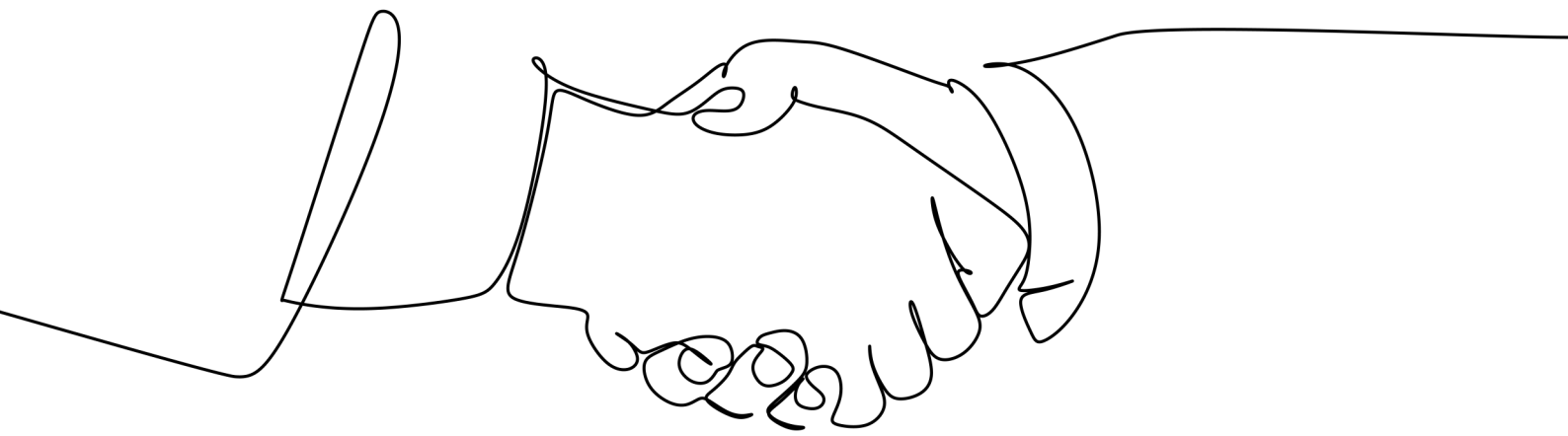


# SUMMARY OF THE LAW ON SEXUAL ORIENTATION DISCRIMINATION



This booklet sets out the basic employment rights to which workers are entitled under the sexual orientation discrimination provisions of the Equality Act 2010.

These apply in Scotland, England and Wales only.

- PROTECTION AND LIABILITY
- HARASSMENT
- EXCEPTIONS
- REMEDIES
- DISCRIMINATION
- VICTIMISATION
- TRIBUNAL CLAIMS
- CIVIL PARTNERSHIP

## **WHAT DOES THE ACT COVER?**

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

## **WHO IS PROTECTED?**

It covers most employment types, including apprenticeships, employees with two years of continuous service and workers. Former staff members can also make a discrimination claim against a former employer provided that ACAS is notified within 3 months of the date after the alleged discrimination.

Sexual orientation discrimination legislation applies to lesbian women, gay men, heterosexual people and bisexual people.

## **WHO IS LIABLE?**

Individual employees and the employer are liable for acts of discrimination, harassment and victimisation in the workplace.

The information contained in this booklet is not a substitute for legal advice. You should talk to a lawyer or advisor before making a decision about what to do.

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## WHEN CAN SEXUAL ORIENTATION DISCRIMINATION ARISE?

Sexual orientation discrimination can arise in relation to:

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

## WHAT IS THE PUBLIC SECTOR DUTY?

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

The general duty has three aims and requires public bodies to have due regard to the need to: Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act. Advance equality of opportunity between people from different groups. Foster good relations between people from different groups.

## WHAT IS POSITIVE ACTION?

The Act allows employers to select someone with an under-represented protected characteristic during the process of recruitment and promotion.

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

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

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

## WHAT DOES THE ACT OUTLAW?

### Direct discrimination

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

In order to determine whether someone is directly discriminated against a comparison has to be made with someone of a different sexual orientation.

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

Examples of direct discrimination include:

- An employee not being promoted because of their sexuality.
- A worker being subjected to harassment because they have a lesbian daughter.
- An employee is excluded from the work group chat because they are thought to be bisexual.

### Indirect discrimination

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

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

## **HARASSMENT**

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

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

Unwanted conduct includes the spoken or written word (including social media), jokes, graffiti or other behaviour.

In determining whether the conduct amounts to harassment, the Tribunal will take into account the perception of the person who experienced the Harassment. Any compensation for Injury to Feelings will be assessed on how the harassment made the individual feel. It is therefore immaterial if the harassment would have impacted someone else in a different way.

## **VICTIMISATION**

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

A protected act includes:

- Bringing proceedings under the Equality Act 2010
- Alleging that the Equality Act 2010 has been breached
- Giving evidence or information in connection with proceedings that someone else has brought.
- Doing anything else such as raising a grievance or giving evidence in someone else's grievance.

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

## **ARE THERE ANY EXCEPTIONS?**

There are three main exceptions:

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

## **OCCUPATIONAL REQUIREMENT**

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

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

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

## **RELIGIOUS REQUIREMENT**

Conduct which would ordinarily amount to discrimination because of sexual orientation may be permissible if it is in relation to employment for the purposes of an organised religion. Organised religion is not defined in the Equality Act 2010 but case law has established that it should be applied very narrowly. The employer will have to show that it is directed to comply with the doctrines of the religion, or avoids conflict with the strongly held religious convictions of the religion's followers.

## **BENEFITS DEPENDENT ON MARITAL STATUS**

The Equality Act 2010 states that an employer can still provide certain benefits that are restricted to opposite sex married employees or same sex couples in a civil partnership.

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

## **IS IT EASY TO PROVE A CLAIM?**

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

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

## **HOW DO CLAIMANTS GATHER INFORMATION FROM THEIR EMPLOYER?**

Workers can no longer use standard forms (the questionnaire procedure) when requesting information from their employer about their complaint. They can still ask their employer to provide them with information, but there is no obligation on the employer to provide it.

## **WHAT TIME LIMITS APPLY?**

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

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

## WHAT REMEDIES ARE AVAILABLE?

There are three remedies available to a Tribunal:

- Declaration.
- Compensation.
- Recommendations.

### DECLARATION

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

### COMPENSATION

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

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

### RECOMMENDATIONS

The Tribunal can make recommendations for the purpose of preventing or reducing the effect of the discrimination on the claimant.

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

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