

**Explanatory notes for the**  
***Employment Equality (Sexual Orientation)***  
***Regulations 2003***

**and**

***Employment Equality (Religion or Belief)***  
***Regulations 2003***

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**Table of contents**

<b>Regulation</b>	<b>Title</b>	<b>Page</b>
	Introduction.....	1
<b>PART I</b>		
1.	Citation, commencement and extent.....	1
2.	Interpretation.....	1
	<i>Definition of “sexual orientation”</i> .....	2
	<i>Definition of “religion or belief”</i> .....	2
	<i>Other interpretation provisions</i> .....	4
3.	Discrimination on grounds of sexual orientation / religion or belief.....	4
	<i>Direct discrimination</i> .....	4
	<i>Direct discrimination: perception</i> .....	5
	<i>Direct discrimination: association</i> .....	6
	<i>Direct discrimination: instructions</i> .....	6
	<i>The discriminator’s sexual orientation / religion or belief</i> .....	6
	<i>Indirect discrimination</i> .....	7
	<i>Indirect discrimination: application of “provision, criterion or practice”</i> .....	8
	<i>Indirect discrimination: group disadvantage requirement</i> .....	8
	<i>Indirect discrimination: individual disadvantage requirement</i> .....	8
	<i>Indirect discrimination: justification</i> .....	9
	<i>Special treatment which amounts to direct discrimination</i> .....	10
4.	Discrimination by way of victimisation.....	10
5.	Harassment on grounds of sexual orientation / religion or belief.....	11
	<i>Unwanted conduct on grounds of sexual orientation / religion or belief</i> .....	11
	<i>Conduct having the purpose or effect of harassment</i> .....	13
	<i>Violating dignity; intimidating, hostile, degrading, humiliating or offensive environment</i> .....	14
<b>PART II</b>		
6.	Applicants and employees.....	14
	<i>Discrimination against employees</i> .....	15
	<i>Part IV of the Employment Rights Act</i> .....	18
	<i>Employers’ other legal obligations</i> .....	18
7.	Exception for genuine occupational requirement.....	18
	<i>Scope of application of regulation 7</i> .....	18
	<i>Meaning of “genuine occupational requirement”</i> .....	20
	<i>Proportionate application</i> .....	21
	<i>Meeting the genuine occupational requirement</i> .....	22
	<i>Religion or belief Regulations: employers with a religious ethos</i> .....	23
	<i>Ethos based on religion or belief</i> .....	23

	<i>A genuine but not a determining occupational requirement</i> .....	24
	<i>Sexual orientation Regulations: employment for purposes of an organised religion</i> .....	25
	<i>Meaning of “employment for purposes of an organised religion”</i> .....	25
	<i>Requirement related to sexual orientation</i> .....	26
	<i>Doctrines of religion</i> .....	26
	<i>Religious convictions of followers</i> .....	27
8.	Contract workers.....	27
9.	Meaning of employment and contract work in Great Britain .....	28
	<i>Work outside Great Britain</i> .....	29
	<i>Employment on ships, aircraft, hovercraft</i> .....	30
	<i>Employment on oil and gas rigs</i> .....	30
9A	Trustees and managers of occupational pension schemes.....	30
10.	Office-holders etc .....	31
	<i>Government appointments</i> .....	32
	<i>Paid and directed office-holders</i> .....	32
	<i>Political offices and elected posts excluded</i> .....	33
11.	Police.....	33
12.	Barristers.....	34
13.	Advocates.....	34
14.	Partnerships.....	34
15.	Trade organisations.....	35
16.	Qualifications bodies.....	35
17.	Providers of vocational training.....	36
18.	Employment agencies, careers guidance etc.....	37
19.	Assisting persons to obtain employment etc.....	38
20.	Institutions of further and higher education.....	38
21.	Relationships which have come to an end.....	39
PART III		
22.	Liability of employers and principals.....	40
23.	Aiding unlawful acts.....	41
PART IV		
24.	Exception for national security.....	41
25.	<i>(SO regs*)</i> Exception for benefits dependent on marital status.....	42
25.	<i>(RB regs*)</i> Exceptions for positive action.....	42
26.	<i>(SO regs*)</i> Exceptions for positive action.....	42
26.	<i>(RB regs*)</i> Protection of Sikhs from discrimination in connection with requirements as to wearing of safety helmets.....	43
PART V		
27.	Restriction of proceedings for breach of Regulations.....	43
28.	Jurisdiction of employment tribunals.....	43
29.	Burden of proof: employment tribunals.....	44

30.	Remedies on complaints in employment tribunals.....	45
31.	Jurisdiction of county courts and sheriff courts.....	45
32.	Burden of proof: county and sheriff courts.....	45
33.	Help for persons in obtaining information etc.....	46
34.	Period within which proceedings to be brought.....	46

#### PART VI

35.	Validity of contracts, collective agreements, and rules of undertakings.....	47
36.	Application to the Crown etc .....	47
37.	Application to House of Commons staff .....	47
38.	Application to House of Lords staff.....	48
39.	Amendments to legislation ( <i>SO regs*</i> ) .....	48
39.	Savings of, and amendments to, legislation ( <i>RB regs*</i> ).....	48

#### SCHEDULES

Schedule 1—Norwegian part of the Frigg Gas Field.....	49
Schedule 1A—Occupational Pension Schemes.....	49
<i>Interpretation</i> .....	49
<i>Non-discrimination rule</i> .....	50
<i>Procedure in employment tribunals</i> .....	50
<i>Remedies in employment tribunals</i> .....	50
Schedule 2—Questionnaire of person aggrieved.....	51
Schedule 3— Reply by respondent.....	52
Schedule 4—Validity of contracts, collective agreements, and rules of Undertakings.....	52
<i>Part 1 – Validity and revision of contracts</i> .....	52
<i>Part 2 – Collective agreements and rules of undertakings</i> .....	54
Schedule 5—Amendments to primary legislation.....	54

\*NOTE: *SO regs* refers to the numbering of the sexual orientation Regulations, and *RB regs* to the numbering of the religion or belief Regulations.

## Introduction

1. This document has been prepared by the DTI to explain the provisions of the Employment Equality (Sexual Orientation) Regulations 2003 (SI 2003/1661) and the Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660). It gives general explanations only and should not be regarded as a complete or authoritative statement of the law. Guidance on practical issues in the workplace arising under each set of Regulations has been published by ACAS, and can be found on its website at:  
[http://www.acas.org.uk/publications/pdf/guide\\_sexualO.pdf](http://www.acas.org.uk/publications/pdf/guide_sexualO.pdf)  
[http://www.acas.org.uk/publications/pdf/guide\\_religionB.pdf](http://www.acas.org.uk/publications/pdf/guide_religionB.pdf)
2. The two sets of Regulations implement the sexual orientation and religion or belief strands of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. The deadline for implementation of these strands is 2 December 2003.
3. The two sets of Regulations are identical in most respects. The structure of the Regulations largely follows that of the Race Relations Act 1976 (“RRA”) and the Sex Discrimination Act 1975 (“SDA”). Some provisions are also similar to provisions in the Disability Discrimination Act 1995 (“DDA”).

### PART I

#### GENERAL

##### *Regulation 1*

##### **Citation, commencement and extent**

4. The titles of the regulations are the Employment Equality (Sexual Orientation) Regulations 2003 and Employment Equality (Religion or Belief) Regulations 2003.
5. The sexual orientation Regulations come into force on 1 December 2003, and the religion or belief Regulations on 2 December 2003. Both sets of Regulations were made on 26 June 2003.
6. Regulation 1 provides that the Regulations do not extend to Northern Ireland. That means that they form part of the law of England and Wales, and the law of Scotland, but not the law of Northern Ireland. However, the Regulations apply in some situations outside of Great Britain (see regulation 9 below).

##### *Regulation 2*

##### **Interpretation**

7. Regulation 2 defines various terms used throughout the Regulations, as set out in the following paragraphs.

### ***Definition of “sexual orientation”***

8. In the sexual orientation Regulations, regulation 2(1) defines sexual orientation as an orientation towards persons of the same sex (this covers gay men and lesbians); the opposite sex (this covers heterosexual men and women); or both sexes (this covers bisexual men and women).
9. The definition does not include sexual practices or sexual conduct. As the definition says, a sexual orientation is simply an orientation towards persons of the same sex, the opposite sex, or both sexes.

*For example, a difference of treatment by reason that a person has engaged in a sexual act with a work colleague is not in itself sexual orientation discrimination under the Regulations. However, it would be direct discrimination (see below) under the Regulations if the heterosexual person engaging in that act with a colleague of the opposite sex were treated less favourably than a gay person had been after engaging in a similar act with a colleague of the same sex.*

### ***Definition of “religion or belief”***

10. In the religion Regulations, regulation 2(1) defines “religion or belief” as “*any religion, religious belief, or similar philosophical belief*”. It will be for the courts and tribunals to determine, in accordance with the Directive’s requirements, whether a religion or belief falls within this definition.
11. The reference to “religion” is a broad one, and is in line with the freedom of religion guaranteed by Article 9 ECHR. It includes those religions widely recognised in this country such as Christianity, Islam, Hinduism, Judaism, Buddhism, Sikhism, Rastafarianism, Baha’is, Zoroastrians and Jains. Equally, branches or sects within a religion can be considered as a religion or religious belief, such as Catholics or Protestants within the Christian church, for example. The European Court of Human Rights has recognised other collective religions including Druidism, the Church of Scientology, and the Divine Light Zentrum. The main limitation on what constitutes a “religion” for the purposes of Article 9 ECHR, is that it must have a clear structure and belief system (see X v UK (1977) 11 DR 55). Even if a belief does not constitute a religion for these purposes, it may constitute a “similar philosophical belief” (see below).
12. The reference to “religious belief” is also a broad one, in line with Article 9 ECHR. It may go further than simply a belief about adherence to a religion or its central articles of faith. It may include other beliefs founded in a religion, if they attain a certain level of cogency, seriousness, cohesion and importance, provided the beliefs are worthy of respect in a democratic society and are not incompatible with human dignity (see judgment of the European Court of Human Rights in Campbell and Cosans v UK (1982) 4 EHRR 293 at 304).
13. The reference to “similar philosophical belief” does not include any philosophical or political belief unless it is similar to a religious belief. That does not mean that

a belief must include faith in a God/Gods or worship of a God/Gods to be “similar” to a religious belief. It means that the belief in question should be a profound belief affecting a person’s way of life, or perception of the world. Effectively, the belief should occupy a place in the person’s life parallel to that filled by the God/Gods of those holding a particular religious belief. As with a religious belief, a similar philosophical belief must attain a certain level of cogency, seriousness, cohesion and importance, be worthy of respect in a democratic society, and not incompatible with human dignity (see judgment of the European Court of Human Rights in *Campbell and Cosans v UK* (1982) 4 EHRR 293 at 304). Examples of beliefs which generally meet this description are atheism and humanism; examples of beliefs which generally do not are support for a political party, support for a football team.

14. References to “religious belief” and “similar philosophical belief” include reference to an individual’s belief structure involving the absence of particular beliefs, because these are two sides of the same coin. This is in line with Article 9 ECHR (see judgment of the European Court of Human Rights in *Kokkanikis v Greece* (1994) 17 EHRR 397 at 418). For example, if a Christian employer refuses an individual a job, because he is not Christian, regardless of whether he is Muslim, Hindu, atheist (etc), that would be direct discrimination on grounds of the individual’s religious belief, which can be described as ‘non-Christian’. It is not necessary to identify the individual as an atheist or a Hindu for the purposes of the Regulations in such circumstances if he can be identified as a ‘non-Christian’. The same is true of persons who might describe themselves as “unconcerned” by religious beliefs, or “unsure” of them.
15. The definition of “religion or belief” does not include the “manifestation” of, or conduct based on or expressing a religion or belief (see also the distinction made in Article 9 ECHR). For example, a person might wear certain clothing, or pray at certain times in accordance with the tenets of her religion, or she may express views, and say or do other things reflecting her beliefs. In such a case it would not in itself constitute direct discrimination on grounds of religion or belief under the Regulations (see below) if a person suffers a disadvantage because she has done or said something in this way. It would only be direct discrimination if a person with different beliefs (or no beliefs) was treated more favourably in similar circumstances. However, if an employer does set down requirements about (for example) clothing or breaks for prayers, these may constitute indirect discrimination (see below) under the Regulations unless they are justified.

*For example, an employer might discipline an employee who has made comments, motivated by his religious beliefs, which included offensive remarks about a gay colleague. The disciplinary action would not be direct discrimination on grounds of religion or belief if the basis for the treatment of the employee is the statements he has made, not his beliefs themselves. In other words, the employer could show that he would discipline employees of other faiths (or no faith) in the same way if they made similar statements. It might constitute indirect discrimination if the practice particularly disadvantaged those of the employee’s faith, but not if the employer could show this was justified (e.g. by the obligation to prevent harassment on grounds of sexual orientation in the workplace).*

16. It has been suggested that membership of a cult or sect considered dangerous, or centred on unlawful conduct could not be considered as a religion for the purposes of the Regulations. However, there are no cults of which membership is unlawful in Britain. In principle, such a sect could be recognised as a religion for the purposes of the Regulations, provided it meets the criteria described above. But, as indicated above, “religion or belief” does not include conduct based on those beliefs. So it would not be direct discrimination to treat an individual less favourably because he is involved in unlawful conduct. Nor would it generally be indirect discrimination, even if such treatment particularly disadvantaged members of a sect, if it could be justified by the concern about unlawful conduct.

***Other interpretation provisions***

17. Regulation 2(3) sets out the general interpretation provisions for each set of Regulations. The definitions of the terms set out are mainly drawn from s.82(1) SDA and s.78(1) RRA.
18. The term “*detriment*” is defined so as to ensure that it does not include harassment. This prevents overlap between the definitions of harassment and direct discrimination, so that harassment is not treated as a type of detriment caused by direct discrimination.
19. The definition of “*employment*” follows that in s.68 DDA, which is similar to the RRA and SDA. It is capable of applying to the circumstances where a self-employed person is personally contracted to perform work (e.g. plumber hired by a home-owner). The definition of “*employer*” includes, for the avoidance of doubt, a person who has no employees at the particular time but is seeking to employ someone.

***Regulation 3***

**Discrimination on grounds of sexual orientation / religion or belief**

20. Regulation 3 in each set of Regulations defines direct and indirect discrimination on grounds of sexual orientation and religion or belief for the purposes of the Regulations.

***Direct discrimination***

21. Direct discrimination occurs where, on grounds of sexual orientation / religion or belief, A treats B less favourably than he treats or would treat other persons. For example, if an employer refuses to give a person a job simply because he is gay, that is direct discrimination. The definition is similar to that used in s.1 of the SDA and s.1 of the RRA.
22. In contrast to indirect discrimination (see below), there is no defence of justification where direct discrimination takes place. Usually, the only occasion where direct discrimination is not unlawful under the Regulations is in the very limited circumstances where being of a particular sexual orientation is a “genuine

occupational requirement” for the job under regulation 7 (see below), although other limited exceptions may also apply under regulations 24 to 26 (see below).

23. The definition of direct discrimination requires that the treatment in question is compared with treatment which is or would be afforded to other persons (i.e. of a different sexual orientation / religion or belief) in the same circumstances, or in circumstances that are not materially different. Regulation 3(2) of the sexual orientation Regulations and regulation 3(3) of the religion or belief Regulations make this clear for the avoidance of doubt. So the circumstances need not be identical, particularly where they may vary according to the sexual orientation or the beliefs of the person concerned, but they should not be materially different.

*For example, it would not be direct discrimination on grounds of religion or belief if a Jewish employee were no longer permitted to write staff reports after complaints were made about her reporting technique, if the employer would have stopped any employee against whom such complaints were made from writing reports, regardless of their religion.*

*Nor would it be direct discrimination on grounds of religion or belief if an employer refused to allow a prayer break for Muslim employees at a certain time, if he refused breaks for all employees at that time. (Such a refusal might constitute indirect discrimination if it is not justified – see below.)*

*However, it would be direct discrimination on grounds of sexual orientation if an employer dismissed a worker because it had learned of her relationship with a colleague of the same sex, when it would not have dismissed a worker discovered to be in a relationship with a colleague of the opposite sex.*

24. The use in regulation 3(1)(a) of the phrase “*on grounds of sexual orientation / religion or belief*” (rather than “*on grounds of his/her sexual orientation / religion or belief*”) follows the formula used in the RRA (“*on racial grounds*”), which has been interpreted broadly by the courts and tribunals. The wider formula means that discrimination based on perception, association or instructions is covered as described below.

***Direct discrimination: perception***

25. Direct discrimination “*on grounds of sexual orientation / religion or belief*” can also include discrimination based on A’s perception of B’s sexual orientation / religion or belief, whether the perception is right or wrong. This has been recognised by the House of Lords in relation to the RRA definition: see speech of Lord Fraser in *Mandla v Dowell Lee* [1983] IRLR 209. This means that people will be able to bring a claim even if the discrimination was based on (incorrect) assumptions about their sexual orientation / religion or belief. Nor will they be required to disclose their sexual orientation / religion or belief in bringing a claim of direct discrimination – it will be sufficient that they have suffered a disadvantage because of the assumptions made about their sexual orientation / religion or belief.

***Direct discrimination: association***

26. In addition, direct discrimination “*on grounds of sexual orientation / religion or belief*” covers discrimination against a person by reason of the sexual orientation / religion or belief of someone with whom the person associates. For example, an employee may be treated less favourably because of the religion of his or her partner, or because his or her son is gay. This has been recognised by the House of Lords in relation to the RRA definition: see paragraph 80 of Lord Hope’s speech in MacDonald v Advocate General for Scotland [2003] UKHL 34.

***Direct discrimination: instructions***

27. Furthermore, direct discrimination “*on grounds of sexual orientation / religion or belief*” covers discrimination against a person by reason of a refusal to follow an instruction to discriminate against another person on grounds of sexual orientation / religion or belief. This has been recognised by the Court of Appeal in the context of the RRA: see Weathersfield Ltd v. Sargent [1999] IRLR 94.

***Direct discrimination: the discriminator’s belief / orientation***

28. The phrase “*on grounds of sexual orientation / religion or belief*” in the Regulations does not cover direct discrimination by the discriminator against another person because of his (the discriminator’s) sexual orientation / religion or belief. When a court or tribunal considers if direct discrimination has taken place it must decide, from an objective viewpoint, if sexual orientation / religion or belief was a substantial cause of the difference of treatment in question (see O’Neill v Governors of St Thomas More Roman Catholic School [1997] ICR 33). For example, if an employer discriminates against a job applicant because of her sex or race, the objective cause for the difference of treatment derives from the applicant’s characteristics, not those of the employer. It cannot be said that the employer acts unlawfully because of his own sex or race.
29. The same reasoning applies to direct discrimination on grounds of religion or belief and sexual orientation. For example, an employer with strong religious views who refuses to employ an applicant because she is female or gay does not discriminate on grounds of religion or belief. The cause of the difference of treatment, objectively considered, is the sex or sexual orientation of the applicant. The employer’s religious views are not the cause of the difference of treatment; an employer without such views might refuse to employ a female or gay applicant in exactly the same way. The motivation for the act of discrimination (whether religious or otherwise) is not relevant.
30. For the avoidance of doubt, regulation 3(2) of the religion or belief Regulations makes clear that discrimination on grounds of religion or belief does not include the discriminator’s religion or belief. No similar provision is included in the sexual orientation Regulations because it is sufficiently clear that the discriminator’s sexual orientation is not a relevant factor.

### ***Indirect discrimination***

31. Indirect discrimination is defined by regulation 3 in similar terms to those used in the RRA (as amended by the Race Relations Act 1976 (Amendment) Regulations 2003). Indirect discrimination is taken to occur where–

- A applies to B a provision, criterion or practice which A applies equally to other persons; and
- that provision, criterion or practice puts persons of B's sexual orientation / religion or belief at a particular disadvantage; and
- B suffers that disadvantage; and
- A cannot justify the provision, criterion or practice as a proportionate means of achieving a legitimate aim.

This contrasts with the definition of direct discrimination (see above), which does not allow any possibility for justification by the respondent to a complaint. It also contrasts with direct discrimination in that indirect discrimination does not involve any express distinction on grounds of sexual orientation / religion or belief.

*For example, if an employer refuses work breaks for all his employees on shift work between the hours of 6am and 9am, this could well be indirect discrimination on grounds of religion or belief:*

- *The practice which is applied to all employees equally is that they may not take any breaks during the relevant period.*
- *This practice could particularly disadvantage Muslim employees, because their faith requires them to take breaks from work to pray at certain times of the day.*
- *An employee could then show that he suffers that disadvantage if he himself is Muslim.*

*It would then be for the employer to justify the practice of refusing all work breaks. The refusal may be based on a legitimate aim of ensuring work productivity. It would then be a question of whether the refusal of all breaks could be considered proportionate to that aim. The nature of the work may demonstrate an essential requirement for all staff to be working throughout that whole period. But if other staff can cover a brief absence, or staff taking a short break can make up later for any time lost, that would suggest the refusal is not proportionate to the aim.*

32. The above example is merely an illustration. The question of whether unlawful indirect discrimination has taken place will depend on the facts of the case, particularly when considering if an employer can justify a provision/criterion/practice as a proportionate means of achieving a legitimate aim. The answer can only be determined authoritatively by a court or tribunal in each individual case.

33. Under the Regulations, where a complainant establishes a *prima facie* case of discrimination, the burden of proof then falls on the respondent to the complaint to prove that he did not act unlawfully (see regulations 29 and 32 below, implementing Article 10 of the Directive). In *Nelson v Carillion Services* [2003]

EWCA Civ 544 the Court of Appeal gave guidance (in the context of the SDA) on how the burden of proof operates in relation to indirect discrimination. It held that it is for the complainant to establish the three elements of the first half of the test described above (e.g. (1) application of the provision to B, (2) provisions particularly disadvantages bisexual persons, (3) B disadvantaged because she is bisexual). The burden of proof will then fall on the respondent to justify the provision as a proportionate means of achieving a legitimate aim.

***Indirect discrimination: application of “provision, criterion or practice”***

34. The words “*provision, criterion or practice*” go beyond strict requirements or conditions. In addition to selection criteria for recruitment or promotion, and conditions of employment, for example, they can also include informal workplace practices.

***Indirect discrimination: group disadvantage requirement***

35. The first limb, set out in regulation 3(1)(b)(i), requires that persons in the complainant’s relevant sexual orientation / religion or belief group (e.g. bisexuals) are put at a “*particular disadvantage*” by the provision, criterion or practice. This ‘group disadvantage’ requirement differs from previous references in the SDA and RRA to “*considerably smaller*” proportions of persons being able to comply. It is more flexible and means that statistical evidence will not always be required to show “*particular disadvantage*”. This is important in the areas of sexual orientation and religion or belief, where reliable statistics are not available. For example, expert evidence may instead be presented to demonstrate that a requirement particularly disadvantages a certain group.
36. Under the religion regulations, the complainant’s relevant religion or belief group may be identified in two ways. That is because it is possible that the complainant’s religion or belief may be identified as being (for example) Jewish or atheist on the one hand, or ‘non-Muslim’ on the other (see regulation 3 above). In whichever way the complainant describes his beliefs, he must establish that the relevant group of persons with those beliefs is put at a particular disadvantage.

*For example, if a job advertisement for a leader of a play group for Muslim children specified that job applicants must be familiar with the teachings of the Koran, a Jewish job applicant might find themselves disadvantaged by this requirement. To establish a group disadvantage, the applicant might demonstrate that the requirement disadvantaged all Jewish applicants, or simply all non-Muslim applicants. There would be no difference in the practical outcome. (Of course, a requirement such as this may be justified by the nature of the post concerned.)*

***Indirect discrimination: individual disadvantage requirement***

37. The second limb, set out in regulation 3(1)(b)(ii), requires that the complainant is, as an individual, put at that disadvantage. The wording used has the same effect

as that in the SDA and RRA to date, which state that the requirement or condition “*is to her detriment because she cannot comply with it*”. In regulation 3(1)(b) the “*disadvantage*” must be the same one in both the first limb (group disadvantage) and the second limb (individual disadvantage).

38. The ‘individual disadvantage’ requirement in the second limb of the definition means that abstract test cases of indirect discrimination cannot be brought, because a complaint must be brought by an individual who is disadvantaged by the practice in question.

***Indirect discrimination: justification***

39. Where the application of a practice, group disadvantage, and individual disadvantage are established, the alleged discriminator must show that the provision, criterion or practice pursues a legitimate aim, and is a proportionate means of doing so. The discriminator’s justification must be objective (i.e. demonstrating legitimacy and proportionality), and will be subjected to close scrutiny by courts and tribunals; it is not sufficient for the discriminator merely to argue that his view of justification is a reasonable one.
40. A wide variety of aims may be considered as legitimate. In many organisations, economic factors such as business needs and considerations of efficiency will often be a legitimate aim (see C-96/80 Jenkins [1981] ECR 911). This may include aims such as effective use of human or other resources, profitability, or administrative efficiency. Market forces dictating that certain workers are in short supply may also be a legitimate aim when paying those jobs more (see C-127/92 Enderby [1993] ECR I-5535). By contrast, aims related to the discriminatory effects of a practice cannot be considered as legitimate aims.

*For example, an employer’s policy on employees taking holidays at certain times may particularly disadvantage employees with religious beliefs which preclude work on certain special festival days. The employer’s disapproval of such festivals would not be a legitimate aim; but the business need to ensure the effective use of resources would be. (There would remain the question of whether the policy was proportionate to that aim – see below.)*

41. For the provision, criterion or practice to be proportionate means that it must be an appropriate and necessary means of achieving the legitimate aim in question (see C-222/84 Johnston v. RUC [1986] ECR 1651 and C-170/84 Bilka-Kaufhaus GmbH v Karin Weber von Hartz [1986] ECR 1607). Proportionality will depend on the facts of each case, and an authoritative ruling can only be given by a court or tribunal. But generally, an appropriate means is one which is suitable to achieve the aim in question, and which actually does so. A necessary means is one without which the aim could not be achieved; it is not simply a convenient means. This will include consideration of whether the aim could be achieved by other means which have lesser discriminatory effects.
42. Proportionality thus requires courts and tribunals to weigh up the needs of the person applying the practice against its discriminatory effects (see comments of the House of Lords in Webb v EMO Air Cargo (UK) Ltd [1987] ICR 129). That

may include consideration of the number of employees affected, for example, and the extent of the disadvantage which they suffer (see Court of Appeal's comments in *Jones v University of Manchester* [1993] IRLR 218). It may also include, where the legitimate aim is an economic one, consideration of the cost to the organisation, for example, and the size of the organisation. For example, a tribunal might consider that a certain practice is not proportionate because, although it would cost more to achieve the aim by alternative means, the cost would not be excessive for the organisation (see *London Underground v Edwards (No.2)* [1998] IRLR 364).

***Special treatment which amounts to direct discrimination***

43. If a person such as an employer accords special treatment to her employees in order to avoid discriminating directly or indirectly against them, this may constitute unlawful direct discrimination if it amounts to less favourable treatment of others on grounds of their religion or belief.

*For example, if an employer gives a Jewish employee an extra day of paid holiday in order to mark a religious festival, this would be direct discrimination against employees who are atheist or follow other faiths, because they are treated less favourably on grounds of their religious beliefs. If the Jewish employee were required to use one day of his existing holiday entitlement to mark the festival, there would be no direct discrimination against other employees.*

*Regulation 4*

**Discrimination by way of victimisation**

44. Regulation 4 provides the definition of victimisation, and is similar to s.4 of the SDA and s.2 of the RRA. A person victimises another person if he treats that person less favourably than he treats or would treat other persons by virtue of something done by him under or in connection with the Regulations.

*For example, an employer victimises an employee if he disciplines him or refuses him a promotion simply because the employee has brought proceedings under the Regulations, or given evidence in proceedings brought against the employer by someone else under the Regulations.*

In other words, there are two stages:

- firstly there must be some form of action, complaint or allegation under or connected to the Regulations about discrimination on grounds of sexual orientation / religion or belief;
  - then secondly, victimisation may take place if the person taking that action or making that complaint or allegation is treated less favourably because of it.
45. The type of action, complaint or allegation which victimisation may relate to is defined broadly. It not only includes complaints from a person who has suffered

discrimination, but also the provision of information by someone else in relation to such a complaint. Nor is it limited to persons who have brought proceedings in a court or tribunal; it also covers informal complaints of unlawful discrimination made to management, or information supporting such complaints.

46. Victimisation can also include complaints about discrimination which are made in good faith, even if it ultimately transpires (e.g. following a tribunal ruling) that discrimination did not take place. However, the definition of victimisation does not include cases where a person makes allegations or gives evidence which he knows are false (see regulation 4(2)). In those circumstances he is not 'victimised' if, for example, his employer takes disciplinary proceedings against him.

#### *Regulation 5*

#### **Discrimination by way of harassment**

47. Regulation 5 defines harassment for the purposes of the Regulations as an unlawful act distinct from direct and indirect discrimination. Harassment is defined in broad terms: it takes place if a person's conduct has the purpose or effect of either violating another person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

*For example, if jokes which are degrading to lesbians are emailed by employees to one another, this would be harassment if it violates the dignity of a lesbian employee or creates a degrading or humiliating environment for her.*

There is no defence for a person to argue that harassment is justified. The same definition is used in the RRA and DDA (as amended).

#### ***Unwanted conduct on grounds of sexual orientation / religion or belief***

48. The definition of harassment requires that the conduct in question is *unwanted* by the complainant. This does not mean that the complainant is always required to make clear that he finds certain conduct or language unacceptable; for example, in many cases it will be perfectly clear that offensive remarks about persons of a particular sexual orientation or religious belief are unwanted by those persons. However, it does mean that where (for example) a person is engaged in light-hearted banter and makes such remarks about her own orientation or beliefs, it may not be considered as unwanted if another person simply repeats those comments to her in the same context.
49. The conduct must also be *on grounds of sexual orientation / religion or belief*. In other words, regulation 5 does not go so far as to cover any form of harassment or bullying.

*For example, it would not necessarily constitute harassment under the Religion Regulations if an employee who happens to be Hindu is bullied. The employee's religion or belief must be the reason for the conduct in question.*

The question of whether the conduct is on grounds of sexual orientation / religion or belief will be considered objectively by courts and tribunals, so it is not only intentional harassment which is unlawful (see below as to the words “*purpose or effect*” in the definition).

50. A complainant is not required to identify a comparator (i.e. show that the harassment is less favourable treatment than that accorded to other comparable persons), in the same way she would for a complaint of direct discrimination (see regulation 3 above). However, in order to establish that the conduct in question is on grounds of sexual orientation / religion or belief, a complainant may often find it helpful in practice to compare how a person of a different orientation or belief has been or would be treated in the same circumstances.

*For example, a Muslim employee who is bullied by her manager may be able to establish that the manager’s conduct is on grounds of her religion or belief, by making a comparison of her treatment with that afforded to non-Muslim employees whom the manager does not bully. If she can make out a prima facie case, the burden of proof will fall on the employer to demonstrate that the conduct was not harassment on grounds of religion or belief (see regulations 29 and 32 below).*

51. In certain circumstances, employers may be liable for acts of harassment by their employees, and other persons or organisations may be liable for harassment by a person authorised to act as their agent (see regulation 22). However, only in very limited circumstances could an employer also be liable for harassment of his employees by third parties. This is because the definition of harassment requires that the conduct of the employer is on grounds of sexual orientation / religion or belief. An employer would only be liable in respect of harassment by a third party in the limited circumstances where the situation is under the employer’s control, and he fails to prevent the harassment taking place because of the employee’s sexual orientation / religion or belief.

*For example, a straight employee faces harassment on grounds of his sexual orientation on a regular basis by a customer, and the employer takes step to prevent this when the employee raises it. However, when a lesbian employee suffers similar harassment, the employer declines to do anything to prevent it because he considers such harassment to be acceptable. In this case, the employer’s conduct in failing to protect the lesbian employee is on grounds of her sexual orientation, and could have the effect of violating her dignity (by way of the harassment by the third party which ensues).*

The mere fact that the harassment by the third party might be on grounds of sexual orientation / religion or belief is not sufficient. (See, by analogy, the comments of the House of Lords in MacDonald v Advocate General for Scotland; Pearce v Governors of Mayfield School [2003] UKHL 34 on the Employment Appeal Tribunal judgment in Burton v De Vere Hotels [1997] ICR 596.)

*So an employer who runs a shop would not be liable for insulting remarks made to one of his gay employees by a customer, except in the event that the reason why the employer failed to prevent the harassment was because the employee was gay.*

***Conduct having the purpose or effect of harassment***

52. The definition of harassment requires that the conduct in question should have the “purpose or effect” of harassing the person (i.e. violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him). This is a broad test. It is sufficient that conduct was intended to be harassment of the complainant; or alternatively, it is also sufficient that the conduct had the effect of harassing the complainant, whether intentional or not.

*For example, calling a lesbian work colleague by an offensive nickname related to her sexual orientation would generally be prima facie evidence of intentional harassment. (The burden of proof would then fall on the respondent to establish that it was not – see regulations 29 and 32.) Even if the person could show that it was unintentional because he did not realise the nickname was offensive, his colleague would have the opportunity to show that it nevertheless violated her dignity or created an offensive environment for her.*

53. Regulation 5(2) provides that conduct should only be regarded as having the effect (whether intended or not) of harassing the complainant if, taking into account all the circumstances, the conduct should reasonably be considered as having the effect of harassing the complainant. This includes a requirement to take into account the complainant’s perception of the conduct. As such, the test is partly objective, and partly subjective. It is not sufficient in itself that the complainant perceives the conduct to be offensive for the conduct to constitute harassment. The test reflects the judgment of the Employment Appeal Tribunal in the case of *Driskel v Peninsula Business Services Ltd* [2000] IRLR 151 (which concerned the approach to be followed by tribunals when considering whether alleged harassment amounted to sex discrimination). Ultimately, it will be for a court or tribunal to rule on the facts of each case as to whether conduct should reasonably be considered as having the effect of harassing the complainant.

*For example, if an over-sensitive employee unreasonably took offence at a perfectly innocent comment related to his religious beliefs, it would not constitute harassment because the comment could not reasonably be considered to have violated his dignity or created an offensive environment for him.*

54. The fact that an employer might be unaware of an employee’s sexual orientation or religious belief may be a relevant factor to be taken into account when considering the effect of the conduct in a case. However, the absence of an

intention to harass is no bar to concluding that the conduct did have the effect of harassing the complainant.

*For example, if an employer tells a joke which she does not deny is offensive to Muslims then it would be reasonable to consider that the joke offended the Muslim employee to whom she told it. The fact that the employer was unaware that the employee was Muslim makes the joke no less offensive.*

***Violating dignity; intimidating, hostile, degrading, humiliating or offensive environment***

55. Regulation 5(1)(a) and (b) require that the conduct in question has the purpose or effect of violating the complainant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. That is a very broad test. There may often be overlap between the various aspects of this definition. Conduct which violates a person's dignity may also create an offensive (etc) environment for that person, and vice versa; conduct which is hostile may also be offensive and humiliating, etc. A complainant needs only to establish any one element (or more) of the definition to show that harassment has taken place.

*For example, if a vocational training course provider makes a number of jokes about Christians in the course of the training, this could constitute harassment of a Christian student because it violates her dignity, and/or creates an intimidating, degrading, humiliating or offensive environment for her.*

56. Conduct which might fall within the definition of harassment could be obviously offensive, or it could be more subtle, perhaps reflecting a negative stereotype associated with persons of a particular sexual orientation or religious belief. It could be an isolated incident or remark, or a cumulative series of events which together amount to a degrading environment. It could be intentional or unintentional.

## PART II

### DISCRIMINATION IN EMPLOYMENT AND VOCATIONAL TRAINING

#### *Regulation 6*

#### **Applicants and employees**

57. Regulation 6 makes it unlawful for employers, at an establishment in Great Britain, to discriminate against, or harass, job applicants and employees in a wide variety of circumstances, starting with the arrangements they make for determining to whom they should offer employment and finishing with dismissal. Acts committed after the employment relationship has ended may also be unlawful under regulation 21 (see below). Under regulation 22 (see below), the employer may also be liable if her employees discriminate against or harass their

colleagues in a way prohibited by regulation 6. Regulation 6 is similar to s.6 of the SDA, s.4 of the RRA and s.4 of the DDA. The extent of what is considered as employment at an establishment in Great Britain is set out in regulation 9 (see below).

58. Regulation 6(3) prohibits harassment by an employer against an employee or job applicant.

*For example, if an employer permits a poster with an offensive anti-gay slogan to be displayed on his premises, this may constitute harassment of his gay employees (see definition of harassment in regulation 5 above).*

59. Regulation 6(1) covers circumstances where an employer might discriminate against a job applicant, such as by refusing to offer the applicant the job, or offering the job with discriminatory terms. It also covers arrangements which an employer makes for recruiting an applicant.

*For example, if an employer recruits for a post by using a discriminatory 'head-hunting' process, or advertising the post in a discriminatory way, this would be unlawful.*

### ***Discrimination against employees***

60. Regulation 6(2) covers the circumstances where the employer might discriminate against an employee, such as in the terms of employment, pay and other benefits. It also covers opportunities for promotions, transfers and training, and dismissals. Regulation 6(5) gives "dismissal" a broad meaning so that it includes expiration of a period (e.g. non-renewal of a fixed-term contract) and a resignation which is justified by the conduct of the employer (i.e. constructive dismissal). The definition is similar to that in section 82(1A) SDA.

*For example, an employer may need to consider if her pay arrangements, which include double pay on Sundays, are discriminatory. Such arrangements may constitute indirect discrimination if they are not justified, because they may disadvantage those employees whose faith recognises a day of rest other than Sunday. However, in many cases the employer may be able to justify such arrangements by reference to market forces, which require her to pay those rates for Sundays (but not other days) in order to attract sufficient staff to work on Sundays.*

*For example, if an employer deals with requests for prayer breaks in a discriminatory way, this may cause a detriment to employees which would be unlawful under regulation 6. If an employer agreed to such requests for prayer facilities from employees of one faith, but refused the requests of employees of other faiths in similar circumstances, this would constitute direct discrimination (see regulation 3 above).*

*If an employer treated requests for prayer breaks in the same way, regardless of employees' faiths, by refusing all requests, this may be a practice which causes particular disadvantage for members of a particular faith (e.g. Muslims, Christians) if that faith requires followers to pray at regular intervals throughout the working day. As such it would constitute indirect discrimination and be unlawful unless the employer could justify it as a proportionate means of achieving a legitimate aim (see regulation 3 above). The employer could rely on a number of factors to justify refusing to provide for breaks or facilities for prayer: such as lack of space, the expense of providing facilities, or the incompatibility of prayer breaks with the nature of the work. So it could be justified to refuse permission to a fire fighter to take a prayer break at any time when she is responding to an emergency.*

*If an employer, deals with requests for days off in a discriminatory way, this may also cause a detriment to employees which would be unlawful under regulation 6. For example, if an employer refuses all requests for time off during a one-month period, this could disadvantage employees of a particular faith if that faith requires followers to abstain from work or to attend a ceremony on a one-day holiday or festival during that month. As such it would constitute indirect discrimination and be unlawful unless the employer could justify it as a proportionate means of achieving a legitimate aim (see regulation 3 above). A number of factors might be relied on by an employer to justify refusing time off in such circumstances. So the employer may be trying to meet a large order crucial to the business, which requires an intense working period. This could be a legitimate aim, but it would also be necessary to consider if the ban on time off was proportionate. It is unlikely to be proportionate if the business needs could still be met in circumstances where only a small number of staff were taking a single day off to mark a festival.*

*On the other hand, a requirement by an employer for all employees to take time off on Christmas Day would not constitute direct discrimination against employees of faiths other than Christianity, because all employees would be required not to work on that day regardless of their faith.*

*It is possible that a requirement for all employees to take time off on Christmas Day could constitute indirect discrimination if it is not justified, because it may disadvantage employees who are not Christian, and who are required to use up their holiday entitlement to mark their religious festivals at other times of the year. However, in most cases the requirement could be justified on the basis that Christmas Day is a holiday which is widely recognised throughout Britain, on which very few businesses are open for trade; and furthermore, most employees (regardless of their faith) might expect to have the day as a holiday, thus making it difficult for an employer to find a sufficient number of employees to work on Christmas Day. In those circumstances, the vast majority of employers would be justified in requiring their employees to take time off on Christmas Day so that the business can close down.*

61. Although employers may not discriminate against applicants and employees on grounds of sexual orientation / religion or belief, that does not mean that they are required to ask applicants and employees what their sexual orientation / religion or belief is. Indeed, applicants and employees may prefer to keep such matters to themselves particularly as, generally, they have no bearing on their ability to do their job. However, if being of a particular sexual orientation / religion or belief is a genuine occupational requirement for a job (see regulation 7 below), then the employer will obviously have to ask applicants and employees about their sexual orientation / religion or belief in order to find out if they are able to carry out the job in question.
62. Regulation 6(4) imposes a limit on the employment context covered by the Regulations, so that regulation 6 does not apply where the employer is engaged in providing benefits, facilities or services to the public, and the employee receives them in the same way as other members of the public. Such cases relate to the provision of goods and services, and cannot be considered as discrimination in employment. It means that an employee could not bring an employment tribunal complaint against the employer where, outside the context of the employment relationship, the employer discriminated against him (or harassed him) in the provision of those benefits etc.

*For example, where a lesbian employee worked as a receptionist at the London airport office of a car rental company but then, while on holiday, was discriminated against on the grounds of her sexual orientation when trying to hire a car from the same company's Edinburgh office, regulation 6(4) would prevent her from making a complaint to an employment tribunal – unless one of the three exceptions (a) to (c) applied. So if it were part of her employment package that she should receive cheap car hire while on holiday, the benefits would be regulated by her contract in accordance with regulation 6(4)(b) so as to entitle her to bring employment tribunal proceedings.*

## ***Part IV of the Employment Rights Act 1996***

63. Part IV of the Employment Rights Act 1996 contains special provisions protecting shop workers and betting workers in relation to Sunday working. They have, in certain circumstances, a statutory right to opt-in or opt-out of Sunday working, and a right not to suffer detriment on grounds of such a decision. The religion or belief Regulations do not in any way affect the rights of employees under Part IV of the Employment Rights Act. Employees covered by the Act continue to benefit from those rights, and the rights are not extended to others by the Regulations.
64. However, those rights are supplemented by regulation 6 of the Regulations, by virtue of the fact that the way in which employers handle requests from employees (whether shop workers, betting workers, or any other type of employee) not to work on particular days might constitute direct or indirect discrimination in some circumstances (see above).

### ***Employers' other legal obligations***

65. When considering the interests of employees of a particular faith in the context of requirements under the religion or belief Regulations, an employer also needs to consider the interests of other employees who might be affected in a way which is unlawful under other legislation.

*For example, an employee might express views based on his religious beliefs which were offensive to female colleagues, or to gay and lesbian colleagues. In addition to the employee's liability, the employer could be liable for harassment under the sexual orientation Regulations or the SDA in these circumstances, if he has not taken reasonable steps to prevent the harassment. In those circumstances it is very unlikely that the employer would be acting unlawfully if he were to discipline the employee in question. It would not be unlawful direct discrimination under the religion or belief Regulations if the employer would discipline other employees for such comments in similar circumstances. And it is unlikely it would amount to indirect discrimination, because even if such a disciplinary practice caused a particular disadvantage to employees with particular beliefs, it could in most cases be justified by the need to prevent unlawful harassment under the sexual orientation Regulations and the SDA.*

## ***Regulation 7***

### **Exception for genuine occupational requirement**

#### ***Scope of application of regulation 7***

66. Regulation 7 is an exception which allows an employer, when recruiting for a post, to treat job applicants differently on grounds of sexual orientation / religion or belief if being of a particular sexual orientation / religion or belief is a genuine occupational requirement ("GOR") for that post. An employer may also rely on

this exception when promoting, transferring or training persons for a post, and when dismissing persons from a post, where a GOR applies in respect of that post. A GOR may only apply in relation to discrimination under regulation 3, so it cannot be used to justify victimisation or harassment.

67. Regulation 7 may apply where an employer is dismissing a person from a post. That is because, after taking up a post to which a GOR applies, an employee's sexual orientation / religion or belief might change in some cases.

*For example, an employee might convert to a different faith, or might discover that she is bisexual. In those circumstances, if the employee no longer meets the GOR in question, she would no longer be able to perform the functions of the post – accordingly, the employer would be justified in dismissing her.*

68. An employer could not use this provision to justify dismissing an employee if there were no change in circumstances and no change in the employee's sexual orientation / religion or belief. That is because if the person was taken on by the employer to perform the job in the first place, and performed the job, that would be clear evidence that there was no GOR which applied to the job and which the employee was unable to meet. However, if the employee had deliberately given the employer false information to suggest that he complied with the GOR, the employer would be entitled to dismiss the employee, once it became clear that the employee did not comply with the GOR. In any event that would not be discrimination if the provision of false information were the reason for the dismissal, rather than the employee's sexual orientation / religion or belief.

69. Regulation 7 is referred to as an exception in cases of discrimination under regulations:

- 6 (employment),
- 8 (contract workers),
- 10 (office-holders),
- 11 (police – indirectly via regulation 6)
- 14 (partnerships),
- 17 (providers of vocational training),
- 18 (employment agencies, careers guidance etc) and
- 20 (institutions of further and higher education).

70. Regulation 7(1) and (2) take the same approach in both the sexual orientation Regulations and religion or belief Regulations, as does the RRA (as amended). Both sets of Regulations have further exceptions in regulation 7(3), which differ in their scope and effects. In regulation 7(3) of the sexual orientation Regulations there is an exception for requirements related to sexual orientation which are applied to employment for purposes of an organised religion. In regulation 7(3) of the religion or belief Regulations, there is an exception where the employer has an ethos based on religion or belief, and being of a particular religion or belief is a GOR for the job. Each of these provisions is addressed separately below.

### ***Meaning of “genuine occupational requirement”***

71. Regulation 7(2) does not list a series of specific circumstances where a GOR might exist. It instead provides a general definition containing the criteria which must be met in order to establish that a GOR exists.
72. The introductory words of regulation 7(2) require regard to be had, when considering if a GOR applies, to “*the nature of the job*” or “*the context in which it is carried out*”. This effectively means that the functions of the post in question must be considered. The reference to context serves to demonstrate that the nature of the job is not to be considered narrowly, but can include wider elements related to the job.

*For example, one could describe the functions of a counsellor in a Christian support group for people with long term illnesses in a very narrow sense as simply talking with and advising the people involved. On this view (which would be misleading), a person of any religion or belief could perform those functions if they could offer appropriate advice. But when considering the context of the job, it is self-evident that the person must be Christian in order to carry out the job, because the purpose of the job is to provide advice from a Christian perspective.*

73. Regulation 7(2)(a) then provides that regulation 7 applies if, having regard to that nature or context, “*being of a particular sexual orientation / religion or belief is a genuine and determining occupational requirement*”:
- A requirement is stronger than something which is merely a factor, a preference, or a qualification for the job – it is something which is essential for the person to be able to perform the functions of the job.
  - It must also be a determining requirement – that is, the requirement must be crucial to the post, and not merely one of several important factors.
  - The fact that it must be an occupational requirement emphasises the necessary connection to the job in question.
  - And it must be a genuine occupational requirement for that job – in other words, the employer cannot simply create a requirement on a whim because she does not like persons of a particular sexual orientation / religion or belief.
74. It will depend on the facts of each case whether a requirement for a job constitutes a genuine and determining occupational requirement in these terms. This will include consideration of what exactly the functions of the post in question are, its context, and what skills or attributes are required in order to carry out the job. Therefore, it is not possible simply to declare that every person employed in an organisation must be of a particular sexual orientation / religion or belief, because an individual examination of each and every post would be necessary. Only a court or tribunal can give an authoritative ruling on whether a requirement constitutes a genuine occupational requirement in the case of a particular job.

75. It is very rare indeed that being of a particular sexual orientation is a genuine occupational requirement for a job under regulation 7(2) of the sexual orientation Regulations. In the vast majority of jobs, a person's sexual orientation has no bearing on whether or not they can carry out the job in question. However, a GOR may be justified in a small number of cases.

*For example, it may be possible to establish a GOR to be gay or lesbian, having regard to the context of the work, for persons in a position of leadership in, or representing the public face of, an organisation concerned with advising gay men and lesbians about their rights, or promoting those rights. In those circumstances there may be an issue of credibility which makes it a GOR for the person to be gay or lesbian in order to perform the functions of the post. On the other hand, for posts in the organisation which simply involve advising gays and lesbians about their legal rights, no GOR would apply because it is not essential to be gay or lesbian in order to offer good legal advice to gays and lesbians. The mere fact that the people receiving the advice might prefer to deal with a gay or lesbian adviser does not make it a GOR for the job.*

76. It is also rare for a particular religion or belief to be a genuine occupational requirement for a job under regulation 7(2) of the religion or belief Regulations. In the vast majority of jobs, a person's religion or belief has no bearing on whether or not they can perform the functions of the job in question. However, there are some jobs where a GOR could apply.

*For example, if a hospital were to employ a chaplain to minister to patients and staff, it might specify that he or she must be Christian, because almost all the patients and staff are Christian. If the patients and staff represented a number of different faiths, the hospital might need to give consideration to whether a minister of another faith could also carry out the job, including ministering to those of faiths other than his or her own. Even in that case, the hospital could probably specify that the chaplain must be a minister of a religion, rather than an atheist, for example.*

77. In practice, if an employer already employs a person who does not have the required sexual orientation / religion or belief in a particular post, this will provide a very strong indication that having that sexual orientation / religion or belief is not a GOR for the post. Also, in many jobs, it will be sufficient that employees have some understanding of, and respect for, the religion or belief in question, or persons of the particular sexual orientation, as the case may be. If that is the case, then being of that particular sexual orientation / religion or belief would not be a genuine occupational requirement for the job.

#### ***Proportionate application***

78. Regulation 7(2)(b) requires the employer to show that the GOR is applied proportionately in the particular case. As indicated above (see regulation 3), for the application of the requirement to be proportionate means that it must be an

appropriate and necessary means of achieving the legitimate aim in question – namely that the employer needs to recruit a person able to perform the functions of the job. Proportionality will depend on the facts of each case. But generally, an appropriate means is one which is suitable to achieve the aim in question, and which actually does so. A necessary means is one without which the aim could not be achieved; it is not simply a convenient means. This will include consideration of whether the aim could be achieved by other means which have lesser discriminatory effects.

*For example, it would not be proportionate for an employer to rely on a GOR to exclude persons of a particular sexual orientation / religion or belief when filling a vacancy if he already has other employees of that sexual orientation / religion or belief who could reasonably carry out those duties. (If it caused the employer excessive difficulties to make such arrangements, it would be justified not to do so.) In this way an employer could recruit a new employee to a post with duties to which no GOR applied.*

### ***Meeting the genuine occupational requirement***

79. Regulation 7(2)(c) provides that the GOR exception applies either (i) where the employee or job applicant does not meet the requirement, or (ii) where the employer is not satisfied and in all the circumstances it is reasonable for him not to be satisfied, that the employee or applicant meets it.
80. If challenged, it is the employer who faces the burden of proving before a tribunal that the criteria in regulation 7 are met, if he wishes to rely on the exception. If the employee or applicant acknowledges that she is not of the particular sexual orientation / religion or belief specified by the employer, then the employer should have no difficulty in establishing that (i) the employee or applicant does not in fact meet the requirement. In other situations that may be difficult for the employer to establish, because the sexual orientation / religion or belief of the employee is usually something which would be in her exclusive knowledge. Therefore, the employer may instead seek to establish that (ii) he is not satisfied and in all the circumstances it is reasonable for him not to be satisfied, that the employee or applicant meets the requirement.

*For example, when an employer is recruiting for a job to which a GOR applies, if the job applicant refused to disclose her sexual orientation / religion or belief, the employer could seek to demonstrate that he was not satisfied that she was of the specified sexual orientation / religion or belief required for the job, and that it was reasonable for him not to be satisfied.*

81. This does not mean that an employer could refuse to offer an applicant a job, merely because he suspects that the applicant is not of the specified sexual orientation / religion or belief.

*In the above example, if the applicant states that she is of the specified sexual orientation / religion or belief, it is very unlikely that a mere suspicion on the part of the employer that this was not correct would be sufficient to establish that it was reasonable for him not to be satisfied that the requirement was met. The employer would probably need a good reason which cast doubt on the applicant's statement if he were to prove to a tribunal that it was reasonable for him not to be satisfied.*

***Religion or belief Regulations: employers with a religious ethos***

82. There is a further exception in regulation 7(3) of the religion or belief Regulations which may be relied upon by an employer who has an ethos based on religion or belief. (Regulation 7(2), in contrast, is in principle available to any employer.) This exception is very similar to that in regulation 7(2) and, in most respects, operates in the same way. However, there are three differences:

- the employer has to show that he has an ethos based on religion or belief;
- the GOR has to be applied having regard to that ethos; and
- the GOR does not have to be a determining requirement.

Apart from these differences, the same considerations apply as under regulation 7(2) (see above) for an employer to establish that, having regard to the nature or context of the work, being of a particular religion or belief is a genuine occupational requirement for the job. It will be for the employer to show that he has an ethos based on religion or belief; and that, having regard to that ethos, being of a particular religion or belief is a GOR for the job. There are also special provisions in the School Standards and Framework Act 1998 and the Education (Scotland) Act 1980 (see regulation 39 below), which regulate the circumstances in which it may be a requirement for a teacher in a faith school or denominational school to be of a particular religion or belief.

***Ethos based on religion or belief***

83. It is for the employer to show that his organisation has “*an ethos based on religion or belief*”. To do so, he may seek to rely on evidence such as the organisation’s founding constitution or similar documents, provisions in contracts of employment used by the employer, or other evidence about the practices of the employer’s organisation and the way it is run. When considering if an employer’s organisation has an ethos based on religion or belief, it is necessary to consider the meaning of “religion or belief” set out in regulation 2 (see above) – a religion, religious belief, or similar philosophical belief.

84. In some cases there may be questions as to the identity of the employer for the purposes of establishing if its organisation has a religious ethos. To state the answer in its simplest terms, the employer is the person or body which has engaged, together with the employee, in the mutual obligations set out in the contract of employment.

*For example, if a children's play group with a Jewish ethos hires a member of staff, the employer is the person or body running the group who hires the person in question. Accordingly, it is for the employer to show that its organisation running the group has an ethos based on religion or belief. It is not for the employer to show that the local synagogue, or Judaism in general, has a religious ethos. Nor, if the employer is an individual, is it for the employer simply to show that he or she attends the local synagogue. However, if the employer's organisation is affiliated to a local synagogue, it might refer to that fact to demonstrate its religious ethos.*

85. The employer must also establish that the GOR applies, having regard to its ethos. This means that the ethos should be taken into account when considering what the functions of the job and its context are, and the skills and attributes required to perform them, so as to assess whether it is a GOR for the person doing the job to be of the particular religion or belief. It also means that the GOR should not be inconsistent with that ethos.

***A genuine but not a determining occupational requirement***

86. Under regulation 7(3) it is not necessary to establish that the GOR is a determining requirement. This means that it is slightly broader than the GOR in regulation 7(2), because the employer is not required to show that religion or belief is a determining (i.e. decisive) factor in selection for the post in question. However, the employer must still show that the religion or belief is a requirement, and not just one of many relevant factors.
87. In practice, a GOR will apply to a job for an employer with an ethos based on religion or belief only in a small number of cases. A GOR is more likely to apply if the job is one which has particular importance for maintaining the ethos of the employer's organisation.

*For example, a Christian hospice could probably show that it was a requirement for its chief executive to adhere to that faith, because of the leadership which a chief executive must give in relation to maintaining and developing the religious ethos. It could only establish that a similar requirement applied to a nurse in the hospice if there were aspects of the job or its context going beyond the medical care of patients which required that the person must adhere to the particular faith.*

*On the other hand, it would not be a GOR for a shop assistant to be of a particular faith in order to work in a bookshop with a religious ethos, if for all practical purposes the nature and context of the job are the same as for a shop assistant in any other bookshop. The fact that the employer or customers may prefer a person of the same faith is not relevant to whether or not a GOR applies to the job.*

If the ethos of the employer relates not only to adherence to a religion, but to a specific belief based in that religion, it is unlikely that having that belief will be a

GOR for the job, unless the belief has particular relevance to the nature or context of the job.

*For example, in the Christian hospice in the above example, the ethos might not only be based on Christianity, but more specifically on Christian beliefs to the effect that gay sex is not acceptable. It would only be a GOR for the chief executive to hold those beliefs, if the nature or context of the job required it.*

*The hospice would also need to consider its position under the sexual orientation Regulations if it were to apply such a requirement. If in fact it used the requirement to exclude gays from the post of chief executive, this would be unlawful direct discrimination, unless it could demonstrate that it was a GOR for the chief executive to be heterosexual (see above). If the hospice were prepared to employ a chief executive of any sexual orientation provided he or she held the beliefs on which its ethos was based, this could constitute indirect discrimination unless justified, because the requirement might particularly disadvantage gays and lesbians. It is unlikely that such a requirement could be justified as a proportionate means of achieving a legitimate aim unless the hospice could demonstrate that the nature or context of the post required a chief executive to subscribe to that belief in order to be able to carry out the job.*

88. In practice, if an employer with a religious ethos already employs a person who does not have the required religion or belief in a particular post, this will provide a very strong indication that having that religion or belief is not a GOR for the post. Also, in many jobs, it will be sufficient that employees have some understanding of, and respect for, the faith in question. If that is the case, then being a follower of the faith in question would not be a genuine occupational requirement for the job.

***Sexual orientation Regulations: employment for purposes of an organised religion***

89. Regulation 7(3) of the sexual orientation Regulations provides a further exception in relation to employment for purposes of an organised religion, which is similar to section 19 of the SDA. In brief, where employment is for purposes of an organised religion, it allows the employer to apply a requirement related to sexual orientation so as to comply with the doctrines of the religion or avoid conflicting with followers' religious convictions.

***Meaning of "employment for purposes of an organised religion"***

90. Whilst the exception in regulation 7(2) is in principle available to any employer, regulation 7(3) of the sexual orientation Regulations may only be relied upon in relation to employment for purposes of an organised religion. This means, in other words, that the employee is working for an organised religion: the effect of the words "for purposes of" is similar to stating that the person is employed "by" an organised religion.

91. Regulation 7(3) thus applies to a limited range of employment. Its scope includes members of the clergy or other ministers of religion, but also other staff working for an organised religion. They may work in a local body or place of worship such as a church, temple, or mosque, or in a body which coordinates the work of such bodies or places of worship throughout the country. For example, this may include: a General Secretary, official spokesperson, typists, support staff, cleaners (though only if the other criteria in regulation 7(3) described below are also met).
92. The scope of regulation 7(3) does not include employment where the employer simply has some form of religious ethos. In this respect, it is narrower than regulation 7(3) of the religion or belief Regulations (see above). So it would not generally apply in relation to a care home or a school with a religious ethos because the employment is for purposes of a home providing healthcare, or a school providing education; the employees do not work for an organised religion. Only in exceptional circumstances might it be the case that an organised religion runs such an organisation (rather than simply having a representative on a board of management, or contributing to funding), such that employment there was for purposes of the religion.

#### ***Requirement related to sexual orientation***

93. In contrast to regulation 7(2), regulation 7(3) refers to the employer applying “*a requirement related to sexual orientation*”, rather than to the situation where “*being of a particular sexual orientation*” is a requirement. In this respect, regulation 7(3) is slightly broader. For example, a requirement not to engage in sex with a same-sex partner would be a requirement related to sexual orientation, which would be covered by regulation 7(3) but not regulation 7(2).

#### ***Doctrines of religion***

94. Regulations 7(3)(b)(i) permits an employer to rely on the exception if he applies a requirement related to sexual orientation “*so as to comply with the doctrines of the religion*”. In other words, the employer may apply a requirement related to sexual orientation if the religion’s doctrine requires him to do so. The doctrines of a religion are the core concepts and articles of faith laid down by a religion in its teachings as true. As such, doctrine must represent the established teachings of a religion which is authoritative, commanding a wide, if not universal, acceptance within the religion.
95. It is unlikely that this element of regulation 7(3) will be applicable in most cases of employment for purposes of an organised religion. Few religious doctrines have anything to say about heterosexuals, bisexuals, gay men or lesbians which necessitates the application of a requirement related to sexual orientation to those working for the religion. Where there are such doctrines, they are likely to apply to ministers of religion, rather than to other employees whose work is not of a spiritual nature (e.g. cleaners).

### ***Religious convictions of followers***

96. Regulation 7(3)(b)(ii) is an alternative which permits an employer to rely on the exception if he applies a requirement related to sexual orientation “*because of the nature of the employment and the context in which it is carried out, so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers*”. It does not cover any work for an organised religion that a requirement is applied to; it only covers work for an organised religion if the requirement is applied to it because of the nature and context of the work. What are “*strongly held convictions of a significant number*” of the followers will need to be assessed in the context of each case, but it may be a significant number of followers in a local context, or a regional, national or international context. It does not mean a majority of followers, but it does mean a substantial number – more than a few. In practice, there will be very few cases under regulation 7(3)(b)(ii) where a requirement for a job related to sexual orientation will be required by both the convictions of followers and the nature and context of the work.

*For example, a large number of followers of a particular faith may have strongly held religious convictions that ministers of religion must be heterosexual or, if they are gay, that they must be celibate. The employer could apply a requirement under regulation 7(3) to avoid conflicting with the followers' convictions, if that were required by the nature and context of the work – perhaps because it is essential that the minister of religion should have the confidence of the followers. However, the employer could not apply the same requirement to a church cleaner by reason of the same convictions of the followers, if that is not required by the nature and context of the work. It is very unlikely that the nature and context of work as a cleaner would require the application of such a requirement.*

### ***Regulation 8***

#### **Contract workers**

97. Regulation 8 covers contract workers whose employer contracts to supply their services to another person or business (“the principal”) at an establishment in Great Britain. The definition of “contract worker” can include any person loaned or seconded under a contract between one employer and another, such as agency workers. Contract workers are placed in a similar position in relation to the principal to that of employees in relation to their employer under regulation 6, and it is unlawful for the principal to discriminate against, or harass, a contract worker.

*For example, if a house-building company sub-contracts some work to an electrical company, and if an electrician working for this company suffers discrimination from the foreman of the building company, she may bring a complaint against the house-building company under regulation 8.*

*For example, a nurse is employed by an agency which supplies staff to a number of hospitals. If, while working in one of the hospitals, the nurse suffers harassment from the hospital's manager, he may bring a complaint against the hospital and against the manager under regulation 8 (see also regulations 22 and 23 below as to the liability of the hospital for the acts of its employees).*

98. By definition, contract workers are also employees and have a remedy under regulation 6 if their own employer discriminates against them. Employment includes a contract personally to carry out work, even if it is not described as a contract of employment as such (see definition of “*employment*” in regulation 2 above). So in the first example above, the electrician could bring a complaint against her own electrical company if it discriminated against her on grounds of her sexual orientation / religion or belief by paying her less than someone else. In the second example above, the agency nurse would be covered by regulation 8 even if he did not have a formal contract of employment with the agency, providing he had a contract with the agency personally to carry out work.
99. A person who is self-employed and contracted to do work for an employer would not fall within the definition of a contract worker in regulation 8, because he has no employer of his own, but he may be covered by regulation 6. Going back to the first example above, if the electrician were self-employed and contracted personally to do the work, she would be considered “employed” by the building company under regulation 6 (see definition of “*employment*” in regulation 2 above).
100. As with employers and employees under regulation 7 (see above), regulation 8(3) allows a principal to treat contract workers differently on grounds of sexual orientation / religion or belief if they are required to do work for which a particular sexual orientation / religion or belief would be a GOR under regulation 7.
101. Regulation 8(4) provides an exception similar to that in regulation 6(4) (see above) limiting the scope of the provision where the principal is concerned with providing benefits, facilities or services to the public.

### *Regulation 9*

#### **Meaning of employment and contract work at establishment in Great Britain**

102. Regulation 9 sets out the circumstances in which employment or contract work is to be considered as being “*at an establishment in Great Britain*” for the purposes of regulations 6 and 8. If the employee’s work is undertaken wholly or partly in Great Britain, it is treated as being at such an establishment. If the employee works wholly outside Great Britain, the work will only be caught if it meets the test described below. However, specific provisions are made in relation to employment on ships, aircraft, hovercraft, and oil and gas rigs.

### ***Work outside Great Britain***

103. An employee is treated as employed at an establishment in Great Britain if he works partly in Great Britain – even if the work in Britain is only a small part of the job, and the employee works most of the time overseas.
104. If the employee works wholly outside of Great Britain – in other words, he does not even work in Britain for a small part of the time – he will only be treated as employed in Great Britain if the criteria in regulation 9(2) are satisfied. The first two criteria require that the employer has a place of business at an establishment in Great Britain, and that the work is for the purposes of the business carried on at that establishment. This means that, if an employee works for an organisation overseas, she cannot be covered by the Regulations simply because the organisation happens to have an office in Britain, unless her work is for the purposes of that office.

*For example, a salesman works for the French office of a large multinational computer company which has its main headquarters in Britain. The salesman operates exclusively from the French office, selling computer equipment to businesses around France; he has no dealings with his company's headquarters in Britain. The salesman could not bring a claim under the Regulations in a tribunal in Britain, because his work is not for the purposes of the business carried on at the company's headquarters in Britain. On the other hand, if the orders obtained by the salesman were sent back to the British headquarters, which then supplied the computers to the customers in France, the salesman's work would be for the purposes of the establishment in Britain.*

105. If the first two criteria are met, the third criterion then requires, in addition, that the employee is ordinarily resident in Great Britain, either at the time of applying for or being offered the job, or at some time during the course of the employment. Ordinary residence is a question of fact, which needs to be considered on case-by-case basis, taking into account all the relevant circumstances. To be ordinarily resident in Great Britain means that a person is usually living in and based in Britain, year after year. The fact that a person goes abroad for long periods at a time may not detract from the fact that they remain ordinarily resident in Britain – for example, if the person keeps their main residence in Britain. Equally, if a person lives from year to year in another country, he is not ordinarily resident in Britain simply by virtue of working temporarily in Britain for a few weeks or months.

*For example, a company in Britain might open a customer service call centre in Ireland to handle its incoming telephone calls from customers. The work done in the centre is for the purposes of the business in Britain, so would meet the first part of the test in regulation 9(2). If staff for the centre were recruited in Britain, where they were ordinarily resident, and transferred out to Ireland to work in the centre, they would fall under regulation 9(2). However, if staff for the centre were recruited locally in Ireland, they would not fall under regulation 9(2) because they were not ordinarily resident in Britain when recruited, or when working at the call centre.*

106. These criteria are broadly similar to those which apply to the question of whether an employee working wholly outside Great Britain may be liable to pay income tax in Great Britain. So if an employee pays income tax in Britain because he is ordinarily resident in Britain and works for an employer resident in Britain, that will provide an indication that the employee is probably caught by regulation 9(2). However, the criteria are not identical, and so income tax liability should not be treated as a conclusive indication.

#### ***Employment on ships, aircraft, hovercraft***

107. Specific provision is made in regulation 9(3) in relation to employment on ships, aircraft, and hovercraft. Employment on board a ship is only covered if the ship is registered at a British port. Employment on an aircraft or hovercraft is only covered if the aircraft or hovercraft is registered in the UK and is operated by a person who is ordinarily resident in Britain, or has his principal place of business in Britain.

*For example, if an airline pilot worked on an aircraft operated by an airline company based in Germany, he would not be covered by the Regulations even if that aircraft was registered in Britain.*

#### ***Employment on oil and gas rigs***

108. Regulation 9(4) and (5) makes special provision in relation to employment on board oil and gas rigs. Any employment on an oil or gas rig is covered by the Regulations if the rig is:

- in the territorial waters off Great Britain (because this is treated as being in Britain – see regulation 2(3) above);
- in the British sector of the continental shelf (i.e. designated under section 1(7) of the Continental Shelf Act 1964, except areas where the law of Northern Ireland applies);
- in the Norwegian part of the Frigg Gas Field if the employer is based in Britain (see regulation 9(4) and (5), and Schedule 1 to the Regulations which describes the area in detail).

#### ***Regulation 9A***

#### **Trustees and managers of occupational pension schemes**

109. Regulation 9A is inserted into each set of Regulations by the Employment Equality (Sexual Orientation) (Amendment) Regulations 2003 and the Employment Equality (Religion or Belief) (Amendment) Regulations 2003, which come into force on 1 and 2 December 2003 respectively. Regulation 9A makes it unlawful for the trustees and managers of an occupational pension scheme, when carrying out their functions, to harass or discriminate against a member or prospective member of the scheme on grounds of sexual orientation / religion or belief. Regulation 9A covers the admission of members to the scheme and the treatment of members of it.

110. Regulation 9A gives effect to Schedule 1A to the Regulations (see below), which defines the terms used in the regulation and Schedule, inserts a non-discrimination rule in every scheme, and makes special provisions for procedures and remedies in employment tribunals.

#### *Regulation 10*

#### **Office-holders etc**

111. Regulation 10 prohibits discrimination against and harassment of workers who are not technically in employment for the purposes of regulation 6, but whose position may be similar to that of employees. This includes any person who holds an office or a post (referred to here as an “office-holder”) if:

- the appointment of the office-holder in question is made or recommended by a Minister or government department (whether the office/post is paid or unpaid); or
- the office-holder is appointed to discharge functions personally, is paid and is subject to the direction of another person.

In other words if the office-holder or post-holder is a government appointment, or is in a position similar to that of an employee, then she will fall under regulation 10. However, the types of offices and posts covered by regulation 10 are described in more detail below.

112. Regulation 10(1)-(4) makes it unlawful to discriminate or harass before, during or after an appointment to an office or post covered by regulation 10, and in this way has an effect similar to that which regulation 6 has for employees and job applicants. In contrast to the more straight-forward employer-employee relationship, for an office-holder there may be one person who appoints her, another who sets her pay and conditions, and yet another who has the power to dismiss her. It is the relevant person or persons with the power to act in each set of circumstances (e.g. making the appointment, setting pay, dismissing) who will be liable under regulation 10(1)-(4).

*For example, a member of a tribunal is appointed by an appointments body, but once in post her pay and conditions are regulated by a tribunals body. Under regulation 10, the appointments body will (only) be liable for any discrimination against her relating to the appointment, and the tribunals body will (only) be liable for any discrimination against her in pay and conditions following the appointment.*

113. Exceptions where being of a particular sexual orientation / religion or belief is a genuine occupational requirement for the post in question apply to office-holders under regulation 10(5) in the same way as they do for employees (see regulation 7 above). Regulation 10(6) limits the scope of the provision in relation to benefits also provided to the public, in the same way that regulation 6(4) does for employees (see above). And regulation 10(7) provides the same broad meaning of dismissal as regulation 6(5) (see above) which includes expiry of a fixed term and constructive dismissal.

114. Regulation 10(8) provides that regulation 10 does not apply to an office or post if it is already covered by regulation 6 (applicants and employees), 8 (contract workers), 12 (barristers), 13 (advocates) or 14 (partnerships). So for example, civil servants working in government departments are treated as employees under regulation 6 by virtue of regulation 36(2)(a), and so they are not covered by regulation 10.

### ***Government appointments***

115. Regulation 10(8)(b) provides that a public appointment is covered if the appointment is made by, or is on the recommendation or subject to the approval of:

- a Minister of the Crown;
- a government department;
- the National Assembly for Wales; or
- a part of the Scottish Administration.

Such appointments are covered whether or not the office or post in question is paid or subject to the direction of another person (in contrast to the position for other offices and posts – see below). Examples of the public appointments covered include the chairs/members of some non-departmental public bodies, judges and members of tribunals. However, appointments to political offices or posts are not covered by regulation 10 (see below).

### ***Paid and directed office-holders***

116. Apart from government appointments, other offices and posts are covered by virtue of regulation 10(8)(a) if:

- the office-holder is appointed to discharge functions personally under the direction of another person; and
- the office-holder is entitled to be paid for discharging the functions.

Regulation 10 is thus very broad and may include, for example, company directors (where they have no contract of employment), members of the clergy and other ministers of religion.

117. The requirement to discharge functions personally means that the appointment is for a specific individual to do the job.

*For example, if a firm is appointed to act as accountants for a company, the individual accountant sent by the firm to do the work is not appointed to discharge the functions personally, because the appointment is for any one (or more) of the firm's accountants to do the work.*

The requirement to be subject to the direction of another person is satisfied if the other person can merely direct the office-holder as to when and where he discharges his functions (see regulation 10(9)(a)).

*For example, a member appointed to a tribunal is not directed as to the decisions she should make in the tribunal, but she would be directed as to when and where she should attend to sit as a tribunal member. Therefore, she would be covered by regulation 10.*

*However, a trustee appointed to collect and administer the estate of a deceased person does not act subject to the direction of any person (though a trustee has a number of legal duties). She would not fall under regulation 10.*

Regulation 10(9)(b) clarifies that the requirement to be paid means that the office-holder must receive more than simply expenses, or compensation for loss of income from another job which the office takes him away from.

*A person who only receives travel expenses for holding a post, and a small sum to off-set the reduction in her other earnings from taking off two hours each week to hold the post, would not be considered as a paid office-holder under regulation 10.*

### ***Political offices and elected posts excluded***

118. Regulation 10(10)(a) provides that regulation 10 does not apply to elected posts, such as a Member of Parliament. Regulation 10 also excludes appointments to political offices, which are listed in regulation 10(10)(b), such as Ministerial posts, posts in the House of Commons and House of Lords, posts in bodies in the National Assembly for Wales and the Scottish Executive, and posts held by local councillors within a local council.

### ***Regulation 11***

#### **Police**

119. Regulation 11(1) ensures that all police constables enjoy the same protection from discrimination and harassment as employees under regulation 6. The chief officer of the force to which they belong is treated as their employer (except in relation to acts done by the police authority, in which case the authority itself is treated as the employer). The police officers covered include members of the National Criminal Intelligence Service and the National Crime Squad, and officers in forces such as the British Transport Police, Ministry of Defence Police, and Royal Parks Police. Police cadets are also covered, as are officers seconded to another force.
120. Regulation 11 deems the holding of the office of police constable to be treated as “*employment*” for the purposes of these Regulations, so that police officers are covered by the provisions of regulation 6. Regulation 11(2) provides that the chief officer of police is liable under regulation 22, as if he were the employer, for an act of discrimination committed by one police officer against another in the course of his/her employment (e.g. an act of harassment). Regulation 11 is similar to s.17 SDA.

## *Regulation 12*

### **Barristers**

121. Regulation 12 makes it unlawful for barristers and their clerks to discriminate against, or harass, pupils and tenants (and applicants for pupillages and tenancies). The circumstances that are covered range from the arrangements that barristers and their clerks make for determining to whom they should offer pupillages and tenancies, to the circumstances in which they bring a pupillage to an end, or if pressure is put on a barrister to leave a set of chambers. The terms are defined widely, so that reference to a barrister's clerk can include anyone carrying out a clerk's functions (e.g. a practice manager), and reference to a tenant can include any barrister permitted to work in a set of chambers even if not formally a tenant (sometimes known as "squatters").
122. In addition, regulation 12(4) makes it unlawful for a person instructing a barrister to discriminate against any person or to subject him to harassment. This can cover discrimination against a barrister or a pupil.
123. This regulation, which does not apply in Scotland (see regulation 13 below on advocates in Scotland), is similar to s.35A of the SDA and s.26A of the RRA.

## *Regulation 13*

### **Advocates**

124. Regulation 13 prohibits discrimination against and harassment of pupils and would-be pupils by advocates in Scotland in the same way as regulation 12 does in respect of barristers in England and Wales. It also prohibits discrimination or harassment in the instruction of advocates in Scotland. It is similar to s.35B of the SDA and s.26B of the RRA.

## *Regulation 14*

### **Partnerships**

125. Regulation 14 makes it unlawful for a firm to discriminate against, or harass, a partner or an applicant for a partnership in the firm in a wide variety of circumstances. The circumstances that are covered range from the arrangements that firms make for determining to whom they should offer a partnership, to the circumstances in which a partnership is brought to an end. However, regulation 14(4) does allow a firm to refuse to offer a partnership to a person on grounds of sexual orientation / religion or belief where the position in question is one for which a particular sexual orientation / religion or belief is a GOR (see regulation 7 above). Regulation 14(8) provides that an expulsion of a partner can include expiry of a fixed term or a constructive termination/dismissal, and operates in the same way as regulation 6(5) does (see above). Regulation 14 is similar to s.10 of the RRA.
126. Regulation 14(5) provides in relation to limited partnerships that only 'general partners' are covered. In such partnerships the general partners are responsible for

running the firm, whereas the ‘limited partners’ are effectively just investors, with no involvement in the day-to-day running of the firm. This is not to be confused with ‘limited liability partnerships’ which are covered in the same way as any other partnership by virtue of regulation 14(6). Such partnerships may be established under the Limited Liability Partnerships Act 2000, and may limit the financial liabilities to which partners are subject, in the same way that a limited liability company can for its shareholders.

#### *Regulation 15*

#### **Trade organisations**

127. Regulation 15 makes it unlawful for a trade organisation to discriminate against, or harass, a member (or an applicant for membership) of that organisation in a variety of circumstances. The circumstances that are covered range from a refusal to admit an applicant to membership to the circumstances in which a member may be deprived of membership. The term “trade organisation” is widely defined, and may be a trade union, an employers association, a professional body or “*any other organisation whose members carry on a particular profession or trade for the purposes of which the organisation exists*”. This regulation is similar to s.12 of the SDA and s.11 of the RRA.

128. Regulation 15 relates only to membership of trade organisations: employees of such organisations are covered by regulation 6 (see above), office-holders by regulation 10 (if they meet the relevant criteria – see above), and persons receiving professional qualifications from them by regulation 16 (see below).

#### *Regulation 16*

#### **Qualifications bodies**

129. Regulation 16 makes it unlawful for a body which confers professional or trade qualifications on people to discriminate against a person by refusing to confer, or in the terms on which it confers, such a qualification on him, or by withdrawing (or varying the terms of) such a qualification which he holds. This regulation also makes it unlawful for such a body to harass the holder of, or an applicant for, a professional or trade qualification conferred by it. The term “*professional or trade qualification*” is defined broadly to include any authorisation, recognition or approval which is either necessary for, or facilitates, engagement in a particular profession or trade. Regulation 16 is similar to s.13 of the SDA and s.12 of the RRA.

*For example, a franchise which the Legal Services Commission grants to a solicitor to provide legal aid services is a “professional or trade qualification” covered by regulation 16, because it effectively gives the solicitor the right to do publicly funded work on behalf of clients. (See judgment of the Court of Appeal of 20 November 2003 in Patterson v Legal Services Commission.)*

130. Regulation 16(4) of the sexual orientation Regulations (the same provision is in regulation 16(3) of the religion or belief Regulations) excludes from coverage of this regulation any discrimination by institutions of further and higher education, which would be covered by regulation 20, and any discrimination by a school against its pupils.
131. Regulation 16(3) of the sexual orientation Regulations contains an exception in relation to qualifications for purposes of an organised religion, which is similar to the exception in regulation 7(3) (see above), and to section 19 of the SDA. Where a qualification is for purposes of an organised religion, it allows the body to apply a requirement related to sexual orientation so as to comply with the doctrines of the religion or avoid conflicting with followers' religious convictions.
132. Complaints against qualifications bodies are generally to be brought in employment tribunals under regulation 28 (see below). However, if there exists a statutory appeal procedure under which the alleged discriminatory act of the qualifications body in question may be challenged, then that must be used instead (see regulation 28(2)(a) below).

#### *Regulation 17*

#### **Providers of vocational training**

133. Regulation 17 makes it unlawful for a person who provides training that helps fit people for employment to discriminate against them in relation to such training. The training covered includes practical work experience that helps fit people for employment. This regulation also makes it unlawful for such a training provider to harass a person to whom he is providing such training or who has applied to him for such training.

*For example, regulation 17 would apply to a company which provides courses to train people to be plumbers or hairdressers. It would also apply to an engineering employer who takes on (or refuses to take on) an engineering student for a 3 month period of work experience as part of her degree course which helps fit her for employment.*

Regulation 17 does not apply to anything done that is already covered by regulation 6 (applicants and employees) or 20 (institutions of further and higher education institutions). So an employer providing training to her employees would fall under regulation 6 rather than regulation 17.

134. Regulation 17(3) does allow a training provider to refuse to offer training to a person on grounds of sexual orientation / religion or belief where the employment for which the training is to be undertaken is employment for which a particular sexual orientation / religion or belief is a GOR (see regulation 7 above). However, this exception differs from the scope of the exception available to employers under regulation 7 in two ways:

- Firstly it is a ‘secondary’ GOR, in that the GOR must first apply to the employment to which the training relates, and it may then in turn also apply to the training.
- Secondly the training provider is permitted to rely on the exception only if he is acting in relation to training for particular employment to which the GOR applies – if part of the training is for other employment to which a GOR does not apply, then the training provider may not rely on the exception.

*For example, if a Catholic theological training course run by a training provider is exclusively required for those training to be Catholic priests, it may be a GOR for students on the course to be Catholic, because it is a GOR for priests to be Catholic.*

*However, if a training provider runs a course on counselling from a Christian perspective, it would probably not be a GOR for all students on the course to be Christian under regulation 17. Though it may be a GOR to be Christian in a job counselling solely from a Christian perspective, there could be other jobs which involve such counselling alongside other forms of counselling, and to which no GOR applies. Therefore, the GOR would not apply to the training course, because the course (in part) relates to a job to which no GOR applies.*

135. Schools are excluded from regulation 17 in relation to any discrimination against their pupils.

### *Regulation 18*

#### **Employment agencies, careers guidance etc**

136. Regulation 18 makes it unlawful for an employment agency to discriminate against a person in the way it provides (or refuses to provide) its services. It also makes it unlawful for such an agency to harass a person to whom it is providing, or who has requested, its services. An employment agency is defined as any agency which finds employment for individuals or supplies individuals to employers, whether it does so for profit or not. In addition to finding jobs and recruiting people, regulation 18 also covers careers guidance or any other service related to employment provided by an employment agency. Regulation 18 is similar to s.15 of the SDA and s.14 of the RRA.

137. Regulation 18(3) permits an exception if the employment in relation to which the agency’s services are provided is employment for which a particular sexual orientation / religion or belief is a GOR (see regulation 7 above). Moreover, an agency can defend a claim (see regulation 18(4)) by showing that it relied, and that it was reasonable for it to rely, on a statement from an employer that a particular sexual orientation / religion or belief was a GOR for a particular employment. It is, however, a criminal offence under regulation 18(5) for employers to provide an employment agency with a statement which they know to be false.

138. Regulation 18 expressly excludes schools and institutions of further and higher education if they should act as employment agencies (e.g. careers guidance or other services to help students find employment).

#### *Regulation 19*

#### **Assisting persons to obtain employment etc**

139. Regulation 19(1) makes it unlawful for the Secretary of State to discriminate against, or to harass, a person in the provision of facilities or services under s.2 of the Employment and Training Act 1973 (“ETA”). Section 2 of the ETA requires the Secretary of State–

*“to make such arrangements as he considers appropriate for the purpose of assisting persons to select, train for, obtain and retain employment suitable for their ages and capacities or of assisting persons to obtain suitable employees.”*

Under this section the Secretary of State may make arrangements for providing temporary employment for the unemployed, and may make grants or loans to persons who provide facilities in pursuance of such arrangements.

140. Regulation 19(2) makes it unlawful for Scottish Enterprise and Highlands and Islands Enterprise to discriminate against, or harass, a person in the provision of facilities or services to him under such arrangements as are mentioned in s.2(3) of the Enterprise and New Towns (Scotland) Act 1990. These arrangements are analogous to those which the Secretary of State is required to make under s.2 of the ETA.
141. Regulation 19 does not apply in a case where regulation 17 (providers of vocational training) applies, or where the Secretary of State is acting as an employment agency under regulation 18 (employment agencies, careers guidance etc). Regulation 19 is similar to s.15 RRA and s.16 SDA.

#### *Regulation 20*

#### **Institutions of further and higher education**

142. Regulation 20 makes it unlawful for institutions which provide further or higher education to discriminate against, or harass, their students or persons who have applied to be students. It applies to applications for admission, and treatment while a student at the establishment, through to any decision to exclude a student from the establishment.
143. The institutions covered include universities (and colleges within universities) and most sixth-form colleges, along with any other institutions in the further and higher education sectors. The scope of higher education includes degree courses, post-graduate courses, and some specific courses providing professional qualifications; further education covers other education provided to those above the compulsory school age of 16 years, except for education which is provided by

a school. So in general, education in a sixth-form college is covered as further education, but a sixth-form education provided within a school which also caters for under-16s is not covered by regulation 20. If an institution (other than a school) falls outside the further and higher education sectors, it may nevertheless fall under the Regulations in relation to any courses it provides which constitute vocational training within the meaning of regulation 17 (see above).

144. In contrast to the provisions in regulations 6 to 19 above, if a student wishes to bring a complaint against an institution under regulation 20, she must do so in a county court in England and Wales, or a sheriff court in Scotland (see regulation 31 below). That is consistent with the position under the SDA, RRA and DDA.
145. Regulation 20(3) provides an exception so that an education institution can restrict access to a course if it relates to employment to which a GOR would apply (see regulation 7 above), and the student would not meet that requirement. This operates in the same way as the exception in regulation 17(3) (see above), and like that exception differs from the scope of the exception in regulation 7.

#### *Regulation 21*

#### **Relationships which have come to an end**

146. Regulation 21 makes it unlawful for a person covered by regulations 6 to 20 (e.g. an employer) to discriminate against or harass another person (e.g. a former employee) after the relationship (e.g. employment relationship) between them has ended. But an act of discrimination or harassment is only unlawful if it arises out of and is closely connected to the former relationship. Regulation 21 can thus apply to a wide range of persons covered by regulations 6 to 20, including employers, those hiring contract workers, those appointing office-holders, trades unions, qualifications bodies, universities. Similar provisions are included in the SDA, RRA and DDA.

*For example, a university which discriminates on grounds of sexual orientation / religion or belief by refusing to provide a reference to a former student would be acting unlawfully under regulation 21. (This does not mean that a university or an employer is not entitled to refuse any request for a reference, but simply that they may not refuse in a discriminatory way on grounds of sexual orientation / religion or belief.) Also, an employer who discriminated against a former employee in the course of her internal appeal against her dismissal would be acting unlawfully under regulation 21.*

147. This regulation does not itself lay down any time limit for its application. However, by virtue of regulation 34 (see below) any complaint must normally be presented to an employment tribunal within 3 months of the alleged act of discrimination or harassment. Regulation 21 is also restricted in its application, in that the further removed the alleged act of discrimination or harassment is from the former working relationship, in both time and context, the less likely it is that a person will be able to establish the necessary close connection to the former relationship. So an incident which takes place a number of years after the

relationship has ended, or in a social context unrelated to that relationship, is unlikely to fall under regulation 21.

148. Regulation 21(3) clarifies the position in respect of relationships which ended before the Regulations come into force in December 2003. Its effect is that an act of post-relationship discrimination or harassment taking place after the Regulations have come into force is unlawful, whether the relationship in question came to an end before or after December 2003. Of course, an act which takes place before December 2003 is not unlawful, because it precedes the coming into force of the Regulations.

### PART III

#### OTHER UNLAWFUL ACTS

##### *Regulation 22*

##### **Liability of employers and principals**

149. Regulation 22 has the effect that an employer is liable for the acts of his employees, whether or not he knew or approved of those acts.

*For example, if an employee is subjected to harassment in the workplace by colleagues, she can bring a complaint of harassment against the employer under regulations 6 and 22(1), whether or not the employer knew or approved of the harassment.*

The same applies in other areas covered by the Regulations, such as if the employee of a qualifications body in the course of her work harasses a person to whom a qualification is awarded – in that case the person could bring a complaint against the body under regulations 16 and 22(1). However, under regulation 22(3), the employer may, depending on the circumstances, have a “reasonable steps” defence to the action – for example, if he can show that he has an equal opportunities policy and carries out training to ensure that all employees know that such behaviour is not permitted, and/or that he has disciplined employees in the past who have been guilty of such harassment.

150. Regulation 22(2) also makes a person such as an employer liable for acts done by any other person on his behalf (i.e. acting as his agent). The person is only liable for the agent’s acts if they were done with his authority, and so the defence under regulation 22(3) does not apply in relation to agents.

*For example, an employer may get her non-employee friend to harass a gay employee in the hope of pushing her into leaving. The friend would be acting as an agent, and so the employer would be liable under regulation 22. However, if the employer simply asked the friend to deliver a letter to the employee’s office, and did not instruct him to harass the employee, then the employer would probably not be liable under regulation 22 because the agent acted outside the authority given to him.*

Regulation 22 is similar to s.41 of the SDA and s.32 of the RRA.

### *Regulation 23*

#### **Aiding unlawful acts**

151. By virtue of regulation 23, a person who knowingly helps someone to do an act that is unlawful under the Regulations is himself treated as having done an equivalent act. Regulation 23(2) applies this rule to employees and agents, so if they discriminate against or harass a colleague they are treated as aiding their employer, or the person for whom they act as agent (i.e. their principal), if the employer or principal would be liable for the act under regulation 22(1) or (2). In other words, the combined effect of regulations 22 and 23 is that the person doing the act, as well as his employer or principal, acts unlawfully.

*For example, if an employee harasses a colleague in the workplace, the employer could be liable under regulation 22(1), and the employee would be liable under regulation 23(2) for having aided the employer. The employer may be able to rely on the defence under regulation 22(3) that he took reasonable steps to prevent the act (see above), but the employee would nevertheless remain liable under regulation 23(2).*

152. By virtue of regulation 23(3), a person does not knowingly aid another to do an unlawful act of discrimination if he reasonably relies on a statement by that other person that the act is not unlawful under the Regulations. Under regulation 23(4) a person who knowingly or recklessly makes a misleading statement in this regard, commits a criminal offence punishable by a fine.

*For example, an employment agency refuses to put forward one of its workers for a particular post, because it has been told by the employer that a genuine occupational requirement (GOR) applies to the post under regulation 7, and the worker does not meet that GOR. In fact, there is no GOR and the worker brings a complaint against both the agency and the employer. In that case, the agency may be able to show that it was reasonable for it to rely on the employer's statement about the GOR, and so the agency would not be liable under regulation 23. The employer would remain liable under regulation 22.*

Regulation 23 is similar to s.42 of the SDA and s.33 of the RRA.

## PART IV

### GENERAL EXCEPTIONS FROM PARTS II AND III

#### *Regulation 24*

#### **Exception for national security**

153. Regulation 24 provides that the Regulations do not render unlawful any act which is done to safeguard national security, if it is justified. It is similar to s.42 of the RRA.

*Regulation 25 (of the sexual orientation Regulations only)*

**Exception for benefits dependent on marital status**

154. Regulation 25 of the sexual orientation Regulations provides that the Regulations do not render unlawful the granting of benefits by reference to criteria based on marital status. This means that rules based on marriage do not constitute unlawful discrimination on grounds of sexual orientation, notwithstanding the fact that it is not possible for same sex partners to marry in the UK.

*For example, if survivor benefits in an employer's occupational pension scheme are only available to the widow(er) of a deceased employee, this does not constitute unlawful discrimination on grounds of sexual orientation under the Regulations.*

*Regulation 25 of the religion or belief Regulations*

*Regulation 26 of the sexual orientation Regulations*

**Exceptions for positive action**

155. Regulations 26 of the sexual orientation Regulations and 25 of the religion or belief Regulations permit positive action in certain circumstances, and are similar to sections 37 and 38 of the RRA. Positive action is permitted where it reasonably appears that the action ‘prevents or compensates for disadvantages linked to sexual orientation / religion or belief’ among the relevant section of people to whom the positive action relates. For example, regulation 25/26 can thus be relied upon by showing that persons of a particular sexual orientation / religion or belief are under-represented in jobs or trade organisations, or that there is evidence of widespread harassment or discrimination in jobs or trade organisations.

156. Regulation 25/26(1) permits employers and other persons to restrict some vocational training to disadvantaged groups, or to encourage disadvantaged groups to take up particular work. However, this does not permit employers to discriminate in favour of particular individuals when selecting someone for a job, as that remains unlawful under regulation 6 (see above).

*For example, if a factory owner has a small number of Hindu employees despite being based in an area with a large Hindu population, when advertising for new recruits he could include a statement that “applications from Hindus are particularly welcome”. However, it would be unlawful under regulation 6 to give preference to a Hindu job applicant over an applicant of another faith, simply because the employer wishes to have more Hindu employees.*

157. Regulation 25/26(2) similarly permits trade organisations covered by regulation 15 (see above) to provide training or ‘encouragement’ for disadvantaged groups to take up posts in their organisations. Regulation 25/26(3)

permits trade organisations to encourage disadvantaged groups to become members of their organisations (e.g. recruitment campaigns).

*Regulation 26 of the religion or belief Regulations*

**Protection of Sikhs from discrimination in connection with requirements as to wearing of safety helmets**

158. Regulation 26 of the religion or belief Regulations is similar to section 12 of the Employment Act 1989. It provides that where an employer requires a Sikh wearing a turban to wear a safety helmet on a construction site, it is to be treated as unlawful indirect discrimination with no opportunity for justification open to the employer. This reflects the fact that section 11 of the Employment Act 1989 exempts Sikhs from requirements to wear safety helmets on construction sites (which was introduced because such requirements could conflict with the requirements of the Sikh religion to wear a turban). Regulation 26 also provides that such special treatment of Sikhs is not to be treated as discrimination against any other persons.

PART V

ENFORCEMENT

*Regulation 27*

**Restriction of proceedings for breach of Regulations**

159. Regulation 27 ensures that if a person wishes to complain of discrimination or harassment under the Regulations, they may only do so in the employment tribunal or the county or sheriff court, as appropriate (see regulations 28 and 31). This does not, however, prevent the making of an application for judicial review in an appropriate case, or an investigation or determination by the Pensions Ombudsman of an allegation of discrimination made against the trustees or managers of an occupational pension scheme. Regulation 27 is similar to s.62 of the SDA and s.53 of the RRA.

*Regulation 28*

**Jurisdiction of employment tribunals**

160. Regulation 28 provides that complaints under Part II of the Regulations (except regulation 20 – institutions of further and higher education) should be brought in employment tribunals. The usual tribunal rules of procedure apply to a complaint brought under these Regulations. Regulation 28 does not apply to qualifications bodies covered by regulation 16, if there is a statutory appeal already available against the alleged discriminatory act of that body. Regulation 28 is similar to s.63 of the SDA and s.54 of the RRA.

161. If an individual wishes to bring a complaint of discrimination or harassment under the sexual orientation Regulations in an employment tribunal, but does not wish her sexual orientation to enter the public domain, she may ask the tribunal to

make a Register Deletion Order and/or a Restricted Reporting Order, which would allow her to remain anonymous in the proceedings. See rules 15(6) and 16 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001 (SI 2001/1171) and, by way of analogy, the judgment of the Employment Appeal Tribunal of 29 January 2003 in X v Stevens (Commissioner of the Metropolitan Police Service).

#### Regulation 29

#### **Burden of proof: employment tribunals**

162. Regulation 29 makes provision concerning the burden of proof which applies to complaints brought in employment tribunals. Essentially, once the person making the complaint has made out a *prima facie* case – in other words, where the tribunal could in the absence of an explanation consider that discrimination or harassment has taken place – it is for the respondent to the complaint (e.g. the employer) to prove that he did not commit the act of discrimination or harassment. To do so, the respondent may prove that he did not commit an act which constituted discrimination or harassment under the Regulations, or that the act is not to be treated as discrimination or harassment – for example, by virtue of an exception in the Regulations on which the respondent is entitled to rely. If the respondent does not establish that proof, the tribunal will find against him. This regulation is similar to s.63A of the SDA.

*For example, a Sikh man applies for a job, and is one of only two people invited to an interview by the employer – the other applicant is a man who is not a Sikh. The employer gives the job to the non-Sikh, even though the Sikh applicant is far better qualified for the job. In the absence of an explanation, this would probably constitute a prima facie case of direct discrimination against the Sikh applicant on grounds of his religion. The burden of proof would then fall on the employer to show that it did not unlawfully discriminate on grounds of religion or belief.*

163. The consideration of the burden of proof and when it shifts from complainant to respondent will depend on the facts of each case. When considering if a complainant has established a *prima facie* case, a tribunal may draw an inference (if just and equitable to do so) from a respondent's failure to reply to a questionnaire, or a reply which it considers evasive or equivocal (see regulation 33 below). If a *prima facie* case is established and the tribunal has drawn such an inference, the respondent may be required to provide an explanation for the facts which led to the inference being drawn. (See also the comments of the Employment Appeal Tribunal in relation to section 63A of the SDA in its judgment of 3 April 2003 in Barton v Investec.)

164. Although regulation 29 makes a general provision for the burden of proof, there are specific provisions elsewhere in the Regulations which apply in relation to establishing:

- indirect discrimination (see regulation 3 above);
- whether conduct has the effect of harassing a person (see regulation 5 above); and

- whether a person meets a genuine occupational requirement (see regulation 7 above).

### *Regulation 30*

#### **Remedies on complaints in employment tribunals**

165. Regulation 30 sets out the remedies which are available for a complaint brought in an employment tribunal. The tribunal may make a declaration or recommendation, or may order compensation to be paid. Compensation may also include damages for injury to feelings. No limit is set on the amount of compensation, and interest on the sum may also be ordered. In any case where a recommendation is made but not complied with (unless there is a reasonable justification), the tribunal can award compensation, or increase any award already made. However, regulation 30 is subject to the provisions on remedies in relation to occupational pension schemes under Schedule 1A (see below). Regulation 30 is similar to s.65 of the SDA and s.56 of the RRA.
166. Under regulation 30(2), in cases of unintentional indirect discrimination, the tribunal must first consider if it would make a declaration or recommendation (or both) if it had no power to make an order for compensation. Once it has done so (and, if appropriate, made such a recommendation or declaration), it may go on to make an order for compensation.
167. Regulation 30(4) gives the tribunal power to include interest in awards of compensation which it makes. The Regulations refer to the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 so that the provisions there apply to interest awarded on compensation under these Regulations. Schedule 5 to the sexual orientation and religion or belief Regulations makes the necessary consequential amendments to the 1996 Regulations (see below).

### *Regulation 31*

#### **Jurisdiction of county and sheriff courts**

168. Regulation 31 provides that complaints under regulation 20 (institutions of further and higher education) should be brought in a county court, in England and Wales, or a sheriff court in Scotland. The usual court rules of procedure apply to such complaints, in the same way as any other claim in tort (in England and Wales) or in reparation (in Scotland) for breach of statutory duty. Regulation 31(3) clarifies for the avoidance of doubt that compensation may also cover injury to feelings. Regulation 31 is similar to s.66 of the SDA and s.57 of the RRA.

### *Regulation 32*

#### **Burden of proof: county and sheriff courts**

169. Regulation 32 makes provision concerning the burden of proof which applies to complaints brought in a county or sheriff court. It operates in the same way as

regulation 29 does in relation to complaints in employment tribunals (see above). It is similar to s.66A of the SDA.

### *Regulation 33*

#### **Help for persons in obtaining information etc**

170. Regulation 33 permits a complainant or potential complainant, if they wish, to serve a questionnaire on the (potential) respondent (e.g. his employer) in order to obtain information relating to their complaint. The complainant may serve the questionnaire before presenting a complaint to a court or tribunal, and in more limited circumstances once a complaint has been presented to a court or tribunal. Paragraphs (3) and (4) of the regulation set out the time limits which apply.
171. Suggested forms for questions and replies are set out in Schedules 2 and 3 to the Regulations (see below). Complainants and respondents may either follow these or use forms to the like effect, with such variations as the circumstances require. If the respondent does not reply within 8 weeks, or if his replies are evasive or equivocal in the view of the court or tribunal, the court or tribunal may draw adverse inferences under regulation 33(2), including an inference that discrimination did take place, if appropriate. Regulation 33 and Schedules 2 and 3 are similar to s.74 of the SDA and the Sex Discrimination (Question and Replies) Order 1975 (SI 1975/2048).

### *Regulation 34*

#### **Period within which proceedings to be brought**

172. Regulation 34 lays down the time limits for bringing a complaint under the Regulations. A complaint to an employment tribunal must be presented within 3 months of the alleged act, and a complaint to a county or sheriff court within 6 months, though a court or tribunal has a discretion to accept a late complaint if it would be “*just and equitable*” to do so. Regulation 34(4) sets out how these time limits operate in relation to contracts, acts extending over a period and omissions. This regulation is similar to s.76 of the SDA and s.68 of the RRA.
173. The time limits under regulation 34 may be varied by the Secretary of State exercising powers under section 33 of the Employment Act 2002, so as to provide for the use of internal dispute resolution procedures in employment before a complainant presents a complaint to an employment tribunal. In the summer of 2003, the DTI carried out a consultation on proposals for the use of the powers under the 2002 Act, and further information is available from the DTI website at: <http://www.dti.gov.uk/er/disputeresolution.htm>

## PART VI

### SUPPLEMENTAL

#### *Regulation 35*

#### **Validity of contracts, collective agreements and rules of undertakings**

174. Regulation 35 gives effect to Schedule 4, which makes provision concerning contracts, collective agreements and rules of undertakings (see below).

#### *Regulation 36*

#### **Application to the Crown etc**

175. Regulation 36(1) provides that the Regulations apply to acts by government Ministers and departments, and to acts of other Crown bodies. Regulation 36(2) applies the employment provisions of regulation 6 to staff working for such departments and bodies, and to members of the Armed Forces. Regulation 36(5) and (6) make provision regarding the Crown Proceedings Act 1947, which concerns proceedings to which the Crown is a party. Regulation 36 is similar to s.85 of the SDA and s.75 of the RRA.

176. Regulation 36(7) to (10) makes special provision relating to complaints by members of the Armed Forces, who are required to submit a complaint under the internal service redress procedures before presenting a complaint to an employment tribunal. Regulation 36(8) provides that such a complainant may only submit a complaint to a tribunal if he has first submitted a complaint to his commanding officer using the internal service redress procedures, and he has not withdrawn that complaint. Regulation 36(8) does not require the service redress procedure to be completed (it will often involve a formal investigation lasting many months), but only that it has been started and that the complaint has not been withdrawn. Regulation 36(9) requires the complainant to submit his complaint to the Defence Council at the appropriate stage in the redress procedures; if not, the complaint is deemed to have been withdrawn. Regulation 36(10) allows the service procedures to continue in parallel to tribunal proceedings, although this does not prevent one from being adjourned pending the conclusion of the other.

#### *Regulation 37*

#### **Application to House of Commons staff**

177. Regulation 37 provides that the Regulations apply to House of Commons staff in the same way as they apply to other employees. It is similar to section 85A of the SDA.

### *Regulation 38*

#### **Application to House of Lords staff**

178. Regulation 38 provides that the Regulations apply to House of Lords staff in the same way as they apply to other employees. It is similar to section 85B of the SDA.

### *Regulation 39*

#### **Amendments to legislation** (*sexual orientation Regulations*)

#### **Savings of, and amendments to, legislation** (*religion or belief Regulations*)

179. Regulation 39 (in both the sexual orientation and the religion or belief Regulations) gives effect to Schedule 5, which makes various amendments to legislation in consequence of the Regulations (see below).

180. In the religion or belief Regulations only, regulation 39 makes it clear that sections 58 to 60 and 124A of the School Standards and Framework Act 1998 (SSFA – which applies to England and Wales) and s.21 of the Education (Scotland) Act 1980 (ESA – which applies to Scotland) are unaffected by these Regulations.

181. Section 21(2A) of the ESA requires that any person appointed to the staff of a denominational school must be approved as regards religious belief and character by representatives of the relevant church or denominational body.

182. The provisions of sections 58 to 60 of the SSFA are more detailed, and can be summarised as follows:

- Section 59 prevents discrimination against both applicants for positions in schools and existing teachers on the basis of their religious opinions or attendance at worship. Teachers are also not required to give religious education (or to be discriminated against for related reasons). However, this section does not extend to:
  - Voluntary Aided schools with a religious character – these are governed by section 60(5);
  - Reserved teachers (i.e. the strictly limited number of teachers in such schools who are selected and specifically appointed in accordance with section 58(2) to give religious education in accordance with the school's religious character) at foundation or voluntary controlled schools with a religious character – these are also governed by section 60(5);
  - Independent schools – those with religious character are governed by section 124A.
- Sections 60(5) and 124A permit preference to be given in employment matters to those teachers who have religious opinions, attend worship, or have a willingness to give religious education in accordance with the school's religious character. They also provide that in terminating a

teacher's employment or engagement, schools may also have regard to conduct which is incompatible with that religious character.

- In relation to the head teacher of a foundation or voluntary controlled school with a religious character, section 59 does apply, but regard may be had in connection with a person's appointment, to their ability and fitness to preserve and develop the religious character of the school

(N.B. Section 124A of the SSFA was inserted by the Independent Schools (Employment of Teachers in Schools with a Religious Character) Regulations 2003 (SI 2003/2037), which amended regulation 39 of the religion or belief Regulations accordingly.)

183. The sexual orientation Regulations do not contain any exception in relation to these provisions. This means that a school could not rely on the ESA or SSFA provisions to justify an act of unlawful discrimination or harassment on grounds of sexual orientation.

## SCHEDULES

### *Schedule 1*

#### **Norwegian part of the Frigg Gas Field**

184. Schedule 1 specifies the Norwegian part of the Frigg Gas Field for the purposes of employment on oil and gas rigs as provided for in regulation 9 (see above). It is identical in all material respects to the schedule to the Sex Discrimination and Equal Pay (Offshore Employment) Order 1987 (SI 1987/930) and the equivalent order made under the RRA.

### *Schedule 1A*

#### **Occupational Pension Schemes**

185. Together with regulation 9A, Schedule 1A is inserted into each set of Regulations by the Employment Equality (Sexual Orientation) (Amendment) Regulations 2003 and the Employment Equality (Religion or Belief) (Amendment) Regulations 2003.

#### ***Interpretation***

186. Paragraph 1 of Schedule 1A defines terms used in the Schedule and in regulation 9A.

- The terms “managers”, “member”, “pensioner member” and “trustees or managers” are defined by cross-referring to the definitions of these terms in section 124(1) of the Pensions Act 1995 as at the date the Regulations come into force;

- “Non-discrimination rule” is defined to mean the rule that every occupational pension scheme is treated as including, namely, the rule requiring pension managers and trustees to refrain, when carrying out their functions, from harassing or discriminating against a member or prospective member of the scheme;
- “Prospective member” is defined to mean someone who can choose to join the scheme (or will be able to do so if he continues in the same employment for long enough); someone who will be admitted to it automatically unless he decides not to become a member; or someone who may join with his employer’s consent;
- “Occupational pension scheme” is defined by cross-referring to the Pension Schemes Act 1993 as at the date the Regulations come into force.

### ***Non-discrimination rule***

187. By virtue of paragraph 2 of Schedule 1A, every occupational pension scheme is treated as including a non-discrimination rule, i.e. a rule requiring the trustees or managers of the scheme not to act in a way contrary to regulation 9A (see above). By virtue of paragraph 3, all other provisions of the scheme are subject to the non-discrimination rule. This means that, where there is a conflict between the non-discrimination rule and a rule of the scheme which would otherwise require the trustees/managers to act in a discriminatory way, the non-discrimination rule prevails. Further, by virtue of paragraph 4, trustees and managers are given power to alter schemes to ensure conformity with that rule. This power applies when either they do not have power to make the necessary alterations to the scheme, or when they do have the power but the procedure for doing this is likely to be unduly complicated or protracted, or involves gaining consent which cannot be obtained, or can only be obtained with undue delay or difficulty.

### ***Procedure in employment tribunals***

188. Where a member or prospective member of a scheme has been subjected to harassment or discrimination contrary to regulation 9A, he can make a complaint against the trustees or managers of the scheme to an employment tribunal. In such cases, paragraph 6 of Schedule 1A provides for the employer in relation to the scheme to be added as a party to the complaint, since it is likely that the employer will be required to provide any necessary additional resources to a scheme against which a declaration or award of damages has been made.

### ***Remedies in employment tribunals***

189. In addition to a remedy in the employment tribunal, the option of complaining to the Pensions Ombudsman, who has jurisdiction over disputes of “facts or law” in relation to an occupational pension scheme (see section 146(1)(c) of the Pensions Schemes Act 1993), is available. Regulation 27 expressly provides for this (see above).

190. Schedule 1A (paragraph 7) sets out special provisions on remedies applicable to certain pension scheme claims. The particular circumstances in which these special provisions apply are that: the complaint relates to unlawful behaviour by an employer or the trustees/managers regarding access to or treatment in an occupational pension scheme; the complainant is not a pensioner member of the scheme; and an Employment Tribunal has found the complaint well founded. In such a case, the tribunal has the power to make a declaration as to the complainant's rights to equal access to the scheme, or to membership of the scheme without discrimination. Once a complainant has obtained such a tribunal declaration of his legal entitlement (either to join the scheme, or to enjoy membership without discrimination) he will be able to enforce his rights under the scheme as in any other case where the trustees or managers have wrongfully refused access or breached the rules.
191. However, in such cases a tribunal cannot make an order for compensation under regulation 30(1)(b), unless the compensation is for injury to feelings or the order is made by virtue of regulation 30(3) (failure to comply with a tribunal recommendation). Compensation for arrears of benefits will not be necessary (except for pensioner members) because members will be given by the tribunal's decision the right to join the scheme or to equal treatment under the schemes rules. This approach ensures that complainants obtain the same accrued rights they would have had but for the unlawful discrimination. It also means that they receive their entitlement to pension provision in a way which is as economical as possible (because making up accrued rights in the scheme will always cost the same as, or less than, paying damages to enable the complainant to buy such rights).
192. The Regulations do not require employers to provide appropriate resources to an occupational pension scheme in order to meet the complainant's accrued rights. But in most (if not all) cases the employer will be required (either as a matter of law or practice) to make up any shortfall in a scheme following a tribunal award.
193. Neither regulation 9A nor the non-discrimination rule in Schedule 1A applies in relation to rights accrued or benefits payable for service before the coming into force of the Regulations.

## *Schedule 2*

### **Questionnaire of person aggrieved**

194. Schedule 2 sets out a suggested format for the questionnaire which may be used under regulation 33. This includes a warning to the respondent that a court or tribunal may draw adverse inferences from a failure to reply or an inadequate reply. The form is a guideline, and the complainant may use forms to the like effect, with such variations as the circumstances require. This is similar to the format set out in the Sex Discrimination (Question and Replies) Order 1975 (SI 1975/2048) and the equivalent orders made under the RRA and DDA.

### *Schedule 3*

#### **Reply by respondent**

195. Schedule 3 sets out a suggested format for the reply to a questionnaire under regulation 33. This is similar to the format set out in the Sex Discrimination (Question and Replies) Order 1975 (SI 1975/2048) and the equivalent orders made under the RRA and DDA.

### *Schedule 4*

#### **Validity of contracts, collective agreements and rules of undertakings**

196. Schedule 4 contains detailed provisions relating to terms of contracts, collective agreements, and rules of undertakings which are discriminatory. The provisions are similar to s.77 SDA and s.6 of the Sex Discrimination Act 1986.

##### ***Part 1 – validity and revision of contracts***

197. Part 1 of the Schedule deals with terms in contracts. Under paragraph 1(1), a term of a contract which makes the contract itself unlawful under the Regulations, or which provides for an unlawful act, is void. A term of a contract which is found to be void is treated as if it had never existed (subject to paragraph 1(3) below).

*For example, if a clause in a contract stated that funding for a vocational training provider would only be granted if gay students are excluded, the clause is treated as if it never existed, because it would be providing for an act which is unlawful under the sexual orientation Regulations. So the remainder of the contract, requiring the funds to be paid to the training provider, would still be valid.*

198. However, paragraph 1(2) makes clear that paragraph 1(1) does not apply where the term provides for discrimination against or harassment of a party to the contract – the term is merely unenforceable against that party, and he or she may choose to rely on it if it also has some benefits for them.

*For example, an employee is party to her contract of employment with her employer, under which she is given 3 days' less holiday than other employees each year because she is Christian. She could enforce the discriminatory term if she wished to against the employer if there is some benefit to her in the term (e.g. to be able to take her holiday), because if she could not, then she might not be entitled to any holiday under the contract. But the employer is prevented from enforcing the discriminatory aspect of the term against her, so that she can receive the extra 3 days of holiday.*

In contrast to a void term of a contract, an unenforceable term is not treated as if it had never existed. Instead, it is treated as having no effect at any point when a party seeks to enforce it.

199. Paragraph 1(3) provides that a term which tries to exclude or limit the operation of the Regulations is unenforceable by the person in whose favour the term operates. (There is an exception to this for compromise agreements under paragraph 2(1) to (8) – see below.)

*For example, if an employer were to insert a term into his employment contracts stating that the sexual orientation / religion or belief Regulations do not apply to them, and that employees are deemed to agree to being dismissed for discriminatory reasons without access to an employment tribunal, the term would be unenforceable.*

200. Paragraph 1(4) specifies that these provisions apply whether the contract was entered into before or after the coming into force of the Regulations in December 2003. However, in the case of a contract entered into before December 2003, the provisions do not have effect in relation to any period before that date.

201. Under paragraph 3(1) and (2), a county or sheriff court has the power to modify or remove a discriminatory term which is void or unenforceable, once any party to the contract has been given the opportunity to make representations. Under paragraph 3(2), the court may make an order having retrospective effect, but only as respects any period after December 2003.

202. Paragraph 2(1) to (8) contains special provisions relating to compromise agreements to settle complaints brought under the Regulations, and the safeguards which they must meet to be valid. Paragraph 1(3) does not apply in relation to such agreements. Under paragraph 2(1), the compromise agreement must either relate to:

- a) employment tribunal proceedings if assisted by an ACAS conciliation officer (for which there are no special conditions),
- b) other employment tribunal proceedings where the special conditions in paragraph 2(2) are fulfilled, or
- c) county or sheriff court proceedings (for which there are no special conditions).

203. The special conditions set out in paragraph 2(2) require the contract to be in writing, and to refer to these Regulations, and require the complainant to be advised by an appropriate independent adviser. Paragraphs 2(3) and 2(4) set out who is (e.g. a solicitor or trade union representative) and who is not (e.g. a solicitor acting for the other party) an appropriate independent adviser.

204. Paragraphs 2(5) to (8) contain more precise details as to the types of independent adviser covered by paragraphs 2(3) and (4). Paragraph 2(5) provides the definition for barristers, solicitors and (in Scotland) advocates who may act. Paragraph 2(6) provides the definition of trade union. Paragraph 2(8) specifies that an adviser is not considered to be independent if he or she acts for a company which is connected (e.g. as a subsidiary) with a party to the contract.

## ***Part 2 – collective agreements and rules of undertakings***

205. Part 2 of the Schedule deals with terms of collective agreements, and rules made by employers, trade organisations or qualifications bodies, as specified in paragraph 4(1). As with contracts (see above), a term of a collective agreement which makes the agreement itself unlawful under the Regulations, or which provides for an unlawful act, is void. The same is true of rules made by employers, trade organisations or qualifications bodies.
206. Paragraphs 5 to 7 set out the circumstances in which an individual may bring a complaint about such an agreement or rule (e.g. if he or she believes the rule may affect them in the future). The terms of (non-binding) collective agreements are often incorporated into individual contracts of employment, and so Part 2 of the Schedule gives the employee an opportunity to challenge the agreement where it may affect him in the future. (If the agreements or rules are part of a legally binding contract, they would also be caught by Part 1 of this Schedule.)
207. Under paragraphs 8 and 9 a tribunal may declare a discriminatory term or rule to be void, but the rights of certain persons under the agreement or rule may also be preserved (as under contracts – see above). Paragraph 8(2) specifies that these provisions apply whether the term or rule was made before or after the coming into force of the Regulations in December 2003. However, in the case of a term or rule made before December 2003, the provisions do not have effect in relation to any period before that date.
208. Paragraph 8 provides that the tribunal must declare the relevant term or rule void if satisfied that it is unlawful – there is no power for the court to amend the term or rule in question. In those circumstances the parties would be left to renegotiate an agreement with lawful terms – i.e. a third party cannot seek a court ruling to instruct the parties on what to put in their agreement.

## *Schedule 5*

### **Amendments to legislation**

209. Schedule 5 makes a number of consequential amendments to other legislation. These are consistent with references to provisions of the SDA, RRA and DDA in the relevant legislation. Similar amendments are made by both the sexual orientation and the religion or belief Regulations.
210. Section 18 of the Employment Tribunals Act 1996 is amended so that its conciliation provisions also apply in relation to complaints brought in employment tribunals under the sexual orientation and the religion or belief Regulations. Accordingly, an ACAS conciliation officer will be able to act in such a case.
211. Section 21 of the Employment Tribunals Act 1996 is amended so that the Employment Appeal Tribunal has jurisdiction to hear appeals relating to complaints under the sexual orientation and the religion or belief Regulations.

212. Section 126 of the Employment Rights Act 1996 is amended so that, where an act is both unfair dismissal and discrimination or harassment under the sexual orientation and the religion or belief Regulations, compensation cannot be awarded twice for the same loss.
213. Regulation 1(2)(b) of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 is amended so that those provisions apply to calculating interest on awards of compensation made in relation to complaints brought under the sexual orientation and the religion or belief Regulations (see also regulation 30 above).
214. Schedule 3 to the Employment Act 2002 is amended so that if the powers under section 31 of that Act are exercised to make provision for the adjustment of awards, then such provisions can apply to complaints made under the sexual orientation and the religion or belief Regulations. This means that a tribunal could reduce or increase the amount of compensation it awards, in cases where the employer or employee has not followed a required procedure for making an internal complaint (see Schedule 2 to the 2002 Act). In the summer of 2003, the DTI has carried out a consultation on proposals for the use of the powers under the 2002 Act, and further information is available from the DTI website at: <http://www.dti.gov.uk/er/disputeresolution.htm>
215. Schedule 4 to the Employment Act 2002 is amended so that, if the powers under section 32 of that Act are exercised, an employee wishing to complain under the sexual orientation and the religion or belief Regulations must first submit a statement of grievance to their employer. Further details of the 2002 Act provisions are available on the DTI website (see above).
216. Schedule 5 to the Employment Act 2002 is amended so that the provisions of section 38 of that Act also apply to cases brought under the sexual orientation and the religion or belief Regulations. This means that, where an employer has failed to give a statement of employment particulars to the employee, the tribunal must make an award of compensation to the employee for this, separate from its consideration of the complaint of discrimination.