

Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity

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Contents

EXECUTIVE SUMMARY	3
A. IMPLEMENTATION OF EMPLOYMENT DIRECTIVE 2000/78/EC.....	6
B. FREEDOM OF MOVEMENT	10
C. ASYLUM AND SUBSIDIARY PROTECTION.....	12
D. FAMILY REUNIFICATION	13
E. FREEDOM OF ASSEMBLY.....	15
F. CRIMINAL LAW	17
G. TRANSGENDER ISSUES.....	24
H. MISCELLANEOUS	27
I. GOOD PRACTICES.....	28
ANNEX 1 – CASE LAW.....	31
ANNEX 2 – STATISTICS.....	38

Executive summary

Implementation of Employment Directive 2000/78/EC

Although the Directive has been implemented by the Equality Act 2004 which amends the pre-existing Employment Equality Act 1998 and the Equal Status 2000 a number of gaps in the implementation have been identified. Although a well developed quasi-judicial system exists for the consideration of complaints including complaints brought on the sexual orientation ground there is a low level of complaints brought under that ground which probably under-represents the extent of sexual orientation discrimination. The Equality Authority – which was established in 1999 – deals with discrimination (including harassment and victimisation) on nine grounds.

Freedom of movement

Statistics are not available to demonstrate the impact of free movement laws on LGBT partners. Third country nationals – whether LGBT or not – are required to establish themselves as legally resident in another EU country before joining their partners in Ireland.

Asylum and subsidiary protection

Although Irish law does recognise sexual orientation as basis upon which a person seeking asylum might have been persecuted in order to gain refugee status it does not recognise LGBT partners as family members in the context of asylum or subsidiary protection.

Family reunification

The Family Reunification Directive has not been transposed into Irish law and the definition of ‘family’ – for the purpose of the Refugee Act 1996 – is confined to persons who are married and their children under eighteen years of age. Exceptional leave to enter for family reunification

purposes has been granted to same-sex couples on an *ad hoc* discretionary basis but the bases on which this discretion has been exercised by the Minister for Justice, Equality & Law Reform is not clear.

Freedom of assembly

Although various statutes exist to regulate and control the exercise of the right of freedom of assembly it is a right explicitly protected by the Irish Constitution and under the ECHR to the extent that the Convention is given further effect in Irish law since 2003. The recent record in relation to the holding of LGB/LGBT marches is quite positive.

Hate speech and criminal law

There is a criminal prohibition on incitement to hatred on the ground, *inter alia*, of sexual orientation since 1989. This is supplemented by other laws of a criminal and civil nature and by 'soft law'. There are a number of problems with the 1989 Act which remains under review and, although official statistics are effectively non-existent, there is some evidence of hate-related crimes and other offences affecting LGBT communities. In recent years there is evidence of quite effective relationships between An Garda Síochána (police) and organisations representing LGBT communities.

Transgender issues

Despite a recent decision of the High Court declaring Irish law in the area of recognition of post-operative gender identity for transsexual incompatible with the ECHR this incompatibility has not been addressed in reforming legislation. There is, however, some protection against discrimination on the gender ground for transsexuals under the general equality legislation covering employment and access to goods, services and other opportunities. A number of reports and studies have highlighted serious practical difficulties faced by transgendered persons in Ireland.

Miscellaneous

Nothing to report.

Good practices

A number of what might be described as good practices are discernible including: the approach adopted by the Equality Authority, the accessibility of the redress mechanisms available before the Equality Tribunal, the evolution of good working relations between An Garda Siochana and LGBT organisations and certain provisions of the Good Friday / Belfast Agreement 1998.

A. Implementation of Employment Directive 2000/78/EC

The Equality Act 2004 – which amended the pre-existing Employment Equality Act 1998 and the Equal Status Act 2000 – purports to implement Employment Directive 2000/78/EC. Sexual orientation was already a prohibited ground of discrimination under the previous equality law (i.e. 1998 and 2000 Acts) which covered employment generally as well as access to goods, services and other opportunities. The other eight grounds of prohibited discrimination are: gender, marital status, family status, age, membership of the Traveller Community, race, disability and religion.

A number of gaps in the implementation of the Directive have been identified in a reasoned opinion of the EU Commission. For example, the definition of indirect discrimination has been criticised for not being broad enough; the limits on compensation payable for the non-gender grounds of prohibited discrimination have also been criticised as have the limits on the legal capacity of interested parties (other than direct victims) to bring cases. A rather broad exemption from the prohibition on discrimination afforded to religious institutions with a particular religious ethos was also raised as an issue of enduring concern in the reasoned opinion. This might prove to be especially concerning in the context of sexual orientation discrimination where a person who claimed that a religious institution had discriminated against him/her on the ground of sexual orientation but that institution claimed an exemption based on the assertion that the alleged discrimination was done for the purpose of protecting the religious ethos of the institution. The points raised in the Commission's reasoned opinion have also been raised in a number of ways by the statutory national body charged with promoting equality and combating discrimination, the Equality Authority. Ireland answered the Commission's reasoned opinion by way of letter on the 4th of April 2008 and provided explanations as to a number of issues that concerned the Commission. Included in these explanations was one for the broad exemption from the prohibition on discrimination afforded to religious institutions with a particular religious ethos. The Commission, after

examining Ireland's latest reply, is satisfied with the measures taken and has thus closed the infringement procedure on this point.²

Under equality legislation complaints of sexual orientation discrimination whether in the area of employment or access to goods, services and other opportunities can be brought to the Equality Tribunal, a quasi-judicial body established under the Employment Equality Act 1998 and the Equal Status Act 2000. Complaints under any of the nine grounds of prohibited discrimination against licensed premises (e.g. bars, clubs and hotels) must be brought to the District Court, a normal court of local and limited jurisdiction which deals exclusively at first instance with licensing matters. Complaints of gender discrimination – where no ceiling on compensation applies – can be taken directly to the Circuit Court. In a gender case where there was also a sexual orientation dimension it would not be possible to have this latter dimension considered by the Circuit Court. Rather, the complaint of sexual orientation discrimination would have to be considered by the Equality Tribunal. In practical terms, this can frustrate the multiple grounds approach to equality litigation encouraged by the Equality Authority whereby complainants are encouraged to plead all grounds of discrimination (including harassment and victimisation) relevant to their case.

The Employment Equality Act 1998 and Equal Status Act 2000 pre-dated the implementation of the Framework Directive (2000/78/EC). As access to goods, services and other opportunities was covered by the Equal Status Act 2000 under which, *inter alia*, sexual orientation discrimination was prohibited it was broader than the Employment Equality Directive. But, in other respects Irish law relating to race discrimination and indirect discrimination is narrower than the Race Directive (2000/43/EC). The scope of the Race Directive in the non-employment areas is broader than the scope of the protection against discrimination on the ground of sexual orientation in the Equal Status Act in that the Act does not apply to functions of the state that do not come within the provision of goods and services, e.g. registration of marriages. More fundamentally, the legislation is subordinate in the sense that anything required by other legislation which might be challenged as discrimination is exempt from the prohibition on discrimination. Under both the Employment Equality Act 1998 and Equal Status Act 2000 the remedies could not be described

¹² Press Release by the European Commission "EU closes infringement case against Ireland" available at http://ec.europa.eu/ireland/press_office/media_centre/may08_en.htm#19

as effective, proportionate and dissuasive as required by both the Race Directive and the Framework Directive. Specifically in relation to employment, the exemption contained in Section 37 of the 1998 Act is over broad and patently problematic from the point of view of sexual orientation discrimination in that it allows the prohibition on discrimination to be overridden by institutions with a religious ethos in the name of protecting that ethos. While the Commission initially noted this as a concern, further explanation from Ireland on the issue as a result of an infringement procedure brought by the commission has since justified their position.

The Equality Authority, an independent statutory body, was established on 18th October 1999 under the Employment Equality Act 1998. It replaced the pre-existing Employment Equality Agency and has a much broader mandate which was expanded under the Equal Status Act 2000 and the Intoxicating Liquor Act 2003. The Authority has four main functions:

- To work towards the elimination of discrimination in relation to the nine areas of prohibited discrimination covered by the legislation
- To promote equality of opportunity in relation to the areas covered by the legislation
- To provide information to the public on equality and related legislation
- To monitor and review the operation of equality and related legislation.

The two core pieces of legislation under which the Authority works outlaw discrimination in employment, vocational training, advertising, collective agreements, the provision of goods and services and other opportunities to which the public generally have access on the abovementioned nine grounds. Discrimination is defined as the treatment of a person in a less favourable way than another person is, has been or would be treated on any of or a combination of the nine grounds.

As well as the Equality Authority there exists a body of quasi-judicial specialist tribunals known collectively as the Equality Tribunal. These deal with complaints of discrimination (except in relation to licensed premises) on all of the nine grounds but, as stated previously, complaints of gender discrimination can be taken directly to the Circuit Court.

Depending on the nature of the complaint there is a right of appeal from the Equality Tribunal to the Labour Court or Circuit Court.

See data from Annual Reports of the Equality Authority in Annex 2.

Although Article 9(2) of the Employment Directive 2000/78/EC has not been formally implemented in Irish law civil society organisations can represent complainants before the Equality Tribunal although they themselves have no right of audience before the District Court or Circuit Court. While civil society organisations can represent complainants before the Tribunal they would not have sufficient legal standing to make a complaint in their own name. There is no hard data on how frequently civil society organisations represent complainants in complaints brought before the Equality Tribunal although, anecdotally, it is evident that this occurs regularly³. For example, one such organisation, the Irish Traveller Movement (ITM) runs its own legal unit that assists complainants from the Traveller Community in various forms of legal action.

For relevant statistical information, see Annex 2.

³ See generally: *Enabling Lesbian, Gay and Bisexual Individuals to Access Their Rights Under Equality Law*, a report of the Equality Commission for Northern Ireland and the Equality Authority (November 2007).

B. Freedom of movement

EU citizen LGBT partners of EU citizens have the same free movement rights as any EU citizen not by virtue of their being ‘partners’ but simply by virtue of their EU citizenship. It should be noted that, in Ireland, the situation as regards citizens of Romania and Bulgaria is somewhat different in that their rights of free movement post-accession are limited except for those Romanian and Bulgarian citizens lawfully resident in Ireland for one year prior to the accession of those two countries. Apart from adoption and guardianship situations, there is no recognition of non-biological parenthood in Irish law. While the Civil Partnership Bill 2009 is presently before the Oireachtas it does not confer any added right or responsibility on a non-biological parent. (It seemed that the Irish courts were willing to recognise a same sex couple as a family in a recent case where in the High Court Mr Justice Hedigan claimed a lesbian couple and their child were a de facto family and thus entitled to certain rights protecting the family however, this decision was overturned by the Supreme Court)⁴

Under the instrument that transposes Directive 2004/38/EC, third country nationals are required to have established themselves as legally resident in another EU country before joining their partners here. This was upheld in a decision of the High Court here in Ireland which was then appealed to the Supreme Court.⁵ However, a subsequent ECJ decision on a case referred from the High Court⁶ explicitly reversed early findings⁷ to come to a conclusion that the non-community spouse of a citizen of the Union can move and reside in the Union without having previously been lawfully resident in a member state. It is not a right that can be made conditional to the prior lawful residence in another member state. Irish law does not recognise same-sex unions concluded elsewhere – whether marriages or civil partnerships – but the existence of such formal relationships can impact positively on the assessment of a relationship for the purpose of dealing with a family reunification claim, as discussed later in the Report under para 28. It must also be noted that part two of

⁴ <http://www.irishtimes.com/newspaper/opinion/2009/12/11/1224260511577.html>

⁵ *Kumar v. Minister for Justice, Equality & Law Reform, Ireland and the Attorney General*, Unreported High Court decision of 28th May 2007.

⁶ C-127/08 *Blaise Baheten Metock and Others v. Minister for Justice, Equality and Law Reform*. (Reference for a preliminary ruling from the High Court (Ireland) Judgement of 25th July 2008)

⁷ Case C-109/01 *Secretary of State for the Home Department v. Hacene Akrich* (Reference for a preliminary ruling from the Immigration Appeal Tribunal)

the Civil Partnership Bill 2009 proposes that the Minister may declare that a class of legal relationship entered into by two persons of the same sex is entitled to be recognised as a civil partnership.

There are no official statistics available to demonstrate the impact of the foregoing requirements on LGBT persons.

C. Asylum and subsidiary protection

Under the Refugee Act 1996 the ground of membership of a social group as a basis upon which refugee status could be recognised includes social groups defined by sexual orientation. There are some concerns that this level of protection may be lowered under new legislation which is about to be enacted, the Immigration, Residence and Protection Bill. There are instances of subsidiary protection being granted on the sexual orientation ground to persons denied asylum but these are not recorded in a manner that would indicate the bases upon which such protection was granted.

The official statistics provided by the Office of the Refugee Applications Commissioner (ORAC) and the Office of the Refugee Appeals Tribunal (ORAT) do not specify the grounds on which refugee status is recognised in a manner that demonstrates impact on LGBT persons.

Irish law does not recognise LGBT partners – whether married or not - as family members in the context of asylum and/or subsidiary protection. There are no statistics to demonstrate impact on LGBT persons.

The Civil Partnership Bill, if it enters into Irish law, will consequentially amend the Refugee Act 1996 by inserting an entitlement for a civil partner of a refugee to apply to enter and reside in the state.

D. Family reunification

The Family Reunification Directive (2003/86/EC) has not been transposed into Irish law. The definition of family for the purpose of the Refugee Act 1996 is confined to persons who are married and their children under the age of eighteen years. This reflects the narrow definition of ‘family’ under Irish law generally. As the definition of marriage in Irish law is confined to marriage between persons of the opposite sex, and as this definition is derived from Article 41 of the Irish Constitution 1937, there would be little or no basis for challenging the constitutionality of the exclusion of married same-sex couples from the definition of ‘family’ for the purpose of the Refugee Act 1996. The narrow definition of ‘family’ was considered recently in a case involving two women married in Canada who wished to be treated like a married opposite sex couple for the purposes of Irish tax law but the case did not succeed and is now on appeal to the Supreme Court (*Zappone & Gilligan v. Revenue Commissioners and Others*, Unreported High Court decision of 14th December 2006). Because of the privilege attaching to biological parenthood in Irish law the family reunification rights of children and their biological parents are stronger. Obviously, this may have a further disproportionate adverse impact on LGBT parents where only one or neither party is the biological parent of the child or children in question.

There is anecdotal evidence to the effect that exceptional leave to enter for the purpose of reunifying same-sex or unmarried opposite sex partners has been granted on an *ad hoc* discretionary basis by the Minister for Justice, Equality & Law Reform but, in the absence of statistical evidence of this, it is impossible to analyse the manner in which this discretion has been or is being exercised.

The Civil Partnership Bill was introduced in the Dail in 2009. It has been welcomed as an important step forward for civil rights in Ireland and for the first time gives same sex couples formal recognition. However, the Equality Authority has expressed some concerns with the proposed legislation for the lack of reference to children and adoption of same sex couples. The Equality Authority supports the full implementation of the Government Working Group on Domestic Partnership⁸ which has recommended that same-sex couples should be considered as adoptive parents. However the failure of the government to address this issue in the legislation leaves children facing many questions regarding

⁸ <http://www.justice.ie/en/JELR/OptionsPaper.pdf/Files/OptionsPaper.pdf>

inheritance, guardianship and access. However the Working Group on Domestic Partnership hopes “...that the Law Reform Commission’s current consultation on the Legal Aspects of Family Relationships will bring forward a major reform in this area.”

In the past the European Union has stated that the definition of ‘family member’ should also include the registered partner if the legislation of the host Member State treats registered partnerships as equivalent to marriage⁹. This is not the case in Ireland and the Civil Partnership Bill does not recognise a unit of civil partnership as a family. This results in further problems for transnational families who have formed their family through registered partnerships.

⁹Part 5 DIRECTIVE 2004/58/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States

E. Freedom of assembly

Freedom of assembly or the right to protest and demonstrate by means of marching and holding public meetings is a right explicitly guaranteed in Article 40.6.1.ii of the Irish Constitution 1937 (*Bunreacht na hEireann 1937*). Consideration should also be given to the European Convention on Human Rights Act 2003 which gave further effect to the ECHR in Irish law. The model of incorporation used was interpretative incorporation at a sub-constitutional level thus requiring, for example, that laws affecting freedom of assembly be interpreted in a manner compatible with the relevant provisions of the ECHR including the guarantee of freedom of assembly in Article 11 but subject to the Irish Constitution. There is also a general obligation (under Section 4, ECHR Act 2003) on the Irish courts at all levels to have due regard to the jurisprudence of the European Court of Human Rights. Under Section 3, ‘organs of the state’ are required to carry out their duties and functions in a manner that is compatible with the provisions of the ECHR.

The exercise of the constitutional right of freedom of assembly is subject to public order and morality. Furthermore, the Irish Constitution states that “provision may be made by law to prevent or control meetings which are determined in accordance with law to be calculated to cause a breach of the peace or to be a danger or nuisance to the general public and to prevent or control meetings in the vicinity of either House of the Oireachtas [the Parliament].” Thus, meetings that are not peaceful, cause a nuisance or are violent will not enjoy the protection of the Irish Constitution. In the event of a non-peaceful protest normal criminal responsibility applies in addition to the provisions of the Criminal Justice (Public Order) Act 1994 which placed the offences of riot, affray and violent disorder on a statutory footing.¹⁰ Furthermore, the Offences Against the State Acts 1939-1998 make it an offence to support an unlawful organisation and meeting that obstructs the course of justice. Aside from these constitutional and legislative provisions, freedom of assembly has been subject to little legislative regulation – apart from occasional attempts to restrict and control freedom of assembly by way of local by-laws – or judicial scrutiny in Ireland.¹¹

¹⁰ Sections 14, 15 and 16 of the Criminal Justice (Public Order) Act 1994 respectively.

¹¹ Freedom of assembly was considered in the Supreme Court decisions of *Dunne v Fitzpatrick* [1958] IR 29 and *D.P.P. v Kehoe* [1983] IR 136; [1983] ILRM 237].

Demonstrations, protests, marches and public meetings in favour of LGBT rights are covered by the constitutional and legislative provisions outlined above. Official barriers to freedom of assembly on the ground of sexual orientation do not exist in Ireland. For example, Dublin City Council facilitate the Annual Gay Pride Week, erecting rainbow flags along the River Liffey which runs through the centre of the capital city and allowing the event to use the Civil Offices Park for the closing event of the Pride March. Furthermore, An Garda Síochána [the police] facilitate any other Pride Marches, demonstrations or protests held by LGBT groups. It appears that in the context of freedom of assembly, the experience is largely positive with marches and demonstrations being facilitated by local public authorities. Official statistics do not exist detailing the number of demonstrations in favour of tolerance of LGBT people. In Ireland, the first LGB pride marches were held in Dublin in the early 1980s and then again in 1991. Since the abolition of the offence of buggery between persons in 1993¹² Pride Marches have taken place in Dublin, Belfast, Waterford, Galway, Cork and the Northwest.¹³ Official statistics on the number of demonstrations against tolerance of LGBT people do not exist and anecdotal evidence to this effect could not be found during the period under review. Homophobic demonstrations may be banned if they do not comply with the constitutional provision outlined above.

¹² Section 2, Criminal Law (Sexual Offences) Act 1993

¹³ Cork's first ever Pride Parade a triumph, 08/06/2006 available www.indymedia.ie.

F. Criminal law

The only criminal statute in Ireland dealing specifically with hate speech is the Prohibition of Incitement to Hatred Act 1989. This statute makes it an offence to incite hatred against a group of persons in the State or elsewhere on account of their race, colour, nationality, religion, ethnic or national origins, membership of the Traveller Community or sexual orientation. Interestingly, it came into force before the enactment of legislation (in 1993) that de-criminalised certain forms of homosexual sexual conduct. Other legislation including the Video Recordings Act 1989, the Criminal Justice (Public Order) Act 1994, the Offences Against the State Act 1939, the Equal Status Act 2000 and the Employment Equality Act 1998 deal in various respects with hate speech in a broad sense. The latter two pieces of legislation – the Equality Acts – prohibit harassment on the ground of, *inter alia*, sexual orientation and provide a number of civil remedies for complainants in such situations. Where the criminal level of proof required under the 1989 Act cannot be met, the Equal Status Act 2000-2004 might well provide a useful alternative redress mechanism. The recently established Press Council of Ireland state in their *Code of Practice for Newspapers and Periodicals* that: “newspapers and periodicals shall not publish material intended or likely to cause grave offence or stir up hatred against an individual or group on the basis of their race, religion, nationality, colour, ethnic origin, gender, sexual orientation, marital status, disability, illness or age”.

Section 2 of the 1989 Act deals with actions likely to stir up hatred making it an offence for a person to publish or distribute written material, use words, behave or display written material in a place other than a private residence if the material, words, behaviour, visual images or sounds are threatening, abusive, insulting or are intended or likely to stir up hatred. Under section 3 it is an offence to broadcast an item involving threatening, abusive or insulting visual images or sounds. Section 4 makes the preparation and possession of material likely to stir up hatred an offence. A person can be convicted summarily or on indictment for these offences. A summary conviction carries a penalty of a fine not exceeding €1,270 or a term of imprisonment not exceeding 6 months. A person guilty of an offence on indictment shall be liable to a fine not exceeding €12,700 or imprisonment for a term not exceeding 2 years or both. A body corporate can also be liable under the legislation.

There are a number of limitations and difficulties relating to this legislation and the criminalisation of hate speech in Ireland. Notably,

there have been a low number of prosecutions brought under the Act since its inception and even fewer convictions. For example, there were only 9 convictions under section 2 of the Act during the period 2000-2005.¹⁴ Official statistics are not available on whether any cases under the period of review related to the sexual orientation ground contained in the Act however anecdotal evidence suggests that this has not been the case.¹⁵

Criticism has also been levelled at the vague terms used in the 1989 Act.¹⁶ Daly states that “[c]onfusion in the Oireachtas [the Parliament] surrounding the purpose and likely operation of the Act and the dismissive approach to the right to free speech means the Act suffers from numerous defects... Perhaps the most striking aspect of the 1989 Act is the fact that a number of key terms are not defined. Thus, the meaning of ‘stir up’, ‘hatred’ and ‘threatening, abusive or insulting’ may not be readily discerned.”¹⁷

The legislation does not include measures dealing with the general vilification of minorities.¹⁸ In particular, face-to-face abuse or “drive-by shoutings”¹⁹ are not covered by the legislation unless they can be construed as likely to stir-up or incite hatred. This is unfortunate as evidence suggests that this is a prevalent form of hate speech experienced

¹⁴ Garda Síochana Annual Reports 2000-2005 available at www.garda.ie. Responsibility for the compilation and publication of crime statistics was transferred from the Garda Síochana to the Central Statistics Office in 2006. In the quarterly reports for 2006 and 2007 a separate entry was not recorded for offences under the Prohibition of Incitement to Hatred Act 1987. It is assumed that incitement to hatred offences have been subsumed into the category “miscellaneous other offences.” For further information see http://www.cso.ie/releasespublications/pr_crimejust.htm.

¹⁵ Correspondence with Eoin Collins, Director of Policy Change, Gay and Lesbian Equality Network, 10/01/2008.

¹⁶ For a full discussion on difficulties in relation to the Prohibition of Incitement to Hatred Act 1989 see Daly, T., Reform of the Prohibition of Incitement to Hatred Act 1989 – Part 1, (2007) 17(3) *Irish Criminal Law Journal* 16, Daly, T., Reform of the Prohibition of Incitement to Hatred Act 1989 – Part 2, (2007) 17(4) *Irish Criminal Law Journal* 16a, McGonagle, T., Wrestling (racial) equality from tolerance of hate speech, (2001) 8(1) *Dublin University Law Journal* 21

¹⁷ Daly, T., “Reform of the Prohibition of Incitement to Hatred Act 1989 – Part 1”, (2007) 17(3) *Irish Criminal Law Journal* 16 at p.3.

¹⁸ For further discussion see Daly, T., “Reform of the Prohibition of Incitement to Hatred Act 1989 – Part 1”, (2007) 17(3) *Irish Criminal Law Journal* 16.

¹⁹ Henderson, “Walking a Gauntlet: Nielson’s License to Harass” 20 *Berkely J Gender L and Justice* 269, 270 (2005).

by minorities in Ireland although research on hate speech specifically related to homophobia is limited.²⁰

The 2006 LGBT Hate Crime Report by *Johnny*, a non-governmental organisation for gay and bi-sexual men, indicated the prevalence of hate crime in Dublin.²¹ *Johnny* conducted a “Stop Hate-Related Crimes in Ireland” survey of 1,000 people that frequented the LGBT community and its associated venues in Dublin and the greater Dublin area. For the purpose of the survey “hate crime” was described as “any physical or verbal attack; where the victim is primarily targeted because of his or her perceived sexual orientation.”²² The survey indicated that 41% of respondents had been a victim of a hate crime and 66% of those who had been a victim of a hate crime stated that this incident had occurred in the last 12 months. 55% of the victims had been subject to a verbal attack only while 45% suffered a physical and/or physical and verbal attack.²³ Further, 72% stated that they did not feel safe showing affection with a person of the same sexual orientation in public.²⁴ 80% of victims did not report the attack to An Garda Síochána. There were a number of reasons as to why respondents did not report their attack but 36% of respondents cited lack of police confidence as the reason while 33% stated that there was “no point” in reporting.²⁵ 86% of respondents believed that more visible Garda patrolling would make them feel safer.²⁶ *Johnny* has also undertaken campaigns against hate crimes.²⁷ According to *Johnny* such crimes are on the increase. They have focused their attention on lobbying the Department of Education to educate students and young people on multiculturalism. There has also been an appeal to the Department of Justice Equality and Law Reform to better police the streets of Dublin, particularly in noted LGB areas.

Research conducted by GLEN/Nexus found that 25% of respondents had been punched, beaten, hit or kicked because they were assumed to be gay.²⁸ A study conducted by Superintendent McGowan of the

²⁰ The National Consultative Committee on Racism and Interculturalism biannual reports published since 2001 note that racial abuse and harassment are the most common form of incident. See <http://www.nccri.ie/publications.html>.

²¹ 2006 LGBT Hate Crime Report: Stop Hate Crimes in Ireland Campaign, available at <http://johnny.fruitdesign.ie/upload/hatecrimereport.pdf>.

²² *Ibid.* at p.15.

²³ *Ibid.* at p.21.

²⁴ *Ibid.* at p.36.

²⁵ *Ibid.* at pp.27-28.

²⁶ *Ibid.* at p.32.

²⁷ <http://www.johnny.ie/Page.aspx?PageID=39&SectionID=16>

²⁸ GLEN and Nexus Research, *Poverty: Lesbians and Gay Men, the Economic and Social Effects of Discrimination*, (1995, Combat Poverty Agency, Dublin).

Community Relations Section of An Garda Síochana carried out in 1999 indicated a high level of physical and verbal assaults on LGB individuals with 79% of respondents stating that they had been physically and verbally abused.²⁹ This report echoed that of the abovementioned *Johnny* report regarding the low levels of individual reporting of such incidences to the police.³⁰

Hate speech of this nature can be covered by other legislation apart from the 1989 Act but these legislative provisions do not expressly refer to hate speech or sexual orientation. For example, Section 10 of the Non-Fatal Offences Against the Person Act 1997 makes harassment an offence but the behaviour must be persistent in nature in order to secure a conviction. Hate speech can also be dealt with under section 6 of the Criminal Justice (Public Order) Act 1994 which makes threatening abusive or insulting behaviour in a public place an offence. In order to be convicted for an offence under section 6 a person must intend to provoke a breach of the peace or be reckless as to whether a breach of the peace may be occasioned. Protection against violence can also be secured through, for example, the provisions of the Domestic Violence Act 1996. According to Part 9 of the Civil Partnership Bill 2009, the Domestic Violence Act 1966 will be amended to take civil partners into account. As stated previously, the Refugee Act 1996 recognises persecution on the grounds of sexual orientation (i.e. membership of a social group) as a basis upon which refugee status can be recognised.

If an incident of hate speech or a hate crime occurs it may be dealt with as an offence of “assault”, “assault causing harm” or “causing serious harm” as defined by the Non-Fatal Offences Against the Person Act 1997.³¹ Section 2 states that a person shall be guilty of the offence of assault who, without lawful excuse, intentionally or recklessly, - (a) directly or indirectly applies force to or causes an impact on the body of another, or (b) causes another to believe on reasonable grounds that he or she is likely immediately to be subject to any such force or impact, without the consent of the other. It is clear from the definition that words alone can constitute an assault, provided that the words amount to

²⁹ McGowan, P., (1999) *Anti-Gay and Lesbian Crime: A Study of the Problem in Ireland*, MA Thesis for Garda Síochana College, Ireland.

³⁰ The study found the reporting rate for such incidences was 35% for physical assaults and 11% for verbal assaults. Reasons for non-reporting included fear of Garda response, fear of reprisal and the victim felt it was not serious enough to report. McGowan, P., (1999) *Anti-Gay and Lesbian Crime: A Study of the Problem in Ireland*, MA Thesis for Garda Síochana College, Ireland.

³¹ Section 2, 3 and 4 of the Non Fatal Offences Against the Person Act 1997 respectively.

reasonable grounds for the belief that the application of force or impact was immediately likely. Thus, an incident of hate speech could be dealt with through this provision.

In light of the practical difficulties experienced in prosecuting offences and securing convictions under the 1989 Act, the Minister for Justice, Equality and Law Reform announced in September 2000 that the Act was to undergo a comprehensive review. This remains the case. The Department of Justice, Equality and Law Reform under the auspices of the *National Action Plan Against Racism* commissioned a report on combating racism through the criminal law in 2005. This report is due to be published by the Department of Justice, Equality and Law Reform in April 2008. Although the report focuses on racially oriented hate speech, the authors have stated that the report and its recommendations have a wide application and will be useful in the context of addressing sexual orientation related hate speech.³² The authors presented some tentative findings of their research in March 2007 that are useful in discussing whether reform is necessary and, if so, what form it should take. In particular, the report considered the addition of a further element to existing offences creating racially aggravated criminal offences. Such offences add an additional element to offences such as assault causing harm or criminal damage to create a new offence of assault causing harm with racist intent or criminal damage with racist intent. However, the authors of the report concluded that the extension of these offences to include racist intent would not be appropriate noting that the criminal law does not traditionally deal with the motivation for committing a crime and that this would be more appropriately dealt with at sentencing stage. The research does not recommend making substantive changes to the Prohibition of Incitement to Hatred Act 1989.

A number of reform proposals have been presented since the Minister for Justice, Equality and Law Reform announced that the primary legislation was under review in 2000. The National Consultative Committee on Racism and Interculturalism (NCCRI) reviewed the Act and recommended the expansion of the provisions in the legislation to facilitate a greater number of convictions for the offences.³³ Cowhey recommends that incitement to hatred could be more effectively dealt

³² Schweppe, J., *Combating Racism through the Criminal Law*, *Spectrum: The Journal of the National Consultative Committee on Racism and Interculturalism*, Issue 14 May 2007 p.9.

³³ *Prohibition of Incitement to Hatred Act 1989: A Review*, (2001) available at <http://www.nccri.ie/submissions/01AugLegislation.pdf>.

with through public order legislation.³⁴ Daly recommends the introduction of legislation to combat the primary manifestations of hate speech in Ireland.³⁵ He argues that legislation should be enacted to the effect that acts targeting a member of a group protected by the 1989 Act, such as a member of a group of a particular sexual orientation, be dealt with as an offence against the person. The rationale for this reform is that “[t]he introduction of [such] measures would introduce a more multifaceted response to hate speech in this jurisdiction, and by reducing over-reliance on incitement to hatred legislation, would allow the reformed 1989 Act to work, not as a quasi-public order provision, but in Vance’s wording, to ‘serve symbolic and deterrent functions, encouraging civility in public debate by putting prospective defendants, particularly racist and xenophobic political parties and social organisations [sic], on notice of prohibited insults’.”³⁶ In relation to the Act itself and incitement to hatred, he recommends the amendment of the legislation in order to clarify the terms used in the sections. The NCCRI closed at the end of December 2008 due to cutbacks in the government budget. This decision will significantly weaken protection for LGB people. In addition to this the budget for the Office of the Minister of Integration was also cut at this time.

In the context of reform, account needs to be taken of the Council Framework Decision on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law³⁷ and the Additional Protocol to the Convention on Cybercrime concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems.³⁸ In light of the Framework Decision and Additional Protocol it may be necessary to amend the 1989 Act to cover incitement to hatred of members of a group enumerated in the Act as well as the groups themselves, to require that proof of intent be a requirement in order to secure a conviction and to prohibit intentionally aiding and abetting the commission of an offence.³⁹

³⁴ Cowhey, D., “Racist hate speech law in Ireland: The need for reform”, available at http://www.ucc.ie/colr/index.php?option=com_content&task=view&id=84&Itemid=40.

³⁵ Daly, T., “Reform of the Prohibition of Incitement to Hatred Act 1989 – Part 2”, (2007) 17(4) *Irish Criminal Law Journal* 16a at p.8-9.

³⁶ Daly, T., Reform of the Prohibition of Incitement to Hatred Act 1989 – Part 2, (2007) 17(4) *Irish Criminal Law Journal* 16a, at p.9

³⁷ See Council proposal 11522/2007.

³⁸ The full text is available at <http://conventions.coe.int/Treaty/en/Treaties/Html/189.htm>.

³⁹ Other reforms will be necessary but they are not directly relevant to homophobic hate speech. For a full discussion see Daly, T., “Reform of the Prohibition of Incitement to Hatred Act 1989 – Part 1”, (2007) 17(3) *Irish Criminal Law Journal* 16.

While making adequate legislative provision is important in combating such behaviour the limits of the law, particularly in the criminal sphere, in addressing hate speech and other such homophobic behaviour must be recognised. Social and political structures are better placed to tackle homophobic behaviour at its source and a wide range of organisations and institutions are engaged in this activity in Ireland.⁴⁰ The importance in actively targeting and tackling such behaviour was highlighted by the Equality Authority, stating that “[u]nchecked public anti-homosexual comment or behaviours reinforce ideas linking difference to deviance which can in turn fuel further violence and harassment.”⁴¹

There are no official statistics on cases involving homophobic motivation for hate speech. In fact, the authors are not aware of any such cases being taken under the Prohibition on Incitement to Hatred Act 1989.

If a common crime is committed with a homophobic motivation, that motivation may be dealt with at the sentencing stage of the criminal process. Statutory sentencing guidelines dealing with this do not exist. The dominant principle in Irish sentencing law is that a sentence must be proportionate to the gravity of the offence and the personal circumstances of the offender. Therefore, there is a possibility that at sentencing the court may consider homophobic motivation as an aggravating factor in the context of the gravity of the offence. Specific legislation does not exist to this effect. The aforementioned authors of a report on combating racism through the criminal law due to be published by the Department of Justice, Equality and Law Reform in April 2008 state that although there would be reluctance to impose statutory guidelines on the judiciary to deal with hate crimes such an approach may be appropriate and would be in keeping with the current criminal process.⁴² Relevant case law or statistics are not available in this area.

⁴⁰ See for example the Gay and Lesbian Equality Network, Gay HIV Strategies, Outhouse, Transgender Ireland.

⁴¹ “Implementing Equality for Lesbians, Gays and Bisexuals”, (2002) The Equality Authority, available at <http://www.equality.ie/index.asp?locID=107&docID=88> at p.73.

⁴² Schweppe, J., Combating Racism through the Criminal Law, *Spectrum: The Journal of the National Consultative Committee on Racism and Interculturalism*, Issue 14 May 2007 p.10

G. Transgender issues

In Ireland, there is no provision for transsexual people to be officially recognised in the gender in which they identify. As a consequence transsexual people do not have a right to marry in their reassigned gender or to change their birth certificate or to enjoy any right legally confined to the gender with which they identify.

Some protection against discrimination is afforded to transsexual people under Irish equality legislation (discussed above). The Employment Equality Act 1998 (as amended by the Equality Act 2004) has to be interpreted in a manner that takes account of the judgment of the European Court of Justice that prohibits workplace discrimination against a person for a reason related to gender reassignment⁴³. The Equality Authority notes that the Equal Status Acts 2000-2004 will also have to be interpreted to provide transsexual people with protection against discrimination. Although other grounds of prohibited discrimination could be involved in transsexual cases it is clear that the gender ground – with all of the previously discussed advantages attaching to that ground – is engaged by such cases.

The consequences of not allowing transgendered people to be officially recognised in the gender with which they identify include the following:

- They cannot marry in their reassigned gender
- They are not currently entitled to have their birth certificates revised
- It may be necessary to reveal their original birth certificate gender when applying for a new job
- They may worry that if they do not disclose their legally recorded gender for insurance purposes that this may amount to fraud
- They are not entitled to enjoy any right legally confined to persons of the gender with which they identify.

A report by the Equality Authority⁴⁴ in 2004 highlighted the almost complete lack of health services for transsexual people. This Report pointed out that, in Ireland, access to and provision of appropriate treatments or provision for the health needs and service requirements of transsexual people more generally have not featured to date in key policy

⁴³ Case C-13/94.

⁴⁴ Eoin Collins, Nexus Research and Brian Sheehan. (2004) *Access to Health Services for Transsexual People*. Dublin: The Equality Authority.

developments at national level. An almost complete lack of research on the issue has also meant that the health and other needs of this group of the population have remained hidden and unexplored. Nor is there any documented information on current health sector practice across health board (now HSE) areas in terms of understanding or responding to the needs presented by transsexual persons.

The level and intensity of stigma attached to issues of gender variance means that transsexual people are often hidden from and invisible to both the general population and to service providers. This not only makes it difficult to establish the extent of the transsexual population, it also makes it extremely difficult to access this population in order to develop an understanding of their circumstances, needs and experiences. The capacity to understand needs is further constrained in an Irish context where, despite evidence of increased activism around the issue, there are limited resources available for representative organisations. There is also little evidence of any previous research in Ireland on the circumstances of transsexual people or on 'transsexualism' as an issue.

There is evidence to suggest that the health authorities have paid for gender reassignment surgery (which is not available in Ireland) in the United Kingdom. However, many people report being refused funding by public health authorities and their health insurance companies for treatments along the 'treatment path', including genital reassignment surgery.

In relation to marriage, there is an implicit constitutional bar on marriages between same-sex couples and this applies where the reassigned gender of a transsexual person has not been recognised officially and that person wishes to marry a person of the opposite sex.

There is no legislation regarding names and changes of names for transgendered persons. However, there is no prohibition in practice on a person adopting a new first name or surname by deed poll and using this on passports, driving licences, medical records, tax and social security documents. It remains unclear how this would be treated in relation to the differing eligibility for pensions and some social welfare benefits between male and female applicants.

A Passports Bill was introduced in parliament in recent years which proposed to recognise transgendered people and their rights to obtain passports in their reassigned gender. This Bill has not yet been enacted into law.

Although there have been few cases taken by transgendered persons the most significant one is the case of *Lydia Foy v. An tArd-Chlaraitheoir* (Judgment October 2007). The details of the two stages of this case are set out in the Annex. Ultimately, it involved a finding that the Civil Registration Act 2004, which governs the registration of births, deaths and marriages made no provision for the registration of the gender of transgendered people with a reassigned gender.

The Civil Registration Act 2004 only allows the correction of typographical errors, but not the registration of a reassigned gender. The High Court found that this was incompatible with Article 8 ECHR as given further effect by the European Convention on Human Rights Act 2003. A declaration of incompatibility was made by the High Court under Section 5 of that Act. This was the first and only such order issued to date under the ECHR Act 2003 and requires the Taoiseach (Prime Minister) to lay before the Oireachtas (parliament) a copy of the order within 21 days. The effect of a declaration of incompatibility is not to render the legislation in respect of which it has been granted invalid but, rather, to alert the parliament to the incompatibility in question in order to prompt a political response. A person who receives a declaration of incompatibility may also receive an *ex gratia* award of compensation.

Many people change their names by deed-poll but no central register detailing which of these are transgendered persons is available.

In April 2009 Ireland held its first Transgender Human Rights Conference and Educational Seminar. Professor Stephen Whittle from Manchester Metropolitan University highlighted the fact that the legal framework for transgender people in this country is wholly inadequate. The conference, entitled ‘Transforming Attitudes’, was organised by Transgender Equality Network Ireland⁴⁵, The Union of Students in Ireland⁴⁶ and Belong to Youth Services.⁴⁷ Professor Whittle chaired the conference and spoke of his research concerning transgender people in Britain and the health service. The purpose of the seminar was to inform civil organisations and policy makers about transgender issues in Ireland. Teni Chairperson, Cat McIlroy, said that they hoped “the conference will mark a watershed moment in the recognition of human rights for transgender people in Ireland.

⁴⁵ www.teni.ie

⁴⁶ www.usi.ie

⁴⁷ www.belonto.org

A research report called *Transphobia in Ireland*⁴⁸ was published in 2009 by the Transgender Equality Network Ireland and highlights the distinct lack of legislation that defines hate crimes. The European Convention of Human Rights has guaranteed the rights of transsexual people. This report documents how Ireland has failed to introduce legislation to reform current domestic laws in relation to transsexuals. The report further indicates that the lack of data on hate crime in Ireland is not indicative of an absence of such crimes. The reality is that such crimes are not reported and the Gardai do not collect or publish data on such incidents. The main aims of the report were to:

- Identify what policies or guidelines are in place to report transphobic incidents in Ireland.
- Document barriers to access support and justice.
- To make recommendations about the recording and monitoring of transphobic incidents and hate crime, involving consultations between policy makers, An Garda Síochána, and the transgender community.

H. Miscellaneous

Research has shown that there are no legal provisions comparable to the Lithuanian law prohibiting homosexual behaviour in Ireland

There is no information available regarding phallometry or phallometric testing

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<http://www.teni.ie/Publications?action=AttachFile&do=get&target=Transphobia+in+Ireland+Report.pdf>

⁵⁰ Informal liaison and support has been in existence at Pearse St. Garda Station in Dublin since 1996.

I. Good practices

Apart from issues discussed in the foregoing paragraphs what might be instanced as evidence of good practice from Ireland is as follows:

- The priority attached to LGBT issues by the Equality Authority which is charged with responsibility for multiple grounds of discrimination. This is evidenced by the establishment and resourcing of an Advisory Group on LGB issue. It is also noteworthy that the Authority was the first statutory body to call for equality in marriage for same-sex couples in a report published in 2002 (*Implementing Equality for Lesbians, Gays and Bisexuals*).
- The relative informality of procedures used in cases before the Equality Tribunal although this can be overstated as an example of good practice. Over time good working relations between LGB non-governmental organisations and An Garda Síochána have evolved. At a practical level, there appears to be a number of examples of good practice currently evident in Ireland. In particular, An Garda Síochána is active in dealing with and addressing homophobic violence, harassment and hate speech. 25 Garda Liaison Officers have been appointed to act as a point of contact for LGB people reporting homophobia, hate speech or homophobic violence.⁵⁰ In the 2006 LGBT Hate Crime Report, 70% of respondents stated that they were aware of these Liaison Officers.⁵¹ The Gay and Lesbian Equality Network (GLEN) has worked with the Garda to develop a LGBT Community Safety Strategy for the Dublin Metropolitan Region launched by the Minister for Justice, Equality and Law Reform in June 2006.⁵² The core elements of the strategy include:
 - A drop-in service at an LGBT community centre.
 - Regular Forum meetings between the Gardaí, LGB commercial venues and other community representatives.
 - Re-establishing a National Advisory Panel to discuss policing and the LGB population.

Further examples of positive work being carried out by the Garda include developing leaflets for the LGB community encouraging people to report homophobic crimes; providing information on Garda

⁵¹ 2006 LGBT Hate Crime Report: Stop Hate Crimes in Ireland Campaign, available at <http://johnny.fruitdesign.ie/upload/hatecrimereport.pdf> at p.35

⁵² It is expected that this will be expanded to a national level.

Liaison Officers to members of the LGB community; and providing training for Garda on LGB issues.

- The ‘equivalence’ requirement of the Good Friday / Belfast Agreement 1998 which requires the Republic of Ireland to have an equivalent level of protection for human rights (including the right to equality) as exists in Northern Ireland. It should, however, be pointed out that the full potential of this principle has not been realised. Because of the relatively sophisticated apparatus for dealing with discrimination in Northern Ireland, underpinned by a statutory duty on public bodies not to discriminate, the formally high standards in that part of the island of Ireland could well act as an elevating benchmark of good practice in the Republic of Ireland.
- In a report⁵³ jointly published by the Equality Authority over 40 people were interviewed to determine the experiences of lesbians, gays and bisexuals with the health services in North West Ireland. It studied and identified the restrictions faced by LGB people preventing them from accessing such services. The report also suggests good practice to be implemented in the HSE and by individual health providers. The participants suggested how health services for LGB people could be improved. Among these suggestions were:
 - Emphasising a culture of equal rights rather than special treatment.
 - Acknowledging that patients and staff could be gay, lesbian, or bisexual and raise the visibility of LGB people throughout the health service.
 - Introduce and influence more training on LGB issues and about specific medical issues for them.
 - Work in conjunction with the LGB community and others concerned with LGB health.

Another significant consideration was developing a working relationship with the educational sector. The importance of working jointly with all levels of the education sector and in particular designing programmes to inform about sexual orientation issues and to challenge prejudice and ignorance.

Further evidence of good practice can be drawn from certain research conducted on addressing homophobic bullying in 2008 by the Equality Authority. In a report called *‘Developing Good Practice in Addressing*

⁵³ Gibbons, Mary: Recognising LGB identities in Health Services,
http://www.equality.ie/getFile.asp?FC_ID=433&docID=711

Homophobic Bullying in Second-Level Schools, guidance is provided for educational practitioners on good practice in developing and implementing strategies to address homophobic bullying.

Annex 1 – Case law

Transgender – case 1

<i>Case title</i>	<i>Foy v. An tArd- Chlaraitheoir (Registrar General) and others (No. 1)</i>
<i>Decision Date</i>	9 July 2002
<i>Reference Details (type and title of court/body; in original language and English)</i>	High Court:
<i>Key facts of case (500 words)</i>	The applicant was born a male with conforming biological structures. He was diagnosed as suffering from gender identity disorder and underwent gender reassignment surgery. She subsequently sought to have her birth certificate amended to reflect what she maintained should have been her gender since birth. The Registrar General refused, and the applicant applied for judicial review. She contended, inter alia, that, having regard to the most recent scientific evidence, there was a further indicator of sexual differentiation other than the traditional chromosomal, gonadal and genital tests as set out in previous authority, namely brain differentiation, which should be decisive if inconsistent with the biological markers, and that, consequently, there had been an error of fact or a clerical error such that her birth certificate should be rectified under s 27 of the Births and Deaths Registration (Ireland) Act 1880. The Registrar General replied that, by virtue of s 15 of the Vital Statistics and Births,

	<p>Deaths and Marriages Registration Act 1952, s 5 of the Births, Deaths and Marriages Registration Act 1972 and s 7 of the Registration of Births Act 1996, the preceding legislation had effectively been re-enacted such that it enjoyed the presumption of constitutionality. Issues arose, inter alia, as to: (i) whether the criteria for determining sex should also include brain differentiation; (ii) whether the mechanisms available for amending the birth certificate, namely s 8 of the 1880 Act, as amended by s 5 of the 1952 Act, and s 27 of the 1880 Act (set out at [72-3]) could achieve the rectification sought by the applicant; and (iii) if not, did the absence of any such provision by which that rectification could be achieved render the legislative scheme unconstitutional by reference to the applicant's rights to privacy, to dignity, to equality and to marry, and having regard to increasingly sympathetic jurisprudence under the European Convention on Human Rights. The application would be dismissed.</p>
<p><i>Main Reasoning/ Arguments</i></p>	<p>(1) The evidence to date was insufficient to establish the existence of brain differentiation as a marker of sex. (2) An amendment under s 8 of the 1880 Act, as amended by s 5 of the 1952 Act, could, by itself, have no effect on the sex specified in column four. Further, the birth certificate was a historical document recording facts and events particular to the date of birth. In those circumstances, and having regard to the findings on the medical evidence, the error alleged by the applicant could not, under any circumstances, be described as a clerical error for the purposes of s 27 of the 1880 Act and the 1880 Regulations. Moreover, as the applicant was, at birth, a male with conforming biological structures, there had been no error of fact or substance for the purposes of s 27(3) of the 1880 Act (see [101], [123-5]). (3) Neither s 15(2) of the 1952 Act, s 5 of the 1972 Act, nor s 7 of the 1996 Act had the effect of re-enacting the earlier legislation such that the presumption of constitutionality arose in relation to the latter. In the context of what a birth certificate truly was, the absence of a provision to permit the rectification sought did not undermine the applicant's rights to privacy and dignity. Any difference of treatment between the applicant and a biological female was not unjust invidious</p>

	<p>or arbitrary. Marriage, as understood by the Constitution, by statute, and by case law, referred to the union of a biological man with a biological woman. Accordingly, there was no sustainable basis for the submission that the existing law, which prohibited the applicant from marrying a party who was of the same biological sex, was a violation of her Constitutional right to marry. In any event, the right to marry was not absolute and the interference in question was legitimate (see [134], [170-5]).</p> <p>In the applicant's daily interaction with persons, with services and with society generally and the law, there remained only a limited number of circumstances in which her birth certificate would have to be produced. Furthermore, the state had a legitimate interest in having in place a system of registration of births, the resulting register being a document of historical value. It was not unreasonable for that system to include an entry for the sex of the child in question. It could not rationally be suggested that no entry should be made for persons in the position of the applicant as that would render the entire system inoperable. One could not know at birth whether in later life any given child would suffer from gender identity disorder. Accordingly, the interference with the applicant's rights to privacy and to dignity was proportionate. In relation to the right to equality, a male to female transsexual could never shed entirely their male biological characteristics, and, likewise, could never acquire in many material respects, vital characteristics of the female sex. What difference in treatment there was did not apply within male to female transsexuals as a group, or within female to male transsexuals as a group; in either group, the rectification sought would be refused for the same reasons.</p>
<i>Key Issues (concepts, interpretation in case</i>	
<i>Results (sanctions) and key consequences or</i>	Implications of the case were that Lydia Foy was unable to have her birth certificate amended

<i>implications of the case</i>	to reflect what she maintained should have been her gender since birth.
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Transgender – case 2

<i>Case title</i>	<i>Foy v. At tArd-Chlaraitheoir (Registrar General) and others (No. 2)</i>
<i>Decision Date</i>	19 October 2007
<i>Reference Details (type and title of court/body; in original language and English)</i>	High Court:
<i>Key facts of case (500 words)</i>	On 30 th July, 2002 Dr. Foy filed a Notice of Appeal to the Supreme Court. By the time the appeal came on for hearing, on 8 th November, 2005, there had been three significant changes in the legal landscape. Firstly, some short time after the 9 th July, 2002, the European Court of Human Rights, in abandoning and indeed in reversing its declared jurisprudence up to then, unanimously held, in the case of a male to female post operative transsexual, that by reason of its legal regime (being one comparable to that of this jurisdiction), the United Kingdom was in breach of both Articles 8 and 12 of the European Convention of Human Rights, 1950 (see the decisions in the cases of “ <i>Goodwin</i> ” and “ <i>I</i> ”). Secondly on 31 st December, 2003 the rights contained in this International Convention (“The Convention” or “the ECHR”) became part of the domestic law of this State via the enactment of the European Convention on Human Rights Act, 2003, (“The 2003 Act”) and thirdly, a new system of Civil Registration was introduced by the Civil Registration Act, 2004, (“The 2004 Act”); which in the process repealed all existing primary and secondary legislation in this area. As a result of these events the applicant wished to raise these new issues on her appeal. However since such matters were not, and could not have been, dealt with by this court in July 2002, the Supreme Court remitted the case back so

	<p>that a decision could be made at first instance on these points. Hence this second judgment in the first set of proceedings. By letter dated 21st November, 2005 Mr. Michael Farrell Solicitor wrote to An t-Ard Chlaraitheoir on behalf of the applicant seeking to have the “mistake” in the record of her birth corrected so as to reflect her “true and actual” female gender as well as changing her name from “Donal Mark” to “Lydia Annice”. He also sought the issue of a new birth certificate reflecting these corrections in respect of his client. The case made in support of this application was then outlined and included references to the 2003 Act and to both the “<i>Goodwin</i>” decision (35 EHRR 447) and the “<i>I</i>” decision (ECHR 11/7/02) delivered in 2002. These cases are referred to later in this judgment, but as the lead decision was <i>Goodwin</i>, references to that case can be considered as including the decision in “<i>I</i>”, as the legal principles in both are essentially indistinguishable. By way of response dated 23rd December, 2005 the first named respondent denied that there had been any “mistake” in the record of Ms. Foy’s birth and accordingly refused her application. Being dissatisfied, the applicant exercised her right under s. 60(8) of the Civil Registration Act, 2004 to appeal to this court from that decision. Hence the second set of proceedings.</p>
<i>Main Reasoning/ Arguments</i>	The legislation governing Birth Certificates is incompatible with the States obligations under the European Convention on Human Rights as established in the State under the European Convention on Human Rights Act 2003.
<i>Key Issues (concepts, interpretation in case</i>	
<i>Results (sanctions) and key consequences or implications of the case</i>	The Court felt, that some five years after the ECtHR decision in <i>Goodwin</i> , the absence of any provision which would enable the acquired identity of Dr. Foy to be legally recognised in this jurisdiction, meant that the State is in breach of its positive obligations under Article 8 of the Convention. Its margin of appreciation has been thoroughly exhausted save as regards the

	<p>appropriate means of achieving recognition of the applicant's Article 8 rights. The Court issued a Declaration of Incompatibility of the law as set out in s. 60(8) of the Civil Registration Act, 2004. This means that the legislation is incompatible with the European Convention on Human Rights Act 2003 and the Taoiseach (Prime Minister) is required to lay an Order before each House of Parliament.</p>
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Annex 2 – Statistics

Complaints under Equality Legislation 2000-2007 under Sexual Orientation Ground

	Referrals under Employment Equality (EE) Legislation	Referrals under Equal Status (ES) Legislation	Decisions Issued (EE)	Awards (EE)	Decisions Issued (ES)	Awards (ES)
2000	1	0	0	€0	0	€0
2001	5	8	1	€0	0	€0
2002	5	6	2	€0	0	€0
2003	4	3	3	€0	0	€0
2004	4	4	2	€10,000	1	€1,000
2005	4	3	2	€0	1	€1,000
2006	7	2	0	€0	0	€0
2007	4	0	3	€0	1	€0
Total	34	26	13	€10,000	3	€2,000

This information was provided by Brian Farrell of the Equality Tribunal, the State body charged with adjudicating on complaints of discrimination under the Employment Equality Acts and the Equal Status Acts. These complaints refer those made under one ground only, and although there are some on multiple which include sexual orientation no data exists to collate these.

Cases taken by the Equality Authority (EE = Employment Equality legislation; ES = Equal Status legislation)

	2000	2001	2002	2003	2004	2005	2006	2007
Total complaints of discrimination on the ground of sexual orientation (equality body, tribunals, courts etc.): if possible disaggregated according to social areas of discrimination (employment, education, housing, goods and services etc.)	10 (EE) 1 (ES) Access to public bar - 1.	15 (EE) 18(ES) Education - 1 Access to Nightclub -11. Soc. Welf.- 4 Banking -2 Misc. -1 Accom. - 1 Insurance - 1	17(EE) 32 (ES) Licensed Premises – 16. Insurance - 1. Soc. Welf. -2. Banking -1 Clubs - 1 Harassment - 1 Education -1 Misc. - 9	14 (EE) 25 (ES) Licensed Premises – 8. Insurance - 2. Soc. Welf. - 3. State Bodies -3 Transport -1 Banking -1 Other -5 Education -2	5 (EE) 8 (ES) Licensed Premises – 1. Insurance - 2. Soc. Welf. -2. Other -2 Education - 1	5 (EE) 2 (ES) Licensed Premises – 1. Health - 1.	5 (EE) 4 (ES) Licensed Premises – 1. State bodies - 1 Financial services - 1. Education - 1	N/A
Total finding of Discrimination confirmed (by equality body, tribunals, courts etc.): if possible disaggregated according to social areas of discrimination (employment, education, housing, goods and services etc.)								
National Number of sanctions/compensation payments issued (by courts, tribunals, equality bodies etc.): if possible disaggregated according to social areas of discrimination (employment, education, housing, goods and services etc.)								
National range of sanctions/compensation payments (by courts, tribunals, equality bodies etc.): if possible disaggregated according to social areas of discrimination (employment, education, housing, goods and services etc.)								

This data concerns new cases taken by the Equality Authority, but does not include queries, of which there were many hundreds each year.

There a range of settlements ranging up to €40,000 and the putting in place of appropriate policies and procedures.

An example from the Annual Report of 2003 illustrates the type of outcome in sexual orientation cases dealt with by the Equality Authority;

1. Employment on a Community Employment Scheme. Complainant was harassed and questions were asked relating to his sexual orientation. He was asked by his supervisor to confirm whether or not rumours to the effect that he was gay were correct. When he told the supervisor that this was none of his business he was asked directly by the supervisor to state if he was gay. The supervisor also asked other participants on the course if he was gay after he refused to answer this question. When the supervisor had received confirmation from the other participants he again asked him if he was gay. Case settled for €400.

2. In a large solicitors firm, an employee who was out sick was not allowed to return to work by his employers when he informed them that he was H.I.V positive. The employer wanted to disclose his condition to all partners of the firm. This case was settled on the basis of partners agreeing to keep it confidential and his being allowed back to work to finish his apprenticeship.

3. The Department of Social and Family Affairs refused to issue a Free Travel Pass (under the Free Travel Scheme) to the co-habiting partner of a gay an. Following intervention by the Equality Authority, the Free Travel Pass was issued to his partner and both men received €1,500 each in compensation.

The Annual Report of 2004 provides another example: The complainant attended for interview with the company. The complainant was very happy with her interview. The Managing Director of the company advised her that her CV was the

best of those received and went on to discuss salary, commission, company car and other conditions of the job and then offered her the position. The complainant was happy to accept the offer of the position. As the complainant was leaving, the Managing Director asked her whether she was married and she informed that she was as good as married but that her partner was a woman. The claimant was informed a week later that she had not got the job. The company subsequently denied that the claimant was asked this question and stated that she proffered the information herself. It also denied that her sexual orientation was not a factor in their decision not to offer her the job. The case was settled for €8,000.