ltd* did not greatly influence that conclusion, since the European Court of Justice was then considering the issue of equal pay and not concerned directly with the definition of the word "sex".

Since the word "sex" is capable of including sexual orientation, the appropriate comparison for the purpose of the Sex Discrimination Act, if comparators are relevant, is between a male or female homosexual and a female or male heterosexual in order to determine not whether one homosexual is being treated less favourably than another, but whether homosexuals of either gender in the context are being treated less favourably than heterosexuals of the opposite gender.

In the present case, therefore, by reason of his dismissal on grounds of his sexual orientation, the appellant was discriminated against in terms of the Sex Discrimination Act.

618, 619.1
The employment tribunal also erred in finding that the correct comparator for the purpose of the appellant's claim of sexual harassment in respect of the way in which a vetting interview was conducted was with a female homosexual. The tribunal misdirected itself in not applying a wider definition which would have allowed the appellant's claim of sexual harassment on grounds of sexual orientation. Once it was appropriate to interpret the word "sex" as capable of including sexual orientation, the distinction was between how the employer treated a homosexual, be it male or female on the one hand and a heterosexual, be it female or male on the other.

The correct comparator in the present case was female heterosexual, and it was nothing to the point that the interviewer would have treated a lesbian female in exactly the same way as a homosexual male. Given the tribunal's findings as to the nature of the interview, the test which applied was that laid down in *Porcelli v Strathclyde Regional Council* which confirmed that if the nature of conduct is both sexually-related and blatantly unacceptable, there is no need for a comparator. On the facts as found therefore, the appellant was subjected to sexual harassment contrary to the Sex Discrimination Act.

Obiter dicta:
1700
It is not clear whether the Human Rights Act applies only to discriminatory acts committed after the operative date of 2 October 2000, or whether it also

Baker v State of Vermont, Vermont Supreme Court, 20 cember 1999
...own v Stott [2000] SLT 379 CS
Grant v South-West Traine Ltd, C-249/96 [1998] IRLR 206 ECJ
Murray v HM Advocate [2000] JC 102 CS
O'Neill v HM Advocate [1999] SLT 958 CS
Pearce v Governing Body of Mayfield Secondary School [2000] IRLR 548 EAT
Porcelli v Strathclyde Regional Council [1986] IRLR 134 CS
Reed and Bull Information Systems Ltd v Stedman [1999] IRLR 299 EAT
R v Director of Public Prosecutions ex parte Kebeline and others [1999] 4 All ER 801 HL
R v Ministry of Defence ex parte Smith [1996] IRLR 100 CA
R v Secretary of State for Defence, ex parte Perkins [1997] IRLR 297 HC
R v Secretary of State for Defence, ex parte Perkins (No.2) [1998] IRLR 508 HC
Salgueiro da Silva Mouta v Portugal, 33290/96, 21 December 1999 ECHR
Smith and Grady v United Kingdom [1999] IRLR 734 ECHR
Smith v Gardner Merchant Ltd [1998] IRLR 510 CA
T, Petitioner [1997] SLT 724 CS
Toonen v Australia [1994] IHRR 97
Vriend v Alberta [1998] 1 SCR 493 Canadian Supreme Court
Webb v EMO Air Cargo (UK) Ltd [1993] IRLR 27 EAT

Appearances:
For the Appellant:
AIDAN O'NEILL QC, instructed by Anderson Strathern
For the Respondents:
IAN TRUSCOTT QC, instructed by Robson MacLean WS

1 LORD JOHNSTON: This is an appeal at the instance of the applicant appellant against a decision of the employment tribunal in respect of his claim that he had been discriminated against unlawfully on grounds of sex, contrary to the Equal Treatment Directive 76/207/EEC and s.6 of the Sex Discrimination Act 1975 ('SDA'). He also had a consequent claim for sexual harassment which raises similar but separate issues. Both claims were dismissed.

2 The appellant is homosexual. He is 35 years of age and was commissioned initially in the Intelligence Corps (Territorial Army) in May 1986. He subsequently enlisted as an officer cadet in the Royal Air Force and was commissioned and subsequently promoted to various posts culminating in a period of service at RAF Aldergrove. He then arranged for a transfer to the Scottish Air Traffic Control Centre (Military) at Prestwick, largely for compassionate reasons to be closer to a relative who was ill. He realised this would involve certain vetting procedures, in the course of which he was asked to declare whether he was a homosexual, to which he agreed. He subsequently also made that declaration to his commanding officer. These declarations led eventually to his compulsory resignation under Queen's Reg. 2905, his last paid day of service being 27 March 1997.

3 He subsequently made a timeous application to the then industrial tribunal claiming discrimination on the grounds stated and sexual harassment and compensation, which came to a hearing in July and September 1999.

4 The tribunal made a number of findings of detailed fact, not least in relation to the interview conducted in the vetting process by a Wing Commander Leeds which was the basis of the claim for sexual harassment. In that latter respect there were some factual discrepancies disputed before us, the tribunal not being satisfied that the vigorous questioning by the officer in relation to the appellant's sexuality and its content was sexually motivated as far as the Wing Commander was concerned. It considered it was more part of what he perceived to be a strenuous vetting to the appellant. We put that matter aside for the tir being and turn to the real issue in the case.

5 It was not disputed that the appellant's employment in t Royal Air Force was terminated by reason of his admitt homosexuality, but the substance of the decision again him is that the SDA, in so far as it refers to the word 'se is concerned with gender and not sexual orientation. Tl admitted reason therefore for the termination of the appe lant's employment does not fall, in the view of the emplo ment tribunal, within the scope of discrimination envi aged by the 1975 legislation.

6 It has to be noted that the principal argument before th tribunal concerned whether or not, there being unce tainty in the law as to the proper definition or constru tion to put upon the word 'sex', in the 1975 Act, the tr bunal should make a reference to the European Court c Justice. It also has to be noted that, subsequent to th hearing but prior to the issue of the judgment, the Eurc pean Court of Human Rights in Strasbourg issued a judg ment best found as *Smith and Grady v United Kingdor* [1999] IRLR 734 in which it held that investigations by th Ministry of Defence into the homosexual orientation of th two appellants violated their human rights in terms o Article 8 of the European Convention on Human Rights The basic facts of this case and its sister case, *Lustig Prean and Beckett*, are indistinguishable from the presen case inasmuch that all four applicants in the Strasbour Court were maintaining violation of their human rights ir terms of the Convention by reason of being dismissed from the Services as a consequence of being homosexual, in terms of the policy then adopted by the Ministry o Defence which was to the effect that homosexuality is incompatible with service in the armed forces and that persons who were known to be homosexual and to engage in homosexual activity are administratively discharged from the armed forces. The European Court of Human Rights upheld their contention, with the result that subsequent to the hearing in this case before the tribunal below, for the first time the European Court of Human Rights has interpreted the Convention so as to protect the rights of homosexuals, albeit under the right to privacy.

7 The operative part of the tribunal's judgment in relation to this general question is to be found on p.22 of their decision as follows:

> 'The tribunal recognises that the decision of the European Court of Human Rights in *Smith and Grady* (and indeed the related case of *Lustig-Prean and Beckett* – Applications Nos 31417 and 32377/96) represent a significant landmark in the campaign of those seeking the elimination of the Services' policy on homosexuality. The tribunal understands that in the light of the rulings by the European Court of Human Rights the UK Government has suspended all action against homosexuals facing dismissal from the forces. Apart from any other consideration, the rulings will have particular significance in the United Kingdom when the Human Rights Act 1998 comes into force in October 2000. In the context of this case the rulings do no more than establish that the treatment of the applicants breached rights embodied in the Convention. Those rights existed prior to the rulings. They existed at the time of the ECJ decision in *Grant*. While therefore the tribunal recognises that the rulings of the European Court of Human Rights represent a significant advance in the overall cause of persons such as the applicant in the present case, it does not find that they advance in any way the argumen that the tribunal should make a reference of the kin which it is being asked to make.

In any event, the ECJ did have in consideratio "human rights issues" when it made the decision i *Grant*. As noted above, Mr O'Neill quoted at length fro the judgment of the ECJ in *Grant* in an effort to illus trate the extent to which the Court drew from the cas law of the European Court of Human Rights. In *Gran* ... before it, the Cour

"In the light of all the material in the case, the first question to answer is whether a condition in the regulations of an undertaking such as that in issue in the main proceedings constitutes discrimination based directly on the sex of the worker. If it does not, the next point to examine will be whether Community law requires that stable relationships between two persons of the same sex should be regarded by all employers as equivalent to marriages or stable relationships outside marriage between two persons of opposite sex. Finally, it will have to be considered whether discrimination based on sexual orientation constitutes discrimination based on the sex of the worker."

The passages (paragraphs 29–35, p.218) quoted by Mr O'Neill in his supplementary submissions represent the Court's observations on the second of the three questions identified by it in paragraph 24 of its judgment. It is the third of the three questions set out there which principally concerns this tribunal. The tribunal notes that when it came to deal with this question the ECJ recorded a submission made by Miss Grant that the Community provisions on equal treatment of men and women should be interpreted as covering discrimination based on sexual orientation. She referred the Court in particular to the International Covenant on Civil and Political Rights of 19 December 1966 (United Nations Treaty Series, vol. 999, p.171) in which, in the view of the Human Rights Committee established under Article 28 of the Covenant, the term 'sex' is to be taken as including sexual orientation. Having noted that submission the ECJ made these observations (paragraphs 44 and 45, p.219):

"The Covenant is one of the international instruments relating to the protection of human rights of which the Court takes account in applying the fundamental principles of Community law (see, for example, case 374/87 *Orkem v Commission* [1989] ECR 3283, paragraph 31, and joined cases C-297/88 and C-197/89 *Dzodzi v Belgian State* [1990] ECR I–3763, paragraph 68).

However, although respect for the fundamental rights, which forms an integral part of those general principles of law, is a condition of the legality of Community acts, those rights cannot in themselves, have the effect of extending the scope of the Treaty provisions beyond the competences of the Community (see inter alia, on the scope of Article 235 of the EC Treaty as regards respect for human rights, Opinion 2/94 [1996] ECR I–1759, paragraphs 34 and 35)."

It appears to the tribunal that what the Court said about fundamental rights being incapable in themselves of having the effect of extending the scope of the Treaty provisions beyond the competences of the Community effectively answers Mr O'Neill's argument on the "human rights issues". This ties in with what the ECJ said later in *Grant* about the provision in the Treaty of Amsterdam for the insertion into the EC Treaty of an article which will allow the council to take appropriate action to eliminate, among other forms of discrimination, discrimination based on sexual orientation. As Lightman J said in *Perkins No.2* (paragraph 10, p.510):

"It is a matter for the council to make this extension in Community rights, not the ECJ."

In short the tribunal finds itself in no different a position than Lightman J in *Perkins No.2* in dealing with the request that it should make a reference to the ECJ. Having reviewed the authorities and the detailed and careful arguments advanced by Mr O'Neill the tribunal finds that the answer to the question of construction which the proposed reference raises is so obvious as to leave no scope for reasonable doubt. The tribunal does not know whether, as suggested by Mr Truscott, a reference would be met by a letter from the Administrator of the ECJ inviting the tribunal to consider withdrawing the reference. The important point is that the tribunal has no reasons formulated in Mr O'Neill's supplementary submissions were it to address them. For that reason the tribunal has decided not to make the reference. Further it has decided that in the light of the authorities on the interpretation of both the Directive and the SDA the applicant's complaint of sex discrimination in respect of his enforced discharge from the Royal Air Force falls to be dismissed.'

8 That part of the judgment has to be looked at against the background of other decisions of the English court and of the European Court as follows:

R v Ministry of Defence ex parte Smith & Grady [1996] IRLR 100

R v Secretary of State for Defence ex parte Perkins [1997] IRLR 297

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9 With the exception of the latter case, these cases were all decisions of the English courts determining, irrespective of issues under the Convention, that the relevant discrimination as to sex in relation to EEC legislation, was that between male and female ie an issue of gender. Thus, it can be seen that the substance of the decision of the tribunal below in refusing a reference was that the matter had been clearly interpreted and an answer to a reference was obvious and that any claim for discrimination under the SDA or indeed the Equal Treatment Directive, was restricted to, or related to, discrimination as between a male and a female and not based on sexual orientation or persons of the same sex or because of their sexual orientation.

10 Although the tribunal below had knowledge of the existence of *Smith and Grady* before issuing its decision, it seems it did not appear to consider that such bore upon the content of it (see p.22 of the decision).

11 There are two other important issues. At the beginning of October 2000, the Human Rights Act 1998 comes into effect within the United Kingdom general law which requires, essentially, that courts should interpret United Kingdom legislation against the background of, and to be compatible with, the European Convention on Human Rights, and it is against that background that the Ministry of Defence changed their policy and abandoned their prohibition on homosexuality within the Services, notwithstanding the Act has yet to come into force. This tribunal however, is faced with the fact that very shortly after the issue of our judgment, the Convention will be incorporated into United Kingdom law generally, although it has been within the Scottish jurisdiction for over a year. This, it was submitted by Mr O'Neill on behalf of the appellant, was an important factor with regard to the future, inasmuch that he maintained that his client could not in the long term lose, albeit he was losing at the moment. Whatever may be the position under the Human Rights Act, however, we consider we must apply the law at the date of this hearing, which means that we cannot have regard to the possible effect on this case in due course of the Human Rights Act. There was an issue between the parties in this respect that the arrival of this Act will not in any event have any retrospective effect, which means that this particular application will be never be subject to it by reason of the fact that the alleged discriminatory act occurred before the Human Rights Act came into force. As will be seen, we offer no view upon this matter, since it need not be focused for our determination of the issues before us.

12 However, there is one other matter of some importance. We were informed that in *Salgueiro da Silva Mouta v Portugal*, an unreported case of the European Court of Human Rights dated 29 December 1999, that Court has ruled that sexual orientation is contrary to its own discriminatory provision, [illegible] Article 14 of the Convention

"In the light of all the material in the case, the first question to answer is whether a condition in the regulations of an undertaking such as that in issue in the main proceedings constitutes discrimination based directly on the sex of the worker. If it does not, the next point to examine will be whether Community law requires that stable relationships between two persons of the same sex should be regarded by all employers as equivalent to marriages or stable relationships outside marriage between two persons of opposite sex. Finally, it will have to be considered whether discrimination based on sexual orientation constitutes discrimination based on the sex of the worker."

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It appears to the tribunal that what the Court said about fundamental rights being incapable in themselves of having the effect of extending the scope of the Treaty provisions beyond the competences of the Community effectively answers Mr O'Neill's argument on the "human rights issues". This ties in with what the ECJ said later in *Grant* about the provision in the Treaty of Amsterdam for the insertion into the EC Treaty of an article which will allow the council to take appropriate action to eliminate, among other forms of discrimination, discrimination based on sexual orientation. As Lightman J said in *Perkins No.2* (paragraph 10, p.510):

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11 There are two other important issues. At the beginning of October 2000, the Human Rights Act 1998 comes into effect within the United Kingdom general law which requires, essentially, that courts should interpret United Kingdom legislation against the background of, and to be compatible with, the European Convention on Human Rights, and it is against that background that the Ministry of Defence changed their policy and abandoned their prohibition on homosexuality within the Services, notwithstanding the Act has yet to come into force. This tribunal however, is faced with the fact that very shortly after the issue of our judgment, the Convention will be incorporated into United Kingdom law generally, although it has been within the Scottish jurisdiction for over a year. This, it was submitted by Mr O'Neill on behalf of the appellant, was an important factor with regard to the future, inasmuch that he maintained that his client could not in the long term lose, albeit he was losing at the moment. Whatever may be the position under the Human Rights Act, however, we consider we must apply the law at the date of this hearing, which means that we cannot have regard to the possible effect on this case in due course of the Human Rights Act. There was an issue between the parties in this respect that the arrival of this Act will not in any event have any retrospective effect, which means that this particular application will be never be subject to it by reason of the fact that the alleged discriminatory act occurred before the Human Rights Act came into force. As will be seen, we offer no view upon this matter, since it need not be focused for our determination of the issues before us.

12 However, there is one other matter of some importance. We were informed that in *Salgueiro da Silva Mouta v Portugal*, an unreported case of the European Court of Human Rights dated 29 December 1999, that Court has ruled that sexual orientation is contrary to its own discriminatory provision, namely Article 14 of the Conven-

sarily be read as providing much support for the ambiguity position.

20 In *T, Petitioner*, Lord President Hope failed to find any ambiguity but quite clearly states that if he had done so in the relevant context he would have given effect to the provision favouring the Convention Right.

21 He states as follows:

> 'The amicus curiae suggested that, if we were unclear as to whether the provisions of the 1978 Act were intended to allow applications such as that made by the petitioner, we should consider whether regard should be had to the European Convention on Human Rights as an aid to the construction of the Act. As he pointed out, Lord Ross, in *Kaur v Lord Advocate* [1981] SLT at p.330, said that, as the Convention was not part of the municipal law of the United Kingdom, the court was not, so far as Scotland was concerned, entitled to have regard to the Convention either as an aid to construction or otherwise. That opinion was expressed after a careful review of the English authorities. These consisted largely of various dicta in the Court of Appeal, where the judges stated that, if there was any ambiguity in the United Kingdom statute, the court may look at and have regard to the Convention as an aid to construction. But Lord Ross said that he shared the view of Diplock LJ, as he then was, that the Convention was irrelevant in legal proceedings unless and until its provisions had been incorporated or given effect to in legislation. For my part, I think that, read as a whole and in context, Diplock LJ's remarks in *Salomon v Commissioners of Customs and Excise* [1967] 2 QB, at p.143, were not intended to indicate that the Convention could not be looked at in order to resolve an ambiguity. What he was saying was that the terms of the statute could not be departed from if they were clear and unambiguous. However that may be, Lord Ross's opinion, although widely quoted in the textbooks as still representing the law of Scotland on this matter, has been looking increasingly outdated in the light of subsequent developments, and in my opinion, with respect, it is time that it was expressly departed from.
>
> It is now clearly established as part of the law of England and Wales, as a result of decisions in the House of Lords, that in construing any provision in domestic legislation which is ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with the Convention, the courts will presume that Parliament intended to legislate in conformity with the Convention, not is conflict with it: see *R v Home Secretary ex parte Brind* per Lord Bridge of Harwich at [1991] 1 AC, pp.747H–748A. Similar views with regard to the relevance of the Convention were expressed by Lord Reid in *R v Miah* [1974] 1 WLR at p.694B–E, and by Lord Keith of Kinkel in *Derbyshire County Council v Times Newspapers Ltd* [1993] AC at pp.550D–551C. In *Anderson v HM Advocate* the opportunity was taken at [1996] SCCR, p.121; [1996] SLT, p.158, to refer to the Convention and to Lord Bridge's observations. But an opinion was reserved as to whether these observations were part of the law of Scotland also, as the court was not concerned with a matter of statutory interpretation in that case. It is however now an integral part of the general principles of European Community law that fundamental human rights must be protected, and that one of the sources to which regard may be made for an expression of these rights is international treaties for the protection of human rights on which Member States have collaborated or of which they are signatories: see *Stair Memorial Encyclopaedia*, vol. 10, 'European Community Law', para. 95. I consider that the drawing of a distinction between the law of Scotland and that of the rest of the United Kingdom on this matter can no longer be justified. In my opinion the courts in Scotland should apply the same presumption as that described by Lord Bridge, namely that, when legislation is found to be ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with the Convention, Parliament is to be presumed to have legislated in conformity with the Convention, not in conflict with it.'

22 619.1, 1738

> This seems to us to accord with common sense against a background of the general presumption that United Kingdom domestic law has been presumed to conform to the Convention ever since the United Kingdom Government became a signatory to the Convention and obviously before such time as the Human Rights Act enacted the Convention into the United Kingdom domestic law, (*T, Petitioner*, supra). The position seems to us to be compatible with the now accepted doctrine of ambiguity in relation to the construction of Parliamentary statutes where reference can be made to Parliamentary debates, background papers and the like to resolve the ambiguity by ascertaining the intention of Parliament. We consider the authorities entitle us to conclude at this point in time that if United Kingdom domestic legislation is ambiguous in the context of a potential Convention Right, the Convention may rule as between the two or more interpretations.

23 At the end of the day, Mr Truscott did not appear seriously to dispute this basic proposition, taking his stance on a determined position that there was no ambiguity in the interpretation of the word 'sex' both naturally and as focused by the Courts in the relevant decisions that he had referred to, not least *Smith v Gardner Merchant* and the recent decision of *Pearce*.

24 619.1, 1738

> We do not consider that the two recent decisions of the European Court of Human Rights and, in particular, the Portuguese case of *Salgueiro*, have created an ambiguity but rather that they have focused one in the relevant word 'sex' found both in the SDA and Article 14 of the Convention. Intrinsically, the *Oxford University Dictionary* (1989 edn) inter alia includes a definition under the word 'sex' of 'a third sex' which undoubtedly refers to homosexuality in both men and women. Since the word also can obviously mean 'gender' as interpreted by the English courts, an obvious ambiguity arises on the face of the record. Extrinsically, the European Court of Human Rights has now expressly included sexual orientation in the definition of the word 'sex', as found in their Convention; we consider there is the classic example of a statutory ambiguity before us from two competent authorities and we therefore consider we have a choice of interpretation.

25 619.1, 1738

> If this analysis is correct we have thereafter no hesitation in favouring the wider interpretation. The only case presented to us since the obvious change of circumstances created by the two recent European Court of Human Rights cases, is that of *Pearce*, which seems to have concentrated upon the existing state of the English law, and certainly there is no indication that the Convention cases were laid before the tribunal. In any event the substance of that case was dealing with comparators and applied *Smith v Gardner Merchant*, which in its terms is very clear.

26 In reaching our conclusion we have not been greatly influenced by the case of *Grant v South-West Trains* [1998] IRLR 188, since the European Court of Justice was then considering the issue of equal pay and not concerned directly with the definition of the word 'sex'.

27 619.1, 1738

> In our opinion, accordingly, on the present state of the law, stated at the date of the dissemination of this judgment, the word 'sex' in the SDA should be interpreted to include, 'on grounds of sexual orientation'. In reaching this conclusion, we admit no criticism of the tribunal below who were directed to the essential issue of the reference against

opinion, by the time the matter has reached us, matters have moved on.

28 619.1, 1738
Mr O'Neill had a supplementary position, that in any event, if the issue involved a comparator, the comparator should not be on a gender basis but on a sexual orientation basis. This position arose precisely in the same way as the main argument has done, inasmuch that it depended upon whether sexual orientation could be contemplated within the scope of the 1975 Act. Since we have determined this point, we would also agree with Mr O'Neill's position that if comparators are relevant, the issue is not as between a male and a female simpliciter but between a male or female homosexual and a female or male heterosexual in order to determine not whether one homosexual is being treated less favourably than another but whether homosexuals of either gender in the context are being treated less favourably than heterosexuals of the opposite gender, which is the true comparator in the context of sexual orientation as a consequence our definition of the word 'sex'.

29 That leaves us to deal with the issue of sexual harassment. This can be dealt with comparatively shortly since, although there are some factual disagreements, the essential complaint as set out by the tribunal was the way in which the interview was conducted with Wing Commander Leeds. The tribunal's essential decision is as follows:

'The applicant's complaint goes beyond the suggestion that Wing Commander Leeds gained his own sexual gratification from the interview. He complains of the intrusive nature of the questioning. He complains about being asked about those with whom he has had homosexual relations. He complains about being asked about his heterosexual activities. He complains about being asked about the history of his sexuality including questions about his schooldays. He complains about the way in which he was asked for details of his sexual activities. He complains about being asked repeatedly to name other service people with whom he has had sexual relations. He complains about being asked about the extent of his family's knowledge of his sexuality. All of this the applicant maintains amounted to sexual harassment. Whether or not Wing Commander Leeds's conduct in these respects should properly be classified as sexual harassment there were elements of his conduct which in *Smith and Grady* were found by the European Court of Human Rights to be violations of rights under Article 8 of the Convention. If there were violations of the applicant's Convention rights that is not something with which this tribunal has jurisdiction to deal.

Since for the reasons given above discrimination on the ground of sexual orientation does not constitute sexual discrimination for the purposes of either the SDA or the Directive, the applicant's complaint of sexual harassment can only succeed if he satisfies the tribunal in terms of s.1(1)(a) of the SDA that on the ground of his sex he has been treated less favourably than a woman would have been treated. Section 5(3) of the SDA provides that a comparison of the cases of persons of different sex under s.1(1) has to be such that 'the relevant circumstances' in both cases are the same or not materially different. Mr O'Neill contends that the appropriate comparator in a case like the present is a heterosexual woman. It is not appropriate to consider how a lesbian might be treated in comparison to a gay man because this involves changing the gender not only of the subject under consideration but also the gender of the object of his or her affection. That argument was considered by the Court of Appeal in *Smith v Gardner Merchant Ltd* which held that the appropriate comparator in such a case must be a female homosexual. In that case homosexuality was held to be 'the relevant circumstance' which had to be the same for the purpose of the comparative analysis required by s.5(3) of the SDA. The tribunal is bound by that decision.

relevant circumstances" in this case for the purposes o
s.5(3) it would be necessary to have regard to the con
text of the interview which Wing Commander Leed
conducted. It was a security vetting interview. It was
second interview specifically held for the purpos
rightly or wrongly, of confirming the applicant's sexu
orientation and seeking to ascertain the extent to whic
this had involved other service personnel. The tribun
had no doubt that, if he had been faced with a hom
sexual female officer who had undergone a similar inte
view to that which the applicant had with Mr Warne
Wing Commander Leeds would have conducted th
interview on very much the same lines. To do so wa
what he perceived to be his responsibility as a vettin
officer. On the basis of that conclusion the applicant
complaint of sexual harassment also falls to be di
missed.'

30 It will be immediately apparent that the tribun
approached the matter quite understandably in regard t
the position it had already reached on the main issue, tha
what was required was harassment as between a male an
female comparison on a gender basis, in the sense that
there had to be both that distinction and orientation, th
proper comparator was therefore a female homosexual.

31 618, 619.1
Generally, for the reasons we already discussed, we do n
consider that this is correct once it is appropriate to inte
pret the word 'sex' in the SDA as capable of including se
ual orientation. As soon as that is established, compa
isons with other homosexuals which in the male conte
have to be female are immaterial. The distinction must
between how the employer treated a homosexual, be
male or female on the one hand, and a heterosexual, be
female or male on the other. Thus in the case of a ma
one is looking for a female heterosexual comparator. Th
issue did not even factually arise in the present case. N
in our opinion, is it anything to the point that the inte
viewer would have treated a lesbian female in exactly t
same way as a homosexual male.

32 We are left with the slightly disturbing point as to t
extent to which the tribunal have concerns about t
applicant's credibility when it comes to his recollection
the nature of the interview but, given the case of *Reed a*
Bull Information Systems Ltd v Stedman [1999] IRLR 2
referred to by the tribunal, we do not consider any furth
investigation is relevant on this point, not least becau
given the tribunal's findings in fact as to the nature of t
interview, the test laid down in *Porcelli v Strathcly*
Regional Council [1986] IRLR 134 must apply, which c
firms that if the nature of the conduct is both sexua
related and blatantly unacceptable there is no need fo
comparator. Res ipsa loquitur. On the facts generally fou
proved by the tribunal, this is at least a possible interp
tation.

33 All this confirms to our mind that the tribunal misdirec
itself by not applying the wider definition which wo
have admitted the claim for sexual harassment on grou
of sexual orientation. Again, we emphasise no criticism
the tribunal below, for the reasons we have already giv

34 In these circumstances this appeal is allowed. Since
issues raised are questions of law we feel able to quash
decision simpliciter, find that, by reason of his dismi
from the armed forces on grounds of his sexual orientat
the appellant was discriminated against in terms of
SDA and that he is entitled to compensation in respec
that legislation. We also find on the facts generally fo
proved by the tribunal, that he was subjected to sex
harassment and is also entitled to compensation in
respect.

35 In these circumstances the case is remitted back to
employment tribunal to proceed as accords in relatio
the issues of compensation.