

# Sexual orientation discrimination



## ► Inside

The law explained

Benefits for same sex partners

Equality policies

Monitoring and data protection



## Introduction

Sexual orientation is a particularly sensitive personal issue, and also involves the right to privacy under the Human Rights Act 1998. An added complication is that individuals can choose whether or not to be 'out' in the workplace, so employers are unlikely to know the sexual orientation of all of their employees.

This Inbrief provides a general summary of the main features of the law and gives practical advice on how to manage its impact in the workplace.

## Basic concepts

### Who is protected?

Protection for individuals from sexual orientation discrimination is set out in the Equality Act 2010. 'Sexual orientation' is defined as a sexual orientation towards persons of the same sex, persons of the opposite sex, or persons of either sex. In basic terms, the law therefore covers gay men, lesbians, bisexuals and heterosexuals. All of these groups are protected equally. This means that, as well as protecting against homophobic treatment, the law allows people to claim that they have been discriminated against because they are heterosexual. It also includes discrimination where an individual is a civil partner rather than married.

It is unlawful to discriminate against:

- **Job applicants** — in relation to recruitment arrangements and decisions, harassment and victimisation
- **Employees** — in relation to terms, promotions, transfers, training, benefits, dismissal, harassment and victimisation
- **Ex-employees** — where the discrimination is closely connected to their employment

### Types of discrimination

- **Direct discrimination** — less favourable treatment because of sexual orientation
- **Indirect discrimination** — applying a provision, criterion or practice which disadvantages an employee/job applicant and would put others of the same sexual orientation at a particular disadvantage and which is not a proportionate means of achieving a legitimate aim (i.e. not justified by the employer)
- **Victimisation** — subjecting someone to a detriment because they have done, or might make a complaint or bring or assist with a claim
- **Harassment** — unwanted conduct related to sexual orientation which violates a person's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment

## Direct discrimination

Direct discrimination covers any less favourable treatment that is 'because of' sexual orientation. This definition is quite wide, so that the treatment does not have to be directed at the individual's own sexual orientation. This has a number of effects.

Firstly, it means that an employee can complain if he or she has been discriminated against on the grounds of another person's sexual orientation. For example, an employee could make a claim if he or she is bullied or harassed because of **associating with** gay friends. An employee could also make a claim if he or she is disciplined for refusing to carry out instructions to discriminate against gay people or disadvantaged for refusing to join in with homophobic jokes in the workplace, whether or not that employee is gay or lesbian.

Secondly, it means that the law covers **perceptions** of sexual orientation. For example, if a person is disadvantaged because they are assumed to be gay they will be able to make a claim whether or not that assumption is correct. The effect is to protect individuals from stereotyping and to discourage inaccurate speculation and teasing about sexual orientation. This means that an employee who is harassed or bullied for 'acting gay' will be protected by the law whether they are gay, bisexual or heterosexual.

Finally, this means that individuals do not even need to reveal their own sexual orientation in order to make a claim for direct discrimination. At first sight this may seem quite surprising. However, this recognises the fact that sexual orientation is a private issue. For example, employees can therefore make a complaint about being subjected to homophobic jokes or bullying in the workplace without needing to 'out' themselves — the employee's own sexual orientation is irrelevant, as they have clearly been treated unfavourably 'because of' sexual orientation. If an employee raises such an issue, the employer therefore needs to be aware that they may be at risk of a discrimination claim if they do not take appropriate action even if the employer does not know that employee's actual sexual orientation.

The fact that sexual orientation can be kept

private and is generally not obvious to third parties means that there is a risk that direct discrimination can take place without the perpetrator realising. For example, a group of employees might make homophobic jokes or other inappropriate comments without realising that one of the individuals present is actually gay, lesbian or bisexual and may be particularly offended by the conversation. It is therefore important that employees are made aware that such behaviour is not acceptable irrespective of who is present at the time.

## Other types of discrimination

### Indirect discrimination

It is actually difficult to think of a good example of indirect sexual orientation discrimination and therefore this is quite unlikely to arise in practice. A possible example might be a part-time work policy that favours employees with children, if gay and lesbian employees could establish that they are less likely to have children and therefore less likely to be able to take advantage of the policy. However, even if this could be established an employer is likely to be able to justify favouring employees with children in this way.

### Victimisation

The definition of victimisation means that anyone who makes a complaint of discrimination (whether to the employer or to a tribunal), or assists someone else's complaint, is protected from suffering any detriment as a result.

### Harassment

Harassment takes place where a person is subjected to unwanted conduct related to their sexual orientation. This must either have the purpose or effect of violating dignity or creating an offensive environment. The definition of harassment can therefore cover both single acts directed at a particular person and more general behaviour that creates an inappropriate environment — for example, homophobic jokes being told in the office. Employment Tribunal decisions have indicated that overheard homophobic comments will be enough (even where the victim was not, and was not believed to be, gay), and jokes or banter will be treated as examples of serious harassment.

The harasser does not need to intend the harassment — it is enough if their conduct has a harassing effect, whether they meant it to or not. However, a tribunal will look at whether the conduct could reasonably be considered as having a harassing effect taking into account all the circumstances including the perception of the victim. This means that a single act may be harassment where it is reasonably obvious that the behaviour in question was inappropriate. However, a single act may not be regarded as harassment where it is not reasonably obvious that the victim could regard this as offensive — for example, if a person reacts very sensitively to something that most people would not regard as inappropriate conduct. If however the victim has made it clear that such behaviour is unwanted, any repetition of the behaviour will be harassment.

## Occupational requirements

The law allows an employer to discriminate on grounds of sexual orientation where it is an 'occupational requirement' of the job that the employee is of a particular sexual orientation. This means that it can be lawful for an employer to specify that they need a gay person, or a heterosexual, for a specific job. An occupational requirement can be used to justify decisions not to recruit, train or promote and to justify dismissals.

The test for occupational requirements:

It will actually be quite difficult for an employer to show that they have a valid occupational requirement. In order to reject someone for a job on grounds of their sexual orientation an employer must look at the nature of the employment or the context in which it is carried out and then show that the requirement to be of a particular sexual orientation is a proportionate means of achieving a legitimate aim, and that the individual does not meet that requirement.

It is likely that there will only be a few jobs where an occupational requirement can be used. ACAS has published some guidance on sexual orientation in the workplace (available online at [www.acas.org](http://www.acas.org)) which gives the example of the post of Chief Executive of a gay rights organisation. As this post involves being the 'public face' of the organisation it may be

an occupational requirement that the post-holder is gay or lesbian. ACAS also provides some guidance as to what employers need to do in order to establish an occupational requirement, including:

- Identify the requirement at the start of the recruitment process and make it clear to all job applicants
- Consider whether the requirement is really necessary for each particular post, including reviewing the position periodically
- Consider whether specific duties could be allocated to other employees instead

Religious occupational requirements:

There is an additional occupational requirement which applies to employment for the purposes of an organised religion. This applies where a requirement relating to sexual orientation is a proportionate means of complying with religious doctrine or avoiding conflict with religious convictions. This exemption applies only to those who work for an organised religion. It does not apply where the employer is not an "organised religion" but simply has a religious ethos, such as a faith school. This means, for example, that this exemption cannot be used to reject a gay person from employment as a teacher at a religious school, as the purpose of this job is to teach.

## Equality in the workplace

### Employment benefits

The law also applies to discrimination in the provision of employment benefits. This means that benefits that are provided to opposite-sex couples must also be provided to same-sex couples. This could apply to a wide range of benefits — for example, pension benefits for partners, medical insurance coverage, beneficiaries of death in service benefits, and travel or other concessions.

There is an exception for benefits that are only provided to married couples. The exception applies to both married couples and civil partners. It is not unlawful discrimination to limit benefits to married couples and civil partners only.

Employers also need to be careful about benefits that are provided by third parties, such

as private health insurance. It is possible that the terms of such schemes might discriminate on the grounds of sexual orientation. For example, some health or life insurance policies might treat gay men differently on the grounds that they are thought to be at a higher risk of having HIV. It is not yet clear to what extent an employer will be liable in these circumstances. However, if an employer has a choice of provider at the very least it would be good practice to ensure that the provider chosen does not discriminate in the provision of benefits.

### Equality policies

Employers need to ensure that sexual orientation is included in all Equality Policies/ Equal Opportunities Policies. The ACAS guidance recommends that these policies should be reinforced by:

- Making it clear to staff what behaviour is unacceptable, including the fact that sexual orientation discrimination is now unlawful
- Making sure that staff know what to do if they think discrimination or harassment is taking place
- Ensuring that staff are trained in equality issues, including issues relating to sexual orientation

An Equality Policy, backed up by appropriate training, will help an employer to show that it has taken all reasonable steps to prevent employees from discriminating against or harassing other employees.

### Equal opportunities monitoring

Sexual orientation is a very private issue and therefore the issue of whether or not to include sexual orientation as part of equal opportunities monitoring is a controversial one. Because the issue is so sensitive, and many employees may not wish to be 'out' at work, it may be difficult to obtain accurate information as staff may be reluctant to answer equal opportunities questionnaires on this subject. However, employers may wish to monitor the makeup of their workforce in order to check for under-representation of particular groups.

Information about sexual orientation is also sensitive personal data under the Data Protection Act 1998. If the information is not collected on a strictly anonymous basis it is essential to ensure that the employees have given explicit consent to collection and use of the information.

Instead of relying on monitoring, ACAS suggests that the best way to guard against discrimination is to have a good equality policy and training programme.

For further information on this subject please contact:

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