

# Summary of the law on SEXUAL ORIENTATION DISCRIMINATION



This booklet sets out the basic employment rights to which workers are entitled under the sexual orientation discrimination provisions of the Equality Act 2010. These apply in England, Scotland and Wales only.

- PROTECTION AND LIABILITY
- DISCRIMINATION
- HARASSMENT
- VICTIMISATION
- EXCEPTIONS
- TRIBUNAL CLAIMS
- REMEDIES
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## What does the Act cover?

The Act covers all forms of discrimination in the workplace, including recruitment, terms and conditions, promotions, transfers, dismissals and training or any other detrimental treatment because of sexual orientation.

## Who is protected?

It covers all employment and applies to apprentices, those working under a contract of employment and the self employed working under a contract personally to do the work.

Ex-employees can also make a claim against a former employer, if they are complaining about something that was closely connected to their employment.

Sexual orientation applies to lesbian women, gay men heterosexual people and bi sexual people.



## Who is liable?

The employer is generally liable for acts of discrimination, harassment and victimisation in the workplace. However, individual employees may also be liable for example if they have subjected a colleague to harassment related to sexual orientation.

## When can sexual orientation discrimination arise?

Sexual orientation discrimination can arise in relation to:

- the arrangements made for deciding who should be offered employment such as shortlisting and interviews.
- the terms upon which employment is offered.
- refusing or deliberately omitting to offer employment.
- the ways in which access to opportunities for promotion, transfer, training or other benefits, facilities or services are offered.
- dismissal or any other detriment.



## What is the public sector equality duty?

Public bodies such as local government, the NHS and those carrying out public functions are under a duty to consider equality when making day to day decisions both in terms of service delivery and employment. This consists of a general duty and specific duties.

The general duty has three aims and requires public bodies to have due regard to the need to:

- eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act.
- advance equality of opportunity between people from different groups.
- foster good relations between people from different groups.

The specific duties are designed to help public bodies comply with the general duty. Broadly these require specified public bodies to publish information on how the general duty is being met, set equality objectives and engage with others such as employees and unions when setting the objectives.



## What is positive action?

The Act allows employers to treat someone with a protected characteristic more favourably during the process of recruitment and promotion.

If they "reasonably" think the person with a protected characteristic was disadvantaged because of that characteristic (or there are fewer people with a particular protected characteristic employed), they can choose that person over someone who does not have the characteristic provided that:

- The person is "as qualified" as the other candidate.
- The employer does not have a recruitment or promotion policy of treating people of the underrepresented group more favourably.
- The more favourable treatment is a proportionate means of achieving a legitimate aim (the legitimate aim being encouraging participation and overcoming disadvantage).

These provisions are voluntary. An employee cannot bring a claim because the employer did not apply positive action during the recruitment or promotion process, although they may still be able to bring a claim if they were discriminated against during it.



## What does the Act outlaw?

### Direct discrimination

Direct discrimination means treating a worker less favourably than someone else because of sexual orientation.

In order to determine whether someone is directly discriminated against a comparison has to be made with someone of a different sexual orientation but whose circumstances are the same or not materially different.

The definition is wide enough to cover those who are also discriminated against because they are perceived to be of a particular sexual orientation or because they are associated with someone of a particular sexual orientation.

Examples of direct discrimination include:

- Someone who is not promoted because they are a gay man.
- Someone who is subject to harassment because they have a lesbian daughter.
- Someone who is prevented from attending training because they are thought to be bi-sexual.

### Indirect discrimination

Indirect discrimination arises when an employer applies a provision, criterion or practice which puts those of a particular sexual orientation at a particular disadvantage compared to those who do not share the same sexual orientation and which the employer cannot justify.

Employers can only justify indirect discrimination if they can show that it was "a proportionate means of achieving a legitimate aim".



## Harassment

This occurs when one person subjects someone else to unwanted conduct related to sexual orientation that has the purpose or effect of violating a person's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment.

The definition of harassment also applies to those subjected to unwanted conduct because of another person's sexual orientation. So, for example, an employee who is subjected to offensive comments about their lesbian daughter will be protected under the Act.

Unwanted conduct includes the spoken or written word, jokes graffiti or other behaviour.

In determining whether the conduct amounts to harassment, the Tribunal will take into account the perception of that person and whether it was reasonable for them to consider the comments or behaviour to be offensive.

Employers may also be liable for harassment by third parties such as clients or customers, provided the employer knows the worker has been subject to harassment on two previous occasions and has not taken any reasonably practicable steps to prevent the harassment.



## Victimisation

This occurs when an employer subjects a person to a detriment because they have done or may do a protected act.

A protected act includes:

- bringing proceedings under the Act, or previous discrimination legislation.
- making allegations of a breach of the Act or previous discrimination legislation.
- giving evidence or information in connection with proceedings that someone else has brought.
- doing anything else such as raising a grievance or giving evidence in someone else's grievance.

The person complaining of victimisation does not need to show they are of a particular sexual orientation in order to bring a claim. However, they do have to have acted in good faith when doing a protected act. A false allegation will not amount to a protected act.



## Are there any exceptions?

There are three main exceptions:

- Occupational requirement.
- Religious requirement.
- Benefits dependant on marital status.

### Occupational requirement

The Act does not apply when the employer can show that there is an occupational requirement to do with the nature or context of the work which means they need to recruit someone of a certain sexual orientation, as long as they can show it is a proportionate means of achieving a legitimate aim.

The occupational requirement applies only to direct discrimination in recruitment, promotion, transfer and training, and not to the way in which an employer affords access to benefits, facilities or services.

In practice the occupational requirement will only apply in very limited circumstances.



## Religious requirement

Discrimination because of sexual orientation is also lawful in relation to employment for the purposes of an organised religion. Organised religion is not defined in the Act but case law has established that it should be applied very narrowly.

In order to satisfy the occupational requirement the employer will have to show that it is directed to comply with the doctrines of the religion, or avoids conflict with the strongly held religious convictions of the religion's followers.

## Benefits dependant on marital status

The Act states that an employer can still provide certain benefits that are restricted to opposite sex married employees or same sex couples in a civil partnership.

So, for example, employers can refuse survivor benefits in their occupational pension scheme to opposite sex unmarried couples and same sex couples who are not in a civil partnership.



## Is it easy to prove a claim?

Someone complaining of discrimination has to prove, on the balance of probabilities, that their employer discriminated against them because of their sexual orientation.

Tribunals are aware that it can be difficult for claimants to provide clear evidence of discrimination so once an employee has established facts from which a Tribunal could conclude that there had been discrimination then the burden shifts to the employer to show that they did not discriminate against them.

This is known as the reversal of the burden of proof.



## How do claimants gather information from their employer?

Workers can request information from their employer about their complaint. There are standard forms for asking and answering questions (the questionnaire procedure), as well as guidance which explains how the procedure works.

A questionnaire can be sent to the employer any time before a claim is lodged at the Tribunal or within 28 days of a Tribunal claim being lodged.

If the employer fails to answer the questions within eight weeks, a Tribunal may use this fact to draw an inference of unlawful discrimination.

## What time limits apply?

Claims must be brought within three months less one day of the act of discrimination that the person is complaining about. In exceptional circumstances the three month time limit may be extended if a Tribunal believes that it is just and equitable to do so.

When the discrimination has occurred over a long period of time, this may amount to a continuing act extending over a period. A claim must then be brought within three months less one day of the last act in the series of acts.



## What remedies are available?

There are three remedies available to a Tribunal:

- Declaration.
- Compensation.
- Recommendations.

### Declaration

A declaration is a statement of the rights at the end of a claim, for instance that a worker has been subject to direct discrimination.

### Compensation

Compensation can be awarded for injury to feelings and financial losses, if there are any. There is no limit to the amount of compensation which can include loss of earnings (past and future), loss of pension, interest and any other outlays associated with the discrimination.

The amount of compensation for injury to feelings can vary enormously. The person's age and vulnerability may be considered, and also the severity of the discrimination.

Aggravated damages can also be awarded if the employer has behaved in a high-handed malicious or insulting way which has aggravated the injury to the claimant's feelings.

Claimants can also ask for compensation for personal injury if they have been seriously affected by the discrimination, particularly in harassment cases which can lead to illness and depression. If so, claimants need to produce a medical report to support their claim.



## Recommendations

The Tribunal can make recommendations for the purpose of preventing or reducing the effect of the discrimination on the claimant or any other person even though they were not a party to the claim.

Examples of recommendations Tribunals can make include requiring an employer to:

- introduce an equal opportunities policy.
- ensure their harassment policy is more effectively implemented.
- set up a review panel to deal with equal opportunities and harassment/grievance procedures.
- re-train staff, or
- make public the selection criteria used for the transfer or promotion of staff.

A Tribunal cannot recommend that a person be given a job in a case where an employee successfully claimed they were discriminated against in a promotion exercise, for example.

If the employer fails to comply with a recommendation, then the Tribunal may order the compensation to be increased.



## Discrimination because of civil partnership

Anyone who is in a civil partnership is also protected under the Act. Civil partnership refers to the union of a same sex couple under the Civil Partnership Act 2004, including those registered outside the UK.

People who only intend to form a civil partnership, or who have had their civil partnership dissolved, are not protected.

Unlike other discrimination legislation, there is no protection from direct discrimination by association or perception or harassment for those who are in a civil partnership, although harassment related to civil partnership may amount to harassment because of sexual orientation.



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**Published May 2011**