

A guide for employers
and employees



sexual orientation and the workplace

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Sexual orientation and the workplace

*Putting the Employment Equality (Sexual Orientation)
Regulations 2003 into practice*

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Introduction

From 1 December 2003, when the Employment Equality (Sexual Orientation) Regulations came into force, it became unlawful to discriminate against workers because of sexual orientation. The Regulations also cover providers of vocational training. This booklet describes the Regulations and gives guidance on associated good employment practice. It takes account of the Civil Partnership Act 2004 (in force from 5 December 2005) and the connected amendments to the Employment Equality (Sexual Orientation) Regulations.

Fairness at work and good job performance go hand in hand. Tackling discrimination helps to attract, motivate and retain staff and enhances an organisation's reputation as an employer. Eliminating discrimination helps everyone to have an equal opportunity to work and to develop their skills.

Existing legislation protects people against discrimination on the grounds of sex, race, disability and gender reassignment. From 2 December 2003, separate Regulations to protect people from discrimination on the grounds of religion or belief also came into force.

A lot of the good practice in this booklet will be familiar from existing advice on avoiding sex, race and disability discrimination. The Regulations should pose few difficulties in organisations where people are treated fairly and with consideration.

Employers are encouraged to consider whether their policies and procedures respect the sensitivity of the individual's sexual orientation and the importance of maintaining a high level of confidentiality. Workers of all sexual orientations should feel welcome and safe in their workplace and the dignity of all should be respected.

What the regulations say – in summary

These Regulations apply to all employment and vocational training and include recruitment, terms and conditions, promotions, transfers, dismissals and training. They make it unlawful on the grounds of sexual orientation to:

- discriminate directly against anyone – that is, to treat them less favourably than others because of their actual or perceived sexual orientation
- discriminate indirectly against anyone – that is, to apply a criterion, provision or practice which disadvantages people of a particular sexual orientation unless it can be objectively justified
- subject someone to harassment. Harassment is unwanted conduct that violates a person's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment for them having regard to all the circumstances including the perception of the victim
- victimise someone because they have made or intend to make a complaint or allegation or have given or intend to give evidence in relation to a complaint of discrimination on grounds of sexual orientation
- discriminate against someone, in certain circumstances, after the working relationship has ended.

Within the Regulations, sexual orientation is defined as –

Orientation towards persons of the same sex (lesbians and gay men)

Orientation towards persons of the opposite sex (heterosexual)

Orientation towards persons of the same sex and the opposite sex (bisexual).

What do the *regulations mean?*

1. A brief explanation of the Regulations

1.1 Direct discrimination means that workers or job applicants must not be treated less favourably because of their sexual orientation, their perceived sexual orientation or because they associate with someone of a particular sexual orientation. For example it is unlawful to:

- decide not to employ someone
- dismiss them
- refuse to provide them with training
- deny them promotion
- give them adverse terms and conditions
- deny them access to benefits available to individuals of a different sexual orientation because they are, or are thought to be, lesbian, gay, bisexual or heterosexual, or because they associate with someone of a particular sexual orientation. However it is not unlawful to restrict benefits to people who are married or in a civil partnership to the exclusion of people who hold neither status. Where this is the case there must be equal treatment for:
 - Civil partners and spouses
 - Unmarried couples of the same or opposite sex who are not civil partners.

Example: Whilst being interviewed, a job applicant says that she has a same sex partner. Although she has all the skills and competences required of the job holder, the organisation decides not to offer her the job because she is lesbian. This is direct discrimination.

NB: A job applicant can make a claim to an employment tribunal, it is not necessary for them to have been employed by the organisation to make a claim of discrimination.

Direct discrimination may only be justified in the very limited circumstances where a genuine occupational requirement can be shown to apply.

1.2 Indirect discrimination means that an organisation must not have selection criteria, policies, benefits, employment rules or any other practices which, although they are applied to all employees, have the effect of disadvantaging people of a particular sexual orientation unless the practice can be justified. Indirect discrimination is unlawful whether it is intentional or not.

In contrast to direct discrimination, indirect discrimination will not be unlawful if it can be justified. To justify it, an employer must show that there is a legitimate aim (eg a real business need) and that the practice is proportionate to that aim (ie necessary, and there is no alternative means available).

1.3 Harassment includes behaviour that is offensive, frightening or in any way distressing. It may be intentional bullying which is obvious or violent, but it can also be unintentional, subtle and insidious. It may involve nicknames, teasing, name calling or other behaviour which is not with malicious intent but which is upsetting. It may be about the individual's sexual orientation (real or perceived) or it may be about the sexual orientation (real or perceived) of those with whom the individual associates. It may not be targeted at an individual(s) but consist of a general culture which, for instance, appears to tolerate the telling of homophobic jokes.

The Regulations apply as equally to the harassment of heterosexual people as they do to the harassment of lesbians, gay men, and bisexual people.

Organisations may be held responsible for the actions of their staff as well as the staff being individually responsible. If harassment takes place in the workplace or at a time and place associated with the workplace, for example a work related social gathering, the organisation may be liable and may be ordered to pay compensation unless it can be shown that it took reasonable steps to prevent harassment. Individuals who harass may also be ordered to pay compensation.

It is good practice for employers to protect their workers from harassment by third parties, such as service users and customers.

Employers investigating claims of harassment should consider all the circumstances before reaching a conclusion, and particularly the perception of the complainant as harassment is often subjective. Having gathered all the evidence employers should ask themselves “could what has taken place be reasonably considered to have caused offence?”

Example: A male worker who has a same sex partner is continually referred to by female nicknames which he finds humiliating and distressing. This is harassment.

Example: A worker has a son who is gay. People in the workplace often tell jokes about gay people and tease the worker about his son’s sexual orientation. This may be harassment on grounds of sexual orientation, despite it not being the victim’s own sexuality that is the subject of the teasing.

Example: A worker (who was not known to be lesbian) is ridiculed by colleagues when they find out that she intends to register a civil partnership with her same-sex partner. She finds their treatment of her very distressing. This is likely to amount to harassment on grounds of sexual orientation since the reason for the unwanted conduct is the worker’s sexual orientation.

- 1.4** Victimisation is when an individual is treated detrimentally because they have made a complaint or intend to make a complaint about discrimination or harassment or have given evidence or intend to give evidence relating to a complaint about discrimination or harassment. They may become labelled ‘troublemaker’, denied promotion or training, or be ‘sent to Coventry’ by their colleagues. If this happens or if organisations fail to take reasonable steps to prevent it from happening, they will be liable and may be ordered to pay compensation. Individuals who victimise may also be ordered to pay compensation.

Example: A worker gives evidence for a colleague who has brought an employment tribunal claim against the organisation of discrimination on grounds of sexual orientation. When that worker applies for promotion her application is rejected even though she is able to show she has all the necessary skills and experience. Her manager maintains she is a ‘troublemaker’ because she had given evidence at the tribunal and therefore should not be promoted. This would be victimisation.

- 1.5 Discrimination,** harassment or victimisation following the end of a working relationship covers issues such as references either written or verbal.

Example: A manager is approached by someone from another organisation. He says that Ms ‘A’ has applied for a job and asks for a reference. The manager says that he cannot recommend the worker as she was not accepted by other staff because she was bisexual. This is direct discrimination because of sexual orientation.

- 1.6 A genuine occupational requirement (GOR).** In very limited circumstances it will be lawful for an employer to treat people differently if it is a genuine occupational requirement that the job holder must be of a particular sexual orientation. When deciding if this applies, it is necessary to consider the nature of the work and the context in which it is carried out. Jobs may change over time and organisations should, from time to time, consider whether the requirement continues to apply, particularly when recruiting. Further guidance is given in Appendix 1.

Example: An organisation advising on and promoting gay rights may be able to show that it is essential to the credibility of its chief executive who will be the public face of the organisation that s/he should be gay. The sexual orientation of the holder of that post may therefore be a genuine occupational requirement.

The Regulations also permit differences of treatment on grounds of sexual orientation where the employment is for the purposes of an organised religion – such as the leader of a faith or of an establishment such as a mosque or temple. Any organisation wishing to rely on this provision will also need to establish that the requirement is necessary to comply with religious doctrine; or, because of the nature of the work and the context in which it is carried out, to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers.

- 1.7** The Regulations only relate to sexual orientation, that is lesbians and gay men, heterosexual people and bisexual people.

There is a sound business case for eliminating discrimination in the workplace. Staff who are subjected to discrimination, harassment or victimisation may:

- be unhappy, less productive and demotivated
- resign
- make a complaint to an employment tribunal.

If staff are subjected to discrimination, harassment or victimisation this may affect an organisation in terms of:

- damage to reputation both as a business and as an employer
- cost of staff leaving and consequent recruitment and training
- cost of compensation if they take a claim to an employment tribunal – there is no upper limit to the amount of compensation an organisation may be ordered to pay.

Recruitment

- 2.1 It makes sound business sense for an organisation to attract a wide field of applicants – it is not a good idea to rely on the friends or family of current staff as this may limit the diversity of the organisation.
- 2.2 Advertising is best undertaken in a form accessible to a diverse audience. For instance, use of a wide interest publication or agency rather than one focused on a niche or specialist culture or interest area which will limit the diversity of applicants and may constitute indirect discrimination.

Example: An advertisement placed only in a magazine aimed at gay men and lesbians may indirectly discriminate against people who are heterosexual because they are less likely to subscribe to the magazine and therefore less likely to find out about the vacancy and apply.

- 2.3 Organisations should be clear about what skills they actually need for the post, differentiating them from those which are merely desirable or reflect the personal preferences of the selector. They should recruit and/or promote for those skills and aptitudes – there is nothing to prevent an employer from deciding not to recruit or promote someone if the applicant does not have the necessary skills or abilities.
- 2.4 Organisations should ensure they do not set unnecessary selection criteria or standards which might prevent people from applying because of their sexual orientation.

Example: A sports club requires two individuals to manage the bar and other facilities. They advertise for a husband and wife team. This is likely to be direct discrimination on grounds of sexual orientation because the sports club is treating civil partners less favourably than spouses.

- 2.5** At the interview or selection process questions should be asked or tests set to check for the skills and competences needed for the post. Interviewers should not be tempted to ask personal questions, which may be perceived to be intrusive and imply potential discrimination. Where such information is volunteered, selectors should take particular care not to allow themselves to be influenced by that information. An organisation only needs to know if the person can do the job and if they are willing to do the job. Assumptions should not be made about who will and who will not fit in.

Good practice: The perception of the interviewee is important. Questions not obviously related to the post may be perceived as providing a basis for discrimination and, in addition, the interviewer may subconsciously take personal matters into consideration. It is good practice to avoid enquiring about marital status, number of children and arrangements for their care, sexual orientation, and social life.

- 2.6** Care should be taken with the wording on application forms. It is most unlikely, for instance, that an organisation needs to know the marital status or civil partnership status of the applicant. If such information is required people should be asked if they are married or in a civil partnership but not asked to say which. If there are any circumstances where it is necessary to identify married people and civil partners separately, for purposes such as security clearance, the information can be sought in confidence when the selection process has been completed.
- 2.7** Employers should be aware that the laws relating to gay men have changed significantly over time. It is possible that applicants may have acquired a criminal conviction many years before for a matter no longer unlawful, (such as consensual adult gay sex). This is unlikely to have any bearing on the individual's skills and suitability for the job or training advertised. Generally a subsequent change in the criminal law does not affect whether an existing sentence becomes spent, the sentence still stands.

2.8 At recruitment and beyond, staff welcome an organisation having a robust Equality Policy which includes sexual orientation as well as other forms of discrimination, and which takes the matter seriously if the policy is contravened. Although not a legal necessity, such a policy makes applicants feel confident and serves to discourage those whose attitudes and behaviours do not embrace equality of opportunity.

Applicants who are not heterosexual may be discouraged from applying for posts in organisations that do not specifically include sexual orientation in their Equality Policy.

Acas can help organisations to draw up and implement such a policy and with their training needs.

2.9 Selection for recruitment or promotion must be on merit, irrespective of sexual orientation. Where employers have reason to believe that persons of a particular sexual orientation are under-represented in the workforce, it is possible to take certain steps to redress the effects of any previous inequality of opportunity. This is called 'positive action'. Employers may wish to consider positive measures such as:

- training their existing employees for work which has historically been the preserve of individuals of a particular sexual orientation;
- advertisements which encourage applications from people of a particular sexual orientation but making it clear that selection will be on merit without reference to sexual orientation.

Retaining *good staff*

- 3.1** Opportunities for promotion and training should be made known to all staff and be available to everyone on a fair and equal basis.
- 3.2** Where staff apply for internal transfers, it should be remembered that informal and verbal references between departmental heads, supervisors, etc should be fair and non-discriminatory and are covered by the Regulations.
- 3.3** Organisations and their staff should not assume that everyone is heterosexual. If organisations offer the opportunity for social gatherings which extend to the partners of staff, care should be taken with the wording of invitations, posters, etc to ensure inclusion of those with same sex partners. Where opposite sex partners are invited, the exclusion of same sex partners is hurtful and may constitute discrimination.
- 3.4** Everyone should understand what discrimination and harassment is and that it is hurtful, unlawful and totally unacceptable. However large or small an organisation, it is good practice for them to have an Equality Policy and to train all staff and update them on a regular basis. This will help to reduce the likelihood of discrimination, harassment and victimisation taking place and may help to limit liability if a complaint is made.
- 3.5** When delivering equality training, an organisation should cover issues such as homophobic comments and jokes and the use of inappropriate language which may simply have been intended as “banter” but which have the effect of being degrading or distressing. Some words can be seen as offensive, and may be viewed as harassment. When talking about sexual orientation, words such as heterosexual, bisexual, lesbian and gay are generally acceptable.

3.6 Organisations should ensure that their staff understand that if they harass colleagues, they could be personally liable and may have to pay compensation themselves. Such liability is separate from, and in addition to, any compensation that the organisation is ordered to pay. Workers should understand that merely saying “no offence was intended” will not constitute a defence. In addition, an absence of complaint from the individual being harassed does not mean that harassment has not taken place.

Handouts to workers visiting your premises could include a summary of your Equality Policy as well as the more usual health and safety instructions.

An employment tribunal case brought under the Employment Equality (Sexual Orientation) Regulations 2003: a general manager in the leisure industry was overheard referring to a gay colleague in offensive terms. Although the gay employee did not hear the remarks himself, an employment tribunal found that the remarks amounted to unlawful harassment contrary to the Regulations. The complainant was awarded £4,000 for injury to feelings against the employer as well as over £5,000 for unfair dismissal.

3.7 Staff should be made aware of what steps they could take if they feel they have been discriminated against, harassed or victimised. They should feel confident that their complaint will be treated seriously, that managers will deal with the cause of the problem and that the process will be undertaken in confidence. If it is practical, it is a good idea for organisations to have a named individual who is trained and specifically responsible for dealing with employment equality issues and complaints.

Example: As part of their equality training, an organisation produces an article in a newsletter to reinforce the message that homophobia and inappropriate jokes will not be tolerated. Copies of the newsletters are subsequently defaced with offensive words and drawings. Managers do nothing about it, simply saying “it is only to be expected”. Confidence amongst their gay and lesbian staff might be badly affected and they may have a claim of harassment. The organisation may be liable if they had failed to act on the complaint.

3.8 By their very nature, sexual matters are private and confidential. Although some people are comfortable talking about their partner, many people do not share such information with their managers and colleagues. They may find it very difficult to make a complaint or be fearful that by making a complaint they will be ‘outed’* in the workplace. Organisations should make strenuous efforts to ensure confidentiality of procedures and information management systems and reassure their staff that policies to ensure confidentiality are in place.

* ‘Outing’ is when, against their wishes, a person’s sexual orientation is revealed by another person. ‘Outing’ someone without their clear permission is inappropriate and a breach of that person’s privacy. It may constitute harassment and/or a breach of the Data Protection Act.

3.9 Lesbians, gay men and bisexual people are sometimes ‘outed’ for malicious reasons and consequently suffer harassment by colleagues or service users/customers. Employers should treat such a matter seriously.

3.10 Personal information should be maintained in the strictest confidence. Managers should not forget that even basic information such as a partner’s name is confidential, nor should they assume that it is common knowledge.

Example: On a residential training course, delegates are required to give the tutor the name, telephone number and relationship of an emergency contact. The completed forms are left on the tutor's desk where they can be seen by other delegates. As a result it becomes common knowledge that one of the delegates has a same sex partner. The delegate is distressed and as a result resigns from the company.

- 3.11** Take care to avoid stereotyping. For instance, gay men are sometimes assumed to be HIV positive and consequently suffer exclusion by their managers and colleagues and can be subjected to offensive comments. It can be a good idea to include HIV/Aids awareness training in your equality programme but care should be taken not to reinforce stereotyping whether adverse or otherwise.

Know your *staff*

- 4.1** There is no legal requirement to keep information on how staff groups are made up (gender, ethnic groups, and age, those with disabilities) other than in the public sector where racial monitoring is a statutory requirement. Monitoring generally is good practice, underpinning the success of equality policies. However, monitoring for sexual orientation raises some issues where there is a variety of opinion amongst employers, employees and within the lesbian and gay communities.
- 4.2** Organisations may consider asking a question about sexual orientation on their equal opportunities questionnaire. It is perhaps unlikely that this will give an accurate picture as many people will see the question as an invasion of privacy and staff are under no obligation to give such information. Additionally without accurate statistics on sexual orientation in the community as a whole it is difficult to determine whether employees of any particular sexual orientation are under-represented. It is good practice to monitor disciplinary and grievance procedures as a means of alerting management to homophobic attitudes within the organisation. Employers should take these issues seriously and make it known that discrimination is a disciplinary issue and give support to the victims.

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- 4.3** Initially, organisations may wish to consider including a question on their anonymous staff attitude surveys to ascertain whether workers have ever felt harassed on a range of issues which should include sexual orientation.

- 4.4** Organisations wishing to implement monitoring may wish to consider seeking specialist assistance concerning the methods and format of monitoring in this sensitive area. Raising awareness of sexual orientation issues amongst their workforce is considered to provide a sound foundation before moving to monitoring at a later date. There are a number of organisations providing assistance in this field, such as Stonewall and most trade unions have Lesbian, Gay, Bisexual Committees all of whom would be happy to assist. The Acas Equality Direct helpline 08456 00 34 44 can also provide assistance.
- 4.5** If organisations decide to include sexual orientation in their equality monitoring processes, staff should be told why the information is being collected and how it is intended it will be used. Such information is governed by the Data Protection Act 1998 and staff should be assured of both confidentiality and genuine anonymity. They should be informed that they are under no obligation to give such information. Employers must ensure confidentiality and anonymity.

What to do if you think *you have suffered discrimination or harassment*

- 5.1** If you think you are being harassed or discriminated against it is a good idea to make it clear to the person who is harassing you that their behaviour is unwelcome and that you want it to stop. However, you do not have to do this, particularly if you are feeling bullied or intimidated. If you do choose to address your concerns to the person, be clear and assertive but take care that you are not perceived to be bullying the individual. Some people may find it helpful to ask a friend, colleague, welfare officer or trade union representative to be with them in a support role.
- 5.2** If speaking to the person in question has failed to stop the problem, you should talk to your manager or your trade union representative. If it is your manager or supervisor who is harassing you, speak to someone higher up. Employers should deal with such complaints quickly, thoroughly and sympathetically.
- 5.3** It is usually best to try and sort things out quickly and as close to the problem as possible. If your organisation has a personnel or human resources department or an equality adviser you might find it helpful to talk to them. Discrimination can happen accidentally or through thoughtlessness. Harassment can be unintentional. Often, once a manager understands the problem, he or she will be willing to try and put things right.

- 5.4** If your manager is unable to help you, or refuses to help you, you should use your organisation's grievance procedure. All organisations should have a grievance procedure by law. You also have a legal right to be accompanied by a trade union representative or a work colleague at any hearing into your grievance.
- 5.5** If you are not satisfied with the result of a grievance procedure, you have a right of appeal which should be heard, if the organisation's size allows it, by someone different from the person who conducted the original grievance hearing. You have a right to be accompanied by a trade union representative or a work colleague during the appeal hearing.
- 5.6** If you have tried all these things, or if you feel too intimidated to use the internal procedures, you may be able to bring a complaint to an employment tribunal under the Employment Equality (Sexual Orientation) Regulations 2003. You do not have to hand in your notice to bring such a complaint. As part of your employment tribunal claim, you can require your employer to answer a set of questions about discrimination in your workplace. A questionnaire is available on the DTI website (www.dti.gov.uk) and from Jobcentres and Citizens Advice Bureaux.
- 5.7** You and any witnesses have a right not to be victimised for following up a grievance or complaining to an employment tribunal under these Regulations provided the complaint was made in good faith.
- 5.8** If you have been dismissed because you objected to conduct towards you, you may be able to bring a complaint of unfair dismissal to an employment tribunal.
- 5.9** Complaints to an employment tribunal must normally be brought within three months of the act you are complaining about. Care should be taken to ensure that the three month point is not exceeded during any internal grievance/appeals process.

Frequently *asked questions*

Q **What are organisations required to do as a result of the Employment Equality (Sexual Orientation) Regulations?**

A They should ensure that sexual orientation is included in their Equality Policy. It is a good idea for them to revisit the Equality Policy from time to time to ensure it has not become outdated, to test any new employment policies and procedures for discrimination and to ensure the policy itself meets current legislation requirements. Staff need to be made aware (through training, noticeboards, circulars, contracts of employment, etc) that it is not only unacceptable to discriminate, harass or victimise someone on the grounds of sexual orientation, it is also unlawful. Organisations should also make it clear that they will not tolerate such behaviour. Staff should know what to do if they believe they have been discriminated against or harassed, or if they believe someone else is being discriminated against or harassed, and this should be included in the grievance procedure.

Organisations should also consider adding all forms of discrimination and harassment (sex, race, disability, gender reassignment, sexual orientation and religion or belief) to their disciplinary rules which should also include bullying. It is good practice to include age discrimination within your policies ahead of the legislation due in October 2006. Reminder: The Employment Act 2002 requires all employers, however large or small, to have both a disciplinary procedure and a grievance procedure.

Q **Must organisations have an Equality Policy?**

A Whilst organisations do not have to have an Equality Policy, implementing and observing such a policy is a commonplace means of demonstrating that an employer has taken reasonably practicable steps to prevent employees discriminating against or harassing other employees. The policy should set the minimum standard of behaviour

expected of all staff through recruitment and onwards and what staff can expect of the organisation. It acts as a reminder, gives staff confidence that they will be treated with dignity and respect, and may be used as an integral part of a grievance or disciplinary process if necessary.

If organisations do not have an Equality Policy and would like help in putting in place an effective policy Acas can help.

Q Do these Regulations cover all workers?

A The Regulations apply to all workers, including office holders, police, barristers, partners in a business and members of the armed forces. They also cover related areas such as membership of trade organisations, the award of qualifications, the services of careers guidance organisations, employment agencies and vocational training providers, including further and higher education institutions. The Regulations cover anyone who applies to an organisation for work, or who already works for an organisation – whether they are directly employed, work under some other kind of contract, or are an agency worker. Organisations will also be responsible for the behaviour of their staff towards an individual working for someone else but on their premises, for example someone from another organisation repairing a piece of your equipment.

Staff are sometimes harassed by third parties, such as customers or clients. Where possible organisations should protect their staff from such harassment and should take steps to deal with actual or potential situations of this kind. This will enhance the organisation's reputation as a good employer and make the organisation a welcoming and safe place to work.

Many organisations provide visitors and visiting workers with guidance on health and safety matters. It may be appropriate to include some comments in any policy your organisation has on harassment.

Q Do organisations have to collect data on sexual orientation?

A The Regulations do not require organisations to collect such data. If they decide to include sexual orientation in their equality monitoring

process they should first consider taking expert advice as it is a particularly sensitive issue.

Staff should be told why the organisation wishes to collect the data, show how the organisation intends to use such information, and should be assured of confidentiality and anonymity. They should be informed that they are under no obligation to give such information. Under the Data Protection Act, organisations require the consent of individuals to collect and use such information. The best way for an organisation to make sure it does not discriminate is to have a robust, regularly reviewed Equality Policy and a good supportive training programme to make sure everyone understands and implements the policy.

Q How will an organisation know if it is discriminating inadvertently?

A Individuals, or their trade union, will usually tell the employer, particularly if they are in a culture whereby staff feel comfortable in sharing such information. It can be helpful for organisations to have a designated individual to whom people can go in confidence. However, staff may be worried about raising issues which relate to their sexual orientation or their personal life. It is a good idea for organisations to get their management team, staff representatives or a specially convened group of employees to think through and test whether any policies and procedures impact on sexual orientation or discriminate on any other grounds such as disability, religion or belief, sex, gender reassignment, age or race. Discrimination on the grounds of age will become unlawful in October 2006.

Q Are staff entitled to claim time off to deal with emergencies involving same sex partners?

A Under the terms of the Employment Rights Act 1996 (as amended by the Employment Relations Act 1999), employees are entitled to unpaid leave to deal with unexpected or sudden problems concerning a dependant or close family member including a same sex partner. This particular Regulation does not apply to those who are self-employed, members of the police service or armed forces. Organisations should consider whether their policies and procedures for granting time off for dependants or bereavement leave, discriminate on the grounds of

sexual orientation either intentionally or implicitly by the use of language. Time off for an emergency related to a spouse must be made available on equal terms to employees who have a civil partner.

Reminder: Parental leave is available to anyone who has, or expects to have, parental responsibility for a child under the age of five years or under the age of 18 years if the child has a disability (see Acas Rights at Work leaflets, on Parents at work and Time off).

If the individual meets the relevant conditions, adoption leave is available to an individual who adopts a child and two weeks' paternity leave is available to their partner, whether opposite sex partners or same sex partners. Paternity leave is perhaps more easily understood if considered to be 'maternity (or adoption) support leave'.

Q No one in my organisation has ever complained of discrimination or harassment so I don't need to do anything new, do I?

A People do not always feel able or confident enough to complain, particularly if the harasser is a manager or senior executive. Sometimes they will simply resign. One way to find out is to undertake exit interviews when people leave and to include the question of whether they have ever felt harassed, bullied or discriminated against in the workplace. If it is possible, exit interviews should be undertaken by someone out of the individual's line of management, for instance a personnel officer.

Discrimination includes harassment which can take place without management being aware of it. Organisations should make sure all their staff understand that harassment means any unwanted behaviour that makes someone feel either intimidated, degraded, humiliated or offended and that includes teasing, tormenting, name calling and gossip and it applies to whoever the perpetrator may be. The victim's perception of the effect of the behaviour is also important. Organisations should take all possible steps to make sure staff understand that they and their management teams will not tolerate such behaviour and that they will deal with whoever is causing the problem.

Q What about benefits for same sex partners?

- A** If organisations give benefits such as insurance or private healthcare to opposite sex unmarried partners then refusing to give the same benefits to same sex partners would be discrimination. If benefits specify “married” partners or “spouse” then they should be extended to civil partners, but they do not have to be extended to cover unmarried opposite-sex or same-sex partners not in a civil partnership.

Organisations should take care not to unjustifiably change their existing policies in order to exclude same sex partners or civil partners in the light of the legislation. This may be viewed as discrimination and be unlawful.

Q What about transgender people?

- A** Gender reassignment is a separate issue and unrelated to sexual orientation despite a common misunderstanding that the two issues are part of the same picture.

It is unlawful to discriminate against or harass anyone on the grounds that the person intends to undergo, is undergoing or has undergone gender reassignment. These issues are already covered by the Sex Discrimination (Gender Reassignment) Regulations 1999.

If the person has completed gender reassignment treatment, organisations may never know. If the person is undergoing treatment (or raises questions about it), it is good practice to agree with the individual how they would prefer it to be dealt with and to follow a process agreed with them.

Q Should organisations introduce positive action programmes on sexual orientation?

- A** The law allows organisations to introduce positive action measures where they can demonstrate that staff of a particular sexual orientation are at a career disadvantage or are under-represented in the organisation.

Q A member of staff has made a complaint of harassment which involves an inaccurate perception of their sexual orientation. Is this covered by the law?

A Yes, any harassment based on sexual orientation is covered by the Regulations. A worker harassed by their colleagues or manager on an inaccurate suspicion of or speculation about their sexual orientation has grounds for complaint and may take their case to an employment tribunal if their employer fails to deal with the matter in a timely and proper manner.

Q I am being harassed by my colleagues. Must I use the internal grievance procedure before making an employment tribunal claim?

A It is usually quicker and easier to deal with issues as close to the problem as possible. It is also fairer to your employer, who may not know there is a problem. Talk to your manager or supervisor, or to someone else that you trust such as your trade union representative. If it is your manager or supervisor who is causing the problem, then seek help from someone in a more senior position.

If you are dissatisfied with the measures taken by your organisation or have reason not to feel able to access the internal procedures, you can make a claim to an employment tribunal. Tribunals will usually expect you to have tried to sort things out before making a claim.

However, sometimes there are special circumstances (such as your feeling bullied or intimidated) which make it particularly difficult for you to deal with the situation in the workplace and tribunals will take this into account.

Q We are an organisation providing employment rights advice to lesbian, gay and bisexual people and would therefore like job holders to be of a particular sexual orientation. Are we allowed to do this?

A Staff can be recruited on the basis of their sexual orientation where this is a genuine occupational requirement (GOR) for the job. You must be able to show that being of a specific sexual orientation is a requirement of the job. Appendix 1 provides some further guidance on this subject.

It is important that each post be considered individually both in terms of the duties of the job and the context within which it is carried out. For instance, an organisation should ask “Is a particular sexual orientation a requirement of the job?” “Would someone not of that sexual orientation be unable to do the job?” Organisations should not expect to apply a blanket GOR to all its posts.

Organisations should consider whether it is proportionate to apply a GOR to the job. For instance, if only a small part of the job qualifies for a GOR then it may be possible to redistribute work or reorganise roles in such a way as to avoid the necessity to apply a GOR to a particular post.

Organisations should be clear about the link between the requirements of the job and sexual orientation as, in the event of an employment tribunal claim on the grounds of sexual orientation, the burden of proof will be on the employer to show a GOR. Tribunals tend to interpret GORs very narrowly since they effectively go against the principle of equal treatment.

A GOR on the grounds of sexual orientation is specific and cannot be lawfully used to discriminate on any other grounds such as religion or belief, sex, disability or race.

Q I am concerned that on the grounds of religion, some of my staff may refuse to work with their gay or lesbian colleagues.

A Some religions do have strong views concerning sexual orientation but most do not advocate persecution of people because of their sexual orientation. Everyone has the right to be treated with dignity and respect in the workplace whatever their sex, race, colour, disability, age, religion or sexual orientation. You should include this over-riding premise in your Equality Policy and show that you take a robust view when this principle is not adhered to. Your workers do not have to be friends but you can insist that they treat each other professionally.

Q What is the impact of the amendments made to the Sexual Orientation Regulations as a consequence of the introduction of civil partnership?

A From 5 December 2005 employers will have to extend benefits offered to the spouses of employees to civil partners of employees. For example, health insurance which covers a spouse, should also cover the civil partner of an employee. Or if there are benefits given to an employee who is marrying – such as time off before or after the wedding – this should be made available to people about to register a civil partnership.

Occupational pension benefits should be made available to civil partners and spouses on the same terms for service after 5 December 2005. Contracted-out occupational and personal pension schemes, including public service pension schemes, will need to provide survivor benefits for civil partners on the basis of deceased members' rights accrued from 6 April 1988, to treat them on a par with widowers. Widows and widowers who are entitled to a survivor benefit on introduction of civil partnerships, on 5 December 2005, should continue to receive that benefit if they form a civil partnership or live with someone as a civil partner.

Employers should respect sensitivities when extending benefits to civil partners. In particular they should not require employees to identify themselves as a civil partner when there is no need to distinguish them from married people. Appendix 2 contains a checklist of actions for employers.

Appendix 1

Genuine Occupational Requirements – Guidance

Employers wishing to claim a GOR should bear in mind the following points.

1. GORs should be identified at the beginning of the recruitment, training or promotion process, before the vacancy is advertised. Advertisements and material sent to potential applicants should clearly show that the employer considers that a GOR applies and the point should be reiterated during the selection process.

Reminder: Applicants who do not agree that there is a GOR for the post are at liberty to make a claim to an employment tribunal because they believe they have been prevented from applying for the post on the grounds of sexual orientation. It would be for the employer to show that such a GOR is justified.

2. If an employer wishes to claim a GOR s/he must consider what the duties are for which an exemption is to be claimed; a GOR cannot be claimed unless some or all of those duties require a person of that sexual orientation to undertake those duties.
3. A GOR exemption cannot be claimed in relation to particular duties if the employer already has sufficient employees who are capable of carrying out the required duties and whom it would be reasonable to employ on those duties without undue inconvenience.
4. Each job for which a GOR may apply must be considered individually; it should not be assumed that because a GOR exists for one job it also exists for jobs of a similar nature or in a similar location. The nature or extent of the relevant duties may be different or there may be other employees who could undertake those duties.

5. A GOR can only be claimed where it is necessary for the relevant duties to be carried out by someone of a particular sexual orientation, not merely because it is preferable. The Regulations allow organised religions to claim a GOR in very narrow circumstances to comply with the doctrines of the religion or because of the nature and context of the job so as to avoid conflicting with a significant number of followers' strongly held religious convictions.
6. A GOR must be reassessed on each occasion a post becomes vacant to ensure that it can still be validly claimed. Circumstances may have changed, rendering the GOR inapplicable.
7. A GOR cannot be used to establish or maintain a balance or quota of employees of a particular sexual orientation.
8. GORs are always open to challenge by an individual. The burden of proof lies with the employer to establish the validity of a GOR by providing evidence to substantiate a claim.
9. Only an employment tribunal or a higher court can give an authoritative ruling as to whether or not a GOR is valid.

Appendix 2

Civil Partnership – A checklist for employers

The Civil Partnership Act 2004 (in force from 5 December 2005) will allow two non-related adults of the same sex to register a civil partnership, which has many of the same rights and responsibilities as marriage. Further information about the Act is available at www.womenandequalityunit.gov.uk/civilpartnership/

From 5 December the Employment Equality (Sexual Orientation) Regulations 2003 will allow employers to restrict employment benefits to married people and people in a civil partnership to the exclusion of those who hold neither status. The Regulations will also require spouses and civil partners to be treated equally in the workplace and for vocational training.

Employers should:

- ✓ Check benefits provided for spouses of employees, or benefits contingent on marriage such as health insurance for a spouse, or time off before or after a marriage. These benefits must also be made available to an employee in a civil partnership, or to their civil partner, if appropriate. There is no requirement to offer these benefits more widely than spouses and civil partners – ie to unmarried opposite-sex couples and unregistered same-sex couples.
- ✓ Amend human resource systems and forms and outward facing material and forms to reflect the introduction of civil partnership. Where there is a reference to 'spouse' or 'marriage' there should also be a reference to 'civil partner' or 'civil partnership.'
- ✓ Avoid making people identify themselves as either married or in a civil partnership. In most situations because the treatment given to civil partners and married people is the same, there should be no need to identify them separately.
- ✓ Be aware that some people may want to change their name upon registering a civil partnership, or hyphenate their name with their partners.

It is customary that a marriage certificate can be used as evidence of a change of name, therefore the Government will treat civil partnership certificates as evidence of a change of name eg for the purposes of passports and drivers licenses.

- ✓ Check with the trustees of your contracted-out occupational pension scheme that the scheme rules accord with The Civil Partnership (Contracted-out Occupational and Appropriate Personal Pension Schemes)(Surviving Civil Partners) Order 2005, Statutory Instrument (SI) No 2005/2050 (available from www.opsi.gov.uk). The order requires contracted-out schemes to offer survivor benefits to civil partners based on the same entitlement as widowers.
- ✓ Make sure that employees know that these changes have taken place and know how to claim benefits available to them or their civil partner.
- ✓ Be aware that same-sex couples in certain overseas relationships may automatically be treated as civil partners in the UK, for example a same-sex couple married in the Netherlands, or a same-sex couple who have formed a civil union in the US state of Vermont. More information on overseas schemes recognised as civil partnership in the UK can be found at www.womenandequalityunit.gov.uk/civilpartnership.htm

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Information in this booklet has been revised up to the date of the last reprint – see date below.

Legal information is provided for guidance only and should not be regarded as an authoritative statement of the law, which can only be made by reference to the particular circumstances which apply. It may, therefore, be wise to seek legal advice.

Acas aims to improve organisations and working life through better employment relations. We provide up-to-date information, independent advice, high quality training and we work with employers and employees to solve problems and improve performance.

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