



TRANSPHOBIA IN IRELAND

Research Report

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Transgender Equality Network Ireland
(TENI)

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Mum - thanks for reading and feeding me.

For the Gender Outlaws of Ireland, who live their truth and show the world everyday.

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Executive Summary

- ☞ Invisibility and non-recognition hides the identities, experiences and situations of trans people who are excluded from participation and involvement in policies and decision-making that directly affect their lives. There is a significant diversity of individuals within the trans community, however, there is no substantive knowledge or information about the number of people in Ireland who identify as transgender.
- ☞ Trans people face various forms of social, economic, cultural and legal injustices and are subject to shaming, harassment, discrimination, and violence while simultaneously being denied legal rights and equal protections - clear, fundamental denials of recognition. Transphobia negatively affects an individual's capacity to fully access and enjoy their rights as citizens.
- ☞ In Ireland, there is a lack of legislation that comprehensively defines and addresses hate crimes. Currently there are no provisions for penalty enhancement even for the most serious bias crimes. It is essential to name violations of human rights as criminal offences and to identify them as such.
- ☞ A major issue with the Equal Status Acts is that there are no protections from discrimination when dealing with the functions of the State that are not defined as a service; these are not open to challenge by way of the Equal Status Acts 2000-2004 because of the statutory exemption in Section 14.
- ☞ Since 2002, the European Convention on Human Rights has guaranteed the rights of transsexual people to have their gender recognised and to be able to marry someone of a different gender. Ireland has not introduced legislation to reform the current laws that fail to recognise gender change and permit marriage.
- ☞ Institutionalised transphobia is evident where governmental, legal or social practices encourage, tolerate, or enable the perpetration of discrimination against transgender people by overtly denying, or ensuring the non-realisation of, their civil, political and social rights.
- ☞ Lack of data and information on hate crime in Ireland does not reflect an absence of hate crimes, rather crimes and incidents may simply not be detected or reported. The full extent of the problem of

transphobia is not known because the Gardaí does not collect or publish data on such incidents.

- ☪ There have been a small number of casefiles of trans discrimination brought to the attention of the Equality Authority, such as difficulties with access to gyms and health services, and issues for employees and students.
- ☪ There is a clear absence of government commitment to support the equality and rights of trans people and the lack of trans-related research and policy development is indicative of the social and political exclusion experienced by trans people.
- ☪ Actual experiences or expectations of being received with hostility, having one's concerns dismissed as trivial, lack of awareness and respect, and the absence of a mechanism that would recognise and record the discriminatory motive of an incident are all causes of vulnerability and concern for trans people. In addition, with a lack of appropriate services and supports, and fear of discrimination and prejudice, clearly few people report incidents. Violence against trans people, therefore, remains invisible to the Gardaí, law and policy makers, politicians, and Irish society in general.

1. Introduction

¹ Transphobia: a fear, dislike or hatred of people who are transgender, transsexual or challenge conventional gender categories of male/female. This will be discussed further in greater detail.

² Transgender: an umbrella term referring to people whose gender identity and/or gender expression differs from the sex assigned to them at birth.

³ Transsexual: a person who identifies as, or desires to live and be accepted as a member of the sex other than that assigned at birth.

⁴ Lesbian, Gay, Bisexual and Transgender.

⁵ Search terms included: Transphobia/transphobic; Transgender and hate crimes; Transgender discrimination; Transgender and violence; LGBT discrimination; Transgender and domestic violence; Transgender and immigration; Transgender harassment.

⁶ Trans: an inclusive term for all transgender, transsexual, and gender-variant or differently gendered people, who identify as, or are perceived to be, transgressing stereotypical gender norms.

This report is a comprehensive review of Irish literature, policy and documentation on the handling of transphobia¹ and transphobic incidents in an Irish context. It assesses what methods have been used to document and deal with such incidents at governmental and non-governmental levels, if any. The review looks to European models of policy and best practice and contextualises them within the Irish social, cultural and economic situation. The recommendations seek to inform policy proposals in the documenting and recording of transphobic incidents, but also, very importantly, to inform policy makers about the unique experiences of transgender² people in Ireland.

The main aim of the report is to comprehensively explore documentation policies and procedures on issues of transphobia and hate crimes against transgender people. Are records consistently or adequately maintained? Is there any evidence based research on transphobia that exists in Ireland? This report tries to fully assess the Irish situation and compare it to models of best practice in the European context. It focuses on the experience of transgender and transsexual³ people explicitly, with attention given to the wider LGBT⁴ or gender discrimination situation, where appropriate. The literature review includes academic research, government policy documents, reports and submissions authored by legal, equality, and human rights organisations and individuals.

A systematic search of academic literature databases, journals, and university library catalogues in the disciplines of Law and the Social Sciences was conducted, with a number of relevant search terms used.⁵ Websites of Irish and international government departments, statutory bodies, police forces, human rights organisations, LGBT organisations and other relevant NGOs were also included for review, where they referenced transphobia, discrimination, or hate crimes committed against transgender people.

A sound baseline measurement of the current situation of transphobia in Ireland, and how it is dealt with, recorded, and monitored, is crucial to adequately articulate and understand the specific issues involved. This is necessary before we can advocate for policy change to address the issues in an appropriate and effective manner.

A primary aim of the report is to act as a catalyst and a tool for dialogue and guidance that will contribute to a greater visibility, awareness, and understanding of the lives of trans⁶ people in Ireland by exploring the

realities of trans discrimination. This report is a reflection on the real challenges of transphobia and discrimination as they manifest in the lives of trans people in Ireland. Serious consequences result from the inaction on the part of Government and other authorities who fail to respond to the discrimination, violence and oppression faced by many trans people. The complete lack of research on this issue is indicative of the silence that appears to allow such discrimination to continue. This report is of relevance to all service providers, policy makers, government agencies, and individuals who work with trans people.

This research was provoked by several factors:

- 🌀 The perception that there are no trans people (or very few) in Ireland and therefore, there is no transphobia in Ireland
- 🌀 A growing body of evidence, internationally, that trans people experience discrimination and violence based on their gender presentation
- 🌀 Rationale for having transphobia/transphobic incidents recorded and monitored - putting mechanisms in place so people would report and the police would become aware of, and acknowledge the problem exists
- 🌀 Specific experiences of trans people regarding discrimination and violence
- 🌀 Lack of understanding and education about trans issues and experiences

The specific aims of the research are:

- 🌀 To identify what policies or guidelines are currently in place to report transphobic incidents in Ireland
- 🌀 To document challenges and 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 trans community

Invisibility and non-recognition hides the identities, experiences and situations of trans people who are excluded from participation and involvement in consultations, reports, policies and decision-making

processes that directly affect their lives. It is important to develop a visible and effective response to the findings and recommendations of this research, which have direct implications for policy makers, discussing how these barriers can be addressed and how good practice can be encouraged.

The following sections in this introductory chapter will define, in greater detail, the terms used throughout this report - Transgender, Transphobia, and Hate Crime - before outlining the legal and social context of human rights and hate crime in Ireland. Chapter 2 consists of the Policy, Documentation and Literature Review and analysis addressing Institutionalised Transphobia, Hate Crime Reporting and Monitoring, and Trans Discrimination. Chapter 3 draws conclusions from the review findings and highlights European models of best practice that guide the recommendations for actions in Chapter 4. These recommendations can be utilised to develop opportunities for change to reduce transphobia and discrimination against trans people.

1.1 Definitions - Transgender, Transphobia, and Hate Crime

⁷ Whittle et al. (2008)
*Transgender EuroStudy:
Legal Survey and Focus
on the Transgender
Experience of Healthcare*,
ILGA-Europe and
TransGender Europe,
Brussels

In this report, as others have used the terminology⁷, I refer to people who may identify as transgender, transsexual or gender-variant in any way as 'trans'. Trans people have complex gender identities, often moving from one 'trans' category into another over time. By its nature, language used to describe trans people is fluid. How people self-identify may not be the same as how others identify them, or try to classify them, and this self identity may change significantly over time and in different contexts.

Transgender

Transgender people are individuals whose gender expression and/or gender identity differs from conventional expectations based on the physical sex they were assigned at birth. 'Transgender' is also an umbrella term which is often used to describe a wide range of identities, experiences, and people whose appearance seems to conflict with the gender norms of society, including transsexuals, transgender, intergender, gender queers, cross dressers, drag queens, drag kings, and many more. Transgender people can have any sexual orientation - lesbian, gay, bisexual, straight, asexual or indeed, be celibate. Trans people cross the boundaries of gender, frequently calling into question the binary categories of female and male in how they present themselves and interact with the world. Many trans people undergo a number of surgeries to be fully bodily reassigned in a different gender.⁸

⁸ Whittle et al. (2007)
*Engendered Penalties:
Transgender and
Transsexual People's
Experiences of Inequality
and Discrimination*
www.pfc.org.uk/files/EngenderedPenalties.pdf

There is a significant diversity of individuals within the trans community, reflecting the multiple identities and experiences of its members, however, there is no substantive knowledge or information about the number of people in Ireland who identify as transgender.

Transphobia

Refers to fear of, aversion to, or discrimination against transgender people, or people who transgress (or are perceived to transgress) norms of gender, gender identity or gender expression. Hill and Willoughby (2005)⁹ define transphobia in terms of 'emotional disgust toward individuals who do not conform to society's gender expectations'. This fear and hatred of transgender people, is a variant of homophobia understood as hatred of the queer, where 'queer' means any form of sexuality and/or gender that deviates from the norm of reproductive heterosexuality.

⁹ Hill, D. and Willoughby, B. (2005) 'The Development and Validation of the Genderism and Transphobia Scale', *Sex Roles*, 53, 531-544

Transphobia is more broad than homophobia in that it is not only about revulsion and irrational fears of transgender and transsexual people, but also cross dressers, feminine men, and masculine women. This encompasses larger issues of gender roles and gender identities rather than just sexual orientation. Although there is established literature on homophobia, transphobia is still an understudied area of research and no research has been conducted specifically on transphobia in the Irish context. Transgender individuals are often not distinguished or distinguishable in LGBT research from gay, lesbian, and bisexual people, and so there is no differentiation between issues of gender identity, gender roles, and sexual orientation.

Trans people face various forms of social, economic, cultural and legal injustices and are subject to shaming, harassment, discrimination, and violence while simultaneously being denied legal rights and equal protections - clear, fundamental denials of recognition. Transphobia has a negative effect on an individual's capacity to fully access and enjoy their rights as citizens, seeking as it does to exclude, marginalise and discriminate against trans people.






Hate Crime

¹⁰ British Home Office website:




www.homeoffice.gov.uk/crime-victims/reducing-crime/hate-crime

British Home Office definition¹⁰: Hate crime


Hatred is a strong term that goes beyond simply causing offence or hostility. Hate crime is any criminal offence committed against a person or property that is motivated by an offender's hatred of someone because of their:

-  Race, colour, ethnic origin, nationality or national origins
-  Religion
-  Gender or gender identity
-  Sexual orientation
-  Disability

Hate crime can take many forms including:


-  Physical attacks - such as physical assault, damage to property, offensive graffiti, neighbour disputes and arson
-  Threat of attack - including offensive letters, abusive or obscene telephone calls, groups hanging around to intimidate and unfounded, malicious complaints
-  Verbal abuse or insults - offensive leaflets and posters, abusive gestures, dumping of rubbish outside homes or through letterboxes, and bullying at school or in the workplace.

Our [*British Home Office*] definition of a hate crime:

-  Any incident, which constitutes a criminal offence, which is perceived by the victim or any other person as being motivated by prejudice or hate.

¹¹ PSNI Policy Directive on the Police Response to Hate Incidents
www.psni.police.uk/policy_directive_0206_police_response_to_hate_incidents.pdf

The Association of Chief Police Officers (UK) definition of a Hate Incident, used by the Police Service of Northern Ireland¹¹ (PSNI), states:

-  Any incident, which may or may not constitute a criminal offence, which is perceived by the victim or any other person, as being motivated by prejudice or hate.

In Ireland, there is a lack of legislation that comprehensively defines and

addresses hate crimes, and there are no provisions for penalty enhancement at sentencing even for the most serious bias crimes.¹² It is essential to name violations of human rights as criminal offences and to identify them as such. An effective response to hate crimes is difficult without a clear picture and understanding of the extent of the problem and the types of offences being committed. According to Human Rights First, the Organisation for Security and Co-operation in Europe (OSCE) member states, including Ireland, have committed to "collect and maintain reliable data and statistics on hate crimes and incidents".¹³ Hate crimes and hate violence manifest in many different forms and places but they have one common goal or purpose - to degrade, humiliate, or stigmatise the victims.

¹² Human Rights First (2008) *2008 Hate Crime Survey*, New York

¹³ Human Rights First (2008) *2008 Hate Crime Survey*, New York

1.2 Human Rights and Hate Crime in the Irish Context

This section will review and present national legislation and its relevance to transgender human rights and hate crime. Despite the question of legal gender recognition and the rights of trans people being highlighted on the policy agendas of NGOs and human rights institutions, transsexual people in Ireland still do not have legal recognition. This absence of a gender recognition provision substantially contributes to a discriminatory culture.¹⁴

Ireland ratified the European Convention on Human Rights and Fundamental Freedoms (ECHR) in 1953. In December 2003, the European Convention on Human Rights Act 2003 entered into force implementing the European Convention into Irish law subject to the Irish Constitution. Since then, people have been able to claim the rights and freedoms of the European Convention before domestic courts. Specifically regarding trans rights, the ECHR guarantees a transsexual person the right to have their gender identity recognised, and also protects the right of the trans person to marry a person of a different gender. Consequently, the European Convention on Human Rights Act 2003 is a core instrument in upholding and promoting human rights in addition to the fundamental rights guaranteed in the Irish Constitution.¹⁵

¹⁴ Walsh et al. (2007) *Enabling Lesbian, Gay and Bisexual Individuals to Access their Rights Under Equality Law*, Research Summary Report, Equality Commission for Northern Ireland, Belfast and Equality Authority, Dublin

The Equality Acts

Many of the socio-political changes that have occurred in Ireland over the last fifteen years have led to the development of a more tolerant and open society. A legislative momentum continued after the decriminalisation of homosexuality in 1993 which saw the introduction of new laws - the Employment Equality Acts 1998-2007 and the Equal Status

¹⁵ Report by the Commissioner for Human Rights Mr. Thomas Hammarberg on his visit to Ireland 26 - 30 November 2007 <https://wcd.coe.int/ViewDoc.jsp?id=1283555&Site=C ommDH&BackColorIntern et=FEC65B&BackColorIntranet=FEC65B&BackColorLogo=FFC679>

Acts 2000-2004 - both recognising and protecting the rights of transsexual people, although not explicitly. These Acts prohibit discrimination on the grounds of gender, race, religion, age, disability, sexual orientation, marital status, family status and membership of the Traveller Community. The Equal Status Acts and Employment Equality Acts offer some protection to the rights of sexual minorities, as anti-discrimination laws, however, harassment, discrimination and the threat of violence remain features of daily life for many trans people in Ireland.

The Employment Equality Acts 1998-2004 established two national institutions with enforcement functions under the Equality legislation - the Equality Authority and the Equality Tribunal. The Equality Authority is an independent body required, under the legislation, to work towards the elimination of discrimination, to promote equality of opportunity, to provide information to the public on a number of equality matters and to review various legislative enactments. The Equality Authority also has the power to instigate litigation on its own behalf or to assist a litigant. The Office of the Director of Equality Investigations (known as the Equality Tribunal) is a quasi-judicial body established for the purpose of investigating complaints under the Employment Equality Acts 1998-2007 and the Equal Status Acts 2000-2004. The Equality Tribunal is a statutory body, and an independent and impartial forum to hear or to mediate alleged discrimination. Equality Officers investigate complaints and issue a legally reasoned and public decision, which is legally binding. Discrimination complaints, including dismissal cases are brought to the Equality Tribunal.

¹⁶ Ibid.

There is, however, a substantial backlog of cases waiting to be heard at the Equality Tribunal, resulting in delays of up to three years.¹⁶ The lack of resources allocated to the Tribunal and the cut of 43% to the Equality Authority's budget for 2009 do not augur well for strong human rights protection in Ireland. The Department of Justice, Equality and Law Reform is responsible for funding both bodies, as well as developing anti-discrimination policy and a legal framework to advance equality.

The laws that do exist are anti-discrimination laws specifically aimed at the prevention of discrimination rather than the promotion of cultural, economic, political or affective equality. Therefore, while rights discourse often focuses on widespread and systemic social wrongs, it is left to the frequently vulnerable individual to prove that their rights have been infringed. The Employment Equality Acts prohibit discrimination in the

workplace and in vocational training, and the Equal Status Acts prohibit discrimination in the provision of goods and services, accommodation, and education. Both Acts cover nine grounds including gender, affording a degree of protection to transsexual people. The gender provisions of the Acts have to be interpreted in light of the judgment of the European Court of Justice (*P. v S. and Cornwall County Council*)¹⁷ which precludes dismissal of a transsexual person for a reason related to gender reassignment.

¹⁷ European Court of Justice, Case C13/94

In recent years, the Equality Authority has noted a growing number of transsexual people bringing forward allegations of discrimination under the Equality Acts. However, the protection would appear to be only for post-operative trans people. A serious question arises about the protections for people who are just starting to transition or who have been living as a different gender but cannot or have not yet accessed surgery.



A major issue with the Equal Status Acts is that there are no protections from discrimination when dealing with the functions of the State that are not defined as a service, for example, birth and marriage registration.¹⁸ A significant amount of discrimination against trans people arises as a result of the requirements of various laws, such as social welfare legislation and succession acts, for example, and the definitions of spouse and the family that are used. These are not open to challenge by way of the Equal Status Acts 2000-2004 because of the statutory exemption in Section 14, thus where an act is required by virtue of another piece of legislation then the Equal Status Acts 2000-2004 does not apply. This has a seriously limiting effect on the usefulness of the Acts to challenge discrimination against trans people.

¹⁸ Barry, E. (2004) *Transsexualism and Gender Dysphoria*, Equality Authority, Dublin

Human Rights Commission

The Human Rights Commission, established under the Human Rights Commission Act 2000, has a wide-ranging competence to promote and to protect human rights as defined by the Irish Constitution and any international agreements to which Ireland is a party.

Section 2 of that Act defines human rights as:

-  The rights, liberties and freedoms conferred on, or guaranteed to, persons by the Constitution, and
-  The rights, liberties or freedoms conferred on, or guaranteed to persons by any agreement treaty or convention to which the State is a party.

The functions of the Commission include reviewing legislation, promoting human rights and supporting complaints of breaches of human rights. The Commission is required to 'promote understanding and awareness of the importance of human rights in the State and, for those purposes, to undertake, sponsor or commission, or provide financial or other assistance for, research and educational activities.' The Commission may also provide independent assistance to victims of discrimination in pursuing their complaints.¹⁹ However, the Commission's budget for 2009 has also been cut by 24%, the effects of which will negatively impact on the Commission's ability to fulfil its core human rights functions.

¹⁹ Quinlivan, S. (2004) Report on Measures to Combat Discrimination Directives 2000/43/EC and 2000/78/EC Country Report - Ireland http://europa.eu.int/com/m/employment_social/fundamental_rights/policy/annual/mon_en.htm

Prohibition of Incitement to Hatred Act 1989

The only criminal statute in Ireland dealing specifically with hate speech is the Prohibition of Incitement to Hatred Act 1989. This statute makes it an offence to incite hatred against a group of persons on the basis of race, colour, religion, nationality, ethnic or national origins, membership of the Traveller Community or sexual orientation. These terms are not defined within the legislation. This Act does not strictly relate to discrimination, but a prohibition on incitement to hatred. Hatred is defined in the Act as hatred against a group on account of the grounds named above. This legislation creates a criminal offence of incitement to hatred, that involves publishing, distributing, displaying material or behaviour that is threatening, abusive or insulting and is intended or is likely to stir up hatred.

There are a number of limitations and difficulties relating to this legislation and the criminalisation of hate speech. Notably, there have been a low number of prosecutions brought under the Act and even fewer convictions. For example, there were only twelve convictions under the Act during the period 2003-2007. Official statistics are not available on whether any cases under the period of review related to the sexual orientation ground contained in the Act, however, anecdotal evidence suggests that this has not been the case.²⁰ The legislation does not include measures dealing with the general vilification of minorities. In particular, abuse or harassment on the street is not covered by the legislation unless proven likely to stir up or incite hatred; however, this may be a prevalent form of hate speech experienced by minorities in Ireland. The difficulty with this provision relates to the fact that it requires an intention to stir hatred; this has proven to be an exceptionally difficult evidential barrier to overcome. Although official statistics are effectively non-existent, there is some evidence of hate-related crimes and other offences affecting LGBT communities.²¹ It is important to note, however, that trans people are not protected by the Act, which remains under review.

²⁰ O'Connell, D. (2008) *Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation - Ireland* http://fra.europa.eu/fraWebsite/material/pub/comparativestudy/FRA-hdgso-NR_IE.pdf

²¹ Ibid.

Hate Crime

There is no specific legislation for hate crimes in Ireland. They can be covered by other legislation but these legislative provisions do not expressly refer to hate crime or gender identity. Section 10 of the Non-Fatal Offences Against the Person Act 1997 makes harassment an offence but the behaviour must be persistent in nature in order to secure a conviction. Hate speech can also be dealt with under section 6 of the Criminal Justice (Public Order) Act 1994 which makes threatening, abusive or insulting behaviour in a public place an offence. Protection against violence can be secured through the provisions of the Domestic Violence Act 1996.²²

²² Ibid.

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. When sentencing an assault committed due to the gender identity of the victim, it is not considered as an aggravating circumstance.²³

²³ Walsh, J. and Conlon, C. (forthcoming) *The Situation Concerning Homophobia and Discrimination on Grounds of Sexual Orientation in Ireland - Sociological Report*, European Union Agency for Fundamental Rights

Trans people are not expressly protected under any equality or hate crime legislation in Ireland.

2. Policy, Documentation and Literature Review

²⁴ Requests were made to the Department of Justice, Equality and Law Reform, An Garda Síochána, the Irish Prison Service, and the Courts Service via email, fax and/or telephone.

It is important to note that much of the information sought for this report was not available. Requests were made to various government departments and services²⁴ to ascertain if a policy was in place to deal explicitly with transgender or transsexual people and the specific issues that may affect them. Most confirmed that no policies currently existed, at least not in any formal, published format and in other cases, the information requested was not forthcoming. This highlights, once again, the issues of invisibility and non-recognition of trans people in the Irish legal system and the absence of appropriate supports to meet their needs when they experience social and institutional anti-trans bias and hostility.

During the review, a number of specific areas of concern regarding transphobia and discrimination on the grounds of gender identity emerged. Three broad themes were identified as having the most serious issues and impacts for trans people:

- 🔍 Institutionalised Transphobia
- 🔍 Hate Crime Reporting and Monitoring
- 🔍 Trans Discrimination

There is much overlap between the areas - they intersect with a lack of policy and legislation that reaffirms and legitimises the discrimination, social exclusion and marginalisation faced by many trans people in Ireland.

2.1 Institutionalised Transphobia

The UN Human Rights Committee is the supervisory body established to oversee the State's compliance with the provisions of the International Covenant on Civil and Political Rights. In July 2008, the Committee considered the State's Third Periodic Report.²⁵ In its Concluding Observation No. 8, the Committee stated:

²⁵ UN Human Rights Committee
(CCPR/C/IRL/CO/3)
Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee
<http://daccessdds.un.org/doc/UNDOC/GEN/G08/433/49/PDF/G0843349.pdf?OpenElement>

- 🔍 The State party should also recognize the right of transgender persons to a change of gender by permitting the issuance of new birth certificates.

The statement below is the response offered by the Irish Government to the Human Rights Committee questions to clarify the situation of

transgender people in Ireland:

☪ The Government are [sic] aware of the need to look at changing the law on birth registration to allow a trans-gendered person to obtain a birth certificate in their new gender and this is under consideration. This matter is complex and requires careful examination both of the rights of trans-gendered persons and others, such as family members, who might be affected by such a change. Detailed consideration of the matter will be required when litigation currently before the Supreme Court is adjudicated upon.²⁶

Since the European Court of Human Rights case, *Goodwin v. UK*²⁷ in 2002, the European Convention on Human Rights has guaranteed the rights of transsexual people to have their gender recognised and to be able to marry someone of a different gender. Ireland has not introduced legislation to reform the current laws that fail to recognise gender change and permit marriage. The European Court has found several countries including the United Kingdom, France and Lithuania in breach of the ECHR for such lack of recognition provision. Indeed, from the above statement, it would appear that detailed consideration of the matter by the Irish Government will not take place until the Supreme Court has decided its ruling. The litigation refers to Dr. Lydia Foy who has been seeking to obtain a birth certificate reflecting her female gender since April 1997. Upon appeal, the High Court on 19 October 2007 delivered a landmark judgment ruling that the State is in breach of Article 8 of the ECHR, and in February 2008 issued a declaration of incompatibility. This decision has been appealed by the Government to the Supreme Court and a stay has been put on the declaration.

Similarly in the Report by the Commissioner for Human Rights, Mr. Thomas Hammarberg on his visit to Ireland, 26 - 30 November 2007,²⁸ he recommends:

☪ Change the law on birth registration in such a way that transgender persons can obtain a birth certificate reflecting their actual gender.

²⁶ UN Human Rights Committee (HRC), *Replies to the list of issues (CCPR/C/IRL/Q/3) to be taken [sic] up in connection with the consideration of the 3rd periodic report of the government of Ireland (CCPR/C/IRL/Q/3)* [i.e. CCPR/C/IRL/3], 24 June 2008. CCPR/C/IRL/Q/3/Add.1. Online. UNHCR Refworld <http://www.unhcr.org/refworld/docid/4885cf80.html>

²⁷ *Goodwin v. UK* (2002) 35 EHRR 18

²⁸ Report by the Commissioner for Human Rights Mr. Thomas Hammarberg on his visit to Ireland 26 - 30 November 2007 <https://wcd.coe.int/ViewDoc.jsp?id=1283555&Site=C&omDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679>

Response of the Irish government:

☪ This Recommendation, and the High Court decision to which reference is made in paragraph 81 of the Commissioner's report, relate to the Civil Registration Act. However any proposal to change this legislation along the lines suggested would involve a number of broad and complex issues which require detailed consideration across many Departments. In view of the significance of the High Court judgement [sic] not merely for this case but for future cases under the European Convention on Human Rights Act, an appeal has been lodged in the Supreme Court against the High Court decision mentioned, in the interest of seeking clarity on all its implications.

Institutionalised transphobia is evident where governmental, legal or social practices encourage, tolerate, or enable the perpetration of discrimination against transgender people by overtly denying, or ensuring the non-realisation of, their civil, political and social rights. In Ireland, trans people are invisible because of the everyday practices that result from unquestioned norms and assumptions underlying institutional rules - that everyone is heterosexual and that no one changes their gender.

Marriage and family recognition rights are currently denied to trans people who transition - there is no guarantee that they will be able to maintain their parental rights and have access to their children after marriage breakdown.²⁹ Without gender recognition, trans people cannot marry in their new gender because they are still legally seen as the gender stated on their birth certificate. There is an implicit constitutional bar on marriages between same-sex couples and this applies where the reassigned gender of a transsexual person has not been officially recognised and they wish to marry a person of a different gender.³⁰ Section 2(2)(e) of the Civil Registration Act 2004 explicitly precludes the possibility of a valid civil marriage between two persons of the same sex. Irish law breaches the Convention standards set out in *Goodwin v. UK*, which established that post-operative transsexuals have the right to marry people of their birth gender.

In its submission to the Inter-Departmental Committee on Reform of Marriage in 2004, the Irish Council for Civil Liberties (ICCL) raised the fact that Irish law, by failing to extend the right to marry to transsexual people, is in violation of the ECHR. As section 3 of the European Convention on Human Rights Act 2003 requires that State bodies act in compliance with the ECHR, Irish law must either be re-interpreted,

²⁹ Whittle et al. (2008) *Transgender EuroStudy: Legal Survey and Focus on the Transgender Experience of Healthcare*, ILGA-Europe and TransGender Europe, Brussels

³⁰ O'Connell, D. (2008) *Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation - Ireland* http://fra.europa.eu/fra/Website/material/pub/comp/parativestudy/FRA-hdgso-NR_IE.pdf

amended or failing such action, persons affected have a cause of action against the Government.³¹

As was confirmed by the High Court in the case of *Lydia Foy v. An tArd-Chlaraitheoir (Registrar General) and others (No. 2)* (judgment of 19 October 2007), the legislation governing birth certificates in Ireland is incompatible with the European Convention on Human Rights, made applicable in Ireland by the European Convention on Human Rights Act 2003. The Court issued a Declaration of Incompatibility of the law as set out in s. 60(8) of the Civil Registration Act 2004. 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 transgender people with a reassigned gender. The Civil Registration Act 2004 only allows the correction of typographical errors, 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, being the first and only such order issued to date under the ECHR Act 2003.³²

Trans people are invisible and continue to go unrecognised because formal policies, supports and services do not exist in Ireland that address their specific needs. A report commissioned by the Equality Authority in 2004, *Access to Health Services for Transsexual People*,³³ highlighted the underdeveloped nature of the health treatment and supports available to trans people and called for new health policy and provision. In 2009, the situation remains unchanged.

In January 2009,³⁴ the Minister for Justice, Equality and Law Reform, Dermot Ahern was asked by Deputy Joe Costello, a member of the Dáil (Irish Parliament), if there are transsexual prisoners in jail at present and if so, the location where they are imprisoned. The Minister replied:

☞ "I am informed by the Irish Prison Service that there are no transsexual prisoners in prison custody."

The Irish Prison Service does not have a formal policy for transgender people. According to anecdotal reports, at least two transgender women have been imprisoned in male facilities in Ireland, which raises further serious questions regarding human rights violations by the State.

³¹ Irish Council for Civil Liberties (2006) *Equality for All Families*, ICCL, Dublin

³² European Union Agency for Fundamental Rights (2008) *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States Part I - Legal Analysis* http://fra.europa.eu/fraW/ebSite/material/pub/comp_arativestudy/FRA_hdgso_part1_en.pdf

³³ Collins, E. and Sheehan, B. (2004) *Access to Health Services for Transsexual People*, Equality Authority, Dublin

³⁴ <http://debates.oireachtas.ie/DDebate.aspx?F=DA L20090127.xml&Node=3815&Page=48>

³⁵ The other being, Barry, E. (2004) *Transsexualism and Gender Dysphoria*, Equality Authority, Dublin

³⁶ Irish Human Rights Commission (2008) *Submission to Government concerning the protection of the rights of transgendered persons*
http://www.ihrc.ie/_fileupload/downloads/FINALSubmissionSubtransgenderedpersons.doc

³⁷ Section 11 of the Passports Act 2008.

³⁸ Irish Human Rights Commission (2008) *Submission to Government concerning the protection of the rights of transgendered persons*
http://www.ihrc.ie/_fileupload/downloads/FINALSubmissionSubtransgenderedpersons.doc

³⁹ Ní Mhuirthile, T. (2008) 'Declaring Irish Law Incompatible with the Law of the ECHR - Where to Now?', *Independent Law Review*, Volume 4, Summer 2008
http://www.claruspress.ie/ILR_Vol4_Web_2008.pdf

The Irish Human Rights Commission (IHRC) authored one of only two policy documents³⁵ explicitly addressing the legal situation of transgender people in Ireland.³⁶ It surveyed the European and domestic case law and looked to the UK example of the Gender Recognition Act to potentially address the issue in the Irish context. The submission also highlights the Passports Act 2008, as it provides for the right of transgender people to apply to have a passport issued in their new gender³⁷ and is the first statutory recognition of transgender rights in Irish legislation.³⁸

In the IHRC's view, there would appear to be no impediment to the Government considering the issue of the legal recognition of transgender persons' rights. The IHRC is concerned that Irish law does not conform with international human rights standards relating to the rights of transgender people, and recommends that the Government take steps to remedy the current lack of protection of trans rights under Articles 8 and 12 of the ECHR through amending legislation.

Ireland has failed to respond at any level, even the most exploratory, to the issue of gender recognition. The silence from the Government on the issue indicates that it has taken no significant steps to addressing the discrimination that continues to exist. At present, Ireland is isolated amongst the other EU states because the law will not recognise a change of gender.³⁹

In Ireland, transphobia is institutionalised and pervades all aspects of life:

- 🌀 Access to healthcare
- 🌀 The workplace
- 🌀 Education
- 🌀 Access to goods and services
- 🌀 Policing and hate crime
- 🌀 Changing legal documentation
- 🌀 Family and relationship recognition
- 🌀 Immigration status
- 🌀 Domestic violence issues

It is essential to recognise that discrimination against trans people still widely exists as a socially acceptable and institutionally sanctioned form of prejudice. In order to claim recognition and equality, it is necessary to make trans people and the institutional discrimination they face recognisable - it is very difficult, if not impossible, to articulate the needs

or defend the rights of socially and legally invisible members of society. Unless trans people are specifically written into Irish legislation, the rights of trans people will remain invisible. However, social visibility can also bring more brutal forms of discrimination.

2.2 Hate Crime Reporting and Monitoring

Transphobia can be expressed at an individual level as harassment, bullying and hate crime. It is important to highlight that the lack of data and information on hate crime in Ireland does not reflect an absence of hate crimes, rather crimes and incidents may simply not be detected or reported. A lack of reliable statistics presents a challenge to collect data and evidence to prove acts of violence against trans people take place. The recording of crimes is necessary to research the causes of violence and implement measures to prevent them. It also encourages people to report crimes and raises awareness of the issues. Physical attacks as well as incidents of harassment, intimidation or discrimination should be recorded.

Homophobic and transphobic incidents and crimes are believed to be among the most under-reported and under-documented, and the perpetrators of such crimes often go unpunished.⁴⁰ Gender nonconformity and perceived gender transgression has been identified as a target of prejudice, discrimination, and violence against trans individuals - individuals who are perceived as transgressing normative gender roles and presentation are often subjected to prejudice and violence. Violence related to sexual orientation is often interconnected with gender nonconformity. Perceived gender transgression is often explicitly targeted by the perpetrator, and frequently involves threats of, as well as real, violence.

⁴⁰ Human Rights First (2008) *2008 Hate Crime Survey*, New York

This section seeks to address the following questions:

- ❖ Does the Gardai record transphobic acts of violence?
- ❖ What policies/guidelines are in place for reporting transphobic incidents?
- ❖ What would the criteria be for recording? Are there issues regarding the privacy of the victim?
- ❖ What are the experiences of trans people accessing justice?
- ❖ Is the Gardai meeting the needs of trans people when incidents are reported?
- ❖ What difficulties are experienced?
- ❖ Are best practice models encouraged and replicated?

The difficulties surrounding disclosure of gender identity places trans people at a disadvantage in terms of accessing justice and victim support. From contact made with Garda Headquarters, it would appear that formal policy and practice to address the needs of victims of transphobic violence and discrimination does not exist. There is no documented information on current Garda practice in terms of understanding or responding to the issues presented by trans people or those perceived to be trans. No evidence was found regarding the monitoring or recording of transphobic incidents, nor the acknowledgement or recognition that transphobia even exists. It is certainly not articulated in formal, written policy statements disseminated to members of An Garda Síochána or the general public. The full extent of the problem is not known because the Gardaí does not collect or publish data on such incidents. The lack of data makes it very difficult to assess whether crimes are actually reported and what the police response is to them.

⁴¹ www.garda.ie

A search for the term 'hate crime statistics' on the An Garda Síochána⁴¹ website returned no information. A search for 'hate crime' produced six results:

- 🔗 A Review of research on victimisation of gay and lesbian community in Ireland
- 🔗 An Garda Síochána Human Rights Audit
- 🔗 Garda Human Rights Audit Executive Summary
- 🔗 Garda Public Attitudes Survey 2007
- 🔗 Public Attitudes Survey 2002
- 🔗 Public Attitudes Survey 2006

⁴² www.garda.ie/FAQ/Default.aspx?FAQCategory=12

In the 'Frequently Asked Questions' section of the website,⁴² listed under 'General', one of the entries states:

- 🔗 I am doing a college project. Where can I get crime statistics?
The Central Statistics Office is responsible for producing crime statistics and publishes them on its website.

The CSO website, while offering a database of information on Crime and Justice, does not facilitate a select option for 'hate crime', nor when entering the search terms 'hate crime statistics' or 'hate crime' does it return any information. On the 'Current Releases and Publications' page,⁴³ Garda Recorded Crime Statistics 2003-2007 Excel Tables are available to view. These produced the following information:

⁴³ www.cso.ie/releasespublications/pr_crimejust.htm

Incitement to Hatred Offences

- 🕒 2003 - 18 recorded 4 convictions
- 🕒 2004 - 20 recorded 3 convictions
- 🕒 2005 - 16 recorded 3 convictions
- 🕒 2006 - 17 recorded 1 conviction
- 🕒 2007 - 17 recorded 1 conviction

There is no disaggregated information available to see on what grounds these specific offences were recorded; nor is there any information provided for other offences such as assaults or property damage that may have a hate motive. In the 2007 Annual Report, there was no mention of hate crime statistics.⁴⁴

⁴⁴www.garda.ie/Documents/User/Annualreport07.pdf

The LGBT Hate Crime Report by Johnny, an action based peer support group for gay and bisexual men, examined the prevalence of hate crime in Dublin in 2006.⁴⁵ 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." 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 twelve months. 55% of the victims had been subject to a verbal attack only, while 45% suffered a physical and/or physical and verbal attack. Further, 72% stated that they did not feel safe showing affection with a person of the same sexual orientation in public. 80% of victims did not report the attack to the Gardaí.

⁴⁵ 2006 LGBT Hate Crime Report: Stop Hate Crimes in Ireland Campaign <http://johnny.fruitdesign.ie/upload/hatecrimereport.pdf>

There were a number of reasons as to why respondents did not report their attack but 36% of respondents cited lack of confidence in the police as the reason, while 33% stated that there was "no point" in reporting. 86% of respondents believed that more visible Garda patrols would make them feel safer. In one specific question, respondents were asked if they believed the Irish Government was doing enough to: prevent hate crimes from taking place; to support the victims of hate crimes and if the Gardaí were effectively dealing with hate crimes - 95% of respondents said no. There is little evidence of research in Ireland on transgender people and this survey, although including trans people in LGBT, focused on violence based on sexual orientation.⁴⁶

⁴⁶ Walsh, J. and Conlon, C. (forthcoming) *The Situation Concerning Homophobia and Discrimination on Grounds of Sexual Orientation in Ireland - Sociological Report*, European Union Agency for Fundamental Rights

An Garda Síochána is trying to address homophobic violence, harassment and hate speech and has worked with the Gay and Lesbian Equality Network (GLEN) to develop a LGBT Community Safety Strategy for the

⁴⁷ http://www.garda.ie/Documents/User/victims_charter.pdf

Dublin Metropolitan Region. Positive work being carried out by the Gardaí also includes developing leaflets for the LGB community encouraging people to report homophobic crimes, providing information about Garda Liaison Officers to members of the LGB community, and providing training for Gardaí on LGBT issues. In the Garda Charter for Victims of Crime,⁴⁷ it states that if you are a member of the Gay, Lesbian, Bisexual or Transgender Community and a victim of crime or traumatic incident, the Gardaí will refer you to a designated Garda. It also states:

- ☞ Our citizen, client and customer service standards are characterised by courteous, helpful, respectful and professional behaviour. In addition, when persons are traumatised as a result of a crime or other traumatic incident, we are committed to responding to their needs in a caring, sensitive and empathic manner.
- ☞ Special regard for your dignity, concerns and needs is a high priority for us.
- ☞ All members of An Garda Síochána are trained to treat victims with dignity and respect. We are continuously developing and refining our awareness and understanding of your expectations, needs and entitlements.

⁴⁸ Sarma, K. (2004) *A Review of Research on Victimisation of the Gay and Lesbian Community in Ireland*, Garda Research Unit, Research Report No. 4/04
[http://www.garda.ie/Documents/User/gru_report_gaylesbian\[1\].pdf](http://www.garda.ie/Documents/User/gru_report_gaylesbian[1].pdf)

A review by Sarma (2004)⁴⁸ highlights the lack of empirical research and subsequent lack of knowledge of the Gardaí regarding the experiences of victimisation and the profile of perpetrators of hate crimes in Ireland. He states that the victimisation of Ireland's transgender community has been totally ignored to date and notes that a more sensitive and sophisticated policing response to dealing with hate crimes is required.

⁴⁹ http://www.psnl.police.uk/policy_directive_0206_police_response_to_hate_incidents.pdf

An appropriate policing response to hate crime is evident in the Police Service of Northern Ireland (PSNI) Policy Directive 02/06,⁴⁹ where Hate Crimes and Hate Incidents are explicitly defined and recorded in the following areas:





- ☞ Race or Ethnicity
- ☞ Sexual Orientation
- ☞ Faith or Religious (non-sectarian incidents)
- ☞ Faith/Religion or Political Opinion (sectarian incidents - relates to Roman Catholic - Protestant incidents)
- ☞ Disability
- ☞ Gender Identity

The PSNI commenced recording transphobic incidents in March 2006. Whilst to date there have been few reports, the Police Service is aware that hate incidents against transgender people is a frequent reality.

The PSNI define a transphobic incident to be:

 **Any incident which is perceived to be transphobic by the victim or any other person.**

Methods of reporting incidents of hate crime:

-  Report to Police on 999 system if it was an emergency or on the non-emergency number
-  Report online via the PSNI website
-  Report via Crimestoppers
-  Third Party reporting - third party reporting system launched to report Homophobic and Transphobic hate incidents through a dedicated phone line.

During 2006/07, the PSNI established a baseline measure of incidents and crimes with a transphobic motivation. There were 32 transphobic incidents recorded during 2006/07. There were 14 transphobic crimes recorded, 12 of these offences were of criminal damage and 2 were assaults. None of these crimes were cleared during 2006/07.⁵⁰ In statistical reporting for the period 1 April 2007 to 31 March 2008, the PSNI reported 160 homophobic incidents and 7 transphobic incidents (4 crimes - 2 offences were of criminal damage, 1 was an assault and 1 fell within the category of intimidation/harassment). 68.4% were reported to be violent crimes against persons (as opposed to property crimes), significantly higher than for any other bias category. Compared with the previous year, there were 5 more homophobic incidents reported (+3.2%) and a decrease of 25 transphobic incidents (-78.1%). There were no crimes with a transphobic motivation cleared during 2007/08.⁵¹

⁵⁰http://www.psnipolice.uk/hate_incidents_and_crimes_2006-07.pdf

⁵¹http://www.psnipolice.uk/3_hate_incidents_and_crimes_2007-08.pdf

The United Kingdom and Northern Ireland report hate incidents and hate crimes, providing detailed information on the criminal prosecution or dismissal of hate crimes. Transphobic incidents occur in Northern Ireland and when reported, these are recorded by the PSNI.

Recently, significant research looked at the experiences of LGBT people in Ireland.⁵² It is the most comprehensive study carried out to date on the lives of lesbian, gay, bisexual and transgender (LGBT) people and is fully

⁵² Mayock et al. (2009) *Supporting LGBT Lives: A Study of the Mental Health and Well-Being of Lesbian, Gay, Bisexual and Transgender People*, National Office of Suicide Prevention, GLEN and BeLonG To Youth Service, Dublin

inclusive of trans identities. For many in the study, homophobia and anti-gay or anti-transgender violence, whether physical or verbal, featured as deeply distressing experiences. The fact that the vast majority of the 1,100 individuals who took part in the on-line survey had experienced verbal insults, with a quarter of all respondents reporting having experienced physical violence as a consequence of their LGBT identification, is indicative of the hostile and homo/transphobic climate within which LGBT people experience their everyday lives. The following quote is from an in-depth interview with a participant in the study.⁵³ She recalls how she was physically assaulted and 'left for dead' on her way home one night by a 'guy who tried to take advantage' of her, when he discovered her transgender identity:

⁵³ Ibid., p.62

"... obviously he put his hand for my boobs because there's nothing there and this is the last memory I have and I woke up in the hospital again. And my cheek bone had been fractured in four places. I'd been left for dead basically I woke up and I was lying on a hospital bed ... I was all swollen and I cried and I think my mom came over and came to the ward and she had to be taken out of the ward because she broke down. Basically I must have looked like the Elephant man or something; my face was that fucking destroyed ... and then I had plastic surgery on my face. I got a plate there and three plates there. My cheek bone had to be reconstructed basically ... I was terrified to tell the story of what happened so I just said I couldn't remember."
(Male-to-Female Trans, Heterosexual, 27)

Transphobic incidents occur in Ireland, however, these are not recorded by An Garda Síochána and so remain invisible.

2.3 Trans Discrimination

The current experience and situation of trans people in Ireland is characterised by stigma and exclusion, an invisibility in policy making, and attitudes of ignorance, fear and denial in service provision that fail to acknowledge and address their needs.⁵⁴ The lack of recognition of trans people as full and equal members of a community and as citizens only exacerbates their invisibility and marginalisation. Trans people have not been recognised by the Irish Government to date and the lack of naming and acknowledgement perpetuates continuing discrimination, exclusion and marginalisation. This lack of support impacts negatively on the prevention of discrimination against trans people, as it is the 'transphobic'

⁵⁴ Collins, E. and Sheehan, B. (2004) *Access to Health Services for Transsexual People*, Equality Authority, Dublin

response of other members of society that results in trans people experiencing inequality or discrimination. At the core of this is a hostility based on a failure to conform to gender norms. Anti-discrimination legislation is the first step along the road to creating acceptance of diversity and difference.⁵⁵

Research from the UK has found that personal safety was a significant issue for trans people, with 73% of those surveyed having experienced some form of harassment, with 10% being victims of threatening behaviour while in public spaces.⁵⁶ Despite the recent legislative changes regarding gender recognition, there were still unacceptably high levels of intolerance and harassment of trans people. The sectors of life in which discrimination and inequality most impacted their lives were employment and the workplace, healthcare access, and leisure and education. According to Moran and Sharpe (2004),⁵⁷ trans people suffer abuse in social spaces in a way that other minorities do not. Although anti-discrimination provisions are now in place and the police services in the UK record transphobic harassment as hate crime, discrimination still continues.

On 21 December 2007, Member States were required to implement the EU Directive on the Principle of Equal Treatment between Men and Women in the Access to and Supply of Goods and Services (2004/113/EC) into national law. This protection also includes trans people who are "intending to undergo, undergoing or who have undergone gender reassignment". However, the major concerns that trans people face across Europe are continuous discrimination and inequality in all aspects of their lives. The findings of *Transgender EuroStudy*⁵⁸ highlight the astonishingly high numbers of trans people who have suffered from discrimination and denial of their rights. Many trans people simply have no idea of the rights and protections that are recognised by national and European case law and legislation. Trans people affected by multiple discrimination - race, gender, disability, age, poverty, health status and sexual orientation - are more at risk of having their rights denied and even less in a position to claim their rights and seek redress.

Incidents of alleged trans discrimination have been documented by the Equality Authority. These incidents have only been noted where an individual has made contact with the Equality Authority to seek assistance. There have been a small number of casefiles of trans discrimination, under the Employment Equality Acts and the Equal Status Acts, brought to the attention of the Equality Authority, such as difficulties with access to gyms and health services, and issues for employees and students.

⁵⁵ Whittle et al. (2007) *Engendered Penalties: Transgender and Transsexual People's Experiences of Inequality and Discrimination* <http://www.pfc.org.uk/files/EngenderedPenalties.pdf>

⁵⁶ Ibid.

⁵⁷ Moran, L.J. and Sharpe, A.N. (2004) 'Violence, Identity and Policing: The Case of Violence against Transgender People', *Criminal Justice*, 4 (4), 395-417

⁵⁸ Whittle et al. (2008) *Transgender EuroStudy: Legal Survey and Focus on the Transgender Experience of Healthcare*, ILGA-Europe and TransGender Europe, Brussels

Discrimination is defined in Irish equality legislation 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 listed previously. Four principle categories of discrimination are prohibited: direct discrimination, indirect discrimination, victimisation and harassment (including sexual harassment).

In 2004, the Equality Authority recommended that it was clear from the developing jurisprudence of the European Court of Justice that Ireland was now obliged to introduce legislation to give legal recognition to transsexual people and that it could be useful to clarify explicitly in both the Employment Equality Acts 1998-2007 and the Equal Status Acts 2000-2004, that discrimination against transsexual people constitutes discrimination on the gender ground.⁵⁹ This has not been implemented.

⁵⁹ Barry, E. (2004) *Transsexualism and Gender Dysphoria*, Equality Authority, Dublin

⁶⁰ <http://www.equality.ie/index.asp?docID=757>

In 2007,⁶⁰ a case was settled with the State Examinations Commission and the Department of Education and Science regarding the reissuing of an individual's exam certificates in a new name. This recognition from an important statutory body only came as the result of a complaint lodged under the Equal Status Acts 2000-2004. Similarly, an employer paid compensation, but without admission of liability, for a claim of discrimination on the gender and disability grounds when an individual claimed she was dismissed after she informed her employer that she would be presenting as female on her return to work from annual leave.

Access to healthcare is a serious issue for many trans people. Two specific cases dealt with access to health insurance services, where surgery was classified as cosmetic and therefore refused, and life assurance, where the individual's premium was increased by 75%, post-surgery. Health authorities in Ireland have paid for individuals to access gender reassignment surgery (which is not available in Ireland) in the UK, however, many people also report being refused funding by public health authorities and their health insurance companies for treatment, including gender reassignment surgery.⁶¹ A trans man who sought payment from his health insurer for chest surgery was refused payment because the insurer had not adopted any policy for the treatment of Gender Identity Disorder and so consequently, no agreement was in place to provide cover for such treatment. The complaint was inadmissible due to it being outside the time limit of the Equal Status Acts 2000-2004 provisions, but it would seem the trans man was being punished for the lack of a specific policy being in place when he requested coverage.⁶² The lack of a

⁶¹ Collins, E. and Sheehan, B. (2004) *Access to Health Services for Transsexual People*, Equality Authority, Dublin

⁶² Equality Authority Annual Report 2006 www.equality.ie/index.asp?locID=136&docID=684

Department of Health and Health Services Executive (HSE) policy for trans people accessing treatment services ensures that individuals will not necessarily receive a consistent and fair decision, or even be fully informed of the treatment options available to them.

Under the Employment Equality Acts 1998-2007, employers have an obligation to provide reasonable accommodation to people with disabilities. It should be noted, however, that there is no corresponding obligation to provide reasonable accommodation on any of the other grounds, thus there is no explicit obligation under the gender ground to reasonably accommodate the needs of transsexual people.⁶³ In discussion with Eilis Barry, Head of the Legal Section of the Equality Authority, she advised that two constructive dismissal cases are currently before the Equality Tribunal and await a decision.

⁶³ Barry, E. (2004) *Transsexualism and Gender Dysphoria*, Equality Authority, Dublin

All potential claimants face certain barriers in the identification and pursuit of complaints, however, many of these are heightened for trans people.⁶⁴ Significant statutory exemptions can undermine the usefulness of equality legislation for trans people and low levels of litigation on the gender ground may result from discrimination being experienced by individuals that falls outside of the protection afforded by the law. There is also the key problem of visibility, whereby in order to make a complaint, trans people effectively have to disclose their gender identity or 'come out' as trans. Substantial delays, of up to three years, in hearing a case before the Equality Tribunal may cause withdrawal or reluctance to lodge a claim in the first place.⁶⁵

⁶⁴ Walsh et al. (2007) *Enabling Lesbian, Gay and Bisexual Individuals to Access their Rights Under Equality Law*, Research Summary Report, Equality Commission for Northern Ireland, Belfast and Equality Authority, Dublin

Also in 2007, the Ombudsman for Children became involved in the case of a transition year student who had been refused access to a particular school because of her gender identity. The Office sought clarification from the Department of Education and Science of the obligations on schools to provide access to education. The Minister confirmed that this was in violation of equality legislation but unfortunately, it is not known exactly how the student found a satisfactory outcome to the situation.⁶⁶

⁶⁵ Ibid.

Transgender people are often negatively affected by the prejudices and actions of many members of society who feel entitled to express their hostility towards gender nonconforming appearance and behaviour. One's physical appearance, language, behaviour, manner of interacting with others, and other ways of being are policed by society and if found to deviate, the transgressor may be severely punished. There appear to be absolutely no cases of harassment of trans people in Irish society if complaints to the Equality Authority are the measure. Based on anecdotal evidence, this is clearly not a true reflection of the trans experience.

⁶⁶ Ombudsman for Children's Office Annual Report 2007 www.oco.ie/pdf/oco_annual_report_web.pdf

3. Conclusions and Models of Best Practice

A key focus of this report was to identify examples of current and evolving policy, and models of best practice dealing with recording and monitoring incidents of transphobia. This would draw on the overview of hate crime and transphobia, and relevant legal developments in Ireland, including the painstakingly slow movement towards legal recognition of gender change, and anti-discrimination protections currently in place. Examples of inclusive and respectful policies and best practice are documented where there is greater involvement and consideration of trans people in the policy making process. However, it is important to be aware that homophobia and transphobia are ingrained in the heterosexist policies and practices of the police and the judicial system, just as in all other social institutions.

As mentioned previously, there is no evidence of any written policy or strategic documentation dealing with, or specifically referring to, trans people at a government departmental, agency, or national level, in any capacity. Unlike in the UK, as we shall see in the examples of best practice, it is very difficult to determine the official An Garda Síochána/Department of Justice, Equality and Law Reform understanding of trans people, the type of policies necessary to meet their needs, and the current barriers to implementation of such policies. The absence of trans-related research and policy development is indicative of the social and political exclusion experienced by trans people.⁶⁷

⁶⁷ Whittle et al. (2008) *Transgender EuroStudy: Legal Survey and Focus on the Transgender Experience of Healthcare*, ILGA-Europe and TransGender Europe, Brussels

The equality legislation that is currently in place in Ireland is subordinate to other legislation that may be seen as discriminatory, but is exempt from challenge. This proves particularly difficult for trans people who face much discrimination at the hands of the State but cannot use the existing statutory protections to seek redress. Those individuals who do attempt to battle discrimination are usually subjected to a lack of information, advice and emotional support, and unacceptable delays in bringing a case to the Equality Tribunal.

There is a clear absence of government commitment to support the equality and rights of trans people, and this lack of support impacts negatively on the prevention of discrimination against these individuals. Indeed, the Irish Government in not recognising, or legislating for, gender change is violating the human rights of Ireland's transgender people on a daily basis.

Specific barriers to change that have emerged from the review:

- 🌀 Institutional transphobia with a lack of formal policies and procedures
- 🌀 Political resistance, prejudice and discrimination
- 🌀 Lack of gender recognition legislation
- 🌀 Lack of information and research
- 🌀 Invisibility of trans rights

The key issues regarding the reporting of transphobic incidents in Ireland:

- 🌀 The level of violence - who is targeted?
- 🌀 Lack of reporting - why do people not report or under-report?
- 🌀 Lack of data collection mechanism and failure to record and classify the hate motive of crimes - why is data not collected by An Garda Síochána?
- 🌀 Lack of disaggregated data for hate crime - why is it so hard to find statistics?
- 🌀 Lack of legislation defining violent hate crimes as an aggravating factor or as separate offences - why are laws not in place?
- 🌀 Lack of victim support - where can people go for help?

Legislative reform, policies, structures and models of best practice can be utilised to develop opportunities for change. Much progressive work has been advanced in the UK in the past few years, particularly since the introduction of the Gender Recognition Act 2004, legally recognising gender change, and the recording of transphobic hate crime by police forces and the Crown Prosecution Service. In March 2005, the Association of Chief Police Officers, representing 44 police services in England, Wales and Northern Ireland, issued a tactical guidance manual in relation to hate crime and hate incidents. Hate Incident was defined, Hate Crime was defined, and importantly, Homophobic and Transphobic Incidents and Crimes were defined. It also emphasised the importance of police investigators notifying prosecutors that a crime had been identified as a homophobic or transphobic incident.

Discrimination prevention necessitates awareness raising, education and training about trans issues and this requires trans participation and involvement in consultations, reports, policies and decision making.

Models of Best Practice

To facilitate a better understanding of the issues and improve the working relationship between the police and the trans community, consultation and dialogue must take place. Confidence will increase when there is clear evidence of protection from victimisation, sensitivity in the investigative process, justice and support for victims, and where specific arrangements can be made for reporting. Lancashire Constabulary in England, for example, has been successful in working with the LGBT community, establishing an independent advisory panel that advises and provides support to the police. Support for these initiatives comes from the strategic level, the Association of Chief Police Officers (APCO), which also utilises various working groups to advise on policy and best practice.

Public authorities in the UK have a legal duty to record all racist, religious, homophobic, transphobic and disability hate incidents. The Lancashire Hate Crime Incident Group⁶⁸ produced a guidance framework for statutory, voluntary and community organisations to tackle hate incidents and hate crimes across Lancashire. It aims to provide a consistent approach to hate crimes and their reporting, coordinating the way service providers identify, respond to and tackle hate incidents/crimes in order to improve services, thus building communities' trust and confidence that incidents will be dealt with suitably and sensitively, and increase the number of incidents reported.

A key factor in encouraging more victims of homophobic and transphobic hate crime to report has been the introduction of Third Party reporting facilities, particularly the 'True Vision -Tackling Homophobic and Transphobic Hate Crime Pack'⁶⁹ initiative which is used by 43 police forces in England and Wales, including the Lancashire Constabulary. Information and reporting packs are distributed widely, as well as the provision of an online reporting facility and various non-police station reporting centres. This initiative is endorsed by Stonewall, APCO, the Association of Police Authorities, and the Gay Police Association. It aims to make reporting crime easier and tries to encourage reporting by all LGBT people. Other reporting mechanisms include local police community teams, community forums and support groups, high profile publicity in the UK Press and national LGBT websites providing positive messages of police actions and involvement. Collaboration and partnerships also develop when the police take part in LGBT Pride events and ongoing community projects.

In Scotland, 'Out and Safe' is a free event for the LGBT community on policing and community safety, providing information on personal safety, support and advice, and allowing LGBT people to have their voices heard.

⁶⁸<https://www.blackpool.gov.uk/NR/rdonlyres/9546425D-508F-4531-B6DA-91F28A3CB97E/0/LHCIGguidance.pdf>

⁶⁹ <http://www.report-it.org.uk> for online hate incident reporting.

It outlines available support and police actions to combat hate crime, in particular homophobic/transphobic crime. It is organised by the Grampian Police, Equality Network, the Northern Constabulary, and LGBT History Month Scotland, and is designed to promote well-being and safety in the community and to offer support and reassurance to LGBT people. It is hoped that a Hate Crime Bill,⁷⁰ introduced in 2008, currently making progress in the Scottish Parliament will recognise homophobic, transphobic and disability-related hate crime for the first time.

⁷⁰ The Offences (Aggravation by Prejudice)(Scotland) Bill <http://www.scottish.parliament.uk/s3/bills/09-AggPrej/index.htm>

The Crown Prosecution Service (CPS) has specific policy that addresses transphobic hate crime.⁷¹ Homophobic and transphobic crimes are considered particularly serious crimes based on prejudice, discrimination and hate. The policy is a clear statement that such behaviour is not acceptable and recognises the many difficulties individuals may face in reporting incidents to the police. Fear, mistrust, and a previous negative experience of the justice system can all contribute to a reluctance to report incidents. For many people, fear of being 'outed' as trans when reporting or giving evidence is one of the main reasons why they avoid doing so. The CPS understands that there may be multiple forms of discrimination across many grounds and the individuals concerned can be extremely marginalised. Special measures can be employed under the Youth Justice and Criminal Evidence Act 1999, which offers protection to young and vulnerable people when giving evidence before the courts.

⁷¹ Crown Prosecution Service (2007) *Policy for Prosecuting Cases of Homophobic and Transphobic Hate Crime*, Public Statement, CPS http://www.cps.gov.uk/publications/docs/htc_policy.pdf

From 2008-2009, the CPS will publish an Annual Hate Crimes Report which will contain performance data on homophobic and transphobic crime (along with other hate crimes). Since April 2005, the monitoring of the performance of the CPS on handling cases of homophobic and transphobic crime has been carried out on a quarterly basis. Each CPS Area has Homophobic Crime Coordinators who act as a source of expertise and guidance for cases involving homophobic or transphobic hate crime.

The PSNI is another excellent example of good practice, having specific policy procedures and guidance⁷² in place to address transphobic incidents effectively and appropriately. In addition, specific hate crime specialist officers (Hate Incident and Minority Liaison Officer) are stationed in every Police District to provide support, guidance, information and feedback to victims of hate incidents. The mechanisms to record incidents, explicitly including transphobic incidents, facilitate the supporting of victims of transphobic hate.

⁷²http://www.psnipolice.uk/policy_directive_0206_police_response_to_hate_incidents.pdf

For data recording purposes, the PSNI will record hate incidents where there is a perception on the part of the victim or any other person that the motivation for the prejudice or hate is transphobic in nature. This

includes incidents that the police have no statutory power to deal with but other agencies may have, such as the Northern Ireland Equality Commission. Police officers cannot decide whether or not to record or investigate a hate incident or crime because there appears to be no evidence to support a perception, but must accept the perceived view of the victim or any other person. To report a hate incident, evidence is not needed.

When carrying out their duties, PSNI officers are required to protect human dignity and uphold the human rights of all persons as enshrined in the European Convention on Human Rights and International Human Rights Law. They must be aware that when dealing with hate incidents the following human rights are potentially engaged:

- ☞ Right to life (Article 2 ECHR)
- ☞ Prohibition on inhuman and degrading treatment (Article 3 ECHR)
- ☞ Right to respect for family and private life (Article 8 ECHR)
- ☞ Right to freedom of thought, conscience and religion (Article 9 ECHR)
- ☞ Freedom of expression (Article 10 ECHR)
- ☞ Prohibition of discrimination (Article 14 ECHR)

⁷³ Victim Support, *Working for Victims of Crime*, Information Leaflet
<http://www.victimsupport.org>

⁷⁴<http://www.crimevictimshelpline.ie>








It is essential, therefore, that victim support that is provided also incorporates a human rights-based approach. Victim Support⁷³ is an independent UK national charity which helps people cope with crime, offering a comprehensive service to all sections of the community who need practical information and advice, or someone to talk to. It is committed to ensuring that all kinds of people are welcomed and involved throughout the organisation and is thus inclusive of all types of diversity. A similar victim support service is offered in Ireland⁷⁴ offering specialist services and referrals, but the question that arises is: just how trans-aware and inclusive is this important service?

Actual experiences or expectations of being received with hostility, having one's concerns dismissed as trivial, lack of awareness and respect, and the absence of a mechanism that would recognise and record the discriminatory motive of an incident are all causes of vulnerability and concern for trans people when reporting. In addition, with a lack of appropriate services and supports, and fear of discrimination and prejudice, clearly few people report incidents. Violence against trans people, therefore, remains invisible to the police, law and policy makers,

and politicians. Data collection on the type and frequency of transphobic incidents in Ireland is needed to raise awareness about the issue, with An Garda Síochána playing a key role.

The unexplored nature of transphobia in Ireland, and the absence of established baseline statistics on violence and discrimination against trans people, strongly suggested that a review of this kind was necessary. There is a complete lack of knowledge and understanding of the experiences of trans people and the harassment and discrimination that has to be faced daily by many, often without any source of support. This report seeks to overcome official indifference and indecision in the fight against institutionalised transphobia, hate crime and trans discrimination. It hopes to foster dialogue and influence the development of policies that acknowledge, recognise and respect the dignity of trans people as full and equal members of Irish society. Trans people are deserving of equality and respect, regardless of how they choose to identify, express, or present their gender.

4. Recommendations

-  Establish a Government Interdepartmental Working Group on Transgender People to consult with trans people to address legal, social, and political discrimination and marginalisation. Develop best practice policies for trans people across all government departments, agencies, and statutory bodies ensuring they are adjusted to best fit the department or agency structures. Consultation and support is vital to the development of anti-discrimination policies and practices that will effectively reflect and meet the needs of people subjected to transphobic violence and discrimination.
-  Government must consult with and include trans people in the drafting and enacting of inclusive and carefully considered gender recognition legislation that protects the human rights of all trans people as enshrined in the European Convention on Human Rights. Government should also adopt the Yogyakarta Principles⁷⁵ and ensure their implementation in all aspects of legislation.
-  The Department of Justice, Equality and Law Reform, An Garda Síochána, the Courts Service, and the Irish Prison Service should develop a formal, inclusive policy with detailed standards and procedures for dealing with trans people as victims or perpetrators of crime.
-  Promote diversity and awareness training of different gender identities and expressions through the development of training material for specific modules addressing trans issues within professional training courses for the Gardaí, solicitors, and the judiciary.
-  An Garda Síochána should engage in partnership with trans people to identify needs and barriers to reporting crimes. It is important that the Gardaí make it easier for victims to report crimes - hate crime, domestic violence, bullying, harassment - by being sympathetic, respectful and understanding to help reduce fear of reporting/reluctance to report.
-  An Garda Síochána should implement effective information and training strategies on trans/gender diversity to educate all members of the force about trans people and the specific issues they face.
-  An Garda Síochána should officially record all transphobic incidents and crimes on the PULSE system with 'transphobia' recognised as a motive for crime, to monitor crimes and the frequency of reporting. Standard methodology should be used for recording and monitoring

⁷⁵ Yogyakarta Principles: a set of principles on the application of international human rights law in relation to sexual orientation and gender identity. The Principles address a broad range of human rights standards and were developed in response to abuse targeted toward persons because of their actual or perceived sexual orientation and gender identity.

http://www.yogyakartaprinciples.org/principles_en.htm

all hate crime incidents and these statistics should be publicly reported with disaggregated information. This data should inform the development of appropriate An Garda Síochána policies and procedures addressing transphobic hate incidents.

- ☞ Third Party reporting mechanisms should be developed to encourage greater reporting of hate incidents and support improved engagement with victims of transphobic hate crime.
- ☞ Effective Hate Crime legislation should be enacted and properly implemented - gender identity and gender expression should be explicitly protected with provision for aggravating factors in sentencing.
- ☞ The statutory exemption in Section 14 should be removed from the Equal Status Acts 2000-2004, as it is absolutely essential that the exercise of public functions is covered by equality legislation to reduce discrimination by the State. The limit on financial compensation awards should be removed to ensure appropriate penalties act as a deterrent to further discriminatory practices.
- ☞ Government should ensure the full and proper operation of the Equality Authority and the Equality Tribunal through sufficient and appropriate resources to meet their needs, thus facilitating individuals to be fully informed of their rights and providing information and support to those bringing forth a discrimination claim within a reasonable time frame.
- ☞ Promote policies that increase the visibility of various gender identities to help create an environment where trans people can be open about their identity and have nothing to fear.
- ☞ Research should be commissioned to study the situation of transgender people in Ireland and their experiences of harassment, discrimination and violence. A comparative study of hate experienced by various members of the trans community is needed.
- ☞ There should be wider protections against discrimination on the grounds of 'gender identity and/or gender expression', to be included in all equality policy and legislation. The current lack of recognition of other identities that are gender diverse keeps marginalised and silenced those who resist or fall outside the existing gender binary. Acknowledging the existence of trans people's different lived experiences and recognising a gender pluralism, where our self-identified genders are respected and valued, would certainly help to bring us a more diverse and accepting society.

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LGBT Domestic Violence	www.broken-rainbow.org.uk
True Vision	www.report-it.org.uk
Press for Change	www.pfc.org.uk
Gender Identity Research and Education Society	www.gires.org.uk
Equality Network	www.equality-network.org
Scottish Transgender Alliance	www.scottishtrans.org
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Irish Human Rights Commission	www.ihrc.ie
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