

Equality and Diversity Guidance

Guidance on the Sexual Orientation and Religion or Belief Regulations 2003

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Executive Summary

Guidance on the Sexual Orientation and Religion or Belief Regulations 2003

Date

December 2003

Subject

Guidance on the Sexual Orientation and Religion or Belief Regulations 2003. This guidance will help the Learning and Skills Council (LSC) meet the broad requirements of the Employment Equality (Sexual Orientation) and Employment Equality (Religion or Belief) Regulations 2003 in respect of vocational training and guidance.

Intended recipients

This guidance is intended for local Learning and Skills Councils (local LSCs); Executive Directors; National Directors; strategic planning staff; equality and diversity staff; and staff involved in developing and implementing learning programmes.

Status

For Information

Key Documents

Learning and Skills Act 2000

National Equality and Diversity Strategy Widening Participation and Promoting Inclusion, 2001–2004

The Employment Equality (Sexual Orientation) Regulations 2003

The Employment Equality (Religion or Belief) Regulations 2003

Legal advice in relation to the LSC's obligations under the Regulations can be obtained from:

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Guidance on the Sexual Orientation and Religion or Belief Regulations 2003

Introduction

1 The broad aim of this guidance is to provide an introduction and background to the Employment Equality (Sexual Orientation) Regulations that came into force on 1 December 2003 and the Employment Equality (Religion or Belief) Regulations 2003 that came into effect on 2 December 2003. These are referred to in this guidance as 'the Regulations'.

2 The Regulations prohibit discrimination (direct or indirect), harassment or victimisation on the grounds of sexual orientation and religion or belief in employment and vocational training by:

- employers;
- trade organisations;
- training providers;
- further education and higher education institutions;
- bodies conferring professional and trade qualifications; and
- employment agencies.

For more information on the scope of the Regulations, see paragraph 15.

3 Under the Regulations, sexual orientation means:

- orientation towards persons of the same sex;
- orientation towards persons of the opposite sex; and
- orientation towards persons of the same sex and of the opposite sex.

This includes perceived as well as actual sexual orientation.

4 It is unlawful to discriminate indirectly against anyone on the grounds of their sexual orientation, that is, to treat them less favourably than others because of their sexual orientation by applying criteria, provisions or practices which put people at a particular disadvantage because they are, or because you think they are, lesbian, gay, heterosexual or bisexual.

5 Under the Regulations 2003, religion or belief is defined as:
being any religion, religious belief or similar philosophical belief. This does not include any philosophical or political belief unless it is similar to religious belief. It will be for the Employment Tribunals and other courts to decide whether particular circumstances are covered by the regulations.

6 It is unlawful to discriminate directly or indirectly against anyone on the grounds of their religion or belief, that is to:

- treat them less favourably than others because of their religion or belief;
- apply a criterion, provision or practice which disadvantages people of a particular religion or belief unless it can be objectively justified;
- subject someone to harassment because of their religion or belief;
- 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 the grounds of religion or belief; and
- discriminate or harass someone after the working relationship has ended.

Aims

7 This guidance is designed to assist you in understanding the requirements that apply to the LSC and the providers it funds under the Regulations, and to promote anti-discriminatory practice in relation to sexual orientation and religion or belief.

8 LSC staff are asked to ensure that those vocational training providers with whom they contract are aware of the Regulations and from where further information can be obtained.

9 This guidance should not be used for the purposes of providing legal advice to providers on their responsibilities under the Regulations, nor interpreted as definitive legal advice. Training providers are independent of the LSC: they are not employees of the LSC, and nor do they act as agents for the LSC. It is their responsibility to ensure that they do not act unlawfully. Providers must seek their own independent legal advice in relation to the Regulations and breaches of them. Legal advice in relation to the LSC's obligations under the Regulations can be obtained from:

Cathy Robinson, Council Solicitor
Telephone: 024 7682 3561
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Jo Lewis, Solicitor
Telephone: 024 7682 5706
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Background to the Regulations

10 The Regulations arise from Article 13 of the Amsterdam Treaty (1997). Article 13 provided the European Union (EU) with a legal basis to take action to combat discrimination on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation.

11 The general principles of Article 13 are not in themselves legally binding. However, the Council of Ministers approved two directives, which are binding upon Member States to implement into national law by 2003 and 2006.

12 The two directives are:

- Council Directive 200/43/EC (29 June 2000), implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (referred to as **the Race Directive**); and
- Council Directive 200/78/EC (27 November 2000), establishing a general framework for combating discrimination on the grounds of religion or belief, age, disability or sexual orientation in the areas of employment or training (referred to as **the Employment Directive**).

The Employment Directive

13 The Employment Directive establishes a general framework for equal treatment in employment and vocational training, including careers guidance and the award of qualifications.

14 The Employment Equality (Sexual Orientation) Regulations 2003 and the Equality (Religion or Belief) Regulations 2003 referred to in this guidance

implement the UK's obligations (and matters arising out of or related to those obligations) in relation to sexual orientation, religion or belief under the Employment Directive. They are made under section 2(2) of the European Communities Act 1972.

15 The Regulations are broadly similar in structure and form to the Sex Discrimination Act 1975 and the Race Relations Act 1976. Some provisions are also similar to those introduced in the Disability Discrimination Act 1996. However, in contrast to those Acts, the Regulations apply only to discrimination in employment and vocational training, as the Employment Directive does not go beyond these fields. It does not, for example, explicitly include education.

16 Employers are only mentioned here in their role as training providers.

Main Features of the Regulations

17 There are 39 Regulations in total. Regulation 2 defines various terms that are used throughout the Regulations. In particular, sexual orientation: *is defined as being a sexual orientation towards persons of the same sex (this covers gay men and lesbians); the opposite sex (this covers straight men and women); or both sexes (this covers bisexual men and women). It does not extend to sexual practices and preferences (e.g. sado-masochism and paedophilia).*

Department of Trade and Industry, 'Employment Equality (Sexual Orientation) Regulations 2003: Explanatory Memorandum'.

18 The Regulations make it unlawful to:

- directly discriminate against anyone on the grounds of sexual orientation, that is, to treat them less favourably than others because of their sexual orientation (Regulation 3);
- indirectly discriminate against anyone on the grounds of their sexual orientation, that is, to apply a criterion, provision or practice which disproportionately disadvantages people because of their sexual orientation (Regulation 3);
- harass anyone on the grounds of their sexual orientation. Harassment is unwanted conduct that violates dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment (Regulation 5); and
- discriminate against someone by way of victimisation by treating someone less favourably because they have made a complaint or allegation or have given evidence against another person who has been accused of discrimination,

harassment or victimisation on the grounds of sexual orientation (Regulation 4).

19 Regulation 2 defines various terms that are used throughout the Regulations. In particular, religion or belief:

is defined as being any religion, religious belief or similar philosophical belief. This does not include any philosophical or political belief unless that belief is similar to a religious belief.

Department of Trade and Industry, 'Employment Equality (Religion or Belief) Regulations 2003: Explanatory Memorandum'.

20 The Regulations make it unlawful to:

- **directly discriminate** against anyone on the grounds of religion or belief, that is, to treat them less favourably than others because of their religion or belief (Regulation 3);
- **indirectly discriminate** against anyone on the grounds of their religion or belief, that is, to apply a criterion, provision or practice which disproportionately disadvantages people because of their religion or belief (Regulation 3);
- **harass** anyone on the grounds of their religion or belief. Harassment is unwanted conduct that violates dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment (Regulation 5); and
- **discriminate** against someone by way of victimisation by treating someone less favourably because they have made a complaint or allegation or have given evidence against another person who has been accused of discrimination, harassment or victimisation on the grounds of religion or belief (Regulation 4).

Application to Providers of Vocational Training

21 The definition of 'training' in the Regulations includes:

- facilities for training; and
- practical work experience.

22 A 'training provider' is defined as: *any person who provides, or makes arrangements for the provision of, training which would help fit another person for employment.* Regulation 17 (4) (b).

23 However the definition of 'training provider' in Regulation 17(4) specifically excludes:

- an employer in relation to training for employees;
- further and higher education institutions which are covered by Regulation 20; and
- a school.

24 Regulation 17(4) therefore applies to the provision of work-based learning by a private training provider and to higher education (HE) or further education (FE) courses not provided by an FE or HE institution, as well as to some aspects of adult and community learning and work experience, where this is not provided in a school.

25 The Regulations make it **unlawful for providers of vocational training to discriminate, harass or victimise anyone on the grounds of their sexual orientation, religion or belief:**

- in the terms on which the training provider affords access to training;
- by refusing or deliberately not affording access to training;
- by terminating training; and
- by subjecting a person to any other detriment during training.

Application to Further Education and Higher Education Providers

26 Regulation 20 makes it unlawful for FE and HE institutions to discriminate against or harass students, or persons who have applied to be students, on the basis of their sexual orientation, religion or belief in terms of:

- admissions procedures;
- access to any benefits; and
- exclusionary processes.

27 Regulation 20 applies to all education or training provided by FE and HE institutions. This includes the provision of vocational guidance and also relates to **courses** of study which, because of their general nature, are **aimed at improving general knowledge rather than preparing for an occupation**.

28 However, as with employers and training providers, an educational institution can restrict access to training if the training is related to employment where a genuine **occupational requirement** would apply and the student does not meet that requirement.

Application to Qualifications Bodies

29 Regulation 16 makes it unlawful for bodies that confer professional or trade qualifications to discriminate against a person:

- in the terms on which it confers a professional or trade qualification;
- by refusing or deliberately not granting any application for such a qualification on the grounds of sexual orientation; and
- by withdrawing or varying the terms on which a person holds a qualification.

30 Regulation 16 also makes it unlawful for qualifications bodies to harass the holder of, or an applicant for, a professional or trade qualification conferred by it.

31 Although most providers are not qualifications bodies as defined in the Regulations, the acts of qualifications bodies can obviously affect a person's access to vocational training.

Exceptions

32 Not all differences of treatment on the grounds of sexual orientation, religion or belief are unlawful. The Regulations permit exceptions to be made in particular circumstances.

33 Regulation 7 applies to training for employment where an employer could lawfully refuse to offer employment where:

- being of a particular sexual orientation, religion or belief is a **genuine and determining occupational** requirement and it is proportional to apply that requirement in a particular case; and
- a person does not meet this requirement; or
- the training provider is not satisfied, and in all the circumstances it is reasonable for him or her not to be satisfied, that the person meets this requirement.

34 Regulation 26 permits '**positive action**', in certain circumstances, to 'prevent or compensate for disadvantages linked to sexual orientation'.

35 The disadvantage may be that persons of a particular sexual orientation are under-represented, or it may be that there is evidence of widespread harassment of such persons in training provision.

36 Regulation 25 permits '**positive action**', in certain circumstances, to 'prevent or compensate for disadvantages linked to religion or belief'.

37 The disadvantage may be that persons of a particular religion or belief are under-represented, or it may be that there is evidence of widespread harassment of such persons in training provision.

Implementing the Regulations: Breaches, Complaints and Remedies

38 Regulation 28 provides that any complaints against employers or training providers can be brought in employment tribunals.

39 Employment tribunals can give the following remedies where they find a complaint is upheld:

- make an order declaring the rights of the complainant;
- make an order for compensation in favour of the complainant; and
- make a recommendation that the training provider or employer take, within a specified period, action to address the adverse effect of any act of discrimination about which the complainant has complained.

40 Complaints against FE or HE institutions or qualifications bodies have to be brought in the County Court (under Regulation 31), which can make an award of damages.

Promoting Equality within Diversity

41 Although the Learning and Skills Act 2000 Section 14 (the duty to promote equality of opportunity) makes no specific reference to sexual orientation or religion or belief, the LSC's broader remit is to widen participation and promote inclusion in all aspects of the exercise of its function. The LSC aims to promote equality of opportunity for all learners, irrespective of their age, race, sex, religion, sexual orientation, and whether or not they have a disability, learning difficulty or any other characteristic. Opportunities for training should be available to everyone on a fair and equal basis.

42 The National Equality and Diversity Strategy 2001–2004 is currently under review. The forthcoming strategy for 2004–2007 will include provision for the LSC to promote equality of opportunity regardless of a person's sexual orientation or religion or belief.

Useful Websites

The Advisory, Conciliation and Arbitration Service (ACAS):

www.acas.org.uk

- Guidance on Employment Regulations 2003: Sexual Orientation and the Workplace; and
- Guidance on Employment Regulations 2003: Religion or Belief and the Workplace.

The Department of Trade and Industry:

www.dti.gov.uk/er/equality

- Brief note on protection against discrimination at work on the grounds of sexual orientation; and
- Brief note on protection against discrimination at work on the grounds of religion or belief.

Her Majesty's Stationery Office:

www.hmsso.gov.uk

- The Employment Equality (Sexual Orientation) Regulations 2003 Statutory Instrument 2003 No. 1661 The Employment Equality (Sexual Orientation) Regulations 2003; and
- The Employment Equality (Religion or Belief) Regulations 2003 Statutory Instrument 2003 No. 1660 The Employment Equality (Religion or Belief) Regulations 2003.

The Office of National Statistics:

www.statistics.gov.uk

The Inter Faith Network:

www.interfaith.org.uk

The Lesbian and Gay Employment Rights organisation:

www.lager.dircon.co.uk

Stonewall: www.stonewall.org.uk

Employers' Organisation for Local Government:

www.lg-employers.gov.uk/diversity/belief/index.html

- main provisions of the regulations; and
- the implications and requirements of the EU Anti-Discrimination in Employment Directive covering Religion, Belief and Sexuality from the Employment Relations Unit.

Notes

Notes

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