



*Guidance on New Measures to Outlaw
Discrimination on Grounds of Sexual
Orientation in the Provision of Goods,
Facilities and Services*

Equality Act (Sexual Orientation) Regulations 2007



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Foreword

We are delighted to introduce this guidance on new measures outlawing discrimination on grounds of sexual orientation and religion or belief in the provision of goods, facilities and services, education, the use and disposal of premises and the exercise of public functions.

Modern British society is founded on the principles on which this legislation is based: fairness, tolerance, decency and respect. These are the principles that have seen this Government take great strides towards a more equal society over the last decade, not least through similar legislation outlawing discrimination on these grounds in employment.

While the case for new legislation in both areas was widely accepted, there was concern that in safeguarding the rights of one group, the sometimes competing rights of another may be infringed. The Government recognised the sensitivity of these issues, which go to the very heart of our society. The measures we have brought forward protect the rights of individuals and organisations to hold religious beliefs while also ensuring that everyone lives a life free from harmful discrimination.

As with previous discrimination legislation, these measures will provide real benefits to people's everyday lives. It cannot be right in modern Britain that a shopkeeper or restaurant can refuse to serve someone because of their religion. Equally, it cannot be right for a child to be denied the best possible education on the grounds of either their or their parents' sexual orientation. These are rights that the majority of people take for granted; rights which we have a moral imperative to ensure all can enjoy.

This guidance provides practical advice on what this legislation means for businesses, public authorities, charities and voluntary organisations, religious organisations, letting and estate agents, as well as society at large. In the majority of cases there will be no need to change current practice – the two sets of measures simply require services to be provided in a non-discriminatory fashion. The guidance offers clear and common sense advice about the way the two sets of provisions work from a range of perspectives, including everyday examples of what they will and will not do. It also offers advice on what to do if someone feels that they are being discriminated against.

In order to create a fair and cohesive society it is important that the rights of all are balanced. This is what both sets of measures do. Protecting individuals from discrimination should not prevent communities which share cultural, religious or racial identities from celebrating the things that bind them together. Equally, nobody should be prevented from living the life they choose, or made to feel a second-class citizen simply because of who they are.

These protections, together with the guidance, will encourage and promote the rich diversity of our society, accommodating difference and guaranteeing tolerance, respect and the principle of fairness for all.



Ruth Kelly



Meg Munn

Introduction

This document sets out guidance on the Equality Act (Sexual Orientation) Regulations 2007 (“the Regulations”), and their implications for organisations within the private, public and voluntary sectors.

The Regulations contain measures prohibiting discrimination on grounds of sexual orientation in the provision of goods, facilities and services, education, the use and disposal of premises and the exercise of public functions. They provide protection from sexual orientation discrimination that is on a par with the protection already provided on grounds of race and sex; as well as new measures prohibiting discrimination on the grounds of religion or belief.

The Regulations do not deal with employment¹ nor do they make specific provision to cover harassment.²

Commencement

The Regulations came into force on **30th April 2007**.

The Equality Act

The Regulations are made under **Part 3** of the Equality Act 2006.³

Part 1 of the Act establishes the Commission for Equality and Human Rights, which will have a broad remit of championing and promoting equality, good relations and human rights. The Commission for Equality and Human Rights’ role will include supporting and enforcing the operation of equality legislation, including the Regulations and the religion or belief provisions in Part 2 of the 2006 Act. It is intended that the Commission for Equality and Human Rights will assume all of its functions in October 2007.⁴

Part 2 makes it unlawful to discriminate on grounds of religion or belief or lack of religion or belief in the provision of goods, facilities and services, in the disposal and management of premises, in education and in the exercise of public functions. Part 2 came into effect on **30th April 2007**.

Part 4 of the Act amends the Sex Discrimination Act 1975 to prohibit discrimination on grounds of sex in the performance by public authorities of public functions and to impose a general statutory duty on public authorities in relation to elimination of discrimination and promotion of equality of opportunity between men and women.

¹ Discrimination on the grounds of sexual orientation has been unlawful since December 2003 in the workplace and in respect of the provision of vocational training, under the Employment Equality (Sexual Orientation) Regulations 2003. Employment is therefore not covered under the Equality Act (Sexual Orientation) Regulations 2007.

² Specific consideration is to be given through the Discrimination Law Review to the subject of harassment on the grounds of sexual orientation outside the employment context (harassment in the workplace is covered by the Employment Equality (Sexual Orientation) Regulations 2003).

³ The Act and its Explanatory Notes, can be found at <http://www.opsi.gov.uk/acts/acts2006.htm>.

⁴ Further information about the Commission for Equality and Human Rights can be obtained on their website, at <http://www.cehr.org.uk/>.

Making claims

Complaints may be made to the courts under the Regulations by individuals who believe that they have been discriminated against on the grounds of sexual orientation. This process is explained in more detail in the section below on ‘Making a claim’, including advice on what to do if you feel that you have been discriminated against.

Further information on the law in general, or on this guidance (but not on individual claims) can be obtained from the Department for Communities and Local Government at EqualityActEnquiries@communities.gsi.gov.uk (please head your enquiry “Part 3 of the Equality Act 2006”).

Discrimination on grounds of sexual orientation

The Regulations prohibit discrimination on the basis of a person's:

- **actual** sexual orientation;
- the sexual orientation he/she is **thought to have** and/or;
- the sexual orientation of someone with whom he/she is **associated**.

An example of sexual orientation discrimination by association would be where a bar predominantly used by gay men refused entry to a gay man because he was in the company of a heterosexual man.⁵ This would be unlawful under the new Regulations.

Sexual orientation means an individual's sexual orientation towards:

- people of the same sex as him or her (gay or lesbian);
- people of the opposite sex (heterosexual);
- people of both sexes (bisexual).

It does not include transsexuality which is related to gender and is covered in the employment context by sex discrimination legislation.

Direct and indirect discrimination

The Regulations outlaw both direct and indirect discrimination on the grounds of sexual orientation.

Direct discrimination takes place when someone is **treated less favourably** than other people are/would be treated. This is where there is no material difference in the relevant circumstances and the reason for the treatment is the sexual orientation the victim holds or is thought to hold, or that of someone associated with them.

Lesbian, gay and bisexual people have been subjected to unfair treatment in a number of areas, for example:

- refused bookings by tour operators;
- refused entry/service, or encountered discourteous/hostile treatment, in pubs, bars and restaurants;
- denied shared accommodation in hotels, guesthouses and bed and breakfast establishments.

⁵ The new Regulations do not however affect such businesses' right to eject those who they believe may cause trouble or are causing disruption.

Heterosexuals may also experience discrimination, for example, they may be refused entry to gay friendly venues.

Indirect discrimination occurs when provisions, criteria or practices that are applied generally, result in people of a particular sexual orientation being put at a disadvantage, as compared to people with others, and these provisions, criteria or practices cannot be objectively justified. This applies even if the negative impact is **unintentional**.

- For example, if a company refused to provide customers who have had an HIV test with access to its services, this could indirectly discriminate against gay men, who are more likely to have had such a test.

Discrimination and civil partnerships

The Regulations do not change the existing legal position regarding where and how civil partnerships can be formed. The position with regard to religious marriage also remains unchanged. The law explicitly rules out ministers of religion conducting same-sex marriages in church. The Regulations will not force ministers of religion to bless same-sex partnerships nor hire out their religious premises for civil partnership ceremonies.

However, under the Regulations, businesses and public authorities will not be able to discriminate between married persons and civil partners on grounds of their sexual orientation. The Regulations make clear that the fact that one person is in a civil partnership and another married does not represent a 'material difference' in their circumstances and therefore does not justify unequal provision of goods, facilities or services.

Civil partners will thus be able to bring a discrimination claim on grounds of sexual orientation against a provider of goods and services who denies them access to a benefit or service being offered to a married person in a similar situation. Similarly, where mixed-sex unmarried couples are offered a particular service or benefit, it would be expected that these should also, where appropriate, be made available to same-sex couples who are not in a civil partnership.

- For example, if a company offered a discount to married couples, this discount would also need to be available to civil partners, if it were not to constitute indirect discrimination.

Victimisation

The Regulations also protect against **victimisation**. This means that it will be unlawful for a service provider or public authority to treat a person less favourably because they:

- Have brought, have intended to bring, or intend to bring, proceedings under the Regulations;
- Have given, have intended to give, or intend to give, evidence or information in connection with such proceedings or any investigation;

- Have alleged, have intended to allege, or intend to allege, that a person contravened the Regulations;
- Have done, have intended to do, or intend to do, any other thing in connection with the Regulations;
- Suspect them of doing the above things.

An example of victimisation would be if a witness in a case of sexual orientation discrimination against a service provider was, as a result of their giving evidence, barred from accessing the service.

However, a person who makes an allegation which is untrue and not made in good faith will not be protected against adverse consequences for so doing. It is not unlawful for a person to treat less favourably someone who has maliciously made a false allegation against them under the Regulations.

Discriminatory practices

The Regulations make it unlawful for a person to adopt or maintain a discriminatory practice. This is a policy, requirement or condition which would be likely to result in unlawful discrimination if applied to persons of a particular sexual orientation, but where there is not an individual victim of the practice in question. The Commission for Equality and Human Rights is the only body entitled to take enforcement action in respect of discriminatory practices, which, once it is fully operational, it may do by means of its powers in sections 20 to 24 of the Equality Act (investigations, unlawful act notices and action plans, agreements, and applications to the court to enforce these).

Discriminatory advertisements

The Regulations make it unlawful to publish an advertisement for goods, facilities, services or premises that can reasonably be understood to indicate the intention to act in a way that is unlawfully discriminatory.

- For example, it would be unlawful for a company to advertise to the effect that lesbian, gay or bisexual couples would not be able to access its services.

The publisher of the advertisement will not be held liable if able to prove that he or she relied on a statement from the person who placed the advertisement that it was not discriminatory. However it is a criminal offence for a person knowingly or recklessly to make a false statement to that effect.

It is not unlawful to include reference to sexual orientation in an advertisement, as long as it does not specify any restriction on that basis.

- For example, it would be lawful to advertise a service as 'Gay friendly'. However it would be unlawful for there to be any implication in the advertisement that clients of a different sexual orientation would be refused access to that service.

Only the Commission for Equality and Human Rights will be entitled to bring proceedings in respect of unlawful advertisements which, once it is fully operational, it may do so in accordance with the powers set out in section 25 of the Equality Act.

Instructing or causing discrimination

The Regulations also make it unlawful for a person to **instruct**, or cause, another person to discriminate in a way which is unlawful according to the Regulations. Only the Commission for Equality and Human Rights will be entitled to bring proceedings in respect of a contravention which, once it is fully operational, it may do so in accordance with its powers set out in section 25 of the Act.

Validity and revision of discriminatory contracts

The Regulations make clear that terms of contracts which provide for doing an act which is made unlawful by the Regulations, or are included to further an act which is unlawful under the Regulations are **void**. Where provisions provide for, or further, unlawful discrimination against a party to a contract they are unenforceable against that party.

A contractual term that seeks to exclude or limit the requirements of the Regulations will be **unenforceable**, except where it is part of a settlement agreement relating to a claim under the Regulations.

Employer's and principal's liability

Under the Regulations employers and principals are liable for the actions of their employees and agents, whether or not they know about or approve of the act.

- For example, if an employee of a company refused to serve a lesbian, gay or bisexual person, the company may be liable as well as the employee.

It is a defence however for an employer to prove that he or she took reasonable steps to prevent breaches of the Regulations. Organisations will therefore need to take steps to ensure that their employees/agents are aware of the Regulations, and understand the implications for their own work.

Individuals who are concerned that the requirements of their job may be incompatible with their religious beliefs may ask their employer to be redeployed. Employers should be sensitive to the religious beliefs and perspectives of their employees, and will need to be mindful of their obligations under the Employment Equality (Religion or Belief) Regulations 2003 not to discriminate against their employees on grounds of religion or belief.

Aiding unlawful acts

It is unlawful knowingly to help another person to do anything which is unlawful under these Regulations.

Knowingly or recklessly making a false statement that a proposed act is not unlawful under these Regulations, in order to secure someone else's assistance (eg to place a discriminatory advertisement), is a criminal offence. It is liable to result on summary conviction in a fine.

Territorial application

The Regulations apply to anything done in Great Britain⁶; and to the provision of facilities for travel on, and benefits, facilities or services provided on, a British aircraft, ship or hovercraft.

⁶ In relation to immigration entry clearance it applies to acts both inside and outside the UK.

Goods, facilities and services

Where individuals or organisations enter the public realm to provide a service to the public at large, they should accept business from people of all walks of life and provide services to the public as it is constituted - not pick and choose who will benefit or be served.

The Regulations will require providers of goods, facilities and services to ensure that they are not treating their customers unfairly on the grounds of sexual orientation, just as they are already required not to treat their employees unfairly on these grounds.⁷

Unlawful treatment of customers on the grounds of sexual orientation includes:

- refusing to provide a person with goods, facilities or services, if they would normally do so to the public, or a section of the public to which the person belongs. For example, if a service provider normally sells at a discount to pensioners, it may not refuse to sell a discounted ticket to a pensioner because of his/her sexual orientation;
- providing goods or services of an inferior quality than those which would normally be provided; or,
- providing goods, facilities or services in a less favourable manner or on less favourable terms than would normally be the case (eg hostile or less courteous).

The Regulations apply to all forms of goods, facilities and services. The Regulations give as examples the following goods, facilities and services in the provision of which sexual orientation discrimination will be unlawful:

- **Access to and use of a place** that the public is permitted to enter;
- **Accommodation** in establishments such as hotels and boarding houses;
- Facilities for **banking/insurance**, or for **grants, loans, credit or finance**;
- Facilities for **entertainment, recreation or refreshment**;
- Facilities for **transport or travel**;
- **Professional or trade** services.

This list is illustrative, not exhaustive.

Discrimination is unlawful **whether or not a charge is made** for the goods, facilities or services.

Many businesses already feel that treating actual or potential customers in a non-discriminatory manner makes sound business sense, and act accordingly.

⁷ See the Employment Equality (Sexual Orientation) Regulations 2003: <http://www.dti.gov.uk/employment/discrimination/sexual-orientation/index.html>

Some businesses design their services and products in a way which is likely to appeal to particular customers/users on the basis of their sexual orientation (eg bars and travel clubs targeted at lesbian, gay or bisexual users). Providing commercial goods and services likely to be of more interest to a certain group is **not** unlawful under the Regulations. However, it would be unlawful for the business to turn away customers (in the case of the example above, heterosexual customers) on the grounds of sexual orientation; or to advertise in a way which implies that clients of a certain sexual orientation are unwelcome.

The Regulations do not require businesses to start providing goods, facilities or services that they do not usually provide.

- For example, a company that targets its services at lesbian, gay and bisexual people would not be obliged to provide services of particular interest to heterosexual people.

Premises

The Regulations prohibit discrimination on grounds of sexual orientation when disposing of premises, i.e. when selling or renting property. This would include:

- refusing to sell or rent the premises to a particular person;
- offering less generous terms; or
- discriminating against people on a list of those requiring housing: for example by giving priority to people of a certain sexual orientation, or deliberately overlooking those of a certain sexual orientation.

The Regulations also make unlawful any discriminatory behaviour by a manager of premises on account of the sexual orientation of a tenant or other occupier, or someone who is associated with them. This would cover all aspects of a manager's duties towards a tenant or other occupier, including the facilities they would provide and the terms under which they would evict a person.

The Regulations do not apply where a landlord, or the landlord's near relative⁸, shares small premises, as described below, with the tenant. This applies if:

- The landlord or a near relative lives in another part of the same premises (and intends to continue to do so); and
- the premises include parts that the landlord or a near relative would share with the tenant such as a bathroom or kitchen; and
- the premises are of a size where no more than two households, or six individuals, can live in the premises in addition to the landlord or a near relative.

This exemption is in place to preserve an individual's right to privacy in their own home, not to allow those running commercial businesses to turn away potential guests on the grounds of sexual orientation. It would not apply to a bed and breakfast or a guest house, where the owners are providing a service to the public at large on a commercial basis.

The Regulations also provide an exemption from the prohibition on discrimination in the disposal of premises for people who own and occupy the whole of the premises; and when selling them do not use an estate agent, or advertise for a buyer. So, for example, a person giving or selling a house privately to someone they know would not be open to a claim that they had breached the Regulations.

The prohibition on discrimination in disposal of premises only applies to premises which are in Great Britain; premises which are elsewhere are not covered by the Regulations, even if the sale takes place in Great Britain.

⁸ ie spouse or civil partner; parent or grandparent; child or grandchild (whether or not legitimate), or his/her spouse or civil partner; brother or sister (half or full blood); any of the above that arise through marriage, civil partnership or adoption.

Public authorities and public functions

The Regulations make it unlawful for public authorities to discriminate when exercising public functions. This includes the non-legislative decisions of Ministers, and the work of local authorities, the police and other governmental organisations⁹.

Public authorities, such as local authorities, must ensure that all their services are provided in such a way that no-one entitled to use any service is disadvantaged in receiving it by reason of sexual orientation. They should ensure that their employees and agents also do so using contractual or other controls as appropriate to achieve that result.

Examples of action public authorities may need to take to comply with the Regulations might include:

- Those responsible for publicly funded services (eg hospitals; mental health services; housing services; care for vulnerable people; prisons/young offenders' institutions) will need to take steps to ensure that the environment is one in which lesbian, gay or bisexual people are able to access services as effectively as heterosexual people.
- Staff working in publicly funded services will need to treat lesbian, gay or bisexual users as courteously and professionally as they do other users, whatever their own personal views.
- Commissioners/planners of services will need to take steps to ensure that lesbian, gay or bisexual people have fair access to the services which they need. For example, Primary Care Trusts will need to seek to ensure that GPs under contract to them offer essential services such as screening tests to lesbian or bisexual women who need them; or that GPs do not strike off their list patients who 'come out'.

The following public bodies and functions are exempt from the Regulations in order to safeguard **national security** or to preserve the **constitutional independence** of the judiciary or **legislative and executive freedom**:

- All activities of either House of Parliament, including the House authorities;
- Security Service, Secret Intelligence Service, GCHQ and servicemen assisting the latter as required by the Secretary of State;
- Judicial functions and things done on the instruction of those exercising judicial functions;
- Legislating, whether by Westminster, devolved bodies or the General Synod of the Church of England, and making secondary legislation;
- Decisions whether to prosecute.

⁹ However, the Regulation contains no equivalent to the general statutory duties that are set out in (s 71) of the Race Relations Act 1976, nor anything equivalent to Race Equality Schemes or Race Equality Impact Assessments. The duties of public authorities under the Regulations are solely to comply with the requirement not to discriminate unlawfully.

Educational establishments and education authorities

All maintained and special schools and Academies and independent schools in England and Wales, and all public, grant-aided and independent schools in Scotland, are covered by the regulations, which also make it unlawful for a local authority to discriminate on grounds of sexual orientation in the exercise of their functions. The responsible body in maintained schools will be the governing body and in independent schools it will be the Proprietor.

General

Schools that already employ non-discriminatory practices and adhere to existing guidance should already be acting within the spirit and letter of the Regulations.

Schools will need to make sure that gay or lesbian pupils, or the children of gay or lesbian parents, are not singled out for different and less favourable treatment from that given to other pupils. They should check that there are no practices which could result in unfair, less favourable treatment of such pupils. They will need to ensure that homophobic bullying is taken as seriously and dealt with as firmly as bullying on any other ground. But all of this should already be established practice in schools.

Admissions

The School Admissions Code, which applies to all maintained schools and academies, already prohibits any discrimination on the basis of a pupil's or parent's sexuality, or indirect discrimination by, for example, giving priority to pupils whose parents are married. Should such arrangements be proposed the local authority would be under a duty to object to them and parents would also have the power to object. Any objection to arrangements prohibited by the Code would be upheld by the Schools Adjudicator.

Should a parent, carer or child believe they have nonetheless been discriminated against, on the grounds of their sexual orientation, and have not been offered a place at a school they wanted through the admissions process, the parent or carer could appeal to the independent admission appeals panel. The appeals panel has the power to award a place at the school. It is worth noting that as a school's admission arrangements cannot lawfully include criteria that discriminate on grounds of sexual orientation, the admission authority would also have failed in its further legal duty to apply its published admission arrangements.

Under the Regulations, the parent or carer or child could also or alternatively seek redress through the courts for any discrimination in both maintained and independent schools. A court would have the power both to quash the decision not to award a school place and to award damages for the discrimination itself.

The Regulations would also apply to discriminatory behaviour in the arrangements surrounding the admissions process, such as open evenings and published material. Schools should be careful to avoid any possible implication that they are seeking to deter applications on grounds of the sexual orientation of a potential pupil or that of his or her parents or carers.

Teaching and the Curriculum

The Regulations should have no effect on teaching and the curriculum in schools. Guidance is already available in the area of Personal, Social and Health Education (PSHE) and Sex and Relationship Education (SRE) which sets out the requirements for schools – with the promotion of respect and pupil welfare being of paramount importance. It makes clear that teaching, particularly in these areas, should meet the needs of all young people, whatever their developing sexuality or family circumstances. It also sets out that decisions on detailed content of SRE should be taken at local level to take account of the specific needs and circumstances of pupils and that schools can exercise appropriate flexibility to ensure that it can be taught in a way that is relevant and appropriate to the school's ethos. If schools continue to adhere to this guidance, dealing sensitively and appropriately with issues around sexuality, then they should not fall foul of the Regulations. Schools should, nonetheless, make sure that they do not discriminate in delivering any part of the school curriculum or extra-curricular offer. So, for example, they must not prevent a pupil from taking part in a residential school trip because he is, or is perceived to be, gay, or make a pupil get changed for P.E separately from the other boys because he is gay, or prevent a girl from being head prefect because she is a lesbian.

Independent Schools

Whilst the guidance available in relation to Personal, Social and Health Education and that for Sex and Relationship Education sets out the requirements for maintained schools, it also provides useful guidance for independent schools and should help prevent independent schools from falling foul of the new regulations

Conflict with Religious Freedom

Protection in the area of discrimination on grounds of religion or belief and the right to manifest one's religion or belief has already been addressed in Part 2 of the Equality Act 2006. However, many views on sexual orientation are entrenched in religious belief and this has led to some misunderstanding and to concerns being expressed about the impact that these regulations will have on religious freedom in faith schools. Non-denominational maintained schools and voluntary controlled denominational schools teach RE according to the locally agreed syllabus and voluntary aided schools teach RE according to the tenets of their faith. However, the concerns expressed are that faith schools will no longer be able to teach according to an aspect of their belief or faith – which is the importance of traditional family values and that same sex relationships are sinful. There are similar concerns about the possibility that individual teachers expressing their views in this area, whether based on their religion or not, might be the subject of legal action.

The Regulations will not prevent any of this. So for example, if a faith school (or indeed any school) teaches that the Christian and Moslem faiths decree that same-sex sexual activity is a sin then the school will not be acting unlawfully. Similarly, if a pupil asks a teacher his views on homosexuality and the teacher gives his view, then again, that teacher will not be acting unlawfully. In both cases, the subject must be dealt with appropriately in accordance with existing guidance. Haranguing or harassing a particular student or group of students is not an acceptable way to convey a belief within an educational context, and such behaviour could constitute unlawful discrimination.

Organisations relating to religion or belief

It is essential to balance the right to protection from sexual orientation discrimination with the right to manifest a religious belief. In recognition of the need to avoid unnecessary and unjustifiable restrictions on people's right to exercise their religious belief, the Regulations include where justifiable an exemption to cover the activities of religious organisations.

The exception applies to an organisation and to persons acting on behalf of or under the auspices of an organisation which has any of the following purposes:

- **practice, advance or teach** the practice or principles of any religion.
- enable persons of the religion or belief to **receive any benefit or engage in any activity, within the framework of the religion or belief.**

This will cover a range of formal and informal groups.

Those wanting to take advantage of the exemption will need to demonstrate that:

- i. their purpose is not mainly or wholly commercial;
- ii. the service in question is not being provided on behalf of and under contract with a public authority;
- iii. the restrictions imposed are necessary to comply with the doctrine of the organisation, or so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers.

Where the exemption applies, the Regulations allow for organisations lawfully to **restrict** on the grounds of sexual orientation:

- their **membership**;
- **participation** in their activities, or activities undertaken on their behalf or under their auspices;
- the **provision of goods, facilities or services** in the course of their activities/ activities undertaken on their behalf or under their auspices;
- the use or disposal of **premises** owned or controlled by them.

A **minister of religion** or other person with a similar function in such an organisation¹⁰ may for the same reasons restrict:

- **participation in activities** carried on in the performance of his or her functions in relation to that organisation;
- the **provision of goods, facilities or services** in the course of those activities in the performance of his or her functions.

¹⁰ ie someone who performs functions in connection with a religion to which a religious organisation relates, and holds an office or appointment in, or is accredited, approved or recognised for the purposes of, a religious organisation.

These exemptions will enable organisations and ministers of religions to continue to act in accordance with their religious belief in a wide range of activities, including the social activities which are often central to the life of religious communities.

Below are some illustrative examples of areas where it will be **lawful to impose restrictions** on the grounds of sexual orientation, where these restrictions are necessary to comply with the doctrine of the organisation, or so as to avoid conflicting with the strongly held religious convictions of a significant number of a religion's followers:

- The decision by a minister of religion as to whom to administer religious rites (eg in the case of Christianity; baptism, Holy Communion, reconciliation, confirmation, marriage or Ordination, or the sacrament of the sick);
- Who should be allowed to attend related activities - eg confirmation or marriage preparation/support sessions;
- Who should be allowed to attend activities such as a prayer or theological study/support group;
- Who should be admitted to primarily religious (rather than commercial) residential accommodation/activities eg diocesan centres, religious conference centres, retreats, faith-based camps, pilgrimages etc;
- Who should be admitted to clubs and societies run by the religious organisation;
- Who should be allowed to use the organisation's premises, eg for meetings/celebrations;
- Who should be allowed to occupy housing provided by a religious organisation.

The exemption is **not** however available to:

- Religious organisations delivering goods, facilities or services **on behalf of and under contract with a public authority**.
- Primarily **commercial organisations**, even if marketing themselves as having a religious ethos. Like other commercial organisations, these are required by the Regulations to offer and deliver services to the public on a non-discriminatory basis.

Voluntary adoption agencies and independent fostering agencies

The Regulations will have no effect on the legal framework for adoption and fostering, nor the criteria against which decisions are taken about the placement of children with prospective adopters/ foster carers:

Adoption

- In England and Wales, married couples, civil partners, single people (irrespective of their sexual orientation) and two people (whether of different sexes or the same sex) living as partners in an enduring family relationship have been able to apply to adopt jointly since 30th December 2005. The same position will apply in Scotland, once the Adoption and Children (Scotland) Act 2007 is implemented.
- The welfare of the child throughout his or her life remains the paramount consideration in any decision on whether to place a child for adoption with particular prospective adopters, taking account of the child's religious persuasion, racial origin and cultural and linguistic background, and the decision on the placement of children with specific adopters will continue to be taken by the local authority that is looking after the child.
- Voluntary adoption agencies recruit, assess and prepare prospective adoptive parents for adoption.

Fostering

- The Children Act 1989 sets the overall framework for the current care system in England and Wales. The framework in Scotland is governed by the Children (Scotland) Act 1995.
- An authority's duty is to find and approve the most suitable foster parents for children who need family placement. Fostering decisions must centre on the interests of the child and whether the individuals concerned are able to provide a suitable environment for the care and nurture of a child.
- A looked after child may only be placed with a foster carer if that person has been approved under the terms of the Fostering Services Regulations 2002 in England and Wales and the Fostering of Children Regulations 1996 in Scotland.¹¹ Foster carers are approved either by a local authority fostering service, or by an independent or voluntary provider (and the Fostering Services Regulations or the Fostering of Children Regulations apply to all three sectors). Foster carers are approved as individuals. Where responsibility for the care of a child is shared between two individuals who live together, both individuals should be assessed and approved.
- The welfare of children in care is paramount in all placement decisions. Children are more likely to thrive if they are placed with carers who are a good match in terms of location, culture, language and lifestyle. The National Minimum Standards for

¹¹ Members of same sex couples may foster in England and Wales. In Scotland a child may only be fostered by a man and a woman living and acting jointly together or a man or a woman living and acting alone.

fostering services in England and Wales and the National Care Standards in Scotland require that placement decisions consider the child's assessed racial, ethnic, religious, cultural and linguistic needs and match these as closely as possible with the ethnic origin, race, religion, culture and language of the foster family.

- Fostering agencies recruit, assess, approve, train, support, monitor and review foster carers.

Voluntary adoption agencies are often also independent fostering agencies ie the same organisation provides both services.

Under the Regulations, the general rule is that voluntary adoption agencies and independent fostering agencies must offer the same service to all individuals or couples who wish to adopt or foster.

Transitional arrangements

However, as specific concerns were raised about the impact of the Regulations on faith-based voluntary adoption agencies and independent fostering agencies during the consultation, the Regulations provide for a transitional period for faith-based agencies until the end of 2008. To take advantage of the transitional arrangements, agencies will have to:

- i) be certain that the restrictions in the provision of their service are necessary to comply with the doctrine of the religious organisation, or avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers;
- ii) make arrangements to refer gay, lesbian and bi-sexual people to agencies who are able to assist.

If these conditions are not satisfied, agencies could face a claim for unlawful discrimination.

Contracts in place between local authorities and voluntary adoption agencies and independent fostering agencies will continue to be binding, and we expect local authorities to continue to access the services of faith based voluntary adoption agencies and independent fostering agencies in accordance with the need for and of adopters/foster carers in their area, provided the overall service maintained by the local authority is accessible to all prospective adopters/foster carers¹².

During the transition period, an independent assessment team, to be commissioned by the Prime Minister, will identify the issues agencies will need to address and the impact the Regulations will have on adoption services. The role of the assessment team will be to work with the Government, local authorities and agencies to prevent any disruption to the provision of services to children, prospective adopters, foster carers and adoptive parents. The independent assessment team will also work to ensure that these much valued and needed services are retained and developed, while also ensuring agencies comply with these Regulations.

¹² Faith based voluntary adoption agencies and independent fostering agencies should not indicate an intention to discriminate unlawfully when advertising their service. However, it would not be unlawful during the transition period for an advert to make clear that a faith based agency will refer prospective adopters or foster carers of a particular sexual orientation in line with Regulation 15.

Charities

It will be unlawful for charities to discriminate on the grounds of sexual orientation. An example of this might include:

- a homeless charity refusing to provide a bed for the night to a woman on the grounds that she was, or was suspected of being, a lesbian.

However charities¹³ may lawfully provide benefits only to persons of a particular sexual orientation if acting in pursuance of a charitable instrument¹⁴, and if **the restriction is imposed by reason of or on the grounds of the provisions of the charitable instrument**. Examples of this might include:

- a charity supporting victims of homophobic hate crime;
- a helpline for lesbian, gay or bisexual young people with mental health difficulties (these are at high risk of committing suicide);
- a charity campaigning for equal treatment for lesbian, gay or bisexual people.

Religious charities may qualify for the **religious organisation exemption**.

Special needs for education, training and welfare

The Regulations do not make it unlawful to do anything by way of meeting people's special needs for education, training or welfare on grounds of their sexual orientation, or providing ancillary benefits in connection with meeting such needs. This will enable organisations to take steps to prevent/compensate for disadvantage, or to meet special needs related to a particular sexual orientation.

For example, some organisations restrict the provision of their services to lesbian, gay or bisexual people, where it can be demonstrated that this leads to greater take up of the service in question or improves the effectiveness of service delivery. Examples of separate services include:

- Sexual health promotion/advice services;
- Hostel accommodation;
- Housing advice services;
- Employment advice;
- Mental health services.

Under the Regulations these targeted services, where meeting a justified need, will continue to be lawful.

¹³ ie in relation to England and Wales, a charity as defined in the Charities Act 2006, and in Scotland, a body entered in the Scottish Charity Register.

¹⁴ ie the instrument establishing or governing a charity.

Associations

Associations with 25 or more members, whether or not their activities are carried out for profit, will not be able to discriminate on the grounds of sexual orientation. It will be unlawful to discriminate on these grounds in relation to membership admissions, access to benefits, facilities or services, or depriving people of their rights as members/associates.

However, this regulation does not apply to associations whose **main object** is to enable the benefits of membership to people of a particular sexual orientation. The main object of a club/association may be determined by factors such as its essential character and all other relevant circumstances, particularly the extent to which the affairs of the association are so conducted that the persons primarily enjoying the benefits of membership are of a particular sexual orientation.

Examples of associations whose main object is to provide benefits to people of a particular sexual orientation might include health networks, mutual support groups, or lesbian, gay or bisexual sports/social clubs. Privacy and/or a safe and supportive peer environment constitute important benefits of membership of such associations.

Insurance

Insurance companies tailor their policies to reflect different risk profiles, based on the latest actuarial data regarding lifestyles and behaviour. The Regulations provide a targeted exemption for insurance companies to allow differential treatment where supported by sound actuarial evidence. This exemption is similar to, but narrower than, provisions in the Sex Discrimination Act and Regulations made under the Disability Discrimination Act.

It is intended that this particular exemption will not apply beyond the end of 2008. Current best practice guidance from the Association of British Insurers makes it clear that insurers should not ask about sexual orientation or any HIV negative tests, but instead base their assessment of risk on answers provided about actual behavior, regardless of sexual orientation. The Government will work with the insurance industry and others to ensure that if any exemption is required beyond 2008, it reflects a genuine need in the industry and is in line with industry best practice, and will legislate accordingly.

Outside of this specific, targeted exemption, insurance companies will still have to comply with the Regulations. As such, the Regulations will prevent someone being charged an extortionate premium for their mortgage insurance as a result of blanket prejudice about their sexual orientation.

Blood Donation

Currently, the National Blood Service excludes blood donations by certain groups, including gay men, where this is tied to close and regular analysis of the epidemiology of confirmed HIV and Hepatitis B positive tests among blood samples from people donating blood in the UK. The Regulations include a targeted exemption for the National Blood Service enabling this policy, which is regularly subject to review, to be maintained.

Statutory requirements

The Regulations do not make it unlawful to do anything which is necessary to comply with statutory requirements.¹⁵

¹⁵ ie an Act of the UK or Scottish Parliament; legislation made/to be made by: a Minister of the Crown/Order in Council/ Scottish Ministers or a member of the Scottish Executive/the National Assembly for Wales/by virtue of a Measure of the General Synod of the Church of England; or a condition or requirement imposed by a Minister of the Crown by virtue of the above.

Claims of unlawful action

Individual claims

In most circumstances under the Regulations, remedies for discrimination on grounds of sexual orientation can be obtained by the victim bringing proceedings in the county court in England and Wales or the sherriff court in Scotland. Advice and assistance relating to the bringing of such proceedings may be obtained from the Citizen's Advice Bureau, Law Centres, or solicitors. From October 2007, there will also be a possibility of obtaining assistance from the Commission for Equality and Human Rights.

The claimant must prove facts from which the court could conclude, in the absence of a reasonable alternative explanation, that an act of unlawful discrimination had been committed. In these circumstances the court must assume an unlawful act has been committed unless the respondent can prove otherwise.

The court can award **compensation** and other remedies if a claim is successful. If a claim fails, the claimant may have to pay the respondent's costs.

The **time limit** for bringing a case under the Regulations is six months from the date of the action (or the last of a number of actions) that is being complained about.

Discrimination can be difficult to prove. Claimants will stand a better chance of convincing a court that they have been discriminated against if they gather as much **evidence** as they can, as soon as possible, including the names of possible witnesses.

It may be possible to sort out the problem **informally** by making an approach to someone in authority.

If claimants wish formally to question the person they think has discriminated against them, this can be done by writing to that person setting out the facts as they appear to the claimant, and asking them the reason for their actions. To help this process, a **standard form** has been provided which can be found at:
http://www.opsi.gov.uk/si/si2007/uksi_20071263_en.pdf

This form and the reply may be used in evidence in court provided the questions were put within six months of the act complained of and served on the respondent in accordance with the Regulations, which provide that the claimant may:

- deliver it;
- send it by post to the respondents usual or last known residence or place of business;
- deliver it or send it to a solicitor acting for the respondent.

If the respondent does not reply within 8 weeks, or gives an evasive reply, the court may draw an inference from that fact. A failure to reply might for example lead a court to infer that an unlawful act of discrimination has taken place.

When replying to a complaint, the respondent may use a similar standard form, which can be found at: http://www.opsi.gov.uk/si/si2007/uksi_20071263_en.pdf Replies delivered or posted to the respondent should be sent to the address stated on the claim form, or if no such address is stated, to the usual or last known residence.

Questions and replies may also be served on a body corporate, trade union or employers' association by sending it to the secretary or clerk of the body at its registered or principal office.

The reply may be admissible as evidence in court.

The response forms allow space for responses to the questions posed in the claimant's form, or statements as to why a reply will not or cannot be given.

Actions instigated by the Commission for Equality and Human Rights

The Commission for Equality and Human Rights will be responsible for enforcement of the discriminatory advertising and discriminatory practice provisions of these Regulations. The only criminal offences created by the Regulations relate to the making of false statements that acts or advertisements are not discriminatory.

Among other things the Commission may:

- **conduct an investigation** where it suspects that a person or organisation may have contravened these Regulations;
- apply to a court for an **injunction** (in England and Wales) or an **interdict** (in Scotland) where it suspects that a person or organisation will, unless stopped, commit an act of unlawful discrimination under these Regulations.

Annex A: Q and A for members of the public and providers of goods, facilities and services

From **30 April 2007** it will be unlawful for anyone providing goods, facilities or services, or managing or disposing of premises, to discriminate against a person on the grounds of their actual or presumed sexual orientation; or the actual or presumed sexual orientation of someone with whom they are associated.

Sexual orientation means an individual's sexual orientation towards:

- people of the same sex as him or her (gay or lesbian);
- people of the opposite sex (heterosexual);
- people of both sexes (bisexual).

Why has the Government introduced these Regulations?

The principles behind these measures are straightforward. It can't be right in a decent, tolerant society that a shopkeeper or restaurant can refuse to serve a customer because of his or her sexual orientation. It cannot be right for a school to discriminate against a child because of their parents' sexuality or not to take homophobic bullying as seriously as they should.

Our consultation on these issues has been extensive and has provided evidence that this kind of unfair treatment takes place far too often.

The Regulations make such discrimination illegal. We want to ensure that when people visit their hospital, study at school or college, or even do something as everyday as shopping or booking a holiday, they get treated fairly and with respect, no matter what their sexual orientation.

How long did the Government consult on the new provisions?

The consultation period lasted 12 weeks – it was launched on 13th March 2006, and closed on 5th June 2006. Almost 3,000 responses were received during that period – of which over 500 were from organisations.

Whilst the vast majority supported the decision to legislate in this area, there was a clear divide on the issue of how the Regulations ought to balance the competing rights of individuals to hold and manifest a religious belief against the right to live free from discrimination.

Due to the volume and strength of replies received, the Government decided that it was only right that it took the time to consider properly such a complex issue, and postponed the introduction of the Regulations. The Secretary of State committed to bringing them into force in April 2007 alongside similar provisions on grounds of religion or belief, so that it could provide protection against discrimination for everyone, in a way that is effective and appropriate.

Who does this apply to?

The prohibition of discrimination on the grounds of sexual orientation includes anyone supplying goods, facilities or services of any kind, including for example banking, retail services, and hotel accommodation. It also includes management and disposal of premises. There are exceptions for people who manage small premises, where they or a close relative live in them, and for people who dispose of premises privately, without advertisement.

What do the Regulations mean?

When providing goods, facilities or services you must not:

- refuse to supply your normal service to someone, or to treat them less well than others, on ground of their actual or presumed sexual orientation, or that of someone with whom they are associated.
- apply some provision, criterion or practice which puts, or would put, people of a particular sexual orientation at a disadvantage compared to others.

If a company refused to provide customers who have had an HIV test with access to its services, this would indirectly discriminate against gay men, who are more likely to have had such a test.

- treat civil partners on an unequal basis to those who are married, or treat same sex unmarried couples on an unequal basis to mixed-sex unmarried couples.

It would be unlawful for a company offering a discount to married couples not to make the same discount available to civil partners.

- treat someone less well because they have been involved in making, or supporting, a complaint about discrimination of this kind; unless they were acting maliciously in knowingly making a false complaint.

It would be unlawful for a commercial establishment to turn away a customer, irrespective of their sexual orientation, because they had complained about the treatment of a lesbian customer, or because they had supported the latter in a complaint – provided the complainant or supporter did so in good faith.

- advertise in a way which indicates an intention to discriminate unlawfully.

It would be unlawful for a company to advertise to the effect that they do not offer their services to lesbians, gay men or bisexuals.

- instruct someone else to do any of these things.

But what if people behave in a way that is unacceptable?

The Regulations do not prevent you from excluding people who behave in ways that are unacceptable, for example if they intrude on other customers. They simply require that you provide your normal service in a non-discriminatory way.

If in doubt – do your best to treat people fairly and be open to suggestions that your customers or potential customers may raise. Small adjustments that make life easier for your customers may increase your opportunities.

What if employees discriminate?

Under the Regulations employers and principals are liable for the actions of their employees and agents, whether or not they know about or approve of the act.

If an employee of a company refused to serve lesbian, gay or bisexual people, the company may be liable as well as the employee.

It is a defence however for an employer to prove that he or she took reasonable steps to prevent breaches of the regulations. You will therefore need to take steps to ensure that your employees/agents are aware of the Regulations, and understand the implications for their own work.

How do I avoid discriminating accidentally?

Good customer service which responds to the needs and wishes of customers is unlikely to discriminate accidentally, and will help show up any areas where change is needed.

What if my service is of more interest to people of a particular sexual orientation? Will this be seen as discriminatory?

No-one is required to change the nature of their business by this legislation, so a company that targets its products at lesbians, gay men or bisexuals is not obliged to develop a set of new products and services of specific interest to heterosexuals or vice versa.

What do I do if someone says I am discriminating against them?

You need to take complaints seriously and try to resolve them promptly. You need to decide whether you agree with the complainant about the facts of what happened, and to be clear why they think they have been discriminated against. If you agree you have discriminated against them, consider what steps to take to resolve the matter with your customer, for example by apologising or taking steps to ensure it does not happen again. A person who complains has the right to take court action in support of their claim, and may seek to use any response from you in evidence.

What are the penalties for falling foul of the Regulations?

The Regulations will provide for a civil remedy for discrimination through the County Courts.

The Regulations will not lead to individuals being subject to criminal sanctions, unless they knowingly or recklessly making a false statement that a proposed act is not unlawful under these Regulations, in order to secure someone else's assistance (for example, to place a discriminatory advertisement). If convicted, they may be liable to a fine.

What should I do if I'm being discriminated against?

If you feel you are being discriminated against, it may be possible to sort out the problem **informally** by making an approach to someone in authority. If this is not possible, formal claims of discrimination can be brought in the county courts (Sheriff Courts in Scotland), within 6 months of the alleged discrimination taking place. Further advice on this can be obtained from the Citizen's Advice Bureau, Law Centres or Solicitors.

What's the effect of the Regulations on adoption and fostering agencies?

There is no specific exemption for adoption and fostering agencies. However, the Government has committed to provide for a transition period for voluntary adoption and fostering agencies until the end of 2008 to ensure that vital services for children are not disrupted, in line with the Prime Minister's statement of 29th January.

In the interim, any faith based adoption or fostering agency wishing to take advantage of the transitional arrangements will have to refer same-sex couples to other agencies which they believe are able to assist.

In addition, the Prime Minister will be commissioning an ongoing independent assessment of the issues agencies would need to address in the transition period, if much valued and needed services are to be retained and developed. This will enable vital services for children to be maintained, whilst preserving the principle of non-discrimination.

Do these Regulations make it illegal for me to say certain things?

The Regulations will have no effect on freedom of speech; rather, they will ensure that businesses/public authorities do not give customers a hostile or less courteous service on grounds of their sexual orientation.

The Regulations will not:

- i) enable someone to be sued for holding or expressing views about homosexuality or sexual relationships;
- ii) prohibit bookshops from stocking religious or other texts that make statements about homosexuality.

Are charities able to discriminate?

The Regulations will not interfere with current charity law. If a charity is required to discriminate in line with the explicit terms of the charitable instrument under which it is established, it may continue to do so. Otherwise, it must not discriminate on grounds of sexual orientation.

Faith based voluntary organisations or charities will not have to comply with the Regulations where this would conflict with either the doctrine of their organisation or the strongly-held beliefs of a significant number of the religion's followers - provided they are not operating on either a commercial basis, or on behalf of and under contract with a public authority.

Are private members clubs able to discriminate?

Only if their main aim is to provide a genuine benefit or opportunity to a group linked to their sexual orientation – for example a health network for lesbian, gay and bisexual people may be set up to provide a safe haven in which individuals are able to seek support, which it may otherwise be difficult for them to find.

Am I able to discriminate when letting premises?

The Regulations do not prevent individuals from choosing whom they live with in their private home. The Regulations are designed to prevent discrimination in the letting of rooms as a commercial concern, not to dictate to individuals whom they live with on a personal basis. The government respects an individual's right to privacy.

If an individual or organisation providing accommodation as a commercial concern (for instance a Bed & Breakfast or a hotel), they must not discriminate. Commercial organisations have a responsibility to accept society as it is constituted, and offer equality of service to all.

As religious organisations, churches could qualify for the religious organisation exemption and therefore continue to restrict to whom they hire their premises to – provided they can demonstrate that this restriction is necessary to comply with doctrinal belief or avoid conflicting with the strongly held beliefs of a significant number of the religion's followers.

The Regulations guarantee that, where facilities are being made available on behalf of and under contract to a public authority, they must provide equality of access regardless of sexual orientation.