

OUTHOUSE LEGAL SEMINARS – NOVEMBER/DECEMBER 2005

WEEK 4: COHABITATION AND CIVIL PARTNERSHIPS RIGHTS- PART II

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The purpose of this Seminar: To provide a practical overview of the law and procedures relating to the cohabitation of same-sex couples, with particular reference to immigration law, domestic violence, social welfare rights and obligations, health and children. Building on seminar no. 3, the purpose of this seminar is to provide useful practical solutions to legal problems, while acknowledging the deficiencies of the law as it applies to same sex couples. Although some of these issues raise the pressing need for law reform, the primary focus of the seminar is on the law as it stands, with an emphasis on practical strategies for securing legal rights.

N.B. The information supplied and opinions offered during this seminar and in this handout are offered solely for educational purposes and should not be taken to constitute legal advice on the merits or otherwise of a specific case. Neither Outhouse nor the seminar presenters accept any liability whatsoever in respect of the content of these seminars and handouts.

Cohabitation: Recap on General principles

A cohabiting couple for these purposes is a couple, whether of the same sex or of opposite sex, who, though not married to each other, reside together in an arrangement where each party provides emotional support, and where appropriate financial support, to the other party.

In Ireland in 2002, according to the census of that year there were (approx.):

...77,000 cohabiting couples

...30,000 of these cohabiting couples had children

...there were 1,300 cohabiting couples of the same sex (probably an underestimate)

...1 in every 3 children since 1999 were born outside marriage

...1 in every 8 people live in a one parent family, (12% of the population).

Despite these figures, in general under Irish law, (and with some important exceptions) **cohabiting couples are not legally recognised**. This applies equally to heterosexual and homosexual cohabiting couples (though the former generally have, of course, the option to marry). Although the Constitution grants important rights and privileges to the Family, the Courts have consistently ruled that the 'Family' as understood in the Constitution, applies only to the family based on marriage.

Marriage is defined as the 'the voluntary union for life of *one man and one woman* to the exclusion of all others.' (*Hyde v. Hyde* (1866)) (thus excluding same sex marriage).

Marriage is accorded a special preferential status under the Constitution. (Article 41.3) This means that it is unconstitutional to treat an unmarried couple more favourably than a married couple. (*Murphy v. Attorney General* (1982))

It is not, by contrast, unconstitutional to treat a member of a non-marital family less favourably than a marital family (*O'B. v. S.* (1984)) though such treatment may infringe other laws that ban discrimination.

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Children are generally treated as equal, regardless of the status of their parents

Status of Children Act, 1987 – although there is still discrimination between marital and non-marital parents, with unmarried fathers faring particularly poorly under the law.

European Convention on Human Rights

The European Convention on Human Rights is part of Irish law (though the Constitution still takes precedence in cases of conflict). Under Article 8 of the Convention contracting states, are required to respect the right to a private and family life is protected. Article 14 of the Convention bans certain types of discrimination in the application of the Convention - **for these purposes ‘discrimination’ is deemed to include sexual orientation discrimination.**

Unlike the Irish Constitution, the term ‘family’ is not in this context confined to married couples and their children. The term ‘family life’ includes the following relationships:

- A non-marital mother and her child (*Marckxx v. Belgium*, 1979)
- A non-marital father and his child, whether the father lives with his child or not (*Keegan v. Ireland*, 1994)
- A cohabiting couple and their children (*Johnston v. Ireland*, 1986)
- An LGBT parent and his or her children (*Da Silva Mouta v. Portugal*, 1999)
- A person who is transgendered and his or her partner (*Goodwin v. U.K.* 2002)
- A same-sex couple (*Ghaidan v. Godin-Mendoza*, 2004)

Da Silva Mouta

A father who was otherwise deemed to be the better custodian of his child, was denied custody solely on the grounds that he was gay. The European Court of Human Rights ruled that it was contrary to Article 14 and 8 of the Convention to deny him custody solely on the grounds of his sexual orientation

Ghaidan v. Godin-Mendoza

A provision of the English and Welsh Rents Acts that appeared to confine a benefit to non-marital couples of the opposite sex, was re-interpreted as including non-marital couples of the same sex. The House of Lords ruled that a provision that treated non-marital couples of the same sex less favourably than those of the opposite sex contravened Article 14 and 8 of the Convention.

A. Immigration, Residency and LGBT relations

A1. Refugee Law

Under the Refugee Act, 1996, a person who has a **well-founded fear of persecution on the basis of that person’s sexual orientation** should they be returned to their country of origin is entitled to refugee status in Ireland. Such persecution may be either at the hands of the State, or may arise in circumstances where the State has proved unwilling or unable to prevent persecution at the hands of other persons.

Once established as having refugee status, the refugee is entitled to most of the rights that would be enjoyed by citizens of Ireland, including the right to live and work in the State, to receive education and undertake vocational courses, to access social welfare and other benefits and to acquire citizenship through naturalisation.

The refugee also has an **express right to family reunification** – that is, to be joined in Ireland by other members of his or her immediate family – but for these purposes the category of eligible family members is confined to spouses and dependent children. The same sex partners of refugees may be admitted at the discretion of the Minister for Justice, Equality and Law Reform but there is **no express legal right** to reunification in such cases nor is there any designated procedure for this purpose.

A2. Immigration

In theory, **immigration law does not recognise non-marital relationships**. In this regard, same-sex and unmarried opposite sex couples are treated alike, with the obvious exception that opposite sex couples can, in most cases, opt to marry and avail of various rights as a result of such marriage. To date, the State has failed formally to recognise in legislation relationships between adults outside of marriage although there is **some evidence that the State is beginning informally recognising same sex relationships** and allowing foreign national partners of Irish citizens to live and in some cases work in Ireland on the basis of a same sex relationship.

It is worth noting that in determining whether a person should be granted leave to land in the State, an immigration officer is required to have regard to any family relationships of the foreign national with persons in the State. The term ‘family relationships’ applies, however, only to relationships by ‘blood or marriage’.

Immigration for EEA and EU citizens

A national of a member state of the European Union or the European Economic Area (EU + Norway, Liechtenstein and Iceland) is entitled to move freely throughout the EU, to take up employment, provide or access economic services and move their money throughout the EU on the same basis as a national of the relevant State.

Options for non-EEA citizens:

Unfortunately, most of the options available to same sex couples require that the non-EEA partner establish his or her right to stay in Ireland independently of considerations relating to his or her relationship. (*i.e.* treated as a single immigrant).

Here are some of the options:

- **Refugee Status (as above)**
- **Humanitarian leave to remain in cases where Refugee Status has been denied.**
 - Holiday visa:** Subject to certain conditions, a foreign national may visit Ireland for up to three months, provided that he or she has sufficient means to support himself or herself while in the State and does not engage in a trade or profession or take up employment while here. Citizens of certain countries designated by the Visas Order require visas in order to visit Ireland. (check with the Department of Justice for the current list of visa-required states).
 - Student visa:** must be for a full-time programme. Part-time courses will not attract immigrant status. *Beware:* fees for non-EU students can be considerably higher than those for EU students. In addition, time spent as a student is not reckonable when applying for citizenship
 - Employment permit:** This is usually attached to a specific place of employment - technically it is *obtained and held by the employer* rather than the employee. If the employee intends to move to another workplace a separate visa must be obtained by the new employer. It is usually a condition of obtaining such visa that the employer demonstrates that a similarly qualified EU national is not available to take up employment. Permits cannot be obtained in respect of certain designated sectors of employment.

Work Visa/Authorisation: In respect of certain designated areas of employment, (*e.g.* nurses, doctors architects) where there is a high demand for qualified workers, a non-Irish national may obtain a ‘work visa’ or ‘work authorisation’ entitling him or her to work in that industry.

Business Permission: If you’ve bagged a sugar daddy/mammy willing to invest €300,000 or more in Irish industry, he or she may apply for business permission on the condition that he or she invests in Irish industry. There are certain conditions as to the amount and as regards the number of EU nationals employed by the business.

Artists’ business permission: The conditions noted above for business permission are relaxed in the case of artists, writers and craft workers seeking to work as self-employed in Ireland. This may include, for instance, actors.

Citizenship: Unless one is married to an Irish citizen, the foreign national must have resided legally in Ireland for 5 of the previous nine years.

Right of residence? There is some evidence that the same sex partners of EEA citizens may be admitted at the discretion of the Minister for Justice, Equality and Law Reform and permitted to reside in Ireland, either with or without the right to work. There is, however, **no express legal right to residence** in such cases nor is there any designated procedure for this purpose. Such permission would, moreover, usually be subject to conditions, most notably as to duration and means (*i.e.* you must demonstrate that you have sufficient means to remain in the State without resorting to social welfare).

Conditions for entry to (and remaining) in Ireland

In general, a non-EEA national may be denied entry to Ireland on any of the following grounds:

He or she **does not have sufficient means** of financial support. A letter of support from a partner (promising to provide financial support, if required) may be useful for this purpose.

He or she is a drug addict, or is suffering from a prescribed communicable disease, including TB, syphilis, or is profoundly mentally disturbed.

He or she has **committed an offence** either abroad or in Ireland attracting a maximum sentence of one year in prison or more – if possible, get a police clearance certificate from your home country before you apply for a visa.

He or she is not in possession of a valid passport or equivalent document.

He or she intends to work in Ireland without a valid visa for this purpose.

He or she requires a valid Irish visa but does not possess such a visa.

You must inform the Garda National Immigration Bureau of any change of address.

Please note: It is an offence to work in Ireland without a valid work permit/visa/authorisation.

B. Domestic Violence in LGBT Relationships

Every person has a **constitutional right to bodily integrity**: the State is obliged, insofar as it is practicable to do so, to defend this personal right and provide feasible remedies where the right is attacked.

B1. Under the general criminal law:

Even where violence occurs within the home, the general provisions of criminal law may be invoked.

Assault/ Assault with harm

Causing serious harm

Threat to kill or cause serious harm

Rape: includes forced oral and anal penetration, (however slight) and penetration of the vagina by an object held or manipulated by another person

Sexual Assault: any unwelcome contact of a sexual nature, includes same sex activity

Aggravated Sexual Assault: as above, with serious violence

Coercion- using or threatening to use violence to force a person to do what they are entitled not to do

Harassment

B2. Under the Domestic Violence Acts, 1996-2002

These Acts are designed to provide more effective remedies for violence between partners. These are technically civil (*i.e.* non-criminal) remedies but if breached the party in breach is liable to imprisonment for up to one year and/or a fine up to €1, 905. Some but not all of the remedies are available to same-sex partners.

In what circumstances may one apply? Where a court is satisfied that there are reasonable grounds for believing *that the safety or welfare of an applicant or dependent child so requires.*

Must there be violence or the threat of violence? No. Welfare for these purposes includes the physical *and* psychological welfare of the person in question. Sexual abuse may also give rise to a remedy, as will psychological abuse of a sustained nature. Alcoholism or drug abuse on the part of the the person against whom the case is taken ('the respondent') may also give rise to a remedy.

Must the abuser have intended to cause injury? No. It is not necessary that the party against whom proceedings is taken be shown to have intended to cause injury or damage to health. Nor is it pertinent to take into account any possible excuse for the respondent's behaviour. The court takes the standpoint of the applicant and simply asks: is a remedy required to protect the applicant's safety or welfare.

What types of remedy are available?

Safety Order: Subject of the order may be directed *not to use or threaten to use violence against, molest or put in fear the applicant or dependent person and shall not watch or beset the place where the applicant or dependent person resides.* 'Molest' in this context, means to pester and includes an act done with intent to annoy which in fact does annoy the applicant. Safety order valid for 5 years and may be renewed for another five years. Does not require the subject of the order to vacate the family home

Barring Order: Allows you to *exclude the person from your home.* If granted, requires the respondent, if living with the applicant or dependent person, to leave such place and whether he or she is living in that place prohibits the respondent from returning there or 'entering such place'. Valid for three years but renewable.

Interim Barring Order: May be obtained pending determination of the above.

Protection Order: Effectively an emergency order, affording immediate protection pending the determination of an application for a safety or barring order. *Applies where immediate protection is required, or where the applicant fears retribution in the case of an application for a safety or barring order being made.* Has broadly the same effect as a safety order but can be obtained more speedily and without the need to inform the subject of the order in advance.

Who may seek a safety or protection order? A safety or protection order may be availed of by the *spouse, dependent child or cohabiting partner* of another person,

whether that person lives with them or not. It may also be obtained by a parent against a child aged 18 or over.

A person may obtain either order against *any other person of full age who is residing with the respondent in a relationship the basis of which is not primarily contractual*. This rather awkward phrase includes a cohabiting same-sex partner. There is no required minimum period of cohabitation required in this case – in deciding whether the parties have the required relationship the court can look to the time spent together, the absence of profit or payment from the living arrangement and the ‘duties performed’ by each person for the other.

Who may seek a barring order? A person may obtain a barring order in respect of a *spouse of the applicant or a child of the applicant aged 18 or over*. A cohabiting partner who has been ‘*living with the respondent as husband or wife*’ for at least 6 of the previous 9 months may also apply. It is generally understood that this does not include same sex partners –**it is confined to opposite sex partners**. However, in the UK case of *Ghaidan v. Godin-Mendoza* the House of Lords ruled that the phrase ‘*living with the tenant as husband or wife*’ should be interpreted as including same-sex partners, as required by the European Convention on Human Rights. As such, a similar argument could be made that same-sex partners can avail of a barring order, though this has never been tested and the outcome of such a case would be unclear.

A Health Board may also apply on behalf of a party.

Are there limitations on the rights to a barring order? Even if same sex partners can seek a barring order, (and at the moment it appears doubtful) in the case of unmarried partners an order may only be sought *where the applicant has at least a 50% beneficial interest* in the property (reminder: a party without legal title may acquire a beneficial interest through the payments towards a mortgage or towards family expenses).

What happens if a safety or barring order if it is breached?

The relevant order takes effect from the time it is notified to respondent (oral communication + copy of order will suffice). Your local Garda station is also notified. In case of a breach the respondent faces a fine of up to €1,905 and up to one year in prison. May also amount to contempt of court for which a person theoretically may be imprisoned for an indefinite period of time. A Garda who suspects a breach may arrest a person without warrant, by force if required and may search any place where the respondent is suspected to be.

What are the benefits of getting a domestic violence order? It’s quicker and easier to obtain and you, the victim, have greater control over the process (by contrast with the general criminal law, where the victim is merely a witness for the State)

C. Social Welfare and Family Law

Cohabitation with a person of the opposite sex, **but not of the same sex**, may affect the entitlement of a person to particular social welfare payments, in particular the one parent family allowance. A person living with a person of the opposite sex in a relationship that is akin to marriage, (‘*living together as husband and wife*’), will not be entitled to the one parent family allowance. The income of a person’s opposite sex cohabiting partner may also be taken into account in assessing the former person’s entitlement to unemployment assistance and other like allowances.

In general, in assessing eligibility for social welfare payments, the Department of Social and Family Affairs **does not have regard to same-sex cohabitants living with each other**. Thus in assessing whether two people are cohabiting for the purposes of say, the one parent family allowance, regard is only had to opposite sex partners living together.

Here is how the Department itself defines cohabitation. “As there is no other definition in law of what constitutes cohabitation, the relationship between the man and the woman must be shown to be the same as that of a husband and wife. As relationships and domestic and financial arrangements between husbands and wives vary considerably each individual case must be considered on its own particular facts” (<http://www.welfare.ie/foi/cohabit.html#general>)

In determining whether two people are cohabiting together, the Department looks to a variety of criteria including.

1. **Co-residence**– are the parties living together?
2. **Household Relationship:**
 - Whether and to what extent finances are shared?
 - Whether and to what extent household duties are shared
3. **Stability**– how stable is the relationship?
4. **Social** – do the parties socialize together? Are they regarded locally as an established couple?
5. **Sexual** – do the parties have children together? Do they appear to share a bedroom?

Although the message currently appears to be ‘don’t date outside your own sex’, (with apologies to bisexuals!) it is arguable that the distinction between same sex and opposite sex couples infringes the European Convention on Human Rights and should be abolished. Law Reform Commission has recommended extending the definition of cohabitation to include same sex relationships.

D. Health, Children and the Law

D1. Hospital Treatment – visitation rights

If a partner goes into hospital for treatment, there is no automatic right of visitation. In practice, however, many hospitals have adopted a policy that permits visitation by a partner. Hospitals are subject to the Equal Status Acts, 2000-2004. As such, *any discriminatory treatment on grounds of sexual orientation would most likely be contrary to the Acts*. A hospital that fails to allow access to a same sex partner should be reported to the Equality Authority.

D2. Consent to treatment

Unless a person is mentally incapacitated, she and she alone may make decisions regarding her treatment. A person may not be subject to medical treatment or surgery without that person’s full free and informed consent. *As a general rule, neither the next of kin nor the spouse of a person can interfere in the decision of a person regarding their medical treatment.*

D3. Treatment in cases of incapacity

Despite common perceptions to the contrary, an adult’s next of kin (usually the spouse, or parent or nearest relative of a person) has no automatic right to make decisions on behalf of an incapacitated adult. Medical Council guidelines stress that a doctor may only act in such cases where such surgery is considered necessary for the recovery of the patient. While Medical Council guidelines recommend

consultation with next of kin and/or the spouse of a person, *no provision is made for consultation with a non-marital partner. (A non-marital partner cannot act as 'next of kin')*

Using an 'Enduring Power of Attorney'. An exception arises where the partner has acquired an enduring power of attorney under the provisions of the Power of Attorney Act, 1996. The Enduring Power of Attorney is *an instrument signed by a donor permitting the attorney to act on the donor's behalf, in accordance with the terms of the power.* This gives the attorney power to make decisions regarding property, finance, business and personal care in respect of the donor. It does not confer the power to make decisions regarding surgery or medical treatment, but does allow the attorney to make a decision that might have implications for the health care of a person, most notably, whether an incapacitated partner should be allowed to die a natural death.

D4. Access to medical records

Under Data Protection laws, *neither a spouse nor a partner of a patient has a right to access the patient's medical records without the consent of the patient.* The only exception to this would be where the patient has an enduring power of attorney.

D5. Rights on the death of a partner

In the sad circumstances of a partner's death, a surviving same sex partner has few rights. *This situation may be improved, however, if the surviving partner is nominated as 'executor' in the deceased partner's will.* This means that the survivor will be entitled to arrange the funeral, and generally to administer the deceased's estate in accordance with the wishes expressed in the will. Without a will, however, the unmarried partner has no rights either to succeed to the estate of the deceased or to arrange the funeral.

D6. Right to sue for wrongful death of a partner

The Civil Liability Amendment Act 1996 extended to a cohabiting partner who has been 'living with the respondent as husband or wife' for at least 3 years the right to sue for the wrongful death of a partner. This means that where a partner has died as a result of the negligence of another person, the latter may be sued by the surviving partner.

It is generally understood that the Act **does not include same sex partners** – that it is confined to opposite sex partners. However, in the UK case of *Ghaidan v. Godin-Mendoza* the House of Lords ruled that the phrase 'living with the tenant as husband or wife' could be interpreted as including same-sex partners as required by the European Convention on Human Rights.. As such, an argument could be made that same-sex partners can avail of this right to sue, though this has never been tested.

D7. Children: Custody, Adoption and Fostercare

While there is nothing in Irish law preventing an LGBT person from adopting a child on his or her own, *it is not possible jointly to adopt a child unless the adopters are married to each other.* There is, however, no legal restriction on same-sex couples fostering a child together. The overriding consideration in such cases is whether the fostercare arrangement is in the best interests of the child.

In custody cases, it is contrary to the European Convention on Human Rights to deny custody on the grounds of a person's sexual orientation. It is not possible,

Useful materials and websites

www.glue.ie – Gay and Lesbian Unions Éire

www.equality.ie – website of the Equality Authority

www.bailii.org – Irish legislation online

www.oasis.ie – Government Information website – very useful

www.immigrantcouncil.ie

www.irishrefugeecouncil.ie

www.dsfa.ie – Department of Social and Family Affairs

www.justice.ie – Department of Justice, Equality and Law Reform

Immigrant Council of Ireland, *Handbook on Immigrants' rights and Entitlements in Ireland* (2003)

Law Reform Commission, *Consultation Paper on the Rights and Duties of Cohabitees*, (April 2004) (www.lawreform.ie)

Equality Authority, *Implementing Equality for Lesbians, Gays and Bisexuals*, (2002)

Mee and Ronayne, *Partnership Rights of Same Sex Couples*, (Equality Authority, 2001)

OUTHOUSE LEGAL SEMINARS – NOVEMBER/DECEMBER 2005

WEEK 5: EQUAL STATUS AND HATE CRIMES

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The purpose of this Seminar: To provide a practical overview of the law and procedures relating to discrimination in the provision of goods and services and in relation to hate crimes and other criminal offences against members of the LGBT community. Although some of these issues raise the pressing need for law reform, the primary focus of the seminar is on the law as it stands, with an emphasis on practical strategies for securing legal remedies.

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General principles:

As a general principle, the law permits people to enter into contracts and arrangements, buy and sell land, sell goods and provide services at their own discretion. In general, a person is free to decide to do business with whomever they please (and correspondingly to refuse to trade with any person for whatever reason they see fit). However, **in certain circumstances the law does restrict private persons generally from treating people differently on account of any of nine specified grounds. Sexual orientation is one of these grounds.**

In practice very few cases are taken on the basis of sexual orientation discrimination. In 2002, for instance the Equality Tribunal received only 11 claims of discrimination based on the sexual orientation ground, and only 13 in 2001. These statistics, however, belie the actual experience of gays and bisexuals in the workplace and in society generally. Some people who are gay or bisexual may experience minimal discrimination or harassment due simply to the fact that they have chosen to remain discreet on the point. Those that are 'out', and do suffer discrimination, moreover, may choose not to report it for fear of exposing themselves to scrutiny.

There is some necessary overlap between sexual orientation discrimination and other types of prohibited discrimination. **The sexual orientation of a person may, indirectly, lead also to discrimination on the basis of marital status or family status, which is also banned in certain cases.** Provisions, for instance, that favour married persons over unmarried will necessarily impact disproportionately on gay and lesbians persons, who are less likely to be married than their heterosexual counterparts. Similar considerations arise in relation to the grounds of family status, with gay and lesbian persons being less likely to have children than heterosexuals.

The Constitution and Discrimination

Regrettably the Constitution of Ireland 1937 does not prevent the State from discriminating against people on the grounds of their sexual orientation. Nor does it prevent persons from being criminalised for sexual conduct of a homosexual nature, even where such conduct is between consenting adults in private. This is despite an express guarantee in the Constitution of equality before the law. (*Norris v. Attorney General* (1984)).

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The Constitution does not, however, require the State to discriminate against people on the basis of their sexual orientation. Provided that what the Constitution sees as the privileged status of marriage is ‘protected from attack’, the Constitution does not prevent legislation from being introduced affording equal legal rights to people regardless of sexual orientation.

The European Convention on Human Rights

The European Convention on Human Rights does however ban discrimination on the basis of sexual orientation. In *Norris v. Ireland* (1988) the European Court of Human Rights ruled that the legislation banning consensual sexual activity between adult males failed to respect the convention right to a private life (Article 8). This verdict led ultimately to the enactment of the Sexual Offences Act, 1993 establishing a broadly equal age of consent in respect of homosexual and heterosexual sexual activity alike.

The Court of Human Rights has further held that, within the sphere of rights protected by the Convention, **sexual orientation discrimination may infringe Article 14 of the Convention**. Article 14 prohibits discrimination in the application of other rights set out in the Convention. In *Da Silva Mouta v. Portugal*, (1999), the Court ruled that a decision denying a father custody of his child solely because the father was gay was “...not acceptable under the Convention.” This amounted, the Court held, to discrimination contrary to Article 14 in respect of the applicant’s right to a private and family life, as protected by Article 8.

As a result of the European Convention on Human Rights Act, 2003 the **Convention is now deemed to be part of Irish law**. As such, where Irish laws discriminate on the basis of sexual orientation, the Courts in Ireland are empowered to issue declarations of incompatibility in respect of such laws.

European Union Law

The Treaty of the European Community, as originally enacted in 1957, banned only sex discrimination and discrimination between nationals of different Member States. **The sex discrimination provisions of European Union law have been interpreted as banning employment discrimination against persons who are transgendered, but do not cover discrimination on the grounds of sexual orientation.**

In 1998, however, a clause was added to the Treaty of the European Community allowing the Community to ban, amongst other things, discrimination on the basis of sexual orientation. This Article does not in itself ban such discrimination – it simply confers the power, in areas where the Community has competence, to take measures to combat discrimination.

The **Charter of Fundamental Rights of the European Union** (which as yet is not binding) contains a more definitive prohibition on such discrimination.

Article 20 declares that “Everyone is equal before the law”, Article 21(1) of the Charter specifically declares that: “Any discrimination based on any ground such as...sexual orientation shall be prohibited”.

Neither right is absolute. *N.B. the Charter has not yet been brought into force.*

A. Equal Status in the provision of goods and services

The Equal Status Acts, 2000-2004 ban discrimination and harassment on nine grounds³ "...in connection with the provision of goods and services, property and other opportunities generally available to members of the public". Thus, while the Employment Equality Act 1998 concerns discrimination against employees, the Act of 2000 embraces various forms of discrimination against the customers or clients of a business, or other persons seeking goods and services.

A1. Who is protected by the legislation?

In general, in the supply of goods and services, discrimination on the basis of sexual orientation is banned. For the purposes of the Equal Status Act, 2000 "sexual orientation" means a "...heterosexual, homosexual or bisexual orientation". (N.B. includes straights as well as gays and bisexuals).

The Acts also ban discrimination on the basis of a *wrongful perception* that a person is of a particular sexual orientation, even if they are not of that orientation. For instance a woman could sue if she were refused entrance to a gay nightclub on the basis that the bouncer believed she was heterosexual, even if she were not.

A person, moreover, may not be treated unfavourably because of *the sexual orientation of an associated person*, such as a family member. If for instance a mother were refused a service on the basis that her daughter was gay, this would amount to discrimination under the Act, just as if the daughter herself had been the direct subject of the discrimination.

N.B. Transgendered people are covered by the ban on sex discrimination

The definition of sexual orientation appears to exclude a transsexual or transgendered status. Discrimination on the basis of transgendered status, however, constitutes sex discrimination for the purposes of European Union sex discrimination law. Sex discrimination is also banned under the Equal Status Acts.

A2. In what circumstances is discrimination banned?

Basically, a supplier of a good, service or of accommodation is *not entitled to treat a person more or less favourably on the basis of that person's sexual orientation*.

The word 'service' in this context includes:

"A facility of any nature which is available to the public generally or a section of the public"

Access to and the use of any place

Facilities for banking, insurance, grants, loans, credit or financing

Facilities for entertainment, recreation or refreshment, or for cultural activities

Facilities for transport and travel

A service or facility provided by a club

A professional or trade service.

The Acts cover discrimination in disposing of goods or in providing a service to the public generally or a section of the public or in providing a service. The Acts apply whether or not the provider of the good or service is receiving payment for such provision.

<p>Discrimination = the treatment of a person in a less favourable way than another person is, has been or would be in a comparable situation, where a reason for such differentiation is any of the nine grounds.</p>

A3. Discrimination in specific circumstances

³ Gender, race (incl. colour, national or ethnic origin), religious belief, age, disability, sexual orientation, marital status, family status, membership of the Travelling Community.

(a) Land and Housing.

The Acts ban discrimination in relation to the disposal of any interest in land (including by mortgage). It is also illegal to discriminate in the provision of leases and tenancies. A landlord could not, for instance, refuse residency to potential tenants on the basis of their sexual orientation.

The Act does not, however, apply:

Where land is disposed of by *will or gift*.

Where a person *provides accommodation in a part (other than a separate and self-contained part) of her home*, or where the provision of the accommodation affects the person's private or family life or that of any other person residing in the home,

In respect of *the provision of housing by a local housing authority*. Although this exemption does not directly permit sexual orientation discrimination, local authorities may indirectly favour heterosexuals in accessing social housing. The Acts permit councils to discriminate on the basis of family size, family status and marital status.

(b) Education

All 'educational establishments' in the State are prohibited from discriminating on any of the nine grounds in relation to:

The admission or terms of admission of a student

The access of a student to courses and other facilities

Any other term or condition of participation in the establishment

The expulsion of such student.

An 'educational establishment' for these purposes includes

pre-school services,

primary and post-primary schools,

institutions providing adult education

a university or other third level educational institution.

The Act applies to both publicly funded and privately funded bodies.

The Act bans discrimination on the basis of association with a person of a particular sexual orientation. *This means that the children of LGBT parents should not be excluded from or less favourably treated at school.*

Religious ethos exemption. An exemption applies however in the case of establishments for the education of priests and other ministers of religion. Such establishments are permitted to discriminate on the grounds of religious belief. Primary and post-primary schools run in accordance with rules of a particular faith, moreover, may exclude students not of that faith (or otherwise treat such students differently) with a view to promoting the religious ethos of the school. While neither clause expressly permits discrimination on the basis of sexual orientation, it suggests a possible avenue for the legal exclusion of gay or lesbian students, where such faith is opposed to homosexuality, and/or homosexual conduct.

(c) Health Insurance

The Health Insurance Act, 1994 introduced a mandatory system of health insurance under which common rates of health insurance are available to all regardless of differences in circumstances.

Though it was not strictly necessary to do so, the Act expressly bans discrimination on the grounds of sexual orientation and against persons suffering from a chronic disease or illness. These express references reflect a fear that gay and bisexual men in particular would face higher health insurance costs on the basis of a higher statistical

risk of contracting HIV/AIDS and other STDs. The Act does not, however, apply to life assurance, thereby leaving gay and bisexual men, in particular, subject to potentially inflated life assurance *premia*.

A4. Are same sex couples entitled to plead discrimination on the basis of their relationship?

A literal interpretation of the Equal Status Acts suggests that minimal protection exists for couples (as opposed to individuals) that are discriminated against on the basis of their same-sex relationship. While the Acts prohibits discrimination on the basis of marital status, such status includes only the status of being married, divorced, widowed or single. It does not expressly include one's status as the non-marital partner (same sex or opposite sex) of a person.

The 'Bus Pass' case. Nonetheless, the Department of Social and Family Affairs recently conceded that a retired man, whose male partner was denied a bus pass, had suffered unlawful discrimination on the basis of his sexual orientation. The Department had allowed the opposite sex partners of retired persons, but not same sex partners, to travel with the retired person free of charge under the bus pass scheme. The Equality Authority argued that sexual orientation discrimination as recognised in law includes differential treatment of same-sex couples. This would seem logical, given that, by definition, *a homosexual or bisexual orientation presupposes the potential formation of same sex relationships*. The State however, subsequently reversed its decision by means of legislation (namely the Social Welfare (Miscellaneous Provisions) Act, 2004), deeming the discrimination to be valid in law.

A5. Advertisements

Like the Act of 1998, section 12 of the Equal Status Act bans the publication or display of advertisements indicating an intention to discriminate contrary to the Act. It might, for instance, be illegal, to advertise that a particular nightclub is open to 'lesbians only' or even 'women only'. The better approach would be to invite 'discerning women and their fabulous friends' (!)

A6. Harassment

The Act of 2000 also contains provisions banning harassment and sexual harassment of the recipient or potential recipient of goods or services.

Harassment for these purposes is "*...any form of unwanted conduct related to any of the discriminatory grounds*" one of which is sexual orientation, which "*...has the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person.*"

Sexual harassment is *unwanted verbal, non-verbal or physical conduct of a sexual nature which has the purpose or effect described above*. N.B. sexual harassment may arise where the parties are of the same or different sex.

Conduct includes *acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material*.

Does it matter that the offending party did not intend to offend me personally? The intention or purpose of the alleged harasser for these purposes is not conclusive. Indeed, the fact that the person accused of harassment did not intend to cause offence, even that they are embarrassed or upset to be told that they caused offence is not in itself a defence to a charge of harassment. In the context of sexual orientation, in fact, the alleged harasser may claim not to have intended to cause offence simply because he or she assumed that the audience for the comments in question did not include homosexuals. This assumption in itself, it may be argued, needs to be addressed.

Nor is it necessarily a defence to argue that the conduct in question was not directed at any particular gay or lesbian person.

In all circumstances, the reaction to an allegation of harassment must be proportionate. In many cases, the allegation may be addressed informally, by speaking to those involved and resolving any misunderstanding.

Could the person's employer be liable? Yes. Even if the person who has harassed you is an employee, the employer may be liable for such conduct, if, when notified of the conduct, he or she fails to take reasonable steps to address your complaint.

A7. Exceptions

The Act permits discrimination in certain specified cases, the most relevant of which are as follows:

1. Insurance (excluding Health Insurance) and Pensions.

Differences in treatment are permitted in relation to annuities, pensions and insurance where actuarial or other statistical factors indicate that such differentiation is reasonable. This may impact negatively on gay and bisexual men seeking life assurance and cognate policies, such men being statistically at greater risk of contracting certain STDs. This exemption potentially leaves gay or bisexual men facing higher *prima* in respect of life assurance. (Though see the commentary below regarding safeguards in the area of Health Insurance).

Please note: The law sets a standard of *utmost good faith* in relation to insurance contracts. In other words, if you fail to reveal a material fact, or indeed actively conceal such a fact, your insurance contract may be avoided at the instance of the insurance company. In relation to a contract of life assurance, the fact that a person is gay or bisexual, or has a partner who is gay or bisexual is a material fact.

If you are asked whether you or your partner is gay or bisexual, be upfront!

Concealing your sexual orientation may result in the invalidity of your life assurance contract, with devastating implications. You may be asked broadly to detail your sexual history, to indicate whether you have had a HIV test and what the result was. You may be asked to undergo a HIV test. Unfortunately, the Equal Status Act permit all of this to be done.

You should **not** however, be expected to tolerate any homophobic comments on the part of the insurer or insurance broker. Even though the insurer is entitled to ask these questions, if it does so in a manner that causes you humiliation or distress, such treatment may well constitute harassment for these purposes.

Tip: Several insurance brokers who specialise in securing life assurance for people who are gay and bisexual advertise their services in GCN.

2. Promoting the 'Special Interests' of a category of persons

Difference treatment is permitted where facilities are made available to a category of persons in respect of services provided for the principal purpose of promoting, for a legitimate purpose and in good faith, *the special interests of persons in that category where such treatment is necessary to promote those special interests*. A good example would be a lesbian and or gay health clinic – the very specific health needs of lesbians and/or gay men may justify the establishment of such a clinic.

3. Services suitable only to the needs of a category of persons

Differences in the treatment of persons are permitted where goods or services may reasonably be regarded as suitable only to the needs of a particular category of people.

4. Disposals made by means of will or as a gift to a person.

5. Special deals for married people

Preferential rates for married couples are permitted by the Act, indirectly favouring heterosexual over homosexual couples.

6. Preventing anti-social or criminal behaviour

A provider of goods or services may refuse to serve or otherwise exclude a particular person *where a reasonable person would anticipate that there is a substantial risk that the recipient will engage in criminal or disorderly conduct or cause damage to property in the vicinity of the service provider.*

7. Discriminatory Conduct permitted by legislation or EU Law

The Act exempts differences in treatment that are permitted by any other Act of Parliament or by EU law.

8. Positive action

The Act permits positive discrimination in favour of a category of persons who because of their circumstances, require particular facilities, arrangement, services or assistance.

9. Registered Clubs

Private clubs that are registered under the Registration of Clubs Acts, 1904-1999 (mainly sporting clubs with a drinks licence) are entitled to discriminate if certain stringent conditions are met.

A8. Taking an Equal Status Action

Cases involving licensed premises are dealt with by the District Court pursuant to the Intoxicating Liquor Act, 2003.

Otherwise allegations of discrimination are dealt with by equality officers of the Equality Tribunal. (This is distinct from the Equality Authority, which has a broader strategic brief).

Will my case be heard in public? No. Although a report of the case may be published, confidentiality is guaranteed

Procedure:

1. *Written notification:* victim must notify the person against whom the claim is being made within two months of the most recent incident of discrimination. Details of the claim must be outlined. (Use form ODEI 5)

2. *Making a claim:* If no satisfactory resolution arises as a result of step 1, the complaint may be referred to the Equality Tribunal. Time limit: must occur within six months of the most recent act of discrimination.

3. *Mediation:* If both parties consent, the Director of the Equality tribunal may refer the matter to mediation.

4. *Investigation*: Otherwise, the matter will be considered by an Equality Officer. You are entitled to represent yourself before the tribunal but you may also be represented by the Equality Authority, a community group or a trade union.

5. *Remedies*

Where an equality officer determines that unlawful discrimination has occurred the following remedies are available:

- an order for up to € 6,350 in compensation
- an order that a person or persons take a specified course of action to rectify the complained of discrimination.

6. *Appeals*.

The decision of the Equality Officer is subject to appeal to the Circuit Court by either party, though such appeal must be lodged within 42 days of the Officer's decision.

7. *Costs*

Each side usually pays its own costs, unless one party has obstructed the work of the Tribunal.

B. Hate Crimes, Violence and Harassment

The law generally permits people freely to express opinions and perspectives. That said, the law does not generally permit people to incite others to crime or violence, or to suggest to others how they might commit an offence and/or evade prosecution for an offence.

B1. Under the criminal law generally:

The following are offences which may generally be invoked in respect of violent or coercive conduct:

- Assault* – fine up to €1905 and/or up to 6 months in prison
- Assault causing harm* - a fine and up to 5 years in prison
- Causing serious harm* - a fine and/or life in prison
- Threat to kill or cause serious harm* – a fine or up to 10 years in prison
- Coercion* - using or threatening to use violence to force a person to do what they are entitled not to do (or not to do what they are entitled to do - a fine and up to 5 years in prison. *N.B. includes threatening to injure a cohabiting partner, including a same-sex partner*
- Harassment* - a fine and up to 7 years in prison
- Blackmail* – making an unwarranted demand with menaces (*e.g.* to expose sexual orientation) with a view to making a gain or causing a loss to the blackmailed party – a fine and up to 14 years in prison

Sexual offences:

- Rape*: includes forced oral and anal penetration, (however slight) and penetration of the vagina by an object held or manipulated by another person
- Sexual Assault*: any unwelcome contact of a sexual nature, includes same sex activity
- Aggravated Sexual Assault*: as above, with serious violence
- Statutory rape* – it is an offence for a man to have 'unlawful carnal knowledge of a girl under the age of 17

Sex with a minor:

- male same sex activity: age of consent for all sexual acts is 17
- female same sex activity: age of consent for all sexual acts is 15
- opposite sex activity: age of consent is 15 for acts falling short of sexual intercourse

- In all cases it is an offence to have sex with a person who because of a mental disability is not in a position to consent to such activity

Do I take the case myself? No. In most cases it is up to a Garda or the Director of Public Prosecutions to take a criminal case. In such cases the victim effectively acts as a witness for the State.

B2. Public Order Offences

1. Disorderly Conduct

It is an offence in a public place to between 12 a.m. and 7 a.m. (or at any other time if asked by a Garda to desist) to engage in “offensive conduct” meaning “*any unreasonable behaviour which, having regard to all the circumstances, is likely to cause serious offence or serious annoyance to any person who is, or might reasonably be expected to be, aware of such behaviour.*”

2. Use of threatening, abusive or insulting words

It is an offence for any person in a public place *to use or engage in any threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or being reckless as to whether a breach of the peace may be occasioned.* Likewise it is an offence to distribute or display any writing sign or visual representation which is threatening, abusive, insulting or obscene.

B3. Hate Crimes

Although there is no particular provision penalising violent crime which is motivated by the sexual orientation of the victim, such motivation may be taken into account in determining sentencing.

There are however specific offences relating to speech that would tend to incite to hatred. The **Prohibition of Incitement to Hatred Act, 1989** bans:

- The publication, distribution or display of written material,
- The use of words or behaviour,
- The distribution, display or publication of visual images or sounds
- The showing or playing of recorded sounds or images

...where such words, behaviour, visual images or sounds **are threatening, abusive or insulting and are intended or, having regard to all the circumstances, are likely to stir up hatred on the grounds of sexual orientation** (or any other of the named grounds, which include race, and religion). An exception applies where the conduct takes place in a private residence, unless it occurs in circumstances where the words, behaviour or material are heard or seen by persons outside the residence.

It is also an offence to:

- make a broadcast that incites to hatred
- prepare or possess material that incites to hatred

Penalties – a fine of up to €12,700 or imprisonment for up to 10 years

With the permission of a District Court judge or Peace Commissioner, the Gardaí may search a premises and seize any material proscribed as above.

Video Recordings that contain material likely to stir up hatred may be censored under the Video Recordings Act, 1989

Useful materials and websites

www.equality.ie – website of the Equality Authority

www.bailii.org – Irish legislation online

www.equalitytribunal.ie

www.oasis.ie – Government Information website – very useful

www.justice.ie – Department of Justice, Equality and Law Reform

www.garda.ie

www.victimsupport.ie

Law Reform Commission, *Consultation Paper on the Rights and Duties of Cohabitees*, (April 2004) (www.lawreform.ie)

Equality Authority, *Implementing Equality for Lesbians, Gays and Bisexuals*, (2002)

Mee and Ronayne, *Partnership Rights of Same Sex Couples*, (Equality Authority, 2001)

Ryan, “Sexual Orientation Discrimination” in Cotter and Moffatt (eds.), *Discrimination Law* (Dublin: Law Society, 2005)