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Employment Equality Regulations: Religion and Sexual Orientation

Draft *Employment Equality (Religion or Belief)* and *Employment Equality (Sexual Orientation) Regulations 2003* were laid before Parliament on 8 May 2003. They will outlaw discrimination in employment on grounds of religion or belief or sexual orientation from 2 December 2003. They are due to be debated in the Fourth Standing Committee on Delegated Legislation on 17 June 2003.

This note provides some background to the regulations and a brief overview of their content, but concentrates on the controversial question of the extent to which religious organisations will be able to restrict employment to those of their own faith and discriminate against gays and lesbians.

Timothy Edmonds

Julia Lourie

Business & Transport Section

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Summary of main points

The *Employment Equality (Religion or Belief) Regulations 2003* and the *Employment Equality (Sexual Orientation) Regulations 2003*, laid in draft before Parliament on 8 May 2003, implement the *EC Directive establishing a general framework for equal treatment in employment and occupation (2000/78/EC)*. The purpose of this directive, commonly called the “Employment Directive”, is to prohibit discrimination in employment on the grounds of religion or belief, disability, age or sexual orientation. UK law already prohibits employment discrimination on the grounds of race, gender or disability. Some relatively minor changes to the *Disability Discrimination Act 1995* are being made by the *Disability Discrimination Act 1995 (Amendment) Regulations 2003*, laid in draft on the same day. These are not covered in this research paper. Legislation outlawing age discrimination will be introduced separately at a later date.

From the outset, the most contentious issue has been the extent to which, particularly, religious organisations could exercise choice (or discriminate) over their appointments. On the one hand, the spirit of the legislation is to eliminate all discrimination, but on the other, there are clear cases when certain individual characteristics or attributes are an essential part of the job or, controversially, a bar to a job.

There has been some comment in the press to the effect that the Regulations now before the House provide considerably more latitude for religious organisations than existed in the previous draft version of the regulations. This has been ascribed to lobbying by church groups and direct influence from ‘Number 10’.

The Regulations provide a comprehensive law banning discrimination in employment on the grounds of religion or belief and sexual orientation. They cover all stages of the employment process, recruitment, conditions of continuing service, pay, promotion etc, and dismissal subject to a ‘genuine occupational requirement exception’ which allows discrimination where (on the grounds of religion)

- being of a particular religion or belief is a genuine and determining occupational requirement for the job; and
- it is proportionate to apply that requirement in the particular case

Where the employer has “an ethos based on religion or belief”, the occupational requirement need only be “genuine”, not necessarily “determining”

A similar framework is proposed to outlaw discrimination with respect to sexual orientation; however, it is the general occupational exception in this regulation which has attracted most attention. In this case discrimination is allowed if, first,

- being of a particular sexual orientation is a genuine and determining occupational requirement for the job; and

- it is proportionate to apply that requirement in the particular case,

And, secondly

- the employment is for purposes of an organised religion
- the employer applies a requirement related to sexual orientation-
 - (i) so as to comply with the doctrines of the religion, or
 - (ii) 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.

This last exemption has caused the National Secular Society to declare that the legislation is a 'witch-hunter's dream come true' and the Lesbian and Gay Christian Movement to say that it would institutionalise homophobia in a way that "makes section 28 (which forbade the promotion of homosexuality by local authorities) look like a tea party".

Stonewall, a gay and lesbian campaigning group, estimate that between 275,000 and 390,000 employees have experienced discrimination due to their sexual orientation. The DTI's regulatory impact assessment assumes that about 2% (roughly 92,000) of those who could possibly be affected may have experienced any form of discrimination on the grounds of religious belief.

CONTENTS

I	Introduction	7
II	The Draft Directive	9
	A. Parliamentary scrutiny	9
	B. Political agreement	13
III	Implementing the directive	16
	A. Method of implementation	16
	B. Consultation on implementation	18
	1. <i>Towards Equality and Diversity</i>	18
	2. <i>Equality and Diversity: The way ahead</i>	20
IV	The Regulations, May 2003	22
	A. The Employment Equality (Religion or Belief) Regulations 2003	22
	1. The general prohibition	22
	2. The genuine occupational requirement exception	23
	3. Definition of religion or belief	26
	B. The Employment Equality (Sexual Orientation) Regulations 2003	29
	1. The general prohibition	29
	2. The genuine occupational requirement exception	29
	3. Pensions	33
V	Reaction to the Regulations	36
VI	Numbers affected	39

I Introduction

The *Employment Equality (Religion or Belief) Regulations 2003* and the *Employment Equality (Sexual Orientation) Regulations 2003*, laid before Parliament in draft on 8 May 2003, arise out of the need to implement the *EC Directive establishing a general framework for equal treatment in employment and occupation* (2000/78/EC) adopted on 27 November 2000. The purpose of this directive, commonly called the “Employment Directive”, is to prohibit discrimination in employment on the grounds of religion or belief, disability, age or sexual orientation.

The Directive started life as the *Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation* published by the European Commission on 25 November 1999 as part of a package of proposals brought forward under the new Article 13 added to the Treaty establishing the European Community by the Treaty of Amsterdam agreed in June 1997.¹ The Article provides:

Article 13 (ex Article 6a)

Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

The European Commission issued a press release explaining that the November 1999 package contained a Communication and:

- (i) a Directive prohibiting discrimination in employment. This proposal outlaws discrimination on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation ;
- (ii) a Directive prohibiting discrimination on the grounds of racial or ethnic origin in a wider range of areas - employment, education, the provision of goods and services, social protection ;²
- (iii) an action programme designed to support and complement implementation of the Directives through the exchange of information and experience and the dissemination of best practices in both legislative and non-legislative areas.³

¹ COM(1999) 565 final

² Political agreement on the “race directive” was reached on 6 June 2000, Home Office press release, 6 June 2000, *UK spearheads EU anti racism pledge*. It was adopted on 29 June 2000 - Council Directive 2000/43/EC

³ European Commission press release, 25 November 1999, *Commission: a step forward for the EU – empowering victims of discrimination*,

Anna Diamantopoulou, the EU Commissioner for Employment and Social Affairs, launched the package with the following words:

Today is a milestone in the construction of a Social Europe. Discrimination blights the lives of so many of our citizens. We want to see a common level of protection against discrimination right across the European Union. We want to cooperate with and support the efforts of Member States, NGOs and the social partners. These proposals will ensure that a real difference is made to people's lives by providing victims with a clear remedy against discrimination.⁴

The provisions on race discrimination were eventually included in a separate directive.⁵ They are being implemented from 19 July 2003 by the *Race Relations Act 1976 (Amendment) Regulations 2003*, also laid before Parliament in draft on 8 May 2003. It is intended that the provisions on disability will be implemented from 1 October 2004 by the *Disability Discrimination Act 1995 (Amendment) Regulations 2003*, also laid in draft before Parliament on 8 May 2003. The provisions on age discrimination will not be implemented until December 2006.

Articles 1 and 2 of the draft employment framework directive outlawed discrimination in employment on any of the grounds covered, including “religion or belief” and “sexual orientation”. However, Article 4 permitted discrimination where the ground was a “genuine occupational qualification” and, in subparagraph (2), made specific reference to religion:

1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the discriminatory grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine occupational qualification.
2. Member States may provide that, in the case of public or private organisations which pursue directly and essentially the aim of ideological guidance in the field of religion or belief with respect to education, information and the expression of opinions, and for the particular occupational activities within those organisations which are directly and essentially related to that aim, a difference of treatment based on a relevant characteristic related to religion or belief shall not constitute discrimination where, by reason of the nature of these activities, the characteristic constitutes a genuine occupational qualification.

The UK Government's position was described in an Explanatory Memorandum submitted by the DfEE on 6 January 2000:

http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/99/895|0|AGED&lg=EN

⁴ Ibid

⁵ Council Directive 2000/43/EC of 29 June 2000

12. The Government supports the principles enshrined in Article 13 and welcomes the Commission's proposals as a step forward in combating discrimination and exclusion across the EU. ...
 13. Our negotiating strategy will have to take account of an evolving domestic agenda. Adoption of the proposal in its current form would require changes to UK law. The Government is open to making necessary and proportionate changes in this area to promote equal opportunities if the case is made. However, the need to avoid unnecessary and burdensome regulation will remain a priority in the Government's considerations. It will also be guided by assessments of the progress which can be achieved through non-legislative means such as codes of practice. The possible requirement for legislative change differs according to the type of discrimination (...)
- Religion or belief: there are no generally applicable provisions in GB statutory law on employment. However, as a result of case law, Jews are recognised as a racial group and as such are protected under the Race Relations Act. Sikhs also receive protection via special legal provisions, particularly in the Employment Act 1989. The Government is currently conducting research into this complex area.
 - Sexual orientation and age: the Government has produced a Code of Practice on discrimination in employment based on age and proposes that a Code of Practice on the ground of sexual orientation should be produced in conjunction with the Equal Opportunities Commission.

II The Draft Directive

A. Parliamentary scrutiny

The proposals generated a great deal of controversy. They were the subject of reports by the European Scrutiny Committee,⁶ and the House of Lords Select Committee on the European Union.⁷ They were debated in European Standing Committee C,⁸ and the

⁶ 7th Report, 1999/2000, 2 February 2000, HC 23-vii, <http://pubs1.tso.parliament.uk/pa/cm199900/cmselect/cmeuleg/23-vii/2304.htm> ; 19th Report 1999/2000, 24 May 2000, HC 23-xix, <http://pubs1.tso.parliament.uk/pa/cm199900/cmselect/cmeuleg/23-xix/2304.htm> ; 4th Report 1999/2000, 12 July 2000, HC 23-xxiv, <http://pubs1.tso.parliament.uk/pa/cm199900/cmselect/cmeuleg/23-xxiv/2303.htm#a1>

⁷ 9th Report 1999/2000, HL Paper 68,

<http://pubs1.tso.parliament.uk/pa/ld199900/ldselect/ldcom/68/6801.htm>

⁸ SC Deb, 24 July 2000, <http://pubs1.tso.parliament.uk/pa/cm199900/cmstand/euroc/st000724/00724s01.htm>

House of Lords.⁹ The Government issued a Consultation Paper and a Regulatory Impact Assessment.¹⁰

In a debate on the House of Lords report on 30 June 2000, Baroness Blackstone, Minister of State at the DfEE, sought to reassure peers that the directive was not a major threat to the employment practices of religious organisations:

I turn to religion--an issue that has exercised some speakers in the debate. The Government support the principle of action under Article 13 to combat discrimination on the ground of religion. They have also listened to the concerns of minority faith communities about issues of religious discrimination, including that within the field of employment. Of course, this raises difficult, sensitive and complex questions and there is no quick and easy solution. The employment directive presents an opportunity to protect individuals from discrimination on the ground of their religion. I am sorry that some speakers on the Conservative Benches have failed to recognise that. However, of course, I accept that we must get it right. (...)

Concerns have been expressed by the committee and in this debate by the noble Baroness, Lady Young, the right reverend Prelate the Bishop of Southwark and others that the directive may limit the freedom of religious organisations to preserve their own distinctive identity. However, I believe that the noble Baroness, Lady Young, and the noble Lords, Lord Griffiths of Fforestfach and Lord Vinson, rather overplayed the dangers of this directive. It is not a missile aimed at our Judeo/Christian tradition; nor is it attacking our basic freedoms, as the noble Lord, Lord Vinson--I see that he is not in his place--claimed. When the CBI broadly welcomes the proposals and when the Republic of Ireland already possesses such legislation, it seems alarmist and absurd to take such a line... There is a need to amend the proposals in order to protect the legitimate rights of religious organisations, and we intend to do so. We expect that many other member states will support us and we shall not agree to proposals unless we achieve a satisfactory outcome.

As the noble Lord, Lord Lester, said, the proposals are not an attack on religious freedom. They are designed to protect people from unjustifiable discrimination at work. Therefore, they aim to achieve quite the opposite of what has been implied by some speakers. Moreover, the proposed directive recognises that some jobs have a determining requirement to be undertaken by those of a particular religion.

We agree that it should be acceptable for a Church school to be able to require a teacher to be an active member of the Church in question. We shall press for amendments to the directive to ensure that there is no question of religious

⁹ HL Deb, 30 June 2000, cc 1177 – 1241,
http://pubs1.tso.parliament.uk/pa/ld199697/ldhansrd/pdvn/lds00/text/00630-03.htm#00630-03_head0

¹⁰ DfEE, August 2000

¹² HL Deb 30 June 2000, cc 1237-1239

organisations being forced to employ people who are not members of the relevant faith, because that would dilute the maintenance of a distinctive religious ethos. This is not a matter of the UK versus the European Commission or the rest of Europe. This was always the intention behind the proposals and I am sure that many other member states have similar views.

The Government are grateful to the committee and to the noble Lord, Lord Pilkington, and others for raising their concerns over the possible limitations of Article 4 of the framework directive. We agree that in its original form it was far from clear, but we believe that it provides a basis for further negotiation to secure sufficient safeguards for religious organisations, including schools. (...)

The Government also abhor unjustified discrimination on the ground of sexual orientation. Our equality statement made clear our approach (...) I return to the concern that the employment directive might require religious organisations that believe that homosexual activity is wrong to open all jobs to practising homosexuals. The Government accept that difference in treatment in such circumstances may be justifiable. It would be unacceptable, for example, for a teacher in a Catholic school to challenge openly the teachings of the Church on homosexuality. We shall continue negotiating on that point to ensure that the directive is clear. We are also concerned to ensure that the employment directive will permit Section 60 of the School Standards and Framework Act 1998 to be maintained. I hope that that reassures the right reverend Prelate the Bishop of Southwark.¹²

The draft directive was also debated in European Standing Committee C.¹³ Tessa Jowell, then Minister for Employment, Welfare to Work and Equal Opportunities, re-iterated the Government's position:

The issue of what requirements religious organisations can make of their staff has been raised by the European Scrutiny Committee and by many outside organisations. I hope that the Committee will be reassured to learn that we intend to do all that we can to ensure that the proposals are modified so that religious organisations may continue to discriminate on the grounds of religion and belief when it is justifiable to do so.

In reply to questions from Members of the Committee, Ms Jowell implied that the Government intended to ensure that church schools were able to continue to give preference to teachers who belonged to the same faith, but not to grant so many exemptions that they could be used as "a cover for bigotry":

Dr. Stephen Ladyman (South Thanet)...

What are religious organisations, particularly schools, allowed to do at present in pursuit of preferences with respect the people whom they employ? Will that state of affairs be affected if the measure is passed in its present state?

¹³ 24 July 2000, <http://pubs1.tso.parliament.uk/pa/cm199900/cmstand/euroc/st000724/00724s01.htm>

Ms Jowell: As things stand, there is clear statutory protection for schools in preserving their religious ethos. One of our key negotiating objectives is to retain the present relevant legislative framework under the School Standards and Framework Act 1998. We want Church schools to remain free to recruit teaching staff of the faith in question. As my hon. Friend will know, the current provisions do not extend to ancillary staff. (...)

Mr. Keith Darvill (Upminster): My right hon. Friend will be aware of the widespread concern about the drafting of article 4, which deals with genuine occupational qualifications. Will she make specific representations to the European Union about the definitions of church youth workers and Christian playgroups? They are concerned about the implications for their activities.

Ms Jowell: We shall certainly pursue the interests of those groups of workers during our negotiations, and I hope that I have made our negotiating objective clear. The enormous amount of correspondence that I have passed on to the Commission shows that the matter is of great public concern. (...)

Mr. Borrow: (...) Although it would be generally acceptable for religious schools to be able to appoint members of staff from that faith, who decides whether an individual belongs to that faith? Does he simply announce that he belongs to it or must that be accepted by the governing body? From the tone of some of the correspondence, it seems that a strong link is made between discrimination on religious grounds and discrimination on the basis of sexual orientation. Apparently many religious schools do not employ gay men or women as they could not be a member of that faith because of their sexuality. The Government need to take a strong line on this issue. I should be grateful for my right hon. Friend's comments.

Ms Jowell: The concern that my hon. Friend raises would be a matter for domestic implementation. I have seen a range of correspondence that has been generated by this issue. We are keen to protect people who have risked discrimination on grounds of their religious faith, but by the same token, that should not enable bigotry to be dressed up as religious necessity. That will be an important consideration when we look at the implementation of the directive. (...)

Mr. Bercow: Under article 4 of the proposed directive, would a Christian school be entitled to insist on employing a Christian secretary?

Ms Jowell: Domestic legislation regards a secretary as an ancillary member of staff rather than as a member of the teaching staff, therefore his or her religious faith would not be stipulated. As I said earlier, our negotiating objective is to secure the same protection in the directive as there is in the School Standards and Framework Act 1998.

The key provisions of the *School Standards and Framework Act 1998* can be found in section 60 (4)-(6):

(4) In connection with the appointment of a person to be head teacher of the school (whether foundation or voluntary controlled) regard may be had to that person's ability and fitness to preserve and develop the religious character of the school.

(5) If the school is a voluntary aided school-

(a) preference may be given, in connection with the appointment, remuneration or promotion of teachers at the school, to persons-

- (i) whose religious opinions are in accordance with the tenets of the religion or religious denomination specified in relation to the school under section 69(4), or
- (ii) who attend religious worship in accordance with those tenets, or
- (iii) who give, or are willing to give, religious education at the school in accordance with those tenets; and

(b) regard may be had, in connection with the termination of the employment of any teacher at the school, to any conduct on his part which is incompatible with the precepts, or with the upholding of the tenets, of the religion or religious denomination so specified.

(6) If the school is a voluntary aided school, no person shall be disqualified by reason of his religious opinions, or of his attending or omitting to attend religious worship, from being employed for the purposes of the school otherwise than as a teacher.

B. Political agreement

Political agreement on the draft directive was reached at the Employment and Social Affairs Council on 17 October 2000. The UK Government was pleased that many of its concerns about the original proposals were met. The DfEE issued a press release which summarised "key changes" won by the UK Government. This press release is reproduced below:

The UK Government today (17 October) reached political agreement on an EU Directive designed to outlaw discrimination against people at work on the grounds of their religion, age, disability or sexual orientation.

The new Directive (based on Article 13) was agreed after the Employment and Social Policy Council meeting in Luxembourg accepted amendments put forward by the UK to improve the clarity and effectiveness of the measures.

Employment Minister Tessa Jowell who led the Government's negotiations said:

"Our chief concern was to get the detail right. We have fought hard to ensure the Directive is workable in practice and does not burden business, schools and other

organisations with unintended problems. We have also secured an exemption for the armed forces in order to ensure combat effectiveness.

"Delivering real benefits for individuals suffering discrimination at work depends on a realistic timetable for implementation. That is why we have agreed a deadline for 2003 for the provisions on religion and sexual orientation and 2006 for disability and the more complex age discrimination laws.

"We were successful in our negotiations to protect the traditions of religious schools in line with existing UK legislation and to ensure the disability provisions for Europe are based on our successful new laws.

"The employment Directive marks a new chapter in workplace rights and responsibilities and the Government is pledged to ensure that its implementation strikes a fair and sensible balance."

Key changes won by the UK Government include:

- Disability provisions now in line with the Disability Discrimination Act.
- Age provisions clarified with exemptions for occupational pensions.
- Religious provisions protecting the existing measures in the Schools Standards and Framework Act 1998 which allows religious schools to recruit from among their faith group.
- Special arrangements for Northern Ireland to safeguard the Good Friday Agreement with exemptions for the RUC and teacher recruitment.
- Exemption for the armed forces from the provisions on age and disability.

CARE, the Christian caring and campaigning charity, commented:

"We are grateful for the work done by the British Government in securing a fair and equitable redrafting of the Directive which now recognises the important contribution made by faith-based welfare groups."

Chris Humphries, Director General of the British Chamber of Commerce, said:

"We recognise the opportunities offered by the Directive, providing there is an information programme which sets out the benefits to business without incurring extra regulatory burdens."

The EC Employment and Social Policy Council, itself, issued a press release which referred to the changes made on religious discrimination:

After difficult negotiations the Council reached unanimous political agreement on the proposal for a Directive establishing a general framework for equal treatment in employment and occupation. The purpose of the Directive is to combat discrimination on grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation. It will be formally adopted at a forthcoming Council meeting after the finalisation of the text.

Agreement was finally reached on the basis of a compromise text which accommodated the difficulties encountered by certain Member States concerning, in particular, the possibility for churches and organisations the ethics of which were based on religion or belief of applying different treatment on account of essential, legitimate and justified professional requirements. In addition, different treatment on the basis of age could be justified in certain circumstances.

The Directive will apply to the following fields in particular:

- access to employment, including selection criteria, recruitment conditions and professional promotion;
- access to vocational training, advanced vocational training and retraining;
- employment and working conditions, including the conditions governing dismissal and pay;
- membership of and involvement in an organisation of workers or employers.

The Directive defines the concepts of direct and indirect discrimination and establishes a minimum framework by means of which discrimination may be made illegal. It includes the provisions of the Directive on equal treatment irrespective of racial or ethnic origin as regards the common minimum level of protection before the law, reparation and compensation. In addition, it is also intended to protect workers against dismissal or any other adverse treatment on the part of an employer as a reaction to a complaint or to legal proceedings. Like the other Directive, it also provides for adaptation of the rules on the burden of proof (in civil matters) on the basis of provisions already in force in the field of discrimination on the basis of sex (Directive 97/80/EC on the burden of proof), in a case where there is prima facie evidence of discrimination which a petitioner brings before the Court, and the Court accepts it.¹⁴

The Directive was adopted at the EC Employment and Social Affairs Council on 27 November 2000. It is the *Directive establishing a general framework for equal treatment in employment and occupation*.¹⁵ It differs significantly from the draft directive originally proposed. The final version of Article 4 reads:

1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

¹⁴ Employment and Social Policy Council press release, 17 October 2000

¹⁵ Council Directive 2000/78/EC of 27 November 2000

2. Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.

Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.

III Implementing the directive

A. Method of implementation

The Government chose to implement the Directive by means of Regulations under the *European Communities Act 1972*. This means that it cannot range more widely than the directive. The directive is limited to employment: therefore the regulations are limited to employment. Whilst discrimination in education, the provision of goods and services and the disposal of premises is outlawed on the grounds of sex, race and disability, it will not be outlawed on the grounds of religion or sexual orientation.

Lord Lester of Herne Hill introduced an *Equality Bill* in the Lords on 14 January 2003. This comprehensive Bill, drawn up on the basis of extensive research under the auspices of the Odysseus Trust, would establish a single *Equality Act*, enforced by a single *Equality Commission*, which would cover all the “strands” of discrimination and all the areas in which discrimination might be outlawed. Speaking on second reading of the Bill, Lord Lester said:

The approach of successive governments to the increasingly complex, opaque and anomalous state of the legislation has been piecemeal and minimalist. It has involved adding new layers of legislation in bits and pieces, be they to implement European Community law, to introduce half measures on disability discrimination, or, now, to give effect to the new but restricted EU equality directives. (...)

The regulations will forbid religious discrimination, sexual orientation discrimination, disability discrimination and age discrimination, but only in employment. That is not because it is right in principle to fail to tackle unjustifiable discrimination on those grounds in education, housing and the

provision of services and facilities; it is simply because the framework equality directive is confined to the employment field. Without primary legislation, Parliament cannot cover these wider areas, as they are covered in the Sex Discrimination Act and the Race Relations Act. What the Government describe as their full agenda of action on equality matters, including what they call “targeted legislation” misses the important target. Without primary legislation, women will continue to face a heavier burden of proof in discrimination cases outside the employment field; a homosexual or a Muslim denied a service because of sexuality or religion will still be unable to obtain legal redress; and an elderly person, denied essential services by a health authority or local council on the ground of age, will be denied legal redress. Except in the field of race relations, there will be no positive duty on public authorities or large employers to make progress towards equality of opportunity, even though, as long ago as November 1999, the Government promised legislation to create one. To adapt the words of George Orwell, all animals will be equal, but some animals will be more equal than others.¹⁶

Lord McIntosh of Haringey explained the Government’s opposition to this “big bang” approach in his response:

I wish to say a few more words about the “big bang” theory. The noble Lord, Lord Lester, claims that there is something terribly wrong with the current law due to its inconsistencies. Of course we aim to remove unwarranted inconsistencies, but the law is different in some cases. For example, disability law is different, as has become clear this afternoon, because it is designed to tackle specific issues relevant to a particular group. The noble Lord, Lord Goodhart, made that very clear. He said that disability legislation was different because it sought to remove obstacles that exist, whereas other forms of discrimination are the other way round, so to speak.

To implement the race and employment directives, we are working hard to make the legislation coherent and easy to use. We are using the same wording for key discrimination concepts where appropriate. We will always seek to simplify the law by reducing exceptions.

The other problem with the big bang theory is that it is, in a sense, a moving target. Not only is the law in this country evolving, but so are European directives. Almost always, they evolve in a helpful direction. There have been three directives since 2000. One was on race, and another on employment deals with sex orientation, religion, disability and age. We talked yesterday about the amendment to the equal treatment directive, which deals with sex discrimination. (...)

As all those directives become law, they have to be incorporated into UK law. That means a constant succession of legislation, both primary and secondary. The

¹⁶ HL Deb 28 February 2003, cc 526,527

noble Lord, Lord Addington, thought that the Bill would provide some sort of final solution for discrimination and that we would not be troubled with it in Parliament if the Bill were passed. I am afraid that that is not the case. The process is, will be and ought to be a continuing one. That is why we take the view that we do about the big bang theory.¹⁷

B. Consultation on implementation

The Government allowed a long consultation period to reflect the delicate nature of the subject matter and the intensity of feelings that it arouses. There are two main consultation documents.

1. *Towards Equality and Diversity*

The Government's first consultation document on implementing the directive, *Towards Equality and Diversity*, was published in December 2001. It gave examples of church posts in which a requirement to adhere to a particular faith might be a "genuine occupational requirement", but declined to provide any sort of definitive list:

Provisions for organisations with an ethos based on religion or belief

13.10 The Directive contains two provisions allowing us to permit differences of treatment based on a person's religion or belief which would otherwise be treated as unlawful discrimination. Both apply where there is a genuine occupational requirement that the job concerned should be held by a person adhering to a particular religion or belief.

13.11 The first – Article 4(1) – is a provision which applies generally (see chapter 9). It has effect – regardless of the nature of the organisation concerned – whenever it is "a genuine and determining occupational requirement" that a job be carried out by a person belonging to a particular religion, or holding a particular set of religious or other beliefs. **So, for example, it would be a genuine and determining occupational requirement that the post of Church of England chaplain in the armed forces should be held by an Anglican Minister (as opposed to a Methodist).** [Emphasis added]

13.12 The second – Article 4(2) – applies only to "churches and other public or private organisations whose ethos is based on religion or belief". It will allow such organisations to recruit staff on the basis of their religion or belief where this is "a genuine, legitimate and justified occupational requirement having regard to the organisation's ethos". **So, for example, a religious organisation may be able to demonstrate that it is a genuine requirement that all staff – not just senior staff or people with a proselytising function – should belong to the religion concerned, so as to ensure the preservation of the organisation's**

¹⁷ Ibid, cc 585-586

particular ethos. Alternatively, depending on the circumstances, the exemption might apply only to a number of key posts. However, this exemption does not allow religious or belief organisations to discriminate on other grounds. [Emphasis added]

13.13 Article 4(2) also makes it clear that organisations with an ethos based on religion or belief can continue to expect their staff to “act in good faith and with loyalty to [that] ethos”. **So, for example, where an employee of a religious organisation conducted him or herself in a manner that was inconsistent with the organisation’s ethos, disciplinary action against the employee might be appropriate where it was clear that the conduct would undermine the ethos.** [Emphasis added]

13.14 We therefore propose to include in the new legislation a provision based on the wording of Article 4(2) to allow organisations which have an ethos based on religion or belief to pursue employment policies necessary to ensure the preservation of that ethos. But we do not propose to define which particular organisations will be covered by this exemption. Nor do we intend to specify the particular posts which are essential in underpinning an organisation’s ethos.

13.15 Given the broad range and variety of religious and belief organisations in this country, we believe it is unhelpful to be unduly specific about which organisations and posts should be covered. Smaller organisations in particular may welcome this approach. It will therefore be up to each organisation to consider whether they qualify as a “religious or belief organisation” and which of their posts need to be held by believers in order to preserve their ethos, particularly where ancillary or support staff are involved.

13.16 However, organisations who want to rely on these provisions would have to be in a position (where necessary) to satisfy Employment Tribunals that:

- (a) they do qualify as a religious or belief organisation under Article 4(2), and
- (b) their particular recruitment or other staffing policies could be justified.

The burden of proof would be on the organisation (see Part 1, paragraphs 2.16 to 2.17 of this document).

13.17 Once the new legislation is in place, we propose to consult on and issue guidance to assist religious or belief organisations, their staff and others – including Courts and Tribunals – in dealing with these issues.

13.18 You are invited to comment on the proposals outlined above. Are there particular issues here we should cover in the guidance?

Employment in religious schools

13.19 We know that many people will be interested in the position of employment in schools. The new legislation implementing the Directives will apply to them.

13.20 We are, however, committed to maintaining the position of state maintained schools as set out in sections 58 to 60 of the Schools Standards and Framework Act 1998 (“SSFA”), which applied in England and Wales. These include provisions enabling governing bodies of schools with a religious character to employ teachers who have a commitment to the particular faith or denomination concerned.

13.21 In Scotland, education is the responsibility of Scottish Ministers. Section 21 of the Education (Scotland) Act 1980 provides that a teacher being appointed by the education authority to the staff of a denominational school must be approved by representatives of the relevant church or denominational body.

13.22 In our view, there will be no need to amend sections 58 to 60 of the SSFA. Scottish Ministers take the same view in relation to section 21 of the Education (Scotland) Act 1980.

13.23 Those sections, coupled with the proposed provision described in paragraph 13.15 above based on Article 4(2) of the Directive, will allow the governing body of a religious school – and in Scotland, the education authority responsible for a denominational school, with the approval of the church or denominational body concerned – to pursue employment policies needed to preserve the particular religious character of the school.¹⁸

2. *Equality and Diversity: The way ahead*

A second consultation document, *Equality and Diversity: The way ahead*, was published in October 2002, to accompany draft regulations. This also gave examples of religious posts in which adherence to a particular faith might be a genuine occupational requirement:

52. In most jobs, personal characteristics – such as someone’s religion or race – will be immaterial. But people work in a wide variety of circumstances and, in some cases, having a particular characteristic will be a genuine requirement. Legislation on race, disability, religion, age and sexual orientation will have the flexibility to recognise this.

A hospital wants to employ a chaplain to pray with people and offer spiritual counselling when asked. The job description has been designed in response to a survey which showed that most patients who needed this kind of service were Christian. In these circumstances, the hospital may decide that having a Christian faith is a genuine requirement of the job.

¹⁸ <http://www.dti.gov.uk/er/equality/consult.pdf>

53. The limited circumstances in which employers can look to recruit only a woman, or a man, to a particular job are already well-established in legislation and case law. Recruiting a man or woman, for example, may be justified for reasons of privacy or decency if a job requires intimate contact with other people. We do not propose to make any change to the SDA.

What you said in consultation

54. Of 654 respondents, 619 (95%) agreed that race, sexual orientation, religion and age legislation should have a general provision allowing employers to recruit staff on the basis of a “genuine occupational requirement” in the limited circumstances in which this could be justified. Only 35 (5%) disagreed.

How the law will work

55. These provisions will be narrowly drawn. Legislation on sexual orientation, religion, age, disability and race will make it clear that occupational requirements must be “genuine”. Employers cannot use these provisions to get round the law – by discriminating on other grounds, for example. If potential candidates believe that a job description is discriminatory, by referring to a particular characteristic, they will be able to complain as usual. It will then be for the employer to demonstrate to an Employment Tribunal that the characteristic is genuinely needed for the particular job.

Ethos based on religion or belief

82. We also said that we proposed to include in the new legislation a provision based on the wording in the Directive which would allow organisations which have an ethos based on religion or belief to pursue employment policies necessary to ensure the preservation of that ethos. We did not propose to define which particular organisations would be covered by this exemption, nor did we intend to specify the particular posts which are essential in underpinning an organisation’s ethos. Overall, 263 organisations commented on these specific proposals. Of those, 11% thought the proposals did not do enough to support religious or belief organisations; 8% said that religious organisations did not need additional help to preserve their ethos; and 14% thought the proposals went further than necessary. The majority (67%) supported our approach, now adopted in draft regulations.

Faith schools in Great Britain and denominational schools in Scotland will be able to continue with employment policies needed to preserve their particular religious character as set out in the School Standards and Framework Act and the Education (Scotland) Act. They will not be able to discriminate against their staff on any of the other grounds.¹⁹

¹⁹ accessible via <http://www.dti.gov.uk/er/equality/wayahead.htm> (RTF format)

IV The Regulations, May 2003

Draft *Employment Equality (Religion or Belief) Regulations 2003* and draft *Employment Equality (Sexual Orientation) Regulations 2003* were laid before Parliament on 8 May 2003. They incorporate changes made following consultation on the draft regulations issued for consultation in October 2002. Amongst other things they have taken account of submissions from religious organisations urging the Government to allow them to dismiss those who change their religion or belief and to discriminate on grounds of sexual orientation where this is necessary to comply with the doctrines of the religion or avoid conflicting with followers' religious convictions. In a rare move, the Joint Select Committee on Statutory Instruments (the "Joint Committee") called for witnesses to give evidence on 'certain technical aspects' of the regulations.²⁰ Answers from the legal and technical staff at DTI responsible for them to questions from the Committee are included in the following section.

A. The Employment Equality (Religion or Belief) Regulations 2003

1. The general prohibition

The Regulations provide a comprehensive law banning discrimination in employment on the grounds of religion or belief. Draft Regulation 6 covers all stages of the employment process, recruitment, conditions of continuing service, pay, promotion etc, and dismissal:

6.—(1) It is unlawful for an employer to discriminate against a person—

- (a) in the arrangements he makes for the purpose of determining to whom he should offer employment;
- (b) in the terms on which he offers that person employment; or
- (c) by refusing to offer, or deliberately not offering, him employment.

(2) It is unlawful for an employer to discriminate against a person whom he employs—

- (a) in the terms of employment which he affords him;
- (b) in the opportunities which he affords him for promotion, a transfer, training, or receiving any other benefit;
- (c) by refusing to afford him, or deliberately not affording him, any such opportunity;

²⁰ *Joint Select Committee on Statutory Instruments, Oral Evidence 3 June 2003.*

(d) by dismissing him, or subjecting him to any other detriment.

(3) It is unlawful for an employer to subject to harassment a person whom he employs or who has applied to him for employment.

(4) Paragraph (2) does not apply to benefits of any description if the employer is concerned with the provision (for payment or not) of benefits of that description to the public, or to a section of the public which includes the employee in question, unless—

(a) that provision differs in a material respect from the provision of the benefits by the employer to his employees; or

(b) the provision of the benefits to the employee in question is regulated by his contract of employment; or

(c) the benefits relate to training.

(5) In paragraph (2) (d) reference to the dismissal of a person from employment includes references—

(a) to the termination of that person's employment by the expiration of any period (including a period expiring by reference to an event or circumstance), not being a termination immediately after which the employment is renewed on the same terms; and

(b) to the termination of that person's employment by any act of his (including the giving of notice) in circumstances such that he is entitled to terminate it without notice by reason of the conduct of the employer.

Actions such as 'discrimination' are defined in Regulations 3 (discrimination), 4 (victimisation) and 5 (harassment).

2. The genuine occupational requirement exception

Regulation 7 makes an exception for genuine occupational requirement:

Exception for genuine occupational requirement

7.—(1) In relation to discrimination falling within regulation 3—

(a) regulation 6(1) (a) or (c) does not apply to any employment, and

(b) regulation 6(3) (b) does not apply to promotion or transfer to, or training for, any employment,

(c) regulation 6(2) (d) does not apply to dismissal from any employment,

where paragraph (2) or (3) applies.

(2) This paragraph applies where, having regard to the nature of the employment or the context in which it is carried out—

(a) being of a particular religion or belief is a genuine and determining occupational requirement for the job; and

(b) it is proportionate to apply that requirement in the particular case, and this paragraph applies whether or not the employer has an ethos based on religion or belief.

(c) either

(i) the person to whom that requirement is applied does not meet it, or

(ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it

and this paragraph applies whether or not the employer has an ethos based on religion or belief.

(3) This paragraph applies where an employer has an ethos based on religion or belief and, having regard to that ethos and to the nature of the employment or the context in which it is carried out—

(a) being of a particular religion or belief is a genuine occupational requirement for the job; and

(b) it is proportionate to apply that requirement in the particular case, and

(c) either

(i) the person to whom that requirement is applied does not meet it, or

(ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it

The DTI's Explanatory Notes on this regulation say:

Regulation 7

Exception for genuine occupational requirement

22. Regulation 7 allows an employer, when recruiting for a post, to treat job applicants differently on grounds of religion or belief if possessing a particular 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 where a GOR applies in respect of that post.

23. Regulation 7(1) and (2) follows the wording of Article 4.1 of the Directive, as do the Draft Race Relations Act 1976 (Amendment) Regulations. However regulation 7 (2) does not copy out the reference in Article 4.1 to “the objective [being] legitimate”. This is because if an occupational requirement is established as a genuine one in order to carry out the job in question, then it also pursues a legitimate objective; a requirement which pursues an illegitimate objective would not constitute a *genuine* occupational requirement.

24. The exception in regulation 7(1) and (2) – what may be called “the general GOR” – applies whether or not the employer has an ethos based on religion or belief. But a further exception in regulation 7(3) – what may be called “the religious organisations GOR” – is available to an employer who does have such an ethos. The religious organisations GOR is based closely on the general GOR, since both are intended to operate in a similar way. But the religious organisations GOR, unlike the general GOR, does not have to be a determining occupational requirement. This means that the religious organisations GOR is slightly broader than the general GOR, 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.

25. 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. The wording of regulation 7(3) follows that in Article 4.2 of the Directive.²¹

The Joint Committee sought views on the meaning within the Directive of ‘genuine’ and ‘requirement’:

Mr Donaldson: Referring back to Article 4.1 of the EC Directive, what do you think the terms "genuine and determining" mean in that Article?

Mr Magyar: We think the word "genuine" would carry its natural meaning, so a requirement would be a genuine requirement for a job having regard to the nature or context of the work, not one which would be created at the whim of the employer in order to exclude persons of a particular orientation. We feel the word "determining" denotes that the requirement must be crucial or decisive to the post in question, not merely one of several general requirements.²²

When asked for a practical example of the application of these criteria the DTI official responded:

²¹ The Explanatory Notes can be found at Annex B of the Transposition Notes on the Draft Regulations, ODP, 18 May 2003. They were posted on the DTI website on 30 May 2003, <http://www.dti.gov.uk/er/equality/explanreligion.doc>

²² Joint Committee, Q7

Andrew Bennett: Yes. You have just described it in these terms, can you now put it into a more practical example of how you think one group would be covered by the regulation and another group might be exempt from the regulation?

Mr Magyar: We think that the obvious example of one that would be covered would be clergy or a high ranking official in a church body. We think that an example of a case that would not be within that would be, for example, a nurse in a care home.

Mr Thorneloe: Yes, on the basis that if it were a care home perhaps that had a religious ethos or was run on religious principles that would nevertheless probably not be employment purposes in an organised religion and would not have a sufficiently close relationship to the religion in the nature and context of the work so as to meet the criteria of regulation 7(3).

Andrew Bennett: You made the comment about a high ranking official, how low down do you come before you are caught or you are not caught?

Mr Magyar: Again, I think that ultimately has to be a question of fact for the tribunal or court considering the matter. It is extremely difficult to try and give examples in the abstract, particularly when one is not aware of the particular organisation, one is simply talking about an hypothetical organisation.²³

3. Definition of religion or belief

One other issue which attracted a good deal of attention during the consultation period was the difficulty of defining “religion or belief”. Regulation 2 defines “religion or belief” as “any religion, religious belief, or similar philosophical belief”. The Explanatory notes put the following gloss on the definition:

“religion or belief” is defined as being any religion, religious belief or similar philosophical belief. This does not include any philosophical or political belief unless that belief is similar to a religious belief. The courts and tribunals may consider a number of factors when deciding what is a ‘religion or belief’ (e.g. collective worship, clear belief system, profound belief affecting way of life or view of the world).

This is the definition put forward in the consultation broadly supported by the evidence to the Committee:

Mr Magyar. As the Committee has realised, the term "organised religion" is not a new one in legislation, it is taken from section 19 of the Sex Discrimination Act. We are not aware of any case law on what constitutes an organised religion. In practice it would appear that the term does not appear to have caused any misunderstandings but, as I say, as far as we are aware it has not been the subject of any case law. Whether something is an organised religion ultimately will be a question of fact for the court or tribunal. We do not expect that it would prove a

²³ Ibid Qs 11 & 12

more difficult question than other questions of fact regularly faced by courts. In practice, how the courts are likely to approach this, we anticipate that in general it should be reasonably clear whether or not employment is for purposes of an organised religion. We think that would involve consideration of who or what the employer is and what it does and consideration of the role of the employee and the functions of his or her post. Generally speaking, we would be thinking that an organised religion is something like a church, a mosque, a temple, something of that nature, but it could be wider than that ultimately, it is a question of fact for the court or tribunal.

Chairman: So the main religions would be covered but it would be a matter for the courts to decide on religions which are not necessarily household names?

Mr Magyar: Yes, I think that is correct.²⁴

However, some employers are concerned that the definition is too broad and might cover people with sincerely held secular beliefs, such as animal rights campaigners or vegans. Makbool Javaid, an employment lawyer, describes this as “major hole” in the draft legislation:

This leaves the courts to develop a definition on a case by case basis. But it doesn't give employers the kind of clarity needed to ensure compliance with the law.

What one person holds sacred may appear absurd to another. The inability of the courts to come up with a workable definition is illustrated by the fact that the Church of Scientology is not considered a religion in UK charity law but accepted as such under the European Convention of Human Rights. The European Court of Human Rights has adopted an approach not always capable of rationalisation, too. Druidism, for example, has not been accepted but the Krishna Consciousness movement was accepted without argument.

If the courts are inconsistent then employers will have real problems in establishing whether paganism, Satanism or other movements fall within the definition of religion. Businesses will probably be thousands of pounds out of pocket by the time they realise the movement they considered a dangerous cult was an acceptable religion.²⁵

However, Michael Rubenstein considers that the Government was probably wise not to attempt any further definition:

The government, probably wisely, has resisted calls to attempt to provide a detailed definition or set out an exhaustive list of groups that should be regarded as religious. The draft Regulations merely specify that “religion or belief” means “any religion, religious belief or similar philosophical belief”.

²⁴ Ibid Qs 5&6

²⁵ “Return of the Jedi?”, *People Management*, 21 November 2002

So far as religions are concerned, defining it as including “any religion” will tend to cover fringe religions and membership of cults. There is unlikely to be any need for Scientologists or Moonies, for example, to bring proceedings to establish that their members are protected by this definition.

“Religious belief” is likely to cover manifestations of a person’s religion as well as belonging to the religion itself. An employer who discriminates against an observant Muslim because he refuses to work on Friday would not be able to defend its position by arguing that the discrimination was not on grounds of being a Muslim, but merely because of the refusal o work on Fridays. A tribunal would find that not working on Fridays was part of a Muslim’s religious beliefs. (...)

The right not to be discriminated against on grounds of religion or belief is not intended to be co-extensive with Article 9 of the European Human Rights Convention, which protects freedom of thought, conscience and religion (from interference by a public authority)_. It is also clear that it is not intended to provide protection against discrimination on grounds of “political opinion”, in contrast to the position in Northern Ireland. These provisions will not protect an employee from being discriminated against on grounds of membership of the Labour or Conservative Party, for example. Some political beliefs, however, may be similar to religious beliefs, at least in the way that they are practised by particular individuals. Communism, National Socialism, pacifism – all could be said to involve belief systems affecting the believer’s world view.

Similarly, there are philosophical beliefs which most people would regard as similar to religious belief. Humanism or pacifism, for example, are likely to fall within the scope of the Regulations. Nevertheless there are bound to be grey areas and scope for litigation. To take two examples, will an animal rights activist be able to claim protection under the Regulations? Will an abortion advisory service be able to insist that its employees are not opposed to abortion?²⁶

A potential conflict with race discrimination legislation has also been identified. Rachel Dineley, another employment lawyer, has given the following example:

"Consider an employee who posts evangelical literature on a company noticeboard which offends his work colleagues from a different ethnic background," he said.

"Under current law regarding race discrimination, an employer might be advised to remove such material to avoid a potential claim from other sections of the workforce and to take disciplinary action against the individual.

²⁶ “Consultative draft discrimination Regulations: an EOR guide”, *Equal Opportunities Review No 113*, January 2003

"However, under this draft legislation, it's possible that the employee could seek redress in respect of such disciplinary action by arguing that he had been subjected to an unlawful detriment.

"It would be up to a tribunal to try and resolve this conflict, but the current draft legislation offers little guidance or support".²⁷

B. The Employment Equality (Sexual Orientation) Regulations 2003

1. The general prohibition

These regulations follow the same pattern as those covering the religion and belief regulations. Sexual orientation is defined by Regulation 2 as meaning "a sexual orientation towards

- (a) persons of the same sex;
- (b) persons of the opposite sex; or
- (c) persons of the same sex and of the opposite sex"

Again general prohibitions are laid down against discrimination (Regulation 3), victimisation (Regulation 4) and harassment (Regulation 5).

2. The genuine occupational requirement exception

Regulation 7 contains a similar exception for genuine occupational requirement:

7.—(1) In relation to discrimination falling within regulation 3 (discrimination on grounds of sexual orientation)—

- (a) regulation 6(1) (a) or (c) does not apply to any employment,
- (b) regulation 6(2) (b) or (c) does not apply to promotion or transfer to, or training for, any employment, and
- (c) regulation 6(2) (d) does not apply to dismissal from any employment,

where paragraph (2) or (3) applies.

(2) This paragraph applies where, having regard to the nature of the employment or the context in which it is carried out—

²⁷ "Anti-religious discrimination 'could confuse', *Personneltoday.com*, 30 October 2002, http://www.personneltoday.com/pt_news/news_daily_det.asp?liArticleID=15671

(a) being of a particular sexual orientation is a genuine and determining occupational requirement for the job;

(b) it is proportionate to apply that requirement in the particular case, and

(c) either

(i) the person to whom that requirement is applied does not meet it, or

(ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it

and this paragraph applies whether or not the employment is for purposes of an organised religion.

(3) This paragraph applies where

(a) the employment is for purposes of an organised religion

(b) the employer applies a requirement related to sexual orientation-

(i) so as to comply with the doctrines of the religion, or

(ii) 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; and

(c) either

(i) the person to whom that requirement is applied does not meet it, or

(ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it

Regulation 7 (3) was not in the draft regulations issued for consultation in October 2002. The Explanatory Notes comment:

24. Regulation 7(3) provides a further exception in relation to employment for purposes of an organised religion, which is similar to section 19 of the SDA. 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. This applies to employment in a church or temple, for example, but does not necessarily apply to any employment which is (or is claimed to be) of a religious character. Regulation 7(3) is consistent with Article 4.1 of the Directive, although it does not copy out its wording. This is because a requirement which meets the criteria defined in regulation 7(3) is necessarily a genuine and

determining occupational requirement which is applied proportionately, within the meaning of Article 4.1. in this context, recital (24) of the preamble of the Directive refers to Declaration No 11 annexed to the Amsterdam Treaty recognising the status under national law of churches and religious associations.²⁸

Since this exemption has proved to be one of the most controversial aspects of the regulations, it was to be expected that it would figure prominently in the questions from the Joint Committee:

Earl Russell: There are one or two precedents on this which perhaps might be helpful. There are EOC and Employment Tribunal precedents in this country. It has been ruled that a job fitting women's bras is one where being a woman is a genuine and determining occupational requirement, and I think one can understand that well enough. There was also a case where a man was offered a job under the Jobseeker's Act pulling pints in the Cardiff Conservative Club and he refused it on the ground that he was a Labour voter and this was ruled not to be a determining occupational requirement. Where do you draw the line between these two types of case? How does it apply to these regulations?

Mr Magyar: I think it is actually very difficult, as I say, to draw the line, particularly in relation to sexual orientation and religion or belief where I think we are in a slightly different ball game than sex discrimination. I think one simply has to look at the particular facts of any individual case and ultimately, as I say, it will be for the court or tribunal to determine the issue.

Earl Russell: There are two pieces of wording here that I wanted to ask what parallels there are to. 7(3)(ii)"...so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers..." A lot of things interfere with people's convictions, where else has this allowance been made in equivalent regulations? (...) Where else has an equivalent allowance been made in regulations for something which conflicted with someone's strongly held convictions? Where else has this been held as sufficient ground for exemption?

Mr Magyar: Section 19 of the Sex Discrimination Act has a similar formulation but we are basing our regulations squarely on Article 4.1. The point here is it is not merely so as to avoid conflicting with the strongly held religious convictions of a significant number of followers that is sufficient, it is because of the nature of the employment and the context in which it is carried out. One also needs to have regard to the first criterion where the employment is also for purposes of an organised religion. We are not talking about any employment, we are talking about a specifically narrowly drawn category of employment and even then, because of the nature of the employment and the context in which it is carried

²⁸ The Explanatory Notes can be found at Annex B of the Transposition Notes issued by the ODPM, 18 May 2003. [They were posted on the DTI website on 30 May 2003.](http://www.dti.gov.uk/er/equality/explanorient.doc)
<http://www.dti.gov.uk/er/equality/explanorient.doc>

out, the requirement is necessary"...so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers..."

Earl Russell: There we come back again to the question of the exemption for a person pulling pints at the Conservative Club. What is and what is not "for purposes of a religion"? Would pulling pints in a bar be for purposes of a religion or would cleaning its windows be for purposes of a religion?

Mr Magyar: In my view, I think it would be a very difficult argument to sustain that such employment would be for purposes of an organised religion, but even if one were to overcome that particular hurdle, and I think it is a difficult one, it would be difficult to say that the nature of the employment and the context in which it is carried out would make it necessary so as to avoid conflicting with the religious convictions of the followers of the religion. Ultimately, obviously, that is my view on that but it is not to say that that argument will not be run in a court or tribunal but my feeling is it is unlikely to be sustained.

Earl Russell: Why then is this argument allowed for a religion and not for Cardiff Conservative Club?

Mr Magyar: As I said at the outset, I think that with religious discrimination we are in a slightly different ball game from sex discrimination and also we are talking about the strictly drawn criteria that we have here based on Article 4.1 of the Directive and that gives a different context.²⁹

Later:

Lord Lea of Croydon: Under draft regulation 7(3)(b)(i) a discriminatory requirement may lawfully be applied so as to comply with the doctrines of the religion, regardless of the nature of the employment or the context in which it is carried out. How is this justified by Article 4.1 of the Directive, which requires that a characteristic should be related to the nature of the particular activities concerned or the context in which they are carried out?

Mr Magyar: Where religious doctrine requires a post to be filled by persons of a particular orientation we believe it will do so because of the nature of the post or the context in which it is carried out. We are not aware of any cases in which religious doctrine requires a post to be filled by persons of a particular orientation, but religions and religious doctrines change over time so we felt it was important to include this. The essential point is that where religious doctrine requires a post to be filled by persons of a particular orientation we believe it will do so because of the nature of the post or the context in which it is carried out, not merely because of discriminatory motives not attributable to the post or the context.

Mr Donaldson: Just exploring this point a bit further on where you draw the line. The Bible, which of course is central to Christian churches, teaches that homosexuality is a sinful practice. If a church in London wishes to employ

²⁹ Joint Committee, Qs 13-17

someone to clean its windows, is that a genuine and determining factor in terms of employment to that particular post? If that same church wished to employ a Christian counsellor to counsel, for example, someone who was the victim of sexual abuse, in those circumstances would it be a genuine and determining requirement?

Mr Magyar: I think with the cleaner of the windows the argument, as I think I have indicated, would be difficult to sustain. I cannot give a categoric answer here, and I am sure you would not expect me to be able to do so, but I would have thought that for that sort of post it would be very difficult to sustain that argument. With different posts there may be the possibility of the argument. In the other post that you mentioned, it is possible. Again, it is a question of fact ultimately for a court or tribunal. Certainly with the cleaner I think there would be great difficulty in sustaining the argument.

Earl Russell: With the cleaner we are in an area of considerable uncertainty, especially since religions may claim to be the supreme judge of what is compatible with their ethos. There could be room for a good deal of litigation here.

Mr Magyar: I think I would have to accept that I cannot give a categoric assurance to this Committee that an argument will not be run in relation to a cleaner. What we have tried to do with regulation 7(3) is draw the criteria in such a strict way that there will be a number of hurdles for any employer trying to sustain such an argument to actually convince a court or tribunal that to be a cleaner they had to hold a particular religious view and that that was a genuine and determining occupational requirement. As I say, I cannot give a categoric assurance that a case of this nature will not be run, it will not give rise to litigation, but we have tried to draw the criteria in a way that gives a clear indication to courts and tribunals that this is a strict exemption.³⁰

3. Pensions

One of the main criticisms of the proposed regulations during the consultation period was that they failed to outlaw discrimination on grounds of marital status in pension schemes. There is an argument that this amounts to indirect discrimination on grounds of sexual orientation as unmarried opposite sex partners are legally entitled to get married, whereas unmarried same sex partners are not.

However, the Government has maintained its position and regulation 25 provides an exception for benefits dependent on marital status:

25. Nothing in Part II or III shall render unlawful anything which prevents or restricts access to a benefit by reference to marital status.

The Explanatory notes comment:

³⁰ Ibid Qs 21-22

Regulation 25

Exception for benefits dependent on marital status

Regulation 25 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 cannot be challenged as indirectly discriminatory by reason of the fact that it is unlawful for same sex partners to marry in the UK. So, for example, if survivor benefits in an employer's occupational pension scheme are only available to the widow(er) of a deceased employee, this will not be discrimination on grounds of sexual orientation under the Regulations.

Regulation 25 reflects the fact that treatment by reference to marital status is outside the scope of the Directive. Article 3 of the Directive states that it applies only "within the limits of the areas of competence conferred on the Community". Distinctions between the rights of married and unmarried people are outside the scope of Community competence, because marriage is a family law concept which is regulated by the laws of the Member States. This was recognised by the Advocate General of the ECJ in C-249/96 *Grant v. South West Trains* [1998] ECR I-621 (at paragraph 28 of his opinion). Recital (22) of the preamble to the Directive confirms that it is "without prejudice to national laws on marital status and the benefits dependent thereon".

The TUC campaigned hard, but ultimately unsuccessfully, on this issue. In a press release issued on 14 November 2002 it assessed the scale of the problem:

Who is affected?

A large number of workers are affected by the government's draft regulation. The National Association of Pension Funds Annual Survey in 2001 identified that whereas almost every pension scheme paid out a pension to a surviving spouse, 12% of private and 48% of public sector pension schemes did not provide continuing pensions for unmarried partners (either opposite or same sex) in any circumstances, 49% and 23% respectively paid out to unmarried partners at the discretion of trustees and 19% and 41% respectively did not pay lump sum benefits to either group. Of schemes paying lump sum benefits to unmarried survivors, only 38% and 52% respectively treated same sex relationships the same as opposite sex partners. Therefore, while it is not possible to state exactly what number of workers may suffer as a result of the exemption, it is clear that a large number of unmarried opposite sex partners, and an even larger proportion of same sex partners, will face discrimination as a result.³¹

The same press release made the "case for equality":

³¹ TUC press release, *Campaign for true equality: making the case to end the pensions exemption: Employment Equality (Sexual Orientation) Regulations 2003*, 14 November 2002

The government's consultation documents do not explain why they have rejected the strong arguments already presented to them, in the first consultation on the new law during 2002, to change their proposals in this area. The tone and language of the whole of the rest of the package of proposals is based on equal treatment, and the recognition and acceptance of diversity. It does not therefore imply that their reasons for the exclusion are based on a 'moral' case for the superiority of married relationships over same sex and unmarried relationships. It is likely, therefore, that their reasoning is based on fears of the potential costs to occupational schemes of extending survivor benefits to unmarried members.

There are many arguments that can be advanced in support of the case for equality.

- The first argument is a simple one of justice and fairness. If lesbian and gay people are to be regarded as equal citizens, then lesbian and gay people's same sex relationships should be treated with equal respect. Increasingly, the law is being interpreted to provide equal rights for same sex partners. A recent Court of Appeal housing case (*Mendoza v. Ghaidan*) interpreted the Rent Act definition of a tenant's (resident) spouse to include a same-sex partner. The government itself offered strong support to the recognition of same-sex partnerships for adoption purposes. For the government's new regulations to require employers not to discriminate on grounds of sexual orientation, but to allow pension schemes to continue to discriminate on grounds of marital status, contradicts any commitment to equal treatment in the first place.
- Unmarried pension scheme members make the same contributions as married scheme members. Pensions are anyway, legally, deferred pay that still appertains to the worker. What possible justification can there be for some members of the scheme being able to pass their pensions over to a partner when they die, and others not being able to do so, even though both have paid the same contributions?
- Nor is this a question of there being a potential problem in identifying who the unmarried partner actually is. This is a technical problem, and there are now plenty of schemes that have found an entirely acceptable answer (such as expression of wish forms) to ensure that there is no abuse of the scheme.
- The world has changed a great deal since many of the traditional occupational pension schemes drew up their rules. When most did so, it was calculated that almost every scheme member (90-95%) would be married. The reality over past decades has been that this proportion has fallen dramatically. For years then, many schemes have been paying out less in survivors' benefits than they were budgeting for. Now is the time for pension schemes that have not already done so (and many have - see below) to be required to catch up with modern society and for the law to reflect equal treatment in ALL its aspects.

- The changing world has been recognised by a growing number of occupational pension schemes that have changed their rules. In the public sector, the Civil Service itself has introduced a brand new, non-discriminatory scheme. In the private sector, a growing number of large financial institutions have established non-discriminatory pension schemes for their own employees. Such are the pension schemes agreed with the unions by Barclays Bank, Bank of Scotland, and others (see *Winning Lesbian and Gay Equality*, TUC, 2001) These organisations are good models to follow, in particular as it might be thought that such employers would give careful consideration to any fears about additional cost. This does not seem to have led them to reach the conclusion that being non-discriminatory cannot be sustained financially.
- In fact, MPs themselves have voted to change their own pension scheme so as to reflect modern reality and to include same sex and unmarried partners.
- The arguments about cost are anyway open to challenge. The government developed a costs model in the Regulatory Impact Assessment (RIA) done for its original consultation on the new European legislation. It reached the conclusion that extending equal pension rights would cost employers (public and private) £69 million. The problem with the figure is, of course, that it is simply not known how many workers with same sex partners there are. Indeed, it is the purest guesswork how many lesbian or gay workers there are at all. Nor is it known, or can be known, how many scheme members will pre-decease their partners. All of these figures therefore are, and can only be, pure speculation. The TUC carried out its own estimates (*Pensions and Prejudice*, TUC, 1995, dealing with public sector schemes) and reached very different conclusions from the RIA, using the 1995 Population Trends. The TUC study argued that across the various public sector schemes studied, the additional cost of including unmarried partners would be minimal, because the government's estimates of numbers of those who would benefit was greatly exaggerated. It is also the case that these schemes are making immense savings by not paying out to the large number of people who they either excluded from survivor benefits, or who do not have partners at all.

V Reaction to the Regulations

Most of the immediate comment on the final version of the Regulations has centred on the decision to allow organisations with a religious ethos to discriminate on grounds of sexual orientation.

The *Independent on Sunday* reported that this change was made following an intervention from the Prime Minister:

The Independent on Sunday has learned that the statutory instruments slipped out to Parliament last week were watered down following direct intervention by Downing Street. A Whitehall source said the decision was made “at the highest level” and that Barbara Roche, the Equalities Minister, had been overruled.³²

A spokesman from the National Secular Society, quoted in the same article, described the Regulations as a ‘witch-hunter’s dream come true’. The *Observer* ran a similar article that day, quoting the National Secular Society as saying:

We are absolutely horrified Religious organisations have been given carte blanche to get rid of gays. It actually institutionalises discrimination.³³

The *Morning Star* also quoted outraged reaction from trade unions and gay rights campaigners:

Trade unions and gay rights campaigners were outraged yesterday at revelations that new government legislation will allow religious employers to sack gay, lesbian and atheist staff.

Faith schools, charities, churches, hospices and any employer "with an ethos based on religion or belief" will be able to dismiss workers who do not share their beliefs.

The 2003 employment equality regulations were supposed to give rights to muslims and gays, following an EU directive.

The directive, which must be in place by December this year, was intended to achieve a breakthrough in combating discrimination in the workplace on grounds of sexuality or religion.

But intervention at the "highest level" by Downing Street has completely reversed the legislation, a source told the *Independent on Sunday*...

Gay rights campaigner Peter Tatchell said that Mr Blair has "capitulated to the forces of religious fundamentalism.

"The government is effectively endorsing a system of sexual apartheid," he said. The blow hit gay rights campaigners as they fought to repeal Section 28 in England and Wales. Scotland dropped its equivalent of the discriminatory legislation in 2000..³⁴

³² “Blair gives religious employers the right to sack gay workers”, *Independent on Sunday*, 11 May 2003

³³ “Church groups can sack gay staff”, *Observer*, 11 May 2003

³⁴ “Discriminate all you want: Blair sends message to religious bigots”, *Morning Star*, May 12 2003, p1

Further reaction and comment appeared in a *Sunday Times* article which asserted that the wording of the new clause was virtually dictated by the Archbishops' Council:

Chris Smith, the former Cabinet minister, said: "I'm very worried by this proposal. It is wrong to discriminate in employment whoever the employer may be and that is surely what the law should say."

His view was echoed by Roger Lyons, general secretary of Amicus, the trade union that represents church workers. He said he was "angered and upset" by the government's interpretation of the directive and had complained to John Prescott, the deputy prime minister, and Patricia Hewitt, the trade and industry secretary.

Critics say the new clause will make a mockery of European anti-discrimination legislation. The clause was added after pressure from the Archbishops' Council of the Church of England - a form of cabinet for the church.

Peter Tatchell, the gay rights campaigner, said: "The government has capitulated to the forces of religious extremism. It has given them the right to veto equality and perpetuate discrimination." The Lesbian and Gay Christian Movement (LGCM) said the move would institutionalise homophobia in a way that "makes section 28 (which forbade the promotion of homosexuality by local authorities) look like a tea party".

The church defends the new clause, arguing that without it would not have freedom to practise. In a four-page submission to government, the Archbishops' Council argued the European directive would mean that "actions taken by the church to enforce its own doctrines and beliefs in relation to sexual conduct could be found unlawful. For example a bishop who denied ordination to someone in a gay or lesbian relationship might be found to be discriminating unlawfully on grounds of sexual orientation."

The Department of Trade and Industry (DTI) conceded last week that the clause would affect not only clergy but also teachers in church schools and employees of religious charities or hospitals.

Sources close to the DTI claim Downing Street forced it to accept the clauses.

The wording of the clauses in the statutory instrument are almost identical to those submitted by the Archbishop's Council to the DTI during a consultation process this year.

It says gays can be discriminated against if the "nature and context" of their job "conflicts with the (strong) religious convictions of a significant number of the religion's followers".

Critics say this would allow mosques, synagogues and churches to sack a gardener for being gay because his presence might upset the congregation.

A DTI spokesman admitted the new clause could result in sackings but said

religious groups would have to prove that heterosexuality was a "genuine occupational requirement" before sacking or refusing to hire someone.

Critics say this view is naive and claim it would be simple for a religious group to show that an employee's presence conflicted with their "strongly held religious" beliefs.

Rowan Williams, the Archbishop of Canterbury, is likely to be embarrassed by the clause and his council's role in drafting it before he was enthroned. He has in the past supported the rights of gays in the church.³⁵

Despite the furore surrounding this particular issue, the Regulations are intended improve protection against discrimination for a large number of employees. As an article in the *Financial Times* has put it:

The proposals to implement European employment laws sparked surprise among some people that such action was not already actionable.³⁶

VI Numbers affected

The Regulatory Impact Assessments (RIAs) on the two Regulations give some guidance on the number of people who will be directly affected by their introduction. On the *Sexual Orientation Regulations* the RIA notes:

Although **all** workers are covered by the legislation, we assume, in this Regulatory Impact Assessment, that lesbian, gay men and bisexual workers are the most likely groups to be affected by discrimination on the grounds of sexual orientation. Even though the legislation also covers those perceived as lesbian, gay men or bisexual, we do not attempt to quantify this aspect due to insufficient information. There are no reliable data on the sexual orientation of workers, but using various sources, we estimate that between 5% and 7% of the population are most likely to be affected by the legislation. The current level of employment in Great Britain is just under 28 million which suggests that the legislation may be expected to cover between about 1.3 and 1.9 million workers.

There is some evidence of discrimination on grounds of sexual orientation. Stonewall (1993) found that 15% of lesbians and gay men had suffered at least one experience of discrimination in relation to their working lives. The National Survey of Sexual Attitudes and Lifestyles (1990) found that just over a fifth of lesbian and gay workers had been harassed due to their sexuality. We, therefore, assume that about 20% of lesbian, gay men and bisexual employees have suffered discrimination at work due to their sexuality. This implies that between 275,000

³⁵ 'Churches will get right to sack gays', *SundayTimes* 1 June 2003

³⁶ "A tricky question of faith in work ... Laws to ban discrimination against employees' religious beliefs or sexual orientation raise complex issues, says Bob Sherwood", *Financial Times* 21 April 2003

and 390,000 employees have experienced discrimination due to their sexual orientation. In addition, there will be individuals who suffer from the fact that they cannot disclose their sexual orientation because of fear of discrimination. Further, between 4 and 8% (55,000 to 156,000) claimed to have lost their jobs because of their sexuality.³⁷

With respect to the *Religion and Belief Regulations*, the RIA notes that:

Although the legislation covers everyone regardless of religion or belief, we use estimates of active religious membership in order to guide our analysis of those most likely to be affected.

There is much variability in the information on the distribution of religion or belief amongst workers derived from a variety of sources. Two sources, however, provide reasonably similar estimates. Christian Research estimated that there were about 8.2 million active adult members of religious organisations This implies that there are about 6.2 million active adult religious members of working age, of which roughly 4.6 million will be in paid employment. Similarly, the British Social Attitudes Survey (1999) found that 21% of adult females and 15% of adult males attended religious services or meetings at least once a month. This estimated that there are about 2.5 million women and 2.15 million men in employment who actively participate in religious activities. Although some religions or beliefs will not be reflected in these figures, they are likely to be overestimates. Firstly, most discriminated groups, especially ethnic minorities, tend to have lower employment and economic activity rates. Secondly, retired people, especially older women, have much higher levels of attendance at religious meetings. (...)

We have no direct information on the extent of employment discrimination on the grounds of religion or belief. In most workplaces, religion is not an issue of dispute. The British Social Attitudes Survey (2001) found that only 2% of the British public believed that employers discriminated against job applicants a lot on grounds of religion or belief. This contrasts with about 10% on grounds of sexual orientation and around 20% on grounds of race. We assume that about 2% (roughly 92,000) of those who could possibly be affected may have experienced any form of discrimination.³⁸

³⁷ Regulatory Impact Assessment on the *Draft Employment Equality (Sexual orientation) Regulations 2003*, ODPM, 18 May 2003, RIA 03/69

³⁸ Regulatory Impact Assessment on the *Draft Employment Equality (Religion or Belief) Regulations 2003*, ODPM, 18 May 2003, RIA 03/68

