

VII. Misdirection – ‘being’ versus ‘choice’

92. The Government's elevation of the rights of gay men, lesbians and bisexual people over the rights of Christians (and those of other faiths) to manifest their religious beliefs is essentially based on a view that members of the gay, lesbian and bisexual community do not choose to be so but that Christians (and those of other faiths) do choose to have faith. In short, the Government appears to suggest that it is Christians' fault that they have certain beliefs and, therefore, those beliefs should not be protected. In this regard, paragraph 36 of Dr Mulligan's affidavit states that: 'Sexual orientation, like race or gender, is a state of being. It is not an option or a choice.'
93. The matter is not nearly so simple as Dr Mulligan suggests, however. A person chooses whether or not to engage in sexual activity regardless of whether the orientation is a 'state of being'. Moreover, there is strong support for the views (i) that sexual orientation is not a fixed trait; and (ii) that espousing the view that homosexual practice is wrong is not a choice.

VII.1 *Sexual orientation is not a fixed trait*

94. Peter Tatchell is one of the leading campaigners for the rights of gay men, lesbians, and bisexual people. He has described the gay gene theory as 'obviously a totally implausible theory'. He continues that 'it *is* a choice, and we should be glad it's that way and celebrate it for ourselves'. (See the article in The Observer, 25 April 1999, to a copy of which I now refer [CW2, tab 35])
95. A very recent OFMDFM discussion paper (12 January 2007) summarises the Scottish Executive's research by Sally McManus as criticising the concept of 'sexual orientation' for being 'deterministic and does not allow for change over time'. (CW2, tab 36, page 46). According to the McManus research 'Sexual orientation is also likely to be fluid, changing within an individual over time, and felt differently by different individuals'. Both the OFMDFM and the Scottish Executive raise this issue because of concern 'depending on definitions used, individual [sic] and groups may be excluded from research'. Some leading academics from or sympathetic to the bisexual, lesbian and gay community now agree, after seeing the results of major studies, that there can be 'true change in core sexual orientation'(CW2, tab 37, page 207).
96. There have been press and media reports of people whose sexuality has changed or is in the process of changing. These accounts illustrate that sexual orientation is not a fixed trait like race or biological sex.
- (i) The American writer Heather Dune Macadam became a lesbian after being hurt in a relationship with a man. She spent 18 years as a lesbian, including a relationship lasting 14 years. After splitting up with her long term partner, she fell in love with Simon Worrall, another writer. (See the article in The Observer, 11 June 2006, to a copy of which I now refer [CW2, tab 38])
 - (ii) Stephen Daldry, is a well known film producer (eg 'Billy Elliot') who has had homosexual relationships. He married in 2001 and now has a daughter. (See the articles in the Evening Standard, 22 November 2001 and The Sunday Times, 12 June 2005 to which I now refer [CW2, tab 39]).
 - (iii) David Akinsanya, a BBC journalist, who has been exclusively homosexual since the age of 19, has decided that after 24 years as a gay man he wants to become a heterosexual. He produced a BBC Panorama programme (shown on 10 August 2005) and interviewed people who claimed to be 'Ex-gay'. After the film was

made he said in an interview 'The whole journey I've been on has led me to think that sexuality can and does change over time. I can't necessarily force a change at the very moment I would like it to happen.' (See the article in the *The Independent* 8 August 2005 to which I now refer [CW2, tab 40]).

- (iv) Jazz singer George Melly has been married for over 40 years. He says that he was mainly gay as an adolescent, then bisexual in his twenties and thirties, but increasingly heterosexual in later life. (See the article in the *The Observer*, 17 July 2005 to which I now refer [CW2, tab 41]).

- 97. Many testimonies of people who were homosexual but have become heterosexual can be found from a brief search on the internet. The most prominent secular group, NARTH (National Association for Research and Therapy of Homosexuality), has psychiatrists, and psychologists amongst its clinical membership. Their website lists many accounts and studies. (See <http://www.narth.com/menus/interviews.html>). Christian groups such as *People Can Change* (http://www.peoplecanchange.com/About_Us.htm) and *Exodus International* (<http://exodus.to/content/view/417/180/>) have numerous examples on their websites of people who claim to have changed from being homosexual to heterosexual. See (CW2, tab 42)

VII.2 *The scientific evidence*

- 98. Likewise, the scientific evidence does not support the Government's statement. It is impossible to change your biological race or sex. (Although the Gender Recognition Act allows someone to assume an 'acquired gender', it accepts that birth sex cannot be changed; the Act simply sets out that a person must be treated as a member of the opposite sex 'for all purposes'.)
- 99. A single example of a homosexual person changing to become heterosexual would disprove the assertion the Government have made; but there are many examples of such 'reorientation' in real life, as witnessed by individual testimonies and academic research.
- 100. For example, a 2003 study at Columbia University found that homosexuals could become 'predominantly' heterosexual through psychotherapy. See Spitzer, RL, 'Can Some Gay Men and Lesbians Change Their Sexual Orientation? 200 Participants Reporting a Change from Homosexual to Heterosexual Orientation', *Archives of Sexual Behaviour*, 32 (5), October 2003, pages 403-417 provided at (CW2, tab 43). But no amount of psychotherapy can ever change a person's race. A majority of the 200 people in the study sample reported changes in sexual attraction, fantasy, and desire that are consistent with what would be expected if true changes from predominantly homosexual to predominantly heterosexual orientation had occurred.
- 101. The quite distinct changes in sexual practice, motivation and satisfaction uncovered in the study are enough to indicate that at least some of participants experienced sexual reorientation. See (CW2, tab 43, as above, page 411) At the outset of the study, 53% of the participants were having homosexual sex at least a few times a month. After reorientation therapy only 0.5% were. Sexual fantasies may be the best reflection of one's pattern of sexual attraction. Spitzer's research shows that opposite sex fantasies became increasingly common during therapy, whilst the frequency of same-sex fantasies was reduced. Of those participants who had regular heterosexual sex before and after the study, there was a marked increase in emotional satisfaction with heterosexual relationships (from 14% to 80% of participants) and in physical satisfaction with heterosexual sex (from 25% to 89%).

102. This study is significant because it was carried out by Professor Robert Spitzer, a psychiatrist with a long track record of supporting rights for gay men, lesbians and bisexuals. Dr Spitzer was instrumental in the 1973 decision of the American Psychiatric Association to remove homosexuality from its *Diagnostic and Statistical Manual of Mental Disorders*. He is still glad about the 1973 decision and has expressed clear support for 'gays in the military, and civil unions'. See (CW2, tab 44, page 335) Quoted by Drescher, J, 'An Interview with Robert L. Spitzer' in *Ex-Gay Research: Analysing the Spitzer Study and Its Relation to Science, Religion, Politics, and Culture*, Drescher J and Zucker, K J (Eds), The Haworth Press, 2006, pages 323-339.
103. Unsurprisingly given the highly politicised nature of the debate, the Spitzer study has been subjected to extensive critical analysis. However, academics sympathetic to homosexual rights have examined it and concluded that there can be 'true change in core sexual orientation'. See Wakefield, JC, 'Sexual Reorientation Therapy: Is It Ever Ethical? Can It Ever Change Sexual Orientation?' in *Ex-Gay Research: Analysing the Spitzer Study and Its Relation to Science, Religion, Politics, and Culture*, Drescher J and Zucker, K J (Eds), The Haworth Press, 2006, provided at (CW2, tab 37, page 207).
104. Sexual reorientation was also found to have occurred in Shidlo and Schroeder's 2002 study, which was critical of reorientation therapy. See Ariel Shidlo and Michael Schroeder, 'Changing Sexual Orientation: A Consumers' Report', *Professional Psychology: Research and Practice*, Vol. 33, No. 3, 2002, pages 249-59 provided at (CW2, tab 45) Of their sample, 26 reported perceiving themselves as having successfully completed sexual orientation conversion therapy. See (CW2, tab 45, page 253).. Of these, 8 were considered to have experienced a successful heterosexual shift. The remaining 18 were categorised as either 'successful and struggling' (12) or 'successful and not struggling' (6). Those who had experienced a successful heterosexual shift fulfilled a strict range of criteria: they rated 3 or less on a modified 7-point Kinsey scale of sexual desire, self-labelled as heterosexual, reported heterosexual sexual behaviour, denied homosexual sexual behaviour, and were involved in a heterosexual intimate primary relationship.
105. A number of American psychiatrists have written about how they seek to help individuals who wish to change their sexual orientation. Dr Charles Socarides, states:

"Over the past 30 years, I have had a success rate of about 35 per cent. By success, I mean I've been able to help a homosexual become heterosexual. That is, able to have complete, satisfactory sex with a woman *and* develop the capacity to really love her." See Charles Socarides, *Homosexuality. A Freedom Too Far*, Adam Margrave Books, 1995 (CW2, tab 46, page 149)

Dr Jeffrey Satinover, states:

'The simple truth is that, like most methods in psychiatry and psychotherapy, the treatment of homosexuality has evolved out of eighty years of clinical experience, demonstrating approximately the same degree of success as, for example, the psychotherapy of depression.' See Jeffrey Satinover, *Homosexuality and the Politics of Truth*, Baker Books, 1996 (CW2, tab 47, pages 179-180):

'Note that the composite of these results [a set of 9 studies of psychotherapy and psychoanalysis over 3 decades] gives an overall success rate of over 50 percent – where success is defined as 'considerable' to 'complete' change. These reports clearly contradict claims that change is flatly impossible. Indeed, it would be more accurate to say that *all the existing evidence suggests strongly that homosexuality is quite changeable*' (Emphasis his.) See Jeffrey Satinover,

Homosexuality and the Politics of Truth, Baker Books, 1996 (CW2, tab 48, page 186):

106. Whilst recognising the difficulties inherent in the research of sexual reorientation, the weight of evidence shows the possibility of sexual reorientation. On this ground alone the comparison of sexual orientation to race or gender is a false one.
107. The authors of the largest survey of sexual attitudes and lifestyles ever carried out in Britain noted that their findings included '...a large number of respondents for whom the [homosexual] experience was a single, possibly youthful and experimental, occurrence and for whom homosexual inclination was not a lasting orientation.' See Wellings K et al, *Sexual Behaviour in Britain*, Penguin, 1994, provided at (CW2, tab 49, page 214). They clearly accepted that sexual orientation can change.

VII.3 The genetic argument

108. The analogy of sexual orientation to race and sex is also mistaken on genetic grounds. Both race and sex are determined by genes. Identical twins have identical genes. If one identical twin is black, the other also is black. If one identical twin is female, then the other also is female. But this is not the case with sexual orientation. If it were, identical twins (monozygotes) would always have the same sexual orientation because they have identical genes. A study of 1000 monozygotal twins in Australia found that only 20% of males and 24% of females who had a homosexual twin were themselves homosexual. See J Michael Bailey, Michael P Dunne and Nicholas G Martin, 'Genetic and Environmental Influences on Sexual Orientation and Its Correlates in an Australian Twin Sample', *Journal of Personality and Social Psychology*, 78 (3), March 2000, provided at (CW2, tab 50, page 533). If homosexuality was genetically fixed and determined, 100% of those who had a homosexual twin would be gay.
109. If sexual orientation is not the construct of genetics alone then the analogy with race or sex is a false one.

VII.4 The religious view that homosexual practice is wrong may not be a choice

110. On the other hand, it is also not so simple to suggest that a belief that homosexual practice is wrong is a choice. There are many Christians who, for a number of reasons, find this tenet of Christian doctrine presents them with difficulties but believe it nonetheless. In some cases, this is because the Christian experiences same-sex attraction and, by adhering to the belief that homosexual practice is wrong, must accept a life of celibacy. In other cases this is because of the hostility they experience towards their Christian faith from others around them.
111. Nevertheless, Christians holding to the religious view identified in the first affidavit believe that if one is compelled to Christian faith, one is compelled to accept the tenets of that faith (as expressed authoritatively in Scripture) and cannot simply pick and choose between those aspects of faith or doctrinal imperative which are convenient or popular. Leaving aside the doctrinal debate on predestination and election, it suffices here to say that it is a gross over-simplification to say that Christians merely 'choose' to view homosexual practice as sinful.
112. These Christians hold, preach and explain their belief that the Bible clearly teaches that the only context for sexual activity is within lifelong monogamous marriage, meaning that fornication, adultery and homosexual practice are wrong. It is not that they oppose

lesbian, gay and bisexual people as people – nor do they have any desire to be so considered or perceived. All Christians are under a moral duty to love them, and all our neighbours. This rules out any personal hatred or any unloving conduct towards them. Nonetheless, they believe that homosexual practice is wrong and are compelled by belief in Scripture to hold to that view.

113. These Christians make a fundamental distinction between temptation and sin. It is not morally wrong to experience sexual attraction for the same sex, whereas acting upon that temptation is.
114. In brief compass, the fundamental complaint is that the Regulations will ensure that (short of withdrawal from the provision of goods and services) there will be occasions when those holding to Christian beliefs previously identified have to get involved in the promotion of practices believed to be sinful.

VII.5 No distinction in law

115. Irrespective of the issues raised above, the distinction between discrimination on the grounds of sexual orientation (as 'being') and on the grounds of religious belief (as 'choice') is completely without foundation in law, particularly having regard to the relevant European Community provisions. It appears from paragraph 36 of Dr Mulligan's affidavit that the executive, in drafting the Regulations, purported to treat discrimination on the grounds of sexual orientation in a manner different from discrimination on the grounds of religion. Such an approach, however, is not supported by the primary legislation and is also inconsistent with Council Directive 2000/78/EC of 27 November 2000 which provided a general framework for equal treatment in employment and occupation.