

Enabling Lesbian, Gay and Bisexual Individuals to Access their Rights under Equality Law

March 2008

The Equality Commission for Northern Ireland (ECNI) in partnership with the Equality Authority in Ireland (EA) commissioned research in 2006 on enabling lesbian, gay and bisexual (LGB) individuals to access their rights under both Northern Ireland (NI) and Republic of Ireland equality law. This update provides a summary of the key findings of the research.

In Brief ...

- LGB people on the island of Ireland are subject to particular forms of prejudice, frequently referred to as 'homophobia' and 'heterosexism' and fear of victimisation prevents LGB people from taking legal action against discrimination.
- Aspects of the law may act as a barrier: Time limits for making a complaint, religious belief exemptions and a lack of anonymity in the Tribunals and/or courts may discourage LGB people from accessing their rights.
- Major barriers to pursuing a complaint were identified as a lack of awareness of legal rights; lack of information, advice and emotional support; financial costs; complex legal processes and delays in bringing a case to Tribunal and/or Court.
- The ECNI and EA have undertaken various activities to promote equality and fight discrimination against LGB people. Several challenges including lack of resources and the reach of equality law were identified.
- A review of four EU countries (Belgium, the Netherlands, Sweden and Scotland) has identified good practice in minimising the impact of barriers including, dedicated resources for LGB people, a community legal services network and opportunities for trade unions and LGB organisations to take cases on behalf of individuals.

Introduction

In Northern Ireland (NI)¹ and the Republic of Ireland (ROI)², there are equality laws which seek to promote equality of opportunity and protect LGB individuals from discrimination in the workplace, in the provision of goods and services, accommodation and education.

The effectiveness of the law is influenced by how far lesbian, gay and bisexual people feel able to take a complaint and use the law to challenge prejudice and discrimination against them. Despite widespread reports of discrimination and homophobic abuse³, discrimination complaints on grounds of sexual orientation remain low in both NI and ROI. However, there have been a number of key Tribunal decisions and settlements (see case studies).

The ECNI and the EA are responsible for promoting equality of opportunity and fighting discrimination in the areas covered by equality law across the Island. The ECNI and EA commissioned research to identify strategies whereby specialised equality bodies (e.g. ECNI, EA, Equality Tribunal etc. and other stakeholders) can enable LGB people to successfully secure their rights under equality law.

The research was conducted by the Institute of Conflict Research (ICR), the School of Social Justice, UCD and Barry Fitzpatrick Consulting. The main report combines findings from a small-scale qualitative study⁴ with a literature review and an appraisal of current legislation, policy and practice.

Summary of Key Findings

Enforcement of equality laws in both parts of Ireland depends heavily on individuals taking cases. In order to take a case an individual must realise that they have suffered discrimination, then transform the harmful experience into a complaint under equality law and finally make the decision to remedy their situation using the legal process.

The research report identified barriers for LGB individuals at each stage of accessing rights. These barriers are outlined under three main headings: Homophobia and Heterosexism; the Law; and, Accessing the Law.

1. Homophobia and Heterosexism

Homophobia is irrational dislike, fear and/or hatred towards LGB people. Further, heterosexism, the assumption that everyone is heterosexual or straight, contributes to a culture in which people cannot 'come out'. The main consequence of homophobia and heterosexism is invisibility and stigma. This is the most important factor preventing LGB people from taking action against discrimination and may account for the low number of cases in NI and ROI.

Homophobia and heterosexism act as barriers to accessing rights in the following ways:-

- **Failure to identify Discrimination and Abuse**
Many LGB people report tolerating some abuse as "just the way things were" in order to "get by" in situations such as work, school, university or out socialising. Admitting being a victim of discrimination was described as a painful experience by research participants:-

"You must admit it to yourself first, and then come to terms with the discrimination, it is easier just to say nothing and cope with it" LGB Complainant

- **Absence of a Positive Culture of Respect for LGB people within Workplaces, Schools and other Social Settings**

Prejudice and discrimination against LGB people is still considered to be acceptable and justified by many individuals in Ireland⁵. The following quote from a participant in the present study echoes this sentiment:-

*"There's also a tacit acceptance that if you're gay and if you're maybe even out a bit, you've got to take a certain amount of slugging. Which if it were a black person would be considered racist abuse, but if you're gay, it's like, can you not take a joke?"
Union representative*

Many participants referred to the situations in their places of work as unbearable. In all of the NI cases where employees had experienced discrimination and/or harassment they had changed jobs.

- **Fear of Victimisation**

Many LGB individuals may be discouraged from taking a case because of fear of victimisation, being branded a troublemaker, or having their career prospects threatened given the risk of being 'outed'. In a school context, LGB pupils are reluctant to report homophobic bullying for fear that this may make them a greater target for abuse.

Equality law forbids victimisation of those taking a complaint. Casework in NI and ROI demonstrates how seriously the equality bodies, courts and tribunals view such incidents.

2. The Law

Significant problems were identified with the range and content of equality laws currently operating in both NI and the ROI. These issues included:-

- **Inadequate Legal Remedies**

Financial compensation was not considered a motivating factor for cases under the sexual

orientation ground, but awarding damages does act as a deterrent for employers.

“It is not worth taking a case against an employer...in some cases, after a process of a few years the financial compensation is limited...but even so it’s not about the compensation, it is about being acknowledged, but this rarely happens”
LGB complainant

In ROI, limits on financial compensation in employment claims can serve to effectively reduce the impact of compensation as a deterrent for some employers. In comparison, there is no limit on compensation in NI.

Monetary compensation is not the only legal remedy. Equality Officers in ROI can order employers to improve workplace policies and practices. The Tribunal in NI can also make recommendations, but these are not legally binding and often not used.

Case 1: ROI Tribunal Decision 2007: Piazza -v- Clarion Hotel

The complainant, who is gay, was subjected to harassment via email and derogatory comments by his work colleagues. The Equality Tribunal found that the employer had not taken sufficient measures to prevent the harassment occurring or dealt with the incidents that had occurred appropriately.

Award: €10,000 for harassment, distress and breach of rights. The company was ordered to revise its policies and procedures and provide training for staff and management.

- **Time Limits**
Legal claims of discrimination must be made to the Equality Tribunal, NI Tribunal or County Court within a strict time limit.

Time limits are a major barrier to LGB individuals taking a complaint. Detailed knowledge of the law is needed in order to know that the claims process has time limits. Further, issues regarding sexuality and the time taken to recover from an incident may make the decision to claim complicated and drawn out for LGB people.

- **Exemptions in Equality Law that impact on LGB People**

In both NI and ROI, the law outlines a number of situations where differential treatment may be allowed. These are called exemptions and may impact on an LGB individual’s ability to take a complaint. Such exemptions have a significant chilling effect on the LGB community, with many LGB representatives and individuals believing that religious ethos exemptions⁶ give certain institutions (such as health and education sectors) licence to engage in discrimination against lesbian, gay and bisexual people. As a result, LGB people are reluctant to seek work within those sectors or reveal their sexuality. In these circumstances, a person is unlikely to make a complaint given the high risk to their career. The impacts of these exemptions are still to be tested in case law.

- **Anonymity and Privacy Concerns**

Anonymity and privacy were reported as crucial factors in whether an LGB person pursues a case of discrimination. A decision to take a complaint may require an individual ‘outing themselves’ to a much wider range of people such as neighbours, potential employees and possibly the media and exposing themselves to further abuse and victimisation.

“We are approached by individuals and we signpost them to ECNI and advise them to go down that route, but they would come back to us referring to not being able to be anonymous.” LGB Representative

Anonymity cannot be guaranteed for LGB people taking a legal complaint to the tribunals/courts in either NI or ROI.

For many LGB individuals, anonymity is a central issue as the risks of being 'outed' are too great to consider taking a case.

- **Lack of Equivalence in Laws that Promote a Positive Culture of Respect for LGBs in NI and ROI**

In NI, LGB couples who register their partnership can access similar rights and benefits as married couples. Further, public authorities have a legal duty to promote equality of opportunity in all their practices on nine equality grounds, including between those of different sexual orientations. There is currently no provision for civil partnerships for LGB people in ROI, although the current Programme for Government contains a commitment to legislating for relationship recognition laws, such as civil partnership.

3. Accessing the Law

- **Lack of Awareness of Legal Rights and Avenues of Justice**

It can take some time to realise that the unfair treatment and/or harassment experienced is unlawful discrimination. Victims may also be unaware of where to get information/advice, what legal remedies are available and what making a complaint may involve in terms of costs, confidentiality and so on.

**Case 2: NI Settlement 2005:
Hindley -v- Fannin Health Care Ltd**

The Claimant who is gay alleged that the manager made derogatory and homophobic remarks about him to other staff, forcing him to resign as a result of this treatment and the company's lack of action in dealing with it.

Settlement: £6000 damages.

The company to liaise with the ECNI to review its policies and procedures and communicate these with staff

- **Inadequate sources of Information and Advice**

Information and advice needed to access rights is not purely technical but requires social and

emotional supports. A range of advice-giving organisations are therefore needed to play discrete roles during the early stages of a claim. The EA and ECNI provide an extensive public information service on equality law, but individual advice and legal representation can only be supplied in a limited number of cases. There is a need for further legal support in both NI and ROI, especially for claims arising outside the workplace or where trade union support is not available. Support in the form of advocacy services and equality law information/advice has been provided through organisations such as Citizens Advice Bureaux, Citizens Information Centres and non-governmental organisations (NGOs). However, general advice providers often do not have the equality expertise or resources for these roles. Currently LGB NGOs are an important port of call for people seeking access to rights; however, funding is needed if the sector is to play a central role in providing support.

"Very few people go up the legal route because we're very realistic that it takes a long time, you need to have a lot of evidence..." Union representative

- **Financial Costs**

The cost of taking a complaint to tribunal/court is an obstacle in accessing rights under equality law. Legal aid may be applied for before the courts but is not available for cases taken to the Industrial Tribunal (NI) or Equality Tribunal (ROI). Further, in ROI a case may be appealed beyond the tribunal system where the services of a lawyer would lead to considerable expense.

- **Complex and Unclear Processes**

Many cases are brought before tribunals. Tribunals aim for user-friendliness to enable individuals to represent themselves or make use of a lay advocate. Even so, LGB individuals and representatives regarded the procedures for taking a case as complex and somewhat difficult to understand.

- **Delays**

Substantial delays in a case coming to Tribunal or Court, or the delivery of recommendations carry

**Case 3: NI Tribunal Decision 2007:
Lacey -v- University of Ulster**

A preliminary decision established that a complaint was covered by equality law where an academic claimed he was not short-listed for a job interview because one of his stated research interests was "homosexuality in Ireland". The tribunal was satisfied that a claim could be "on the grounds of sexual orientation" whether or not the individual was lesbian, gay or bisexual.

a heavy psychological toll and may cause withdrawal of claims or dissuade people from bringing a case of discrimination in the first place. In ROI, delays of up to three years for case decisions in the Equality Tribunal presents particular difficulties.

● **Proving Discrimination**

While finding adequate evidence to bring forward a case under equality law is a hurdle faced by every claimant, this is a particular obstacle for LGB people. Sexuality goes to the heart of a person's identity so the issues raised will be particularly intimate. Many people are discouraged when they realise that their sexuality will be discussed before a Tribunal and possibly in wider circles. Discrimination/harassment can be subtle or indirect and difficult to prove and, witness statements may be difficult to obtain. Moreover, amongst LGB organisations and individuals there was a perception that the person needed to prove that they were targeted because they were known to be lesbian, gay or bisexual.

Technically, NI and ROI law does not require an individual to prove they are lesbian, gay or bisexual. Perceived sexual orientation or discrimination by association with LGB people is covered by equality law in ROI and NI (see Case 3).

The Role of ECNI and EA

The ECNI and EA undertake a variety of activities aimed at promoting equality of opportunity and combating

discrimination/harassment against LGB people. These activities include reaching out to LGB communities; awareness campaigns; conducting equality reviews of policies, practices and procedures and; developing models of best practice for employers and providers of accommodation, education and goods, facilities and services. The equality bodies also provide information and occasional training on equality rights; conduct research into discrimination; convene advisory committees to highlight equality concerns for LGB people; use their legal powers to conduct inquiries or investigations into discrimination and; support people who want to make a complaint of discrimination or harassment.

During the course of this research several challenges for the equality bodies were identified. These centred around two key factors, namely:-

(1) Lack of Resources (e.g. staff and funding)

- **Access to Legal Advice and Representation**
Due to resource restrictions both ECNI and EA provide support to a limited number of people who want to make a complaint under equality law. It is therefore, important to ensure access to a number of sources of advice on equality law, for example, through Citizens Information Centres (ROI) and Citizens Advice Bureaux (NI). There is also a need for LGB organisations to play an important role in providing social and emotional support for LGB people making a complaint.
- **Equality Tribunal (ROI): Delays in Taking a Case**
The Equality Tribunal acts as a dedicated, independent forum for seeking justice under equality law. However, lack of resources, complex procedures and case management issues have led to long delays in taking a complaint.

(2) The Reach of the Law

In addition to the legal barriers already identified, the law does not enable third parties such as LGB organisations and trade unions to take legal action against discrimination on behalf of an LGB person in ROI and NI. Further, the ECNI's powers to conduct investigations and take legal action in cases of "persistent discrimination" does not apply to discrimination against LGB people in the workplace in NI.

Case 4: ROI Tribunal Decision 2005: A Female -v- A Publican

The complainant who is lesbian had been being refused service in a pub. On the basis of the evidence, including witness statements, the Equality Tribunal decided that the complainant had been discriminated against because she was lesbian.

Award: €1,000 damages

Additional legal powers could support the work of ECNI and EA and secure a greater role for LGB and community organisations in enforcing LGB equality rights.

Comparative Review

A review of access to rights for LGB people was carried out to see how similar barriers have been dealt with in four other European countries (Belgium, the Netherlands, Scotland and Sweden). Complaints of discrimination made by LGB people are low in all four countries, so the small number of cases in Ireland is not unusual.

Several of the equality bodies in EU countries work closely with LGB organisations to support discrimination complaints, promote equality law and develop resources; including websites dedicated to LGB equality rights (as does the ECNI's site). Further, the Swedish LGB equality body, HoMO, has published a leaflet – Equal at Work⁷ – aimed at LGB advocates which could help develop community advocacy support systems in NI and ROI.

Scotland, Belgium and the Netherlands have strong networks of legal services in the local community which provide advice, and often assistance, on discrimination against LGB people.

Many of the EU countries rely less on LGB individuals taking complaints than NI and ROI, allowing more opportunities for trade unions and LGB organisations to take cases on behalf of individuals, thus avoiding issues of privacy and confidentiality. In Belgium, the Netherlands and Sweden, strong attempts are made to settle complaints of discrimination and/or harassment

outside of the courts and/or tribunals. However, any settlement reached or action taken as a result is publicised. Powers of investigation/inquiry similar to those of the ECNI and EA have been used to deal with complaints of discrimination and/or harassment against LGB people in the Netherlands and Sweden.

Recommendations

In line with the barriers discussed in the earlier sections, conclusions and recommendations were presented under the three main headings: Homophobia and Heterosexism, the Law and Accessing the Law.

The following is a summary of the key suggestions arising from the research.

1. *Homophobia and Heterosexism*

- The ECNI should undertake a project jointly with LGB youth groups to highlight the issue of homophobic bullying in schools, similar to the EA campaign in ROI.
- The EA should continue to highlight the need for relationship recognition laws for LGB people and a statutory equality duty similar to that in NI.
- To tackle heterosexism in the workplace, LGB organisations could introduce an “E-quality mark” scheme for employers.
- Trade unions should appoint dedicated LGB representatives or encourage the setting up of LGB sections/committees.

2. *The Law*

Equality law should be changed to (a) remove barriers to rights (b) promote equality and (c) provide equivalent rights throughout Ireland. Key law reforms are as follows:-

- Extend time limits for making a legal complaint.
- Introduce laws to enable equality bodies and third parties such as LGB organisations/trade unions to take a case on behalf of an individual but also in the organisation's own name; thus avoiding concerns of privacy and anonymity.

- Introduce statutory equality duties in ROI to promote equality of opportunity for LGB people within the public sector.
- Faith-based organisations play an important role in education and healthcare in both ROI and NI. The breadth of religious ethos exemptions should be reconsidered due to its potential impact on LGB people working within these sectors.
- It is vital that anonymity is secured for LGB people and other “sensitive” claims before the tribunals and in the wider court systems to minimize victimisation and stigma.
- Improve compensation and conditions in equality law cases to discourage employers/service providers from committing acts of discrimination and harassment. This may include Equality Officers recommending changes to an organisation’s policies that help prevent homophobia and heterosexism in the workplace.
- Commitments to recognising same sex partnerships in law made in the ROI Programme for Government should be fulfilled at the earliest possible opportunity.

3. Accessing the Law

- The equality bodies should develop straightforward and practical resources, such as information packs and websites, tailored to the needs of LGB people.
- Briefing/training sessions on equality law should be offered to LGB organisations and continued support provided to advice giving groups.
- The equality bodies should continue to build and strengthen training partnerships with citizen information providers, emphasising an equality law and LGB focus, to enable the agencies to host outreach sessions to local LGB organisations.
- The equality bodies must consider how best to use their range of powers to investigate and challenge situations where discrimination may be present.

- LGB organisations should set up a community advocacy programme to provide personal, emotional and social support for LGB people when bringing a legal complaint. Accordingly, funding of LGB organisations must be addressed by government.
- A Rules Committee for procedural and case management issues would assist in reducing delays in cases reaching the Equality Tribunal (ROI).

A number of other important recommendations aimed at various organisations were identified and can be found by accessing the summary and main reports at: www.equalityni.org (NI) or www.equality.ie/research (ROI).

Endnotes

- 1 NI: Employment Equality (Sexual Orientation) Regulations (NI) 2003 (employment and training); Equality Act (Sexual Orientation) Regulations (NI) 2006 (goods, facilities and services, control of premises and performance of public functions); Section 75 of the Northern Ireland Act 1998.
- 2 Employment Equality Acts 1998 & 2004 (EEA); Equal Status Acts 2000 to 2004 (ESA); Intoxicating Liquor Act 2003.
- 3 For example, GLEN/NEXUS (1995) *Poverty, Lesbians and Gay Men: The Economic and Social Effects of Discrimination*. Dublin: Combat Poverty Agency; Jarman, N and Tennant, A. (2003) *An Acceptable Prejudice*. Belfast: Institute for Conflict Research; Lesbian Advocacy Service Initiative (2002) *A Mighty Silence*. Belfast: LASI; Gay HIV Strategies / NEXUS (1999) *Education: Lesbian and Gay Students*. Dublin: Gay HIV Strategies and NEXUS.
- 4 The study comprised interviews with LGB individuals, representatives of LGB non-governmental organisations, personnel working in specialised equality bodies, and other relevant stakeholders. As the qualitative interviews involved a limited number of individuals in each grouping, they are therefore not capable of generalization, but rather are illustrative.
- 5 For example, Jarman, N and Tennant, A. (2003) *An Acceptable Prejudice*. Belfast: Institute for Conflict Research.

- 6 Section 37 of the Employment Equality Act (ROI) and “faith-based” exemptions in the Equality Act (Sexual Orientation) Regulations (NI) (SO GFS Regulations)
- 7 Piehl, M. (2006). *Equal at Work*:
<http://www.accesstojustice.se/>

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