

GUIDANCE ON NEW ANTI-DISCRIMINATION LEGISLATION ON SEXUAL ORIENTATION AND RELIGION

On 1st and 2nd December 2003 two important new pieces of anti-discrimination law come into force, prohibiting discrimination on grounds of sexual orientation and religion respectively. The new laws have similarities with other pieces of existing discrimination legislation, such as that dealing with sex, age and race, but there are important differences in the new law for Church organisations. The laws will also require Church organisations to think about Church teaching on sexual conduct in the context of national legislation and to re-examine any presumptions about the need for certain types of post or role to be performed by any Catholics to ensure they remain valid.

Belief in the equality and dignity of every human being is fundamental to the Catholic faith and Catholic Voluntary Aided Schools and Colleges will wish to ensure that they comply with the new laws for that reason. These areas of life are politically sensitive and emotive however, and Governing Bodies, Headteachers and Principals must secure that their institutions always comply with the letter as well as the spirit of the law to prevent potentially damaging (to the claimant as well as to the institution and the parish community) and unnecessary challenges. Help and support will be available in every diocese to assist schools to audit their practices and make any changes that are needed in addition to this guidance.

A summary of key areas of the new law follows, together with brief notes highlighting points of particular interest. These should be read in conjunction with Guidance for Governing Bodies and Headteachers on Issues to Consider on the Appointment and Dismissal of Staff to be published by the Catholic Education Service at the end of November 2003. The Bishops' Conference of England and Wales is also expected to publish guidelines on equality and diversity in Church organisations in 2004.

The Employment Equality (Sexual Orientation) Regulations 2003¹

The Regulations apply to England and Wales and come into force on 1st December 2003. School and College practice must therefore comply with the Regulations from that date.

Sexual orientation is defined as a sexual orientation towards persons of the same sex, persons of the opposite sex or persons of the same sex and of the opposite sex. In other words "sexual orientation" includes heterosexuality, homosexuality and bisexuality. The law does not distinguish between sexual orientation and sexual conduct in the way that the Church does.

There are four categories of unlawful behaviour under the Regulations:

- Direct discrimination
- Indirect discrimination
- Victimisation

¹ S.I. 2003/1661

- Harassment

Direct discrimination

Direct discrimination will occur where a person ("A") discriminates against another person ("B") if:

A treats B less favourably than he treats or would treat other persons on grounds of sexual orientation.

Indirect discrimination

A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same sexual orientation as B, but

- (i) which puts or would put persons of the same sexual orientation as B at a particular disadvantage when compared to other persons,
- (ii) which puts B at that disadvantage, and
- (iii) which A cannot show to be a proportionate means of achieving a legitimate aim.

NB this is a three-stage test - each test must be met in order for discrimination to occur. When comparing B with another person, the relevant circumstances must be the same and not materially different. If potentially discriminatory action is being considered for any reason, advice should be taken from your diocesan advisers on the proper comparator and the lawfulness of the proposed course of action. Potentially discriminatory action should be very rare.

An example of indirect discrimination would be a requirement that all new teachers at a school be married. Such a requirement would place an unmarried homosexual, or bisexual applicant for a teaching post at a disadvantage as far fewer people with an orientation towards people of the same sex or both sexes will marry someone of the opposite sex than those with an orientation towards people of the opposite sex. A school would be extremely unlikely to demonstrate that such a requirement was "a proportionate means of achieving a legitimate aim" and the defence would therefore fail.

Victimisation

Victimisation occurs when B (the claimant or person suffering discrimination) seeks to or is believed to seek to enforce certain statutory rights. In particular, A (the employer or employer's agent) will discriminate against B if he treats B less favourably than he treats or would treat other persons in the same circumstances and does so because B has:

- (i) brought proceedings against A or any other person under these Regulations;

(E.g. because B, a bisexual teacher who has been turned down for a promotion, has brought a claim for direct discrimination against A, the Governing Body)

- (ii) given evidence or information in connection with proceedings brought by any person against A or any other person under these Regulations;

(E.g. because B, a teacher at A's school, has given evidence in support of claim of direct discrimination on grounds of sexual orientation by C, a homosexual teacher at the school where she, B, used to work, against her former employers)

- (iii) otherwise done anything under or by reference to these Regulations in relation to A or any other person;

(E.g. because B, a teacher at A's school, has advised a colleague, C, that she believes A is discriminating against, about his rights under the Regulations and is encouraging him to seek legal advice with a view to bringing a claim against A);

- (iv) alleged that A or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of these Regulations;

(E.g. because B, a classroom assistant at A's school, has written to the Chair of Governors alleging that she has been treated less favourably than other classroom assistants because she has not been offered the chance to attend an awareness session on becoming a Higher Level Teaching Assistant, unlike the others, and alleging that she has been omitted because she lives with her same sex partner);

or

- (v) because A knows that B intends to do any of the things above **or** suspects that B has done **or** intends to do any of them.

(E.g. because A suspects that B, an unmarried teacher, has consulted a lawyer about his rights under the Regulations).

NB The provisions above do not apply to treatment of B by reason of any allegation made by him, or evidence or information given by him, if the allegation, evidence or information was false and not made (or, as the case may be, given) in good faith.

Harassment

Harassment occurs where a person, A, subjects another person, B, because of B's sexual orientation to unwanted conduct which has the effect of

- (i) violating B's dignity; or
- (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

NB In determining whether conduct has had the effect described in (i) or (ii) the Employment Tribunal must have regard to all the circumstances surrounding the incident or series of incidents, "including in particular the perception of B" and consider in the light of all those circumstances whether the conduct should reasonably be considered as having that effect. The test for harassment therefore has both a subjective element (B's perception) and an objective element (whether to consider the conduct as, for instance, humiliating, is reasonable). Particular regard must be had however to B's perception and it is unlikely to be a defence that B is sensitive.

The broad ranging nature of harassment and the difficulty of knowing in every case how another person feels makes this category of discrimination particularly important. Jokes, misplaced concern, inquisitive questioning about a person's private life or the expression of intolerant views towards persons of a particular sexual orientation could all constitute harassment.

Situations to which the Regulations Apply

The Regulations govern conduct in or connected with the workplace. Discrimination against existing employees or applicants for jobs on grounds of sexual orientation will therefore be prohibited. This includes discrimination:

- in the arrangements an employer makes for the purpose of determining to whom he should offer employment;
- in the terms on which he offers a person employment; or
- by refusing to offer, or deliberately not offering, a person employment;
- in the terms of employment which an employer affords a person;
- in the opportunities which an employer affords a person for promotion, a transfer, training or receiving any other benefit;
- by refusing to afford a person, or deliberately not affording him, any such opportunity; or
- by dismissing a person on grounds of sexual orientation or subjecting that person to any other detriment (**NB this includes both failure to renew a fixed term contract on grounds of sexual orientation and constructive dismissal**).

It is also unlawful for an employer to subject any employee or applicant to harassment.

Exception for Genuine Occupational Requirement

In some cases, an employer will need a person of a particular sexual orientation to perform a particular role. For instance, a charity working with young lesbian women who have suffered abuse within their families might argue that there is a "genuine occupational requirement" that counsellors in their organisation be lesbian. The law provides for this type of circumstance. By contrast, the Church views persons of every sexual orientation as equal before God and does not reserve any position for persons of a particular sexual orientation. It does however have clear teaching on sexual conduct, which applies to all Catholics.

The Regulations provide for Church employers, where employment is *for the purposes of an organised religion*, to apply certain requirements related to sexual orientation. The text of this very limited exemption contained in Regulation 7(3) is set out in full:

"This paragraph applies where

- (a) the employment is for the purposes of an organised religion;*
- (b) the employer applies a requirement related to sexual orientation*
 - (i) so as to comply with the doctrines of the religion, or*
 - (ii) because of the employment and the context in which it is carried out, so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers; and*
- (c) either*
 - (i) the person to whom the requirement is applied does not meet it, or*
 - (ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it."*

NB it is arguable whether, notwithstanding a Catholic Voluntary Aided school's right to give preference to Catholic teachers, teaching in such a school is "employment for the purposes of an organised religion". We believe arguments in favour of such a contention are stronger in relation to certain posts, including chaplain, headteacher and teacher of religious education and advice should always be taken from your Diocesan Director of Education before seeking to rely on this provision.

Sixth Form Colleges

The 16 Catholic Sixth Form Colleges that are deemed further education institutions are also specifically subject to Regulation 20. This states that such a college must not discriminate on grounds of sexual orientation against students or applicants for places:

- in the terms on which it offers to admit;
- by refusing or deliberately not accepting an application for admission;
- in the way it affords access to any benefits;
- by refusing or deliberately not affording access to any benefits, or
- by excluding from the institution or subjecting to any other detriment.

It is also unlawful for a governing body to harass an applicant or student.

The Employment Equality (Religion or Belief) Regulations 2003²

These Regulations apply to England and Wales and come into force on 2nd December. They are drafted in very similar terms to the Sexual Orientation Regulations.

"Religion or belief" in the context of the Regulations means any religion, religious belief or similar philosophical belief.

The categories of unlawful behaviour under the Regulations are the same as under the Sexual Orientation Regulations, namely:

- Direct discrimination
- Indirect discrimination
- Victimisation
- Harassment

The definitions are given below, with material differences to the Sexual Orientation Regulations highlighted, but readers are also advised to review the commentary which accompanies the notes on the Sexual Orientation Regulations. As this Guidance explains on Page 9, Catholic organisations will remain able to give preference to Catholics in some circumstances.

Direct discrimination

Direct discrimination will occur where a person ("A") discriminates against another person ("B") if:

A treats B less favourably than he treats or would treat other persons on grounds of religion or belief.

NB This reference to religion or belief does not include A's religion or belief.

Indirect discrimination

A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same religion or belief as B, but

² S.I. 2003/1660

- (i) which puts or would put persons of the same religion or belief as B at a particular disadvantage when compared to other persons,
- (ii) which puts B at that disadvantage, and
- (iii) which A cannot show to be a proportionate means of achieving a legitimate aim.

NB A comparison of B's case with that of another person under paragraph (1) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

Victimisation

Victimisation occurs when B (the claimant or person suffering discrimination) seeks to or is believed to seek to enforce certain statutory rights. In particular, A (the employer or employer's agent) will discriminate against B if he treats B less favourably than he treats or would treat other persons in the same circumstances and does so because B has:

- (i) brought proceedings against A or any other person under these Regulations;
- (ii) given evidence or information in connection with proceedings brought by any person against A or any other person under these Regulations;
- (iii) otherwise done anything under or by reference to these Regulations in relation to A or any other person;
- (iv) alleged that A or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of these Regulations;

or

- (v) because A knows that B intends to do any of the things above **or** suspects that B has done **or** intends to do any of them.

NB The provisions above do not apply to treatment of B by reason of any allegation made by him, or evidence or information given by him, if the allegation, evidence or information was false and not made (or, as the case may be, given) in good faith.

Harassment

Harassment occurs where a person, A, subjects another person, B, on grounds of religion or belief, to unwanted conduct which has the effect of

- (i) violating B's dignity; or

- (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

NB As in the Sexual Orientation Regulations, conduct shall only be regarded as having the effect specified above if, having regard to all the circumstances, *including in particular the perception of B*, it should reasonably be considered as having that effect. (See note above).

Situations to which the Regulations Apply

The Regulations govern conduct in or connected with the workplace. Discrimination against existing employees or applicants for jobs on grounds of religion or belief will therefore be prohibited. This includes discrimination:

- in the arrangements an employer makes for the purpose of determining to whom he should offer employment;
- in the terms on which he offers a person employment; or
- by refusing to offer, or deliberately not offering, a person employment;
- in the terms of employment which an employer affords a person;
- in the opportunities which an employer affords a person for promotion, a transfer, training or receiving any other benefit;
- by refusing to afford a person, or deliberately not affording him, any such opportunity; or
- by dismissing a person on religion or belief or subjecting that person to any other detriment (**NB this includes both failure to renew a fixed term contract on grounds of religion or belief and constructive dismissal**).

It is also unlawful for an employer to subject any employee or applicant to harassment.

NB The Regulations do not diminish the rights of a Governing Body under section 60(5) School Standards and Framework Act 1998 to give preference, in connection with the appointment, remuneration or promotion of teachers at the school, to persons who -

- (i) whose religious opinions are in accordance with the tenets of the religion or religious denomination of the school, or
- (ii) who attend religious worship in accordance with those tenets, or
- (iii) who give, or are willing to give, religious education at the school in accordance with those tenets.

Similarly, regard may continue to be had, in accordance with section 60(5)(b), in connection with the termination of the employment of any teacher at the school, to any conduct on his part which is incompatible with the precepts, or with the upholding of the tenets, of the religion or religious denomination of the school.

Exception for Genuine Occupational Requirement

There are likely to be circumstances in which it is a genuine occupational requirement that a post be filled by a Catholic - for instance, a school chaplain - and the Regulations make specific provision for those employers who have an ethos based on religion or belief. Catholic Voluntary Aided schools fall within this definition. Regulation 7(3) states:

"This paragraph applies where an employer has an ethos based on religion or belief and, having regard to that ethos and to the nature of the employment or the context in which it is carried out -

- (a) being of a particular religion or belief is a genuine occupational requirement for the job;*
- (b) it is proportionate to apply that requirement in the particular case; and*
- (c) either -*
 - (i) the person to whom that requirement is applied does not meet it, or*
 - (ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it."*

NB The categories of posts in a Catholic school or college for which it is a genuine occupational requirement that the post holder be Catholic will become more clear in time. They are likely to include leadership posts, RE posts, chaplaincy positions and roles with a strong pastoral and spiritual element. Advice should be sought from diocesan advisers before seeking to rely on this provision.

Catholic Sixth Form Colleges

In addition, the 16 Catholic sixth form colleges deemed to be further education institutions are also required to comply with Regulation 20, which prohibits discrimination on grounds of religion or belief against students or applicants for places in very similar terms to Regulation 20 of the Sexual Orientation Regulations. At the time of writing, Regulation 20(1)(b), which prohibits giving preference to Catholics on admission, is under review by the Government. Once a student has been admitted to a college unlawful conduct on grounds of religion or belief is prohibited. Harassment of students and applicants is also prohibited.

Burden of Proof in the Event of a Claim

In the event that a claim of discrimination on grounds of religion or belief or sexual orientation is brought against a Governing Body, the burden of proof will rest with the Governing Body to prove that it did not commit, or as the case may be, is not to be treated as having committed, the act or omission giving rise to the claim. As with all potential litigation, both diocesan and LEA advisers should be notified at the earliest opportunity if it appears that there is a risk a claim may develop.

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