



# **SEXUAL ORIENTATION AND RELIGIOUS BELIEF GUIDANCE**

## **FOR THE SOCIAL CARE WORKFORCE**

Developed by

**Social Care Association  
and  
UK Home Care Association**

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# **EXECUTIVE SUMMARY**

## ***Introduction***

This brief summary is intended to capture some of the key points of the guidance to the Employment Equality (Sexual Orientation) Regulations 2003 and the Employment Equality (Religion or Belief) Regulations 2003 produced for the social care sector.

## ***Overview***

The Employment Equality (Sexual Orientation) Regulations and the Employment Equality (Religion or Belief) Regulations came into effect in December 2003. They extend legal protection to those who experience discrimination on the grounds of sexual orientation or their religion or belief, in employment or vocational training.

The regulations form part of the European Commission's intention to establish a common framework that provides effective protection against discrimination in the workplace on grounds of sexual orientation, religion or belief, disability and age.

The regulations make it unlawful to directly discriminate by treating people less favourably than others on the grounds of sexual orientation, religion or belief unless a genuine occupational requirement is in place.

Indirect discrimination where a provision, intention or practice disadvantages people of a particular sexual orientation, religion or belief, will be unlawful if it cannot be justified as a proportionate means of achieving a legitimate business aim.

Harassment – unwanted conduct that violates a person's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment – will be unlawful. Employers are expected to take reasonable steps to reduce the likelihood of – and respond appropriately to – harassment on the grounds of sexual orientation, religion or belief.

The regulations make it unlawful to victimise by treating less favourably anyone exercising their rights under the regulations, or supporting others in doing so, providing they are acting in good faith.

## **Coverage**

All social care employers and employees in England, Scotland and Wales are covered by the regulations, regardless of how many people are employed by the organisation. It is the existence of an 'employment relationship' that triggers coverage, and this may extend beyond the traditional view of being employed. The regulations cover all aspects of the employment relationship and may extend beyond the workplace or period of employment.

Lesbians, gay men, bisexuals and heterosexuals are covered by the regulations. Employment protection rights are also extended to those experiencing discrimination because of their perceived sexual orientation, or through the real or perceived sexual orientation of their family, friends or associates.

Coverage regarding discrimination on the grounds of religion or belief extends beyond traditional religions to 'any religion, religious belief or similar philosophical belief'. This may include beliefs that are grounded in, but not a central belief, of a religion. The regulations cover those who have no religious belief.

A genuine occupational requirement may apply in rare circumstances where having a particular sexual orientation, religion or belief is essential rather than preferred, and where the post involves leadership and the maintenance of a religious ethos within an organisation.

## **Key Concepts**

The guidance examines the key concepts of direct discrimination, indirect discrimination, harassment and victimisation. It offers examples that might assist employers and employees in understanding their rights and responsibilities with regard to the Employment Equality (Sexual Orientation) Regulations and the Employment Equality (Religion or Belief) Regulations.

## **Recruitment and Organisational Issues**

This section of the guidance makes suggestions as to how organisations might take steps to promote good practice, help in ensuring compliance with the regulations and offers examples to promote understanding and dignity at work. Suggestions are also made with regard to recruitment and similar processes, training and developmental opportunities, and the importance of incorporating

issues of sexual orientation, religion and belief into existing equalities policies, grievance, disciplinary and other employment practices.

The intention is to highlight the importance of employers being confident that the organisation actively works towards the creation and maintenance of a culture in which the respect and dignity of all is accepted as being an important organisational goal. Employees should also have confidence that the employer will respond swiftly, fairly and robustly if it believes discrimination, harassment or victimisation may have taken place.

This section identifies some sensitive employment issues and offers guidance with regard to expectations and aspects of the regulations that employers may wish to consider, as well as possible sources of support.

### ***Genuine Occupational Requirement***

The section on genuine occupational requirement helps to clarify the term as it applies to the Equality Employment (Sexual Orientation) Regulations and the Employment Equality (Religion or Belief) Regulations. A genuine occupational requirement must be an essential requirement relating to the functions of the job. It must be essential rather than desirable or preferential.

It is not envisaged that a genuine occupational requirement will be applicable to many social care jobs under the regulations. It might be used where issues of leadership, confidence or credibility with regard to sexual orientation, religion or belief apply, but the burden of proof in such circumstances falls on the employer to justify the genuine occupational requirement as being an appropriate and necessary means of achieving the required legitimate business aim.

Organisations with a religious ethos may seek a genuine occupational requirement under regulation 7(3) of the religion or belief regulations, but it is more likely to apply to posts that have a particular role in maintaining that religious ethos, rather than to those primarily involved in the direct delivery of social care.

### ***Genuine Occupational Requirements, Positive Action and Resolving issues of Discrimination in the Workplace***

Positive action is not prohibited by the regulations, and organisations may seek to address inequalities by such means. However positive action cannot be used at

the point of deciding to appoint or promote a person, as such action would be unlawful.

The guidance outlines the benefits of resolving issues quickly, informally and at the lowest level needed, so as to promote the dignity of all employees. It also outlines briefly the processes and remedies for resolving disputes that are not settled by internal grievance procedures, and that might result in an employment tribunal making a declaration or recommendations, or ordering potentially unlimited compensation, including damages for injury to feelings.

### ***Contact List and Checklists***

The guidance concludes with a contact list of possible sources of further relevant information, advice or support. Checklists are also included, and organisations may wish to use these as a starting point when considering possible actions to promote compliance with the Employment Equality (Sexual Orientation) Regulations and the Employment Equality (Religion or Belief) Regulations 2003.

## INTRODUCTION

The purpose of this guide to the Employment Equality (Sexual Orientation) Regulations 2003 and the Employment Equality (Religion or Belief) Regulations 2003 is to assist both employers and employees working in the social care sector to understand the intentions of the regulations, and to help them in implementing the change that will be required within their organisations. This guide should be read with this in mind rather than being regarded as a complete or authoritative statement of the law.

The Employment Equality (Sexual Orientation) Regulations and the Employment Equality (Religion or Belief) Regulations came into effect on 1 December and 2 December 2003 respectively. They give legal protection to those who believe they have experienced discrimination on grounds of either their sexual orientation or their religion or beliefs, in their workplace or in vocational training.

Much of what is asked of organisations and individuals within the regulations fits with the key values of social care, and places a legal framework around our sector's belief in the importance of the respect and dignity of the individual. It reflects a desire to turn our value base into services that meet individual need through working with others who, like ourselves, are entitled to respect and dignity.

The regulations make it unlawful to discriminate against an employee either directly or indirectly, harass or victimise them on grounds of sexual orientation, religion or belief, in connection with their employment. It is the intention of the regulations to prevent the following;

**Direct discrimination** : treating people less favourably than others on grounds of sexual orientation, religion or belief.

**Indirect discrimination** : applying a provision, criterion or practice which disadvantages people of a particular sexual orientation, religion or belief, that cannot be justified as a proportionate means of achieving a legitimate business aim.

**Harassment** : unwanted conduct that violates people's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment.

**Victimisation** : treating people less favourably because they have exercised their rights, or supported others in exercising their rights in connection with the regulations.

It is acknowledged that discrimination in the workplace damages individuals, their employment prospects, their productivity and the efficiency of organisations that fail to obtain the best staff working to the best of their ability. This means that those to whom services are provided are likely to receive a lower standard of service.

Tackling inequality contributes towards the creation of a well-motivated and highly- skilled workforce that feels valued, and is likely to contribute more as a result. Organisations should also bear in mind the substantial costs of getting it wrong – both financial in the case of employment tribunals, and also in terms of the image and reputation of an organisation that is perceived as having failed in its obligations with regard to issues of equality.

The government has taken an active role in negotiating the Employment Directive in support of the European Commission's intention to establish a common framework that provides effective protection against discrimination in the workplace. The movement towards a common framework to address discrimination in employment and vocational training through the EC Employment Directive addresses discrimination on grounds of sexual orientation, religion, belief, disability and age.

Amendments to the Disability Discrimination Act (1995) take effect from October 2004, and new legislation giving employees protection against discrimination on grounds of age will be introduced before the end of 2006.

In view of this it would be advisable for employers to examine their policies, procedures and practices to check that they do not either directly or indirectly discriminate against people on grounds of age. Any employer wishing to keep up with developments in respect of age discrimination and employment may find the Age Positive web-site ( <http://www.agepositive.gov.uk> ) a useful place to start.

The Employment Equality (Sexual Orientation) Regulations and the Employment Equality (Religion and Belief) Regulations build on existing equalities and employment legislation, such as:

- The Equal Pay Act (1970)
- The Rehabilitation of Offenders Act (1974)
- The Sex Discrimination Act (1975)
- The Race Relations Act (1976)
- The Disability Discrimination Act (1995)



- The Race Relations (Amendment) Act (2000)

The ACAS Equality Direct web-site ( <http://www.equalitydirect.org.uk> ) gives useful information with regard to the legislation.

## **Coverage**

All social care employers and employees in England, Scotland and Wales are covered by the regulations. The regulations apply regardless of the number of people employed. It is the existence of an 'employment relationship' that triggers coverage, not the size of the organisation. Other regulations will apply to Northern Ireland. The regulations apply to almost all forms of employment relationships including partnerships and contract workers. They cover almost all aspects of the 'employment relationship' and can extend beyond the workplace or period of employment.

The regulations define employment in a similar way to section 68 of the Disability Discrimination Act 1995. This extends beyond the traditional view of being employed to an 'employment relationship'. This might include more personal contracts such as an individual engaging someone to provide a service in their own home, whether that was to install equipment in the house or provide personal assistance. This would be broad enough to include sub-contractors, agency workers and those who may view themselves as being self-employed.

The boundary between a contract 'for' and a contract 'of' service is subject to several case law tests, such as the degree of control exercised over how the work is done, the extent to which the person is 'part' of the organisation and the economic reality of the situation.

It should not be assumed that if services are provided through an agency that an 'employment relationship' cannot be created between the agency and the person delivering the service, regardless of who is viewed as commissioning the service. A court or Tribunal will decide on an individual basis if an 'employment relationship' exists in the light of all the circumstances of the case, but regulation 8 means that 'contract workers' are covered by the regulations and an employment agency may be named in proceedings.

The right to an 'employment relationship' free from discrimination on grounds of sexual orientation, religion or belief would apply to the following examples;

- Decisions within the recruitment process

- Decisions to employ or promote
- Access to training and developmental opportunities
- Pay and terms and conditions of employment, or other employment related benefits
- Work related benefits
- Decisions to dismiss, redeploy or make redundant

However this does not cover all employment benefits relating to pensions in the context of sexual orientation.

The Employment Equality (Sexual Orientation) Regulations 2003 cover discrimination on grounds of sexual orientation and also discrimination on grounds of perceived sexual orientation.

**Example :**

**The manner and clothing of a young man cause his colleagues to tease, make fun of him and mimic his behaviour in a way that suggests he is gay. Regardless of his sexuality, this is likely to amount to harassment on grounds of sexual orientation.**

The regulations extend employment protection rights for the following groups of people:

- Same-sex relationships – lesbians and gay men
- Opposite-sex relationships – heterosexuals
- Same-sex and opposite-sex relationships – bisexuals

Discrimination on grounds of association is also covered by the regulations, and an employee has the right not to be discriminated against on grounds of the real or perceived sexual orientation of their family members, friends or associates.

The definition of sexual orientation within the regulations does not cover sexual practices or conduct, providing that people of a different sexual orientation are treated in similar ways for similar practices or conduct.

**Example :**

**A gay man is charged with an offence of a sexual nature. His employer suspends him from employment. This would not amount to discrimination on grounds of sexual orientation, if in a similar situation the employer would suspend a heterosexual member of staff.**

Discrimination with regard to gender reassignment is not covered by the regulations as it is not an issue of sexual orientation, although it may be an issue of discrimination on grounds of gender. This is covered by the Sex Discrimination (Gender Reassignment Regulations) 1999.

The definition of 'religion or belief' extends beyond the religions and faiths usually recognised. The regulations will extend employment rights against discrimination on grounds of 'any religion, religious belief or similar philosophical belief'. It is likely that employment tribunals and higher courts will be asked to decide what will be recognised as a religion or belief. In doing so such factors as collective worship, clear belief system or profound belief offering a way of life or view of the world would be examined.

**Example :**

**A newly appointed member of staff lets her colleagues know that she holds strong pagan beliefs, and wears jewellery that might indicate this. Her manager tells her to stop wearing this jewellery as she doesn't want service users thinking that she's 'a witch'. This would amount to discrimination if the wearing of jewellery associated with other faiths (for example, a Christian cross) was not similarly prohibited.**

The concept of religious belief may extend beyond central aspects of a religion. This might include beliefs founded in a religion, providing that they are compatible with human dignity, worthy of respect and have a certain level of cogency, seriousness, cohesion and importance.

**Example :**

**A member of staff in a social care organisation who is a practising Roman Catholic asks to be excused from certain aspects of her work relating to contraception or abortion. Providing that it is reasonably practicable to do so, the employer should consider making alternative arrangements.**

The definition of 'similar philosophical belief' does not have to include belief in a god or gods, and therefore would include atheism and humanism. However it

must be a profound belief affecting a person's way of life or their perception of the world. Religion or belief does not include the manifestations of the religion or belief, or conduct based upon religion or belief.

**Example :**

**An employee in the open-plan office of a social care organisation, is heard to state loudly that 'all gay men should be stoned to death'. His manager informs him that his comments are in breach of the organisation's equal opportunities policy, amount to harassment and could lead to disciplinary action. The employee responds that it is his religious belief and as such, is covered by the regulations. This would not amount to discrimination as the manager has responded to the employee's behaviour and not to his beliefs.**

The regulations extend the employment right of non-discrimination to those who follow no religion or belief. It also protects people from discrimination on the grounds of the religion or belief of their family, friends or associates.

Discrimination on grounds of sexual orientation, religion or belief may still be lawful under limited circumstances where a genuine occupational requirement applies. However this is likely to be extremely rare, must meet stringent criteria and is open to challenge. This is discussed in more detail later in this guidance.

## **KEY CONCEPTS**

### ***Direct Discrimination***

Regulation 3 covers direct and indirect discrimination. Direct discrimination occurs when a person is treated less favourably than others would be, for reasons of their sexual orientation, religion or belief. The comparison does not have to be with an actual event that is identical, but one that was, or would be, similar.

**Example :**

**A lesbian employee kisses her partner whilst being dropped off at work. She was subsequently disciplined for this, even though a heterosexual employee behaving in a similar way would not have been. This would amount to discrimination based on the employee's sexual orientation, rather than on their conduct.**

Usually there is no defence of justification in relation to direct discrimination, although there is for indirect discrimination. Under regulation 7, direct discrimination does not occur if sexual orientation, religion or belief is a 'genuine occupational requirement' for the job.

Direct discrimination can occur if the less favourable treatment is based on perception, even if the perception is incorrect. A person who suffers a disadvantage based on the perception of others with regard to their sexual orientation, would be covered by the regulations.

**Example :**

**An employee visits a local gay night club with friends and is seen leaving the club by colleagues from work. The employee subsequently experiences less favourable treatment in the social care organisation where he works, because he is perceived to be gay. This would amount to direct discrimination on grounds of sexual orientation, regardless of his sexual orientation, as it would be direct discrimination on grounds of 'association'.**

Direct discrimination on grounds of sexual orientation, religion or belief extends to those who refuse to follow an instruction that would unlawfully discriminate against another on grounds of sexual orientation, religion or belief.

**Example :**

**A supervisor in an organisation offering services for elderly people refuses to support an appointment process which has discriminated against an applicant on the basis of their religion, by refusing to send out a letter of appointment. If, as a result of not following the instructions of her manager she was subsequently treated less favourably, she is likely to be covered by the term 'on grounds of religion or belief'.**

The religion, beliefs or other motivation of the person who directly discriminates would not be relevant at an employment tribunal. The tribunal will be concerned with the characteristics of the complainant, and whether their sexual orientation, religion or belief, when viewed objectively, is a substantial cause of the differential treatment.

**Example :**

**The manager of a social care service refuses to employ a gay man even though he is suitably qualified and experienced, arguing that it would offend his own deeply-held religious beliefs. A tribunal may take the view**

that others without these beliefs may also discriminate against gay applicants, and conclude that it is the man's sexual orientation, and not the prospective employer's motivation, that has caused the differential treatment. Therefore the applicant has been discriminated against on grounds of his sexual orientation.

### ***Indirect Discrimination***

Indirect discrimination occurs when policies, procedures or practices – even informal ones – when applied equally to a group of people, have a disproportionate effect on those of one sexual orientation, religion or belief, and which causes them a particular disadvantage. Indirect discrimination is unlawful whether intentional or otherwise. It can only be justified if it is necessary to meet a legitimate aim and is a proportionate response to that aim.

Therefore all employers and employees should be alert to ways in which existing policy, procedures and practices might affect others, or how intended actions might affect other people of different sexual orientation, religions or beliefs.

#### **Example :**

A Hindu employee has saved additional hours worked, intending to take half a day off in preparation for a religious festival. During her shift a colleague is taken ill and has to go to hospital. The manager apologises but informs the Hindu employee that she cannot take the afternoon off, as he has been unable to arrange the necessary cover for the employee taken ill. He reminds her of the rule that taking accumulated leave is subject to the needs of the service.

#### **Example :**

A social care organisation pays overtime to those working over Christmas, but not for the religious festivals of other religions. This appears to be indirect discrimination, as it places a different value on working during the festivals of one religion over another. If the social care organisation needs to deliver the service 365 days a year, and the overtime reflect the difficulty in securing appropriate cover, then it may be justifiable as a proportionate response to a legitimate business aim.

On this occasion the rule may have a disproportionate effect. However, it may be justified because it is necessary to meet the legitimate business aim of providing an adequate and safe level of service. An organisation that always closes on a

Sunday may be indirectly discriminating against some people of certain religions or beliefs, but would not be in breach of the regulations if this practice were a proportionate response to meeting a legitimate business aim. The employer may be required to consider alternative arrangements, but it is not compelled to alter them if it undermines a central or significant business need that is reasonably and proportionately met by the existing arrangements.

Once it has been established that indirect discrimination has taken place, the burden of proof falls on the respondent to demonstrate that they have not acted unlawfully. It is insufficient to argue that the practice was needed to meet a legitimate business aim, and proportionate in the opinion of the person applying the criteria.

In deciding what action is required to meet legitimate business aims, employers should consider whether the response is appropriate and necessary. In other words does it meet a legitimate business aim, and does it have to be there for the aim to be met. This means that the employer is required to consider reasonable alternatives capable of achieving a similar result.

**Example :**

**As a result of some confusion over a self-organised rota swap, the manager of a social care organisation decides that no-one will be allowed to swap shifts, and that in future all staff must arrange their social lives around the work rota or take annual leave.**

**A Jewish woman and a Christian woman having equal qualifications and experience, have negotiated and operated an informal rota swap for several years, enabling each to facilitate observance of religious festivals without difficulty. When the new practice is applied equally it particularly disadvantages these two employees on grounds of their religion or belief.**

**However, the new practice would be unlikely to pass an objective test as being the only way of resolving the legitimate business aim of ensuring adequate cover. The manager should at least consider the arrangements made by the two women, as these have worked effectively.**

When considering whether a policy, practice or procedure is proportionate, the tribunal will consider the needs of the employer and the discriminatory effects that result. As a result, the nature of the legitimate business aim, size of the organisation, associated costs, number of people affected and the level of disadvantage experienced will all be relevant. Whether a response is seen as

being proportionate will be determined by a tribunal considering all circumstances of the case.

Treating someone of a particular sexual orientation, religion or belief more favourably – perhaps to avoid the suggestion of discrimination – may cause others to be treated less favourably and result in direct discrimination to them.

**Example :**

**A social care organisation gives paid leave to an employee undertaking a pilgrimage. If it fails to give similar benefits to employees of other faiths under similar circumstances, then this would be favourable treatment that would amount to direct discrimination against those of other faiths or of no faith.**

### ***Harassment***

Harassment concerns behaviour that is unwanted and which has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, humiliating or offensive environment on grounds of sexual orientation, religion or belief.

Harassment might be an event, a series of actions or a culture that exists within the working environment. It would include such things as the use of nicknames, the telling of jokes, material displayed, bullying and behaviour that is frightening, upsetting or offensive.

It is not required that the person being harassed always states that the behaviour is unwanted at the time of the incident. The test for harassment goes beyond the intention of the person suspected of harassing an employee. The question is whether or not the behaviour had the purpose or effect of harassing the employee. It is possible to harass a person without it being an intentional act or targeting an individual.

**Example :**

**An employee repeatedly makes homophobic remarks at work. After a period of time he is approached by a colleague who informs him that he is gay and finds the views expressed offensive. It would not be necessary for the sexual orientation of the gay employee to be known, or for the remarks to have been addressed towards him directly for harassment to have taken place.**



To have the effect of harassing an employee, the other person's behaviour must do more than cause them to perceive it as harassment. It should also reasonably be considered in the light of all circumstances of the case to have had that effect.

**Example :**

**A provider of home care services takes considerable personal offence at a phrase used by one of her colleagues, relating to her beliefs. The remark was made in innocence and was unlikely to have caused similar offence to the majority of carers holding the same beliefs. It is unlikely that this alone would constitute harassment, even though it may have been very distressing for the individual carer concerned.**

Harassment has both a subjective and an objective test. It should reasonably be considered to have violated the dignity of the individual, or to have created an intimidating, hostile, humiliating or offensive environment. When considering this on grounds of sexual orientation, religion or belief, it is not necessary for the individual's sexual orientation, religion or belief to be known.

**Example :**

**An employee who makes an anti-Semitic joke at a staff member's leaving party may still have harassed a colleague, even though he was not aware that the person was Jewish and had not targeted the individual. This would still be seen as an employment issue, even though the incident may have occurred outside of the normal hours or location of work.**

Harassment may be concerned with the individual's real or perceived sexual orientation, religion or belief, or that of the family, friends or associates of the harassed person. It will also apply equally to heterosexuals and people of no religion or belief.

**Example :**

**An employee is teased and taunted by colleagues at work because her sister is known to be a lesbian. This would still amount to harassment on grounds of sexual orientation, even if the employee is heterosexual.**

Individual employees as well as organisations may be held responsible for their actions. An individual may be held responsible for payment of compensation if the organisation can demonstrate that it took reasonable steps to prevent the harassment.

**Example :**

**An organisation has a strong, visible and robustly enforced equal opportunities policy supported by appropriate training. It provides accessible information to all employees with regard to the expectations it places upon them, their rights and responsibilities in respect of themselves and others. This could be the basis from which the organisation might argue that it had taken reasonable steps to prevent harassment.**

Further guidance on the development of equal opportunities policies and procedures is available from ACAS.

In some circumstances the organisation may be held responsible for the actions of third parties or agents in respect of harassment, unless it can demonstrate that it took reasonable steps to prevent the situation, for example by training, content of the contract or the provision of information with regard to harassment. This may even be the case if the third party or agent is self-employed, as an 'employment relationship' may still exist. The employer will need to ensure that complaints of harassment involving third parties and agents are not responded to differently on grounds of sexual orientation, religion or belief.

**Example :**

**A young person in a children's home decorates their bedroom wall with 'artwork' that is Islamophobic. A Muslim employee strongly objects to it and makes a complaint to the manager. If the manager responds less favourably than he would in a similar situation involving a Christian member of staff, this would amount to harassment on grounds of religion or belief. This would be the case even though the actions triggering the complaint were carried out by a third party.**

The regulations require an employer to take reasonable steps to reduce the likelihood of discrimination, harassment or victimisation with regard to sexual orientation, religion or belief. In the event of this occurring, they are required to respond in a way that promotes dignity at work and take reasonable steps to protect employees from such incidents.

The motives or capabilities of those receiving the service are a factor, but they are not a determining factor in deciding the nature of the duty of care that exists, or if the employer may be liable as a result of their acts or omissions once they are aware of the situation. If such incidents can be foreseen, it would be reasonable to expect that an organisation anticipate them by having policies

procedures and practices in place to protect the employee, contractor or agent, as well as the rights of those receiving the service.

**Example :**

A home care worker receives repeated homophobic abuse from someone whose competence is limited or impaired at times. The worker recognises the need to provide the service, but as the frequency and implied threat of these incidents increases, the worker seeks advice and support from the agency. Under such circumstances, and with the co-operation of the workers involved, it might be appropriate for the organisation to take steps to address the issue under its harassment policy. This might include consideration of the reallocation of responsibilities in order to protect the worker.

### ***Victimisation***

Victimisation occurs when a person is treated less favourably because of something they have done in good faith, under or in connection with the regulations, on grounds of sexual orientation, religion or belief. This would include bringing an informal complaint, providing information, giving evidence, taking a case to an employment tribunal or being supportive of a person doing any of the above.

**Example :**

A manager provides a written statement in support of a colleague taking a case to an employment tribunal on grounds of belief. As a result she is subsequently excluded from the usual meetings of the management team, and informed that her future within the organisation is limited because of the need for 'team players'.

This would constitute victimisation under regulation 4, as it would appear that the manager is being treated less favourably because of actions taken in connection with the regulations, even though she is not the person bringing the case.

**Example :**

A staff team stop talking to two people who have made an informal complaint about homophobic behaviour. The staff team do not co-operate

with the two making the complaint, and make their time at work more difficult.

This would constitute victimisation for which the organisation might be held responsible, unless it was able to demonstrate that it had taken reasonable steps to prevent it. If the organisation can demonstrate that it has taken such steps, the individuals may be held liable, including being liable for the payment of any compensation awarded.

As part of their induction, all employees should receive training with regard to the organisation's equal opportunities policy, and their rights and responsibilities with regard to legislation covering issues around equality in employment.

This should include an introduction to the organisation's complaints, grievance and disciplinary procedures. It should also introduce the concept of victimisation in the context of all areas covered by the equal opportunities policy, and not just those currently having legal protection.

## **RECRUITMENT AND ORGANISATIONAL ISSUES**

Organisations should review their recruitment processes and literature to ensure that these help them to create as diverse a workforce as possible, by attracting a wide range of applicants. An organisation that only advises potential applicants of vacancies through one method targeted at a particular group of people, may at best be denying itself a diverse workforce, or at worst be indirectly discriminating against others.

When recruiting, those involved should undertake to find the best applicant for the job, disregarding irrelevant criteria such as a person's sexual orientation, religion or belief unless a legal exemption applies. Literature or materials sent out to applicants should reflect the organisation's commitment to equality of opportunity in employment, and make clear the expectations it places on its employees or agents engaged in the recruitment process with regard to this.

There should be clear expectations on the employer's side about what the job entails, and only necessary criteria should be used in drawing up 'person specifications' and in making decisions to appoint. Applicants should also receive appropriate information to enable them to determine whether or not they wish to apply bearing in mind any potential conflict with their sexual orientation, religion or belief. If applicable the advertisement and any supporting literature should address the use of, and reasoning for, a genuine occupational requirement.

Arrangements should be made to enable applicants to advise the organisation as soon as possible of any elements of the selection process that might disadvantage them on grounds of sexual orientation, religion or belief. This will enable those recruiting to consider what flexibility might be appropriate within the process in order to meet such needs.

**Example :**

**An organisation that would be willing to alter the date or time of an interview to accommodate the partner of a heterosexual job applicant being taken into hospital, would be required to respond in a similar way if the job applicant and their partner were of the same sex.**

Interview processes should avoid personal and potentially intrusive questions. Where personal information is given that does not assist in determining the applicant's capacity to do the job, it should form no part of the appointment decision.

The regulations apply to processes similar to recruitment, such as transfers within an organisation, secondments, or in cases where an employee is asked to cover the duties of a more senior post on a temporary basis, for example maternity leave or long-term illness.

If the organisation has an equal opportunities policy, it should include issues around sexual orientation, religion and belief. The policy should be readily available and accessible to all employees, who should have received a copy and appropriate training to assist in understanding its context, concepts and content, their own role in ensuring compliance and what to do if they feel the need to make a complaint. The training should be updated on a regular basis, or if a particular need emerges.

Training and developmental opportunities should be planned and delivered in ways that do not disadvantage employees on grounds of sexual orientation, religion or belief. This would include factors such as scheduling, location, timing, catering or any aspects of the training or developmental opportunity that might disadvantage on grounds of sexual orientation, religion or belief.

**Example :**

**Training departments should consider religious festivals when allocating places or scheduling training. If they avoid scheduling training around Christmas and Easter they should also take into account key religious festivals associated with other religions and beliefs.**

Potential applicants should be given the opportunity to identify any such conflicts that might be present, in sufficient time for the employer to take whatever steps may be necessary to either remove or reduce the disadvantage. Some training and developmental opportunities might still be used as part of a positive action strategy in order to address existing or historical inequalities.

All employees should be clear about the concepts of harassment and discrimination, and should be aware that they may be held personally liable for their actions or inactions, providing that the employer has taken reasonable steps to prevent harassment or discrimination.

Organisations should be aware that under certain circumstances they may be held responsible for the actions of third parties or those acting as agents on their behalf, if the organisation has not taken reasonable steps to prevent harassment or discrimination. This would include the use of recruitment agencies and apply to 'employment relationships' other than direct employment. Organisations need to consider how they communicate their expectations to those who are not direct employees, for example agency staff and contractors.

**Example :**

**A social care organisation using agency staff from a limited number of agencies, ensures that it provides these agencies with relevant information regarding equality in employment issues. It also has a clause in the contract requiring the agency to ensure that all staff supplied to the organisation have received this information and understand the expectations placed upon them. It might be argued that such an organisation has taken all reasonable steps to prevent harassment or discrimination.**

The complaints, grievance, disciplinary and similar processes should cover issues of sexual orientation, religion and belief. The processes and the rights of employees in respect of those processes, should be communicated to and understood by all employees, and others affected by them such as volunteers, agency staff or contractors.

Within the organisation, people should have training and possess skills relevant to the extent with which their role engages with issues of equal opportunity in employment. If possible, a named person should have sufficient training and the skills to deal competently with complaints with regard to sexual orientation, religion or belief, or other equality in employment issues.

Employees should be confident that the organisation actively works towards creating a culture in which the respect and dignity of all is accepted as being an important organisational goal. Employees should also be confident that the employer will respond swiftly, fairly and robustly if it believes that discrimination, harassment or victimisation may have taken place.

Organisations should take all reasonable steps to protect the personal information of its employees. This includes the 'outing' of lesbians, gay men or bisexuals by fellow employees, particularly if the 'outing' is believed to be malicious. The organisation should take seriously any such actions, and consider if these constitute harassment or discrimination.

Employers are not required to keep records or to monitor the numbers of gay men, lesbians or bisexuals working for them. If an organisation feels that keeping such information would assist in reducing inequality, harassment, discrimination or homophobic attitudes, it should seek the advice and assistance of its own employees. The expertise of external organisations such as Stonewall, Lesbian and Gay Employment Rights (LAGER) and the Advisory, Conciliation and Arbitration Service (ACAS) might also prove helpful.

Where the organisation uses voluntary, anonymous and confidential employee surveys it might consider asking about the sexual orientation or experiences of homophobia of its employees.

The Employment Rights Act (1996) was amended by the Employment Relations Act (1999), and gives entitlements to unpaid leave in relation to unexpected or sudden problems concerning dependants or close family, including same-sex partners.

The collection of such information may assist employers and employees in ensuring that the organisation is responding to issues of possible inequality relating to sexual orientation. Such information may also assist others in reaching a view in matters before an Employment Tribunal. However, such information would be viewed as sensitive under the Data Protection Act.

The regulations do not require employers to provide time and space for observances relating to religion or belief in the workplace. However if it is reasonable and practicable to do so, employers may wish to accommodate such requests, providing that it does not discriminate against other religions or beliefs.

Similarly, requests for annual leave or other forms of time off in connection with religious festivals or ceremonies should be treated sympathetically. The process for allocating time off should not disadvantage any employee on grounds of their

religion or belief. This does not mean that a particular request must be granted, but rather that the decision making process should not discriminate against an employee, either directly or indirectly, on grounds of their religion or belief. For example it may be justifiable to refuse a request for leave, on the basis that similar requests have been refused because of the needs of the service or business.

Where it is likely that a particular festival or religious event may cause more requests for time off than can reasonably be accommodated by the service or business, this should be discussed with employees and relevant trades unions, so as to balance competing needs in a way that does not create indirect discrimination on grounds of religion or belief.

The granting of requests for leave, whether paid or unpaid, should not discriminate on grounds of religion or belief. Organisations should bear in mind that some religious ceremonies and festivals, including those dependent on phases of the moon, may occur at very short notice. The process for allocating leave should be flexible enough to accommodate such needs arising on grounds of religion or belief.

Where reasonable, the organisation of the working day should permit religious observance or the dietary requirements of an employee's religion. It would be appropriate to discuss any such needs arising on grounds of religion or belief, and wherever possible make arrangements to assist in meeting these. For example, this would apply in respect of those involved in religious fasting.

In most cases only minor accommodations are needed, and the regulations do not expect employers to enter into significant expenditure, alter buildings or take steps that would not be reasonably practicable.

Policies relating to the appearance of people at work should not discriminate on grounds of religion or belief. Employees should examine any such policies that might indirectly discriminate against a person who might wear particular clothing, jewellery, or have markings or tattoos on grounds of their religion or belief.

## **GENUINE OCCUPATIONAL REQUIREMENT**

Regulation 7 allows an employer to treat applicants differently on grounds of sexual orientation, religion or belief if any of these factors are a genuine occupational requirement. Genuine occupational requirements may be appropriate with regard to decisions about promotion, transfer or training



opportunities.

For a genuine occupational requirement to exist the employer must consider the nature of the work and the context in which it is carried out. It is not envisaged that many jobs will carry a genuine occupational requirement with regard to a person's sexual orientation, religion or belief.

A genuine occupational requirement must be a 'requirement' and not just desirable. This would suggest that it is essential in order for the applicant to carry out the functions of the job, and it must be a determining factor rather than just being important.

**Example :**

Someone receiving a home care service argues that they have a genuine occupational requirement for a worker of the same religion as themselves, as part of the task involves the preparation of food.

This is unlikely to be a genuine occupational requirement if they eat food from other sources that has not been prepared or produced by people of the same religion. This would also be the case if others of the same faith receiving a similar service, do not find it to be essential. This would amount to a preference rather than a genuine occupational requirement.

To be a genuine occupational requirement there must be strong links between the requirement and the role and function of a particular job. It must be a genuine occupational requirement likely to arise from a legitimate business aim, rather than the preferences of the employer.

**Example :**

A social care organisation and a housing association jointly initiate a project to meet the needs of elderly lesbians. It is a potentially ground-breaking development that is likely to be modelled nationally.

The person chosen to lead the project will be the 'public face' of the development, and must carry the confidence of the lesbian tenants and their communities. There is also a counselling and support element to the role that extends beyond issues of housing.

Those making the appointment may seek to recruit a suitably qualified and experienced person who is a lesbian, by means of a genuine occupational requirement. However, it would not be appropriate to argue that all other posts

within the project should carry a genuine occupational requirement based on sexual orientation.

In the majority of jobs it is sufficient for the post-holder to have some understanding and respect for the religion or belief in question, or for people of a particular sexual orientation. If challenged with regard to genuine occupational requirement, the burden of proof falls to the employer to justify its use and to demonstrate that the exemption was an appropriate and necessary means of achieving the required outcome, rather than a convenient means of achieving it.

An organisation that can demonstrate it has a religious ethos, may seek a genuine occupational requirement under regulation 7(3), in respect of that ethos. Under such circumstances the genuine occupational requirement does not have to be a determining requirement. The genuine occupational requirement is more likely to apply to posts having a particular role in maintaining that ethos, rather than those closely involved in the direct delivery of social care.

**Example :**

**A children's charity providing services to 'looked after children' has a strong Christian tradition that is reflected in its mission statement.**

The charity wishes to appoint an active Christian to the post of manager in one of its existing children's homes. If the previous manager was not an active Christian it would be hard to justify a genuine occupational requirement. Similarly, this would be the case if other children's homes within the organisation are managed by non-Christians. It would be even less likely if the home provided residential provision for children of other faiths or of none.

**Example :**

**A Jewish hospice might appropriately apply a genuine occupational requirement to a post that involved leadership and maintenance of a religious ethos. However, it would not be able to apply this to all nursing or social care posts.**

Some social care providers are very closely aligned to religions. Regulation 7(3)(b)(1) of the sexual orientation regulations allows an employer to rely on an exemption if applying a requirement related to sexual orientation, 'so as to comply with the doctrines of the religion'. It is unlikely that this would apply in most cases of employment for the purposes of an organised religion. Where such doctrines

exist, they are likely to apply to ministers of religion rather than to employees whose work is not primarily of a spiritual nature.

No-one may include an illegal term in a contract. Therefore the inclusion of any term within a contract that breaches the regulations cannot be accepted as a contract, and anyone implementing such a 'contract' may not be able to defend their actions by saying that they were following the requirements of others.

This would apply whether the individual was a third party receiving home care, or a local authority specifying the service arrangements on behalf of a service user. Those involved in commissioning and contracting need to be aware of any elements of the service package that may not comply with the regulations.

Whilst it is appreciated that all recipients of social care have individual preferences with regard to the services they receive – and that wherever possible we should strive to meet these – preferences do not override the requirements of the regulations. If it is possible to meet such preferences without breaking other duties placed on an organisation or someone in an 'employment relationship', then we should strive to do so.

#### **Example :**

**Mr Afzal receives home care provided via an agency. He is happy with the service he receives from a number of carers having different or no religious beliefs, as all are aware of and respectful of his Muslim beliefs.**

**After receiving home care from a Muslim worker, Mr Afzal contacts the agency to inform them that he will only receive care from Muslim workers in future. The agency cannot agree to future services being provided exclusively by Muslim workers, as it is demonstrably not a genuine occupational requirement.**

**However, should it be possible to re-arrange future workloads without detriment to others, the agency can try and match service providers to the wishes of Mr Afzal, although it cannot be a contractual obligation that the worker be a Muslim.**

## **POSITIVE ACTION**

Positive action prevents or compensates for disadvantage linked to sexual orientation, religion or belief among the relevant section of employees or potential

employees. This might be about addressing inequalities in recruitment or in response to widespread evidence of harassment or discrimination.

Regulation 26 of the Employment Equality (Sexual Orientation) Regulations, and regulation 25 of the Employment Equality (Religion or Belief) Regulations permits positive action in certain circumstances. Some vocational training may be restricted to certain disadvantaged groups. Encouragement and support may be given to some groups of people to apply for positions in an organisation. Within the organisation some developmental opportunities might be targeted at underrepresented groups covered by the regulations.

However positive action cannot be used at the point of deciding to appoint or promote a person, as such action would be unlawful.

**Example :**

**A large social care organisation that believes that gay men, lesbians and bisexuals are underrepresented in its workforce, places an advertisement in a publication that is primarily read by people of these sexual orientations. The advertisement contains a welcoming statement and includes a web-site address and details of how to find out more about the vacancies available.**

**Example :**

**A local social care provider of services to adults with learning difficulties, realises that she has several service users who are Muslim and no Muslim staff. The next time she advertises for staff, in addition to her usual advert in the local paper she places an advertisement in the newsletter of the local mosque.**

Both of the above are examples of positive action taken to increase the diversity of potential job applicants, without suggesting that preferential treatment would exist at the point of selection.

## **RESOLVING ISSUES OF DISCRIMINATION OR HARASSMENT IN THE WORKPLACE**

Anyone who is being bullied, harassed, intimidated or discriminated against at work has a right to be listened to and to be taken seriously. The employee may choose to let those behaving in an unacceptable way know that they find such behaviour unwelcome and want it to stop. If the employee approaches the person directly they should do so in a firm but polite way, perhaps in the presence

of a supportive colleague. If the employee feels unable to take the matter up directly, they may choose to take it up with someone else.

If the problem persists it should be discussed with a manager or a representative of the employee's trades union or professional association. Attempts should be made to promote the dignity of all employees by resolving issues quickly, informally and at the lowest level needed.

Similarly, complaints should be dealt with quickly, efficiently, confidentially and supportively. It may take considerable courage to speak out about issues of discrimination, harassment and victimisation. However it is important that employees feel able to do so, as it can improve not only their own lives but also those of service users. It is in no-one's interests, and bad for business if bullying, discrimination victimisation and harassment are not effectively challenged in the work environment.

If it is not possible to resolve the complaint informally, an employee who believes they have experienced discrimination, harassment, victimisation or bullying in the workplace with regard to issues of sexual orientation, religion or belief, should be able to use the grievance procedure if they work in an organisation employing twenty or more employees. When section 36 of the Employment Act 2002 comes into force employees of any social care organisation, regardless of its size, will have access to a grievance procedure.

The outcome of the grievance procedure may be appealed if the employee who brought it is not satisfied. At an appeal, the employee may choose to be accompanied by a trades union representative or a work colleague.

Complaints relating to the Employment Equality (Sexual Orientation) or Employment Equality (Religion or Belief) Regulations 2003 may be brought to an employment tribunal. They may be brought by employees or an applicant for a job, by completing an employment tribunal application form (ET1) which can be obtained from Jobcentre Plus or Citizens' Advice Bureaux. Complaints must normally be brought within three months of the incident forming the basis of the complaint. All parties should bear in mind this timescale whilst seeking to resolve complaints as quickly as possible.

Employment tribunals may make a declaration or recommendations or order compensation to be paid. Any compensation awarded may include damages for injury to feelings. There is no limit set on the amount of compensation that can be awarded.

A person bringing a complaint of discrimination or harassment under the Employment Equality (Sexual Orientation) Regulations, may ask the tribunal to make a Register Deletion Order and/or a Restricted Reporting Order. This would allow them to retain anonymity in respect of the proceedings, so as not to place their sexual orientation in the public domain.

If the complaint relates to institutes of higher or further education, perhaps brought by an employee attending a registered managers' or social workers' qualifying course, it might be dealt with by means of an alternative process.

The complainant might pursue a claim in the County Court or Sheriffs Court against the institute of higher or further education. In these circumstances the complainant has six months to commence proceedings.

If a complaint is made the employee bringing it, those supporting them or those acting as witnesses are entitled not to be victimised, providing they are acting in good faith. Further information with regard to complaints, grievances or employment tribunal procedures is available from ACAS ( 08457 474747 or text phone 08456 061600 ).

If the issue giving cause for concern is one of practice rather than employment, the employee may wish to discuss it with someone working for one of the professional associations representing the area of social care in which they work, or an organisation that represents the interests of the service user group to whom they provide a service.

## **INDICATIVE CONTACT LIST**

The contact list is intended to provide a relatively short list of information points providing appropriate support to employers and employees with regard to the regulations.

- Advisory, Conciliation and Arbitration Service (ACAS)
- Web-based documents giving fuller text and guidance
- DTI web site
- Equality Direct Advice Line
- Chartered Institute of Personnel and Development (CIPD)
- Stonewall
- Lesbian and Gay Employment Rights (LAGER)

- Citizens' Advice Bureaux – England and Wales
- Web-based guide to religions and beliefs (rather than specific religions)
- Commission for Racial Equality
- Age Positive Campaign
- United Kingdom Home Care Association
- Social Care Association

## **SPECIAL ISSUES AND CONSIDERATIONS FOR HOME CARE**

Providers of home care face special issues in ensuring that workers do not suffer discrimination. This addendum to the guidance on equalities legislation attempts to set out some of these issues and, where possible, to suggest approaches which home care providers might adopt to deal with them.

This does not detract in any way from the duty of every home care provider to prevent discrimination, both under the terms of the legislation as it applies to employment situations and more widely. For example, home care providers should be equally thorough in ensuring that users of care do not suffer discrimination, in terms of access to services or in the way in which services are delivered.

### ***Rights and attitudes of service users***

Users of home care services have a right to choose who they admit to their home. They may, for example, express preferences based on incompatibility of personality between themselves and an individual worker. This could apply to any worker, regardless of gender, sexual orientation, race, disability or religion. It might reasonably be expected, however, for such objections to be relatively rare.

Obviously, no such preference could reasonably be expressed, before a specific worker has met the care service user. Care should also be taken to identify any pattern of discrimination emerging from repeated objections, especially if these occur within a very short time after first meeting.

Obviously, users might make such choices based on discriminatory attitudes. It is recognised that, through ignorance or unfamiliarity, such attitudes may sometimes be more prevalent among older people. However, this is far from being universal and should never be assumed or anticipated. Great care should also be taken to ensure that there has been no misunderstanding.

It is not the function of home care providers to educate service users who express discriminatory attitudes. However, experience suggests that many such apparent expressions are not deep seated. People who initially express such a view can often be persuaded that they are acting unreasonably.

It may be effective, for example, to explain that you as a provider will be unable to provide service on the basis of discriminatory requests and that it would be



unlawful for any other provider to do so; The views may not be held sufficiently strongly for the person in need of care effectively to refuse service.

Home care providers must not suggest, prompt, encourage or condone discriminatory instructions or requirements from care service users and must not comply with them if given.

In some cases, this may mean refusing to supply the service requested.

Where a provider encounters discrimination by service users or others in the household, it is essential that the facts are promptly, accurately and fully recorded, together with any action proposed or taken and the outcome of that action.

It should be remembered that records of this sort will be fully accessible to the care service users themselves, under Data Protection legislation.

Particular care must therefore be taken that recorded references to care service users consist only of fact or factual reporting, rather than any speculation or conclusions as to what was 'meant' or 'implied'.

It is important to ensure that the User Guide for the home care service is explicit that no discriminatory requests will be entertained.

If persistent difficulties emerge regarding discriminatory attitudes of a care service user provided with service on behalf of a local authority purchaser, home care providers should contact the purchaser and explain the difficulty. It will then be up to the local authority to discuss the problem with the service user and, ultimately to decide whether they will continue to provide support.

### ***Health and safety of workers***

Very occasionally, service users attitudes may result in behaviour which constitutes a danger to the health and safety of workers. Such dangers include the psychological effects of verbal abuse.

Problems should be dealt with initially in much the same way as any other health and safety matter. The home care provider should discuss the problem with the care service user (or other responsible person) and explain that service cannot be provided unless the health and safety of the worker can be assured.

It is not acceptable, however, to agree a 'safe working practice' which consists of not assigning workers towards whom the care service user might behave inappropriately.

Where a provider encounters discrimination by service users or others in the household, it is essential that the facts are promptly, accurately and

fully recorded, together with any action proposed or taken and the outcome of that action.

Recording may form part of the risk assessment performed by the home care provider but care should be taken not to use the risk assessment as a 'prompt' to suggest that there may be an issue.

It is important to ensure that the User Guide for the home care service is explicit that inappropriate behaviour by the care service user or others in the household may be grounds for the service being withdrawn.

If persistent difficulties emerge regarding behaviour of a care service user provided with service on behalf of a local authority purchaser, home care providers should contact the purchaser and explain the difficulty. It will then be up to the local authority to discuss the problem with the service user and, ultimately to decide whether they will continue to provide support.

### ***Care service users who are not responsible for their behaviour***

In exceptional cases, the attitudes or behaviour of a care service user may arise out of a mental health problem. Similarly, it may not be practical or possible to have a rational discussion with the care service user about the issue.

In these circumstances it may be dangerous to care workers or cruel to the care service user to go against pathological fears, which may therefore amount to a GOR (see below) for workers to be selected to avoid adverse incidents.

Any decision that this is the case should be based on a clear clinical judgement by a relevant professional and should appear explicitly in the care needs assessment.

## **EXCEPTIONS TO UNLAWFUL DISCRIMINATION FOR PARTICULAR WORK**

### ***'Genuine Occupational Requirements'***

In certain, very limited circumstances a 'Genuine Occupational Requirement' (GOR) of the work with a particular care service user may relate to a person's gender, sexual orientation, race, disability or religion. Where there is a GOR, home care services are able to recruit (including advertising) and select workers to meet that requirement.

A GOR does not arise simply because a care service user has a subjective preference, for example, on racial grounds or because the work requires physical strength or stamina; to recruit only men when women would be able to do the work is clearly discriminatory.

Some examples of situations where a GOR might arise in home care are listed below:

- (a) The work may be assigned to a care worker of a specific gender to preserve decency or privacy because:
  - (i) It is likely to involve physical contact with a care user of the same gender in circumstances where they might reasonably object to it being carried out by a member of the opposite gender.
  - (ii) The circumstances of the work might be such that the person may reasonably object to the presence of a member of the opposite gender because they are in a state of undress or are using sanitary facilities.
  - (iii) The religion of the service user forbids intimate contact by someone of the opposite gender who is not married to them.
- (b) The work may be assigned to worker of one gender because it is to be performed or the worker is to live in a private home and a reasonable objection might be made to someone of the other gender doing the work because of:
  - (i) The degree of physical or social contact with a person living in the home.
  - (ii) The knowledge of intimate details of such a person's life, which is likely because of the nature or circumstances of the work or of the home, to be allowed to, or available to, the worker.
- (c) The worker provides people with personal services promoting their welfare or education, which can be provided most effectively by a person of the same gender.
- (g) Selection or assignment of workers on racial grounds may be permissible where persons of a racial group are provided with personal services promoting their welfare and those services can most effectively be provided by a person of that race, for example because considerations of language or cultural understanding.

The above are examples only and it will be important for home care providers to think carefully as to whether a requirement arises in individual circumstances. Each situation will be different and must be considered on its own merits and it should never be assumed that a GOR applies to situations of a particular type.

It is not uncommon and rarely unacceptable for people to receive intimate care and treatment from nurses or doctors of the opposite gender. There is equally no automatic reason why a care service user should raise concerns about a care worker of the opposite gender.

In contrast it may be that a GOR relating to strongly held concerns as to privacy and decency may be applied differently, where the care service user or the care worker are of a particular sexual orientation. Is it more (or less) decent for a gay man to be cared for by a male or a female care worker? Would the answer depend on the sexual orientation of the care worker?

### ***'Matching' of care workers to service users***

National Minimum Standards for home care place great emphasis on the need for workers to have appropriate skills, experience and sensitivities to meet the individual needs of care service users. For example:

3.2 Staff individually and collectively have the skills and experience to deliver the services and care which the agency states in its information material that it can provide. The skills and experience of care staff are matched to the care needs of each service user and they are able to communicate effectively with the service user using the individual's preferred method of communication.

3.4 When services are provided for specific minority ethnic communities, social/cultural or religious groups their particular requirements and preferences are identified, understood and entered into a plan for the service user.

8.5 Care and support workers are sensitive and responsive to the race, culture, religion, age, disability, gender and sexuality of the people receiving care, and their relatives and representatives.

9.6 Care and support workers communicate with service users in their first or, where agreed, their preferred language.

Nothing in these statements requires or permits discrimination on any grounds but they may indicate where a GOR could arise.

Communication "...with service users in their first or, where agreed, their preferred language" is likely, in many cases, to mean selecting a care worker who is from the same background as the care service user. Knowledge of the language will be a GOR but it could theoretically be met by a person of different background, who has acquired the language.

## ***How to apply a GOR***

It is perfectly acceptable to assign work, based on well founded and recorded GORs, by assigning only workers who meet the required profile to the relevant care service user.

It is important, however, to ensure that the effect of implementing a GOR does not have a discriminatory effect on an individual worker. Every worker must have an equal opportunity to gain experience required for future career progression. It is not acceptable to refuse a worker selection for training or promotion, based on having been excluded from specific cases, as a result of a GOR.

## ***Employment agencies***

The legislation applies to employment agencies introducing workers to be employed by a care service user. Such agencies must, themselves, therefore ensure that they do not discriminate against work-seekers.

It is important also, however, to ensure that the agency does not condone or assist the employer to discriminate. Such action (or inaction) could constitute aiding and abetting an offence, even if the agency itself does not discriminate.

Agencies should also be aware that care workers who feel they have been the subject of discrimination might address their grievance towards the employment agency, even where it was the eventual employer who committed the offence. Courts have been known to give unexpected judgements against well insured parties, where a more obvious offender is uninsured.

Employment agencies must not suggest, prompt, encourage or condone discriminatory instructions or requirements from employers and must not comply with them if given.

In some cases, this may mean refusing to supply the service requested

It is advisable to obtain the employer's instructions in writing where they claim that a job is covered by a 'Genuine Occupational Requirement' (see above).

## SEXUAL ORIENTATION CHECKLIST

### Action Needed

Does the organisation communicate the intentions and implications of the Employment Equality (Sexual Orientation) Regulations 2003 to all employees using notice boards, newsletters, briefings and in other ways?

Are employees made aware of the business arguments for a diverse workforce and issues of sexuality?

Does the organisation have a systematic approach to the training and development of all staff around the issues of sexual orientation in relation to the Employment Equality Regulations 2003?

How does the organisation ensure that all employees including agency staff, students or temporary workers are aware of the following concepts:

Direct discrimination

Indirect discrimination

Positive action

Genuine occupational requirements

Harassment

Victimisation

and how they relate to issues of sexual orientation?

Does advertising and recruitment literature make clear statements about welcoming the contribution made by a diverse workforce?

Does the welcoming statement make particular reference to sexual orientation and the employer's commitment with regard to the intentions of the

## Employment Equality 2003 Regulations?

Does the organisation ensure that its recruitment process is accessible around issues of sexual orientation?

Are those involved in recruitment aware that it is their task is to assess an applicant's capacity to do the job? It is not their role to determine who might fit in with other employees or service users.

When recruiting does the organisation only use essential criteria that relate to the requirements of the job?

Are selection criteria reviewed to ensure that they do not discourage or prevent people from applying because of their sexual orientation?

Are interviews and recruitment processes flexible with regard to adjustment for reasons relating to sexual orientation?

Does the organisation invite applicants to identify any particular needs that may affect their participation in the recruitment process?

Does the organisation have a policy with regard to long standing convictions for sexual offences that may appear on CRB checks? For example, a gay man might retain a conviction for what would not now be seen as an offence.

Are staff aware that written and verbal references for external and internal posts are covered by the regulations?

Does the organisation consider the use of genuine occupational requirements around sexual orientation each time it recruits?

When using genuine occupational requirements related to sexual orientation does the advertising and recruitment literature ensure that this is known and the reasons understood?

Does the organisation identify possible areas where positive action strategies could be used to increase the diversity of its workforce with regard to sexual orientation?

Does the employer ensure that its 'secondment', 'acting up' or other developmental opportunities are operating in the interests of diversity and not discriminating with regard to sexual orientation?

Does the organisation's equal opportunities policy include sexual orientation? Does it clearly express the intention of the regulations, indicate the issues are taken seriously and describe how the organisation will follow up relevant complaints?

Is there a summary of the equal opportunities policy or an equalities statement available for all employees and service users?

Has the organisation identified someone to lead on issues of sexual orientation and employment?

Has the organisation established links with others that might assist it in meeting its obligations under the Employment Equality (Sexual Orientation) Regulations 2003?

Has a review of policy, procedures and practice taken place to identify what changes might reasonably be introduced to avoid direct or indirect discrimination on grounds of sexual orientation?

Has the organisation reviewed its request for compassionate leave process with regard to sexual orientation?



Do all staff have an accessible guide to the actions they should take if they feel that they or others have been discriminated against, harassed or victimised on the grounds of sexual orientation?

Do all managers and supervisors have an accessible guide to their responsibilities around issues of discrimination, harassment and victimisation with regard to sexual orientation?

Are all employees aware that they may be personally liable for their actions or inactions with regard to issues of discrimination, harassment and victimisation connected with their employment?

Is there a named individual with appropriate skills and training who is able to deal with employment equality issues and complaints?

Are employees aware that complaints regarding employment equality and sexual orientation issues are taken seriously and that the complaints procedure is visible and understood?

Is the issue of 'outing' taken seriously in the organisation and referred to in the equal opportunities policy, disciplinary and grievance procedures?

Are the confidentiality safeguards sufficient with regard to 'outing' so as to promote the confidence of those reporting discrimination, victimisation or harassment?

Are the confidentiality standards sufficient with regard to personal data for example 'next of kin' records?

Are disciplinary, grievance and incident report forms used to monitor and alert the organisation to homophobic attitudes in the workplace?

If the organisation has twenty or more employees, does it have a grievance procedure that covers sexual orientation issues?

In anticipation of section 36 of the Employment Act 2002, all employers will need a grievance procedure.

Does the organisation gather information with regard to the sexual orientation of its employees in a confidential and voluntary way, explaining its purposes in doing so and in compliance with the Data Protection Act?

Does the organisation conduct staff attitude surveys, and if so do these include questions on staff experiences and perceptions relating to homophobia in the workplace?

Does the organisation have policy and procedures with regard to service users who display homophobic behaviour towards employees?

## RELIGION OR BELIEF CHECKLIST

### Action Needed

Does the organisation communicate the intentions and implications of the Employment Equality (Religion or Belief) Regulations 2003 to all employees using notice boards, newsletters, briefings and in other ways?

Are employees made aware of the business arguments for a diverse workforce and issues of religion or belief?

Does the organisation have a systematic approach to the training and development of all staff around issues of religion or belief in relation to the Employment Equality Regulations 2003?

How does the organisation ensure that all employees including agency staff, students or temporary workers are aware of the following concepts;

- Direct discrimination
- Indirect discrimination
- Positive action
- Genuine occupational requirements
- Harassment
- Victimisation

and how they relate to issues of religion or belief?

Does advertising and recruitment literature make clear statements about welcoming the contribution made by a diverse workforce?

Does the welcoming statement make particular reference to religion and belief and the employer's commitment with regard to the intentions of the

## Employment Equality 2003 Regulations?

Does the organisation ensure that its recruitment process is accessible around issues of religion or belief?

Are those involved in recruitment aware that it is their task to assess an applicant's capacity to do the job? It is not their role to determine who might fit in with other employees or service users.

When recruiting does the organisation only use essential criteria that relate to the requirements of the job?

Are selection criteria reviewed to ensure that they do not discourage or prevent people from applying because of their religion or belief?

Are the fixed dates within the recruitment processes examined so as to reduce the possibility of clashes relating to religion or belief?

Does the organisation invite applicants to identify any particular needs that may affect their participation in the recruitment process?

Does the organisation consider the use of genuine occupational requirements and religion or belief each time it recruits?

When using genuine occupational requirements related to religion or belief does the advertising and recruitment literature ensure that this is known and the reasons understood?

Does the organisation identify possible areas where positive action strategies could be used to increase the diversity of its workforce with regard to religion or belief?

Are staff aware that written and verbal references for external and internal posts are covered by the regulations?

Does the employer ensure that its 'secondment', 'acting up' or other developmental opportunities are operating in the interests of diversity within the workforce and not discriminating with regard to religion or belief?

Does the organisation's equal opportunities policy include religion or belief? Does it clearly express the intention of the regulations, indicate that issues are taken seriously and describe how the organisation will follow up relevant complaints?

Is there a summary of the equal opportunities policy or an equalities statement available for all employees and service users?

Has the organisation identified someone to lead on issues of religion or belief and employment?

Has the organisation established links with others that might assist it in meeting its obligations under the Employment Equality (Religion or Belief) Regulations 2003?

Has a review of policy, procedures and practice taken place to identify what changes might reasonably be introduced to avoid direct or indirect discrimination on grounds of religion or belief?

Do all staff have an accessible guide to the actions they should take if they feel that they or others have been discriminated against, harassed or victimised on grounds of religion or belief?

Do all managers and supervisors have an accessible guide to their responsibilities around issues of discrimination, harassment and victimisation with regard to religion or belief?

Is there a named individual with appropriate skills and training who is able to deal with employment equality issues and complaints?

Are employees aware that complaints regarding employment equality and issues of religion or belief are taken seriously and that the complaints procedure is visible and understood?

Are all employees aware that they may be personally liable for their actions or inactions with regard to issues of discrimination, harassment and victimisation connected with their employment?

If the organisation has twenty or more employees, does it have a grievance procedure that covers issues of religion or belief?

In anticipation of section 36 of the Employment Act 2002, all employers will need a grievance procedure.

Does the organisation have a policy and procedures with regard to service users who display discriminating or offensive behaviour towards employees around issues of religion or belief?

What system exists to determine whether working on a particular day such as Sunday or particular religious festival is a legitimate business need, and that employers' decisions with regard to working patterns do not amount to indirect discrimination on the basis of religion or belief?

Are training and development opportunities equally accessible to all employees? This should include scheduling, timing and delivery methods, for example residential.

Do paperwork and nomination forms for training enable potential participants to identify personal needs with regard to issues of religion or belief?

Has the organisation reviewed the annual leave request process to identify potential difficulties caused at times when multiple requests for leave are expected to exceed what can reasonably and practicably be met?

Do the criteria for granting leave requests indirectly discriminate on grounds of religion or belief?

Does the notice required for leave requests make reasonable adjustments for religious festivals that are determined by phases of the moon, where the exact date may not be known until quite close to the time?

Has the employer considered if space might reasonably be made available within the workplace for prayer or religious observances?

When an employer considers providing such space, what consultation will take place with those who will use it and with those who need to understand its usage?

Has the organisation considered what support might be reasonable and practicable for employees who are fasting?

Does the organisation have a dress code that might conflict with a person's religion or belief that cannot be justified on other grounds, such as health and safety?

Does the organisation have a statement in its dress code, indicating that reasonable adjustments might be made if the employee's clothing, jewellery, tattoos or markings have a recognised significance relating to religion or belief?

Does the organisation gather information with regard to the religion or belief of its employees in a confidential and voluntary way, explaining its purposes in doing so and in compliance with the Data Protection Act?

Does the organisation conduct staff attitude surveys, and if so do these include questions on staff experiences and perceptions relating to issues of religion or belief in the workplace?

Are disciplinary, grievance and incident report forms used to monitor and alert the organisation to issues and concerns around religion or belief in the workplace?