

**EQUALITY  
FOR ALL**



**NUJ**  
NATIONAL UNION  
OF  
JOURNALISTS

Equality Rep's Handbook

# Sexual orientation legislation

## Equality Rep's Handbook

### CONTENTS

- 1 - 6 Sexual orientation legislation
- 7 - 8 Transsexual / gender reassignment issues
- 9 - 10 Workplace negotiating issues on LGBT issues
- 11 LGBT contacts and resources

# Sexual orientation legislation

## THE EMPLOYMENT EQUALITY (SEXUAL ORIENTATION) REGULATIONS 2003

Since 1 December 2003, lesbian, gay and bisexual workers (LGB) have had specific protection from discrimination at work as a result of the implementation of the European Framework Directive which brought about the Employment Equality (Sexual Orientation) Regulations 2003. Before this time, lesbian and gay workers had relied on the European Convention on Human Rights and the Human Rights Act to take forward cases of discrimination. However, this had only limited success because neither gave direct rights which could be referred to in employment tribunals.

The Employment Equality (Sexual Orientation) Regulations 2003 now make it unlawful to discriminate on grounds of sexual orientation in the workplace.

The regulations include the following provisions:

### DIRECT DISCRIMINATION

It is unlawful to treat people **less favourably than others on grounds of sexual orientation or to instruct someone else to behave in this way.**

There is no defence for direct discrimination, but in very limited circumstances an employer may make out a case for a genuine occupational requirement which justifies the discrimination (see later paragraph on exclusions).

### INDIRECT DISCRIMINATION

This involves **applying a practice, provision or criterion which intentionally or not disadvantages people of a particular sexual orientation, unless it can be justified.** An employer who wishes to justify such a practice would have to demonstrate that there is a real business requirement for the treatment and that there is no alternative.

### HARASSMENT

This involves **subjecting a worker to unwanted conduct that violates their dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment.** Harassment does not have to be intentional to be unlawful. The regulations also state that harassment may be unlawful even if the person offended by harassment, by offensive jokes for example, is not themselves gay, lesbian or bisexual. The employer must act to protect workers against bullying or harassment suffered because of their sexuality. Early cases taken to court under the regulations have made substantial awards to people facing such behaviour, where the employer

has failed to act to stop it. **“Workplace banter” is no defence** and the employer is liable for discriminatory actions taken by anyone acting on their behalf, whether or not it was done with their knowledge, unless the employer can show that they tried to prevent such actions.

The regulations state that conduct will amount to unlawful harassment where all the circumstances are taken into account, including the perception of the person being harassed. Particular account has to be taken of the views of the recipient of the harassment. Given this definition, it helps in proving unlawful harassment **if the victim makes clear to the harasser that they find their conduct unacceptable.**

## VICTIMISATION

This protects workers from being treated less favourably because they have made or intend to make a complaint about discrimination on the grounds of sexual orientation, or because they have given or intend to give evidence under the regulations. The definition of “complaint” can range from making a complaint about anti-gay jokes or statements, right up to lodging a formal grievance or tribunal claim.

## APPLICATION OF THE LAW

### Where

The regulations apply to those working wholly or partly in Great Britain, as well as those who work abroad, as long as the employer has a place of business in Great Britain and the work is for the purpose of that business. The worker must also be ordinarily resident in Britain at any time during their employment or whilst applying for the job.

### Who

The regulations cover all lesbian, gay, bisexual and heterosexual workers, as well as those who are thought to be gay, lesbian, bisexual or heterosexual, even if this is a mistake. If a

heterosexual employee is discriminated against because he or she is mistakenly thought to be gay, lesbian or bisexual, that worker can still claim discrimination on grounds of sexual orientation. The regulations also cover workers who are harassed because they have gay friends or socialise with these friends in gay clubs, for example.

The regulations **cover all workers, not just employees.** Therefore they apply to contract workers, office holders, the police, members of the armed forces, partners in business, employment agencies and agency staff.

Liability under the regulations goes much further than employers alone. It includes partnerships, trade organisations and trade unions, barristers, qualification bodies, providers of vocational training, providers of insurance services, trustees and managers of occupational pension schemes and employment agencies.

The regulations **do not cover trans people.** There are specific regulations that provide protection for trans workers (see **Sex Discrimination (Gender Reassignment) Regulations 1999 and Gender Recognition Act 2005**).

### When

The regulations provide protection throughout the employment relationship, including prospective and existing workers, as well as workers who have left their employment when the discrimination arises out of and is closely connected with the employment relationship. The cover therefore begins at recruitment stage and applies to terms and conditions of employment (including benefits such as pensions), pay, promotions, transfers, opportunities for training and dismissal procedures. Even when a worker has left their employment they are protected under the regulations should an employer make

detrimental comments relating to their sexuality in a letter of reference. Workers are protected from the moment they apply for a job and from the first day in the job.

## EXCLUSIONS

There are important exceptions to the ban on discrimination. An employer may:

- deny a same sex partner access to a benefit if they specify that this benefit is **restricted to married partners only**. However, since the introduction of the Civil Partnership Act 2005, registered **civil partners** must be treated the same as married couples
- discriminate where there is a genuine occupational requirement, which is a **“genuine, determining and proportionate”** reason for requiring the employee to be of a particular sexual orientation. The employer has to demonstrate that all three of these requirements have been met. The law is clear that there will only be narrow and exceptional circumstances where this is likely to be valid. For example, in a counselling organisation, where it is important that a counsellor is of the same sexual orientation as the client group
- discriminate if the employment **“is for purposes of an organised religion”** and a particular sexual orientation is required to comply **“with the doctrines of the religion”, or “to avoid conflicting with the strongly held religious convictions of a significant number of the religion’s followers”**. A High Court ruling has indicated what would, and would not, be covered by this exemption. The High Court stated that this clause was to be regarded as applying specifically, and narrowly, to ministers of religion. The judge stated that lesbian, gay or bisexual teachers working in faith schools, for example, were able to claim the protection of the law against discrimination. Case law has still to test the definition of **“doctrines”** or **“strongly held religious convictions”** however.

## POSITIVE ACTION

The regulations make it legal for employers and trade associations (such as trade unions) to take steps to encourage persons of a particular sexual

orientation to apply for particular work or training if this is to compensate for disadvantages otherwise suffered by persons of that sexual orientation. For example, a trade union may provide training specifically aimed at gay, lesbian or bisexual members in order to encourage their participation in the trade union thereby redressing an existing imbalance. **There is no specific legal right to require employers to take positive action** and workers cannot pursue a claim for an employer’s failure to follow a particular course of action.

It is important to note that positive action is not the same as positive discrimination.

## MONITORING

There is no requirement under the law for organisations to collect monitoring data on the sexual orientation of their staff. As sexual orientation remains a sensitive issue, organisations should only gather information if they have a clear commitment to tackling any discrimination that they uncover. All staff should know what the data will be used for and they should be given an absolute guarantee of confidentiality and anonymity. Any pressure to force a person to disclose their sexual orientation may well be considered to be harassment under the regulations and a breach of the Human Rights Act.

## HIV/AIDS

Less favourable treatment or harassment on the grounds of being HIV positive or having AIDS may have more impact on gay men than on heterosexual workers. If this harassment is based on homophobic prejudice this will amount to unlawful direct discrimination. If there is discrimination because someone is HIV positive or living with AIDS, this may amount to indirect discrimination and also be unlawful, unless it can be justified.

As there are no legitimate reasons for refusing a job to a worker solely because they are HIV positive or living with AIDS, it is most unlikely that any indirect discrimination on these grounds could be justified. Workers who are HIV positive or living with AIDS are also likely to be protected by the Disability Discrimination Act. (See section on HIV in the workplace.)

## Enforcement

Complaints about discrimination must be submitted to an Employment Tribunal within three calendar months of the act of discrimination. The complainant may submit a questionnaire to their employer and the tribunal may draw appropriate inferences from a failure by the employer to respond. **The burden of proof lies with the employer to show that they have not broken the law.**

Evidence from surveys carried out during 2004-5 reveal that awareness of the law remains patchy both among employers and trade unionists.

## CIVIL PARTNERSHIP ACT 2005

This Act came into being in December 2005. It created rights equivalent to marriage for same sex couples who register their relationship as a Civil Partnership.

Legal rights only apply to same sex couples who officially register their partnership through the same process as a heterosexual couple marrying at a registry office. This enables the same sex

registered couple to claim the same tax arrangements that apply to married couples, the same access to next-of-kin rights and no liability for inheritance tax.

The Civil Partnership Act also ensures equality in pension survivor benefits where there is an occupational pension scheme in place. The law provides for service to be backdated to 1988, the equivalent date for widowers' pensions. This is a legal obligation and all pension schemes must make the necessary changes to their rules. The law also extends to all those in contracted-out private pension schemes.

Where a registered same-sex couple has responsibility for a child, both partners will be legally recognised as having responsibility. This means that civil partners should be considered as having the same rights as heterosexual couples with children who are under six or a disabled child under 18.

Therefore a civil partner will be legally entitled to request flexible working hours (see NUJ guide to flexible working) and the employer has a duty to consider such a request seriously. If a house agreement has a clause relating rights linked to heterosexual family relationships, these should be extended to include same-sex family relationships. Civil partners who jointly adopt a child will have a legal right for one of them to take adoption leave and receive statutory adoption pay. The other partner will be legally entitled to take paternity leave and pay.

With regard to state pensions, civil partners will have the same rights as husbands currently have, and from 2010, when pension ages are equalised for men and women, they will be treated the same as husbands and wives.

If you are a negotiator, you should ensure that any policy at work restricted to married partners is extended to registered civil partnerships.

# Transsexual / gender reassignment issues

## SEX DISCRIMINATION (GENDER REASSIGNMENT) REGULATIONS 1999

These regulations extend the protection of the Sex Discrimination Act 1975. Put in place following a ruling in the European Court against the UK in 1996, they make it illegal to discriminate in employment and training on grounds of gender reassignment.

The law protects anyone who intends to undergo, is undergoing or has undergone gender reassignment. Protection applies from the moment at which the person indicates their intention to start the reassignment process and includes direct discrimination, victimisation and harassment in employment or training on grounds of gender reassignment.

There is no obligation on a trans person to disclose their status as a condition of employment. If they choose to disclose, this is not in itself a reason for not offering employment. Non-disclosure or subsequent disclosure are also not grounds for dismissal.

The Sex Discrimination Act permits some jobs to be specified as being available only to one sex. In these cases, a trans person who has undergone gender reassignment is entitled to be treated as being of the reassigned sex.

Trans people undergoing medical and surgical procedures may require extended time off work. The whole process can take years and employers may need to be flexible in order to facilitate the provision of the treatment. If a trans person has to take time off work for treatment, he or she has the right to be treated in the same way as anyone else who is absent from work due to sickness or injury or other reason. If the employer treats them differently from other members of staff, they can claim that they have been treated

## A WORD ABOUT TERMINOLOGY

**“Transsexual” applies specifically to someone undergoing gender transition. “Trans” or “transgender” applies to everyone who chooses to live in the opposite gender to which they were born, including those undergoing transition, but also for those who do not. The trade union movement tends to use the broader term whereas legislation relates to those undergoing surgery/hormone treatment etc.**

less favourably and therefore unlawfully under the Act.

Employers should allow some flexibility in dress codes to accommodate the process of transition from one sex to the other and an agreement should be made with a trans person when he or she needs to change use of facilities, such as toilets. It is not acceptable to expect a post-operative trans worker to use facilities that are not those of their post-operative gender.

## GENDER RECOGNITION ACT 2004

This Act enables trans people to assume full legal equality in their acquired gender. Anyone who has obtained a Gender Recognition Certificate (GRC) is entitled to have documentation changed to reflect their acquired gender (e.g. birth certificate).

The GRC is granted by a Gender Recognition Panel and may be applied for by anyone who has lived in their new gender for a minimum of two years and intends to do so permanently, and can provide medical evidence to support this. For anyone currently married, only a time-limited

interim certificate will be granted, as they will be required to divorce their current marriage partner before obtaining a full GRC. A person acquiring a GRC will be able to marry in their new gender, or else to form a civil partnership with someone of the same sex.

The Act confers privacy rights. Anyone who learns of a person's transsexual history in the course of their duties, including trade union representatives and employers, will be liable to criminal proceedings if they pass that information to a third party without the permission of the individual concerned.

### **Time off for transition**

The law also recognises that someone who is undergoing a medical transition to their new gender may require substantial periods of time off work in order to undergo treatment. Anyone in this position has the right to be treated in the same way as someone who is absent from work for reasons of sickness or injury.

### **Support during transition**

A plan for supporting a worker during and after the transition will need to address such questions as what information and training will need to be provided for managers and colleagues. It will often happen that the person undergoing transition will wish to take leave before returning to work in their new gender. This will provide the opportunity to brief managers and colleagues and to ensure that management stress the need for proper treatment of the worker.

The plan will also need to identify the point at which the individual's new gender is formally established in terms of the employer's personnel records and any consequent alterations (security passes, choice of name for directories etc). The right of the individual to maintain the confidentiality of their previous identity needs to be secured at this point. Many employers keep individual records for long periods and access to past records that reveal the individual's previous gender identity should be strictly controlled and limited on a "need to know" basis.

# Workplace negotiating issues on LGBT issues

## Equal opportunities policies and training

Employers should be encouraged to review equal opportunity policies to make sure that these include LGBT issues and to organise training for managers to make sure they understand the law and the policy. Chapels should push for this on progressive grounds, but some employers may only be persuaded when they realise that the failure of a line manager, through ignorance to deal properly with an incident of discrimination will not protect the organisation against legal proceedings.

## Workplace benefits

Packages of benefits that include spouses should be extended to include the partners of those in same-sex relationships. The law now requires that any such benefits offered to married workers are also extended to civil partners. Where the employer already offers such schemes to unmarried heterosexual workers' partners, they must be extended to same-sex partners too, whether or not they are registered civil partners.

## Pension schemes

Although the law (see earlier) requires civil partners to be treated in the same way as married partners, some employers have pension schemes in which unmarried scheme members are able to nominate a beneficiary. This should be extended to same sex partners, whether or not they have been through a civil partnership ceremony.

## Time off provisions

Written agreements and customary practice arrangements dealing with bereavement, emergencies etc, should be extended to civil

## MODEL AGREEMENT ON LGBT

"The organisation" values all its staff equally, regardless of their sexual orientation or gender assignment. Recognising the destructive nature of homophobia, "the organisation" undertakes the following:

- we will provide a supportive environment for staff who wish to be known that they are LGBT. However, it is the right of the individuals to choose whether they wish to be open about their sexuality. To "out" someone, without their permission, is a form of harassment, and will be treated as such.
- homophobic abuse, harassment or bullying (including derogatory jokes, unacceptable or unwanted behaviour, intrusive questions) is a serious disciplinary offence and will be dealt with under the appropriate procedure.
- assumptions will not be made that partners of staff and students are always of the opposite sex. Whenever possible, work place benefits will apply equally to same sex partners.
- LGBT issues will be included in all equality training, internal attitudinal survey, monitoring of complaints of harassment etc
- staff undergoing medical and surgical procedures related to gender assignments will receive positive support to meet their particular needs during this period.

Overall, "the organisation" aims to create an environment in which all staff, whatever their sexuality or gender assignment feel equally valued, and in which homophobic behaviour is not tolerated.

partners and, as above with pension schemes, consideration given to these being extended to encompass everyone who might have need of them, regardless of marital or civil status.

### **Domestic violence**

This is a workplace issue for LGBT members as well as for heterosexual members. (See general section on Domestic Violence). LGBT members face similar situations in same-sex relationships and it has been calculated that up to one third of young LGBT people can face violence from their families while living at home.

The consequences may include periods of absence or sickness and the individual will feel isolated and in need of support. Such members are often reluctant to discuss domestic violence with workplace representatives and this is doubly the case if the workplace is not LGBT friendly.

### **STATUTORY BODIES DEALING WITH LGBT ISSUES**

At the moment the Equal Opportunities Commission includes transgender issues included in its remit. However, there is no body currently dealing with lesbian, gay and bisexual issues. The new Commission for Equality and Human Rights is expected to take over these issues in late 2007.

# LGBT Contacts and Resources

## Civil Partnership information

*Info.civilpartnership@dti.gsi.gov.uk or  
www.tuc.org.uk/welfare/tuc-10602-fo.cfm*

## Broken Rainbow

Domestic violence in same-sex relationships  
0845 2604460

## Gender Trust (law on transsexuality and on trans rights at work)

*www.gendertrust.org.uk*

## Press for Change

*www.pfc.org.uk*  
PFC publishes Transsexual people in the  
Workplace, available from the website

## Gender Reassignment

– A guide for Employers (DTI)  
*www.dti.gov.uk/publications*

## GENERAL LGBT EMPLOYMENT RIGHTS

The TUC and Stonewall have jointly produced a  
basic guide to sexual orientation regulations  
called [Discrimination at Work: it's so over](#).  
This is free of charge and available in a  
Welsh-language version.

**Stonewall:** *www.stonewall.org.uk*

**TUC:** *www.tuc.org.uk*

LGBT rights are explained on the TUC website  
with useful frequently asked questions:  
*www.worksmart.org.uk*

## National Organisation of Disabled Lesbian, Gay Men, Bisexuals and Transgender People

*www.regard.dircon.co.uk*



---

# Notes

---