

Draft Employment Equality (Sexual Orientation) Regulations 2003

(Extract relating solely to Regulation 7, prepared by the National Secular Society)

- A. Below is the Regulation as it was enacted (**Annex A**).
- B. Please note the underlining of 7(3) (b) (i) and (ii). These compare closely with extract from Church of England Archbishops' Council's Submission dated 23 January 2003 shown in bold towards the end of this paper and similarly underlined (**Annex C**). This was submitted after the closure of the public consultation (corroborated in part by its date and Butterworths **Annex E**). The underlined section prepared on 23 January by the Church is almost identical to the wording finally included in Regulation 7 (3) (b), which mysteriously only became known when the regulations were placed before Parliament in May 2003.
- C. Note the verging on threatening tone of the note "Given the importance of the issue we would also want the opportunity for discussions at a very senior level of Government and possibly in partnership with other Church leaders, if a satisfactory solution cannot be found." (our emphasis – an apparent reference to the Prime Minister).
- D. The Church's submission is followed by a memorandum by the Joint Committee on Statutory Instruments (JCSI) (**Annex D**) in which we have emboldened passages detailing their concerns about the vires. The JCSI was so concerned about this it held one of its very rare public meetings. At it there was a collective intake of breath when a DTI civil servant asked by a Committee member whether the Church's change had been the subject of consultation with a body such as Stonewall, said no, because in the Church's opinion, the exemptions did not go far enough.

Regulation as finalised (extract)

ANNEX A

Exception for genuine occupational requirement etc

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

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

where paragraph (2) or (3) applies.

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

- (a) being of a particular sexual orientation is a genuine and determining occupational requirement;
- (b) it is proportionate to apply that requirement in the particular case; and
- (c) either—

- (i) the person to whom that requirement is applied does not meet it, or
- (ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it,

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

(3) This paragraph applies where—

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

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

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

(ii) **because of the nature of the employment and the context in which it is carried out, so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers; and**

(c) **either—**

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

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

END OF EXTRACT [REGULATION 7]

Explanatory Memorandum

Annex B

Draft Employment Equality (Sexual Orientation) Regulations 2003 Notes on Regulations

PART II - DISCRIMINATION IN EMPLOYMENT AND VOCATIONAL TRAINING

Regulation 7

Exception for genuine occupational requirement etc

3. Regulation 7(1) and (2) allows an employer, when recruiting for a post, to treat job applicants differently on grounds of sexual orientation if possessing a particular sexual orientation is a genuine occupational requirement (“GOR”) for that post. An employer may also rely on this exception when promoting, transferring or training persons for a post, and when dismissing persons from a post, where a GOR applies in respect of that post.
4. Regulation 7(1) and (2) follows the wording of Article 4.1 of the Directive, as do the draft Race Relations Act 1976 (Amendment) Regulations. However, regulation 7(2) does not copy out the reference in Article 4.1 to “the objective [being] legitimate”. This is because if an occupational requirement is established as a genuine one in order to carry out the job in question, then it also pursues a legitimate objective; a requirement which pursues an illegitimate objective would not constitute a *genuine* occupational requirement.
5. Regulation 7(3) provides a further exception in relation to employment for purposes of an organised religion, which is similar to section 19 of the SDA. Where employment is for purposes of an organised religion, it allows the employer to apply a requirement related to sexual orientation so as to comply with the doctrines of the religion or avoid conflicting with followers’ religious convictions. This applies to employment in a church or temple, for example, but does not necessarily apply to any employment which is (or is claimed to be) of a religious character. Regulation 7(3) is consistent with Article 4.1 of the Directive, although it does not copy out its wording. This is because a requirement which meets the criteria defined in regulation 7(3) is necessarily a genuine and determining occupational requirement which is applied proportionately, within the meaning of Article 4.1. In this context, recital (24) of the

preamble to the Directive refers to Declaration No.11 annexed to the Amsterdam Treaty recognising the status under national law of churches and religious associations.

6.

END OF EXPLANATORY NOTES FOR REGULATION 7

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Church of England Response to DTI Consultation Document

[Only 1, 24 and 26 shown below, whole Paper on

<http://www.cofe.anglican.org/papers/equalityanddiversity.doc>]

1. The Church of England welcomes the opportunity to respond to the Consultation Document which the Government issued on 23 October.

24. We strongly urge the Government therefore to insert in part 5 of the Regulations the following provision:
'Nothing in parts II to IV of these Regulations shall render unlawful anything done for the purposes or in connection with an organised religion so as to comply with the doctrines of the religion or avoid offending the religious susceptibilities of a significant number of its followers'.

26. **Our officials stand ready to discuss details of this with yours if that would be helpful. Given the importance of the issue we would also want the opportunity for discussions at a very senior level of Government and possibly in partnership with other Church leaders, if a satisfactory solution cannot be found.**

Archbishops' Council **23 January 2003**

[Our underlining: compare the underlined section prepared on 23 January with almost identical wording included in Regulation 7 (3) (b) which mysteriously only became known when the regulations were placed before Parliament in May.]

In particular Par 1.22 onwards

Joint Committee on Statutory Instruments [Twenty-First Report](#)

1 Draft Employment Equality (Sexual Orientation) Regulations 2003: doubtful vires and uncertain effect

Draft Employment Equality (Sexual Orientation) Regulations 2003

1.1 The Committee draws these draft Regulations to the special attention of both Houses on the grounds that there is a doubt as to whether regulation 7(3) is intra vires and that there is uncertainty about the effect of regulation 7.

Background

1.2 These Regulations are proposed to be made under section 2(2) of the European Communities Act 1972, in partial implementation of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation. The structure and form of the regulations have their origins in the Sex Discrimination Act 1975 and the Race Relations Act 1976, but the subject matter of the regulations is confined to discrimination on the grounds of sexual orientation.

The Directive

1.3 Article 1 of the Directive states that its purpose is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment. Article 2.1 of the Directive defines the principle of equal treatment as meaning that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1. Article 2.2 of the Directive defines direct and indirect discrimination for the purposes of Article 2.1.

1.4 Article 4.1, however, provides an exception. Under Article 4.1, "Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate".

1.5 Article 4.2 provides a further exception for occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief. But this further exception is limited to a difference of treatment based on a person's religion or belief. It is stated that such difference of treatment should not justify discrimination on another ground.

The draft Regulations

1.6 Part 2 of the draft Regulations contains provision about discrimination in employment and vocational training on the grounds of sexual orientation. Regulation 6 of the draft Regulations makes it unlawful for an employer to do certain discriminatory acts in relation to employment by him at, and persons employed by him at, an establishment in Great Britain. In particular, the employer may not discriminate by refusing to offer employment; in the terms on which he does offer employment; in opportunities for promotion etc. for employees; or by dismissal.

1.7 Regulation 7(1) disapplies specified provisions of regulation 6 where regulation 7(2) or 7(3)

applies. Regulation 7(2) is limited to cases where, having regard to the nature of the employment or the context in which it is carried out:

- "being of a particular sexual orientation is a genuine and determining occupational requirement";
- it is proportionate to apply that requirement in the particular case; and
- the person concerned does not meet it (or the employer reasonably is not satisfied that the person does).

1.8 Regulation 7(3) applies only where the employment is "for the purposes of an organised religion". It applies where:

- the employer applies a requirement "related to sexual orientation" either so as to comply with the doctrines of the religion, or, because of the nature of the employment and the context in which it is carried out, so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers; and
- the person concerned does not meet the requirement (or the employer reasonably is not satisfied that the person does).

1.9 This provision bears a resemblance to section 19(1) of the Sex Discrimination Act 1975, which disapplies Part 2 of that Act where employment is limited to one sex so as to comply with the doctrines of the religion or avoid offending the religious susceptibilities of a significant number of its followers.

1.10 Regulation 7 is extended by the Regulations to cover various other situations, such as contract workers (regulation 8(3)), office holders (regulation 10(5)), partnerships (regulation 14(4)), vocational training (regulation 17(3)), employment agencies (regulation 18(3)) and educational establishments (regulation 20(3)). Regulation 7(3) is also reflected in regulation 16(3) (qualifications bodies).

The doubt as to vires

1.11 The Committee considered that regulation 7(2) was justified by Article 4.1 of the Directive, but that regulation 7(3) might permit difference of treatment based on a characteristic related to sexual orientation where the characteristic could not be said to be a "genuine and determining occupational requirement" which was proportionate, as envisaged by the Directive. In particular, regulation 7(3) might allow the employer to impose a discriminatory requirement on an employee or prospective employee whose functions or proposed functions did not promote the core activities of the organised religion concerned. In response to a request from the Committee, the Department of Trade and Industry provided a memorandum for the Committee (at Appendix 2) and Departmental witnesses gave oral evidence (at Ev 1-8, Qq 1-56).

1.12 The Department considers that any requirement imposed in accordance with regulation 7(3) must necessarily be a genuine and determining occupational requirement applied proportionately, and so be permitted by Article 4.1 of the Directive.

1.13 Amongst the points made by the Department are these:

- The terms "organised religion" and "for the purposes of an organised religion" are comparatively narrow (paragraph 2 of the Department's memorandum).
- A requirement imposed so as to comply with the doctrines of the religion will in practice always be imposed because of the nature of the post or the context in which it is carried out, and will necessarily always be proportionate.
- A requirement imposed so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers is, under regulation 7(3)(b)(ii), within that provision

only if applied because of the nature of the post or its context; and if applied for that reason it will necessarily always be proportionate.

- Because of the reasons permitted for their imposition, the requirements can only be "genuine and determining" in the sense of being crucial or decisive to the post in question.
- Regulation 7(3) as a whole is proportionate.
- Recital (24) in the Directive acknowledges the special position of churches and religious associations or communities, and refers in particular to Declaration No. 11 annexed to the final Act of the Amsterdam Treaty.
- If there is any doubt, the courts must in any event construe regulation 7(3) in a way which makes it comply with the Directive rather than contravene it.

1.14 The Committee considers that Article 4 of the Directive must be construed strictly, both as a matter of established principle and because Recital (23) talks of "very limited circumstances" in which a difference of treatment may be justified. To be compatible with Article 4.1 a provision must not merely itself be proportionate, but must also secure that differences of treatment can take place under it only where the particular characteristic is a genuine and determining occupational requirement and the requirement is proportionate. The religious context is relevant to these issues. But though there is a general reference in Article 2.5 to "the protection of rights and freedoms of others", the body of the Directive affords no special position to religious organisations in the context of sexual orientation, age or disability discrimination (contrast religion or belief discrimination, for which Article 4.2 makes special provision).

1.15 Against this background, the Committee is not persuaded that the only acts permitted by regulation 7(3) are those permitted by Article 4.1. Organised religions vary considerably in their structure; the identity of the employer will vary according to the structure of the religion. It seems to the Committee wholly within the bounds of possibility that, for example, an employer considering employing a custodian who would, as part of his or her duties, have care of religious artefacts might determine not to employ a worker solely on a ground related to his or her sexual orientation in order to avoid conflicting with the strongly held religious beliefs of a significant number of the religion's followers. Even if those beliefs were held only by a minority of the religion's followers, and by those located at only one of several places where the post holder might be required to work, the discrimination would seem to the Committee apparently to be allowed by regulation 7(3).

1.16 Yet it is open to question whether either the intention or effect of Article 4.1 is to allow the personal beliefs (even of a majority within an organisation) to determine the position, on the basis that they are part of the context in which the work is to be carried out and, in the view of the employer, the factor is decisive. Even if a characteristic of the worker could be said to be a "genuine and determining occupational requirement" in these circumstances there seems to the Committee to be a doubt as to whether the requirement is proportionate as the Directive requires.

1.17 The Committee of course recognises that regulation 7(3) must be construed, so far as possible, to give effect to the Directive. The arguments used by the Department in support of regulation 7(3)'s compatibility with the Directive might or might not succeed, if the Regulations were approved and made in their current form and were tested in the courts. But the Committee's function is to draw attention to doubts; it cannot resolve them. **In the Committee's view the doubt about the compatibility of regulation 7(3) with the Directive should be brought to the attention of both Houses. Since the regulations rely solely on section 2(2) of the European Communities Act 1972, there is therefore a doubt as to whether regulation 7(3) is intra vires and the Committee reports accordingly.**

Regulation 7 - uncertainty

1.18 The Committee was concerned that employers and employees would find it hard to establish

their position under regulation 7 without the need for litigation before a court or tribunal. Regulation 7(2) uses wording very similar to that in the Directive. While this makes it clear how the provision relates to the Directive, it suffers from the same uncertainties as Article 4 which, as one of the Departmental witnesses accurately put it, is "in some respects somewhat unclear".

1.19 Regulation 7(3), whilst seeking to define what is considered to be proportionate and a genuine and determining occupational requirement, carries with it the difficulties to which we have referred above. There is clearly a degree of overlap with regulation 7(2); and, were it not for the possibly wider wording "related to sexual orientation" in regulation 7(3), it would not be apparent why, if the Department's understanding of the limitations of regulation 7(3) were correct, there would be any need for it.

1.20 In the Committee's view, the position of those affected by regulation 7(2) and (3) is uncertain. Whilst acknowledging that a significant element of the uncertainty stems from the Directive, the Committee draws the position to the attention of both Houses.

Regulation 7 - adequate consultation

1.21 The Department was asked whether any significant amendments had been made to regulation 7 between the issue of the draft Regulations for consultation in October 2002 and the laying of the final draft before Parliament on 8 May 2003. The Department has identified four amendments (set out in paragraph 11 of Appendix 2). It considered that three of these amendments were either technical in nature or did not amount to significant changes in substance which required further consultation.

1.22 In its memorandum the Department has set out in greater detail its approach to consultation on the new regulation 7(3).^[1] The issue was also explored in the Committee's examination of Departmental witnesses, who explained that the decision to insert regulation 7(3) was taken on the basis of evidence gathered during the course of the three separate consultation exercises held on the draft regulations in the period 2000 to 2003. These consultations generated almost 4,000 formal responses, and in addition a broad range of opinion was gathered through informal discussions.^[2]

1.23 The Government has taken the view that the Regulations should not interfere in matters of religious doctrine. The Department stated that regulation 7(3) was therefore designed to address comments received in response to the October 2002 consultation, "when it became clear that the exception in regulation 7(2) could cause practical difficulties in relation to employment for the purposes of an organised religion."^[3] Having taken the decision to insert the amendment, in line with the Government's policy, the Department then met "a small number of representatives from churches" to discuss how the practical difficulties which had been identified could be addressed within the scope of the Regulations.^[4]

1.24 While the Department has acknowledged that the impact of regulation 7(3) would be important, it considered that it would be strictly limited and would fall upon only a small number of persons who were employed for the purposes of an organised religion.^[5] It therefore believed that no further consultation was necessary with those likely to be adversely affected.^[6]

1.25 The Committee recognises that, in the Department's view, an appropriate degree of consultation had already taken place with those likely to be affected by the new regulation. It also recognises the extensive consultations which have been undertaken on the overall implementation of the Directive. But as the Committee believes the precise extent of regulations 7(2) and (3) is uncertain, it cannot share the Department's confidence that regulation 7(3) will be strictly limited in its impact and extent.

1. The Committee considers that, in the light of the uncertain effect of regulation 7(3), the Department would have been prudent to undertake further consultation with representatives of persons likely to be adversely affected by regulation 7(3) before the draft Regulations were laid before Parliament.

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- 1 Appendix [], para 13 [Back](#)
 - 2 Q36 (Ms McCarthy-Ward) [Back](#)
 - 3 Appendix [], para 13 [Back](#)
 - 4 *Ibid.*, and Q 36 (Mr Magyar) [Back](#)
 - 5 Appendix [], para 13 [Back](#)
 - 6 Q37 (Ms McCarthy-Ward) [Back](#)

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Butterworths - Are regs to protect sexual orientation biased against gays?

Originally <http://esola.butterworths.co.uk/freelaw/news/DailyNewsItem.asp?nid=2902>
Posted 3/11/03 but replaced daily.

Seven trade unions are challenging the legality of the Government's new Employment Equality (Sexual Orientation) Regulation 2003 which they claim discriminates against gays. Nicola Dandridge, head of equality at Thompsons, who is representing three of the unions talks to Velida Pearce...

Seven TUC affiliated trade unions are bringing a legal action that will challenge the legality of the new Employment Equality (Sexual Orientation) Regulations 2003. The unions are arguing that regulation 25 which relates to pensions and 7(3) which affects people working for religious organisations, continue to discriminate against lesbian and gay workers and do not comply with European legislation. They are angered by the fact that the regulations are meant to give lesbian and gay people additional legal protection but will actually end up discriminating against them. Nicola Dandridge, Head of Equality with Thompsons, who is representing three of the unions, says:

"Although it is lawful under the European Directive for organisations to discriminate where being of a particular sexual orientation is a genuine occupational requirement, Regulation 7(3) extends that exemption to religious organisations so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers." Dandridge explains that the draft Regulations, which are due to come into force on 1 December 2003 had been under consultation earlier this year but "**the exemption for religious organisations in Regulation 7(3) was absent from the draft under discussion. It appeared out of blue - it was introduced at the last minute, without any consultation.**" **The reason why the Government has decided to introduce such a broad exemption to people working for religious organisations at the last minute is anybody's guess.** However, as the law now stands, sexual orientation discrimination will be legal against employees working for an organised religion where a minority of the religion's followers object: "Under the new law, employers may effectively be able to prevent gay, lesbian or bisexual people from working for any school, voluntary organisation, charity or private company with a religious ethos," explains Dandridge. Another thorny issue is regulation 25 that says that discrimination on the grounds of sexual orientation is not unlawful if it is done to prevent or restrict access to a benefit by reference to marital status. Unions are saying that most public sector schemes and around a quarter of private sector pensions schemes still do not provide pensions to unmarried partners. The unions are concerned that large numbers of gay and lesbian workers will continue to miss out if this regulation remains in its current state. Says Dandridge: "This would allow companies to continue to discriminate in favour of married people. We are pursuing the legal challenge on the basis that the provisions amount to indirect discrimination as gay people are not able to marry their partners." Dandridge says the Regulations are designed to implement the EU Employment

Equality Framework Directive and "the unions are arguing that the law as it stands not only misinterprets the EU Framework Directive but also may breach of the Human Rights Act 1988. That is why we are asking for the High Court for a judicial review and want to see the offending clauses scraped."

Seven unions have signed up for the legal challenge: Amicus-MSF, Unison, NUT, the National Union of Rail, Maritime and Transport Workers, the Public and Commercial Services Union, the National Association of Schoolmasters Union of Women Teachers and NATFHE, the University and College Lecturers' Union. "We are hoping the case will be heard quickly, before the Regulations come into force on 1 December," says Dandridge. (03/11/03)

If you have any comments about this or any other news item or feature, please respond via e-mail to: newsroom@butterworths.com

Legislative annotations in other services: The Human Rights Act 1998; Employment Equality (Sexual Orientation) Regulations 2003, SI 2003/1661, reg 7(3), 25 END