Combating sexual orientation discrimination in employment:

legislation in fifteen EU member states

Report of the *European Group of Experts on Combating Sexual Orientation Discrimination* [1]

about the implementation up to April 2004 of *Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation*

17 United Kingdom

by Robert Wintemute [2]

[1] The European Group of Experts on Combating Sexual Orientation Discrimination (www.emmeijers.nl/experts) was established and funded by the Commission of the European Communities under the framework of the Community Action Programme to combat discrimination 2001-2006 (http://europa.eu.int/comm/employment_social/fundamental_rights/index_en.htm).
The contents of the Group's report do not necessarily reflect the opinion or position of national authorities or of the European Commission. The report, submitted in November 2004, aims to represent the law as it was at the end of April 2004; only occasionally have later developments been taken into account.
The full text of the report (including English versions of all 20 chapters and French versions of most chapters, plus summaries of all chapters both in English and French) will be published on the website just mentioned; links to it will be given on www.emmeijers.nl/experts.

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17.1 General legal situation

17.1.1 Constitutional protection against discrimination

Unlike the other fourteen Member States, the United Kingdom (UK) does not have a constitution that is codified, fully written, and entrenched (supreme over ordinary laws), and therefore has no constitutional protection against discrimination, or against violation of any other human right. The closest the UK has come to such protection is the passage of the Human Rights Act 1998 ,[3] which entered into force on 2 October 2000. The Human Rights Act incorporates into UK law most of the rights in the European Convention on Human Rights and its Protocols, and authorises UK courts to enforce these 'Convention rights', including Article 14. Cases of sexual orientation discrimination arising on or after 2 October 2000 in public sector employment (or in Acts of the Northern Ireland Assembly, the Scottish Parliament or the National Assembly for Wales dealing with employment) can therefore be challenged under the Human Rights Act. The main conditions are that the facts must fall 'within the ambit' of another Convention right,[4] and that the discrimination must not be authorised by any Act of the UK Parliament (ss. 6(1), 6(2)), with unclear Acts of the UK Parliament being interpreted 'if possible' in a way that avoids any discrimination (s. 3(1)).[5]

If an Act of the UK Parliament is clearly discriminatory, the Human Rights Act does not permit UK courts to 'strike it down' or annul or invalidate it. Instead, they may only make a 'declaration of incompatibility' (s. 4), which has no legal effect, but is intended to put political pressure on the UK Government to use (voluntarily) a 'fast-track' procedure to obtain the approval of the UK Parliament for regulations amending the Act declared incompatible. This 'fast-track' procedure is similar to the procedure for adopting regulations implementing EC Directives (see 17.1.3). If the UK Government refuses to cause the UK Parliament to amend the Act declared incompatible, the individual obtaining the declaration has no further recourse in UK law, but can take a case to the European Court of Human Rights (ECtHR) which, unlike a UK court, effectively has the power to 'strike down' an Act of the UK Parliament as a result of Article 46 of the Convention.

Because the Human Rights Act can only be enforced directly against a 'public authority' (which includes the regional legislatures but not the UK Parliament), or invoked in a limited way in relation to an Act of the UK Parliament, the Human Rights Act cannot be used directly to challenge sexual orientation discrimination by a private sector employer. It can only be used indirectly, e.g., Human Rights Act s. 3(1) can be invoked by a private sector employee as supporting an interpretation of another Act of the UK Parliament that would

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[3] See www.hmso.gov.uk/acts/acts1998.htm.
[4] The absence of a Convention right to employment does not render Article 14 inapplicable, as long as the sexual orientation discrimination has a sufficient effect on, e.g., 'private life' (which includes sexual orientation) or 'family life' in Article 8, or property interests (including pension or social security contributions) protected by Protocol No. 1, Article 1.
[5] See generally Wintemute, 2000.

protect them, where the other Act (such as unfair dismissal or other employment legislation) does apply to the private sector.

17.1.2 General principles and concepts of equality

There is no general unwritten principle of equality or non-discrimination that applies to Acts of the UK Parliament (apart from judicial discretion to avoid interpretations of unclear Acts that would result in discrimination), or to the private sector. The general principle governing the private sector is that of 'freedom of contract' (e.g., an employer may refuse to enter into an employment contract with a prospective employee for any reason).

'Public authorities' (see 17.1.1) are arguably subject to a general unwritten principle of equality or non-discrimination as part of UK administrative law. However, this principle has yet to have a significant impact in the area of sexual orientation discrimination. For example, UK courts found that the former rules requiring dismissal of lesbian, gay and bisexual (LGB) members of the armed forces did not breach any principle of UK administrative law.[6] For duties on 'public authorities' to 'promote equality of opportunity' between specific groups, see 17.1.8.

17.1.3 Division of legislative powers relating to discrimination in employment

Discrimination in employment in the UK is prohibited mainly by specific Acts of the UK Parliament. Unlike the Human Rights Act, these Acts do not usually apply to the entire country. The official name of the country is 'the United Kingdom of Great Britain and Northern Ireland'. Great Britain consists of England, Scotland and Wales. Thus, the UK has in some respects a 'quasi-federal' system with up to four territorial units to which laws can apply. However, for the purposes of anti-discrimination legislation, the UK has only two such units: Great Britain and Northern Ireland. Only the UK (or Westminster) Parliament (located in the City of Westminster in London) may pass anti-discrimination Acts for Great Britain; the Scottish Parliament (in Edinburgh) and the National Assembly for Wales (in Cardiff) have no competence to do so,[7] and there is not yet any separate legislature for England or any region of England. The UK also has four dependent territories in Europe: the Isle of Man (pop. 76,000), the Bailiwick of Guernsey (pop. 60,000), the Bailiwick of Jersey (pop. 87,000), and Gibraltar (pop. 29,000). Most EC law does not apply to the first three territories (except for EC law on free movement of goods). But in Gibraltar, most EC law does apply, and the Framework Directive must be implemented, as in Great Britain and Northern Ireland.

In the case of Northern Ireland, existing anti-discrimination legislation is a mix of Acts ('statutes') of the UK Parliament and the former Northern Ireland Parliament, and 'Orders', which are executive acts of the UK Government in London adopted as 'statutory instruments' (to be discussed below). Since 1998, the new Northern Ireland Assembly near Belfast (which replaces the former

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[6] See *R.* v. *Ministry of Defence, ex parte Smith* (3 November 1995), [1996] 1 All England Reports 257 (Court of Appeal).

[7] Scotland Act 1998, Schedule 5, Part II, Head L.2 ('equal opportunities' are expressly reserved to the UK Parliament); Government of Wales Act 1998, s. 22 (legislating for 'equal opportunities' is not one of the limited, executive powers transferred by the UK Government to the National Assembly for Wales).

Northern Ireland Parliament) has theoretically had competence to pass anti-discrimination Acts,[8] and therefore to amend or replace these Orders. However, disputes between political leaders of the Protestant and Roman Catholic communities have caused the frequent suspension of the Assembly's powers and the substitution of direct, executive rule by the UK Government in London. The Assembly has therefore not yet had a chance to exercise its competence in this area.

Apart from Northern Ireland, the other main exception to the use of Acts of the UK Parliament to prohibit discrimination is the implementation of EC Directives through 'regulations', which are also made as 'statutory instruments' by a minister of the UK Government, after the final draft of the regulations has been approved by resolutions of both Houses of the UK Parliament (the House of Commons and the House of Lords). Each House must accept or reject the regulations as a whole, and is not permitted to propose any amendments. Although a debate on the regulations may occur and clarify their intended scope, the UK Parliament almost always approves draft regulations. This procedure is expressly authorised by s. 2(2) of the European Communities Act 1972 (which provided for the UK's accession to the EEC in 1973), as long as the regulations do not increase taxation or create new criminal offences. Regulations are called 'secondary', 'delegated' or 'subordinate' legislation, whereas Acts of the UK Parliament are called 'primary legislation'.

Regulations may create a new set of separate and independent rules on a particular kind of discrimination, or they may amend one of the existing anti-discrimination Acts. The advantage of regulations for the UK Government is that they can be adopted much more quickly than an Act of the UK Parliament (which requires three readings and may be amended in each House), and with much less publicity (and therefore, potentially, with much less political controversy). This saves valuable time in the UK Parliament for matters that the UK Government considers more important for future electoral success than anti-discrimination legislation. The disadvantage of regulations for individuals and groups facing discrimination is that s. 2(2) of the 1972 Act permits the use of regulations only 'for the purpose of implementing any Community obligation of the United Kingdom' and 'for the purpose of dealing with matters arising out of or related to any such obligation'. Thus, when regulations are used to implement an EC Directive, they may not go beyond the requirements of that Directive, by providing more generous protection not 'arising out of' or 'related to' those requirements. Only an Act of the UK Parliament may do so.

17.1.4 Basic structure of employment law

Employment law in the UK is not codified (there is no Labour Code), and is instead found in a wide variety of specific, frequently amended Acts of Parliament, as well as some 'common law' rules.[9] Most employment legislation applies both to public sector and private sector employees (one example is the right not to be unfairly dismissed after one year of employment, see 17.1.6), although certain public sector employees (e.g., those in the armed forces or the police) are sometimes excluded. Public sector employees enjoy greater legal

[8] Northern Ireland Act 1998, Schedules 2, 3 ('equal opportunities' are not an excepted or reserved matter).
[9] Bowers, 2002.

protection in that they can challenge discrimination using the Human Rights Act or UK administrative law, whereas private sector employees cannot do so directly.

Although collective agreements between employers and trade unions might contain provisions prohibiting discrimination, these agreements generally are not legally enforceable by the parties. Instead, breach of a collective agreement provides a justification for a strike or other industrial action by the parties. It can be argued that a prohibition of discrimination found in a collective agreement, or in an employer's 'equal opportunities policy', was incorporated into the employment contracts between individual employees and the employer. However, UK courts have been reluctant to interpret such a prohibition as overriding an express term of the employment contract (e.g., a term on mandatory retirement at a certain age, or on benefits for a partner 'of the opposite sex').[10]

17.1.5 Provisions on sexual orientation discrimination in employment or occupation

As of 1 May 2004, UK anti-discrimination legislation (excluding new regulations implementing the Framework Directive) consists of the following Acts and Orders, all of which cover employment (and in most cases, access to professions or trades), and all of which have been subsequently amended:

Great Britain (grounds other than sexual orientation)

Equal Pay Act 1970 ('sex'; pay issues in employment)

Sex Discrimination Act 1975, Part II ('sex', 'gender reassignment', 'married persons'; non-pay issues in employment)

Race Relations Act 1976, Part II ('racial grounds', defined as 'colour', 'race', 'nationality', 'ethnic or national origins') (preceded by Race Relations Acts 1965 and 1968)

Disability Discrimination Act 1995, Part II ('disability')

Northern Ireland (grounds other than sexual orientation)[11]

Equal Pay Act (Northern Ireland) 1970 ('sex'; pay issues in employment) (Act of former Northern Ireland Parliament)

Sex Discrimination (Northern Ireland) Order 1976, Part III ('sex', 'gender reassignment', 'married persons'; non-pay issues in employment)

Race Relations (Northern Ireland) Order 1997, Part II ('racial grounds', defined as 'colour', 'race', 'nationality', 'ethnic or national origins')

Disability Discrimination Act 1995, Part II ('disability') (Act of UK Parliament)

Fair Employment and Treatment Order (Northern Ireland) Order 1998, Part III ('religious belief', 'political opinion') (replacing the Fair Employment (Northern

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[10] See *Taylor* v. *Scottish Prison Service* (11 May 2000), [2000] 3 All England Reports 90 (House of Lords) (age); *Grant* v. *South-West Trains Ltd.* (14 December 1997), [1998] Industrial Relations Law Reports 188 (High Court, Queen's Bench Division) (sexual orientation).

[11] Updated versions of the following Acts and Orders (except the 1995 Act) are available at www.northernireland-legislation.hmso.gov.uk/legislation/northernireland/nisr/yeargroups/index.htm.

Ireland) Acts 1976 and 1989, Acts of UK Parliament) (no equivalent for Great Britain).

None of this existing legislation expressly prohibits sexual orientation discrimination in employment or occupation. Only the regulations implementing the Framework Directive do so. For Great Britain and Northern Ireland, the first drafts of the two sets of Regulations and Explanatory Notes were published for consultation, and the final drafts of the Regulations were adopted, as follows:

Great Britain (sexual orientation)

Employment Equality (Sexual Orientation) Regulations 2003:

first draft[12] published on 22 October 2002; final draft[13] laid before UK Parliament on 8 May 2003, approved by House of Lords on 17 June 2003 and by House of Commons on 25 June 2003, adopted or 'made' by Jacqui Smith, Deputy Minister for Women and Equality, Department of Trade and Industry, on 26 June 2003 as Statutory Instrument 2003 No. 1661; in force on 1 December 2003; amended in a minor way by the Employment Equality (Sexual Orientation) (Amendment) Regulations 2003, Statutory Instrument 2003 No. 2827, made on 6 November 2003, in force on 1 December 2003.

Northern Ireland (sexual orientation)

Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003:

first draft[14] published on 3 February 2003; final draft[15] adopted or 'made' by Office of the First Minister and Deputy First Minister for Northern Ireland on 1 December 2003 as Statutory Rules of Northern Ireland 2003 No. 497; in force on 2 December 2003.

Gibraltar (sexual orientation)

Equal Opportunities Ordinance, 2004:

passed by the Gibraltar House of Assembly on 6 February 2004; given Royal Assent by the Governor of Gibraltar (and became law) on 26 February 2004; published in "First Supplement to the Gibraltar Gazette, No. 3,393 of 26th February, 2004"; in force on 11 March 2004 (Legal Notice 27 of 2004).

The UK does not have Penal Codes (the three territorial units for the purposes of its uncodified criminal law are England and Wales, Scotland, and Northern Ireland) and, since the 1960s, has chosen not to create any general criminal offence of direct or indirect discrimination. Instead, the UK has preferred to concentrate on compensating the victim through civil remedies, rather than punishing the discriminator.

[12] See www.dti.gov.uk/er/equality/wayahead.htm.
[13] See www.hmso.gov.uk/si/si2003/20031661.htm.
[14] See www.ofmdfmni.gov.uk/equalityofopportunity/index.htm.
[15] See www.northernireland-legislation.hmso.gov.uk/sr/sr2003/20030497.htm

17.1.6 Important case law precedents on sexual orientation discrimination in employment or occupation

Prior to the enactment of the Human Rights Act, the Convention was not part of UK law, which meant that public sector employees suffering sexual orientation discrimination could not rely on the Convention in a UK court. Instead, they took their cases to the ECtHR, which held on 27 September 1999 in *Smith & Grady* v. *UK* and *Lustig-Prean & Beckett* v. *UK*[16] that the UK's blanket ban on LGB members of the armed forces violated Convention Article 8 (respect for private life). The UK Government complied with the Court's judgements by permanently revising its policy on 12 January 2000. Since the Human Rights Act came into force on 2 October 2000, LGB public sector employees have been able to invoke Articles 8 and 14 of the Convention and the case law of the ECtHR, which requires a strong justification for all sexual orientation discrimination in public sector employment.

Almost every other case law precedent in the field of employment is negative. Although an employee has a right not to be unfairly dismissed after one year of employment, under the Employment Rights Act 1996, s. 94, it would appear that no reported decision of the Employment Appeal Tribunal (EAT) or any appellate court has ever accepted an unfair dismissal claim by an employee who alleged that they were dismissed because they were LGB.[17] Since 2 October 2000, a dismissed LGB employee (public or private sector) should have a greater chance of success, because they could insist that the tribunal or court interpret the concept of 'unfairness' in the 1996 Act, under Human Rights Act s. 3(1), in a way that avoids sexual orientation discrimination that would violate Articles 8 and 14 of the Convention. But the Human Rights Act made no difference in the recent case of *X* v. *Y* (see 17.3.7).

Like the European Court of Justice (ECJ) in *Grant* v. *South-West Trains*,[18] UK courts have rejected the argument[19] that sexual orientation discrimination is *also* sex discrimination, contrary to EC sex discrimination law or the Sex Discrimination Act 1975.[20] However, both the ECJ and UK courts might have to reconsider the sex discrimination argument in future cases that fall outside the material scope of the Framework Directive and the regulations implementing it, but within the material scope of existing and proposed Directives on sex

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[16] All judgements of the European Court of Human Rights cited in this Chapter are available at www.echr.coe.int/hudoc.htm.

[17] See e.g. *Royal Life Estates (South) Limited* v. *Campbell* (1 October 1993), No. EAT/914/92 (LEXIS); *Wiseman* v. *Salford City Council* (12 March 1981), [1981] Industrial Relations Law Reports 202 (EAT); *Saunders* v. *Scottish National Camps Association Limited* (3 April 1980), [1980] Industrial Relations Law Reports 174 (EAT), affirmed (7 May 1981), [1981] Industrial Relations Law Reports 277 (Court of Session, Inner House); *Boychuk* v. *H.J. Symons Holdings Limited* (7 Dec. 1977), [1977] Industrial Relations Law Reports 395 (EAT). For a non-appealed exception at the first instance level, see *Bell* v. *Devon & Cornwall Police Authority*, [1978] Industrial Relations Law Reports 283 (Industrial Tribunal).

[18] Case C-249/96 (17 February 1998), [1998] ECR I-621, paras. 27-28.

[19] See Koppelman, 1994; Wintemute, 1997; Bamforth, 2000; Wintemute, 2003 (*King's*).

[20] See *Ex parte Smith*, *supra* n.5 (3-0); *Smith* v. *Gardner Merchant*, (14 July 1998), [1998] Industrial Relations Law Reports 510 (Court of Appeal) (3-0); *Advocate General for Scotland* v. *MacDonald* (19 June 2003), [2003] Industrial Relations Law Reports 512 (House of Lords) (5-0), affirming *MacDonald* v. *Ministry of Defence* (1 June 2001), [2001] Industrial Relations Law Reports 431 (Court of Session, Inner House) (2-1, Lord Prosser accepted the argument and dissented), and *Pearce* v. *Mayfield Secondary School* (31 July 2001), [2001] Industrial Relations Law Reports 669 (Court of Appeal) (3-0, Lady Justice Hale accepted the argument and would have dissented but for the binding precedent of *Gardner Merchant*).

discrimination, or the Sex Discrimination Act 1975, which also applies to primary and secondary education, housing, and the provision of goods and services.

17.1.7 Provisions on discrimination in employment or occupation that do not (yet) cover sexual orientation

See the legislation listed under 17.1.5.

17.1.8 Provisions on sexual orientation discrimination in other fields than employment and occupation

Two Acts of the UK Parliament impose a positive obligation on selected public authorities to 'promote equality of opportunity' in relation to sexual orientation, instead of a negative obligation to refrain from sexual orientation discrimination in specific areas. The Northern Ireland Act 1998 provides in s. 75 that: '[a] public authority shall in carrying out its functions ... have due regard to the need to promote equality of opportunity -- (a) between persons of different ... sexual orientation ...' Schedule 9 provides that a public authority must draft an 'equality scheme' and have it approved by the Equality Commission of Northern Ireland, which can investigate complaints that the authority has failed to comply with its scheme. The authority's scheme must state its arrangements for 'assessing and consulting on the likely impact of [its] policies ... on the promotion of equality of opportunity' and for 'monitoring any adverse impact of [its] policies ... on the promotion of equality of opportunity'.

Similarly, the Greater London Authority Act 1999 provides in s. 404 that: '[i]n exercising their functions, it shall be the duty of -- (a) the Greater London Authority ..., (b) the Metropolitan Police Authority, and (c) the London Fire and Emergency Planning Authority, to ... have regard to the need -- (a) to promote equality of opportunity for all persons irrespective of their ... sexual orientation ...; (b) to eliminate unlawful discrimination; and (c) to promote good relations between persons of different ... sexual orientation.'

Although these duties are likely to encourage efforts to promote equal treatment of LGB individuals and same-sex couples, and to 'mainstream' these efforts into all policy formulation, it is not clear what specific substantive outcomes they require or how (apart from the rules on 'equality schemes' in Schedule 9 of the Northern Ireland Act 1998) they could be enforced.

17.2 The prohibition of discrimination required by the Directive

17.2.1 Instrument(s) used to implement the Directive

As mentioned in 17.1.3 and 17.1.5, the UK has implemented the Framework Directive for Great Britain and Northern Ireland through two 'statutory instruments' containing 'regulations'; both are executive acts of the UK Government. (In Gibraltar, the legislature implemented the Directive.) The implementing regulations or ordinance (Employment Equality (Sexual Orientation Regulations 2003, in force 1 December 2003; Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003, in force 2 December

2003; and Equal Opportunities Ordinances 2004, in force 11 March 2004) are completely separate from existing anti-discrimination legislation, and do not amend any such legislation. The following discussion will mainly consider the Great Britain Regulations (the 'GB Regulations') and Annex B to the 6 May 2003 Explanatory Memorandum that accompanied the final draft when it was laid before Parliament (the 'GB Explanatory Memorandum'), because the Explanatory Note at the end of the GB Regulations (as made on 26 June 2003) is much less detailed. Significant differences between the GB Regulations and the Northern Ireland Regulations (the 'NI Regulations'), or the Gibraltar Ordinance, will be mentioned.

17.2.2 Concept of sexual orientation (art. 1 Directive)

The English version of the Framework Directive uses the words 'sexual orientation'. The GB Regulations do the same. Regulation (reg.) 2(1) defines 'sexual orientation' as 'a sexual orientation towards - (a) persons of the same sex, (b) persons of the opposite sex, or (c) persons of the same sex and of the opposite sex'. This definition avoids using the words 'lesbian', 'gay' and 'bisexual', which many persons in the LGB community would have preferred, but also avoids using the word 'homosexual', which many persons in the LGB community consider clinical or offensive. The GB Explanatory Memorandum (Annex B, para. 5) clarifies the definition by using the (apparently non-legal) words 'lesbian', 'gay', 'bisexual' and 'straight', and makes it clear why a definition was considered necessary: sexual orientation 'does not extend to sexual practices and preferences (e.g. sado-masochism and paedophilia)' (a misleading statement discussed in 17.3.1).

The GB Regulations do not use pronouns in connection with 'sexual orientation' (e.g., 'on grounds of his or her [the victim's] sexual orientation'). Instead, like art. 1 Directive ('discrimination on the grounds of ... sexual orientation'), they refer to direct discrimination 'on grounds of sexual orientation' (reg. 3(1)(a)) and to harassment 'on grounds of sexual orientation' (reg. 5(1)). This has the advantage that, whether or not the ECJ will do so, UK courts will almost certainly interpret these concepts as covering direct discrimination against, or harassment of, an individual because of the sexual orientation of other individuals or groups with whom they associate (e.g., discrimination against a heterosexual individual, not because of their actual sexual orientation, but because they are perceived to be LGB or because they associate with LGB individuals). The Court of Appeal (of England and Wales) has already adopted this interpretation of the phrase 'on racial grounds' in s. 1(1)(a) of the Race Relations Act 1976.[21]

17.2.3 Direct discrimination (art. 2(2)(a) Directive)

Part II of the GB Regulations makes it unlawful 'to discriminate' with regard to various aspects of employment and vocational training, while Part I defines what is meant by the term 'to discriminate' in reg. 3(1)(a) (direct discrimination), and reg. 3(1)(b) (indirect discrimination). Reg. 3(1)(a) provides (emphasis

[21] *Weathersfield Ltd.* v. *Sargent* (10 December 1998), (Court of Appeal, England and Wales), [1999] Industrial Relations Law Reports 94.

added) that 'a person ('A') discriminates against another person ('B') if … (a) on grounds of sexual orientation, A treats B less favourably than *he treats or would treat* other persons'. Reg. 3(2) adds that '[a] comparison of B's case with that of another person under [reg. 3(1)(a)] must be such that the relevant circumstances in the one case are the same, or not materially different, in the other'. To demonstrate less favourable treatment 'on grounds of sexual orientation', an LGB individual or a same-sex couple will generally compare the treatment they received with the actual or hypothetical treatment of a heterosexual individual or a different-sex couple for whom all relevant circumstances (including, e.g., employment qualifications, but excluding sexual orientation and other irrelevant circumstances such as family name) are the same. Regs. 3(1)(a) and 3(2) correctly transpose art. 2(2)(a) Directive.

17.2.4 Indirect discrimination (art. 2(2)(b) Directive)

Reg. 3(1)(b) provides (emphasis added) that:

> 'a person ('A') discriminates against another person ('B') if ... A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same sexual orientation as B, but
>
> (i) which puts or would put persons *of the same sexual orientation as B* at a particular disadvantage when compared with other persons,
>
> (ii) *which puts B at that disadvantage*, and
>
> (iii) which A cannot show to be a proportionate means of achieving a legitimate aim.'

Reg. 3(1)(b) correctly transposes art. 2(2)(b) Directive,[22] except that it contains a 'double standing requirement': under reg. 3(1)(b)(i), the individual challenging indirect sexual orientation discrimination must be a member of the group 'put at a particular disadvantage' (the 'group membership requirement'); and under reg. 3(1)(b)(ii), the individual must herself or himself be put at that disadvantage (the 'individual disadvantage requirement'). This 'double standing requirement' has been imported from the Sex Discrimination Act 1975 ss. 1(1)(b), 1(2)(b), and the Race Relations Act, s. 1(1)(a), but neither branch of it is found in art. 2(2)(b) Directive. Although the Directive might permit the second branch (because an individual able to comply with the neutral criterion has no reason to complain), the first branch prevents (e.g.) a heterosexual individual disadvantaged by a criterion that particularly disadvantages LGB individuals from complaining about it (which could benefit LGB individuals). The first branch also requires the complainant to allege (and possibly prove) their sexual orientation (see 17.5.9). For these reasons the first branch is contrary to the Directive.

17.2.5 Prohibition and concept of harassment (art. 2(3) Directive)

Art. 2(3) Directive provides that '[h]arassment shall be deemed to be a form of [direct or indirect] discrimination within the meaning of [art. 2(1)]'. The GB Regulations use a different approach, treating 'harassment' as a separate concept from 'discrimination'. Part II of the GB Regulations makes it unlawful 'to

[22] See 17.4.1 on the justification test in reg. 3(1)(b)(iii).

subject to harassment a person' in various aspects of employment and vocational training,[23] while Part I defines what is meant by 'subject[ing] ... to harassment'. Reg. 5(1) provides that 'a person ('A') subjects another person ('B') to harassment where, on grounds of sexual orientation, A engages in unwanted conduct which has the purpose or effect of -- (a) violating B's dignity; or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B'. The Gibraltar Ordinance, section 8(1), provides that: 'A person subjects another person to harassment where, on the ground of sexual orientation, he engages in such conduct which has the purpose or effect of…' This formulation omits 'unwanted conduct' and substitutes 'such conduct'(meaning harassment), thereby defining (in a circular fashion) harassment as a type of harassment, and omitting the extremely important notion that conduct which might not otherwise appear to be harassment (e.g., touching an individual's shoulder) could be harassment if it is clearly unwanted. Reg. 5(2) adds that 'conduct shall be regarded as having [either effect (a) or effect (b)] only if, having regard to all the circumstances, including in particular the perception of B, it should reasonably be considered as having that effect'.

For the most part, regs. 5(1) and 5(2) correctly transpose art. 2(3) Directive. Reg. 5(1) is broader in one respect, in that the purpose or effect of the harassment need not be *both* a violation of the victim's dignity *and* the creation of an intimidating, etc. environment for them (which was perhaps a drafting error in art. 2(3) Directive). See GB Explanatory Memorandum (Annex B, para. 19).

But reg. 5(1) could be slightly narrower in two respects. First, reg. 5(1) refers to unwanted conduct 'on grounds of sexual orientation', which could be narrower than unwanted conduct 'related to [sexual orientation]' (art. 2(3) Directive). Second, Art. 2(3) Directive refers passively to 'unwanted conduct ... tak[ing] place', whereas reg. 5(1) speaks of a specific person (A) actively 'subject[ing]' a specific victim (B) to unwanted conduct.

Reg. 6(3) prohibits 'an employer ... [from] subject[ing] to harassment a person whom he employs ...'. The harasser (A) will often be another employee rather than the employer (and could also be a client or other third party). Under reg. 22, the employer is liable for A's harassment of B if it was done by A 'in the course of his employment ... whether or not it was done with the employer's knowledge or approval', unless the employer can prove that 'he took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of his employment acts of that description'. (The GB Regulations do not deal expressly with harassment by a client or other third party. But see 17.2.8.) The Directive does not specify how strict the employer's liability should be for harassment of an employee by another employee (or by a client or other third party). Consistency between the GB Regulations and the Directive will depend on how UK courts interpret reg. 22 (see 17.2.8), and on how the ECJ interprets this aspect of the Directive.

17.2.6 Instruction to discriminate (art. 2(4) Directive)

The UK Government seems deliberately to have omitted from the GB Regulations a provision implementing art. 2(4) Directive, even though the

[23] See regs. 6(3), 8(2), 10(4), 12(3)-(4), 13(3)-(4), 14(2), 15(3), 16(2), 19(1)-(2), 20(2), 21(2).

following provision appears in the Sex Discrimination Act, s. 39, and the Race Relations Act, s. 30:

> 'It is unlawful for a person --
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> (a) who has authority over another person; or
>
> (b) in accordance with whose wishes that other person is accustomed to act,
>
> to instruct him to do any act which is unlawful by virtue of Part II [employment] ... or procure or attempt to procure the doing by him of any such act.'

The reason for this omission is probably that Sex Discrimination Act s. 39 and Race Relations Act s. 30 are intended to permit enforcement in situations where instructions to discriminate have been given (i.e., there has been an 'attempt' to discriminate) but there is no 'victim' in a position to complain. The recipient of the instructions (e.g., an employee or an employment agency) might decline to carry them out (meaning that there is no victim), or if they do carry them out, the victim (e.g., a prospective applicant for employment) might not know about the instructions or have any other reason to suspect discrimination. But in either scenario, the recipient of the instructions might be willing to inform a third party. The Sex Discrimination Act and the Race Relations Act supply this third party by establishing enforcement bodies, the Equal Opportunities Commission and the Commission for Race Equality, which are granted exclusive powers to enforce Sex Discrimination Act s. 39 and Race Relations Act s. 30.[24] However, the UK Government did not want to establish a separate enforcement body for sexual orientation discrimination, and chose not to grant enforcement powers in relation to such discrimination to the Equal Opportunities Commission (which deals with sex discrimination) (see 17.5.2). Nor did it make instructions to discriminate on grounds of sexual orientation a criminal offence, enforceable by the police (see 17.1.5).

When will this omission matter? For example, a heterosexual employer could give a heterosexual employee, or an employment agency, instructions to reject all applicants for employment who appear to be LGB. If the heterosexual employee refused to comply and was dismissed by the heterosexual employer, the heterosexual employee could bring a case under the GB Regulations, because 'on grounds of sexual orientation' would apply to discrimination because of the job applicants' sexual orientations.[25] However, if the heterosexual employee refused to comply and suffered no adverse consequences, there would be no victim of discrimination (e.g., an LGB job applicant). Similarly, if the employment agency refused to comply and lost the employer's business, the GB Regulations would not apply, because the employment agency is not the employee of the employer, and there would be no victim of discrimination (e.g., an LGB job applicant). Also if either the heterosexual employee or the employment agency reluctantly complied to avoid dismissal or the loss of the employer's business, there might be no victim of discrimination (e.g., an LGB job applicant) who was aware of the instructions or had any other reason to suspect discrimination. In this situation of 'no victim' or

[24] See Sex Discrimination Act ss. 67(1), 72; Race Relations Act, ss. 50(1), 63.
[25] See Weathersfield, supra n. 21.

an 'unknowing victim', neither the heterosexual employee nor the employment agency, who are fully aware of the instructions, could inform any third party who would have the power to enforce the prohibition in art. 2(4) Directive. The same is true of the Gibraltar Ordinance, even though it includes 'an instruction by a person who has authority over another person to do [a discriminatory] act' in the definition of 'discrimination' in section 2 of the Ordinance.

17.2.7 Material scope of applicability of the prohibition (art. 3 Directive)

(a) *Employment: hiring, promotions, pay, other working conditions, dismissal*

The GB Regulations correctly transpose arts. 3(1)(a) and 3(1)(c) Directive, because they apply to virtually all public and private sector jobs including the armed forces (regs. 2(3) 'employment', 10, 36-38), and to sexual orientation discrimination in relation to being hired initially by the employer (reg. 6(1)), to being promoted within the hierarchy once hired (reg. 6(2)(b)-(c)), to pay[26] and other working conditions once hired (reg. 6(2)(a)-(d)), and to being dismissed by the employer (reg. 6(2)(d)). The GB Regulations also cover contract workers (reg. 8),[27] and employment agencies (reg. 18). Reg. 9A covers the trustees or managers of an occupational pension scheme.

(b) *Access to self-employment or occupation*

The GB Regulations do not contain any general prohibition of sexual orientation discrimination in 'access ... to self-employment or to occupation', as art. 3(1)(a) Directive requires. They do contain a number of specific prohibitions, which will cover many and perhaps most situations of self-employment or occupation, but it is possible that some situations could fall outside these prohibitions. The specific prohibitions protect pupils (trainees) and tenants (members) of barristers' chambers in England and Wales (reg. 12), pupils of advocates in Scotland (reg. 13),[28] partners and prospective partners in firms (e.g., of solicitors or accountants) (reg. 14), and persons applying for or holding qualifications needed for a particular profession or trade (e.g., a medical doctor or a dentist) (reg. 16).

(c) Access to vocational guidance and training

The GB Regulations appear to cover access to 'all types and ... all levels of vocational training', as art. 3(1)(b) Directive requires. If the training constitutes a benefit provided by an employer to existing employees, it is covered by reg. 6(2)(b)-(c). If the training is provided by a university or another institution within the further or higher education sectors, it is covered by reg. 20. All other vocational training is covered by reg. 17, unless it is provided by a school.

The exception for schools is probably consistent with art. 3(1) Directive, which states that the Directive shall apply '[w]ithin the limits of the areas of competence conferred on the Community'. Most commentators would agree

[26] Although 'pay' is not mentioned, it is covered by reg. 6(2)(a) which prohibits discrimination 'in the terms of employment which [the employer] affords [the employee]'.
[27] Contract workers are the 'individuals' working in a situation where 'a person (A) …makes work available for doing by individuals who employed by another person who supplies them under a contract made with A'.
[28] Barristers, advocates and their pupils are (or are in training to become) self-employed lawyers who specialise in appearing before trial and appellate courts.

that the Community has no general competence in the area of education, but this is an area where 'vocational training' and 'education' of pupils aged 14 to 18 could overlap, as 'vocational training' and 'education' in universities overlap. See GB Explanatory Memorandum (Annex A, para. 63).

'Vocational guidance' is not mentioned in regs. 17 and 20 (only in reg. 18(6)(b) on employment agencies), and 'practical work experience' is mentioned in reg. 17(4) 'training', but not in reg. 20. However, both regs. 17(1)(d) and 20(1)(c)(iii) cover 'subjecting [a person] to any other detriment', and reg. 20(1)(c)(i) covers refusing 'access to any benefits', which should include denial of opportunities for vocational guidance or practical work experience.

(d) Organisations of workers, employers and professionals

Reg. 15 correctly implements art. 3(1)(d) Directive. Reg. 15 prohibits sexual orientation discrimination by any 'trade organisation', defined as 'an organisation of workers, an organisation of employers, or any other organisation whose members carry on a particular profession or trade for the purposes of which the organisation exists'. The prohibition covers 'membership' and its terms, 'benefits', and 'any other detriment', which should encompass 'involvement in' the organisation.

17.2.8 Personal scope of applicability: natural and legal persons whose actions are the object of the prohibition

The GB Regulations make it clear that the employer (whether it is a natural person or a company, partnership or other legal person) is liable for the acts of its employees in the course of their employment (reg. 22(1)), and for the acts of agents acting with its express or implied authority (reg. 22(2)). In *Burton & Rhule* v. *De Vere Hotels Ltd*, the Employment Appeal Tribunal held under the Race Relations Act 1976 that the employer will also be liable for the acts of third parties (e.g., clients) 'if the event in question was something which was sufficiently under the control of the employer that he could ... have prevented the harassment [or other discrimination] or reduced the extent of it'.[29] Under *Burton*, if there is sufficient control, the employer will be found (by failing to take preventive or mitigating action) to have 'subject[ed] to harassment a person whom he employs', which is contrary to reg. 6(3). However, in *Pearce v. Governing Body of Mayfield Secondary School*,[30] all five Law Lords said that they considered *Burton* wrongly decided, even though their prior conclusion, that there had been no sexual harassment constituting sex discrimination in *Pearce*, meant that it was unnecessary to consider the employer's liability for harassment by a third party. Once the GB Regulations are in force, UK courts will have to decide whether to follow *Burton* or *Pearce*, especially in view of their duty to interpret the GB Regulations consistently with the Directive (if possible), and the possibility that the ECJ will interpret the Directive as imposing liability on employers for harassment of employees by third parties where the employer has sufficient control over the situation.

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[29] *Burton & Rhule v. De Vere Hotels Ltd* (18 September 1996), [1996] Industrial Relations Law Reports 596, 600 (Employment Appeal Tribunal).

[30] See *MacDonald v. Advocate General for Scotland, Pearce v. Governing Body of Mayfield School* (19 June 2003), [2003] Industrial Relations Law Reports 512 (House of Lords) (5-0) (two cases decided together by one judgement).

In addition to the liability of the employer, the employee, agent or third party who actually commits the act of harassment or other act of discrimination may be held liable under reg. 23(1)-(2) for aiding another person to do an unlawful act.

17.3 What forms of conduct in the field of employment are prohibited as sexual orientation discrimination?

It is assumed in my responses under the following headings that the ECJ will not interpret the Directive as excluding the particular category described in the headings of this paragraph from its notion of discrimination. If the ECJ rules that some of these categories do not constitute sexual orientation discrimination, then of course the GB Regulations need not cover the particular category in question.

17.3.1 Discrimination on grounds of a person's actual or assumed heterosexual, homosexual or bisexual preference or behaviour

*(a) Actual preference or beha*viour

The definition of 'sexual orientation' in reg. 2(1) would cover, at the very least, a 'sexual preference', 'sexual inclination' or 'sexual attraction' which the individual has not acted on, or with respect to which there is no evidence that the individual has acted on it (i.e., being a celibate LGB individual). The definition does not make it clear that it includes acting upon the sexual orientation, e.g., by engaging in same-sex sexual or other intimate activity or by establishing a same-sex partnership. However, UK courts are likely to apply the definition to less favourable treatment of same-sex sexual or other intimate activity (compared with different-sex activity) or of same-sex partnerships (compared with different-sex partnerships), in light of the case law of the ECtHR (which clearly protects such activity and partnerships),[31] Human Rights Act s. 2 (which instructs UK courts to take into account the case law of the ECtHR), and the fundamental rights case law of the ECJ.

The GB Explanatory Memorandum (Annex B, para. 5) states misleadingly that sexual orientation 'does not extend to sexual practices and preferences (e.g. sado-masochism and paedophilia)'. The Memorandum should instead have stated that sexual orientation: 'does not extend to aspects of sexual practices and preferences other than the fact that the practices and preferences involved are same-sex, opposite-sex or both. For example, it does not extend to the use of force (e.g. in sado-masochism) or to the ages of the parties (e.g. in paedophilia), as long as regulation of the use of force and of the ages of the parties is neutral as between practices and preferences that are same-sex, opposite-sex or both.'[32] The NI Explanatory Notes (para. 8) add to the confusion by stating that sexual orientation 'does not extend to illegal sexual practices such as paedophilia'. This statement is inaccurate because direct sexual

[31] ECtHR, *Dudgeon* v. *UK* (22 Oct. 1981); *A.D.T.* v. *UK* (31 July 2000); *L. & V.* v. *Austria* (9 Jan. 2003); *Karner* v. *Austria* (24 July 2003).
[32] In *Laskey* v. *UK* (19 February 1997), the ECtHR implied (para. 47) that it might have found a violation of the Convention if there had been evidence of discrimination against same-sex sado-masochism.

orientation discrimination can occur where either the law (in its formulation or its enforcement) or a specific employer does not treat illegal same-sex sexual activity in the same way as illegal different-sex sexual activity (see 17.3.7).

(b) Assumed preference or behaviour

For the purposes of direct sexual orientation discrimination (reg. 3(1)(a)), it is the discriminator's perception that counts. It should therefore not matter that the discriminator has mistakenly assumed, for example, that an applicant for employment is lesbian, even though she is in fact heterosexual. The GB Explanatory Memorandum (Annex B, para. 9) makes this clear: 'Direct discrimination 'on grounds of sexual orientation' can also include discrimination based on A's perception of B's sexual orientation, whether the perception is right or wrong.' See also 17.2.2 on non-use of pronouns.

17.3.2 Discrimination on grounds of a person's coming out with, or not hiding, his or her sexual orientation

UK courts are likely to find discrimination 'on grounds of sexual orientation' where an LGB employee suffers discrimination because they came out as LGB to co-workers, clients or the media. This should constitute direct sexual orientation discrimination under reg. 3(1)(a), because a heterosexual employee would not suffer discrimination because they 'came out' as heterosexual (i.e., confirmed the social presumption that everyone is heterosexual unless there is some evidence to the contrary). However, this will generally be a hypothetical comparison, because heterosexual employees rarely find it necessary to come out by expressly saying 'I am heterosexual', as opposed to referring to their different-sex partner or displaying a picture of their partner (or of another different-sex person they find attractive). An employer might therefore argue that sexual orientation is a private matter, and that they have a neutral policy of dismissing every employee who publicly states that they are LGB or heterosexual. A dismissed LGB employee could respond that this neutral policy is indirect sexual orientation discrimination under reg. 3(1)(b), because LGB employees, as members of a minority, have a greater need to state their sexual orientation and therefore rebut the social presumption of heterosexuality.[33]

It is worth noting that, although the ECtHR stressed in its *Smith & Grady* and *Lustig-Prean & Beckett* judgements that the applicants had not come out voluntarily but had been outed by third parties,[34] the new policy of the UK armed forces permits LGB employees to come out in the workplace.[35]

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[33] See *Boychuk*, *supra* n.15.
[34] ECtHR, *Smith & Grady* v. *UK* (27 Sept. 1999), paras. 90-91; *Lustig-Prean & Beckett* v. *UK* (27 September 1999), paras. 83-84. In both cases, the Court noted that reports from third parties had prompted 'investigations into their sexual orientation, a matter which, until then, each applicant had kept private'.
[35] Ministry of Defence Press Release 002/2000 (12 January 2000), New Code of Conduct for Armed Forces Personnel, Notes for Editors: '1. The Armed Forces will no longer require people to disclose their sexual orientation either at the recruitment stage, or during their service in the Forces. If people declare themselves to be homosexuals, then that is a matter for them. No special arrangements will be made for anyone who has made such a declaration.'

17.3.3 Discrimination between same-sex partners and different-sex partners

Same-sex partners are excluded from civil marriage in the UK, and no alternative registration system with significant legal consequences exists at the national or regional level, whether for same-sex or different-sex partners. (Recognition of same-sex marriages or registered partnerships from outside the UK is a separate matter.)

(a) Unmarried same-sex partners vs. unmarried different-sex partners

UK courts are likely to find that the denial of employment rights or benefits to unmarried same-sex partners, when those rights or benefits are made available to unmarried different-sex partners, is discrimination on 'grounds of sexual orientation' contrary to the GB Regulations. The UK Government does not refer to this question in the GB Explanatory Memorandum (Annex B, paras. 21, 74, 75), but has accepted this interpretation of the Directive in two consultation documents.[36]

On 5 Nov. 2002, in *Ghaidan v. 2*,[37] the Court of Appeal (of England and Wales) held under the Human Rights Act that failure to interpret a provision of the Rent Act 1977 ('a person who was living with the original tenant as his or her wife or husband shall be treated as the spouse of the original tenant') as including both same-sex and different-sex unmarried partners would result in sexual orientation discrimination violating Convention Articles 14 and 8 (respect for home). On 24 July 2003, the ECtHR agreed with this conclusion in the virtually identical housing succession case of *Karner v. Austria*, as did the House of Lords in affirming the Court of Appeal in Ghaidan on 21 June 2004.[38] Likewise, under its fundamental rights case law, the ECJ would proabably follow Karner in interpreting the Directive, rather than *Grant v. South West Trains*.

(b) Unmarried same-sex partners vs. married different-sex partners

Where an employment benefit is provided only to married different-sex partners of employees, employees with unmarried same-sex partners could argue that this is direct sexual orientation discrimination under reg. 3(1)(a) (because the employer's rule incorporates a criterion, capacity to contract a civil marriage, that contains direct sexual orientation discrimination),[39] or indirect sexual orientation discrimination under reg. 3(1)(b) (because, even if the employer's rule can be characterised as 'neutral', it is clearly far more difficult for same-sex partners to comply with it than for different-sex partners). However, reg. 25 precludes these arguments by creating an express exception: 'Nothing in [the GB Regulations] shall render unlawful anything which prevents or restricts access to a benefit by reference to marital status.' The GB Explanatory

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[36] *Towards Equality and Diversity* (Dec. 2001), www.dti.gov.uk/er/equality/consult1.htm , paras. 12.7, 12.8; *Equality and Diversity: The Way Ahead* (Oct. 2002), www.dti.gov.uk/er/equality/wayahead.htm, para. 80: 'Where the rules of the pension scheme ... restrict benefits to opposite sex partners – whether or not they are married to the pension holder – we expect that this will constitute unlawful direct discrimination.'

[37] *Ghaidan v. Mendoza*, [2002] 4 All England Law Reports 1162 (Court of Appeal, of England and Wales). See Wintemute, 2003 (Public Law).

[38] *Ghaidan v. Godin-Mendoza*, (21 June 2004) [2004] UKHL 30, www.parliament.the-stationery-office.co.uk/pa/ld200304/ldjudgmt/jd040621/gha-1.htm (House of Lords).

[39] It is well established in UK anti-discrimination law that a rule can be directly discriminatory if it incorporates by reference another directly discriminatory rule. See *James* v. *Eastleigh Borough Council* (14 June 1990), [1990] 2 All ER 607 (House of Lords) (swimming pool prices incorporated direct sex discrimination in retirement ages).

Memorandum (Annex B, para. 74) states that 'rules based on marriage cannot be challenged as indirectly discriminatory', and gives the example of 'survivor benefits in an employer's occupational pension scheme [that] are only available to the widow(er) [i.e., the legal spouse] of a deceased employee'. The Memorandum cites (Annex B, para. 75) non-binding recital 22 from the Directive's preamble, and argues that '[d]istinctions between the rights of married and unmarried people are outside the scope of Community competence, because marriage is a family law concept which is regulated by the laws of the Member States'.

Whether or not reg. 25 is permitted by the Directive will depend on how much weight (if any) the ECJ will give to non-binding recital 22, and on whether or not the ECJ will decide that excluding same-sex partners who are legally unable to marry from employment benefits limited to married partners is direct or indirect sexual orientation discrimination, taking into account the possibility of justification under art. 2(2)(b)(i) or 2(5) Directive. In *KB* v*. National Health Service Pension Agency*, the ECJ held that it is sex discrimination, contrary to Article 141 EC, to deny a pension for surviving legal spouses of employees to the transsexual male partner of a non-transsexual female employee, who is currently unable to marry him. Although the ECJ held that '[t]he decision to restrict certain benefits to married couples while excluding all persons who live together without being married is either a matter for the legislature to decide or a matter for the national courts as to the interpretation of domestic legal rules, and individuals cannot claim that there is discrimination on grounds of sex, prohibited by Community law', *KB* did not involve a claim of direct or indirect sexual orientation discrimination.[40]

The ECJ's interpretation of the Directive may in turn be greatly influenced by the case law of the ECtHR on this question. Although the ECtHR has so far declined to find a violation of Articles 8 and 14 of the Convention where unmarried different-sex partners (rather than their children) are treated less favourably than married different-sex partners, a key factor in its reasoning was that the unmarried different-sex partners were legally able to marry and chose not to do so, or neglected to do so.[41] The applicant same-sex partner in the pending case of *M.W.* v. *UK*[42] will be able to stress to the ECtHR that he could not qualify for bereavement benefits because he was legally unable to marry his deceased partner. Since *Thlimmenos* v. *Greece* (6 April 2000), the ECtHR has accepted that indirect discrimination can sometimes violate Article 14 of the Convention (combined with another Article), i.e., 'when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different' (para. 44).

On 26 April 2004, Mr. Justice Richards delivered his judgement in *R.* v. *Secretary of State for Trade and Industry, ex parte Amicus - MSF Section, et al.*, in which six trade unions challenged reg. 25 as contrary to the Directive, or

[40] ECJ, case C-117/01, Judgment of 7 Jan. 2004, paras. 28, 34-36.
[41] See ECtHR, *Saucedo Gómez* v. *Spain* (26 January 1999), Application No. 37784/97 (inadmissible); *Shackell* v. *UK* (27 April 2000), Application No. 45851/99 (inadmissible).
[42] Application No. 11313/02 (communicated to UK Government). The similar case of *Mata Estevez* v. *Spain*, Application No. 56501/00, was declared inadmissible on 10 May 2001, probably because the applicant was not represented by a lawyer, and therefore could not present the arguments for departing from the case law of the former European Commission of Human Rights.

to Articles 8 and 14 of the Convention (via the Human Rights Act 1998).[43] He held that reg. 25 is compatible with both the Directive and the Convention. With regard to the Directive, he concluded that: (i) Recital 22 limits the scope of the Directive (and that the ECJ's reasoning in *KB* applies only to transsexual individuals); (ii) there is no direct sexual orientation discrimination (the distinction is based on marital status); (iii) there is no indirect sexual orientation discrimination (according to the ECJ in *Grant*, *D. & Sweden* and *KB*, a same-sex couple cannot be compared to a married different-sex couple); and (iv) any prima facie indirect sexual orientation discrimination is objectively justified by the UK Government's social policy of supporting marriage and avoiding the cost of benefits for unmarried different-sex partners.[44] With regard to the Convention, he found: (i) no violation of Article 8, either because the GB Regulations provide more legal protection than existed before and therefore do not interfere with any Article 8 right, or because any interference is justified under Article 8(2) for the same reasons that any prima facie indirect discrimination under the Directive is justifiable; and (ii) no violation of Article 14 combined with Article 8, either because there is no 'difference of treatment in the enjoyment of rights falling within the ambit of the Convention', or 'same-sex couples and married couples are not in an analogous situation'.[45] He was not asked to refer any questions to the ECJ.

(c) Registered same-sex partners vs. married different-sex partners

There are not yet any registered partners in the UK, but on 30 June 2003 the UK Government published a consultation document on a registration system in England and Wales for same-sex couples only (the three territorial units for the purposes of family law are England and Wales, Scotland, and Northern Ireland).[46] Similar documents were published with respect to Scotland on 10 September 2003 and Northern Ireland on 18 December 2003.[47] On 30 March 2004, the UK Government introduced the Civil Partnership Bill in the House of Lords of the UK Parliament. The Bill will permit same-sex couples throughout the UK to register their partnerships and obtain most, if not all, of the rights and obligations of married different-sex couples. However, the Bill does not expressly require employers (especially in the private sector) to provide the same employment benefits to the same-sex 'civil partners' of employees as to their different-sex married partners. (It is possible that future regulations, made exercising the general power the Bill grants to UK Government ministers to equalise the treatment of civil and married partners, could do so by amending reg. 25.) If an employer treated civil partners less favourably than married partners with regard to a particular benefit (e.g., a survivor's pension), the result under the GB Regulations would probably be the same as in 17.3.3(b) (the validity of the difference in treatment would depend on the validity of reg. 25

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[43] *R. v. Secretary of State for Trade and Industry, ex parte Amicus – MSF Section, et al.,* Case Nos. CO/4672/2003, etc., High Court, Queen's Bench Division, Administrative Court (London), www.courtservice.gov.uk/judgmentsfiles/j2478/amicus-v-ssti.htm.

[44] See paras. 158-169.

[45] See paras. 187-189, 198-199.

[46] Department of Trade and Industry, Women and Equality Unit, 'Civil Partnership: A framework for the legal recognition of same-sex couples', www.womenandequalityunit.gov.uk/research/index.htm.

[47] Scottish Executive, 'Civil Partnership Registration: A legal status for committed same-sex couples in Scotland', www.scotland.gov.uk/consultations/justice/cprs.pdf; Office of Law Reform, 'Civil Partnership: A legal status for committed same-sex couples in Northern Ireland', www.olrni.gov.uk/PDFs/CPRFINAL.pdf.

under the Directive or the Convention). In *D. & Sweden* v. *Council*,[48] the ECJ was unwilling to require the equal treatment of registered same-sex partners and married different-sex partners, as a matter of EC law.

(d) Children of unmarried same-sex partners

The most common situation would be where the unmarried female partner of a lesbian employee has a child through donor insemination, which the employee and her partner are raising together. Under the Adoption and Children Act 2002 (England and Wales), s. 51(2) (not yet in force), the employee will be able to adopt her partner's child and therefore become its legal parent. However, a heterosexual male employee whose unmarried female partner has a child through donor insemination is automatically the legal father of the child, and no adoption is necessary, as long as they are treated by the fertility clinic together[49] (and the Civil Partnership Bill will not change this for female-female civil partners). If the employer grants a benefit to the child of the heterosexual male employee (including leave to the heterosexual male employee to care for the child when it is ill), but not to the child of the lesbian employee (before she has been able to adopt her partner's child), this would be direct sexual orientation discrimination caught by reg. 3(1)(a) (because the employer's rule incorporates a criterion, legal parenthood, that contains direct sexual orientation discrimination as applied to donor insemination),[50] or indirect sexual orientation discrimination under reg. 3(1)(b) (because, even if the employer's rule can be characterised as 'neutral', it is clearly far more difficult for a female-female couple to comply with it than for a male-female couple).

17.3.4 Discrimination on grounds of a person's association with gay/lesbian/bisexual/heterosexual individuals, events or organisations

The GB Explanatory Memorandum (Annex B, para. 10) makes it clear that a heterosexual individual's associating with LGB individuals is covered: '[D]irect discrimination 'on grounds of sexual orientation' covers discrimination against a person by reason of the sexual orientation of someone else -- for example, a person who is discriminated against because they associate with gay friends ...' See also 17.2.2 on non-use of pronouns.

The analysis of an LGB or heterosexual individual's association with LGB events or organisations would be the same as for an LGB employee's coming out (17.3.2). Direct sexual orientation discrimination could be established through a comparison between the treatment of an LGB or heterosexual employee involved with the LGB movement and the treatment of an LGB or heterosexual employee involved with a hypothetical 'heterosexual movement'. Or a neutral policy against all employee involvement in movements dealing with sexual orientation (or discrimination) could be challenged as indirect sexual orientation discrimination. Human Rights Act s. 3(1) could be invoked, together with Convention Articles 10 (freedom of expression) and 11 (freedom of assembly and association), to support these interpretations of the GB Regulations.

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[48] ECJ, joined cases C-122/99 P, C-125/99 P (31 May 2001), [2001] ECR I-4319.
[49] Human Fertilisation and Embryology Act 1990, s. 28(3).
[50] See *James*, *supra* n.34.

17.3.5 Discrimination against groups, organisations, events or information of/for/on lesbians, gays or bisexuals

The analysis would be essentially the same as for 17.3.4.

17.3.6 Discrimination on grounds of a person's refusal to answer, or answering inaccurately, a question about sexual orientation

If the question were asked only of individuals 'suspected' of being LGB, it would be direct sexual orientation discrimination under reg. 3(1)(a). If the question were asked on a neutral basis of all employees or prospective employees, discrimination for refusal to answer could still be challenged as indirect sexual orientation discrimination under reg. 3(1)(b), because LGB individuals would be less likely to feel comfortable answering the question. Although the GB Explanatory Memorandum does not discuss this situation, it does state (Annex B, para. 9) that individuals 'will [not] be required to disclose their sexual orientation in bringing a claim [of direct discrimination]'. (This is not the case for a claim of indirect sexual orientation discrimination. See 17.2.4.) An individual arguing that an obligation to answer a question about sexual orientation is direct or indirect sexual orientation discrimination contrary to the GB Regulations could also invoke Convention Article 8 (respect for private life), together with Human Rights Act s. 3(1).

Whether the less favourable treatment of the employee or prospective employee results from their refusing to answer the question, their answering truthfully ('I am LGB'), or their giving what is subsequently proved to be a false answer ('I am heterosexual'), the result should be the same. If it is potentially discriminatory even to ask the question, it should not matter which answer triggers the less favourable treatment.

If, for monitoring purposes, an employer asks job applicants or employees their sexual orientation (on the understanding that a reply is voluntary and that the answer will be kept confidential and not shown to any decision maker), no less favourable treatment should follow, whether the individual answers or not, and no question of discrimination should arise. It is common in the UK for employers to ask job applicants or employees their ethnic origin or (in Northern Ireland) their religion, or whether they have a disability. The information is used to determine whether discrimination might be taking place (e.g., if a high percentage of qualified job applicants from a particular ethnic group are rejected).

17.3.7 Discrimination on grounds of a person's previous criminal record due to a conviction for a homosexual offence without heterosexual equivalent

The Sexual Offences (Amendment) Act 2000 equalised the age of consent to male-female, female-female and male-male sexual activity at 16 in England, Wales and Scotland, and at 17 in Northern Ireland. The Sexual Offences Act 2003 removed all other direct sexual orientation discrimination from the criminal

law of England and Wales[51], including the offence of 'gross indecency' (which only two or more men may commit),[52] and the rule that male-male sexual activity is prohibited if 'more than two persons take part or are present'.[53] Will any less favourable treatment of an employee or prospective employee by an employer, because the employee or prospective employee was convicted of a criminal offence that applied only to male-male sexual activity, constitute direct sexual orientation discrimination under reg. 3(1)(a) of the GB Regulations? The answer should be yes for violations of the former unequal age of consent and the 'more than two persons' rule, if the sexual activity was otherwise private (because the employer's rule incorporates a criterion, conviction of a criminal offence, that contains direct sexual orientation discrimination as applied to sexual activity).

However, by far the most common conviction under a discriminatory criminal offence is for 'gross indecency' between two men over 21 (the age of consent from 1967 to 1994) that took place in a semi-public location (e.g., a public toilet, park or woodland). It can be argued that a refusal to hire or a dismissal because of a conviction for 'gross indecency' is direct sexual orientation discrimination, because a man and a woman could never be convicted of this offence. However, the employer might respond that they have a neutral policy of dismissing all employees convicted of semi-public sexual activity, and that the criminal law as a whole prohibits semi-public sexual activity regardless of its sexual orientation: a man could be convicted of engaging in semi-public sexual activity with a woman, and receive a similar sentence, not under the offence of 'gross indecency', but under the common-law offence of 'outraging public decency'.

The employee or prospective employee convicted of 'gross indecency' (or the new sexual-orientation-neutral offence of 'sexual activity in a public lavatory' found in s. 71 of the Sexual Offences Act 2003) could then argue indirect sexual orientation discrimination contrary to reg. 3(1)(b), by seeking to demonstrate that gay and bisexual men are more likely than heterosexual men and women to engage in semi-public sexual activity (an argument of minority cultural difference that most UK courts are probably not yet willing to accept), or to be prosecuted, convicted and ordered to pay a substantial fine for it (i.e., police tend to target male-male but not male-female semi-public sexual activity). The employer would then have to show, under reg. 3(1)(b)(iii), that its rule on semi-public sexual activity was justified (e.g., to protect the employer's reputation).

The historical hostility of UK courts to male-male semi-public sexual activity suggests that they are likely to be very sceptical of this kind of discrimination argument. On 11 June 2003, in *X* v. *Y*,[54] the Employment Appeal Tribunal could not see any issue of direct or indirect sexual orientation discrimination (requiring a different interpretation of the Employment Rights Act 1996 under Human Rights Act s. 3(1)), where a male employee was convicted of 'gross

[51] Sexual Offences Act 1967, s. 1(2). Time and space do not permit an examination of the criminal law of Scotland and Northern Ireland, but any remaining direct sexual orientation discrimination is likely to be removed to avoid violations of the Convention.
[52] Sexual Offences Act 1956, s. 13; Sexual Offences Act 1967, s. 1.
[53] Sexual Offences Act 1967, s. 1(2).
[54] Appeal No. EAT/0765/02/TM, paras. 39-49, www.employmentappeals.gov.uk, affirmed by the Court of Appeal (England and Wales) on 28 May 2004, [2004] EWCA Civ 662, www.bailii.org/ew/cases/EWCA/Civ/2004/662.html .

indecency' with another adult male in a roadside public toilet while off duty. For the Tribunal, the dismissal of the employee was fair because it was based, not on his sexual orientation, but on his being a role model for the young persons (aged 16 to 25) with whom he worked, his having committed a criminal offence, and his having failed to disclose the conviction to his employer.

17.3.8 Harassment

(a) Harassment of a sexual nature

Unwelcome sexual advances will certainly be caught by reg. 5(1) as 'unwanted conduct which has the purpose or effect of ... violating [the victim's] dignity; or ... creating an intimidating ... environment for [the victim]'. However, the question will remain: was the unwanted conduct 'related to sexual orientation'? This might sometimes be the case: a gay man sexually harasses another gay man because he thinks that the victim might be receptive, and would not have treated a heterosexual man in this way; or a heterosexual man sexually harasses gay or bisexual men because he does not want to see them in the workplace, and would not have treated heterosexual men in this way.

But this will not always be the case: a gay man sexually harasses men he finds attractive, whether or not they are gay, bisexual or heterosexual (most sexual harassment of heterosexual men by gay men, or of heterosexual women by lesbian women, would fall into this category); or a bisexual man sexually harasses persons he finds attractive, regardless of their sex or sexual orientation.[55] Harassment of a sexual nature does not fit neatly into anti-discrimination law, and is better dealt with by a general prohibition of such harassment. European Parliament and Council Directive 2002/73/EC supplies such a prohibition.[56]

(b) Harassment 'on grounds of sexual orientation'

Harassment that is clearly motivated by hostility against LGB persons will be caught by reg. 5(1), as unwanted conduct 'on grounds of sexual orientation', whether or not it involves unwelcome sexual advances.

Derogatory language or negative opinions about being an LGB individual, or about same-sex partnerships or sexual activity, if they are expressed in the presence of or repeated to an LGB employee could, depending on their severity and frequency and the employer's efforts to stop them, be caught by the GB Regulations either as harassment in employment (regs. 5 and 6(3)), or direct sexual orientation discrimination causing 'other detriment' in employment (regs. 3(1)(a) and 6(2)(d)) (assuming that the language or opinions would not have been expressed about or directed at a heterosexual individual, or different-sex partnerships or sexual activity). The employee or other person using the language or stating the opinions (and presumably the vicariously liable employer) could attempt to rely in their defence on Convention Article 10,

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[55] See *Holman* v. *State of Indiana* (1 May 2000), 211 F.3d (Federal Reports, Third Series) 399 (US Court of Appeals for the 7th Circuit) (man accused of sexually harassing a man and a woman).

[56] Art. 1(2) inserts into Council Directive 76/207/EEC a new art. 2(2)-(3), which expressly prohibits 'sexual harassment' as sex discrimination and defines it as: 'where any form of unwanted verbal, non-verbal or physical *conduct of a sexual nature* occurs, with the purpose or effect of violating the dignity of a person ...' (emphasis added).

together with Human Rights Act s. 3(1), but the application of the GB Regulations to the expression would probably be seen as a justifiable interference under Article 10(2). In the UK, there is no legislation prohibiting incitement to hatred based on sexual orientation. In Great Britain, only expression inciting racial hatred is prohibited.[57] In Northern Ireland, expression inciting racial or religious hatred is prohibited.[58]

(c) 'Outing' as harassment or discrimination

A single revelation of an LGB employee's sexual orientation might not be sufficient to constitute harassment, whereas repeated revelations might be (e.g., posting notices in multiple locations around a workplace, sending a series of e-mail messages). Whether or not it constitutes harassment, a single revelation by the employer, a co-worker, an agent of the employer, or a third party over whom the employer had sufficient control (see 17.2.8) could constitute sexual orientation discrimination under reg. 3(1) (direct if a heterosexual employee would not have been subjected to this treatment, or indirect if employees' sexual orientations were revealed on a neutral basis). Revealing an individual's sexual orientation without their consent would probably be viewed as 'subjecting him [or her] to any other detriment' in employment, contrary to reg. 6(2)(d). Convention Article 8 (respect for private life) could be invoked, together with Human Rights Act s. 3(1), to support this interpretation. Damages for the emotional distress resulting from being 'outed' would probably be limited, if no less favourable treatment or harassment by the employer, co-workers or third parties followed the revelation.

17.4 Exceptions to the prohibition of discrimination

17.4.1 Objectively justified indirect disadvantages (art. 2(2)(b)(i) Directive)

As in the Directive, absence of justification is part of the definition of indirect sexual orientation discrimination in reg. 3(1)(b). A neutral 'provision, criterion or practice' is discriminatory only if the employer or other discriminator 'cannot show [it] to be a proportionate means of achieving a legitimate aim' (reg. 3(1)(b)(iii)). The concepts of 'appropriateness' (suitability or effectiveness in achieving the legitimate aim) and 'necessity' (absence of alternative means of achieving the legitimate aim that would be equally effective but would have less discriminatory effects), mentioned in art. 2(2)(b)(i) Directive, are implicit in the word 'proportionate'. The GB Explanatory Memorandum (Annex B, para. 13) notes that the Directive itself appears to use 'proportionate' and 'appropriate and necessary' interchangeably in arts. 2(2)(b), 4(1) and 6(1) Directive. 'Proportionality' in the broad sense includes: (i) appropriateness; (ii) necessity; and (iii) proportionality in the narrow sense, i.e., the overall proportionality of the cost (use of the appropriate and necessary but discriminatory means) to the benefit (achievement of the legitimate aim). It is also implicit that reg. 3(1)(b)(iii) is a test of the 'objective justification' of the neutral provision. UK courts will be able to remove any doubt by referring to the wording of art. 2(2)(b)(i) Directive.

[57] Public Order Act 1986, s. 17.
[58] Public Order (Northern Ireland) Order 1986, art. 8.

17.4.2 Measures necessary for public security, for the protection of rights of others, etc. (art. 2(5) Directive)

Reg. 24 provides that the GB Regulations do not 'render unlawful an act done for the purpose of safeguarding national security, if the doing of the act was justified by that purpose', but does not reproduce the requirement in art. 2(5) that the act must be one 'which, in a democratic society, [is] necessary' for this purpose (and, implicitly, which is proportionate to this purpose). This defect will probably be remedied by UK courts, which will read in requirements of appropriateness, necessity and proportionality (in the narrow sense), by referring to art. 2(5) Directive, Human Rights Act s. 3(1), or the fundamental rights case law of the ECJ. Because the GB Explanatory Memorandum (Annex B, para. 73) gives no example of when direct or indirect sexual orientation discrimination might be necessary to safeguard national security, reg. 24 appears to reflect 'post-11 September 2001' caution, by providing in advance for a possible exception which might never be invoked. The Race Relations Act 1976, s. 42, has a similar exception.

In the NI Regulations, reg. 26 is broader because it also refers to 'protecting public safety or public order', and reg. 27 contains detailed rules permitting the Secretary of State to certify conclusively (subject to an appeal to a special tribunal) that reg. 26 has been satisfied. The Gibraltar Ordinance, under section 39, 'shall be without prejudice to any statutory provision or rule of law relating to public security, the maintenance of public order, the prevention of criminal offences, the protection of health or the protection of the rights and freedoms of others'. This goes well beyond art. 2(5) Directive by omitting any requirement that the statutory provision or rule of law be necessary in a democratic society, or justified by or proportionate to the aim it pursues.

17.4.3 Social security and similar payments (art. 3(3) Directive)

The GB Regulations do not contain any exception equivalent to art. 3(3). This is presumably because either the payments constitute 'pay' under the sex discrimination case law of the ECJ, even though they are paid by the state (in which case they are caught by reg. 6(2)(a) on 'terms' of employment), or they do not (in which case they are not received in connection with employment and are outside the GB Regulations).

17.4.4 Occupational requirements (art. 4(1) Directive)

Art. 4(1) Directive is correctly transposed by reg. 7(2), which (read with reg. 7(1)) permits any employer (religious or not) to refuse to hire or promote or to dismiss (e.g.) an LGB individual, on grounds of sexual orientation, if 'having regard to the nature of the employment or the context in which it is carried out -- (a) being of a particular sexual orientation [e.g., heterosexual] 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 ...'

Reg. 7(2) does not say that the occupational requirement must have an 'objective [that] is legitimate', but UK courts will almost certainly treat this as implicit in the provision in reg. 7(2)(b) that the occupational requirement must be 'proportionate'. A test of 'proportionality' (used in the broad sense here) is always applied to the means used (the occupational requirement) to achieve a legitimate aim (e.g., hiring only individuals who are able to do the job vs. excluding persons the employer hates). The GB Explanatory Memorandum (Annex B, para. 23) argues that 'a requirement which pursues an illegitimate objective would not constitute a *genuine* occupational requirement' under reg. 7(2)(a).

The provision in reg. 7(2)(c), that the occupational requirement exception applies if the employer reasonably (on objective grounds) believes that the employee or prospective employee does not meet it, is probably intended to cover cases where there is a dispute as to the sexual orientation of the employee or prospective employee (e.g., an employee says that they are heterosexual but the employer reasonably believes that they are LGB), and to acknowledge the difficulty of 'proving' an individual's sexual orientation. As long as the 'reasonableness test' is applied by UK courts with sufficient strictness, reg. 7(2)(c) should comply with art. 4(1) Directive.

Reg. 7(2) can be invoked both by predominantly LGB organisations claiming that certain jobs require an LGB individual (e.g., counselling about safer sexual activity), or by predominantly heterosexual organisations claiming that certain jobs require a heterosexual individual.

17.4.5 Loyalty to the organisation's ethos based on religion or belief (art. 4(2) Directive)

The first paragraph of art. 4(2) Directive permits 'a difference of treatment based on a person's religion or belief' but 'should not justify discrimination on another ground', including sexual orientation. It is therefore only the second paragraph of art. 4(2) Directive that is relevant to sexual orientation. The second paragraph permits an exception in national legislation allowing 'churches and other public or private [religious] organisations ... to require individuals working for them to act in good faith and with loyalty to the organisation's ethos'.

The GB Regulations do not contain an 'ethos' exception based on art. 4(2) (second para.) Directive.[59] However, s. 60(5) of the School Standards and Framework Act 1998 permits a voluntary aided school with a religious character (a privately-controlled but publicly-funded religious school) to have regard 'in connection with the termination of the employment of any teacher at the school, to any conduct on his part which is incompatible with the precepts, or with the upholding of the tenets, of the [school's specified] religion or religious denomination'. This exception applies only to teachers, according to s. 60(6): 'no person shall be disqualified by reason of his religious opinions, or of his

[59] The Gibraltar Ordinance, section 16(4), purports to implement art. 4(2) (second paragraph) of the Directive by creating an additional exception where 'an employer has an ethos based on religion or belief'. It should be deleted because: (i) it adds nothing to section 16(2) based on art. 4(1) Directive; (ii) it fails to comply with art. 4(1) Directive by omitting (unlike section 16(2) 'and determining' from 'genuine and determining occupational requirement'; and (iii) it goes beyond art. 4(2) (second para.) Directive, which only permits exclusion of employees who fail to 'act in good faith and with loyalty to the organisation's ethos'.

attending or omitting to attend religious worship, from being employed for the purposes of the school otherwise than as a teacher'.

Provided that UK courts apply it only when a failure to 'act in good faith and with loyalty to the [school's] ethos' has been demonstrated, the exception in s. 60(5) would appear to comply with the second paragraph of art. 4(2) Directive. However, it is not at all clear what specific conduct on the part of an LGB teacher would constitute a failure 'to act in good faith and with loyalty to the [school's] ethos'. In the case of a religion that considers same-sex sexual activity sinful, the ECJ will ultimately have to decide whether such conduct includes (e.g.) being seen entering or attending an LGB venue or event outside of school, being openly LGB outside of school, being openly LGB in school, admitting to engaging in same-sex sexual activity, criticising the religion's doctrines on same-sex sexual activity outside of school, or criticising them in school.

If UK legislation had stopped at this point (as did the 22 October 2002 draft of the GB Regulations), implementing art. 4(1) Directive and art. 4(2) (second para.) Directive through reg. 7(2) of the GB Regulations and s. 60(5) of the 1998 Act, there would have been no obvious failure to implement the Directive correctly. For jobs not covered by s. 60(5), religious employers would have had to meet the requirements of reg. 7(2). However, the Church of England wanted reassurance that it would not be required to ordain LGB individuals as priests who are not celibate (outside of different-sex marriage), and therefore lobbied the UK Government for an exception corresponding to s. 19 of the Sex Discrimination Act 1975 (inserted at a time when the Church of England would not ordain women as priests):

> 's. 19 Ministers of religion etc.
> (1) Nothing in this Part applies to employment for purposes of an organised religion where the 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.
> (2) Nothing in section 13 applies to an authorisation or qualification ... for purposes of an organised religion where the authorisation or qualification 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.'

Sections 19(3)-(4), added in 1999, contain similar exceptions 'where the employment [or authorisation or qualification] is limited to persons who are not undergoing and have not undergone gender reassignment'.

The UK Government responded to the Church of England's lobbying by inserting regs. 7(3) and 16(3) into the final draft of the GB Regulations. Reg. 7(3) (read with reg. 7(1)) permits a religious employer to refuse to hire or promote or to dismiss an LGB individual, on grounds of sexual orientation, if:

> '(a) the employment is for purposes of an organised religion; [and]
> (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) [same as reg. 7(2)(c) discussed in 17.4.4]'

Reg. 16(3) creates a similar exception for 'a professional or trade qualification for purposes of an organised religion', e.g., qualification as a priest or other minister of religion (GB Explanatory Memorandum, Annex B, para. 48).

The reason that s. 19 appears in the Sex Discrimination Act 1975 is that there is no exception for genuine occupational requirements (or qualifications) in the Sex Discrimination Act 1975 that is as broad as art. 2(2) of Council Directive 76/207/EEC ('occupational activities ... for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor'), or art. 4(1) of the Framework Directive. The closest equivalent to art. 2(2) is s. 7(2)(a) of the Sex Discrimination Act 1975:

> 'Being a man is a genuine occupational qualification for a job only where –
> (a) the essential nature of the job calls for a man for reasons of physiology (excluding physical strength or stamina) or, in dramatic performances or other entertainment, for reasons of authenticity, so that the essential nature of the job would be materially different if carried out by a woman ...'

Because it would have been awkward to argue that a woman could not be a Roman Catholic or (in 1975) a Church of England priest 'for reasons of physiology ... or, in dramatic performances or other entertainment, for reasons of authenticity', s. 19 was inserted into the Sex Discrimination Act 1975. However, reg. 7(2) *is* as broad as art. 4(1) Directive and art. 2(2) of Council Directive 76/207/EEC. It is highly probable that the ECJ will interpret art. 4(1) Directive, and UK courts will interpret reg. 7(2), especially in light of Convention Article 9, as permitting churches and other religious organisations to refuse to employ priests and other religious leaders who do not comply with, or accept the validity of, the organisation's doctrines on same-sex sexual activity. It was therefore not necessary to add regs. 7(3) and 16(3) to the GB Regulations to meet the Church of England's concern.

The legal problem raised by regs. 7(3) and 16(3) is that they go beyond what the Framework Directive permits. They do not comply with art. 4(1) Directive because, unlike reg. 7(2), they do not provide that the 'requirement related to sexual orientation' (e.g., not engaging in any sexual activity at all, or not doing so outside of a different-sex marriage, and accepting the religious organisation's doctrines on same-sex sexual activity) must be 'proportionate' to any legitimate aim, especially considering the nature of the job to which the requirement is applied (priest or mathematics teacher in a religious school). The GB Explanatory Memorandum (Annex B, para. 24) asserts, without further explanation, that any occupational requirement permitted by reg. 7(3) 'is necessarily a genuine and determining occupational requirement which is applied proportionately, within the meaning of Article 4.1'. It is hard to understand how the UK Government can be so confident, given the huge range of religions and jobs to which art. 7(3) could be applied in the future.

Regs. 7(3) and 16(3) also do not comply with art. 4(2) (second para.) Directive, which requires an assessment of each LGB individual's conduct. Instead, they create (as drafted) a blanket exception, without regard to the conduct of the

individual employee or prospective employee, for any employment 'for the purposes of organised religion', so long as 'the doctrines of the religion' or 'the strongly held religious convictions of a significant number of the religion's followers' condemn same-sex sexual activity.

Regs. 7(3) and 16(3) have caused great concern in the LGB community in the UK, because some religious organisations could argue that *all* their jobs (including employment as a teacher, nurse, librarian, secretary, gardener or cleaner) are 'employment ... for purposes of an organised religion' (a concept which the GB Regulations do not define), and therefore attempt to exclude all LGB individuals from all their jobs. The broad scope of regs. 7(3) and 16(3) (as drafted), and the resulting potential for abuse of these exceptions, simply does not apply to s. 19 of the Sex Discrimination Act 1975. Despite its breadth, there are few religious organisations that would attempt to use s. 19 to exclude women from all their jobs, including jobs as teachers or nurses in religious schools and hospitals. But such is the hostility of many religious organisations towards LGB individuals that is entirely possible that some would try to use regs. 7(3) and 16(3) to exclude LGB individuals from all their jobs.

On 13 June 2003, the UK Parliament's Joint Committee on Statutory Instruments published its report on the GB Regulations: '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 sexual orientation where the characteristic could not be said to be a 'genuine and determining occupational requirement' which was proportionate ... [T]he Committee is not persuaded that the only acts permitted by regulation 7(3) are those permitted by Article 4.1.'[60]

The UK Government insists that regs. 7(3) and 16(3) are intended to have a narrow scope. The GB Explanatory Memorandum (Annex B, para. 24) states that reg. 7(3) 'applies to employment in a church or temple ... but does not necessarily apply to any employment which is (or is claimed to be) of a religious character'. Lord Sainsbury of Turville, a UK Government minister, expanded on this explanation in the House of Lords debate on the GB Regulations on 17 June 2003:[61] 'When drafting Regulation 7(3), we had in mind a very narrow range of employment: ministers of religion, plus a small number of posts outside the clergy, including those who exist to promote and represent religion. ... [T]his is no "blanket exception". It is quite clear that Regulation 7(3) does not apply to all jobs in a particular type of organisation. ...The rule only applies to employment which is for the purposes of "organised religion", not religious organisations. There is a clear distinction in meaning between the two. ... [E]mployment for the purposes of an organised religion clearly means a job, such as a minister of religion, involving work for a church, synagogue or mosque. A care home run by a religious foundation may qualify as a religious organisation ... [but] I believe that it would be very difficult ... to show that the job of a nurse in a care home exists, "for the purposes of an organised religion". I would say exactly the same in relation to a teacher at a faith school. Such jobs exist for the purposes of health care and education.'

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[60] See JCSI - Twenty-First Report (13 June 2003), paras. 1.11, 1.15, www.publications.parliament.uk/pa/jt200203/jtselect/jtstatin/116/11602.htm.
[61] House of Lords, Hansard, 17 June 2003, columns 779-781, www.parliament.the-stationery-office.co.uk/pa/ld199697/ldhansrd/pdvn/home.htm.

He also suggested that: '[i]t would be very difficult for a church to argue that a requirement related to sexual orientation applied to a post of cleaner, gardener or secretary [so as to comply with doctrine]. Religious doctrine rarely has much to say about posts such as those.' He concluded by repeating that: 'Regulation 7(3) ... applies to very few jobs. Only in very limited circumstances would a requirement imposed on someone whose job does not involve participation in religious activities be justified under Regulation 7(3).'

Under *Pepper* v. *Hart*,[62] Lord Sainsbury's statements can be invoked in UK courts and tribunals by LGB individuals who are dismissed or denied jobs or promotions by a religious organisation, but only if the UK court considers that: '(a) [reg. 7(3) or 16(3)] is ambiguous or obscure, or leads to an absurdity; (b) the material relied upon consists of one or more statements by a Minister or other promoter of the Bill ...; (c) the statements relied upon are clear.' However, a UK court or tribunal is free to refuse to consider Lord Sainsbury's statements if it finds that reg. 7(3) or 16(3), as drafted, is not 'ambiguous or obscure', and that its application to the facts before the tribunal would not lead to 'an absurdity'. For example, a UK court or tribunal is free to disagree with Lord Sainsbury that there is a distinction between 'employment ... for purposes of an organised religion' and 'employment ... for purposes of a religious organisation'.

Whatever their legal weight in future litigation, Lord Sainsbury's statements are not enough to prevent the potential harmful effects of regs. 7(3) and 16(3). His statements are not binding on a UK court or tribunal, and are not as accessible to the average employer, employee or prospective employee as the texts of regs. 7(3) and 16(3). If regs. 7(3) and 16(3) are allowed to remain in the GB Regulations, they will have a deterrent effect on prospective LGB employees thinking of applying for jobs with religious organisations (including schools and hospitals run by religious organisations), and on LGB employees of such organisations thinking of being more open about their sexual orientation. The continuing existence on paper of regs. 7(3) and 16(3) will also encourage religious organisations to rely on these exceptions in dismissing, or refusing to hire or promote, LGB individuals, regardless of which job the individual holds or is seeking. A religious employer might be unaware of Lord Sainsbury's statements, or might hope that a UK court or tribunal will decide not to refer to his statements in interpreting regs. 7(3) and 16(3). For these reasons, regs. 7(3) and 16(3) of the GB Regulations, and any corresponding provisions of the final NI Regulations, should be deleted (an exception similar to reg. 7(2) could replace reg. 16(3)).

On 26 April 2004, Mr. Justice Richards delivered his judgement in *R.* v. *Secretary of State for Trade and Industry, ex parte Amicus - MSF Section, et al.*, in which seven trade unions challenged reg. 7(3) as contrary to the Directive, or to Articles 8 and 14 of the Convention (via the Human Rights Act 1998).[63] He held that reg. 7(3) is compatible both with the Directive and the Convention. With regard to the Directive, he concluded that:

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[62] [1992] 3 Weekly Law Reports 1032 (House of Lords).
[63] Case Nos. CO/4672/2003, etc., High Court, Queen's Bench Division, Administrative Court (London), www.courtservice.gov.uk/judgmentsfiles/j2478/amicus-v-ssti.htm.

> '115. ... [I]t [is] clear from the Parliamentary material that the exception was intended to be very narrow; and in my view it is, on its proper construction, very narrow. It has to be construed strictly since it is a derogation from the principle of equal treatment; and it has to be construed purposively so as to ensure, so far as possible, compatibility with the Directive. When its terms are considered in the light of those interpretative principles, they can be seen to afford an exception only in very limited circumstances. ... 116. ... [E]mployment as a teacher in a faith school is likely to be "for purposes of a religious organisation but not '"for purposes of an organised religion" [as required by reg. 7(3)]. ... 122. Looking at regulation 7(3) as a whole, and bearing in mind what I have said about its terms and the strict construction that they must be given, I take the view that the exception is a lawful implementation of article 4(1) of the Directive. 123. The exception involves a legislative striking of the balance between competing rights. It was done deliberately in this way [by excluding a proportionality test] so as to reduce the issues that would have to be determined by courts or tribunals in such a sensitive field. As a matter of principle, that was a course properly open to the legislature ...'

With regard to the Convention, his reasons were essentially the same as for reg. 25 (see 17.3.3(b)). He was not asked to refer any questions to the ECJ.

The case was a challenge to reg. 7(3) as drafted, rather than as applied to a specific fact situation. The narrowness of the exception in reg. 7(3) will be tested in one of the first cases taken by an individual to an employment tribunal under the GB Regulations. The Apostleship of the Sea, a Roman Catholic charity working with seafarers, offered a gay man employment as a "port chaplain" (a lay position despite the name), but withdrew the offer after learning about his long-term relationship with another man.[64]"

17.4.6 Positive action (art. 7(1) Directive)

Reg. 26 contains exceptions for positive action that should be consistent with art. 7(1) Directive. These exceptions are limited to 'affording persons of a particular sexual orientation access to facilities for training' (e.g., special training classes to allow LGB individuals to break into certain employment), and 'encouraging persons of a particular sexual orientation to take advantage of opportunities for doing particular work' (e.g., advertisements encouraging LGB individuals to apply for certain employment), or encouraging them to become members of a trade organisation (see 17.2.7(d)), if this 'prevents or compensates for disadvantages linked to sexual orientation'. The GB Explanatory Memorandum (Annex B, para. 76) states that the 'disadvantage' may be 'that persons of a particular sexual orientation are under-represented in jobs or trade organisations, or ... that there is evidence of widespread harassment or homophobic attitudes in jobs or trade organisations'.

These exceptions *do not* permit employers to prefer openly LGB individuals over heterosexual individuals in making decisions about hiring or promotion, where openly LGB individuals are under-represented (or subjected to

[64] See *The Independent* (London), 9 April 2004.

'widespread harassment or homophobic attitudes') and the openly LGB and heterosexual candidates are equally qualified. For sex, race, religion and sexual orientation, the UK has so far chosen not to permit the degree of preference in hiring and promotion decisions that the case law of the ECJ permits for sex,[65] and will probably also permit for race, religion and sexual orientation.

17.4.7 Exceptions beyond the Directive

There are no exceptions that go beyond the Directive (except as explained in 17.4.2 and 17.4.5).

17.5 Remedies and enforcement

17.5.1 Basic structure of enforcement of employment law

Public and private sector employees generally enforce their employment rights, including those under anti-discrimination legislation, by submitting a complaint to a specialised Employment Tribunal (formerly an Industrial Tribunal) in Great Britain, or to an Industrial Tribunal in Northern Ireland (except for cases of discrimination on grounds of religious belief or political opinion, which go to the Fair Employment Tribunal).[66] These Tribunals consist of one qualified lawyer and two lay (non-lawyer) members. In Great Britain, appeals proceed to the Employment Appeal Tribunal (one judge and two non-lawyer members), then to the Court of Appeal (England and Wales) or the Inner House of the Court of Session (Scotland) (three judges), then to the House of Lords (the highest court in the UK) (usually five judges). In Northern Ireland, appeals go directly to the Northern Ireland Court of Appeal (three judges), then to the House of Lords.

17.5.2 Specific and/or general enforcement bodies

In Great Britain, existing anti-discrimination legislation has established three separate enforcement bodies: the misnamed Equal Opportunities Commission (EOC) (which, despite its broad name, covers only sex, married persons, and gender reassignment, and *not* race, religion, disability, age, sexual orientation or unmarried persons), the Commission for Racial Equality (race), and the Disability Rights Commission (disability).[67] In Northern Ireland, four separate bodies for sex, race, religious belief or political opinion, and disability were amalgamated into a single Equality Commission[68] by the Northern Ireland Act 1998, s. 73. The powers of these bodies include providing financial assistance to applicants (paying for lawyers in important 'test' cases), bringing judicial review cases against discriminatory legislation, conducting investigations into the practices of specified employers, enforcing prohibitions of discriminatory

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[65] ECJ, case C-409/95, *Marschall v Land Nordrhein-Westfalen* (11 November 1997), [1997] ECR I-6363; case C-407/98, *Abrahamsson v Fogelqvist* (6 July 2000), [2000] ECR I-5539.
[66] See www.employmenttribunals.gov.uk (Great Britain); www.industrialfairemploymenttribunalsni.gov.uk (Northern Ireland).
[67] See www.eoc.org.uk, www.eoc-law.org.uk, www.cre.gov.uk, www.drc-gb.org.
[68] See www.equalityni.org.

instructions or advertisements, and issuing non-binding codes of practice giving guidance on how to comply with the legislation. However, these Commissions *do not* themselves receive and adjudicate complaints.

On 30 October 2003, the UK Government announced plans to merge the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission into a single 'Commission for Equality and Human Rights' for Great Britain, which would also enforce the new regulations on religion, age and sexual orientation implementing the Framework Directive.[69] This question is related to the question of merging existing anti-discrimination legislation and the new regulations into a single Equality Act (this is the policy of the Northern Ireland Executive, while Lord Anthony Lester's private member's bill would do the same for Great Britain).[70]

In the case of sexual orientation discrimination, the GB Regulations do not create a new Sexual Orientation Equality Commission, or grant any powers to the Equal Opportunities Commission, the Commission for Racial Equality or the Disability Rights Commission to enforce the GB Regulations. The proposed 'Commission for Equality and Human Rights' will not begin operating until late 2006 at the earliest (3 years after the deadline for implementing the Directive). (The same is true of the new regulations on religion,[71] and will probably be true of the new regulations on age.) The NI Regulations on sexual orientation grant some powers to the Equality Commission (regs. 30-32, 40). The most important of these is the power (under reg. 40) to provide financial and other assistance to individuals seeking to enforce their rights under the NI Regulations, which the Commission also has in relation to sex, race, religious belief or political opinion, and disability.[72]

I would argue that this feature of both the GB Regulations and the NI Regulations is contrary to EC law. Although the Directive does not require the establishment of an enforcement body in relation to sexual orientation discrimination (unlike Council Directive 2000/43/EC in relation to race discrimination, and European Parliament and Council Directive 2002/73/EC in relation to sex discrimination), it is a general principle of EC law that:

> 'in the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, *it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature*.'[73]

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[69] See www.dti.gov.uk/equalitystatement.html.
[70] See www.odysseustrust.org,
[71] Employment Equality (Religion or Belief) Regulations 2003, Statutory Instrument 2003 No. 1660, www.hmso.gov.uk/si/si2003/20031660.htm.
[72] See (texts at URL *supra* n.10) Sex Discrimination (Northern Ireland) Order 1976, art. 75; Race Relations (Northern Ireland) Order 1997, art. 64; Fair Employment and Treatment (Northern Ireland) Order 1998, art. 45; Equality (Disability, etc.) (Northern Ireland) Order 2000, art. 9.
[73] ECJ, case 33/76, *Rewe-Zentralfinanz* v. *Landwirtschaftskammer für das Saarland* (16 Dec. 1976), [1976] ECR 1989, para. 5 (emphasis added).

This is known as the principle of 'equivalence or non-discrimination'.[74] Actions under the Sex Discrimination Act 1975, the Race Relations Act 1976 and the Disability Discrimination Act 1995 are 'of a domestic nature' because these three Acts were all passed voluntarily before Council Directive 76/207/EEC, Council Directive 2000/43/EC, and the Framework Directive were adopted. Although for many purposes, actions under these three Acts became 'Community law actions' once these three Directives were adopted, actions under these three Acts should still be considered 'domestic law actions' for the purposes of the principle of equivalence. This permits a comparison between the national legal system's treatment of 'domestic law actions' that have become 'Community law actions', and of new 'Community law actions' with no prior existence as 'domestic law actions'. Such a comparison is merely an extension of the comparisons the ECJ implied would be possible in *Levez* v. *T.H. Jennings (Harlow Pools) Ltd*:[75] between the procedural rules applicable to a 'domestic law action' for sex discrimination in pay that had become a 'Community law action', and those applicable to a 'domestic law action' for race discrimination that had not yet become a 'Community law action' (or even to a 'domestic law action' for sex discrimination in employment matters other than pay that had become a 'Community law action').

In anti-discrimination actions under the three Acts, which are 'domestic law actions' that have become 'Community law actions', individuals may seek the financial or other assistance of the Equal Opportunities Commission , the Commission for Race Equality or the Disability Rights Commission,[76] each body having been established voluntarily before there was any EC law requirement to do so. In anti-discrimination actions under the GB Regulations on sexual orientation (17.1.5), and under the new regulations on religion (*supra* in 17.5.2), which are 'Community law actions' with no prior existence as 'domestic law actions', individuals are not entitled to any assistance from an enforcement body. The UK Government is therefore discriminating against these 'Community law actions'.

The silence of the Framework Directive on an enforcement body, together with the provisions in Directives 2000/43/EC and 2002/73/EC, do not amount to a comprehensive set of 'Community rules' on the subject of enforcement bodies. Rather, the EC legislature left the matter of an enforcement body for discrimination based on sexual orientation (as well as religion or belief, disability and age) to be decided by Member States in accordance with their traditions and practices regarding enforcement bodies, subject to the principle of equivalence.

A Member State that has never had an enforcement body for any kind of discrimination, prior to the adoption of Directives 2000/43/EC, 2000/78/EC and 2002/73/EC, is not required by the principle of equivalence (as developed above) to establish one for discrimination based on sexual orientation (or religion or belief, disability or age). However, because the UK has had a clear tradition and practice of establishing enforcement bodies for 'domestic law actions' against discrimination, the principle of equivalence requires the UK to

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[74] Craig & de Búrca, 2002, 231-256.
[75] ECJ, case 326/96 (1 December 1998), [1998] ECR I-7835, para. 49.
[76] Sex Discrimination Act 1975, s. 75; Racial Relations Act 1976, s. 66; Disability Rights Commission Act 1999, ss. 7-8.

maintain that tradition and practice when EC legislation prohibits a new kind of discrimination for which no 'domestic law action' exists, either by creating a new enforcement body or by assigning the new kind of discrimination to an existing enforcement body. The UK Government's explanation does not excuse its breach of the principle of equivalence: '[L]egislation needs some time to settle down ... before investigations and legal support can add significant value [there was no 'settling down' period in the case of the Commission for Race Equality and the Equal Opportunities Commission]. In addition, we do not think it would be reasonable either to establish new organisations, or add significantly to the duties of the present Commissions [how much extra work would sexual orientation cases impose on the Equal Opportunities Commission?] at a time when the government is consulting openly about the future of equality institutions.'[77]

Finally, it should be noted that that the principle of equivalence applies only to the national remedies and procedures available in a 'Community law action' for discrimination, not to substantive rights to be free from discrimination. Thus, the fact that the EC legislature allows Member States to provide greater substantive rights to be free from discrimination than under EC law, especially with regard to the material scope of anti-discrimination legislation, does not mean that a principle of equivalence requires Member States to provide the same material scope in their legislation implementing EC anti-discrimination Directives as in their existing domestic anti-discrimination legislation. For example, the fact that the UK voluntarily prohibits sex and disability discrimination in education, housing, and the provision of goods and services (areas not covered by existing EC anti-discrimination law) does not mean that the UK must do the same with regard to sexual orientation discrimination.

17.5.3 Civil, penal, administrative, advisory and/or conciliatory procedures (art. 9(1) Directive)

The GB Regulations on sexual orientation establish two enforcement procedures. For all acts of discrimination or harassment other than those involving institutions of further and higher education (reg. 20), or qualifications bodies with special appeal procedures, the GB Regulations are enforced by a prospective, existing or former employee, contract worker, member of an occupational pension scheme, office-holder, barrister, advocate, partner, trade organisation member, vocational trainee, or employment agency client presenting a complaint to an Employment Tribunal (reg. 28). Reg. 20 on institutions of further and higher education is enforced by commencing civil proceedings 'in like manner as any other claim in tort [in England and Wales] or (in Scotland) reparation [tort and reparation are comparable to civil responsibility in civil law countries] for breach of statutory duty' (reg. 31). The proceedings are brought in a county court (England and Wales) or a sheriff court (Scotland).

[77] See www.womenandequalityunit.gov.uk/equality/project/making_it_happen/cons_doc.htm, Part 10, para. 4.

17.5.4 Civil, penal and/or administrative sanctions (art. 17 Directive)

In further and higher education cases, reg. 31 implicitly provides that the county court or sheriff court may award any remedy that it could award in an action for breach of statutory duty (civil responsibility for breach of an obligation imposed by legislation). Such a remedy could include damages (financial compensation) with no upper limit, including damages for injury to feelings (reg. 31(3)) and exemplary (punitive) damages,[78] and in some cases could include an injunction to prevent continuation or repetition of the discrimination or harassment.

In employment cases, reg. 30(1)(b) specifies that an Employment Tribunal may award the same damages as a county court or sheriff court under reg. 31. A Tribunal may also declare the rights of the parties (reg. 30(1)(a)) and make a non-binding recommendation that the respondent (e.g., the employer) take certain action within a specified period (30(1)(c)). Failure to comply with the recommendation can cause the Tribunal to increase the damages awarded (reg. 30(3)). However, the Tribunal cannot order that an individual be hired, promoted, or reinstated after a dismissal. Damages may be awarded for direct discrimination whether it was intentional or unintentional. In the case of indirect discrimination, if the employer or other respondent proves that the discrimination was unintentional, damages may only be awarded if the Tribunal considers it 'just and equitable' to do so (reg. 30(2)).

Furthermore, Schedule 4 to the GB Regulations provides generally that any term of any contract or collective agreement, and any rule of an employer, trade organisation or qualifications body, that is unlawful by virtue of the GB Regulations is void.

17.5.5 Natural and legal persons to whom sanctions may be applied

Same as for the substantive personal scope of the GB Regulations (17.2.8).

17.5.6 Awareness among law enforcers of sexual orientation issues

The GB Regulations do not provide for any enforcement body. See 17.5.2. Enforcement is only by individuals who have suffered discrimination or harassment. The UK Government has said that: '[s]ince there is no statutory commission covering [sexual orientation] it will be a priority for government to work to ensure that individuals and employers, in both the public and private sectors, understand their rights and responsibilities under new legislation. ... [We plan] to raise awareness, prepare down-to-earth guidance to support legislation, and to provide practical advice.'[79] It is not clear whether this will include training on sexual orientation issues and the GB Regulations for members of Employment Tribunals and judges.

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[78] *Kuddus* v. *Chief Constable of Leicestershire* (7 June 2001), [2001] 3 All England Reports 193 (House of Lords).
[79] See www.womenandequalityunit.gov.uk/equality/project/making_it_happen/cons_doc.htm, Part 10, para. 2.

17.5.7 Standing for interest groups (art. 9(2) Directive)

The GB Regulations do not refer to standing for interest groups. The UK Government appears to interpret art. 9(2) Directive as giving Member States the choice of (i) allowing interest groups to bring proceedings 'on behalf ... of the complainant', (ii) allowing interest groups to bring proceedings 'in support of the complainant', or (iii) both. (Recital 29 tends to support this interpretation.) The UK government has chosen (ii). The GB Explanatory Memorandum (Annex A, Transposition Notes, Article 9) states that '[u]nder the relevant rules of procedure there is no obstacle to organisations supporting a complainant in proceedings. No further implementation is required'. Interest groups may do (ii) by formally intervening in proceedings, to present additional information or arguments to the tribunal or court which the applicant might not present, under the general rules on third-party interventions. They may also assist the complainant from 'behind the scenes', by giving advice or financial assistance, including finding or paying lawyers. However, they may not submit a complaint to an Employment Tribunal, or begin civil proceedings in a county court or sheriff court, in their own name or on behalf of identified or unidentified complainants. This means, for example, that an interest group could not complain about a discriminatory advertisement under the GB Regulations. Instead, they would have to find an individual willing to apply for the job and be rejected, who could then submit a complaint to an Employment Tribunal. Under the Sex Discrimination Act 1975, ss. 38 and 72, or the Race Relations Act 1976, ss. 29 and 63, the interest group could notify the Equal Opportunities Commission or the Commission for Racial Equality, which could commence proceedings against the employer or the publisher of the advertisement.

Although interest groups cannot enforce the GB Regulations in their own names, reg. 27(2) preserves their right to make an application for judicial review. This right could be invoked against an Act of the UK Parliament, an act of a regional legislature or other subordinate legislation, or any other act of a public authority (including pubic employment rules) involving direct or indirect sexual orientation discrimination. The grounds for review could include the incompatibility of the act (e.g., the GB Regulations) with EC law, the Human Rights Act or principles of UK administrative law (but not the GB Regulations themselves).

17.5.8 Burden of proof of discrimination (art. 10 Directive)

Regs. 33 and 35 correctly transpose art. 10 Directive by providing that '[w]here ... the complainant proves facts from which the tribunal [or court] could ... conclude in the absence of an adequate explanation that [an act of harassment or of direct or indirect discrimination has occurred], the tribunal [or court] shall uphold the complaint unless the respondent proves that he did not commit, or ... is not to be treated as having committed, that act'.

17.5.9 Burden of proof of sexual orientation

See 17.3.1(b), 17.3.6, 17.3.8(c). The 'group membership requirement' for indirect sexual orientation discrimination requires the applicant to allege (and possibly prove) their sexual orientation (see 17.2.4). But at no point is the respondent required to prove the applicant's sexual orientation.

17.5.10 Victimisation (art. 11 Directive)

Reg. 4 prohibits an employer from treating less favourably (dismissing or otherwise discriminating directly against) a person who has brought proceedings under the GB Regulations, given evidence or information in connection with proceedings under the GB Regulations, alleged a contravention of the GB Regulations, or done anything else under the GB Regulations, unless it can be shown that their allegations were both false *and* not made in good faith.

17.6 Reform of existing discriminatory laws and provisions

17.6.1 Abolition of discriminatory laws (art. 16(a) Directive)

There are unlikely to be many laws (Acts of the UK Parliament or regulations) that are contrary to the GB Regulations or the Directive. There might be a few isolated provisions relating to employment that expressly provide a right or benefit to unmarried different-sex couples and not to unmarried same-sex couples, but these are likely to be amended soon (see 17.3.3(a)). Most such provisions limit the right or benefit to married different-sex couples (see 17.3.3(b)), especially in the case of survivor's pensions for public sector employees (as in *KB*[80]). Many, if not all, of these provisions will gradually be amended to extend the right or benefit to 'civilly partnered' same-sex couples (see 17.3.3(c)).

17.6.2 Abolition of discriminatory administrative provisions (art. 16(a) Directive)

See 17.6.1.

17.6.3 Measures to ensure amendment or nullity of discriminatory provisions included in contracts, collective agreements, internal rules of undertakings, rules governing the independent occupations and professions, and rules governing workers' and employers' organisations (art. 16(b) Directive)

Schedule 4 to the GB Regulations provides generally that any term of a contract or collective agreement, and any rule of an employer, trade organisation or qualifications body, that is unlawful by virtue of the GB Regulations is void.

17.6.4 Discriminatory laws and provisions still in force

See 17.6.1.

[80] ECJ, Case C-117/01, Judgement of 7 January 2004, *KB* v. *National Health Service Pension Agency*.

17.7 Concluding remarks

On the whole, the UK's implementation of the Framework Directive with regard to sexual orientation to date has been excellent. However, I would draw to the attention of the Commission the following shortcomings in the UK's implementation, which I would consider the most serious:

- 17.2.4: The GB Regulations (reg. 3(1)(b)(i)), the NI Regulations (reg. 3(1)(b)(i)), and the Gibraltar Ordinance (section 7(1)(b)(i)), should be amended by deleting 'persons of the same sexual orientation as B' ('persons of the same sexual orientation as that other person' in the case of Gibraltar) and substituting 'persons having a particular sexual orientation', as in art. 2(2)(b) Directive.
- 17.2.5: Section 8(1) of the Gibraltar Ordinance should be amended by deleting 'such conduct' and substituting 'unwanted conduct', as in art. 2(3) Directive.
- 17.2.6: The GB Regulations and the NI Regulations do not implement art. 2.4 Directive, and the Gibraltar Ordinance does so inadequately. The prohibition on instructions to discriminate found in the Sex Discrimination Act 1975 (s. 39) and the Race Relations Act 1976 (s. 30) should be added to the GB Regulations, the NI Regulations and the Gibraltar Ordinance. The Equal Opportunities Commission (Great Britain), the Equality Commission (Northern Ireland) and the proposed Equal Opportunities Commission (Gibraltar) should be given power to enforce this prohibition, which would provide the effective sanction required by art. 17 Directive.
- 17.4.2: Section 39 of the Gibraltar Ordinance should be amended by deleting 'relating to' and substituting 'which, in a democratic society, is necessary for', as in art. 2(5) Directive.
- 17.4.5: The GB Regulations (regs. 7(3) and 16(3)), the NI Regulations (regs. 8(3) and 18(3)) and the Gibraltar Ordinance (section 16(3)) go beyond what art. 4 Directive permits. These provisions should be deleted (exceptions similar to reg. 7(2) GB and reg. 8(2) NI could replace reg. 16(3) GB and reg. 18(3) NI). Gibraltar Ordinance, section 16(4), should be deleted.
- 17.5.2: To avoid discrimination against the GB Regulations and the NI Regulations, which are 'Community law actions' with no prior existence as 'domestic law actions', the Equal Opportunities Commission (Great Britain) (the most logical choice among the three existing enforcement bodies) and the Equality Commission (Northern Ireland) should be given exactly the same powers to enforce the GB Regulations and the NI Regulations as they were given to enforce 'domestic law actions' that later became 'Community law actions', such as the Sex Discrimination Act 1975, the Race Relations Act 1976, and the Disability Discrimination Act 1995. This does not apply to the proposed Equal Opportunities Commission (Gibraltar), which will only be created after any 'domestic law actions' in relation to discrimination in Gibraltar have become 'Community law actions'.

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