

Implementing the EU Employment Directive

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1.0 Introduction

The EU Directive and the accompanying regulations are intended to protect *employees* from their *employers*. The new laws are intended to protect religious people from discrimination in employment.

The new laws were not designed to protect religious people when they act as an employer. This is where the problems come.

Our focus is on how the Directive will affect Christian *employers*: how new laws will affect the ability of Christian employers to employ believing Christians.

At present there are no laws which prevent churches and Christian organisations from employing only Christians. They have complete discretion. At the moment.

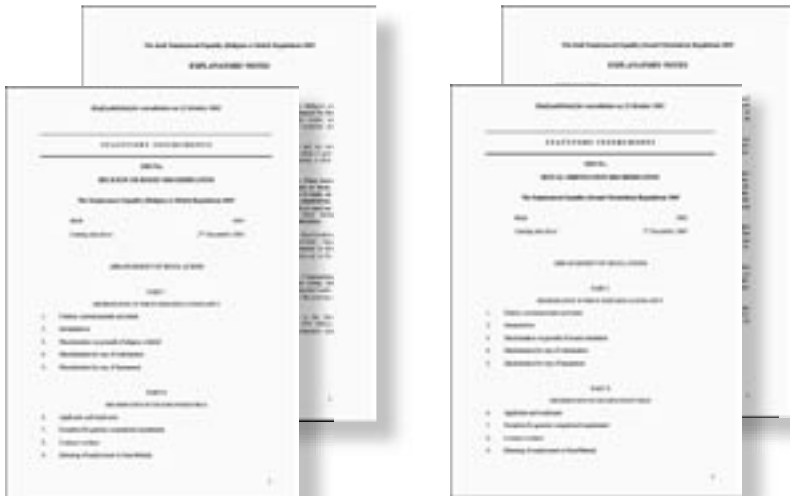
But the European Directive on Employment brings this discretion to an end.

1.1 The Consultation

The Government will implement the directive by December 2003. It is currently consulting on the draft regulations. This consultation ends on 24 January 2003.

The consultation documents are made up of:

- Draft regulations and accompanying explanatory notes



- “Equality and diversity : Making it happen”
This DTI booklet concerns government proposals for a single equality body to enforce the law. This is not the subject of our present concern.



- “Equality and diversity : The way ahead”
This DTI booklet comments on the Government’s general approach to equality issues in employment. It considers the outcome of an earlier consultation process. It includes a response form seeking the views of the public on a very narrow range of issues some of which we concerned about.



The consultation is being co-ordinated by the Department for Trade and Industry. We certainly believe that concerns should be expressed in the DTI consultation. We would also encourage organisations to lobby politicians for changes to the regulations.

We are going to focus on the draft regulations which bar discrimination in employment on the grounds of:

- (a) Religion or belief and
- (b) Sexual orientation

We will also consider how cases can be brought under the regulations and the whole issue of harassment. There is a lot of scope in the regulations as currently drafted for a great deal of litigation against churches and Christian charities acting as employers. There could be problems even before some one is shortlisted for a job. Under the regulations a job advertisement could trigger litigation. That alone entitles someone to bring your organisation in front of an employment tribunal.

We will look too at how the draft regulations are more restrictive than the directive itself.

1.2 Which posts could be affected?

Any posts where a church or Christian organisation employs a member of staff could be affected. This would include:

- Secretarial or administrative staff
- Vergers
- Caretakers
- Youth workers
- Evangelists
- Pastoral staff
- Bookshop staff
- Catering staff

It may or may not be the case that if a Christian believer is appointed to one of these posts the position could be legitimately defended using the exemptions in the directive. We will consider this in detail later on. When it comes to dismissal there are no exemptions from the regulations on any ground for these posts.

Some ordained ministers are employed, for example, those with a contract of employment. They might work for a denomination at a national or local level. They might be a diocesan adviser for education or a chaplain at a University or Prison.

But in general, ministers of religion are not employed. They are office holders, just as an elected trade union official is an office holder. For this reason ministers of religion appointed to work in a particular congregation, will not be affected by employment regulations because they are not employees. Legal precedents originally applying to Church of England clergy have been extended to ministers of other Christian and non-Christian denominations. All clergy are office holders not employees.

The Government is currently consulting on whether this office holder status should be maintained for clergy in respect of certain employment laws such as unfair dismissal or working hours. These proposals do have implications for religious liberties. A blanket change in status does not seem very likely, but the draft regulations include sections which will be inserted after the Government has come to a view on clergy status.

Church schools maintained by the state are in a special position. Teaching posts are exempted, but only from the regulations on religion or belief. They are bound by the regulations on sexual orientation. The current practice of recruiting staff whose belief and conduct is consistent with the religious ethos of the school, as enshrined in Section 60 of the 1998 School Standards and Framework Act and Section 21 of the 1980 Education (Scotland) Act, is therefore only partially protected in the regulations.

Independent schools with a Christian foundation should argue that they should be covered by the same provisions that operate in church schools.

Under the regulations, theological or Bible colleges are deemed to be offering vocational education. Their students are treated as if they were employees. The regulations against discrimination apply in full to them.

1.3 *The importance for religious liberties*

Baroness Caroline Cox is President of Christian Solidarity Worldwide which seeks to help persecuted Christians throughout the world. She knows what it is to

be under gunfire. Her advice to Christians in public life is: “put your head fully about the parapet – it’s the safest place to be”.

That is certainly true when it comes to the implementation of the EU Employment Directive. Churches and Christian organisations will need to act defensively. They will need to use trust deeds, contracts of employment and codes of conduct to reinforce their Christian ethos. There will be a *much greater need* for explicitness in these documents. The more clearly this is done, the more protected the church will be. According to legal advice from a leading employment QC, the more you hide your light under a bushel, the more likely you are to fail to take advantage of the exemptions.

If we must be upfront about our ethos when the directive is implemented, then we should also be upfront now when there is still time to improve the regulations. We must not keep quiet now, and then complain when the regulations start to bite and restrict our religious freedom.

If the draft regulations become law it will become illegal to dismiss an employee on the staff of a church who becomes a practising homosexual, a Muslim or an atheist. These new laws squeeze churches into a secular mould.

A number of Christian organisations have had discussions with civil servants at the DTI. They are well aware of the issues, but unfortunately the regulations they have drafted have failed to take on board Christian concerns.

The Government has decided to apply the directive to churches without the full range of protections and safeguards permitted in the EU directive. We must therefore press the Government to change its mind. This will take a great effort.

2.0 The legal context

It is important to look at the legal foundation for the current regulations, including the background and the basis for what the Government is proposing to do now.

2.1 Background

Since the 1970s Great Britain has had various laws governing certain kinds of discrimination. Sex discrimination was made unlawful in 1975. This followed on from the 1970 Equal Pay Act. The Race Relations Act consolidated the laws on racial discrimination in 1976.

More recently in the 90s disability discrimination has been added to that. In Northern Ireland, because of its particular history, there have been employment laws covering religious discrimination for much longer, the most recent being the Fair Employment and Treatment Order 1998.¹

Those laws do not, of course, cover all kinds of employment discrimination. For example, over the years attempts have been made to use the sex discrimination laws beyond simple discrimination against women. In the case of transsexuals, they have succeeded, broadening interpretation of the provisions to cover discrimination against transsexuals.²

In the case of sexual orientation discrimination they were unsuccessful. Attempts in the courts to read the Sex Discrimination Act as covering sexual orientation have failed.³

The same approach failed at the European level. Attempts to read directives concerned with discrimination against women to include sexual orientation have been ruled out by the European Court of Justice.⁴

It is to fill that “gap”, as it is perceived, that the sexual orientation regulations have been brought forward. The other area our laws don’t cover at present (other than in Northern Ireland) is discrimination on grounds of religion.

Attempts have been made to read religion into the Race Relations Act 1976, particularly via the concept of indirect discrimination that applies under that Act. But the results have been very patchy. Some ethnic groups such as Sikhs have succeeded in getting legal protection by that route.⁵ Other groups which are not

defined by ethnicity, such as Muslims, have not.⁶ Again, the perception for those that want to reform the law is that there is a gap that needs to be filled.

2.2 *The European Directive*

The means of filling it is the European Framework directive on equal treatment⁷ that was passed by the Council of Ministers, the legislative body of the EC, in November 2000. The Community was given the ability to make law in this area back in the Amsterdam Treaty of 1997. Article 13 of that treaty extended the areas of discrimination which it could cover.

The purpose of this directive is to put into effect the principle of equal treatment as regards access to employment and occupation. This includes promotion, vocational training, employment conditions and membership of trade organisations.

What does the directive do? It requires member states to legislate on certain areas of employment discrimination if they are not already covered in their law. In the case of the UK, because we already have disability legislation, this means we have to legislate on religious, sexual orientation and age discrimination.

What does the directive cover? The scope is not just employment. It also covers training. Vocational education will therefore be covered by these requirements as well.

All member states must implement these provisions by 1 December 2003. Which is why we have the draft regulations in front of us now. (Age discrimination does not have to be legislated on until December 2006.)

How is the Government going to meet that timetable? The consultation paper, *Equality and Diversity: The way ahead*, was published in October 2002. It gives their specific proposals. Comments must reach the Department for Trade and Industry by 24 Jan 2003. Draft regulations will be laid in Parliament in the spring with a view to coming into effect by 1 December 2003.

2.3 *The legal basis for the regulations*

It is important to understand how it is that the Government has chosen to implement the directive. There is a key choice that ministers made at the outset and this has some important implications.

Instead of choosing to change the law by an Act of Parliament, it has chosen to use a power contained in the European Communities Act 1972 (ECA), s. 2(2) which allows delegated legislation to be made to implement European law. When there is a new EU obligation imposed, as there is through this directive, this provides an easy route, short of primary legislation, to bring UK law into conformity.

The decision to legislate in this way has some important implications. This is an exceptional power that parliament has granted to the Government to make subsidiary law, *to give effect* to EU obligations. It must not be abused. The content of the subsidiary legislation is limited to the extent of the directive. So it may be argued that if the Government steps outside the terms of the directive in the way it legislates it is exceeding and abusing the power to make law under the European Communities Act.

The process that is being used also affects how Parliament will deal with the issue. If this was being laid out in a parliamentary bill there would be opportunity to amend the bill as it went through in either House of Parliament.

With regulations under the ECA it is different. Parliament can vote to accept or reject the regulations laid before it. What it cannot do is to amend them. It is a matter of take it or leave it. (The vote will be held presumably some time in the summer or the autumn of 2003.)

Another point to note: instead of using a flagship “Equality Act” as might have been expected, with common definitions and exceptions, the Government has chosen to produce these fairly low key regulations on each topic. There are separate regulations on religion and on sexual orientation. This, of course means that, in terms of strategy, it is possible for critics to oppose one set of regulations and not the other.

A final point to note is that, because of the way the Government has chosen to legislate, the regulations can, at the end of the day, also be attacked in the courts. If they took the form of an Act of Parliament that would be virtually impossible. But regulations have to be made within the legal powers granted under the European Communities Act 1972, s. 2(2) i.e. within the terms of the directive which they implement. If they do not, they can be held to be invalid and struck down in part. We will return to this later.

3.0 Religion or belief: examples of concern

The regulations outlaw discrimination in employment on the grounds of religion or belief. We will look at the definitions and the wording of these regulations below. But first we will consider some examples of discrimination and how the regulations might apply.

3.1 *Prohibited discrimination*

It is true that these regulations were designed to help Christians and those of other faiths. Some of us may know examples of Christians who have been unfairly discriminated against at work.

Below are some examples where the regulations could help:

- A Christian who applies for a management job with a telecommunications firm. At the interview he is told he is far more qualified than the other applicants. He has almost been offered the job when he is asked about his hobbies. He explains that he is involved in his local evangelical church and sings in the music group. The interviewers become markedly cooler towards him and one of them asks if he would describe himself as a “fundamentalist”. Another asks if he believes the Bible literally. The interview terminates shortly thereafter. He is refused the job. The applicant could go to an employment tribunal alleging religious discrimination.
- A Christian works as an architect. He has been with the firm for five years without any complaints about his work. A new job comes in. The Christian is asked to work on the project to design a Masonic Temple for the local Masons. He refuses. He is told the job is very important to the firm and he must do it. He refuses again and is sacked. The Christian architect could go to an employment tribunal alleging that it is discriminatory to sack a Christian for not helping with a Masonic Temple. Is this indirect discrimination because it would require a Christian to endorse a particular form of religious observance inimical to the Christian faith? The case would hinge on whether the tribunal believed that the Christian was in a position where he could not comply.

3.2 *Within a religious organisation*

In those situations the regulations might help. But how will the regulations apply when the employer is a church or religious organisation?

3.3 Recruitment

Churches routinely wish to recruit Christian staff. In doing this they are discriminating against people who are not Christians. The issue is whether this discrimination is a genuine occupational requirement.

If a job description requires employees to model Christian behaviour then it is essential that a strong case be made out for it.

Job adverts in the Christian press usually state that a committed Christian is required. The Church of Scotland requires that applicants must have a “live church connection”. One Manchester based youth organisation recently advertised for “a committed Christian who believes in the Lordship of Christ and the authority of scripture”.

Under the regulations a complaint may be triggered on the advertisement alone. The complainant does not even have to apply for the job if he can claim that it was a job he would have been willing to apply for. (See Para. 55 of “The Way Ahead”.)

So even before a job is advertised it is important that the employer has thought through the detailed requirements of the job. The church or religious organisation will have to be prepared to prove why they need a Christian.

They will have to be prepared to demonstrate that certain legal tests are satisfied to guard against the possibility that a job applicant or a reader of the advertisement may complain to an employment tribunal about discriminatory recruitment practices.

- A youth organisation appoints an evangelist. The organisation requires that the post holder is a practising believer.
- A Church of England church advertises for a parish assistant to work for a two-year period. The duties of a parish assistant range from leading Bible studies to carrying out administrative duties. The advert requires that the applicants be communicant members of the Church of England and in agreement with an evangelical basis of faith which all applicants are asked to sign.
- A Christian care home advertises for a carer. The home argues that carers have a personal contact with patients and so are expected to show Christian character and compassion, and a willingness to talk about the Christian faith and pray with patients. Carers also have to participate in a rota with the rest

of the staff to lead daily prayers. An atheist who is a highly experienced carer applies for the job but is not shortlisted. He brings a case to an employment tribunal. The Care home admits that the candidate's atheism was an obstacle to their employment. The Care home demonstrates that their ethos is publicly advertised and enshrined in their trust deed. It produces evidence to show that carers have always attended to the spiritual needs of the patients. The atheist loses the case.

- An accountancy firm has a Christian ethos. All of the accountancy staff are Christians, but not all of the other staff. The firm states clearly in its literature to customers that it seeks to promote high standards of accountancy and ethical investment policies. It is also stated that people in serious financial difficulties can speak to any accountant in the firm who can offer Christian counselling and prayer as well as practical advice. The firm advertises for a Christian trainee accountant.

These are some examples where a church, Christian organisation or a business with a Christian ethos, should be able to satisfy the demands of the regulations. However, below are some examples which are more problematic:

- A Roman Catholic Hospice advertises for a porter stating that a Catholic is preferred. A Sikh man who is a highly experienced porter applies for the post and is sent a job description and application form. The job description fails to list any particular duty which can be considered religious. The Sikh man is refused the job. He argues that he has been discriminated against because of his faith.
- *The Hospice would have been in a much stronger position if it had stated that a Catholic was required, rather than just preferred, and the job description stated that the porter would be expected to uphold Catholic teaching in conversations with patients, read Catholic literature to patients and attend mass with patients.*
- A denominational social work organisation requires employees to be committed members of the denomination. A job applicant insists that his beliefs in the teaching of the denomination have not changed. But the applicant admits that his church attendance is not very regular. When he is rejected, he goes to an employment tribunal alleging discrimination on the grounds of his religious beliefs. The entire case will hinge on whether the denomination was entitled to stipulate that church attendance is necessary for the job. There could be parallel cases where employment tribunals are asked to rule on whether a church could require that staff in their own free time should refrain from getting drunk or attending casinos.
- A church advertises for a "committed Christian" to work as secretary to

the minister. The only applicant for the job is an experienced and qualified secretary who is also an ardent atheist. To an outsider the secretary's job description looks as if it is an ordinary job. It neglects to mention any spiritual duties such as writing the church prayer diary or communicating Christian teaching to telephone callers. The atheist is turned down for the job and threatens to go to an employment tribunal. The church fears losing the case.

3.4 *Dismissal*

The position in relation to dismissal is very different and much easier to state. Churches and religious organisations have no right to dismiss staff on the grounds of their religion or belief. This aspect of the regulations gives rise to some ridiculous scenarios.

- A youth evangelist employed by a church converts to Islam. The man argues "I will use the same talks that I used to give". But the church wants to be able to dismiss him. Under the regulations this is unlawful.

The church could discriminate on the grounds of religion when recruiting a youth evangelist, but once he is on the staff, he cannot be dismissed for changing his religion.

The same would apply to all the examples above. If the careworker became a Satanist and was dismissed, the Christian care home might be ordered to pay a compensation order by an employment tribunal.

3.5 *Within a political organisation*

It is very revealing to consider the position of political parties. The Government has deemed belief for the purposes of the regulations as not including political belief. So under the regulations political parties will continue to be able to employ only party members on their staff as is currently the case in the Labour party. So a researcher at Labour Party Headquarters who is discovered to be giving money to the Liberal Democrats can be dismissed for going against the political beliefs of the party.

4.0 Religion or belief: legal definitions & exceptions

What do the draft regulations say about religion or belief and what are the exceptions to them? First of all we will look at the question of what is covered and the definitions of religion and belief that are used in the regulations.

Draft Regulation 2 of the religious discrimination regulations defines belief as any “religious belief or similar philosophical belief”. By choosing to use the words “any similar philosophical belief”, which do not appear in the directive, the Government is hoping to rule out political parties from the ambit of this.

When framing the definition essentially there were three options:

(1) The regulations could have attempted an umbrella definition of what religion is. Legal experience the world over has shown that is very difficult to do in a watertight way. Such definitions tend to disfavour small or new religions which emerge and don't fit the typical mould of the major religions, for example, they may not involve a belief in a deity, as such. This option was rejected.

(2) They could have simply listed the religions that would be covered. This option too was rejected.

(3) The route that has been taken is simply to leave it open for courts and tribunals to determine in any given situation whether a particular form of discrimination is discrimination on grounds of religious or belief.

The experience wherever religious belief is raised as a legal matter, whether in charity law in the UK or elsewhere, suggests that the courts have been extremely reluctant to enter into definitions because they do not want to be seen to be ruling out any religious group from protection.

That is equally true in the case law of the European Court of Human Rights which has had to tackle the question in terms of the protection of religious liberty under Article 9 of the Convention.

There is, though, a danger in this open-ended approach that invites tribunals to consider the definition in context. It effectively says, “you know it when you see it”. It is possible that a court or tribunal may decide in a particular case that some aspect of religious practice or belief is not in fact required by the religion and so is not covered by the exception.

For example, recently a UK court had to determine whether parents were entitled on the grounds of their religious beliefs to send their children to independent schools where the regime included corporal punishment. The High Court judge who determined the case ruled that the parents' and schools' belief in physical chastisement was nothing to do with their religious beliefs. In his interpretation of Judaism and Christianity, such a belief was entirely peripheral to those religions.⁸ That is the risk. The court or tribunal may impose its own version of what a particular religion might require which might be quite at variance with the beliefs of those bringing or defending the case.

4.1 *Types of discrimination*

The regulations deal with three types of discrimination:

1. direct discrimination,
2. indirect discrimination
3. victimisation and harassment.

4.2 *Direct discrimination*

It is direct discrimination for the employer to treat an employee less favourably than someone else on grounds of religion. As noted above religious discrimination sometimes falls within the laws on indirect race discrimination. When it falls within the law on race there is a defence available - "justification". Thus indirect discrimination can be justified if there was a good reason for the practice that had the discriminatory effect.

For example, in one of the reported cases, a school that advertised for Christian head teacher was allowed to do so.⁹ Although it was indirect race discrimination, it was justified because it was a Christian school.

However, the position under these regulations will be different. With direct religious discrimination there is no general defence of justification. So where an employee or prospective employee alleges direct discrimination, the employer will not be able to defend the claim in the same way.

Incidentally, the Government's explanatory notes draw attention to the fact that it does not have to be the religion of the *complainant* which forms the basis of the discrimination. It would still be unlawful discrimination if the less favourable treatment was on the basis of a third parties' religion or belief. If the employer treats you differently because you associate with Muslims or Christians, that will

constitute direct discrimination. The scope is not limited to B's religion or belief, it is simply that B is treated less favourably *on grounds of* religion or belief.

4.3 Indirect discrimination

The idea of indirect discrimination has been around since the 1970s. It was imported into UK law from the US in the Sex Discrimination Act 1975. It caters for the situation where a group of people suffers from practices which, although not directed against the group on grounds of sex or race, nevertheless they have a greater impact i.e. they adversely affect that group more than they would others.

It is with this notion of indirect discrimination in mind that the regulations have been drafted, but they depart quite significantly from the well-worn pattern of indirect discrimination that previous laws have followed.

First of all, the definition in the regulations requires some provision or criterion or practice which the employee can draw attention to. It could be for example a height requirement, a requirement for educational attainment, a residence requirement, some provisions as to working hours or holidays or some term as to dress or grooming that a religious group might find it hard to comply with. Those things would all be 'facially neutral'. On the face of them they don't appear to discriminate but they could discriminate in terms of their *impact* on different religious groups.

Such a requirement has, under the terms of the regulations, to be applied without discrimination.

Secondly, the way indirect discrimination works is that it disadvantages people of the employee's group. And of course, particularly disadvantages the person who wants to use it and who brings the claim.

And the final element is that it cannot be shown to be a proportionate means of achieving a "legitimate aim". That is a reworking of the idea of 'justification' as applied in previous indirect discrimination laws.

So if there is a legitimate objective that the employer had in mind by introducing this neutral practice and it is not excessive, it is proportionate, then it is possible to have a defence.

That leaves open some questions. What does it mean to place someone at "a

particular disadvantage”, as the regulations say? What does “proportionate” mean? When is there a “legitimate aim”? Ultimately those would all be questions to be determined in the evolving case law of the employment tribunals.

But it is possible to get some idea of what the Government had in mind from the fact that it has not chosen to follow the examples from previous discrimination law. It obviously has something slightly different in mind here.

Perhaps the first thing to say about “particular disadvantage” is that it is not necessary for the employee to show that they just cannot comply with the requirement for reasons of religion. If they can comply but with *inconvenience* that may be enough still to bring a claim for discrimination.

This is different to previous discrimination laws which have referred to “cannot” comply with the test or condition or requirement. So, it establishes a lower standard for the employee to satisfy.

The second thing to say about “particular disadvantage” is that if the practice in previous discrimination law is followed, tribunals will not get involved in elaborate statistical analysis of how particular groups can comply with particular conditions. What they will tend to do is to apply a ‘broad-brush’ kind of approach. They will make their own broad assessment of, say, the impact of a requirement to work particular days on a religious group. They are not likely to carry out any research of their own.

4.4 Proportionality/legitimate aim

This replaces the idea of ‘justification’ which has appeared in earlier laws. The idea behind it is that the practice *does no more than is necessary* to protect the employer’s legitimate interests.

The key thing for us to notice is that the burden of proof will effectively fall on the employer to show why this particular practice or these terms were necessary.

4.5 The Exceptions

That is the basic position. But there are some exceptions that religious employers may want to use in order to defend themselves against claims of religious discrimination. It is these that we are particularly concerned with.

The drafting of regulations is quite convoluted here. We have two overlapping

exceptions both contained in Regulation 7. They both follow, although not completely, the wording from Article 4 of the Framework Directive.

The first is for what is described as a Genuine Occupational Requirement- in other words, that for the job in question, being of a particular religion or belief is a genuine occupational requirement. This applies potentially to *all* types of employers. So an entirely secular employer might in the right context be able to use this exception, as well as a specifically religious employer.

It applies to decisions to recruit, promote,¹⁰ transfer or train, but not to dismiss. That is something of a gap in the provisions.

4.6 Regulation 7 - Genuine Occupational Requirements

A comparison between the wording of draft regulation 7(2) and 7(3) reveals a significant difference in phrasing. The first Genuine Occupational Requirement exception (which applies to all employers) talks about religion or belief being a “genuine and determining occupational requirement”. The words “and determining” are missing from the second exception. We will come back to the possible significance of this later.

The second exception is one for *religious employers* particularly. The wording of Regulation 7(3) refers to where the employer has an ethos based on religion or belief.

To begin with the employer has to *show* that it has a religious ethos. This is why it is important to be up front about the working practices and assumptions of the organisation.

Then it has to be shown that being of a particular religion is a genuine occupational requirement for the post. You have to show that you have to have a person who is a Christian or a Muslim, or whatever it might be, for this job. “Genuine”, but not “determining”.

Finally, in the same way as the previous exception, the requirement has to be applied proportionately.

There are some key things to notice about this:

First, this is not a general exemption from all discrimination provisions for religious employers. It only relates to discrimination claims brought on the ground of religion or belief, and, notably, not to claims brought in relation to sexual orientation (there is no equivalent to Regulation 7(3) in those regulations).

Secondly, there is a grey area that is not covered expressly by these words. It is a concern that many religious employers may have about the *conduct* of their employees. Currently, of course, it is possible, and the law recognises this, to dismiss someone fairly on the basis that their conduct is inconsistent with the ethos of the organisation.

To take one example that appears in the cases: the Catholic school where a single woman who taught religious education became pregnant by a priest who visited the school. She was lawfully and fairly dismissed, the employment tribunal held.¹¹ Very probably that would be the same under the new law because it would be an area of conduct which falls outside of all of these regulations and it is quite possible that the courts would still hold that that was a fair dismissal. If, however, the conduct related to sexual orientation we would be into much more difficult ground.

5.0 Sexual orientation: examples of concern

The regulations on sexual orientation make it unlawful to discriminate in employment on the grounds of sexual orientation.

5.1 *Prohibited discrimination*

All discrimination in employment on the grounds of sexual orientation is prohibited by these regulations.

Any employer who refuses to employ someone because they are a homosexual, would be in clear breach of this regulation.

Only if being of a particular sexual orientation is a decisive requirement of the particular job can an employer justify discriminating.

- A health authority could argue that its sexual health workers who work with gay men must be homosexuals themselves to fully understand those they work with and to help young gay men feel comfortable with being a homosexual and so be happy to approach medical staff for sexual health advice. It is difficult to imagine any employment tribunal rejecting that line of argument.

It is much more difficult to think of examples of an employer who could successfully justify requiring a heterosexual as a defining requirement of the job.

- A marriage guidance counselling organisation could argue they need a *married* counsellor because only a person who is married can properly identify with the married couples he will be counselling.

In requiring a married person the organisation is indirectly discriminating against homosexuals because homosexual couples cannot marry. This discrimination may be justifiable provided that the organisation can demonstrate that being married is a decisive requirement of the job.

5.2 *Within a religious organisation*

The regulations define “sexual orientation” simply as an “orientation”. Whether this means homosexual conduct or just homosexual attraction is not at all clear. Yet this distinction is crucial for Christians.

There are many Christian organisations that would employ *celibate* faithful believers who experience sexual attraction to the same sex. But many would not employ someone who is practising homosexual.

Article 4 of the Directive contains a final paragraph permitting churches and other religious organisations to require individuals “working for them to act in good faith and with loyalty to the organisations ethos”. DTI officials now argue that these remarks only apply to the ground of religious belief. This interpretation hinges on the use of the word “thus” and the fact that the paragraph is not designated 4(3) but follows article 4(2) *and not* article 4(1).

The following assume that the DTI’s interpretation is correct.

Here are some examples of the problems:

- A Catholic Priest advertises for a live-in house-keeper. A homosexual man applies for the post. He makes clear at the interview that he is a Catholic who is an active homosexual and a member of a group pressing for a change of policy within the Catholic Church on homosexuality. He takes legal action when told his application will not be considered because his lifestyle is incompatible with Catholic teaching.
- An evangelical youth organisation recruits a full-time youth worker. When appointed the youth worker was asked if she was in a relationship. She was not. However, she subsequently begins a series of relationships with members of both sexes and later admits to having become a practising bisexual. The organisation feels unable to remove her from her position for fear of an expensive tribunal order against them. The organisation believes they would have no defence and that the tribunal would conclude that the dismissal was because of her ‘sexual orientation’.
- A Deputy Head of a Roman Catholic church school is discovered to be in a homosexual relationship with another member of staff. The powers for a church school to dismiss, recruit or promote staff on the basis of their faith are set out in Sections 58 to 60 of the 1998 School Standards and Framework Act. The regulations on religion *appear* to take account of this legislation. But the right to dismiss on the grounds of religion is not as clear as it should be and the regulations on sexual orientation make no reference at all to the School Standards and Framework Act. So the Diocese is powerless to dismiss the Deputy Head since it is a matter of his sexual orientation which is

protected by law. *What would happen if the Deputy Head committed adultery and not homosexual acts? Presumably he could still be sacked for adultery with a woman (at least until adulterers obtained tribunal rulings to bring them in line with homosexuals.)*

- A Christian Bible publishing business wants its Christian ethos to permeate all it does. A bright job interview candidate who is a regular church-goer declares that he is also ‘openly gay’. He quotes the teachings of theologians like Michael Vasey and Professor Countryman at the interview, arguing that Christ did not teach against loving homosexual relationships. The other candidates, though orthodox Christians, are not as well qualified. If the firm reject him in favour of another candidate, they fear a possible action for discrimination.
- A Christian solicitors practice has a policy of recruiting Christians whenever possible. All the partners are Christians. One of its assistant solicitors has been with the firm for 15 years, longer than any other employee. He announces that he is leaving his wife to live with another man. A few weeks later, the partners decide to invite one of the other assistant solicitors (who has only 5 years experience) to join them in the partnership. The homosexual man complains to an employment tribunal, alleging that he has been passed over for promotion because of his sexual orientation.
- A Christian couple run a small cafe employing three Christian ladies as waitresses. They affiliate the business to their local church and allow the church to use the premises for social gatherings and evangelistic coffee mornings. They encourage local Christians to use the place as a meeting point and display Christian literature around the premises in the hope that non-Christian patrons will become interested in the Christian faith. One of the waitresses lets it be known that she has moved in with her girlfriend and has started attending a Lesbian and Gay church. Other staff attempt over a period of weeks to persuade her to repent and to return to obeying orthodox Christian teaching on sexual morality. She refuses and leaves, claiming that they harassed her and that their repeated attempts to “convert her back to heterosexuality” were unbearable and amounted to constructive dismissal. She argues that her dismissal was unfair because it was based on her sexual orientation as a lesbian. In her action before an employment tribunal, the panel award substantial damages for injury to her feelings, as well as lost earnings. The couple are forced to sell the business in order to pay the award.

- A Pentecostal Bible college runs a university accredited course in theology. It advertises for Christian students. It offers the course to equip students to go into full time Christian ministry as church leaders. There are also students who take the course out of their own interests, not because they want to be a church leader. A gay rights group sees the advert and puts forward six people to apply for places. Each of them at the interview says that they have been attending church for several years. They also make clear that they regard traditional teaching on homosexuality as a wrong interpretation of scripture and draw attention to their sexual orientation. None of the six is offered a place. They launch a joint legal action to the employment tribunal alleging sexual orientation discrimination.

Under the regulations it is only possible to discriminate on the basis of sexual orientation if that is a genuine occupational requirement. It will be very difficult for a religious employer to show that they *need* a heterosexual for the job. Many churches would not, in fact, employ a practising heterosexual if that person was not married.

Churches will need to state that they are seeking to employ people who are either sexually celibate or married. The requirement to be celibate discriminates equally against homosexuals, heterosexuals and bisexuals. The requirement to be married indirectly discriminates against homosexuals since they cannot marry, though presumably a bisexual could.

As with the religion regulations churches will need to clearly state that employees are expected to model Christian behaviour. In particular for posts with any teaching responsibility there should be an explicit duty to teach, preach and promote abstinence education: that is sexual fidelity within marriage and abstinence outside.

6.0 Sexual orientation: legal definitions & exceptions

We will look at three areas:

1. the meaning of orientation,
2. what constitutes discrimination, and
3. the exceptions under the draft regulations.

6.1 *The meaning of 'orientation'*

Draft Regulation 2 of the sexual orientation regulations contain a marvellous circularity that “orientation means orientation”. It elaborates only by stating “Orientation towards”- so far as “towards” adds anything.

Of course, the definition covers not merely orientation if the orientation is homosexual or lesbian, i.e. attraction towards people of the same sex, but also heterosexual and bisexual orientation.

‘Orientation’ seems to have been chosen deliberately to be open-ended. It perhaps means attractions towards or the preferred choice of one’s sexual partner, or some kind of innate predisposition towards. So far as any light can be shed on the Government’s thinking, it perhaps comes in the explanatory notes that accompany the draft regulations. These are very keen to stress that ‘orientation’ does not mean sexual practice. The reason the Government is defensive about that (and it partly explains the way the regulations have been drafted) is that it wanted to meet a concern that there might be more than three sexual orientations. Paedophiles could claim, for example, that they had a sexual orientation towards children. So the Government makes the distinction, at least in the explanatory notes, between orientation on the one hand and particular sexual conduct and practices on the other.

The way that the definition has been drafted is intended to draw that out. One of the options was simply to state blandly that discrimination on the grounds of sexual orientation would be unlawful. That, though, would have carried the risk that the tribunal would fill it in with all kinds of others types as well as the three that have been specified. So the definition in Regulation 2 is intended to prevent this so that discrimination on grounds of orientation can only apply on these three bases and no other.

However, this might seem to open the possibility for those who want to make a distinction, as many religious employers will do, between innate preference or sexual attraction, and actually action in terms of conduct or practice. So is it possibly open to a religious employer to say, “Of course, we wouldn’t discriminate in terms of orientation. If someone was a celibate homosexual, we would have no problem employing them for this post. It’s only if they are active practising homosexual (i.e. it is carried through into conduct) that there is a difficulty.” There may be space for that distinction, because of the way the definition of orientation has been drafted, but it isn’t clear.

However, unfortunately, as soon as one runs down that line of argument, there is another difficulty. As with the religious discrimination provisions, indirect discrimination is also covered. That means something that, on the face it, is neutral but which in its impact puts a person or their group at a particular disadvantage and cannot be shown to be a proportionate response to a legitimate aim.

As a group, people of homosexual or lesbian or bisexual orientation are much more likely to engage in sexual *conduct* with people of the same sex than are those who are not of homosexual or bisexual orientation. So a requirement that employees abstain from same-sex conduct may run straight into the indirect discrimination problem.

The sexual orientation regulations cover the same three kinds of discrimination: direct, indirect, and victimisation and harassment

6.2 **Direct discrimination**

Direct discrimination under the regulations is treating someone less favourably because of their sexual orientation. It requires, as with the religious discrimination provisions, a comparison with how someone else who is not of that orientation would have been treated by the employer.

As with the religion provisions, the words “on the grounds of” cover quite a range of possible situations. For example, it covers not only the person themselves but also less favourable treatment because of the company they keep.

It also includes, in this case, *perception* i.e. the view that the employer or others may form of a person’s sexual orientation. There is no need either way to prove that in practice the person is gay, lesbian, bisexual or heterosexual.

Less favourable treatment on the basis of perception is what counts in terms of discrimination.

6.3 *Indirect discrimination*

As in the religious provisions it is indirect discrimination to apply a criterion or practice to people which disadvantages this person and their group and which cannot be shown to be a proportionate means of achieving a legitimate aim.

One related issue: in such sensitive areas it is very unlikely that there will be direct evidence of a person's sexual practices. Simply asking the question, for example at an interview, may well constitute harassment under these definitions. Simply enquiring into what a member of staff gets up to outside of office hours could amount to harassment on grounds of sexual orientation.

6.4 *The exception*

As with the religious provisions there is an exception. It is equivalent to the first exception under religion for genuine occupational requirement, so it is narrow. There is no second exception of the type we saw for religious employers.

The way this works is that it is a genuine occupational requirement of the job that a person be of a particular sexual orientation. And it has to be a "determining" qualification. This means it is not just a desired factor amongst a number of others, but it is the thing that clinches whether the person is suitable or not. So if they didn't have this attribute, they couldn't be employed in the job. Their sexual orientation, from the employer's perspective, is not just one of a number of factors- it is a pre-eminent factor.

As with the other exceptions that we have seen it must not be applied excessively and it only applies to recruitment and promotion decisions. It does not apply to decisions to dismiss. So even if, as an employer, you could successfully make the case for arguing that a particular practice or rule was defensible and not discriminatory when recruiting staff, if someone changes and becomes a practising homosexual, lesbian or bisexual after being appointed, they cannot then be dismissed. The employer cannot take advantage of this exception. They can take advantage of it in recruitment of the fact that there is a genuine occupational requirement, but they cannot dismiss them at present because of the way the regulation is drafted.

7.0 Harassment: Examples of concern

The regulations outlaw harassment at work as a form of direct discrimination.¹²

7.1 *Prohibited harassment*

The following example is based on a true story of a serious case of harassment:

- A young Christian man works in a factory. He is a simple lad who talks openly about his Christian faith in simple ways, urging his colleagues to consider the claims of Christ. Some of his colleagues on the factory floor mock him for his beliefs, swearing at him and pushing him around. His foreman sees this but does nothing. One day, they grab him and pull him to the floor, in full view of the foreman. One of them produces a hammer and a nail. They tell him that, since he loves Jesus so much, he should be able to identify with him better. They place the nail against the palm of his hand and pretend that they are going to hammer it in. They relent and let him go. Under the harassment regulations the young man could complain to an industrial tribunal about the harassment and the failure of his employers to put a stop to it.

Most people would consider that to be harassment, but under the harassment regulations much more trivial incidents would qualify. The reason for this is that the regulations requires the tribunal to have particular regard to the perception of the complainant. The DTI has decided against the “reasonable person” test, that is whether a reasonable person would regard the conduct in question as harassment.

It appears that most respondents in the DTI’s earlier consultation preferred this test. However, the DTI report that “there was significant concern, particularly amongst the lesbian and gay community, that the idea of a “reasonable person” test could reinforce rather than challenge prejudice.”¹³

The test applies to harassment under both the sexual orientation regulations and the religion regulations.

A hypersensitive staff member could find all sorts of things upsetting and could routinely allege that the behaviour of other staff violates his dignity or creates a hostile environment.

- An over-sensitive evangelical Christian finds it intimidating when other staff read their horoscopes at work. Should he be able to claim for harassment when the employer fails to put a stop to it?

In their consultation paper the DTI gives what it considers to be a clear case where a homosexual employee could make a complaint to a tribunal regarding an “intimidating environment”:

- “John is gay. You give him the job on merit. But one of your staff is giving him the cold shoulder. His behaviour is not violent. He does not use strong language. But the constant remarks about “outing” are clearly having an effect on John...”¹⁴

The fact that John believes that he is harassed must be taken into account by an employment tribunal even if a reasonable person would not deem it to be harassment.

7.2 *Within a religious organisation*

There is no difference in the way in which the harassment regulations apply to a religious organisation.

The following examples demonstrate the areas of concern:

- A church pastoral worker becomes a practising lesbian. She keeps her job after threatening to go to an employment tribunal if the church dismisses her. Other staff quietly reason with her, reminding her of Christian teaching and encouraging her to turn back to Christ. She claims the comments about her way of life “create a hostile and intimidating environment”. She sues for harassment.
- A church employs a verger who is a Christian. However, after a few years, he seems to lose his faith. The church fear dismissing him will result in a legal action and they decide to keep him on. However, they take issue with him when a student at the church reports seeing him in a pub drinking excessively. They tell him that he must not bring the church into disrepute by being seen in public drinking to excess. This happens several times and on each occasion they remonstrate with him, quoting biblical texts about drunkenness. He complains to an employment tribunal, alleging that the church is guilty of religious harassment against him because of his “agnosticism” and the fact that he refused to accept Christian teaching about alcohol.

- A Christian couple own a small hotel. They permeate the business with a Christian ethos, recruiting from local churches and urging staff to be as helpful and friendly as possible to present a ‘good witness’. The hotel advertises in Christian newspapers and magazines to solicit Christian clientele. Christian literature and posters for local church events are left in the lobby. One of the receptionists, recruited as a Christian, becomes a Jehovah’s Witness. She begins to introduce the subject of her religion in conversations with guests. Her employers feel they cannot dismiss her because of her new religion. This would result in a claim and they express to her the hope that she can continue to do her job just as well but without talking about matters of religion. She persists. Her employers tell her firmly that she must not talk about the beliefs of Jehovah’s witnesses at work. She complains that other staff are allowed to talk about the Christian faith but she is banned from talking about her own. Her employers insist and point out that her beliefs are regarded as heretical by Christians. She complains to an employment tribunal, alleging harassment.
- A firm of Christian solicitors has a policy of encouraging Christians to join the firm at all levels, but does not require all its staff to be Christian. They employ a very able IT administrator who they know to be a practising homosexual. All the staff are very friendly towards him and vice versa. However, the Christian staff are encouraged to share their faith by their largely Christian working environment. Several staff invite the IT administrator to church events. He explains that he does not agree with Christian teaching about homosexuality. Some of the staff explain that the Christian faith teaches that we are all sinners. They point out other examples of serious sin in the Bible. One person refers to 1 Corinthians 6 which says that idolaters, adulterers, homosexuals and drunkards will not inherit the kingdom of God, but then concludes “And such were some of you. But you were washed, but you were sanctified, but you were justified in the name of the Lord Jesus and by the Spirit of our God.” The administrator complains to an employment tribunal, making his claim against both the employer and the individuals who shared the gospel with him. The Bible verse is quoted in the legal papers as an example of how they created an intimidating and hostile environment which violated his dignity.

Finally it is important to note that under the regulations, harassment can also occur during a job interview. The limited exceptions for *recruitment* by religious employers could be undermined by this. If an interviewer asks searching questions about an applicant’s religious beliefs and unearths the fact that he holds

views which contradict those of the employer, will the applicant feel harassed and lodge a complaint? This might create a climate which discourages religious employers from properly assessing the beliefs of candidates.

8.0 A Human Rights challenge

As explained in paragraph 2.3 the Government has made a choice over how to legislate. It has chosen to legislate by way of delegated legislation under the European Communities Act. One of the implications of that choice is that the law is not protected from legal challenge in quite the same way it would be if it were an Act of Parliament. In particular, it means that it is more vulnerable to challenge on human rights grounds.

Article 9 of the European Convention on Human Rights contains some key words:

“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.”

This is not an unqualified right. It is possible to restrict it, including on the grounds of protecting the rights and freedoms of others (Article 9(2)).

The key thing is that freedom of religion in Europe is not just individual, it is collective. Of course the individual aspect is what the religious discrimination regulations are focusing on, but the human rights dimension, fully understood, includes a collective right as well. Religious organisations, denominations, churches and other bodies have freedom of religion rights of their own which are human rights. They must be respected internationally in Strasbourg. Because of the Human Rights Act 1998 they must be respected domestically in UK law also.

The decisions of the Strasbourg court recognise that when a state goes too far in interfering with the internal affairs, the religious autonomy, of a religious group, it may infringe Article 9. For example, a number of recent cases from Eastern Europe in which states interfered with religious appointments have been held to be a breach of Article 9.¹⁵

So the argument would be that Article 9 establishes a principle of autonomy for a religious group as regards its appointments, employment and, possibly, training which the state is obliged to recognise and not to trespass into.

Bearing all that in mind we turn to the Human Rights Act 1998 (HRA). This bites on the issue in a number of ways. First of all, every court and tribunal in the

country is required to interpret the law in such a way, as far as is possible to do so, so that it conforms with convention rights. That is Section 3 of the HRA.

So an employment tribunal dealing with a discrimination case has this obligation to interpret the regulations in such a way as to be Convention-friendly, to give effect to the principle of autonomy of religious groups.

So if there are ambiguous areas in the definition, it is arguable they should be resolved in favour of religious autonomy.

Secondly, if that is not possible, if the wording cannot be interpreted in that kind of way, this is where the legal basis becomes key. If this had been an Act of Parliament, all a court would have been able to do was to say that there is an incompatibility, but it stops at that.

However, because these are *regulations*, it is different. The court would have the power to strike them down - to declare them to be invalid.

That is the argument. There could be a claim that in so far as the regulations don't fully recognise the autonomy of religious groups (particularly here we would be looking at how the sexual orientation regulations might apply) then if they are found to be incompatible with Article 9 rights a tribunal or court might be able to treat them as if they were not law at all.

There is, of course, one problem with that: what weight would be given to the restriction in Article 9 about the rights and freedoms of others? The argument on the other side would be that the purpose of these discrimination provisions is to protect employees and so on. Nevertheless, it is a possible argument that might be used, ultimately, in the courts.

9.0 How the regulations are more restrictive than the directive

We would like to see the regulations amended to better protect churches and other religious employers. However, one argument that the Government is certain to use is that it is legally bound by the directive. The regulations it makes cannot go further than the directive in making provision to protect for churches and religious bodies.

But in actual fact, the Government has failed to use a number of safeguards which the directive contains.

9.1 Article 4(2)

Article 4(2) is a potentially much wider exemption on the grounds of religion than applies with the genuine occupational requirement exemption in Article 4(1).

Article 4(2) begins:

“Member States may maintain national legislation in force at the date of adoption of this Directive”.

The Government has chosen to do this in respect of the legislation affecting church schools. The regulations on religion state in Regulation 42 that they are “without prejudice to” the key legislation on church schools in England, Wales and Scotland. This legislation permits the dismissal, recruitment and promotion of staff based on their religious faith.

Are there other pieces of legislation which could have this same exemption status in the religion regulations?

Article 4(2) continues:

“Member States may... provide for future legislation incorporating national practices existing at the date of adoption of this Directive”.

There are very many existing employment practices which churches and religious bodies have practiced perfectly normally for centuries which the Government could chose to enshrine in legislation which is then ring fenced from the regulations.

The Government could, for example, apply to churches the very same legislation which applies to teachers in church schools. There is an *a fortiori* argument, from the greater to the lesser. Church schools are in the public sector and yet are protected by primary legislation, but churches themselves are in the private sector and are not. You would expect the state to exercise a greater degree of control over the employment practices of teachers in church schools, than you would over the employees of churches. At the very least we could have legislation to protect staff in churches involved with teaching responsibilities.

There will be many other examples of current employment practices carried out perfectly lawfully by religious bodies which could be enshrined in legislation and then protected from encroachment by the regulations.

9.2 The final paragraph of Article 4

Article 4 of the Directive concludes with these words:

“Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation’s ethos.”

The DTI argue that the final paragraph of Article 4 applies only to the exception for religion in Article 4(2) and not the genuine occupational requirement (GOR) of Article 4(1). Even if DTI was right, this final paragraph is about religious bodies requiring their employees to “act in good faith and with loyalty to the organisation’s ethos.”

This is about conduct. It includes many things, but it certainly includes sexual conduct. Religious bodies can argue that they have no objection to employing someone who experiences a same-sex attraction or bisexual attraction, provided they are either celibate or married.

9.3 Other aspects of the directive

Freedom of Association

Paragraph 5 of the directive states:

“(5) It is important to respect such fundamental rights and freedoms. This Directive does not prejudice freedom of association, including the right to establish unions with others and to join unions to defend one’s interests.”

Surely that is precisely what is put at risk by the Government's regulations.

Article 2 (5) states that

“This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.” (Emphasis added.)

No requirement to appoint those who are not competent

Paragraph 17 to the pre-amble states that

“(17) This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned...” (Emphasis added.)

Surely that is the argument which religious bodies have about employing people who are not believers. They cannot perform the spiritual duties. They are not competent to do so.

Encouragement to lay down specific exemptions on religion

Paragraph 24 of the pre-amble quotes a section from the Amsterdam Treaty about respecting churches and “with this in view” encourages Member states to lay down specific requirements on what constitutes legitimate exceptions:

“(24) The European Union in its Declaration No 11 on the status of churches and non-confessional organisations, annexed to the Final Act of the Amsterdam Treaty, has explicitly recognised that it respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States and that it equally respects the status of philosophical and non-confessional organisations. With this in view, Member States may maintain or lay down specific provisions on genuine, legitimate and justified occupational requirements which might be required for carrying out an occupational activity.” (Emphasis added.)

References

- ¹ SI Number: 1998/3162 (NI.21)
- ² Sex Discrimination (Gender Reassignment) Regulations 1999, SI 1999/1102, following *P v S*, [1996] ICR 795, ECJ.
- ³ *MacDonald v. Ministry of Defence*, Court of Appeal, 2002.
- ⁴ *Grant v South West Trains*, [1998] ICR 449, ECJ.
- ⁵ *Mandla v Dowell Lee* [1983] 2 AC 548.
- ⁶ *JH Walker v Hussain* [1996] IRLR 11.
- ⁷ Council Directive 2000/78/EC of 27 November 2000
- ⁸ The decision has been subsequently upheld by the Court of Appeal: *Williamson v Secretary of State for Education*, 12 December 2002.
- ⁹ *Board of Governors of St Matthias C of E Church School v Crizzle* [1993] ICR 401
- ¹⁰ There appears to be an oversight in the drafting of the regulations regarding promotion. The exception in Regulation 7 refers to one of the two subsections which deals with promotion but not the other. It is assumed this is inadvertent since it is clearly intended that promotion should be covered by the exception.
- ¹¹ *O'Neill v Governors of St Thomas More RCVA School and Bedfordshire CC* [1996] IRLR 372.
- ¹² The Draft Employment Equality (Religion or Belief) Regulations 2003, Regulation 5 and The Draft Employment Equality (Sexual Orientation) Regulations 2003, Regulation 5
- ¹³ *Equality and Diversity: The Way Ahead*, DTI consultation paper, October 2002, Para. 47
- ¹⁴ *Equality and Diversity: The Way Ahead*, DTI consultation paper, October 2002, Para. 43
- ¹⁵ See *Serif v Greece* (1999) 31 EHRR 561; *Hasan and Chaush v Bulgaria* (2000) 34 EHRR 55; and *Metropolitan Church of Bessarabia v Moldova*, judgment of 13 December 2001.

Implementing the EU Employment Directive

At present there are no laws which prevent churches and Christian organisations from employing only Christians. They have complete freedom to do so.

But a European Directive on employment brings this freedom to an end. It outlaws employment discrimination on various grounds including religion and sexual orientation.

The UK government has drafted regulations to implement the directive in UK law. The regulations contain some limited exceptions for churches and other religious employers, which the directive allows. But the exceptions are badly drafted and inadequate. So, for example, whilst a place of worship is allowed to *recruit* certain employees according to their religion, if it *dismisses* on religious grounds it can be sued in an employment tribunal.

In this booklet, Professor Ian Leigh, a leading human rights lawyer, and Colin Hart, an experienced Christian campaigner, analyse the draft regulations and their likely effect on religious employers.