

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

Ireland

January 2014 Update

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# 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.<sup>1</sup> The Equality Authority – which was established in 1999 - deals with discrimination (including harassment and victimisation) on nine grounds<sup>2</sup>. Statistics concerning complaints pursuant to employment equality legislation under the sexual orientation ground are set out in Annex 2. As these statistics demonstrate, the number of complaints pursuant to employment equality legislation under the sexual orientation ground has remained largely consistent, from a low of one complaint made in 2000 and 2011, to a high of nine complaints made in 2008. The number of decisions issued each year concerning complaints pursuant to equality legislation under the sexual orientation ground has varied from a low of none in 2000, 2006 and 2009, to a high of three in 2003 and 2007. No awards were made in respect of complaints made pursuant to equality legislation under the sexual orientation ground in nine of the twelve years between 2000 and 2012 (2000, 2001, 2002, 2003, 2005, 2006, 2007, 2009 and 2011) while the highest amount awarded in one year was €49,700.<sup>3</sup>

## 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 no longer required to establish themselves as legally resident in another EU country before joining their partners in Ireland as a result of the decision of the European Court of Justice in *Metock v Minister for Justice* (Case C-127/08) [2008] ECR I-6241. The lack of statistics or case law concerning freedom of movement and LGBT persons in Ireland means that it is not possible to identify any trends in this regard.

## Asylum and subsidiary protection

Irish law expressly recognises sexual orientation as a basis upon which a person seeking asylum might have been persecuted in order to gain refugee status.<sup>4</sup> Irish law was amended in 2010 to

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<sup>1</sup> Ireland, 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 Síochána College, Ireland.

<sup>2</sup> Employment Equality Act 1998 and the Equal Status Act 2000.

<sup>3</sup> Information provided by the Secretariat of the Equality Tribunal, the State body charged with adjudicating on complaints of discrimination under the Employment Equality Acts and the Equal Status Acts, February 2014.

<sup>4</sup> Ireland, Section 1 of the Refugee Act 1996, available at [www.irishstatutebook.ie/1996/en/act/pub/0017/print.html#sec1](http://www.irishstatutebook.ie/1996/en/act/pub/0017/print.html#sec1) (accessed on 15 February 2014).

extend family reunification rights to civil partners of refugees on an equivalent basis to spouses.<sup>5</sup> Irish law was amended in 2013 to extend family reunification to civil partners of beneficiaries of subsidiary protection.<sup>6</sup> However, there is no express right to family reunification with de facto partners outside of the institution of civil partnership, which may result in exclusion of some same sex couples. A number of decisions of the High Court since 2010 have recognised that the particular social group includes groups defined by sexual orientation, and that it is not permissible to refuse a refugee application on the ground that the applicant can avoid persecution by the exercise of discretion.<sup>7</sup>

## Family reunification

Ireland opted out of the Family Reunification Directive and is therefore not bound by its terms or subject to its application. Irish law was amended in 2010 to extend family reunification rights to civil partners of refugees on an equivalent basis to spouses.<sup>8</sup> Irish law was also amended in 2013 to extend family reunification to civil partners of beneficiaries of subsidiary protection.<sup>9</sup> However, there is no express right to family reunification with de facto partners outside of the institution of civil partnership, which may result in exclusion of some same sex couples.

## 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<sup>10</sup> and under the ECHR to the extent that the Convention is given further effect in Irish law since 2003.<sup>11</sup> It was noted in the 2010 report that the record in relation to the holding of LGB/LGBT marches was quite positive; this remains the case as of 2014.

## Hate speech and criminal law

There is a criminal prohibition on incitement to hatred on a number of grounds including sexual orientation since 1989.<sup>12</sup> This is supplemented by other laws of a criminal and civil nature and by

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<sup>5</sup> Ireland, Schedule, Part 5 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, available at [www.irishstatutebook.ie/2010/en/act/pub/0024//sched.html#sched](http://www.irishstatutebook.ie/2010/en/act/pub/0024//sched.html#sched) (accessed on 15 February 2014).

<sup>6</sup> Ireland, European Union (Subsidiary Protection) Regulations 2013 (S.I. No.426 of 2013) available at [www.inis.gov.ie/en/INIS/SI%20426%20of%202013.pdf/Files/SI%20426%20of%202013.pdf](http://www.inis.gov.ie/en/INIS/SI%20426%20of%202013.pdf/Files/SI%20426%20of%202013.pdf) (accessed on 15 February 2014).

<sup>7</sup> Ireland, see eg *MA v Refugee Appeals Tribunal* [2010] IEHC 519 available at [www.courts.ie/Judgments.nsf/0/FE2FE1C4A362AFAE802579020048C17F](http://www.courts.ie/Judgments.nsf/0/FE2FE1C4A362AFAE802579020048C17F) accessed on 7 May 2014.

<sup>8</sup> Ireland, Schedule, Part 5 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, available at [www.irishstatutebook.ie/2010/en/act/pub/0024//sched.html#sched](http://www.irishstatutebook.ie/2010/en/act/pub/0024//sched.html#sched) (accessed on 15 February 2014).

<sup>9</sup> Ireland, European Union (Subsidiary Protection) Regulations 2013 (S.I. No.426 of 2013) available at [www.inis.gov.ie/en/INIS/SI%20426%20of%202013.pdf/Files/SI%20426%20of%202013.pdf](http://www.inis.gov.ie/en/INIS/SI%20426%20of%202013.pdf/Files/SI%20426%20of%202013.pdf) (accessed on 15 February 2014).

<sup>10</sup> Ireland, Constitution of Ireland 1937, available at [www.taoiseach.gov.ie/eng/Historical\\_Information/The\\_Constitution/December\\_2013\\_-\\_Bhunreacht\\_na\\_hEireann\\_Constitution\\_Text.pdf](http://www.taoiseach.gov.ie/eng/Historical_Information/The_Constitution/December_2013_-_Bhunreacht_na_hEireann_Constitution_Text.pdf) (accessed on 15 February 2014).

<sup>11</sup> Ireland, European Convention on Human Rights Act 2003, available at [www.irishstatutebook.ie/2003/en/act/pub/0020/](http://www.irishstatutebook.ie/2003/en/act/pub/0020/) (accessed on 15 February 2014).

<sup>12</sup> Ireland, Prohibition of Incitement to Hatred Act 1989, available at [www.irishstatutebook.ie/1989/en/act/pub/0019/](http://www.irishstatutebook.ie/1989/en/act/pub/0019/) (accessed on 15 February 2014).

‘soft law’. There are a number of problems with the 1989 Act which remains under review<sup>13</sup> and, although official statistics are effectively non-existent, there is some evidence of hate-related crimes and other offences affecting LGBT communities.<sup>14</sup> The most recent data available indicates that there were twelve recorded incidents of incitement to hatred contrary to section 2 of the Act in 2009, and 8 recorded incidents in 2010. These data are not disaggregated by gender or ground, so it is not possible to identify the proportion of such incidents which specifically concerned the sexual orientation ground.<sup>15</sup> In recent years there is evidence of quite effective relationships between An Garda Síochána (police) and organisations representing LGBT communities, such as the initiative whereby the Gay and Lesbian Equality Network (GLEN) provided training to An Garda Síochána on LGBT issues in policing, and GLEN’s ongoing work with An Garda Síochána to mainstream LGBT issues in their policies and procedures.<sup>16</sup>

## Transgender issues

Despite the decision of the High Court in 2007 declaring Irish law in the area of recognition of post-operative gender identity for transsexual incompatible with the ECHR, this incompatibility still has not been addressed in reforming legislation.<sup>17</sup> However, the government published proposed legislation in 2013 and publication of the full draft Gender Recognition Bill is now expected in mid-2014.<sup>18</sup> 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 arising from the lack of a formal framework governing gender recognition, eg concerning the ability to marry in the reassigned gender, the lack of entitlement to have birth certificates revised, and the fact that transsexual persons are not entitled to enjoy any right legally confined to persons of the gender with which they identify. In December 2013 the Transgender Equality Network of Ireland (TENI) launched the results of the largest trans survey carried out in Ireland<sup>19</sup>, which revealed high levels of suicide attempt rates amongst the trans community in Ireland, with 78% of respondents reporting that they had considered suicide, and 40% of these reporting that they had attempted to take their own life at least once. The levels of self-harm reported were also reported to be high, with 44% of people having self-harmed.<sup>20</sup>

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<sup>13</sup> Ireland, 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.

<sup>14</sup> Ireland, Central Statistics Office *Garda Recorded Crime Statistics 2006-2010* (Central Statistics Office 2012) available at [www.drugsandalcohol.ie/17469/1/gardacrimestats\\_2010.pdf](http://www.drugsandalcohol.ie/17469/1/gardacrimestats_2010.pdf) (accessed on 15 February 2014).

<sup>15</sup> Ireland, Central Statistics Office *Garda Recorded Crime Statistics 2006-2010* (Central Statistics Office 2012) available at [www.drugsandalcohol.ie/17469/1/gardacrimestats\\_2010.pdf](http://www.drugsandalcohol.ie/17469/1/gardacrimestats_2010.pdf) (accessed on 15 February 2014).

<sup>16</sup> Ireland, information obtained in correspondence with Craig Dwyer, Policy and Programmes Officer, Gay and Lesbian Equality Network, 6 March 2014.

<sup>17</sup> Ireland, [www.welfare.ie/en/Pages/Gender-Recognition-Bill-2013.aspx](http://www.welfare.ie/en/Pages/Gender-Recognition-Bill-2013.aspx) accessed on 16 February 2014.

<sup>18</sup> Ireland, General Scheme of the Gender Recognition Bill 2013 available at [www.welfare.ie/en/downloads/Gender-Recognition-Bill-2013.pdf](http://www.welfare.ie/en/downloads/Gender-Recognition-Bill-2013.pdf) accessed on 22 June 2014.

<sup>19</sup> Ireland, “HSE and TENI - Transgender Health Survey” 1 June 2012.

<sup>20</sup> Ireland, TENI *Speaking from the Margins: Trans Mental Health and Wellbeing in Ireland* (2013) available at <http://teni.ie/news-post.aspx?contentid=970> (accessed on 16 February 2014).

## 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<sup>21</sup>, the accessibility of the redress mechanisms available before the Equality Tribunal, the evolution of good working relations between An Garda Síochána (police) and LGBT organisations (as noted above)<sup>22</sup> and the development of anti-bullying policies in the education context expressly addressing homophobic bullying<sup>23</sup>. The increase of LGBT liaison officers within An Garda Síochána, who have been trained on issues relating to LGBT people and who provide advice and assistance to LGBT people seeking to report a crime, from 50 to over 300 is also a good practice.<sup>24</sup>

## Intersex

There is no specific provision in Irish law or policy concerning intersex persons, whether in terms of prohibition from discrimination, birth registration or medical interventions.<sup>25</sup> Concerns have been expressed by TENI that in this context of invisibility, the rights of intersex persons in Ireland may be vulnerable to breach.<sup>26</sup>

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<sup>21</sup> Ireland, Equality Authority *Implementing Equality for Lesbians, Gays and Bisexuals* (Dublin 2002).

<sup>22</sup> Ireland, information obtained in correspondence with Craig Dwyer, Policy and Programmes Officer, Gay and Lesbian Equality Network, 6 March 2014.

<sup>23</sup> Ireland, Department of Children and Youth Affairs (2013) “Ministers Quinn and Fitzgerald launch Action Plan on Bullying” Press release, 29 January 2013, available at: [www.dcyv.gov.ie/viewdoc.asp?Docid=2572&CatID=11&mn.accessed on 15 February 2014](http://www.dcyv.gov.ie/viewdoc.asp?Docid=2572&CatID=11&mn.accessed%20on%2015%20February%202014).

<sup>24</sup> Ireland, information obtained in correspondence with Craig Dwyer, Policy and Programmes Officer, Gay and Lesbian Equality Network, 6 March 2014.

<sup>25</sup> Ireland, see TENI (2013) Human Rights Violations in Ireland on the basis of Gender Identity and Intersex Identity, Submission to the Country Report Task Forces, 109th Session of the Human Rights Committee, Geneva, October-November 2013, available at [http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/IRL/INT\\_CCPR\\_NGO\\_IRL\\_14833\\_E.doc](http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/IRL/INT_CCPR_NGO_IRL_14833_E.doc) (accessed on 24 February 2014).

<sup>26</sup> Ireland, TENI (2013) Human Rights Violations in Ireland on the basis of Gender Identity and Intersex Identity, Submission to the Country Report Task Forces, 109th Session of the Human Rights Committee, Geneva, October-November 2013.

# 1 Implementation of Employment Directive 2000/78/EC

The Equality Act 2004<sup>27</sup> – which amended the pre-existing Employment Equality Act 1998<sup>28</sup> and the Equal Status Act 2000<sup>29</sup> – 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, civil status, family status, age, membership of the Traveller Community, race, disability and religion.<sup>30</sup>

A number of gaps in the implementation of the Directive were identified in a reasoned opinion of the EU Commission issued on 31 January 2008.<sup>31</sup> For example, the definition of indirect discrimination was criticised for not being broad enough; the limits on compensation payable for the non-gender grounds of prohibited discrimination were also criticised as were the limitations 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.<sup>32</sup> 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 had also been raised in a number of ways by the statutory national body charged with promoting equality and combating discrimination, the Equality Authority.<sup>33</sup> Ireland answered the Commission’s reasoned opinion by way of letter on 4 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 reply, announced that it

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<sup>27</sup> Ireland, available at [www.irishstatutebook.ie/2004/en/act/pub/0024/index.html](http://www.irishstatutebook.ie/2004/en/act/pub/0024/index.html) (accessed on 12 February 2014).

<sup>28</sup> Ireland, available at [www.irishstatutebook.ie/1998/en/act/pub/0021](http://www.irishstatutebook.ie/1998/en/act/pub/0021) (accessed on 12 February 2014).

<sup>29</sup> Ireland, available at [www.irishstatutebook.ie/2000/en/act/pub/0008/index.html](http://www.irishstatutebook.ie/2000/en/act/pub/0008/index.html) (accessed on 12 February 2014).

<sup>30</sup> Ireland, Upon the introduction of civil partnership in Irish law in 2010 the Employment Equality Act 1998 was amended by deleting “marital status” as a prohibited ground of discrimination, and replacing this ground with the new ground “civil status”, which is defined as “being single, married, separated, divorced, widowed, in a civil partnership within the meaning of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 or being a former civil partner in a civil partnership that has ended by death or been dissolved”: see section 102 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 available at [www.irishstatutebook.ie/2010/en/act/pub/0024/sec0102.html](http://www.irishstatutebook.ie/2010/en/act/pub/0024/sec0102.html) (accessed on 12 February 2014).

<sup>31</sup> European Commission “Employment Directive (2000/78/EC): list of Member States to which a reasoned opinion or letter of formal notice will be sent” (Memo/08/68, 31 January 2008) available at [http://europa.eu/rapid/press-release\\_MEMO-08-68\\_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-08-68_en.htm?locale=en) (accessed on 12 February 2014).

<sup>32</sup> Ireland, This limitation is provided in section 37 of the Employment Equality Act 1998, available at [www.irishstatutebook.ie/1998/en/act/pub/0021/sec0037.html](http://www.irishstatutebook.ie/1998/en/act/pub/0021/sec0037.html) (accessed on 12 February 2014).

<sup>33</sup> Ireland, Equality Authority (2002) *Implementing Equality for Lesbians, Gays and Bisexuals* (Dublin, 2002) available at [www.equality.ie/en/Publications/Policy-Publications/Implementing-Equality-for-Lesbians,-Gays-and-Bisexuals.html](http://www.equality.ie/en/Publications/Policy-Publications/Implementing-Equality-for-Lesbians,-Gays-and-Bisexuals.html) (accessed on 12 February 2014).

was satisfied with the measures taken and had thus closed the infringement procedure on this point.<sup>34</sup>

However, notwithstanding the Commission's decision not to pursue infringement proceedings against Ireland, the existence of the section 37 exemption for religious bodies has continued to be the subject of debate. On 24 October 2013 the Equality Authority of Ireland issued a call for submissions in relation to this provision, as part of a consultation process in relation to a proposed amendment to s.37 of the Employment Equality Acts 1998-2011. The deadline for submissions was 1 November 2013. At the date of finalisation of this report, the Equality Authority had not published its conclusions or recommendations following on from this consultation process.

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, among others, 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 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

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<sup>34</sup> European Commission "Closure of the infringement procedure on the transposition in Ireland of Directive 2000/78/EC" (IP/08/703, 6 May 2008) available at [http://europa.eu/rapid/press-release\\_IP-08-703\\_en.htm](http://europa.eu/rapid/press-release_IP-08-703_en.htm) (accessed on 12 February 2014).



justified their position. However, as noted above, the Equality Authority has recently announced a consultation process concerning reform of section 37 of the 1998 Act, and the government of Ireland has indicated that it is committed to reforming this provision.<sup>35</sup>

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 had a much broader mandate which was expanded under the Equal Status Act 2000 and the Intoxicating Liquor Act 2003. The Authority had 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 worked 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.

In September 2011 the Minister for Justice announced the Government's intention to merge the Equality Authority and the Irish Human Rights Commission into a single body in 2012. In June 2012 the General Scheme of a Bill to amalgamate the Human Rights Commission and the Equality Authority was published and referred to the Oireachtas [national parliament] Committee on Justice, Defence and Equality for consideration.<sup>36</sup> In December 2013 the Minister for Justice stated that he expected the legislation to be published shortly.<sup>37</sup> The Irish Human Rights and Equality Commission Bill was published on 21 March 2014 and is currently under consideration by the Dáil (lower house of parliament).<sup>38</sup> It is not possible to estimate when the Bill will be passed into law. However, in advance of the Bill being passed, the Irish Human Rights Commission and the Equality Authority have effectively merged and are now operating as the Irish Human Rights and Equality Commission (designate).<sup>39</sup>

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

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<sup>35</sup> Ireland, Statement by the Minister for Justice and Equality at the second stage of the Employment Equality (Amendment) Bill 2012, 2 May 2012, available at <http://debates.oireachtas.ie/seanad/2012/05/02/00007.asp> (accessed on 14 February 2014).

<sup>36</sup> Ireland, General Scheme of a Bill to amalgamate the Human Rights Commission and the Equality Authority, available at [www.justice.ie/en/JELR/20120605HeadsOfIHRECBill.pdf/Files/20120605HeadsOfIHRECBill.pdf](http://www.justice.ie/en/JELR/20120605HeadsOfIHRECBill.pdf/Files/20120605HeadsOfIHRECBill.pdf) accessed on 14 February 2014.

<sup>37</sup> Ireland, "Bill on merger of human rights bodies to be published 'shortly'" The Irish Times, 3 December 2013, available at [www.irishtimes.com/news/ireland/irish-news/bill-on-merger-of-human-rights-bodies-to-be-published-shortly-1.1615514](http://www.irishtimes.com/news/ireland/irish-news/bill-on-merger-of-human-rights-bodies-to-be-published-shortly-1.1615514) (accessed on 14 February 2014).

<sup>38</sup> Ireland, Irish Human Rights and Equality Commission Bill 2014, available at [www.oireachtas.ie/viewdoc.asp?DocID=25711&&CatID=59](http://www.oireachtas.ie/viewdoc.asp?DocID=25711&&CatID=59) accessed on 6 May 2014.

<sup>39</sup> Ireland, Department of Justice and Equality (2014) Press release "Shatter publishes the Irish Human Rights and Equality Commission Bill 2014", 21 March 2014 available at [www.justice.ie/en/JELR/Pages/PR14000083](http://www.justice.ie/en/JELR/Pages/PR14000083) accessed on 6 May 2014.

gender discrimination can be taken directly to the Circuit Court. There is no ‘class action’ procedure before the Equality Tribunal in Ireland; however, any person who believes that he or she has experienced discrimination contrary to the Employment Equality Act 1998 (as amended) may seek redress by referring the case to the Equality Tribunal.<sup>40</sup>

On 6 July 2012 the Minister for Jobs, Enterprise and Innovation published a policy document detailing his proposed legislative provisions for a new workplace relations service. It is intended that a Workplace Relations Commission will bring together the existing services of this body of quasi-judicial specialist tribunals, including the Equality Tribunal.<sup>41</sup> At the date of finalisation of this report, the proposed legislation required in order to introduce the proposed Workplace Relations Commission had not yet been published.

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

Statistics concerning complaints under equality legislation under the sexual orientation ground are set out in Annex 2. As these statistics demonstrate, the number of complaints pursuant to equality legislation under the sexual orientation ground has remained largely consistent, from a low of one complaint made in 2000 and 2011, to a high of nine complaints made in 2008. The number of decisions issued each year concerning complaints pursuant to equality legislation under the sexual orientation ground has varied from a low of none in 2000, 2006 and 2009, to a high of three in 2003 and 2007. No awards were made in respect of complaints made pursuant to equality legislation under the sexual orientation ground in nine of the twelve years between 2000 and 2012 (2000, 2001, 2002, 2003, 2005, 2006, 2007, 2009 and 2011) while the highest amount awarded in one year was €49,700. 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 regularly<sup>42</sup> 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.

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<sup>40</sup> Ireland, Regan, M., *Employment Law* (Bloomsbury 2009) at para.22.53.

<sup>41</sup> Ireland, Department of Jobs, Enterprise and Innovation *Legislating for a World-Class Workplace Relations Service* (Dublin, July 2012) available at [www.djei.ie/publications/employment/2012/Legislating for a Worldclass Workplace Relations Service July 2012.pdf](http://www.djei.ie/publications/employment/2012/Legislating%20for%20a%20Worldclass%20Workplace%20Relations%20Service%20July%202012.pdf) (accessed on 14 February 2014).

<sup>42</sup> Ireland (2007) Walsh, J., Conlon, C., Fitzpatrick, B, and Hansson, U., *Enabling Lesbian, Gay and Bisexual Individuals to Access Their Rights Under Equality Law*, (Equality Commission for Northern Ireland and the Equality Authority, November 2007), available at [www.equality.ie/Files/Enabling%20Lesbian,%20Gay%20and%20Bisexual%20Individuals%20To%20Access%20Their%20Rights%20Under%20Equality%20Law.pdf](http://www.equality.ie/Files/Enabling%20Lesbian,%20Gay%20and%20Bisexual%20Individuals%20To%20Access%20Their%20Rights%20Under%20Equality%20Law.pdf) (accessed on 14 February 2014).

## 2 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. Restrictions which previously applied to free movement of Bulgarian and Romanian citizens and their family members were lifted on 17 July 2012.<sup>43</sup> Apart from adoption and guardianship situations, there is no recognition of non- biological parenthood in Irish law. While civil partnership was introduced in Irish law by the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, this legislation did not confer any added right or responsibility on a non-biological parent.

Under the instrument that originally transposed Directive 2004/38/EC, third country nationals were required to have established themselves as legally resident in another EU country before joining their partners in Ireland.<sup>44</sup> This was upheld in a decision of the High Court in Ireland which was then appealed to the Supreme Court.<sup>45</sup> However, a subsequent ECJ decision on a case referred from the High Court explicitly reversed early findings to come to a conclusion that the non-EU spouse of a citizen of the Union can move and reside in the Union without having previously been lawfully resident in a member state.<sup>46</sup> The ECJ thus held that this is not a right that can be made conditional to the prior lawful residence in another member state.

The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 allows for recognition of same-sex unions concluded elsewhere – whether marriages or civil partnerships.<sup>47</sup> One important criticism of this power to recognise foreign same sex unions arises from the fact that regardless of whether the union is a marriage or a civil partnership, it will only be recognised as a civil partnership in Irish law; this has been described as an unacceptable downgrading of foreign same sex marriages in Irish law.<sup>48</sup> In order for such unions to be recognised in Irish law, the Minister for Justice may declare by order that a class of legal relationship entered into by two persons of the same sex is entitled to be recognised as a civil partnership in Ireland, provided that under the law of the jurisdiction in which the legal relationship was entered into (a) the relationship is exclusive in nature, (b) the relationship is permanent unless the parties dissolve it through the courts, (c) the relationship has been registered under the law of that jurisdiction, and (d) the rights and obligations attendant on the relationship are, in the opinion of the Minister, sufficient to indicate that the relationship would be treated comparably to a civil partnership. To date, the Minister for Justice has issued three statutory instruments recognising same sex unions from thirty seven jurisdictions, including eleven EU Member States.<sup>49</sup>

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<sup>43</sup> Ireland, Department of Jobs, Enterprise and Innovation (2012) “Labour Market Issues Relating to 2005 EU Accession Treaty” Press release, 20 July 2012, available at [www.djei.ie/press/2012/20120720a.htm](http://www.djei.ie/press/2012/20120720a.htm) accessed on 15 February 2014.

<sup>44</sup> Ireland, European Communities (Free Movement of Persons) (No.2) Regulations 2006 (S.I. No.656 of 2006) available at [www.inis.gov.ie/en/INIS/SI656of2006.pdf/Files/SI656of2006.pdf](http://www.inis.gov.ie/en/INIS/SI656of2006.pdf/Files/SI656of2006.pdf) (accessed on 14 February 2014).

<sup>45</sup> Ireland, *SK v Minister for Justice* [2007] IEHC 216; High Court, 28 May 2007, available at <http://www.courts.ie/judgments.nsf/6681dee4565ecf2c80256e7e0052005b/dd1ae65573561111802573400052505f?OpenDocument> (accessed on 14 February 2014).

<sup>46</sup> European Court of Justice, *Metock v Minister for Justice* (Case C-127/08) [2008] ECR I-6241.

<sup>47</sup> Ireland, Section 5 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, available at [www.irishstatutebook.ie/2010/en/act/pub/0024/sec0005.html#sec5](http://www.irishstatutebook.ie/2010/en/act/pub/0024/sec0005.html#sec5) (accessed on 14 February 2014).

<sup>48</sup> Ireland, Brazil, P., “The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010: Radical New Departure in Irish Law?” (2011) 34 Dublin University Law Journal 208.

<sup>49</sup> Ireland, Civil Partnership (Recognition of Registered Foreign Relationships) Order 2010 (S.I. No. 649 of 2010), Civil Partnership (Recognition of Registered Foreign Relationships) Order 2011 (S.I. No. 642 of 2011) and Civil

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

No cases were identified in Ireland concerning freedom of movement and LGBT couples.<sup>50</sup>

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Partnership (Recognition of Registered Foreign Relationships) Order 2012 (S.I. No. 505 of 2012), available at [www.irishstatutebook.ie/isbc/2010\\_24.html](http://www.irishstatutebook.ie/isbc/2010_24.html) (accessed on 14 February 2014).

<sup>50</sup> Ireland: Sources consulted include Courts Service database of judgments ([www.courts.ie](http://www.courts.ie) accessed on 14 February 2014), Justis legal database ([www.justis.com](http://www.justis.com) accessed on 14 February 2014) and WestlawIE legal database ([www.westlaw.ie](http://www.westlaw.ie) accessed on 14 February 2014).

### 3 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.<sup>51</sup> The Refugee Act 1996 does not expressly recognise gender identity within the concept of a social group. Although the Recast Qualification Directive expressly recognises gender identity within the concept of a particular social group, Ireland did not opt into this Directive and is therefore not bound by it.<sup>52</sup> There were some concerns that the level of protection in respect of sexual orientation under the Refugee Act 1996 may be lowered under new legislation which was initially published in 2006, the Immigration, Residence and Protection Bill. At the date of finalisation of this report in February 2014, this Bill had been withdrawn from parliament for further amendment and it is therefore unclear at present whether the Bill will in fact address the issue of particular social groups defined by sexual orientation. The Bill is expected to be reintroduced later in 2014.<sup>53</sup> 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.<sup>54</sup>

A number of decisions of the Irish High Court since 2010 in respect of asylum applications have made clear that refugee decision-makers are not entitled to refuse an asylum claim related to sexual orientation on the basis that the individual can avoid persecution by exercising discretion in their country of origin in relation to their sexual orientation. It would appear that in a number of cases prior to 2010, at least some asylum applications had been refused on the basis of this “discretion reasoning”.<sup>55</sup> However, as a result of the decisions in *MA v Refugee Appeals Tribunal*<sup>56</sup> and *SA v Refugee Appeals Tribunal*<sup>57</sup> it is now beyond doubt that decision-makers may not refuse an asylum application on such grounds, which is consistent with the decision of the CJEU in (*Cases C-199/12, 200/12 and 201/12*) *X, Y and Z v Minister voor Immigratie*.<sup>58</sup>

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<sup>51</sup> Ireland, Section 1 of the Refugee Act 1996, available at [www.irishstatutebook.ie/1996/en/act/pub/0017/print.html#sec1](http://www.irishstatutebook.ie/1996/en/act/pub/0017/print.html#sec1) (accessed on 15 February 2014).

<sup>52</sup> Ireland, Recital (50) of the Recast Qualification Directive notes “In accordance with Articles 1, 2 and Article 4a(1) of the Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the TEU and to the TFEU, and without prejudice to Article 4 of that Protocol, the United Kingdom and Ireland are not taking part in the adoption of this Directive and are not bound by it or subject to its application.”

<sup>53</sup> Ireland, Parliamentary questions 445 and 446, 11 February 2014, available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2014021100072#WRU03700> accessed on 6 May 2014 .

<sup>54</sup> Ireland, see website of the Refugee Applications Commissioner ([www.orac.ie](http://www.orac.ie) accessed on 15 February 2014) and website of the Refugee Appeals Tribunal ([www.refappeal.ie](http://www.refappeal.ie) accessed on 15 February 2014).

<sup>55</sup> Ireland, see eg *MA v Refugee Appeals Tribunal* [2010] IEHC 519 available at [www.courts.ie/Judgments.nsf/0/FE2FE1C4A362AFAE802579020048C17F](http://www.courts.ie/Judgments.nsf/0/FE2FE1C4A362AFAE802579020048C17F) accessed on 7 May 2014.

<sup>56</sup> Ireland, *MA v Refugee Appeals Tribunal* [2010] IEHC 519.

<sup>57</sup> Ireland, *SA v Refugee Appeals Tribunal* [2012] IEHC 78 available at [www.courts.ie/Judgments.nsf/0/BB3B9837E902D8DA802579EC0052787F](http://www.courts.ie/Judgments.nsf/0/BB3B9837E902D8DA802579EC0052787F) accessed on 7 May 2014.

<sup>58</sup> Court of Justice of the European Union, 7 November 2013 available at <http://curia.europa.eu/juris/liste.jsf?num=C-199/12> accessed on 7 May 2014.

The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 amended the Refugee Act 1996 by inserting an entitlement for a civil partner of a refugee to apply to enter and reside in the state.<sup>59</sup> The Refugee Act 1996 states that, subject to exceptions in the interests of national security or public policy, a person who has been granted family reunification with a refugee (which would include a civil partner of a refugee) has the same rights and privileges in the State as the refugee,<sup>60</sup> including the right to reside in the State and to travel to and from the State; the right to work and have access to education on an equivalent basis to Irish citizens; the right to receive the same medical care and social welfare benefits on an equivalent basis to Irish citizens.<sup>61</sup>

When subsidiary protection was introduced in Irish law in 2006, the provisions regarding family reunification did not extend to civil partners.<sup>62</sup> However, new regulations governing subsidiary protection were introduced in 2013, which extend the definition of “member of the family” to include civil partners.<sup>63</sup>

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<sup>59</sup> Ireland, Schedule, Part 5 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, available at [www.irishstatutebook.ie/2010/en/act/pub/0024//sched.html#sched](http://www.irishstatutebook.ie/2010/en/act/pub/0024//sched.html#sched) (accessed on 15 February 2014).

<sup>60</sup> Ireland, section 18(3)(a) of the Refugee Act 1996 available at [www.irishstatutebook.ie/1996/en/act/pub/0017/sec0018.html#sec18](http://www.irishstatutebook.ie/1996/en/act/pub/0017/sec0018.html#sec18) accessed on 6 May 2014.

<sup>61</sup> Ireland, section 3 of the Refugee Act 1996 available at [www.irishstatutebook.ie/1996/en/act/pub/0017/sec0003.html#sec3](http://www.irishstatutebook.ie/1996/en/act/pub/0017/sec0003.html#sec3) accessed on 6 May 2014.

<sup>62</sup> Ireland, European Communities (Eligibility for Protection) Regulations 2006 (S.I. No 518 of 2006) available at [www.inis.gov.ie/en/INIS/AsylumQual.pdf/Files/AsylumQual.pdf](http://www.inis.gov.ie/en/INIS/AsylumQual.pdf/Files/AsylumQual.pdf) (accessed on 15 February 2014).

<sup>63</sup> Ireland, European Union (Subsidiary Protection) Regulations 2013 (S.I. No.426 of 2013) available at [www.inis.gov.ie/en/INIS/SI%20426%20of%202013.pdf/Files/SI%20426%20of%202013.pdf](http://www.inis.gov.ie/en/INIS/SI%20426%20of%202013.pdf/Files/SI%20426%20of%202013.pdf) (accessed on 15 February 2014).

## 4 Family reunification

In accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community and without prejudice to Article 4 of the said Protocol, Ireland did not participate in the adoption of the Family Reunification Directive (2003/86/EC) and accordingly is not bound by or subject to its application. As noted above, the definition of family for the purpose of the Refugee Act 1996 was extended to include civil partners of refugees in 2010, while a similar reform was introduced in 2013 in relation to beneficiaries of subsidiary protection.

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 and Certain Rights and Obligations of Cohabitants Act 2010 came into force on 1 January 2011. It was welcomed as an important step forward for civil rights in Ireland and for the first time in Irish law gave same sex couples formal recognition. However, concerns were expressed that this legislation made no reference to children of, and/or adoption by, same sex couples.<sup>64</sup> There were concerns that the failure of the government to address this issue in the Civil Partnership Act left children facing many questions regarding inheritance, guardianship and access.<sup>65</sup> However, on 5 November 2013 the Minister for Justice published the general scheme of the Children and Family Relationships Bill 2013, which is intended to address some of these concerns; for example, the Bill provides for extending guardianship (parental responsibility) to civil partners, step-parents, those co-habiting with the biological or adoptive parent and those acting in the place of a parent for a specified period, provided that the child does not then have more than two guardians.<sup>66</sup> Although this proposed legislation will not address same sex adoption, the government has also indicated that it intends to review the law in this area, stating that “a law which permits the adoption of a child by an individual who is gay but excludes the adoption of a child by a same sex couple makes little sense and can properly be regarded as discriminatory.”<sup>67</sup>

At present, recognition of intercountry adoption (previously referred to as foreign adoption) in Ireland is regulated by the Adoption Act 2010.<sup>68</sup> Section 57 of the Adoption Act 2010 states that an intercountry adoption which took place after 1 November 2010 will be recognised in Ireland provided that it has been certified under a certificate issued by the competent authority of the state of the adoption as having been effected by an adopter or adopters who were habitually resident

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<sup>64</sup> Ireland, Marriage Equality “Missing Pieces: A comparison of the rights and responsibilities gained from civil partnership compared to the rights and responsibilities gained through civil marriage in Ireland” (Ireland, 2011) available at [www.marriageequality.ie/download/pdf/missing\\_pieces.pdf](http://www.marriageequality.ie/download/pdf/missing_pieces.pdf) (accessed on 15 February 2014).

<sup>65</sup> Ireland, Marriage Equality “Missing Pieces: A comparison of the rights and responsibilities gained from civil partnership compared to the rights and responsibilities gained through civil marriage in Ireland” (Ireland, 2011), available at [www.marriageequality.ie/download/pdf/missing\\_pieces.pdf](http://www.marriageequality.ie/download/pdf/missing_pieces.pdf) (accessed on 15 February 2014).

<sup>66</sup> Ireland, General Scheme of the Children and Family Relationships Bill 2013, available at [www.justice.ie/en/JELR/Children%20and%20Family%20Relationships%20Bill%202013%20141113.pdf/Files/Children%20and%20Family%20Relationships%20Bill%202013%20141113.pdf](http://www.justice.ie/en/JELR/Children%20and%20Family%20Relationships%20Bill%202013%20141113.pdf/Files/Children%20and%20Family%20Relationships%20Bill%202013%20141113.pdf) (accessed on 15 February 2014).

<sup>67</sup> Ireland, General Scheme of the Children and Family Relationships Bill 2013.

<sup>68</sup> Ireland, Adoption Act 2010, available at [www.irishstatutebook.ie/2010/en/act/pub/0021](http://www.irishstatutebook.ie/2010/en/act/pub/0021) accessed on 12 May 2014.

in that state at the time of the adoption in accordance with the law of that state, and that the adoption complies with the requirements of the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption 1993.<sup>69</sup> However, even where these conditions are met, the recognition of intercountry adoption is “subject to public policy”.<sup>70</sup> It has been suggested that as a result of this provision, “even if a foreign jurisdiction permits adoption by civil partners jointly, the State will not recognise an intercountry adoption order for the adoption of a child by more than one person, other than in favour of a married couple.”<sup>71</sup>

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 marriage. This is not the case in Ireland and the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 does not recognise a unit of civil partnership as a family. This arises from concerns that the definition of the family in the Irish Constitution refers exclusively to the family based on heterosexual marriage.<sup>72</sup> However, on 5 November 2013 the government of Ireland announced that it intends to hold a referendum in 2015 on same sex marriage which, if passed, could positively impact on the problems which can currently arise for transnational LGBT families because of their exclusion from recognition under existing Irish law.<sup>73</sup> There is no case law or statistics available in respect of the family reunification of LGBT partners.<sup>74</sup>

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<sup>69</sup> Ireland, section 57 of the Adoption Act 2010 available at [www.irishstatutebook.ie/2010/en/act/pub/0021/sec0057.html#sec57](http://www.irishstatutebook.ie/2010/en/act/pub/0021/sec0057.html#sec57) accessed on 12 May 2014.

<sup>70</sup> Ireland, section 57 of the Adoption Act 2010.

<sup>71</sup> Ireland, Marriage Equality “Missing Pieces: A comparison of the rights and responsibilities gained from civil partnership compared to the rights and responsibilities gained through civil marriage in Ireland” (Ireland, 2011), p.26, available at [www.marriagequality.ie/download/pdf/missing\\_pieces.pdf](http://www.marriagequality.ie/download/pdf/missing_pieces.pdf) (accessed on 15 February 2014).

<sup>72</sup> Ireland, Zappone and Gilligan v Revenue Commissioners [2006] IEHC 404, available at [www.courts.ie/judgments.nsf/6681dee4565ecf2c80256e7e0052005b/a4fe4e30eef23925802572790040d30c?OpenDocument](http://www.courts.ie/judgments.nsf/6681dee4565ecf2c80256e7e0052005b/a4fe4e30eef23925802572790040d30c?OpenDocument) (accessed on 15 February 2014).

<sup>73</sup> Ireland, (2013) Press release “Referendum on same-sex marriage to take place in first half of 2015”, 5 November 2013, available at [www.merrionstreet.ie/index.php/2013/11/referendum-on-same-sex-marriage-to-take-place-in-first-half-of-2015/?cat=3](http://www.merrionstreet.ie/index.php/2013/11/referendum-on-same-sex-marriage-to-take-place-in-first-half-of-2015/?cat=3) (accessed on 15 February 2014).

<sup>74</sup> Ireland: Sources consulted include Department of Justice and Equality ([www.justice.ie](http://www.justice.ie) accessed on 15 February 2014), Courts Service database of judgments ([www.courts.ie](http://www.courts.ie) accessed on 15 February 2014), Justis legal database ([www.justis.com](http://www.justis.com) accessed on 15 February 2014) and WestlawIE legal database ([www.westlaw.ie](http://www.westlaw.ie) accessed on 15 February 2014).



## 5 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*).<sup>75</sup> Consideration should also be given to the European Convention on Human Rights Act 2003 which gave further effect to the ECHR in Irish law.<sup>76</sup> 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].”<sup>77</sup> 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.<sup>78</sup> 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.<sup>79</sup>

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 [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

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<sup>75</sup> Ireland, Constitution of Ireland 1937, available at [www.taoiseach.gov.ie/eng/Historical\\_Information/The\\_Constitution/December\\_2013\\_-\\_Bhunreacht\\_na\\_hEireann\\_Constitution\\_Text.pdf](http://www.taoiseach.gov.ie/eng/Historical_Information/The_Constitution/December_2013_-_Bhunreacht_na_hEireann_Constitution_Text.pdf) (accessed on 15 February 2014).

<sup>76</sup> Ireland, European Convention on Human Rights Act 2003, available at [www.irishstatutebook.ie/2003/en/act/pub/0020/](http://www.irishstatutebook.ie/2003/en/act/pub/0020/) (accessed on 15 February 2014).

<sup>77</sup> Ireland, Constitution of Ireland 1937.

<sup>78</sup> Ireland, Criminal Justice (Public Order) Act 1994, available at [www.irishstatutebook.ie/1994/en/act/pub/0002/print.html](http://www.irishstatutebook.ie/1994/en/act/pub/0002/print.html) (accessed on 15 February 2014).

<sup>79</sup> Ireland, Freedom of assembly was considered in the Supreme Court decisions of *Dunne v Fitzpatrick* [1958] IR 29 and *DPP v Kehoe* [1983] IR 136; [1983] ILRM 237.

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 1993<sup>80</sup> Pride Marches have taken place in Dublin, Belfast, Waterford, Galway, Cork and the Northwest.<sup>81</sup> 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.<sup>82</sup> This remains the position as of the date of finalisation of this report in 2014. Homophobic demonstrations may be banned if they do not comply with the constitutional provision outlined above.

No case law or statistics were identified in Ireland related to the impact/social reality of relevant legislation for LGBT persons (including re. homophobic /transphobic demonstrations).<sup>83</sup>

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<sup>80</sup> Ireland, Section 2 of the Criminal Law (Sexual Offences) Act 1993 available at [www.irishstatutebook.ie/1993/en/act/pub/0020/sec0002.html#sec2](http://www.irishstatutebook.ie/1993/en/act/pub/0020/sec0002.html#sec2) (accessed on 15 February 2014).

<sup>81</sup> Ireland, Cork's first ever Pride Parade a triumph, 08 June 2006 available at [www.indymedia.ie/article/76475](http://www.indymedia.ie/article/76475) (accessed on 15 February 2014).

<sup>82</sup> Ireland: Sources consulted include Department of Justice and Equality and Central Statistics Office, consulted in February 2014.

<sup>83</sup> Ireland: Sources consulted include Department of Justice and Equality, Central Statistics Office, Courts Service database of judgments, Justis legal database and WestlawIE legal database, consulted in February 2014.

## 6 Criminal law

The only criminal statute in Ireland dealing specifically with hate speech is the Prohibition of Incitement to Hatred Act 1989.<sup>84</sup> 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. Incitement to hatred on grounds of gender identity is not expressly included in the 1989 Act. 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, among other, 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 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”.<sup>85</sup>

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.<sup>86</sup> Section 4 makes the preparation and possession of material likely to stir up hatred an offence.<sup>87</sup> 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.<sup>88</sup> 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.<sup>89</sup> A body corporate can also be liable under the legislation.<sup>90</sup>

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

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<sup>84</sup> Ireland, Prohibition of Incitement to Hatred Act 1989, available at [www.irishstatutebook.ie/1989/en/act/pub/0019/](http://www.irishstatutebook.ie/1989/en/act/pub/0019/) (accessed on 15 February 2014).

<sup>85</sup> Ireland, Press Council *Code of Practice*, principle 8, available at [www.pressombudsman.ie/code-of-practice.150.html](http://www.pressombudsman.ie/code-of-practice.150.html) (accessed on 15 February 2014).

<sup>86</sup> Ireland, Section 2 of the Prohibition of Incitement to Hatred Act 1989, available at [www.irishstatutebook.ie/1989/en/act/pub/0019/sec0002.html#sec2](http://www.irishstatutebook.ie/1989/en/act/pub/0019/sec0002.html#sec2) (accessed on 15 February 2014).

<sup>87</sup> Ireland, Section 4 of the Prohibition of Incitement to Hatred Act 1989, available at [www.irishstatutebook.ie/1989/en/act/pub/0019/sec0004.html#sec4](http://www.irishstatutebook.ie/1989/en/act/pub/0019/sec0004.html#sec4) (accessed on 15 February 2014).

<sup>88</sup> Ireland, Section 6 of the Prohibition of Incitement to Hatred Act 1989, available at [www.irishstatutebook.ie/1989/en/act/pub/0019/sec0006.html#sec6](http://www.irishstatutebook.ie/1989/en/act/pub/0019/sec0006.html#sec6) (accessed on 15 February 2014).

<sup>89</sup> Ireland, Section 6 of the Prohibition of Incitement to Hatred Act 1989.

<sup>90</sup> Ireland, Section 7 of the Prohibition of Incitement to Hatred Act 1989, available at [www.irishstatutebook.ie/1989/en/act/pub/0019/sec0007.html#sec7](http://www.irishstatutebook.ie/1989/en/act/pub/0019/sec0007.html#sec7) (accessed on 15 February 2014).

brought under the Act since its inception and even fewer convictions. For example, the most recent data available indicates that there were twelve recorded incidents of incitement to hatred contrary to section 2 of the Act in 2009, and 8 recorded incidents in 2010. These data are not disaggregated by gender or ground, so it is not possible to identify the proportion of such incidents which specifically concerned the sexual orientation ground.<sup>91</sup>

Criticism has also been levelled at the vague terms used in the 1989 Act.<sup>92</sup> 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.”<sup>93</sup> Notwithstanding such criticisms, there have been no proposals to amend the legislation in Ireland concerning incitement to hatred since 2010. The legislation does not include measures dealing with the general vilification of minorities.<sup>94</sup> In particular, face-to-face abuse or “drive-by shoutings”<sup>95</sup> 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 by minorities in Ireland although research on hate speech specifically related to homophobia is limited.<sup>96</sup>

The 2006 LGBT Hate Crime Report by Johnny, a non-governmental organisation for gay and bisexual men, indicated the prevalence of hate crime in Dublin.<sup>97</sup> 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”.<sup>98</sup> 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.<sup>99</sup> Further, 72% stated that they did not feel safe showing affection with a person of the same sexual orientation in public.<sup>100</sup> 80% of victims did not report the attack to An Garda Síochána (the national police force in Ireland). There were a number of reasons as to why respondents did not

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<sup>91</sup> Ireland, Central Statistics Office *Garda Recorded Crime Statistics 2006-2010* (Central Statistics Office 2012) available at [www.drugsandalcohol.ie/17469/1/gardacrimestats\\_2010.pdf](http://www.drugsandalcohol.ie/17469/1/gardacrimestats_2010.pdf) (accessed on 15 February 2014).

<sup>92</sup> Ireland, 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.

<sup>93</sup> Ireland, 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.

<sup>94</sup> Ireland, 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.

<sup>95</sup> Henderson, “Walking a Gauntlet: Nielson’s License to Harass” 20 *Berkely J Gender L and Justice* 269, 270 (2005).

<sup>96</sup> Ireland, 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 [www.nccri.ie/publications.html](http://www.nccri.ie/publications.html) (accessed on 15 February 2014).

<sup>97</sup> Ireland, Johnny “2006 LGBT Hate Crime Report: Stop Hate Crimes in Ireland Campaign” (2006), available at [www.glen.ie/attachments/5df931d1-d16b-498e-94d6-b5b593eaf597.PDF](http://www.glen.ie/attachments/5df931d1-d16b-498e-94d6-b5b593eaf597.PDF) (accessed on 15 February 2014).

<sup>98</sup> Ireland, Johnny “2006 LGBT Hate Crime Report: Stop Hate Crimes in Ireland Campaign” (2006), at p. 15.

<sup>99</sup> Ireland, Johnny “2006 LGBT Hate Crime Report: Stop Hate Crimes in Ireland Campaign” (2006), at p.21.

<sup>100</sup> Ireland, Johnny “2006 LGBT Hate Crime Report: Stop Hate Crimes in Ireland Campaign” (2006), at p.36.

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.<sup>101</sup> 86% of respondents believed that more visible Garda patrolling would make them feel safer. Johnny has also undertaken campaigns against hate crimes.<sup>102</sup> 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 was also 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.<sup>103</sup> A study conducted by Superintendent McGowan of the Community Relations Section of An Garda Síochána 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.<sup>104</sup> This report was echoed by the subsequently published Johnny report regarding the low levels of individual reporting of such incidences to the police.<sup>105</sup>

In recent years there is evidence of quite effective relationships between An Garda Síochána (police) and organisations representing LGBT communities, such as the initiative whereby the Gay and Lesbian Equality Network (GLEN) provided training to An Garda Síochána on LGBT issues in policing, and GLEN’s ongoing work with An Garda Síochána to mainstream LGBT issues in their policies and procedures.<sup>106</sup>

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.<sup>107</sup> 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.<sup>108</sup> Protection against violence can also be secured through, for example, the provisions of the Domestic Violence Act 1996.<sup>109</sup> The Domestic Violence Act 1996 was amended by Part 9 of the Civil Partnership and Certain Rights

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<sup>101</sup> Ireland, Johnny “2006 LGBT Hate Crime Report: Stop Hate Crimes in Ireland Campaign” (2006), at pp.27-28.

<sup>102</sup> Ireland, Johnny “2006 LGBT Hate Crime Report: Stop Hate Crimes in Ireland Campaign” (2006), at p.32.

<sup>103</sup> Ireland, GLEN and Nexus Research, Poverty: Lesbians and Gay Men, the Economic and Social Effects of Discrimination, (1995, Combat Poverty Agency, Dublin), available at [www.glen.ie/attachments/7155e8b1-eb5f-4a9d-858d-82edc9136517.PDF](http://www.glen.ie/attachments/7155e8b1-eb5f-4a9d-858d-82edc9136517.PDF) (accessed on 15 February 2014).

<sup>104</sup> Ireland, McGowan, P., (1999) Anti-Gay and Lesbian Crime: A Study of the Problem in Ireland, MA Thesis for Garda Síochána College, Ireland.

<sup>105</sup> Ireland, 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 Síochána College, Ireland.

<sup>106</sup> Ireland, information obtained in correspondence with Craig Dwyer, Policy and Programmes Officer, Gay and Lesbian Equality Network, 6 March 2014.

<sup>107</sup> Ireland, Section 10 of the Non-Fatal Offences Against the Person Act 1997, available at [www.irishstatutebook.ie/1997/en/act/pub/0026/sec0010.html](http://www.irishstatutebook.ie/1997/en/act/pub/0026/sec0010.html) (accessed on 16 February 2014).

<sup>108</sup> Ireland, Section 6 of the Criminal Justice (Public Order) Act 1994, available at [www.irishstatutebook.ie/1994/en/act/pub/0002/sec0006.html](http://www.irishstatutebook.ie/1994/en/act/pub/0002/sec0006.html) (accessed on 16 February 2014).

<sup>109</sup> Ireland, Domestic Violence Act 1996, available at [www.irishstatutebook.ie/1996/en/act/pub/0001](http://www.irishstatutebook.ie/1996/en/act/pub/0001) (accessed on 16 February 2014).

and Obligations of Cohabitants Act 2010 to provide protection to civil partners on an equivalent basis to the protection available to spouses.<sup>110</sup> 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.<sup>111</sup> 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.<sup>112</sup> It is clear from the definition that words alone can constitute an assault, provided that the words amount to reasonable grounds for the belief that the application of force or impact was immediately likely.<sup>113</sup> 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.<sup>114</sup> However, no amendments have been proposed to the legislation between 2000 and the date of finalisation of this report in February 2014.

A conference was held on 4 October 2013 on the topic of racism and hate crime in Ireland, hosted by NASC (an immigrant support NGO), in conjunction with the Centre for Criminal Justice and Human Rights, University College Cork.<sup>115</sup> The conference aimed to promote an open dialogue, examining the effectiveness of the current legislative and policy framework to effectively deal with all forms of hate speech, racism and discrimination in Ireland. The Minister for Justice Alan Shatter issued a statement of support in relation to this event, and noted a number of developments at EU level including the agreement reached at a meeting of Justice and Home Affairs Ministers in Dublin in January 2013 to request that the Commission review Framework Decision 2008/913/JHA on a country-by-country basis so as to ensure pan-European effectiveness and consistency of application, which is now underway.<sup>116</sup>

Speaking after the conclusion of the conference, NASC CEO Fiona Finn stated:

*“Ireland is not a particularly racist or discriminatory country, but the reality is the existing framework is not up to the task of combating hate crimes and*

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<sup>110</sup> Ireland, Part 9 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, available at [www.irishstatutebook.ie/2010/en/act/pub/0024/sec0090.html#part9](http://www.irishstatutebook.ie/2010/en/act/pub/0024/sec0090.html#part9) (accessed on 16 February 2014).

<sup>111</sup> Ireland, Non Fatal Offences Against the Person Act 1997, available at [www.irishstatutebook.ie/1997/en/act/pub/0026/](http://www.irishstatutebook.ie/1997/en/act/pub/0026/) (accessed on 16 February 2014).

<sup>112</sup> Ireland, Section 2 of the Non-Fatal Offences Against the Person Act 1997, available at [www.irishstatutebook.ie/1997/en/act/pub/0026/sec0002.html](http://www.irishstatutebook.ie/1997/en/act/pub/0026/sec0002.html) (accessed on 16 February 2014).

<sup>113</sup> Ireland, Non Fatal Offences Against the Person Act 1997, available at [www.irishstatutebook.ie/1997/en/act/pub/0026/](http://www.irishstatutebook.ie/1997/en/act/pub/0026/) (accessed on 16 February 2014).

<sup>114</sup> Ireland, McGonagle, T. “Distinguishing freedom of expression from hate speech” Metro Éireann (No. 7, November 2001), at p. 15 (available at [www.ivir.nl/publications/mcgonagle/MetroEireannNov.pdf](http://www.ivir.nl/publications/mcgonagle/MetroEireannNov.pdf) accessed on 22 June 2014).

<sup>115</sup> Ireland, NASC Conference on Racism and Hate Crime in Ireland Conference programme, available at: [www.nascireland.org/latest-news/nascs-conference-racism-and-hate-crime-in-ireland-4th-october-2013](http://www.nascireland.org/latest-news/nascs-conference-racism-and-hate-crime-in-ireland-4th-october-2013) (accessed on 16 February 2014).

<sup>116</sup> Ireland, Statement of Minister for Justice Alan Shatter TD, available at: [www.nascireland.org/wp-content/uploads/2013/10/Shatter-Statement-NASC-Conference.pdf](http://www.nascireland.org/wp-content/uploads/2013/10/Shatter-Statement-NASC-Conference.pdf) (accessed on 16 February 2014).

*other types of discrimination. What emerged today in the incredibly insightful presentations and the wide-ranging discussion was the need for significant legislative and policy reforms to promote integration in a multicultural Ireland.”*<sup>117</sup>

On 6 November 2013 the Minister for Justice was asked a parliamentary question concerning the possibility of amending Irish law to address such concerns. The Minister responded that having regard to the existing legislation in relation to such matters,<sup>118</sup> he has no intention at present to introduce additional legislation in relation to hate crimes.<sup>119</sup>

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. This remained the case at the date of finalisation of this report in 2014.<sup>120</sup>

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. Relevant case law or statistics are therefore not available in this area.

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<sup>117</sup> Ireland, [www.nascireland.org/latest-news/legislative-reforms-proposed-for-tackling-racism-and-hate-crimes](http://www.nascireland.org/latest-news/legislative-reforms-proposed-for-tackling-racism-and-hate-crimes) (accessed on 16 February 2014).

<sup>118</sup> Ireland, The Prohibition of Incitement to Hatred Act 1989.

<sup>119</sup> Ireland, Dáil Éireann Debates “Written Answer to Parliamentary Question” 6 November 2013, available at: <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2013110500088#WRMM02850> (accessed on 16 February 2014).

<sup>120</sup> Ireland: Sources consulted include Department of Justice and Equality and Central Statistics Office, consulted in February 2014.

## 7 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. This remains the case as of February 2014. However, the government has committed to introducing legislation to address these issues. On 17 July 2013 the Department of Social Protection published the general scheme of the proposed Gender Recognition Bill 2013, with the aim of providing legal recognition to the acquired gender of transgender persons for all purposes, including dealings with the State, public bodies and civil and commercial society.<sup>121</sup> The conditions for a “gender recognition certificate” to issue under Head 6 the general scheme of the Bill concerning “evidence to be submitted with applications for a gender recognition certificate” include the completion of a statutory declaration by the applicant stating that he or she is not in a marriage or a civil partnership, that he or she has a settled and solemn intention of living in the acquired gender for the rest of his or her life, that he or she understands the implications of the application and does it of his or her free will.<sup>122</sup> A statement must also be provided by the applicant’s primary treating physician, which confirms that the person has transitioned or is transitioning to their acquired gender and that the physician is satisfied that the person fully understands the consequences of his or her decision to live permanently in the acquired gender. The Bill includes the right to marry or enter a civil partnership in the acquired gender and the right to a new birth certificate. The effect of the legal recognition is not retrospective but shall be only from the date legal recognition is provided by means of the issue of a gender recognition certificate. Although the proposal was welcomed as being long overdue, there were also concerns expressed in relation to the draft legislation, in particular in respect of the age limitation which means the scheme will only be available to those over 18 years of age, the requirement to have a supporting statement by a primary treating physician and the fact that people who are married will be excluded from gender recognition unless they obtain a divorce.<sup>123</sup> According to the most recent legislative programme published by the Irish government on 18 September 2013, publication of the Bill is now expected in mid-2014.<sup>124</sup>

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 reassignment.<sup>125</sup> The Equality Authority has noted 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.

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<sup>121</sup> Ireland, General Scheme of the Gender Recognition Bill 2013 available at [www.welfare.ie/en/downloads/Gender-Recognition-Bill-2013.pdf](http://www.welfare.ie/en/downloads/Gender-Recognition-Bill-2013.pdf) accessed on 22 June 2014.

<sup>122</sup> Ireland, General Scheme of the Gender Recognition Bill 2013.

<sup>123</sup> Ireland, (2013) Transgender Equality Network Ireland “Government finally launches Draft Heads of Bill” Press release, 17 July 2013, available at: [www.teni.ie/news-post.aspx?contentid=876](http://www.teni.ie/news-post.aspx?contentid=876) accessed on 12 May 2014.

<sup>124</sup> Ireland,

[www.taoiseach.gov.ie/eng/Publications/Publications\\_2013/LEGISLATION\\_PROGRAMME\\_FOR\\_AUTUMN\\_SESSION\\_2013.html](http://www.taoiseach.gov.ie/eng/Publications/Publications_2013/LEGISLATION_PROGRAMME_FOR_AUTUMN_SESSION_2013.html) accessed on 16 February 2014.

<sup>125</sup> Case C-13/94 P v S and Cornwall County Council, European Court of Justice, 30 April 1996.



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 Authority in 2004 highlighted the almost complete lack of health services for transsexual people.<sup>126</sup> 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 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.

In 2012 the Health Service Executive (HSE) announced that it was developing a strategy on transgender health care.<sup>127</sup> In partnership with Transgender Equality Network Ireland (TENI) (a non-governmental organisation) the HSE National Advocacy Unit conducted a survey to inform this strategy.<sup>128</sup> The aim of the survey was to map current level of awareness of the health needs of transgender people among health and social care providers. It also aimed to determine what level of service is provided to transgender people throughout the HSE. On completion of this survey, the HSE stated that resources would be developed and training would be provided for health and social care professionals who deliver services to people who are transgender. On 4 July 2013 the National Director of the Quality & Patient Safety Directorate of the HSE informed the parliamentary joint committee on health and children that “The HSE are working in partnership with Transgender Equality Network Ireland (TENI) the national voluntary organisation which supports transgender people in Ireland to establish a recognised treatment pathway for transgender people, to support the requirement for gender recognition legislation and to develop information for health and social care professionals working with transgender people.”<sup>129</sup> No further information was identified in relation to the outcome of this survey at the date of finalisation of this report in February 2014.

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<sup>126</sup> Ireland, Collins, E. and Sheehan, B. (2004) *Access to Health Services for Transsexual People* (Dublin: The Equality Authority) available at [www.glen.ie/attachments/8d0649bc-afd9-4b7c-8ff8-fca53e8c9d32.PDF](http://www.glen.ie/attachments/8d0649bc-afd9-4b7c-8ff8-fca53e8c9d32.PDF) (accessed on 16 February 2014).

<sup>127</sup> Ireland, “HSE and TENI - Transgender Health Survey”, 1 June 2012, available at [www.teni.ie/news-post.aspx?contentid=579](http://www.teni.ie/news-post.aspx?contentid=579) (accessed on 16 February 2014).

<sup>128</sup> Ireland, “HSE and TENI - Transgender Health Survey” 1 June 2012.

<sup>129</sup> Ireland, Opening Statement by Dr Philip Crowley to the Oireachtas Joint Committee on Health and Children, 4 July 2013, available at [www.oireachtas.ie/parliament/media/committees/healthandchildren/JCHC-4.07.2013---HSE-Opening-Statement.doc](http://www.oireachtas.ie/parliament/media/committees/healthandchildren/JCHC-4.07.2013---HSE-Opening-Statement.doc) (accessed on 16 February 2014).

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. However, on 2 December 2013 TENI launched the results of the largest trans survey carried out in Ireland.<sup>130</sup> The report revealed high levels of suicide attempt rates amongst the trans community in Ireland, with 78% of respondents reporting that they had considered suicide, and 40% of these reporting that they had attempted to take their own life at least once. The levels of self-harm reported were also reported to be high, with 44% of people having self-harmed. TENI Director Broden Giambrore stated:

*"These figures are a result of the widespread transphobia in our society. Trans people experienced worrying levels of violence because of their gender identity: 6% of trans people had been raped; 36% had been sexually harassed; 16% were physically assaulted and 64% were mocked or called names.*

*The impact of this is that trans people and their families experience endemic levels of stress and anxiety. We found that 83% of trans people avoided public spaces due to a fear of being harassed."<sup>131</sup>*

The study also focused on mapping people's experience within the health care system in Ireland. The majority of trans people had reported negative experiences; the report found that health care professionals had discouraged 26% of respondents from exploring their gender and 19% of people were told they 'weren't really trans'. "Trans people are treated like second-class citizens," said TENI Health & Education Officer Vanessa Lacey. "The amount of parents who are contacting me on a daily basis looking for help and hope for their loved ones is astronomical. I'm encouraged by the engagement of the HSE at a high level to take the stigma and discrimination out of health care, but this commitment needs to resonate throughout the system."<sup>132</sup>

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 gender reassignment surgery. This remained the case at the date of finalisation of this report in 2014.

In relation to marriage, the High Court has held that there is an implicit constitutional bar on marriages between same-sex couples and this applies where the reassigned gender of a

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<sup>130</sup> Ireland, TENI *Speaking from the Margins: Trans Mental Health and Wellbeing in Ireland* (2013) available at <http://teni.ie/news-post.aspx?contentid=970> (accessed on 16 February 2014).

<sup>131</sup> Ireland, TENI *Speaking from the Margins: Trans Mental Health and Wellbeing in Ireland* (2013).

<sup>132</sup> Ireland, TENI *Speaking from the Margins: Trans Mental Health and Wellbeing in Ireland* (2013).

transsexual person has not been recognised officially and that person wishes to marry a person of the opposite sex.<sup>133</sup>

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.

As noted above, the government of Ireland has indicated its intention to introduce legislation providing for legal recognition of the acquired gender of transgender persons for all purposes, including dealings with the State, public bodies and civil and commercial society.<sup>134</sup> At the date of finalisation of this report in February 2014, this legislation had not yet been published.

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.

Although the government has indicated its intention to introduce legislation to provide for legal recognition of the acquired gender of transgender persons for all purposes,<sup>135</sup> as noted above this legislation is not anticipated to be published until mid-2014. Civil society groups have been highly critical of the delay in enacting such legislation and the failure to give effect to the High Court decision in *Foy*.<sup>136</sup> On 27 February 2013 Lydia Foy commenced legal proceedings against the State concerning the failure to legislate in order to allow legal recognition of the acquired gender of transgender persons. At the date of finalisation of this report in February 2014 those proceedings were ongoing.

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<sup>133</sup> Ireland, *Zappone and Gilligan v Revenue Commissioners* [2006] IEHC 404 available at [www.courts.ie/judgments.nsf/6681dee4565ecf2c80256e7e0052005b/a4fe4e30eef23925802572790040d30c?OpenDocument](http://www.courts.ie/judgments.nsf/6681dee4565ecf2c80256e7e0052005b/a4fe4e30eef23925802572790040d30c?OpenDocument) (accessed on 16 February 2014).

<sup>134</sup> Ireland, [www.welfare.ie/en/Pages/Gender-Recognition-Bill-2013.aspx](http://www.welfare.ie/en/Pages/Gender-Recognition-Bill-2013.aspx).

<sup>135</sup> Ireland, [www.welfare.ie/en/Pages/Gender-Recognition-Bill-2013.aspx](http://www.welfare.ie/en/Pages/Gender-Recognition-Bill-2013.aspx) accessed on 16 February 2014.

<sup>136</sup> Ireland, FLAC (2013) Press release “First step towards transgender recognition law welcome but government must not blunder on forced divorce” 18 July 2013, available at [www.flac.ie/news/2013/07/18/first-step-towards-transgender-recognition-law-welcome-but-government-must-not-blunder-on-forced-divorce](http://www.flac.ie/news/2013/07/18/first-step-towards-transgender-recognition-law-welcome-but-government-must-not-blunder-on-forced-divorce) (accessed on 16 February 2014).

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

A research report called *Transphobia in Ireland*<sup>137</sup> 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 Gardaí 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.

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<sup>137</sup> Ireland (2009) McIlroy, C., *Transphobia in Ireland* (TENI 2009) available at [www.teni.ie/Publications?action=AttachFile&do=get&target=Transphobia+in+Ireland+ Report.pdf](http://www.teni.ie/Publications?action=AttachFile&do=get&target=Transphobia+in+Ireland+ Report.pdf) (accessed on 16 February 2014).

## **8 Miscellaneous**

Research has shown that there are no legal provisions comparable to the Lithuanian law prohibiting homosexual behaviour in Ireland. This remains the case in 2014.

There is no information available regarding phallometry or phallometric testing. This remains the case in 2014.

## 9 Good practices

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

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.<sup>138</sup> (*Implementing Equality for Lesbians, Gays and Bisexuals*). The Equality Authority has continued to afford priority to LGBT issues, as evidenced by its recent call for submissions regarding reform of section 37 of the Employment Equality Act 1998.

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. The number of Garda Liaison Officers has increased from 50 as noted in the 2010 Report to over 300 as of March 2014;<sup>139</sup> these Garda Liaison Officers act as a point of contact for LGB people reporting homophobia, hate speech or homophobic violence.<sup>140</sup> In the 2006 LGBT Hate Crime Report, 70% of respondents stated that they were aware of these Liaison Officers.<sup>141</sup> The Gay and Lesbian Equality Network (GLEN) has worked with the Gardaí 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.<sup>142</sup> 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 Gardaí include developing leaflets for the LGB community encouraging people to report homophobic crimes; providing information on Garda Liaison Officers to members of the LGB community, and providing training for Gardaí on LGB issues.

On 29 January 2013 the Minister for Education and Skills Ruairi Quinn and the Minister for Children and Youth Affairs Frances Fitzgerald launched a new national “Action Plan on

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<sup>138</sup> Ireland, Equality Authority *Implementing Equality for Lesbians, Gays and Bisexuals* (Dublin 2002).

<sup>139</sup> Ireland, information obtained in correspondence with Craig Dwyer, Policy and Programmes Officer, Gay and Lesbian Equality Network, 6 March 2014.

<sup>140</sup> Ireland, An Garda Síochána “National Contact Details for ELO/LGBT Officers” 2 November 2012, available at [www.garda.ie/Documents/User/Current%20ELO%20LGBT%20list%202.11.12..pdf](http://www.garda.ie/Documents/User/Current%20ELO%20LGBT%20list%202.11.12..pdf) (accessed on 28 February 2014).

<sup>141</sup> Ireland, Johnny “2006 LGBT Hate Crime Report: Stop Hate Crimes in Ireland Campaign” (2006), at p.35

<sup>142</sup> Ireland, It is expected that this will be expanded to a national level.

Bullying”.<sup>143</sup> The Plan sets out twelve actions to help prevent and tackle bullying in primary and second level schools, including proposals to support a media campaign focused on cyber bullying specifically targeted at young people as part of Safer Internet Day 2013; to establish a new national anti-bullying website; begin development immediately of new national anti-bullying procedures for all schools to include an anti-bullying policy template and a template for recording incidents of bullying in schools; to devise a co-ordinated plan of training for parents and for school boards of management; to provide Department of Education and Skills support for the Stand Up! Awareness Week Against Homophobic Bullying organised by BeLonG To Youth Services; and to review current teacher education support service provision to identify what training and continuous professional development teachers may need to help them effectively tackle bullying.<sup>144</sup> The Minister for Education announced that he had ring-fenced €500,000 to support the implementation of the Action Plan on Bullying in 2013.<sup>145</sup>

On the same day as the Action Plan on Bullying was launched, the Minister for Education also announced that the Department of Education and Skills would be supporting a revision of the Stay Safe Programme for primary schools, in order to address new forms of risk, including cyber bullying, and incorporate new research and best practice in the area of safeguarding children as well as changes and developments in the educational context in terms of policies, provision and curriculum.<sup>146</sup>

Building on these initiatives, in September 2013 the Department of Education launched new Anti-Bullying Procedures for Primary and Post-Primary Schools,<sup>147</sup> which require each school in Ireland to develop its anti-bullying policy in accordance with the procedures. The policy must be developed in consultation with parents, students, and all school staff, and aim to create a positive school culture and climate that is inclusive and welcoming of difference. Key elements of the procedures are a strong emphasis on prevention of bullying behaviour through the fostering and development of a positive school culture and climate that is based on inclusivity and respect; a school-wide approach to preventing and tackling bullying behaviour; a requirement that all schools must adhere to the standardised policy template for developing their anti-bullying policy; greater transparency for parents and pupils through the requirement for schools to publish their anti-bullying policy on the school’s website and give it to the parents association; making clear that the definition of bullying includes cyber-bullying and identity based bullying (such as homophobic and racist bullying); and practical tips for building a positive school culture and climate that is based on inclusivity and respect.

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<sup>143</sup> Ireland, Department of Children and Youth Affairs (2013) “Ministers Quinn and Fitzgerald launch Action Plan on Bullying” Press release, 29 January 2013, available at: [www.dcyva.gov.ie/viewdoc.asp?Docid=2572&CatID=11&mn](http://www.dcyva.gov.ie/viewdoc.asp?Docid=2572&CatID=11&mn). accessed on 15 February 2014.

<sup>144</sup> Ireland, Department of Education and Skills (2013) National Action Plan on Bullying 29 January 2013, available at: [www.education.ie/en/Publications/Education-Reports/Action-Plan-On-Bullying-2013.pdf](http://www.education.ie/en/Publications/Education-Reports/Action-Plan-On-Bullying-2013.pdf) accessed on 15 February 2014.

<sup>145</sup> Ireland, Department of Children and Youth Affairs (2013) “Ministers Quinn and Fitzgerald launch Action Plan on Bullying” Press release, 29 January 2013.

<sup>146</sup> Ireland, Department of Children and Youth Affairs (2013) “Ministers Quinn and Fitzgerald launch Action Plan on Bullying” Press release, 29 January 2013.

<sup>147</sup> Ireland, Department of Education and Skills (2013) Anti-Bullying Procedures for Primary and Post-Primary Schools September 2013, available at: [www.education.ie/en/Publications/Policy-Reports/Anti-Bullying-Procedures-for-Primary-and-Post-Primary-Schools.pdf](http://www.education.ie/en/Publications/Policy-Reports/Anti-Bullying-Procedures-for-Primary-and-Post-Primary-Schools.pdf).

## 10 Intersex

Intersex people are not specified, nor is the ground of ‘intersex’ included, under national non-discrimination legislation, jurisprudence and non-discrimination policies. In particular, discrimination on ground of ‘intersex’ is not specifically covered by Irish law. It is unclear whether discrimination on the ground of ‘intersex’ could be included under any other grounds recognised by the law which would offer protection for these cases. There were no cases identified concerning discrimination on the ground of “intersex”.<sup>148</sup>

Intersex discrimination is not covered under national non-discrimination policies in Ireland.

Irish law does not allow children to remain without a gender marker or identification on their birth certificates. Irish law requires that the birth of a child must be registered within three months of the birth.<sup>149</sup>

There is a dearth of research and data on intersex people in Ireland.<sup>150</sup> However, in a submission to the Country Report Task Forces at the 109th Session of the Human Rights Committee in Geneva in October-November 2013, TENI reported anecdotal evidence that gender-normalising surgeries are carried out on intersex children in Irish hospitals, and expressed serious concern that such surgery may be carried out without the informed consent of the child and without regard to the fact that the infant may develop a gender identity other than their assigned sex.<sup>151</sup> TENI suggested that such surgeries may be performed in order to ease the concerns of distressed parents, and called for greater dialogue between medical professionals and the representatives of the intersex community, with any decision to medically intervene to be centred on the best interests of the child.

There is no specific legal basis or medical protocol in place in Ireland in respect of such procedures or interventions.<sup>152</sup> Section 23(2) of the Non-Fatal Offences Against the Person Act 1997 requires the consent of a child aged 16 or over to any surgical or medical treatment which, in the absence of consent, would constitute a trespass to the child.<sup>153</sup> Where a child over the age of 16 gives consent to such procedure, the consent of the child’s parents or guardians is not necessary. However, it has been noted that the law in Ireland is unclear in significant respects,

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<sup>148</sup> Ireland: Sources consulted include Courts Service database of judgments, Justis legal database, WestlawIE legal database) and database of decisions of the Equality Tribunal ([www.labourcourt.ie/en/Decisions\\_Determinations](http://www.labourcourt.ie/en/Decisions_Determinations) accessed on 15 February 2014).

<sup>149</sup> Ireland, Section 19 of the Civil Registration Act 2004 available at [www.irishstatutebook.ie/2004/en/act/pub/0003/sec0019.html#sec19](http://www.irishstatutebook.ie/2004/en/act/pub/0003/sec0019.html#sec19) accessed on 7 May 2014.

<sup>150</sup> Ireland, see TENI (2013) Human Rights Violations in Ireland on the basis of Gender Identity and Intersex Identity, Submission to the Country Report Task Forces , 109th Session of the Human Rights Committee, Geneva, October-November 2013, available at [http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/IRL/INT\\_CCPR\\_NGO\\_IRL\\_14833\\_E.doc](http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/IRL/INT_CCPR_NGO_IRL_14833_E.doc) (accessed on 24 February 2014).

<sup>151</sup> Ireland, TENI (2013) Human Rights Violations in Ireland on the basis of Gender Identity and Intersex Identity, Submission to the Country Report Task Forces , 109th Session of the Human Rights Committee, Geneva, October-November 2013.

<sup>152</sup> Ireland, TENI (2013) Human Rights Violations in Ireland on the basis of Gender Identity and Intersex Identity, Submission to the Country Report Task Forces , 109th Session of the Human Rights Committee, Geneva, October-November 2013.

<sup>153</sup> Ireland, Section 23 of the Non-Fatal Offences Against the Person Act 1997, available at [www.irishstatutebook.ie/1997/en/act/pub/0026/sec0023.html#sec23](http://www.irishstatutebook.ie/1997/en/act/pub/0026/sec0023.html#sec23) (accessed on 24 February 2014).



e.g. “whether such a child has the power to refuse medical treatment, and it does not clarify the position in relation to the consent of a minor and medical examination” or treatment.<sup>154</sup> Furthermore, in respect of a child under the age of 16, the child’s parents or guardians have “complete authority to consent to medical treatment on behalf of the child”.<sup>155</sup>

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<sup>154</sup> Shannon, G., *Child Law* (2<sup>nd</sup> edition 2010 Round Hall) at para.16.32.

<sup>155</sup> Shannon, G., *Child Law* (2<sup>nd</sup> edition 2010 Round Hall) at para.16.33.

# Annex 1 – Case law

## Chapter 3 Asylum and Subsidiary Protection – Case 1

<i>Case title</i>	MA v Minister for Justice, Equality and Law Reform
<i>Decision Date</i>	11 December 2010
<i>Reference Details (type and title of court/body; in original language and English)</i>	High Court: [2010] IEHC 519

*Key facts of case (500 words)*

The applicant was a Nigerian national who applied for asylum in Ireland on the basis of a well founded fear in his country of origin because he was a gay man. His asylum application was refused at first instance by the Refugee Applications Commissioner in December 2006 on a number of grounds including that he could live safely in one of the larger cities in Nigeria provided he was discreet regarding his sexuality. The applicant appealed to the Refugee Appeals Tribunal which ultimately refused his appeal in March 2008 on credibility grounds. In May 2008 the applicant applied for subsidiary protection claiming that he was at risk of torture or inhuman and degrading treatment if he was returned to Nigeria. This application was refused in January 2009 on a number of grounds, including a finding that country of origin information demonstrated that “if Nigerian homosexuals are discreet, they are unlikely to fall foul of the law”. A deportation order was then issued against the applicant. The applicant subsequently requested the Minister for Justice to revoke the deportation order against him, relying on the UNHCR Guidance Note on Refugee Claims relating to Sexual Orientation and Gender Identity, in respect of the finding that the applicant could avoid persecution by exercising discretion in relation to his sexual orientation. The Minister for Justice refused to revoke the deportation order and the applicant then brought judicial review proceedings in the High Court complaining that no regard had been had to the submissions made on behalf of the applicant including the UNHCR Guidance Note. The High Court found that the decision of the Minister for Justice refusing to revoke the deportation order was invalid by reason of the failure to address the issue of whether the discretion based requirement was compatible with Convention provisions and human rights.

<p><i>Main Reasoning/ Arguments</i></p>	<p>The applicant relied on the UNHCR Guidance Note on Refugee Claims relating to Sexual Orientation and Gender Identity, as well as the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity and the decision of the United Kingdom Supreme Court in <i>HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department</i> [2010] UKSC 31 to argue that the Minister for Justice was not entitled to rely on discretion-based reasoning to refuse the applicant's application.</p>
<p><i>Key Issues (concepts, interpretation in case)</i></p>	<p>Refugee law, discretion based requirement, whether refugee application on grounds of sexual orientation can be refused on the basis that persecuted can be avoided by being discreet</p>
<p><i>Results (sanctions) and key consequences or implications of the case</i></p>	<p>The High Court quashed the decision of the Minister refusing the applicant's application to revoke the deportation order and directed the Minister to reconsider the application in accordance with law. The decision of the High Court in this case was significant because it was the first time the Irish courts had considered the discretion requirement in refugee law. The decision of the High Court endorsed the approach recommended by the UNHCR Handbook and the Yogyakarta principles and disapproved of the use of discretion-based reasoning.</p>

Chapter 3 Asylum and Subsidiary Protection – Case 2

<i>Case title</i>	SA v Refugee Appeals Tribunal
<i>Decision Date</i>	24 January 2012
<i>Reference Details (type and title of court/body; in original language and English)</i>	High Court: [2012] IEHC 78
<i>Key facts of case (500 words)</i>	The applicant was an Algerian national who applied for asylum in Ireland on the basis of a well founded fear in his country of origin because he was a gay man. His asylum application was refused at first instance by the Refugee Applications Commissioner and on appeal by the Refugee Appeals Tribunal on a number of grounds, including a finding that the applicant was not at risk of persecution provided he adopt a discreet lifestyle. The applicant brought judicial review proceedings challenging this decision. The High Court found that homosexuals form part of a social group for the purpose of Article 1(A)(2) of the Refugee Convention, and also found that because sexual orientation is an intrinsic and essentially immutable feature of human identity, a gay person cannot be expected to sublimate or conceal their very identity in order to escape persecution. The High Court judge considered country of information regarding the treatment of LGB people in Algeria and concluded that the Refugee Appeals Tribunal had erred in law by failing to consider how the applicant was likely to be treated if he is returned to Algeria, and whether such treatment would amount to persecution.

<p><i>Main Reasoning/ Arguments</i></p>	<p>The High Court judge noted that it was an error to suggest, as the Refugee Appeals Tribunal did, that international protection would be available where the applicant had actually suffered persecution in the past in his home country. The High Court pointed out that the test is a forward-looking one, of whether there was a well-founded fear in the future. The High Court found that homosexuals form part of a social group for the purpose of Article 1(A)(2) of the Refugee Convention, and also found that because sexual orientation is an intrinsic and essentially immutable feature of human identity, a gay person cannot be expected to sublimate or conceal their very identity in order to escape persecution. The High Court judge considered country of information regarding the treatment of LGB people in Algeria and concluded that the Refugee Appeals Tribunal had erred in law by failing to consider how the applicant was likely to be treated if he is returned to Algeria, and whether such treatment would amount to persecution.</p>
<p><i>Key Issues (concepts, interpretation in case)</i></p>	<p>Refugee law, correct test for determining persecution, definition of social group, sexual orientation, discretion based requirement, whether refugee application on grounds of sexual orientation can be refused on the basis that persecuted can be avoided by being discreet</p>
<p><i>Results (sanctions) and key consequences or implications of the case</i></p>	<p>The High Court quashed the decision of the Refugee Appeals Tribunal refusing the applicant's refugee appeal and directed that the appeal be reconsidered in accordance with law. The decision of the High Court in this case was significant because it recognised that the particular social group includes groups defined by sexual orientation. It also affirmed that sexual orientation is an intrinsic or immutable characteristic and that a person cannot be refused refugee status on the basis that they can be discreet in relation to their sexual orientation in order to avoid persecution.</p>

	Transgender – case 1
<b>Case title</b>	<b>Foy v. An tArd- Chlaraitheoir (Registrar General) and others (No. 1)</b>
<b>Decision Date</b>	9 July 2002
<b>Reference Details (type and title of court/body; in original language and English)</b>	High Court:
<b>Key facts of case (500 words)</b>	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 , 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, including : (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><b>Main Reasoning/ Arguments</b></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>
<p><b>Key Issues (concepts, interpretation in case)</b></p>	
<p><b>Results (sanctions) and key implications of the</b></p>	<p>Implications of the case were that Lydia Foy was unable to have her birth certificate amended to reflect what she maintained should have been her gender since birth.</p>

Transgender – case 2

<b>Case title</b>	<b>Foy v. At tArd-Chlaraitheoir (Registrar General) and others (No. 2)</b>
<b>Decision Date</b>	19 October 2007
<b>Reference Details (type and title of court/body; in original language and English)</b>	High Court:
<b>Key facts of case (500 words)</b>	<p>On 30 July, 2002 Dr. Foy filed a Notice of Appeal to the Supreme Court. By the time the appeal came on for hearing, on 8 November, 2005, there had been three significant changes in the legal landscape. Firstly, some short time after the 9 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 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 that a decision could be made at first instance</p>

	<p>on these points. Hence this second judgment in the first set of proceedings. By letter dated 21 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 23 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>
<b>Main Reasoning/ Arguments</b>	<p>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.</p>
<b>Key Issues (concepts, interpretation in case</b>	
<b>Results (sanctions) and key consequences or implications of the case</b>	<p>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 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>

Transgender – case 3

<b>Case title</b>	<b>Deirdre O’Byrne v Allied Irish Bank</b>
<b>Decision Date</b>	2 December 2013
<b>Reference Details (type and title of court/body; in original language and English)</b>	Equality Tribunal, Decision DEC-S2013-015
<b>Key facts of case (500 words)</b>	The complainant submitted that for a number of years she was aware of issues surrounding her gender identity. In recent years the complainant had undergone a difficult and challenging transition after which she was able to establish her true gender as female. Following this process, and as part of it, on 21 October 2010 the complainant changed her name by deed poll to Deirdre Katherine O’Byrne. To reflect this change, and in accordance with the declarations given in the deed poll, the complainant also changed her name on other identifying documents, including her passport. She now goes by the name Deirdre O’Byrne in all communications. The complainant submitted that she had held various bank accounts with the respondent for twenty years or more. These accounts were opened in her birth name. Shortly after executing her change of name by deed poll she went to a branch of the respondent to make them aware of the change of name. Two days later she was phoned by her own branch and was told she would have to close her ‘cashesave’ account in her birth name and open a new account in her new name.
	The complainant submitted that she had been treated differently from other people in comparable situations. She was aware of other transgender people who had changed name by deed poll and had not been required to close down their accounts. The complainant wrote to the respondent on a number of occasions requesting them to change the name on her account and sought reasons why she was being treated differently from acquaintances who had changed their name by deed poll. The respondent agreed to provide the complainant with a credit card in her new name and amended her account accordingly. However, they had limited the complainant’s use of her ‘cashesave’ account and called on her to close the account. Also, the respondent has continued to correspond with the complainant using her old name which caused her considerable distress.

<p><b>Main Reasoning/ Arguments</b></p>	<p>The complainant submitted that as someone who is transgender she had been treated differently than another person in a comparable situation. She further submitted that the discrimination ground of gender protects transgender persons from sex discrimination, relying on <i>P v S and Cornwall county Council</i> (Case C-13/94). The complainant submitted that transgender was a general term for people whose gender identity differs from the sex assigned to them at birth. Transgender people go through a transition over varying periods of time and in different ways and this period is often known as “transition”. Therefore it cannot be said that there exists a particular stage when a person has changed their gender from one to the other. For the complainant this resulted in her affirming her true gender and could not be viewed as a change in identity. Therefore it was ill founded for the respondent to state that the complainant had changed her legal identity, a term unknown in law. However, it was submitted in the alternative that if the respondent was identifying the complainant by her gender alone then this amounted to discrimination.</p> <p>The respondent submitted that this was a complaint on the ground of gender, therefore as the respondent is now female the appropriate comparator must be male. The respondent submitted that for the complainant to establish a claim on the grounds of disability she must establish that she was treated less favourably than a person without a disability or a different disability. The respondent submitted that a person who changes their gender changes their identity and that their policy was that all individuals who change their name by deed poll must close their existing accounts and open new accounts for operational reasons including the maintenance of a comprehensive audit trail for each customer and compliance with anti Money Laundering legislation and other court orders.</p>
	<p>The Equality Tribunal held that following the decision of the CJEU in Case C-423/04 <i>Sarah Margaret Richards v Secretary of State for Work and Pensions</i> [2006] that the appropriate comparator was a woman who has not undergone gender reassignment, in other words has always been a woman, who had changed her name. The Tribunal held that there was inconsistency in the bank’s policy regarding such cases, having regard to the fact that women who changed their name following marriage could change the name on their bank accounts without having to close those accounts and reopen a new account. The Tribunal concluded that the complainant was treated differently than the appropriate comparator on the grounds of gender and found that the bank had failed to rebut the prima facie case of discriminatory treatment on the gender ground raised by the complainant when the respondent refused to allow her change the name on her bank account.</p>

<b>Key Issues (concepts, interpretation in case)</b>	Discrimination on grounds of gender, appropriate comparator
<b>Results (sanctions) and key consequences or</b>	The Tribunal awarded the complainant the sum of €5,000 to compensate her for the effects of the discriminatory treatment experienced by her and also ordered that the respondent review their policies in relation all persons who wish to change the name on their account(s) and to amend these policies to ensure compliance with the Equal Status Acts 2000 – 2012.

## Annex 2 – Statistics

### Complaints under Equality Legislation 2000-2012 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
2008	9	1	1	€49,700	5	€3,000
2009	6	0	0	€0	0	€0
2010	2	2	2	€20,000	0	€0
2011	1	3	1	€0	1	€500
2012	4	1	2	€24,000	1	€0
<b>TOTAL</b>	<b>56</b>	<b>33</b>	<b>19</b>	<b>103,700</b>	<b>10</b>	<b>€5,500</b>

This information was provided by the Secretariat 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 to those made under one ground only and do not include any cases that may involve multiple grounds.

**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	8 (EE) 4 (ES) Education – 1 State bodies- 1 Licensed premises – 1 Other - 1
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.)								



	2008	2009	2010	2011	2012	2013	2014	
<p>Total complaints of discrimination on the ground of sexual orientation (equality body, tribunals, courts etc.):</p> <p>if possible disaggregated according to social areas of discrimination (employment, education, housing, goods and services etc.)</p>	<p>EE – 5 Education- 1 State bodies – 2 Other – 1 Wholesale/ Retail- 1</p> <p>ES – 3 State bodies- 1 Other – 1 Health – 1</p>	<p>EE – 1 No breakdown available</p> <p>ES – 2 No breakdown Available</p>	<p>EE – 2 State bodies -1 Wholesale/retail – 1</p> <p>ES – None identified</p>	<p>EE – 3 No breakdown available</p> <p>ES – None identified</p>	Not available	Not available	Not available	
<p>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.)</p>								
<p>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.)</p>								

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.)								
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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; 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.

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. 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 man. 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.

The Annual Report for 2010 notes that a complaint was made against the licensee of a public house when he was refused entry by a door man at the premises. The claimant believed the reason he was refused entry was on the grounds of his sexual orientation. Following correspondence with the

licensee an offer was made to the claimant to contact him directly to discuss the matter. Following the discussion the claimant contacted the Equality Authority to say that the matter was now resolved to his satisfaction and he was withdrawing his complaint.

**Table 1: Requirements for rectification of the recorded sex or name on official documents**

	Intention to live in the opposite gender	Real life test	Gender dysphoria diagnosis	Hormonal treatment/ physical adaptation	Court order	Medical opinion	Genital surgery leading to sterilisation	Forced/ automatic divorce	Unchangeable	Notes
AT	✓	✓	✓	✓		✓	✗ court decision	✗ court decision		Legal changes expected to confirm court decisions
BE	✓			✓		✓	✓			Rectification of recorded sex
BE	✓			✓		✓				Change of name
BG				?	✓	✓	?	✓	✓ (birth certificate)	Only changes of identity documents are possible (gap in legislation)
CY						✓	✓	?		
CZ	✓	✓	✓	✓		✓	✓	✓		These requirements are not laid down by law, but are use by medical committees established under the Law on Health Care
DE	✓		✓		✓	✓				Small solution: only name change
DE	✓		✓	✓	✓	✓	✓	✗ court decision and law		Big solution: rectification of recorded sex
DK	✓	✓				✓	✓	?		Rectification of recorded sex
DK			✓			✓				Change of name
EE	✓	✓				✓	✓	?		
EL					✓	✓	✓	?		
ES			✓	✓		✓				
FI	✓	✓	✓			✓	✓	✓		Name change possible upon simple notification, also before legal recognition of gender reassignment
FR			✓	✓	✓	✓	✓	✓		Requirements set by case law, legal and medical procedures uneven throughout the country
HU						✓		✓		No explicit rules in place. Requirements descend from praxis, but unclear what is necessary in order to obtain a medical opinion. After 1 January 2011 a marriage can be transformed into a registered partnership

IE									✓ (name change possible by Deed Poll and under Passports Act 2008)	Further changes expected once Gender Recognition Bill is passed.
IT			✓	✓	✓	✓	✓	✓		
LT									✓ (personal code)	Legal vacuum due to lack of implementing legislation, courts decide on an ad hoc basis.
LU										No provisions in force, praxis varies.
LV								✓	✓ Change of name is possible after gender reassignment	Medical opinion is based on an intention to live in the opposite gender and on a diagnosis of gender dysphoria. For rectification of the recorded sex, currently the Ministry of Health decides case-by-case (parameters not specified). Amendments to the law were proposed but not adopted.
MT	✓	✓	✓	✓	✓	✓	✓	(only unmarried, divorce not possible)		Requirements unclear, decided by Courts on an ad hoc basis
NL	✓	✓	✓	✓	✓	✓	✓			According to Article 28a of the civil code, the requirement of physical adaptation does not apply if it would not be possible or sensible from a medical or psychological point of view. Changes are underway, forced sterilisation might be removed.
PL				✓	✓	✓	✓	✓		No legislation in place, requirements set by court practice
PT	✓		✓	✓	✓	✓	✓			Case-by-case decisions by courts, new act expected
RO				✓	✓	✓	✓			
SE	✓	✓			?	✓	✓	✓		Decision issued by forensic board
SI										No formalities for change of name
SK							✓	?		Change of name granted simply upon application accompanied by a confirmation by the medical facility.
UK										Change of name requires no formalities

UK	✓	✓	✓			✓		✓		Rectification of the recorded sex
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Notes: This is not a table about the requirements for accessing gender reassignment treatment. This means, in particular, that gender dysphoria diagnosis might be in practice required by medical specialists as a pre-condition for a positive opinion. This situation is not captured by this table, which illustrates the conditions for legal recognition of gender reassignment.

✓= applies; ?=doubt; ✕=removed; change since 2008

**Table 2: Discrimination on grounds of sexual orientation in legislation: material scope and enforcement bodies**

Country Codes	Material scope			Equality body	Comments
	Employment only	Some areas of RED <sup>156</sup>	All areas of RED*		
AT		✓		✓	Two of nine provinces have not extended protection to all areas covered by RED: Vorarlberg and Lower Austria. Vorarlberg extended protection to goods and services in 2008.
BE			✓	✓	
BG			✓	✓	
CY	✓			✓	
CZ			✓		New anti-discrimination legislation adopted
DE			✓	✓	
DK	✓			✓	New equality body set up
EE	✓			✓	New anti-discrimination legislation adopted
EL	✓			✓	
ES			✓		

<sup>156</sup> Employment discrimination is prohibited in all EU Member States as a result of Directive 2000/78/EC. Directive 2000/43/EC (Racial Equality Directive) covers, in addition to employment and occupation, also social protection (including social security and healthcare), social advantages, education and access to and supply of goods and services which are available to the public, including housing.

Country Codes	Material scope			Equality body	Comments
	Employment only	Some areas of RED <sup>156</sup>	All areas of RED*		
FI		✓			
FR	✓			✓	
HU			✓	✓	
IE		✓		✓	Government intends to merge the Equality Authority and the Irish Human Rights Commission to form a single body, the Irish Human Rights and Equality Commission. Implementing legislation had not been published as of February 2014. Exemption permitted in respect of discrimination by religious institutions with a particular religious ethos (although this is under review by the Equality Authority as of May 2014).
IT	✓				
LT		✓		✓	
LU		✓		✓	
LV		✓		✓	
MT	✓				
NL		✓		✓	
PL	✓				
PT	✓				
RO			✓	✓	
SE			✓	✓	
SI			✓	✓	
SK			✓	✓	
UK			✓	✓	The Equality Act 2010 replicates the sexual orientation protection offered in the Equality Act (Sexual Orientation) Regulations 2007 and the Employment Equality

Country Codes	Material scope			Equality body	Comments
	Employment only	Some areas of RED <sup>156</sup>	All areas of RED*		
					(Sexual Orientation) Regulations 2003 and expands protection in a number of ways. The new Equality Act is expected to enter into force October 2010.
<b>TOTAL</b>	<b>9</b>	<b>7</b>	<b>11</b>	<b>20</b>	

Note: ✓ = Applies; ? = doubt; x = removed; **change since 2008**



**Table 3: Discrimination on grounds of gender reassignment or identity in national legislation**

Country Codes	Form of “sex” discrimination	Autonomous ground	Dubious/unclear	Comments
AT	✓			Legal interpretation and explanatory memorandum
BE	✓			Explicit provision in legislation or <i>travaux préparatoires</i>
BG			✓	
CY			✓	
CZ	✓			The new Antidiscrimination Act makes reference to ‘gender identification’.
DE			✓	Constitutional amendment proposal by opposition (‘sexual identity’)
DK	✓			Decisions by the Gender Equality Board
EE			✓	The Gender Equality and Equal Treatment Commissioner has dealt with one application and took the view that the Gender Equality Act could apply to ‘other issues related to gender’.
EL			✓	
ES			✓	The Constitutional Court held that gender identity is to be read in among the prohibited grounds of discrimination in Article 14 of the Constitution. Together with the adoption of several regional laws, a trend can be noted towards the protection of gender identity.
FI	✓			Committee for law reform proposes to explicitly cover transgender discrimination in equality legislation.
FR	✓			Case law and decisions by the equality body
HU		✓		
IE	✓			The Employment Equality Act 1998-2004 is interpreted in accordance with the case law of the Court of Justice of the EU.
IT			✓	
LT			✓	
LU			✓	
LV			✓	
MT			✓	
NL	✓			Case law and opinions of the Equal Treatment Commission

Country Codes	Form of "sex" discrimination	Autonomous ground	Dubious/unclear	Comments
PL			✓	
PT			✓	
RO			✓	
SE	✓	✓		Discrimination on grounds of gender reassignment is still considered 'sex' discrimination. The new ground 'transgender identity or expression' now covers other forms of gender variance, regardless of gender reassignment.
SI			✓	The Act Implementing the Principle of Equal Treatment contains an open clause of grounds of discrimination.
SK	✓			Explicit provision in legislation
UK		✓		The Equality Act 2010 replicates the 'gender reassignment' protection offered in the Sex Discrimination Act since 1999, but removes the requirement to be under "medical supervision" and expands protection in several ways. The new Equality Act is expected to enter into force in October 2010.
<b>TOTAL</b>	<b>10</b>	<b>3</b>	<b>15</b>	

Note: ✓ = applicable; positive development since 2008

**Table 4: Criminal law provisions on ‘incitement to hatred’ and ‘aggravating circumstances’ covering explicitly sexual orientation**

Country Codes	Criminal offence to incite to hatred, violence or discrimination on grounds of sexual orientation	Aggravating circumstance	Comments
AT			Existing provisions of the criminal law against incitement to hatred explicitly restrict the protection to groups other than LGBT people.
BE	✓	✓	
BG			Existing provisions of the criminal law against incitement to hatred explicitly restrict the protection to groups other than LGBT people.
CY			General provisions could extend to LGBT people.
CZ			New Criminal Code in 2009 contains no explicit recognition of homophobic hate crimes. LGBT could fall under the category ‘group of people’, but as the law entered into force in January 2010 there is no case law yet. The explanatory report of the law also does not define the term.
DE			Hate speech legislation does not explicitly extend to homophobic motive, but extensive interpretation has been confirmed by courts.
DK	✓	✓	
EE	✓		
EL		✓	Article 23 of Law 3719/2008 provides for an aggravating circumstance in cases of hate crime based on sexual orientation.
ES	✓	✓	
FI		✓	According to the pertinent preparatory works, LGBT people could fall under the category ‘comparable group’. A working group has proposed that the provision on incitement be amended to explicitly cover sexual minorities (2010).
FR	✓	✓	
HU			LGBT people could fall under the category ‘groups of society’. Penal Code was amended to include hate motivated crimes against ‘certain groups of society’. Case law has shown this includes the LGBT community.
IE	✓		Homophobic motivation might be taken into consideration at the sentencing stage, but this is left to the discretion of the courts.
IT			Existing provisions of the criminal law against incitement to hatred explicitly restrict the protection to groups other than LGBT people.
LT	✓	✓	Homophobic motivation was included in the list of aggravating circumstances in June 2009.

Country Codes	Criminal offence to incite to hatred, violence or discrimination on grounds of sexual orientation	Aggravating circumstance	Comments
LU			General provisions could extend to LGBT people.
LV			Homophobic motivation might be taken into consideration at the sentencing stage, but this is left to the discretion of the courts.
MT			Existing provisions of the criminal law against incitement to hatred explicitly restrict the protection to groups other than LGBT people.
NL	✓	✓	The 2009 Public Prosecution Service's Bos/Polaris Guidelines for Sentencing recommend a 50% higher sentence for crimes committed with discriminatory aspects.
PL			General provisions could extend to LGBT people
PT	✓	✓	
RO	✓	✓	Art. 317 of the Criminal Code sanctions only hate speech as 'incitement to discrimination', but includes sexual orientation. Article 369 on incitement to hatred does not mention sexual orientation explicitly, but covers incitement against a 'category of persons', without further specification. The new Criminal Code will enter into force on 1 October 2011.
SE	✓	✓	
SI	✓		Article 297 of the new Penal Code concerning provoking or stirring up hatred, strife or violence, or provoking other inequality explicitly includes sexual orientation. Homophobic intent is only considered an aggravating circumstance in the case of murder.
SK			LGBT people could fall under the category 'group of people'
UK (N-Ireland)	✓	✓	
UK (England & Wales.)	✓	✓	The Criminal Justice and Immigration Act 2008, extending provisions on incitement to racial or religious hatred to cover the ground of sexual orientation, came into force on 23.03.2010. It applies to Scotland as well.
UK (Scotland)	✓	✓	In June 2009, the Offences (Aggravation by Prejudice) (Scotland) Act was passed, entry into force on 24 March 2010, also indicating homo- and transphobic motive as an aggravating circumstance.

Note: ✓= applicable; positive development since 2008

**Table 5 - Definition of ‘family member’ for the purposes of free movement, asylum and family reunification**

Country Codes	Free movement <sup>157</sup>		Family Reunification		Asylum		Comments
	spouse	partner	spouse	partner	spouse	partner	
AT		✓		✓		✓	Article 59 of the Registered Partnership Act (BGBl. I, No. 135/2009) modifies Article 9 of the Settlement and Residence Act, which now stipulates that the definition of ‘family member’ includes a registered partner. Article 57 of the Registered Partnership Act modifies Article 2/1 of the Asylum Act [Asylgesetz], which now stipulates that the definition of ‘family member’ includes a registered partner, provided that the registered partnership had already existed in the country of origin. Same-sex spouses are likely to be treated as registered partners.
BE	✓	✓	✓	✓	✓	✓	
BG							Article 7 of the new Family Code (01.10.2009) confirms that marriage is a mutual agreement between a man and a woman.
CY							
CZ		✓		✓		✓	Same-sex spouses are likely to be treated as registered partners. Rights concerning family reunification and asylum are restricted to registered partnerships.
DE		✓		✓		✓	Same-sex spouses are likely to be treated as registered partners. Rights concerning family reunification and asylum are restricted to registered partnerships.
DK	✓	✓	✓	✓	✓	✓	
EE							The new Family Law Act (entry into force 01.07.2010) defines marriage as a different-sex institution only and considers marriage between persons of the same sex invalid. Family reunification possible when the partner can prove that he/she is economically or socially dependent.
EL							
ES	✓	✓	✓	✓	✓	✓	Organic Law 2/2009 of 11 December (Spain/Ley Orgánica 2/2009 (11.12.2009)) has modified Organic Law 4/2000 in order to grant couples who have an affective relationship similar to marriage the right to family reunification. Implementing regulations to this law have not been adopted, thus the meaning of the requirement that the ‘affective relationship’ be ‘duly attested’ remains to be clarified. Article 40 of the Law 12/2009 of 30 October on the right to asylum and subsidiary protection [del derecho de asilo y de la protección subsidiaria] replaces Law 5/1984 of 26.03.1984 and, by transposing the EU <i>acquis</i> , confirms the notion that a family member includes the <i>de facto</i> partner having an affective relationship similar to marriage.
FI	✓	✓	✓	✓	✓	✓	
FR	?	?	?	?	?	?	As a result of the entry into force on 14.05.2009 of a new Article 515-7-1 of the French Civil Code, inserted by law 2009-526 of 12.05.2009, foreign registered partnerships are recognised in France; the repercussions of this change for the purposes of free movement of EU citizens are still unclear. Family reunification of third country nationals depends upon the authorities’ discretion, which may require additional conditions. No information available on refugees.
HU		✓		✓		?	Entry and residence rights for free movement are also granted for the unmarried <i>de facto</i> partner, subject to conditions.

<sup>157</sup> In the vast majority of the Member States, no clear guidelines are available concerning the means by which the existence either of a common household or of a ‘durable relationship’ may be proven for the purposes of Art. 3 (2) of the Free Movement Directive.

Country Codes	Free movement <sup>157</sup>		Family Reunification		Asylum		Comments
	spouse	partner	spouse	partner	spouse	partner	
IE		✓		✓		✓	Adoption of Civil Partnership Act in 2010. Immigration, Residence and Protection Bill not yet enacted, but the government intends to treat registered partners in the same way as spouses. In respect of free movement the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 provides for recognition of foreign same-sex marriages and civil partnerships in Irish law, although only as civil partnerships. Civil partners are now covered by family reunification rules in both refugee applications since 2010, and subsidiary protection applications since 2013. There is no provision in Irish law regarding family reunification for cohabiting partners in a marriage or civil partnership-like relationship.
IT							
LT							
LU		✓		✓		✓	The new law on free movement and immigration (29.08.2008) recognises as a family member a spouse or registered partner provided the conditions set forth in article 4 of the partnership law (09.07.2004) are fulfilled. Rights concerning family reunification and asylum are restricted to registered partnerships. Same-sex spouses are likely to be treated as registered partners.
LV		✓					Article 3.4 of the Cabinet of Ministers Regulation No. 586 on Entry and Residence includes in its definition of family member a person who is a dependant of a Union citizen or his or her spouse and who has shared a household with a Union citizen in their previous country of domicile.
MT							
NL	✓	✓	✓	✓	✓	✓	
PL							
PT	✓	✓	✓		✓		Allows same-sex couples to enter into a marriage since June 2010.
RO		?					The new Civil Code (2009) includes a prohibition of same-sex partnership and marriage, including denial of recognition of partnerships and marriages concluded in other countries.
SE	✓	✓	✓	✓	✓	✓	Allows same-sex couples to enter into a marriage since May 2009.
SI							Provides a legal scheme for registered partnership in domestic law, but without granting entry and residence rights to registered partners
SK							Family reunification possible when the partner can prove economic or social dependence.
UK	✓	✓	✓	✓	✓	✓	
<b>TOTAL</b>	<b>8</b>	<b>15</b>	<b>8</b>	<b>13</b>	<b>8</b>	<b>12</b>	

Note: ✓ = applicable; ? = doubtful/unclear; positive changes since 2008; other developments since 2008.