

ENABLING LESBIAN, GAY AND BISEXUAL INDIVIDUALS TO ACCESS THEIR RIGHTS UNDER EQUALITY LAW

*Research Report
November 2007*

Judy Walsh, Catherine Conlon, Barry Fitzpatrick and Ulf Hansson

Equality Commission

FOR NORTHERN IRELAND



THE EQUALITY AUTHORITY
AN TÚDARÁS COMHIONANNAIS

Enabling Lesbian, Gay and Bisexual Individuals To Access Their Rights Under Equality Law

A Report Prepared for

The Equality Commission for Northern Ireland

And

The Equality Authority

By

Judy Walsh, Catherine Conlon, Barry Fitzpatrick and Ulf Hansson

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<u>Acronyms</u>	
ANIC	Association for Northern Ireland Colleges
ASTI	Association of Secondary Teachers in Ireland (Republic of Ireland)
CA	Citizens Advice (UK and Northern Ireland)
CAB	Citizens Advice Bureau (UK and Northern Ireland)
CAJ	Committee on the Administration of Justice (Northern Ireland)
CEHR	Commission for Equality and Human Rights (UK)
CGB	Equal Treatment Commission (The Netherlands)
CIB	Citizens Information Board (Republic of Ireland))
CIC	Citizens Information Centre (Republic of Ireland)
CLC	Children's Law Centre (Northern Ireland)
CNTR	Centre for Equal Opportunities and Opposition to Racism (Belgium)
COC	<i>Cultuur en Ontspannings-Centrum</i> (LGB organisation, The Netherlands)
CoSO	Coalition on Sexual Orientation (Northern Ireland)
CRE	Commission for Racial Equality (GB)
DCLG	Department of Communities and Local Government (GB)
DJELR	Department of Justice, Equality and Law Reform (Republic of Ireland)
DRC	Disability Rights Commission (GB)
DTI	Department of Trade and Industry (GB)
EA	Equality Authority (Republic of Ireland)
EC	European Communities
ECNI	Equality Commission for Northern Ireland
EEA	Employment Equality Acts 1998-2004 (Republic of Ireland)
EEOC	Equal Employment Opportunity Commission (United States)
EPP	Employment Equality Plans (Northern Ireland)
ENAR	European Network Against Racism
EOC	Equal Opportunities Commission (GB)
ERAP	Equality Reviews and Action Plans
ESA	Equal Status Acts 2000-2004 (Republic of Ireland)
EWHC	England and Wales High Court
FAGL	La Fédération des Associations Gayes et Lesbiennes (LGB organisation, Belgium)
FEED	European Union's 2000 Framework Employment Equality Directive
FLAC	Free Legal Advice Centres (Republic of Ireland)
FHE	Further and Higher Education

GCN	Gay Community News
GFS	Goods, Facilities and Services
GLAD	Gay Men and Lesbians Against Discrimination (LGB organisation, Australia)
GLEN	Gay and Lesbian Equality Network (Republic of Ireland)
GOR	Genuine Occupational Requirements
Holebi	Flemish LGB federation
HomO	Ombudsman against Discrimination on grounds of Sexual Orientation (Sweden)
HREOC	The Human Rights and Equal Opportunities Commission (Australian)
IBEC	Irish Business and Employers Confederation (Republic of Ireland)
ICCL	Irish Council for Civil Liberties (Republic of Ireland)
ICTU	Irish Congress of Trade Unions
ICTU NIC	Northern Ireland Committee of Irish Congress of Trade Unions
IHRC	Irish Human Rights Commission (Republic of Ireland)
ILGA	The International Lesbian and Gay Association
INTO	Irish National Teachers Organisation (Republic of Ireland)
IPRT	Irish Penal Reform Trust (Republic of Ireland)
LAB	The Legal Aid Board (Republic of Ireland)
LGB	Lesbian, Gay and Bisexual
LGBT	Lesbian, Gay, Bisexual and Transgender
LRA	Labour Relations Agency (Northern Ireland)
NALA	National Adult Literacy Association (Republic of Ireland)
NESF	National Economic and Social Forum (Republic of Ireland)
NICEM	Northern Ireland Council for Ethnic Minorities (Northern Ireland)
NIHE	Northern Ireland Housing Executive (Northern Ireland)
NIHRC	Northern Ireland Human Rights Commission (Northern Ireland)
NIO	Northern Ireland Office
NGO	Non-governmental organisation
OFMDFM	Office of the First Minister and Deputy First Minister (Northern Ireland)
OITFET	Office of the Industrial Tribunals and the Fair Employment Tribunal (Northern Ireland)
PAFT	Policy Appraisal and Fair Treatment (UK)
PCS	Public and Commercial Services Union (UK)
PIC	Public Information Centre
RFSL	National Swedish Federation for Lesbian and Gay Rights (Sweden)
RIOH	Recording Incidents of Hate
SACHR	Standing Advisory Commission on Human Rights (Northern Ireland)
SO	Sexual orientation

SOLID	Strategies on Litigation Tackling Discrimination in EU Countries
TRACE	Transnational Partnership for Equality (EU funded project)
TUC	Trade Union Congress
TUI	Teachers' Union of Ireland (Republic of Ireland)
UDA	Unfair Dismissals (Amendment) Act 1993 (Republic of Ireland)
USI	Union of Students in Ireland

Chapter 1: Introduction

1.1 Research Overview

1.1.1 Research Aims

The overall research aim is to propose strategies whereby specialised equality bodies can further enable lesbian, gay and bisexual (LGB) people to secure their rights under equality law. Specific objectives of the report are to explore:

- Obstacles to LGB individuals realising the protection afforded by equality legislation and to engaging effectively with equality bodies.
- Barriers for equality bodies in securing a visibility for LGB people in their work and in the implementation of equality legislation.
- Good practice for specialised equality bodies in securing effective access to rights for LGB people.
- Legislative, policy, resource and contextual changes required to realise effective access to rights for LGB people.
- Key actionable recommendations for the Equality Authority (EA), the Equality Commission for Northern Ireland (ECNI), other specialised equality bodies, policymakers, social partners, and NGOs (non-governmental organisations) including LGB NGOs.

1.1.2 Research Methodology

The report combines findings from a small-scale qualitative study with a literature review and an assessment of current legislation, policy and practice. Interviews were held with:

1. LGB people in both jurisdictions that have encountered access to equality rights issues in the recent past.
2. Members of LGB representative organisations in both jurisdictions.

3. Staff of equality bodies, advice organisations, social and economic partners, representatives of the legal profession and others identified as 'stakeholders' in the access to justice process in both jurisdictions.

The interviews were designed to identify conditions that currently affect the operation of Sexual Orientation (SO) equality law and to elicit views on strategies aimed at enhancing access to equality rights for LGB individuals. Feedback seminars with interview participants took place in Belfast and Dublin to present emerging findings and to concretise proposed strategies. It should be noted that the qualitative study involved a limited number of individuals and so its findings are not capable of generalisation but rather are illustrative. The methodological approach for each element is elaborated upon in Appendix A.

1.1.3 Report Structure

The report is structured as follows: This Chapter sets out the research rationale and methodology, going on to outline the legal and social context in which LGB rights have been pursued in Northern Ireland (NI) and the Republic of Ireland (ROI). Chapter 2 considers the development of a discrimination claim from the identification of a harmful experience to the initiation of a grievance procedure, while Chapter 3 examines the dispute resolution stage. Chapter 4 addresses the role of equality bodies in both jurisdictions. Chapter 5 undertakes a comparative review of the work undertaken in this field by specialised equality bodies located in Belgium, The Netherlands, Sweden and Scotland. Finally, Chapter 6 sets out recommendations directed at specialised equality bodies and other stakeholders.

1.2 Research Rationale

1.2.1 Introduction

Equality law can be activated in various ways. Most obviously it can be triggered through the enforcement mechanisms built into the legislative framework. However, it is important to appreciate that equality law is also given effect in everyday practices without being enforced as such (Griffiths 1999). Such voluntary and proactive compliance is to a large extent prompted by socio-

cultural support for equality and although it is difficult to measure the impact of the promotional work carried out by equality bodies it is a crucial strand of their mandate. In considering how best to secure the equality rights of LGB people we therefore address the development and promotional activities of the ECNI and the EA in tandem with formal means of enforcing the law.

In both jurisdictions enforcement relies heavily upon litigation and given its pivotal role the individual complaint forms a core element of this research. Although the level of litigation pursued is just one indicator of whether equality law is 'working', low invocation rates are problematic, especially when at odds with reported levels of discrimination. Beyond the fact that people who are entitled to redress may be left without a remedy, the wider structural changes effected in part by litigation are not realised.¹ Litigation has an important role to play in clarifying certain principles, establishing precedents that can be availed of by potential claimants, as well as raising awareness and having a wider symbolic impact (Barry 2004, p.7; McCrudden 1999a, p.300).

As discussed below (Chapter 1.3.4), the volume of sexual orientation ground cases is consistently low in the ROI and NI, mirroring patterns in other EU countries (European Network of Independent Experts in the Non-Discrimination Field 2006, p.24). The data on complaints lodged relative to reported levels of discrimination experienced at work and in the other contexts covered by the legislation, suggests that the law is under-utilised (Appendix B). There have been important casework outcomes and settlements of cases on the SO ground. However, the decisions issued to date do not clarify key areas of law of concern to the LGB population. Consequently, isolating the reasons for this pattern and suggesting concrete strategies that enable LGB people to activate equality law is a core concern of this project.

¹ Whether and under what conditions successful litigation, within the anti-discrimination field and more generally, effects wider social change is contested (Fredman 2002, ch. 6; Griffiths 1999; Lacey 1998, ch. 1; McCann 1996; McCrudden 1999a; Rosenberg 1991).

In exploring the difficulties associated with the 'individual justice' mode of redress and how these may be alleviated if not eliminated in the case of LGB people (Chapters 2 and 3), we also examine other means of activating equality law (Chapter 4). The contemporary equality regimes in place in both parts of the island incorporate 'group justice' elements that complement the 'individual justice' model (Barry 2003; McCrudden 1999a). A group justice model has various features: One involves collective aspects to the litigation process, which entails the extension of the ability to litigate (or 'standing') to specialised equality agencies and other bodies (Chapter 4.4.2; 4.5.4). Additionally, positive duties to promote equality move beyond the confines of the individual justice model (Crowley 2006, pp.108-112; Fredman 2002, ch.1; Hepple et al 2000; O'Cinnéide 2003). Such duties have been enacted in several jurisdictions including Northern Ireland, but not as of yet in the ROI (McCrudden 1999b).

A concern for group justice has also generated increased interest in various strategic enforcement initiatives (Cormack 2004; European Roma Rights Center et al 2004). These approaches seek to maximise the impact of complaints pursued through the standard 'individual justice' system of redress. It is widely accepted that while national equality bodies should play an instrumental role, effective collaboration with civil society organisations is also crucial (European Commission 2005a, p.5; European Commission 2006; European Roma Rights Centre et al 2004). In particular NGOs can provide support for individual victims of discrimination (European Commission 2005a, pp.14-15; European Commission 2006, pp.32-35; Piehl 2006). Finally, the 'group justice' model involves fresh consideration of effective sanctions and the extent to which compensation for individuals should be the sole vehicle for redress of grievances (ECNI 2004a).

Each feature of the 'group justice' model is explored in the body of the report given its potential to enhance the traditional individual complaint process. The extent to which comparable redress is available in both jurisdictions is also

underscored given commitments to secure an equivalence of “protection of rights” undertaken in the Belfast (Good Friday) Agreement (O’Cinnéide 2005).

We now turn to outline the literature concerning access to justice and equality rights which informs the current study.

1.2.2 Existing Research on Access to Rights

A framework developed by Felstiner, Abel and Sarat (1981) to explain the course of legal disputes is used to explore the conditions operative during the formative stages of equality litigation (Chapter 2). This phase is frequently overlooked in mainstream accounts of access to justice, which tend to focus on relevant factors once a decision to seek legal resolution of a problem has been made (ibid.). As a preliminary matter tolerance of injustice may simply stem from a failure to perceive that one has suffered harm (ibid., p. 633). The first step on any path of redress then entails identifying a harmful experience. This ‘naming’ process is followed by the transformation of the harmful experience into a grievance, a stage referred to as ‘blaming’ (ibid.). The term ‘rights realisation’ is used instead of ‘blaming’ in this report in order to reflect the fact that in the equality law context the individual becomes conscious that their *human rights* are in issue. Awareness of applicable laws and policies is crucial if persons are to recognise that they may have a valid legal grievance. Once the grievance is brought to the attention of the person/s considered responsible a third stage is reached, that of ‘claiming’ (ibid.). In effect this phase involves a decision to seek redress.

Whether each or any of these transformations occurs, depends on an individual’s personal attributes as well as their social position. A significant theme addressed in this report is the factors specific to LGB people that militate against accepting and understanding that one’s rights have been violated in the first place and ultimately proceeding to seek redress. We then go on to consider obstacles that arise for LGB people when a grievance is rejected in whole or in part by the respondent, potentially triggering recourse to formal internal or external dispute

resolution processes (Chapter 3). During this 'dispute' stage the external environment interacts to a greater degree with the personal factors that predict pursuit of grievances during the formative stages of discrimination law cases (Felstiner et al 1981).

The advent of distinct redress systems for employment related and other discrimination complaints was designed to address some of the access to justice barriers associated with conventional litigation, such as financial costs, the need for specialist legal expertise, and delays.² Despite such developments, a fairly substantial body of literature catalogues and seeks to explain low levels of equality law cases (cf. Blom et al 1995; Engel and Munger 2003; Fredman 2002; Handley 2001; McCrudden et al 1991; Morgan 1999; Williams et al 2003). A Europe-wide study of the factors that predict sex equality litigation sums up the position as follows: "[i]t would appear that many of the most vulnerable workers in the labour market are, in fact, least likely to be in a position to utilise equality litigation. This is partly because they lack the support of agencies, unions and interest groups which would be needed to exploit equality principles but also because judicial process is ill-equipped to cope with the challenge of providing protection to vulnerable workers" (Blom et al 1995, 3.1.).

With respect to the ROI, data collected in a 2004 household survey revealed some significant patterns on the general topic of discrimination (Central Statistics Office 2005; Equality Authority 2006b, p. 13). The findings refer to people's own understanding of their experiences and are not necessarily a record of illegal discrimination. While approximately 382,000 or 12.5% of people aged 18 or over felt they had been discriminated against in the two-year period prior to the survey, almost 60% of them took no action. Verbal action was taken by almost

² Literature specific to the Republic of Ireland includes the Pringle Report (1977), the empirical work conducted by Gogan (2005) on unmet legal need in the Ballymun area of Dublin and the policy document on access to legal aid published by the Free Legal Advice Centres (2005). Whyte's (2002) text on social inclusion and the law addresses public interest law and litigation. In

30%, just over 9% made an official complaint or took legal action and over 7% took written action (some people responded in more than one way).

The survey centred on the nine grounds protected under the Equal Status Acts (ESA) and Employment Equality Acts (EEA), with less than one percent of those experiencing discrimination citing the sexual orientation (0.6%) ground. Reported areas of discrimination under the SO ground were in the 'workplace' (0.8%), 'looking for work' (0.3%), 'accessing health services' (0.8%), and 'using transport services' (4.1%). According to Bond (2005 p.36) "in interpreting these findings it is important to remember that the likelihood of a ground being cited will depend on factors such as the size of the population at risk, the social visibility of its members and their relative willingness to report particular grounds to an interviewer."

Very little existing research deals specifically with the factors that prompt or inhibit the pursuit of SO ground cases. A number of recurrent themes surfaced in the handful of employment-focussed studies uncovered through the literature review (Chapman 1995; European Group of Experts on Combating Sexual Orientation Discrimination 2004, Appendix 1; Kendall and Eyolfson 1995; Mason 2002). In essence visibility mediates all aspects of LGB workplace experiences, including the propensity to assert and access rights under equality law. For instance, claims may be stifled because seeking information required to ground a case would entail disclosing one's sexual orientation. There is some limited evidence that those LGB individuals who pursue discrimination claims may do so using grounds other than sexual orientation in order to avoid 'coming out' (Mason 2002).

Northern Ireland, Dignan (2004) conducted a comprehensive literature review of legal need in for the Northern Ireland Legal Services Commission.

Participants at a recent UK conference on the theme of access to justice noted that far fewer LGB individuals were asserting their rights than anticipated and the workshop on sexual orientation identified the following issues:

- Lack of specialist advice for lesbian, gay and bisexual employees
- There is need for recognition of the personal pain discrimination causes and the need for claimants to talk directly to lesbian, gay and bisexual advice workers
- Legal advice groups need to reach out to and link up with local lesbian and gay groups³

1.3 Equality Infrastructure

1.3.1 The Legal Context

Various discrete NI and ROI laws promote equality of opportunity and prohibit discrimination against individuals on the basis of their sexual orientation (SO). Since the current report concerns the mandate of the specialised equality bodies situated on the island, the particular laws considered are those that fall within the remit of the Equality Commission for Northern Ireland (ECNI), the Equality Authority (EA) and the Equality Tribunal (see Chapter 1.3.2).⁴

Four principal categories of discrimination are prohibited in both jurisdictions: direct discrimination, indirect discrimination, victimisation and harassment (including sexual harassment). In the main these provisions are triggered by individual complaints reflecting adherence to an ‘individual justice’ model of equality law (McCrudden 1999a).⁵ However, the specialised equality bodies also play a role in enforcement (Chapter 1.3.2; Chapter 4.5).

³ See further <http://www.accesstojustice.se/>

This project is discussed in greater detail in Chapter 5 in relation to the Swedish experience.

⁴ For more detailed consideration of protection from sexual orientation discrimination in the ROI see Bell (2003), European Group of Experts on Combating Sexual Orientation Discrimination (2004, ch. 10), and Ryan (2005).

⁵ There are no provisions for class or group actions in NI equality law. Although there is no provision in ROI employment equality law for class actions, complainants can refer a single grouped case encompassing individual claims. The ROI High Court ruled out the use of class actions in *Verbatim v Duffy and Others* (High Court, Kinlen J. 18 May 1994 unreported). See also the decision of an Equality Officer in *Johnson and sixty-five others v Tesco Ireland Limited (formerly Power Supermarkets)* (DEC-E-2001-24; EE1/99).

In the Republic the primary relevant legislation is the Employment Equality Acts 1998-2004 and the Equal Status Acts 2000-2004 and the Intoxicating Liquor Act 2003.⁶ A claim of discrimination can be advanced on any one or several of nine grounds: age, disability, family status, gender, marital status, 'race', religion, sexual orientation and membership of the Traveller community.⁷ Sexual orientation in this context means "heterosexual, homosexual or bisexual orientation".⁸ The EEA governs the field of employment, including self-employment.⁹ Provision of goods, services, accommodation and education, where these are available to the public or a section of the public, fall within the ambit of the ESA. There are specific provisions in relation to registered clubs. A number of significant exemptions qualify the protection afforded by the legislation; those affecting LGB individuals are considered in Chapter 3.

Whereas ROI protection against SO discrimination in the workplace pre-dates the European Union's 2000 Framework Employment Equality Directive (FEED), Northern Irish law is almost entirely dependent upon its implementation. In NI the Employment Equality (Sexual Orientation) Regulations (NI) 2003 (SO Employment Regulations) cover discrimination in the field of employment and training, including institutions of further and higher education.¹⁰ The Equality Act (Sexual Orientation) Regulations (NI) 2006 (SO GFS Regulations), which came into force on 1 January 2007, extend the reach of SO discrimination law to the provision of goods, facilities and services, the control of premises, education and

⁶ From 2004 discrimination claims concerning licensed premises are heard by the District Court under the Intoxicating Liquor Act 2003.

⁷ Sections 6 and 28 EEA; Section 3 ESA.

⁸ Section 2(1), EEA; Section 2(1) ESA.

⁹ It imposes obligations on private and public sectors employers, vocational training bodies, employment agencies, partnerships, professional and trade associations, and trade unions. While tied to the field of employment, pensions are dealt with separately under the Pensions Acts 1990-2004, which prohibit discrimination in relation to occupational pension schemes and other occupational benefits that are contingent on incidents such as death, illness, accidents, or unemployment, but delivered in the form of a pension.

¹⁰ Pensions are not covered by the Employment Regulations but this has been partly rectified by the Civil Partnership Act 2004.

the performance of public functions. “Sexual orientation” is defined as meaning “a sexual orientation towards persons of the same sex; persons of the opposite sex; or persons of the same sex and the opposite sex”.¹¹

A distinctive feature of Northern Irish law is the statutory equality duty. Section 75(1) of the Northern Ireland Act 1998 places an obligation on designated public authorities to show due regard to the need to promote equality of opportunity between, amongst others, people of different sexual orientation. Designated authorities are required to produce equality schemes, approved by the ECNI, and conduct ‘screening processes’ on all their policies over a five year period to establish if they have ‘adverse impact’ on any of the section 75 grounds. If so, they should conduct an equality impact assessment on the policy and consider if the impact of the policy can be avoided or mitigated.

1.3.2 Specialised Equality Bodies

The specialised equality bodies established within and beyond the borders of the European Union vary widely in terms of their structure, mandate, functions and powers (Cormack 2004; European Network of Independent Experts in the Non-Discrimination Field 2007; Obura and Palmer 2006; PLS Ramboll 2002). In the context of the individual complaint process the report distinguishes between ‘assistance-based’ and ‘adjudication-based’ agencies: As assistance-based bodies the ECNI and the EA focus on support for potential victims, rather than on the impartial adjudication of discrimination cases.

It is important to note that the ECNI and the EA are not ‘legal aid’ bodies: They have limited resources but also overarching statutory objectives to combat discrimination and promote equality of opportunity. Hence to a large extent the ECNI and EA are ‘strategic litigators’, seeking to maximise the ‘ripple effect’ of their assistance in terms of testing the law but also promoting widespread changes to policies and practices (O’Neill 2004).

¹¹ Regulation 2(2) SO GFS Regulations; Regulation 2(1) SO Employment Regulations.

A distinct feature of the Republic's equality infrastructure is the presence of a dedicated 'adjudication-based' body: As discussed further below the Equality Tribunal is an independent, quasi-judicial forum for the resolution of claims under the ESA and EEA.¹²

The Equality Authority is the central body involved in the implementation of ROI anti-discrimination legislation. It was formally established on 18th October 1999, replacing the Employment Equality Agency, and enjoys a more extensive set of powers than its predecessor. The EA plays a promotional, advisory and advocacy role and is also charged with enforcing equality law in defined circumstances. As is the case for the ECNI, the EA's core mandate is to work towards the elimination of discrimination and to promote equality of opportunity in the spheres of employment and vocational training and the provision of goods and services, accommodation and education.¹³ Work is carried out in the EA by five sections: Administration, Communications, Development, Legal and Research. For 2007 the EA has a budget of € 5.6 million and an approved staffing level of 53 posts (Equality Authority 2007, p.99).

The EA's Public Information Centre provides an extensive information service to employers, service providers, employees, customers and members of the public on the provisions of the legislation. Useful promotional powers include the establishment of advisory committees¹⁴, preparation of draft codes of practice that can subsequently be used as evidence in legal proceedings¹⁵ and the ability to undertake or sponsor research on areas of importance.¹⁶ The Equality Authority convened an advisory committee involving LGB NGOs to prepare its report on *Implementing Equality for Lesbian Gays and Bisexuals (2002a)*. Recent

¹² The Tribunal's jurisdiction also encompasses discrimination claims under the Pensions Acts 1990-2004.

¹³ Section 39 EEA; Section 39 ESA.

¹⁴ Section 48 EEA.

¹⁵ Section 56 EEA.

research has included work on LGB access to health services (see Chapter 4.2.1.1). The Development Section deals with the promotion of equal opportunities and to that end engages in a range of activities, including equality reviews and the production of equality proofing templates (see Chapter 4.5.3). The communications section deals with public awareness activities and has organised a campaign on homophobic bullying in schools with the BeLongTo youth group (see Chapter 4.2.1.1).

With respect to its advocacy role, the Equality Authority can assist individuals in equality law cases that involve ‘an important matter of principle’ or where it would not be reasonable to expect a person to present their case adequately without assistance.¹⁷ Assistance is not available to all those who request it but is supplied according to criteria that encompass strategic concerns (see Chapter 4.4.1).

The EA enjoys a range of enforcement powers (see Chapter 4.5).¹⁸ For example, in certain circumstances it can refer discriminatory practices or instances of discrimination against an individual to the Director of the Equality Tribunal in its own name.¹⁹ The Authority may also conduct inquiries for any purpose connected with its functions and can conduct or invite organisations to conduct equality reviews and action plans.²⁰

The ECNI came into being in 1999 as a merger of the Fair Employment Commission, the Equal Opportunities Commission for Northern Ireland, the

¹⁶ Section 57 EEA.

¹⁷ Claims of discrimination under the EEA, ESA and the Intoxicating Liquor Act 2003 may qualify for legal assistance from the Equality Authority under Section 67 EEA.

¹⁸ The Authority enjoys exclusive legal standing with respect to discriminatory advertising (*FAS v Burke*, ADE 04/12 Determination No. 0418). See also Section 8 ESA which empowers the Authority along with any other person to apply to the District Court for a determination that a club is a discriminating club within the terms of the Act.

¹⁹ Section 85 EEA, Section 23 ESA. Referrals of individual cases of discrimination or victimisation may take place where it is not reasonable to expect the potential complainant to make such a reference.

²⁰ Sections 58-66 EEA.

Commission for Racial Equality for Northern Ireland and the NI Disability Council.²¹ The initial motivating force for the merger was to provide for an enforcement body to oversee the statutory equality duty.²² The Commission is made up of a Board of Commissioners and a staff of 146 (ECNI 2006a, p.27). It had a budget of £7.295 million for the year 2005-2006 (ibid.).

Its objectives, in relation to the SO Employment Regulations, are²³:

- (a) to work towards the elimination of discrimination;
- (b) to promote equality of opportunity between persons of differing sexual orientations; and
- (c) to keep under review the working of these Regulations and, when it is so required by the Department²⁴ or otherwise thinks it necessary, draw up and submit to the Department proposals for amending these Regulations.

It has wide powers concerning advice, research and other promotional activities.²⁵ The SO Goods Facilities and Services (GFS) Regulations enable the Commission to undertake research and educational activities, and to support third parties (financially or otherwise) to do so.²⁶ In addition the ECNI “may give financial or other assistance to any organisation appearing to the Commission to be concerned with the promotion of equality of opportunity between persons of different sexual orientations”.²⁷

The ECNI has the power to conduct formal investigations²⁸, but not, at present, under the SO Employment Regulations. As is the case for the Equality Authority, the Commission can assist individuals that satisfy the applicable criteria in tribunal and court cases.²⁹ Although the ECNI cannot bring cases in its own name on behalf of named complainants, it does enjoy a range of enforcement

²¹ Section 73, Northern Ireland Act 1998.

²² Schedule 9, Northern Ireland Act 1998.

²³ Regulation 30, SO Employment Regulations.

²⁴ “The Department” means the Office of the First Minister and Deputy First Minister.

²⁵ Regulations 31 and 32, SO Employment Regulations.

²⁶ Regulation 28(1), SO GFS Regulations.

²⁷ Regulation 28(3), SO GFS Regulations.

²⁸ Regulations 30-40, SO GFS Regulations.

²⁹ Regulation 40, SO Employment Regulations; Regulation 45, SO GFS Regulations.

powers that entail litigation. Unlike the Equality Authority, it can initiate applications for judicial review (see Chapter 4.5).

We revert to the powers and functions of the Commission and Authority, and consider the technical processes involved in lodging a complaint in greater detail in the body of the report. The following section provides a brief account of the forums for hearing discrimination cases in both jurisdictions.

1.3.3 Forums of Redress

As noted above, the Equality Tribunal is the Republic's primary forum for redress under equality law. It comprises the Director of the Equality Tribunal, Equality Officers and Equality Mediation Officers.

Complaints of discrimination are referred to the Tribunal using standard forms. Strict time limits apply to claims under both the ESA and EEA, and equal status claims are subject to a further hurdle in that written notification must be forwarded to the goods or services provider within two months of the alleged discriminatory event (see Chapter 3.3.2). Decisions issued are legally binding but unlike court proceedings, all Tribunal hearings are conducted in private, no legal costs are payable, and the procedures adopted are designed to facilitate self-representation.

The investigations conducted by Equality Officers differ from traditional court processes in another important respect: an Officer need not rely exclusively upon the facts introduced by the parties in arriving at a decision: "The inquisitorial model means that the pursuit and defence of a claim is not wholly dependent on the ability and capacity of the individual litigant to marshal relevant evidence and present complex legal arguments" (Barry 2004, p.16).

The Tribunal offers mediation as an alternative to investigation of claims.³⁰ Mediation does not involve written submissions and aims to facilitate the parties to reach a confidential and legally enforceable resolution.

Ordinary courts also play a significant role in ROI equality law, dealing with certain cases from the outset and others on appeal: From 2004 discrimination claims concerning licensed premises are heard by the District Court under the Intoxicating Liquor Act 2003.³¹ Employment claims on the gender ground are also treated exceptionally: they may be brought before either the Tribunal or the Circuit Court.³² An appeal lies to the Labour Court³³ for EEA claims and to the Circuit Court for ESA cases.

There is no equivalent to the Equality Tribunal in Northern Ireland. The forum for redress depends on whether the complaint is employment-based or not: If the former, the complaint is dealt with by the Industrial Tribunal system.³⁴ Complaints must be made within three months of the act of discrimination,³⁵ unless the Tribunal determines that it is 'just and equitable' to allow a later claim.³⁶ The position is complicated by the Dispute Resolution Regulations (NI) 2004 which, in

³⁰ Section 78 EEA; Section 24 ESA.

³¹ Prior to the coming into effect of Section 19 of the Intoxicating Liquor Act 2003 on 29 September 2003, the Equality Tribunal adjudicated discrimination cases involving licensed premises. Section 19 transferred this jurisdiction to the District Court. From a resources standpoint it should be noted that recent years have also witnessed an *expansion* of the Tribunal's remit: Prior to 18th July 2004 complaints of discriminatory dismissal or dismissal arising from victimisation were referred to the Labour Court. Under the Equality Act 2004 all such complaints are subject to the jurisdiction of the Equality Tribunal.

³² Section 77(3) EEA. The exceptional treatment of sex discrimination claims is traceable to European Court of Justice decisions concerning levels of awards and the right to an effective judicial process under Article 6 of the Equal Treatment Directive (Bolger and Kimber 2000, pp.424-427.)

³³ Section 83 EEA. See further: <http://www.labourcourt.ie/>

³⁴ Religious discrimination cases are heard by the Fair Employment Tribunal, which has marginally wider powers than the Industrial Tribunals. The system is administered by the Office of Industrial Tribunals and the Fair Employment Tribunal (OITFET) (<http://www.employmenttribunalsni.co.uk/>). Tribunal procedure is subject to the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005, which are based on the Industrial Tribunals (Northern Ireland) Order 1996.

³⁵ Regulation 41(1)(a), SO Employment Regulations.

³⁶ Regulation 41(3), SO Employment Regulations.

most cases, require a complainant to go through an internal grievance procedure before a tribunal application can be made (Chapter 2.4.6). The time limit can be extended to allow this to occur.

It is now typical for Tribunals to conduct case management hearings at a relatively early stage in the process to clarify jurisdictional points and provide orders for the management of the application. No fees are payable but a claimant may be required to make a deposit of £500 if, as a result of pre-hearing review conducted by a chairman sitting alone, the Tribunal comes to the view that the case has no prospects of success. Costs are not generally awarded against the losing party (OITFET 2005a, p.35).

Hearings are generally held in public, although case management hearings are held in private. There is no equivalent in NI to the Employment Appeal Tribunal in Great Britain. Hence appeals from the Tribunals are made directly to the Court of Appeal for Northern Ireland.

Cases under the SO GFS Regulations and those involving further and higher education (FHE) under the SO Employment Regulations are heard by the County Court. A significant procedural difference here is that the time limit for FHE and GFS cases is six months.³⁷ Legal aid is available for representation at the hearing and costs are awarded against the losing party.

1.3.4 Sexual Orientation Ground Cases

In NI, eighteen sexual orientation discrimination claims were registered with the Tribunal Office between April 2004 and March 2005. Eleven are on file for the subsequent year, April 2005 to March 2006. To date there have been three Tribunal promulgations under the ground, all to the effect that the complaint had been withdrawn (OITFET 2006). Consequently as of yet there are no legal precedents in the form of Tribunal or County Court judgments under either the

employment or GFS laws. There has however, been one important Tribunal decision at pre-hearing review: In *Brian Lacey v University of Ulster*³⁸ the University argued that the complainant had no prospects of success as his complaint was not about discrimination on grounds of *his* sexual orientation. However, the Tribunal concluded that 'on grounds of sexual orientation' in the SO Employment Regulations could include a scenario in which the complainant had indicated on an application form for promotion that his research interests included 'Homosexuality in Ireland'. The claimant was assisted by the ECNI.

Many complaints the Commission assists are resolved prior to hearing. For example over the 2005-2006 period fifty-eight of the sixty-four resolved cases involved pre-hearing settlements (ECNI 2006b, p.5). Settlements are frequently reached on "terms which promote equality of opportunity and eliminate discriminatory practices" (O'Neill 2004, p.21) while also securing redress for the individual complainant: the Employment Development Division liaises with employers to implement the agreed changes in policy and practice. The first SO ground case supported by the ECNI was settled in May 2005 (ECNI 2007a, p. 47). This case, *Hindley-v-Fanin Health Care Ltd*, involved an employer's responsibility for dealing with derogatory and homophobic remarks directed at a gay employee. A second harassment case was settled in March 2006 again with Commission assistance (*ibid.*, p.48). In *Reid-v-Gareth Feehily and Next plc*, a complaint was brought against both the employer and an individual employee in relation to homophobic "banter" directed at a gay employee. Significantly both claims resulted in monetary awards, in the amount of £6,000 and £5,000 respectively, along with remedial terms aimed at improving equal opportunities within the respondent organisations. ECNI policy diverges from that of the Equality Authority in one significant respect: "The Commission will normally publicise decisions and settlements secured under its auspices with the aim of

³⁷ Regulation 41(2), SO Employment Regulations, Regulation 46(1)(a), SO GFS Regulations.

³⁸ Case Ref: 970/05IT *Lacey v University of Ulster*, 05/01/07.

educating potential applicants and respondents as to their respective rights and responsibilities” (ECNI 2007b, p.8).

In the ROI SO ground claims have been possible within the general field of employment since October 1999³⁹ and in relation to the provision of goods and services, accommodation and education from the following year. Annual reports issued by the Equality Authority supply a comprehensive picture of the volume of cases processed by the Legal Section in any given year. In a similar vein the Equality Tribunal’s reviews enable year-by-year assessments of claims that proceed to mediation or investigation. As the Equality Authority reiterates in its Annual Reports low levels of cases on the SO ground are a consistent pattern (see Appendix B).

The first substantive decisions on the ground were issued in 2004 (Equality Tribunal 2005b, p.45).⁴⁰ Of the four cases dealt with that year, one was an ESA claim, the others were under the EEA. In 2005 there were two decisions, one under each law. There were no Tribunal decisions in 2006 (Equality Tribunal 2007b, p.90) however, March of that year saw the first District Court finding of discrimination on the SO ground under the Intoxicating Liquor Act 2003 (Equality Authority 2007, pp.30-31).⁴¹

The two successful ESA cases taken to date involved straightforward claims of direct discrimination in the context of accessing services. In *O’Regan v Bridge*

³⁹ Employees have been protected against dismissals based on sexual orientation since the entry into force of the Unfair Dismissals (Amendment) Act 1993. As such the UDA falls outside the remit of this study. The legislative gap filled by the EEA 98 is illustrated by the case of *McAnnellan v Brookfield Leisure Limited* (EEO12/93): The claimant was allegedly dismissed because of her sexual orientation. However she was unable to pursue a case under the Unfair Dismissals Acts, since she had not completed the necessary one year’s continuous service. Similarly, her claim before the Labour Court under the Employment Equality Act 1977 failed because that legislation did not prohibit SO ground discrimination.

⁴⁰ There were no cases on the sexual orientation ground during 2001 (Equality Tribunal 2002b, p.8), while the subsequent year witnessed one decision, which did not concern the merits of the claim since the Equality Officer did not have jurisdiction: *A Complainant v a Company*, DEC-E2002-036 (similarly Labour Court, *A Retail Company v a Worker*, EED014)

⁴¹ *McGuirk and Twomey v Malone’s Public House*.

*Hotel*⁴² the Tribunal found that the complainant had been discriminated against when he was asked to leave a hotel. *A Female v A Publican*⁴³ concerned a refusal to serve a lesbian woman in a pub. In both cases the respondents had maintained that the individuals were denied access to services for reasons other than their sexual orientation. However, on the basis of the total evidence considered by the Tribunal, including witness statements, the Equality Officer in each case was satisfied that the complainants were treated less favourably on the SO ground.

As of October 2007, only one claim of discrimination in employment has been upheld: The complainant in *Piazza v Clarion Hotel*⁴⁴ supplied strong evidence to support his claim of harassment, including an e-mail and several incidents involving derogatory remarks. In the course of her decision the Equality Officer reiterated that intention and the quality of the relationship between employees was irrelevant in determining whether harassment had occurred: “any interpersonal difficulties between the complainant and his colleagues do not excuse them harassing him on a ground protected by the Act.” The Equality Officer found that the employer had failed to take adequate measures to prevent the harassment occurring, or to deal appropriately with the incidents that occurred. She awarded compensation of €10,000 for harassment, distress and breach of rights under the Act and also ordered the employer to revise its HR policies and procedures to accord with the requirements of the Act and to provide a training seminar for management and staff within three months to brief them on the EEA.

In a 2004 EEA claim, *HR v TG*⁴⁵, the Equality Officer found that the complainant had not been subjected to less favourable treatment, in the form of disciplinary measures, because of her lesbian relationship with a colleague. On the basis of

⁴² DEC-S2004-037.

⁴³ DEC-S2005-026.

⁴⁴ DEC-E2004-033.

⁴⁵ DEC-E2004-053.

an amount of evidence to the effect that the complainant's performance at work was unsatisfactory, the Equality Officer concluded that a heterosexual worker with a comparable record would have been treated in the same manner. Similar reasoning resulted in failure to establish a claim of harassment in a 2005 case.⁴⁶

Many of the cases processed by the Legal Section of the Equality Authority are not ultimately dealt with by the Tribunal (see Chapter 2.3.2). The claimant may, for instance, decide not to proceed, the claim may be resolved informally or the respondents may agree a settlement prior to hearing. Each year a number of cases on the SO ground conclude in this manner. For example, two employment cases were the subject of settlements in 2003. In the first settlement under the EEA an apprentice solicitor was not allowed to return to work following sick leave because he was HIV positive. The agreement reached was to the effect that the complainant could return to work and the matter would be treated confidentially. The other concerned a participant on a Community Employment Scheme who was harassed by continually being asked questions about his sexual orientation. A sum of €400 compensation was agreed upon (Equality Authority 2004, p.29). A settled ESA claim in 2003 (Equality Authority 2004, pp.32-33, 41) attracted a degree of publicity. The action, taken against the Department of Social and Family Affairs, resulted in access for a gay couple to the Free Travel Scheme on a par with their opposite-sex counterparts. As noted in Chapter 3 the outcome of this case was effectively reversed by legislation.

In 2002 a claim against a licensed premises, which involved the SO ground and that of family status, was settled through the payment of compensation (Equality Authority 2003, p.30). That year another ESA claim, this time against an insurance company, was resolved when the company accepted evidence of a gay couple's financial interdependence for the purpose of providing a joint life annuity pension (ibid., p.31). The Equality Authority supported a 2006 complaint under the ESA that resulted in a government decision to pay an adult dependent

⁴⁶ *Mr. X v A Supermarket* DEC-E2005/019.

allowance to the partner of a terminally ill gay man (Equality Authority 2007, p. 30).

Among the small number of SO employment cases on file with the Equality Authority, harassment, general working conditions, dismissals, and access to employment crop up consistently (Appendix B, Table C). With respect to the area of goods, services, accommodation and education, access to licensed premises features strongly as does direct discrimination on the part of public bodies (Appendix B, Table D). There have been no case files concerning indirect discrimination to date.

1.4 The Socio-Cultural Context

1.4.1 The Specificity of LGB Experience

LGB people are subject to particular forms of prejudice, frequently referred to as 'homophobia' and 'heterosexism'. For the purposes of this report we adopt the definition of those terms advanced by the Ontario Human Rights Commission (2006, p.2):

“Homophobia” is often defined as the irrational aversion to, or fear or hatred of gay, lesbian, or bisexual people and communities, or to behaviours stereotyped as “homosexual”. It is commonly used to signify a hostile psychological state in the context of overt discrimination, harassment, or violence against gay, lesbian, or bisexual people.

“Heterosexism” is used to refer to the assumption that everyone is heterosexual. This definition is often used in the context of discrimination against bisexual, lesbian and gay people that is less overt, and which may be unintentional and unrecognized by the person or organization responsible for the discrimination. It can also be useful in understanding and identifying some kinds of institutional or societal bias, although homophobia may also be at play.

Both forms of prejudice have implications for LGB visibility. In order to avoid the adverse consequences that may arise in a homophobic environment, many LGB

people are cautious about disclosing their sexuality. Deciding not to 'come out' is often used as a means of self-protection, yet silence and invisibility is a key dynamic in sexuality-based oppression. Visibility then plays a complex and contradictory role in the lives of LGB people (Sedgwick 1990; Seidman 2003). Sedgwick (1990, pp.71-2) aptly describes the demarcation between being in or out of the 'closet' as the 'defining structure' for lesbian and gay inequality.

'Coming out' is not a one-off event but a process, which is time and context-dependent. There are also degrees of invisibility. According to Yoshino (2001) various categories of LGB people try to avoid homophobia by way of three strategies: 'conversion', which entails adopting a straight life, including heterosexual relationships, 'passing', where LGB people pass themselves off as heterosexual and 'covering', where LGB people are relatively 'out' about their sexual orientation but in ways which involve assimilation into a predominantly straight society: "Covering means the underlying identity is neither altered nor hidden, but is downplayed. Covering occurs when a lesbian both is, and says she is, a lesbian, but otherwise makes it easy for others to disattend her orientation" (ibid., p.772).

As detailed in Chapters 2-3 the question of visibility, although arguably not confined to the SO ground⁴⁷, greatly increases the personal costs associated with the pursuit of a claim. It is also important to appreciate that 'coming out' as lesbian, gay or bisexual is not confined to 'public' spaces: Walters (2000, p.49) argues that "the very place of family is often fraught for lesbians and gay men". Estrangement from family and friendship networks has a profound effect on those in situations of high dependency on others, such as children and younger people (ILGA Europe 2006).

⁴⁷ Many disabled people may face similar dilemmas (cf. Corbett 1994; Rodis, Garrod and Boscardin 2001).

Discrimination prohibitions, including those that target sexuality-based harassment, tackle certain manifestations of homophobia but have very little purchase on heterosexism. The latter is perhaps best dealt with through various promotional campaigns as well as through positive equality duties such as those that apply in NI. While combating openly homophobic behaviour may seem more urgent, heterosexism contributes to organisational cultures in which people cannot 'come out' (Colgan et al 2006) and are effectively forced to adopt the strategies catalogued by Yoshino (2001).

1.4.2 Intersectionality and Multiple Discrimination

While this research focuses on the sexual orientation ground, it adheres to an integrated but differentiated approach to the forms of discrimination faced by LGB people. Members of this minority group share the harms experienced as a result of homophobic and heterosexist practices, yet the group is also internally diverse. LGB individuals have different gender identities and abilities, they vary in age, ethnicity and other 'attributes' protected as grounds of discrimination under the applicable legal provisions (Loudes 2003; National Disability Authority 2005; Rainbow Ripples and Butler 2006; Zappone 2003).⁴⁸ Indeed for several writers, sexual identity oppression is a form of, or at least closely tied to, gender-based oppression (Connell 1995; Kendall and Eyolfson 1995). In any event lesbian and bisexual women and girls experience misogyny as well as homophobia and may face greater pressure to remain invisible (Linc 2006; Loudes 2003). LGB youth are especially vulnerable by virtue of their status as children (ILGA Europe 2006; MacManus 2004). These difficulties are alleviated somewhat by the possibility of bringing multiple ground discrimination claims in both jurisdictions.

However, not all material factors are captured by the existing legislative framework: for example, socio-economic status is not recognised as a ground in

⁴⁸ The categories or grounds of discrimination approach adopted under anti-discrimination statutes fails to capture the complex manner in which various inequalities interact and shape the experiences of individuals that belong to more than one minority group (Beger 2000; Crenshaw 1989; Hannett 2003; Iyer 1993). Consideration of this issue falls outside the scope of this report.

either jurisdiction, yet social class is routinely used as a basis for discriminating against people (Kilcommins et al 2004) and is a major factor affecting one's capacity to litigate (Genn 1999; Gogan 2005).

1.4.3 Existing Research on LGB People

A growing body of literature describes and critiques the social position of LGB people in NI and the ROI. The vast proportion of this research is qualitative in nature and reveals that while the overall trajectory is positive significant obstacles impede the realisation of equality. A key issue in both jurisdictions, as elsewhere (McManus 2003; Equalities Review 2007, p.140), is the dearth of reliable quantitative data on LGB populations (Equality Authority 2002a; Working Group on Domestic Partnership 2006, Appendix 4).⁴⁹ The ROI Working Group on Domestic Partnership (ibid.) points to several difficulties in compiling such information including the fact that the census does not collect data on sexual orientation as such, and reluctance of many people to disclose their sexual orientation in official surveys. UK data recording those who identify themselves as LGB or report same-sex partners over recent periods generally suggest estimates of 2 to 4 per cent. (ibid.) In light of the factors mentioned above however, this is likely to be an under-estimate of the actual population of LGB people.

The Options Paper presented by the Working Group on Domestic Partnership (2006) includes a chapter on the social context for same sex couples, which comprehensively charts the situation and experiences of LGB people. It emphasises that despite considerable progress “LGB people continue to face significant challenges to participating on an equal basis in society” (ibid., p.15).

⁴⁹ The Republic's most recent Census form did not include questions on sexual orientation, although it was possible for cohabiting persons to indicate that they were partners. Such data does not of course count persons that are not cohabiting.

A number of publications have addressed the position of young LGB people in the ROI. The experiences of LGB students and pupils were explored by Barron (1999) and in a report by Gay HIV Strategies (2000), which documented difficulties faced by that group including harassment, diminished self-esteem, early school leaving, fear and even suicide. Such findings have been endorsed by subsequent studies (MacManus 2004; Norman et al 2006). Research published by Dublin City University “reveals a picture of school ethos that can be described as both heteronormative and homophobic in nature” (Norman et al 2006, p. 119). 79% of the teachers surveyed in second-level schools reported witnessing verbal homophobic abuse (ibid.). In contrast the most recent Annual Report of the Equality Authority (2007) includes only one casefile on the SO ground in relation to educational establishments.

Johnny, an action based peer support group for gay and bisexual men published its *2006 LGBT Hate Crimes Report* based on data derived from a survey of over 900 individuals based in Dublin.⁵⁰ It revealed high levels of violence directed at gay and bisexual men coupled with low reporting rates. Positive initiatives in the field include outreach activities on the part of An Garda Síochána⁵¹, and the appointment of Garda Gay and Lesbian Liaison Officers at several sites around the country.⁵²

One of the few pieces of research dedicated specifically to lesbian women identified significant gaps in health service provision for that constituency, which were traceable in part to heterosexist assumptions and homophobic attitudes (L.inc 2006). The Gay and Lesbian Equality Network (GLEN)⁵³ has contributed to and published numerous reports spanning issues such as health, education, local development, and LGBT youth. A study conducted by GLEN and Nexus Research in 1995 entitled *Poverty - Lesbians and Gay Men: The Economic and*

⁵⁰ <http://www.johnny.ie/>

⁵¹ <http://www.glen.ie/press/garda.html>

⁵² <http://www.garda.ie/angarda/gay.html>

⁵³ See further <http://www.glen.ie/>

Social Effects of Discrimination, drew out the socio-economic impact of discriminatory practices based on sexual orientation and charted significant employment-related problems. We can perhaps extrapolate from more recent UK-based studies that LGB employees based in the ROI are also subjected to high levels of discrimination and harassment (TUC 2000; Colgan et al 2006).

As discussed further in Chapter 4, Equality Authority initiatives have acted as a catalyst for current activity on relationship recognition. Several reports dealing with the position of same-sex couples were published in 2006 (ICCL 2006; Law Reform Commission 2006; Walsh and Ryan 2006; Working Group on Domestic Partnership 2006). The Working Group on Domestic Partnership highlights the inequalities that arise where: “Same sex couples do not have the option of taking on the benefits and legally enforceable obligations available through civil marriage” (2006, p.19). As of October 2007, the High Court judgment in *Zappone and Gilligan v The Revenue Commissioners*⁵⁴ is under appeal. The case, which concerns the legal recognition of a same-sex marriage entered into in Canada, has further highlighted the unequal position of LGB families.⁵⁵ Significantly, the current Programme for Government contains a commitment to legislating for civil partnerships.⁵⁶

Material concerning the LGB population in Northern Ireland has also proliferated in recent years (Rainbow Project 1998, 1999; NIHRC 2001; LASI 2002). For many LGB people it has been difficult to come out fully because of potential repercussions for their families, work, and life in general (LASI 2002; Queerspace 2002). As with their ROI counterparts, LGB individuals have experienced harassment, abuse and assault (Jarman and Tennant 2003). An ECNI-commissioned survey on equality awareness amongst the general public

⁵⁴ High Court, 14 December 2006.

⁵⁵ <http://www.kalcase.org/>

⁵⁶ <http://www.taoiseach.gov.ie/eng/index.asp?docID=3493> (accessed July 23rd 2007).

(Research Evaluation Services and Social and Market Research 2006) showed that negative social attitudes towards the LGB population are still prevalent.

Further NI research details homophobia in the workplace and in everyday situations: McNamee (2006) found that 41.1% of those surveyed had experienced homophobia when accessing goods, facilities and services and that 36% had experienced homophobia when visiting bars. Research has also shown that LGB pupils are frequently bullied and harassed at school because of their sexual orientation. One study reported that 72% of lesbian, gay and bisexual adults reported a regular history of absenteeism at school due to homophobic harassment (Loudes 2003; Breitenbach 2004).

According to research conducted by Hansson, Hurley Depret and Fitzpatrick (2007) LGB individuals believe that there are barriers between LGBs and public bodies. It also reports a widespread belief in the strong presence of homophobia and heterosexist attitudes in society more generally. The main areas in which individuals had experienced problems were in work, the health sector and education. The research also found that individuals had not formally complained about the treatment they had received. There was however, some acknowledgement of changes in attitudes and responses to problems associated with people's sexual orientation within public services.

1.4.4 Themes Raised by Research Participants

Participants in the empirical component of this research highlighted a number of recurrent issues as providing an important context for understanding how LGB individuals perceive and negotiate equality legislation. The first theme is the pervasiveness of homophobia. Homophobia was said to impact on every domain of the life of a lesbian woman, gay man or bisexual person, including the extent to which they are 'out' and their confidence and support in taking a legal action. It was agreed that the social environment in NI and the ROI generally is still such that people do not feel comfortable identifying as LGB, even in confidence.

Moreover, the social inequalities that generate reticence to openly identify as LGB can impede the development of systems to address homophobia on an organisational basis. For example, a trade union representative underscored challenges in measuring how members perform in the promotion of equality. Their experience has been that collecting data on sexual orientation is especially challenging given the wider socio-cultural environment.

Secondly, in the ROI, the absence of a legal framework for LGB relationships and family forms was consistently described as a significant element of a heterosexist and homophobic culture. For LGB individuals the resultant legal vacuum causes uncertainty as to whether they are entitled to work-related benefits such as parental leave, various forms of social protection, as well as general services including assisted reproductive technology. In turn such uncertainty was said to impede the pursuit of claims. There is a consensus that should legal recognition for LGB families be secured, it would carry with it a status from which would flow a host of positive changes. This would include feeling more secure in invoking equality legislation.

Finally, the overlapping of gender and sexual orientation issues for transsexual individuals was raised throughout the research process. While relevant case law has established that transsexual issues fall within the ambit of the sex or gender ground⁵⁷, it was argued that the transsexual community encountered common inequalities, including those concerning relationship recognition. In this context EA interviewees noted the recent growth of EA casefiles involving complaints of discrimination by transsexual people based in the ROI. While detailed interrogation of these general issues is beyond the scope of this project, they frame the overall context in which the research is conducted.

⁵⁷ The foundational case is that of the European Court of Justice in *P v S and Cornwall County Council* Case C-13/94 [1996] E.C.R. I-2143. For an account of subsequent developments see Bell 2004.

Chapter Two: Access to Rights: Identification and Pursuit of Complaints

People have to know that they have been harmed, they have to blame someone other than themselves, they have to know how to pursue a remedy, they have to have resources to pursue that remedy, and the benefits that they expect to gain from winning have to outweigh the expected costs. (Handler 1993, p.240)

2.1 Introduction

This Chapter addresses the formative stages of litigation on the SO ground. It highlights current sources of information and support as well as the obstacles that arise during the process of recognising that a harmful experience may be a valid legal grievance. Employing the framework developed by Felstiner et al. (1981) to describe the course of disputes (Chapter 1.2.2), it explores the conditions operative in NI and ROI from the identification of a potential breach of equality law to the lodgement of a complaint. A significant theme is the factors specific to LGB people that militate against accepting and understanding that one's rights have been violated in the first place and ultimately proceeding to seek redress.

2.2 'Naming'

The process of acknowledging being a victim of discrimination – admitting it is happening or has happened and coming to terms with it – was described as a painful one by research participants. It would appear that the 'naming' stage identified by Felstiner et al (1981) is a difficult one for LGB individuals. A study conducted in 1993 by an Australian NGO, Gay Men and Lesbians Against Discrimination (GLAD), found that gay men in particular were likely to regard oppressive conduct as 'just the way things were' or 'things that happened' (cited in Chapman 1995). According to GLAD, because of their awareness of gender

oppression lesbian women were more inclined to name an experience as discriminatory (ibid., p.329).

Interviewees for this study reported that because homophobia is pervasive, LGB people must invoke a range of measures to withstand its impact on their lives. Many participants referred to the situations in their places of work as intolerable. In all of the NI cases where employees had experienced difficulties they had changed jobs. Two people decided to resign despite offers of relocation. A trade union representative drew attention to the fact that, while it might be relatively easy to move from one low-paid post to another, in some sectors alternative employment could be difficult to source.

A common coping strategy is to tolerate or desensitise oneself to dubious practices in order to be able to 'function' in various contexts whether it be educational, work or social settings. One LGB representative described it as follows:

A level of persecution is tolerated or compromise is made, for peace, to cope. Constant fear for some people, watching their backs, afraid of hatred. Your focus can sometimes be just getting through the day.

A union representative echoed those comments:

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 was a black person, would be considered racist abuse, but if you're gay, it's like; can you not take a joke?

Other strategies used either alone or in combination include not 'coming out', working independently or being self-employed, and being selective about where to socialise.⁵⁸ Abandoning that position to identify an incident or policy as discriminatory is challenging as it may entail acknowledging a whole host of discriminations that were previously unnamed. An individual who had taken a

⁵⁸ Similar strategies were adopted by the LGB workers surveyed in Colgan et al's (2006, ch. 7.4) UK study.

case described this as 'internalised homophobia' and detailed how the imperative to remain invisible by not claiming one's rights had asserted itself continually throughout the proceedings:

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.

For Chapman (1995, p.330) while blatant incidents such as firing an LGB employee are likely to be 'named' as discriminatory, lesbians and gay men may expect and accept oppression in the form of self-censorship.

Assisting LGB people to identify discriminatory practices and then consider taking action requires extensive promotional work on the part of specialised equality bodies, acting in concert with LGB groups and the social partners. Any measures taken should address the harms of heterosexist environments as well as the types of conduct that are actionable under equality law. Chapter 4 charts relevant initiatives undertaken by the ECNI and EA, and the concluding Chapter suggests how the general area of promotion and development might be further attuned to SO issues.

2.3 Rights Realisation

2.3.1 General Awareness of Rights

Appropriate knowledge is required to transform a harmful experience into one that is understood as a possible violation of a legal right (Genn 1999). Individuals may not know that a particular practice amounts to unlawful discrimination, be unaware of various avenues of redress, or what making a complaint will entail in terms of costs, confidentiality and so on (Cohen et al 2006, p.58).

According to a recent survey that canvassed knowledge of rights under ROI equality law, a fifth of people who reported experiencing discrimination had no understanding of such rights. Over half stated that they understood a little while

only 27.6% felt that they understood a lot (Central Statistics Office 2005). Persons at work (32.7%) and those from the age groups 25-44 (30.1%) and 45-64 (30.6%) were most likely to report that they understood a lot about their rights.

A study of sex equality litigation across the European Community concluded: “Without a doubt, the most important explanation for lack of equality litigation in any of the Member States is a lack of awareness of equality principles and the scope of (EC) equality law” (Blom et al 1995, 3.1.1). The more recent consultation process that followed publication of the European Commission’s *Green Paper on Equality and Non-discrimination in the European Union* (2004) identified the three most important “remaining obstacles to the effective implementation of European anti-discrimination legislation” as: Continued existence of discriminatory attitudes and behaviour (67.5%); National implementing legislation incomplete (59.1%); Lack of information/awareness about rights and obligations (47.6%).⁵⁹

2.3.2 Sources of Advice and Assistance

2.3.2.1 Introduction

Since the form of advice or assistance required in discrimination cases is not purely technical but encompasses social and emotional supports, a range of stakeholders can be expected to play discrete roles during the ‘rights realisation’ phase. Information and assistance may come from the EA or the ECNI (a central concern of this project), trade unions, LGB NGOs, law centres, legal professionals, citizens’ information or advice centres, and from informal sources (Williams et al 2003). Generic advice providers often do not have specialist equality expertise. It is therefore essential that the EA and ECNI continue to share knowledge of equality law and practice with other advice providers. Effective partnerships with existing agencies build capacity at local levels and

have a significant “multiplier effect” (Klug and O’Brien 2004). We discuss this approach of underpinning the work of the specialised bodies with an infrastructure of alternative sources of advice and assistance, as a ‘community legal services strategy’.

2.3.2.2 Specialised Equality Bodies

Both the ECNI and Equality Authority provide information on equality law directly to the public. The Equality Authority has an information function in relation to the EEA, the ESA, and several other employment rights laws.⁶⁰ It carries out that task through various channels, including its website, direct responses to calls to the Public Information Centre, media work, and through various promotional materials such as booklets, videos and DVDs that are available on request and circulated through Citizens Information Centres and libraries. The Communications section engages in public awareness campaigns and makes presentations to various audiences (Equality Authority 2006b, p.71). Relevant campaigns, advocacy programmes and development activities are discussed in Chapter 4.

With respect to potential complaints the Public Information Centre provides general information on the legislation and the applicable criteria for assistance. In 2006 the sexual orientation ground was the second highest area of inquiry concerning the EEA (Equality Authority 2007, p. 72). The Public Information Centre (PIC) will usually only refer cases that appear to come within the current criteria to the EA’s Legal Section. Cases are then assigned to a solicitor who will bring the claim to the stage where an application for representation will be considered (Equality Authority 2003, pp.34-35).

⁵⁹ http://ec.europa.eu/employment_social/fundamental_rights/policy/aneval/green_en.htm

⁶⁰ The Parental Leave Act 1998, the Maternity Protection Acts 1994 and 2004, and the Adoptive Leave Acts 1995 and 2005 (Section 39 EEA). It is also charged with keeping that body of legislation under review and where appropriate making proposals for its amendment.

Such applications arise only in a minority of cases: many claims are filtered out after referral to the Legal Section either because the involvement of the Equality Authority helps to bring about an early resolution of the matter, or the claim is settled to the satisfaction of the claimant and so withdrawn. Further reasons for not proceeding include receipt of advice to the effect that the claim is unlikely to succeed, delays, and the possibility of incurring costs (ibid.). The nature and scale of assistance provided can stretch from fairly rudimentary advice to representation before a tribunal or court.⁶¹ Legal services include, “the provision of caselaw precedent, legal advice, advice in relation to the running of the case, advice on mediation, legal representation” (Equality Authority 2003, p.33).

The Promotion and Education Division of the ECNI is responsible for promoting awareness of the Commission and Northern Irish equality legislation. At present four teams contribute to the Division’s advice function. The Information team runs the Commission’s general information services including the website, resource centre, inquiry line, corporate advertising and promotion, and publications. The team also provides general awareness talks in the education sector and others. A variety of campaigns, training and awareness programmes, many in partnership with other organisations, are also conducted (see Chapter 4). Codes of Practice and guidance materials further advance the ECNI’s advice and assistance functions.

If a request for advice from an individual is legal in nature, it goes to a Discrimination Advice Officer who gives preliminary advice and information. If an application for assistance is made, the complaint is passed on to a Legal Officer who brings the application to a stage at which the application is considered by a committee of Commissioners, the Legal Funding Committee (ECNI, 2006b).

⁶¹ Decisions to assist and level of assistance provided are reviewed at regular intervals (Equality Authority 2007, Appendix 5).

2.3.2.3 Citizens Information Centres and Advice Bureaux

Citizens Advice Bureaux (CABx) are operative in Northern Ireland.⁶² CABx in NI are now organised, as with CABx in England, Scotland and Wales, into Citizens Advice (CA). It is a registered charity, as is each individual CABx. CA has twenty-eight main offices across the jurisdiction, and provides advice on rights and responsibilities including those relating to public services from over one hundred and twenty other outlets. CA represents members of the public at social security appeal tribunals. It has developed a training package to assist experienced tribunal representatives to gain recognition of their work and also provides the necessary skills for those who wish to get involved in this rewarding area. This course, 'Social Security Advocacy' is accredited by the University of Ulster and looks at how to enhance knowledge and understanding of the jurisdiction and procedures of tribunals. CA has published an equality and diversity strategy, which sets out its aims to become a first point of contact for discrimination advice in partnership with others, and to make equality and diversity part of all it does (Citizens Advice 2006; Cohen et al 2006). In Scotland, there are extensive links between the equality bodies and skilled advisers in the CABx. However this has not been replicated in NI and the CABx rarely become involved in equality cases. CAB staff frequently attend ECNI seminars and events. However there is no specific training link between the bodies. To our knowledge there have not been any formal contacts between CABx in NI and the LGB community. In the experience of a CA representative individuals do not approach the service directly with LGB issues, rather it would materialise after a while that sexual orientation discrimination was relevant.

The equivalent agencies in the Republic are known as Citizens' Information Centres (CICs) and are also organised on a regional basis.⁶³ There are Centres at approximately one hundred locations and those outside county towns and cities operate on a part-time basis. Members of the public can call into the

⁶² <http://www.citizensadvice.co.uk/>

⁶³ See further: http://www.citizensinformationboard.ie/citizens/citizens_centres.html

Centres or make contact by phone or e-mail. CICs fall under the remit of the Citizens Information Board (CIB)⁶⁴ a statutory agency that is tasked with supporting the provision of information, advice and advocacy services to members of the public on a wide range of social and civil services (Comhairle 2006). As well as the CICs the Board operates the Citizens Information Phone Service and an online Citizens Information Database.⁶⁵

The CIB runs outreach services connected directly to Citizens Information Centres. These services are typically located with other service providers in community centres, family resource centres, hospitals, nursing homes and prisons (Comhairle 2006, p.23). Targeted advice sessions for LGB people have not been held and there is no national data available on the profile of CIC clients.

According to the CIB “advocacy is a means of empowering people by supporting them to assert their views and claim their entitlements and, where necessary, representing and negotiating on their behalf” (Comhairle 2006, p. 34). While all information providers offer some advocacy services such as letter writing and making phone calls on behalf of clients that capacity is being enhanced through a number of Advocacy Resource Officer (ARO) pilot projects (ibid., pp.34-35).

Under the auspices of its Outreach Strategy, the Equality Authority has developed a partnership with CIB and the Citizens’ Information Centres. A training module on equality specifically for CIC staff members was first devised and delivered to approximately eighty people in 2000 (Equality Authority 2001, p.15). The EA now has an agreement with CIB to provide regular staff and volunteer training on equality law issues and this includes LGB material. Each year courses are held at various locations throughout the country. In addition specialist clinics conducted by legal staff of the Equality Authority are held on a

⁶⁴ See the Board’s website: <http://www.citizensinformationboard.ie/>. The agency was formerly known as ‘Comhairle’.

⁶⁵ See <http://www.citizensinformation.ie/>

monthly or eight-weekly basis at venues in Cork and Sligo (Equality Authority 2002b, pp.14-15; 2003, p.57; 2006b, p.106; 2007, p.88). The initiative has also led to the development of an accredited course for advocates, run by the Sligo Institute of Technology in partnership with the EA and the CIB (Equality Authority 2006b, p. 108; 2007, p.88).

2.3.2.4 Statutory Legal Aid Bodies

The Legal Aid Board (LAB) administers the Republic's civil legal aid and advice scheme through thirty-three full-time and twelve part-time offices or law centres throughout the jurisdiction. It also operates a private practitioners scheme.⁶⁶ Legal advice is any written or oral advice provided by a solicitor or barrister⁶⁷, whereas legal aid involves the services associated with representation in civil proceedings.⁶⁸ As is the case in many other countries legal advice and aid is classified as a form of welfare provision (Harlow 1999; Whyte 2005b) and relies on a means test, which is difficult to satisfy for persons in full-time paid employment. Persons seeking legal services must apply using designated forms and will see a solicitor within approximately four months (Legal Aid Board 2006, p.18).

Family law matters comprise the bulk of the LAB's work (FLAC 2005; Legal Aid Board 2006, p.15) and while legal *advice* on equality law is technically available it is not accessed in practice. Proceedings before tribunals, including the Equality Tribunal, are not currently covered by the legal aid scheme (FLAC 2005, pp.26-28). Such coverage could be secured by way of a Ministerial Order.⁶⁹ In principle legal assistance and/or aid can be secured for equality law cases heard before *courts*, including proceedings involving allegations of discrimination against licensed premises under the Intoxicating Liquor Act 2003 or those that filter through on appeal. However, this has not been invoked to date.

⁶⁶ See generally the Legal Aid Board's website: <http://www.legalaidboard.ie/>

⁶⁷ Section 25, Civil Legal Aid Act 1995.

⁶⁸ Section 27, Civil Legal Aid Act 1995.

⁶⁹ Civil Legal Aid Act 1995, Section 27(2).

The LAB representative pointed out that the issue of which agency would be most appropriate to provide support to a complainant would have to be resolved should the legal aid scheme be extended to the Tribunal and Labour Court or be availed of in court cases. If another state body has a legal representative role then it may not be appropriate for the Board to act.

The LAB interviewee acknowledged that the Board does not have a proactive equality law agenda. While the LAB is obliged to inform the public about the services provided, lack of funding has precluded extensive advertising (FLAC 2005, pp.24-25). Measures are currently underway to address this awareness gap including “more active engagement with certain community and other groups” (Legal Aid Board 2006, p.23). Under the umbrella of that strategy the LAB could reach out to the LGB community through specific LGB content on the Board’s website; information briefings to LGB organisations; and the development of links between local law centres and LGB groups. The LAB plan to undertake a report during 2007 on unmet legal needs and this provides a forum that LGB representative organisations could use to assert their particular requirements.

Parallel debates about the availability of publicly funded legal services have taken place in Northern Ireland (Dignan 2004).⁷⁰ The Northern Ireland Legal Services Commission (NILSC) was set up as the statutory legal aid body in 2003,⁷¹ replacing the Legal Aid Department of the Law Society for NI. Its activities are centred in its offices in Belfast. It is possible to access basic legal advice on a wide range of legal issues under the legal advice and assistance scheme, also known as the ‘Green Form’ scheme. This scheme is subject to strict financial criteria and does not include representation before tribunals.

⁷⁰ See generally the website of the Northern Ireland Legal Services Commission: <http://www.nilsc.org.uk/index.asp?on=index>

⁷¹ Access to Justice (NI) Order 2003.

However legal aid may be granted 'in exceptional circumstances'⁷² in order to satisfy the 'access to justice' provisions in Article 6 ECHR. Representation can be applied for in cases under the GFS Regulations since these are heard in the ordinary courts. We are not, however, aware of any of these provisions being invoked in an equality case in NI.

2.3.2.5 The Legal Profession

The Northern Ireland Lawyers Pro Bono Unit⁷³ is a joint venture sponsored by the General Council of the Bar of Northern Ireland and the Law Society of Northern Ireland. The objective of the Unit is to provide free legal advice and representation in deserving cases where Legal Aid or other funding is not available and where the applicant is unable to afford legal assistance. The Unit has been set up as a company limited by guarantee and is registered as a charity.

Advice and representation is provided by barristers and solicitors who have volunteered to join the panel and who cover the full range of legal specialisations. Each has offered their services free of charge up to three days or twenty hours each year. The cases most likely to meet the criterion of the Pro Bono Unit will be appeals, applications for leave to appeal, judicial review applications, specific steps in proceedings, tribunal hearings and advisory work. Cases that raise a specific issue of principal or test cases are particularly welcomed. We are not aware of the Unit supporting any SO cases.

In 2005 the Bar Council of Ireland (ROI) instituted a 'Voluntary Assistance Scheme' aimed at NGOs working with communities that cannot afford legal services.⁷⁴ Significantly the scheme is not confined to legal representation but encompasses general advice and training in advocacy skills. Cousins (2005, p.8)

⁷² Article 10A of the Legal Advice and Assistance Regulations (NI) 1981.

⁷³ <http://www.barlibrary.com/about-us/ni-lawyers-pro-bono-group/>

⁷⁴ <http://www.lawlibrary.ie/>

reports that take-up of the service has been poor to date, which may be attributable to the fact that NGOs are unaware of the scheme or are inhibited because of the traditional absence of direct contact with the Bar.

Solicitors frequently represent complainants and respondents in Equality Tribunal and Labour Court proceedings. The LGB individuals and representative organisations interviewed for this project did not, however, regard the profession as a 'frontline' source of advice or assistance. Although a limited number of practitioners advertise in LGB associated media such as the Gay Community News (GCN), there is no official means of ascertaining whether a practice is 'gay-friendly' and as such this may explain why LGB individuals seem to access solicitors only after referral by another advice provider. While solicitors in private practice regularly undertake *pro bono* work, to date the Law Society of Ireland has not established a systematic approach to public interest law and litigation services (*ibid.*).

2.3.2.6 Trade Unions

For employment-related discrimination trade unions are a crucial source of advice and assistance (Colgan et al 2006, ch. 7.5). Indeed, the Equality Authority's legal assistance criteria envisage unions as a primary, if not exclusive, source of advice and ultimately representation for unionised workers (Equality Authority 2007, Appendix 5). Where a local official is not readily accessible or unreceptive a union with a national Lesbian Gay Bisexual and Transgender (LGBT) group, such as the Republic's Irish National Teachers Organisation (INTO)⁷⁵, may be a significant alternative avenue of support for LGB workers (Colgan et al 2006, ch. 7.5.6).

⁷⁵ <http://www.into.ie/lgbt/> The INTO Equality Conference, held in Tullamore Co. Offaly in March 2007, was addressed by Sheila Crowley, Chair of INTO LGBT. UNISON (GB) has a network of branch GLBT groups: <http://www.unison.org.uk/out/>

ICTU published revised guidelines for negotiators on LGB rights in the workplace in December 2003.⁷⁶ It has also published a Resource Manual on the Employment Equality Acts 1998-2004 for all trade unions containing information about the legislation, promotion of equality, enforcement, and a representation practical guide: It covers all nine grounds and breaks them down into nine separate chapters. ICTU has also established an equality committee with a remit that covers nine grounds including the sexual orientation ground. The EA also provides briefings to unions on equality law.

As well as providing advice and representation for individual members, unions frequently take part in law reform campaigns and promotional activities. For example, the main ROI-based teachers unions at post-primary level, including the Association of Secondary Teachers in Ireland (ASTI) and the Teachers' Union of Ireland (TUI), have endorsed the joint BeLonGTo/ Equality Authority Campaign on Homophobic Bullying in Schools (see Chapter 4.2.1.1).

With respect to NI, the Equality and Human Rights Committee of the Northern Ireland Committee, ICTU (NIC) deals with equality matters.⁷⁷ It meets quarterly to advance NIC's work in this area and on human rights. Members of the Committee participate in formal bilateral meetings with the two relevant statutory agencies, the ECNI and the Northern Ireland Human Rights Commission (NIHRC), to discuss issues of concern to the trade union movement and areas of joint work. ICTU (NIC) has recently set up an LGBT Committee which brings together LGBT representatives from a range of NI-based trade unions. Representatives from two NI-based trade unions referred to their help lines, which members of the respective unions can use to access advice and also legal

⁷⁶ <http://www.ictu.ie/html/publications/ictu/Gay%20&%20Lesbian%20Leaflet.pdf>
Development of the guidelines was funded by the Framework Committee for Equal Opportunities at the Level of the Enterprise, which is convened by the Equality Authority (Equality Authority 2005, p.89)

⁷⁷ <http://www.ictuni.org/>

representation. UNISON has been involved with poster campaigns on sexual orientation and is also running courses on topics such as challenging homophobia and heterosexism in the workplace.⁷⁸

2.3.2.7 Public Interest Law NGOs

The general public interest law and litigation culture in the ROI is at an early stage of development (CAIRDE et al 2007). A handful of community law centres operate in the jurisdiction and are generally based on both a 'service' and 'strategic' model of legal aid (Gogan 2005; Whyte 2002). All of the centres are located in Dublin, but the Free Legal Advice Centres (FLAC) operates a general informal and referral line and holds drop-in clinics at various locations throughout the country.⁷⁹ The Centres have pursued a limited number of cases within the Equality Tribunal system and before the ordinary courts.⁸⁰ Lack of resources and other institutional barriers generally dictate that capacity to engage in strategic work is limited (CAIRDE et 2007; Gogan 2005).

While advice is provided to individual LGB clients⁸¹, because of the enormous demand on their resources, to date the law centres have not pursued a proactive LGB specific strand to their work. However the Centres and the wider Independent Law Centres Network⁸² could act as a valuable learning resource for any such initiative emerging from the LGB sector. The Legal Unit of the Irish

⁷⁸ <http://www.ulearnni.org/>

⁷⁹ See generally: <http://www.flac.ie/>. Ballymun Community Law Centre is located in Dublin 9. It engages in a number of community legal education projects, as well as providing legal services to individuals. The Northside Community Law Centre's website provides details on the Centre's activities, including its case work: <http://www.nclc.ie/>

The legal services provided by the Ballymun and Northside Law Centres are limited to those who can satisfy a means test and meet geographic criteria.

⁸⁰ See for example: *Two Complainants (represented by the Free Legal Advice Centre) v The Department of Education and Science*, DEC-S2003-042/043; *Djemma Tsourova (Represented by Simon Mills, Barrister, acting on instruction from Free Legal Aid Centre) v The University Of Dublin, (Trinity College)*, DEC-S2004-162; *Francis (Represented by Marguerite Bolger BL, on the instructions of Northside Community Law Centre) v Bus Átha Cliath/Dublin Bus (Represented by CIE Solicitor's Office)*, DEC-E2006-046.

⁸¹ A Centre representative interviewed for this report recalls advising only one openly LGB client over the course of the past four years.

Traveller Movement⁸³ might be a useful template for the development of a similar section with a national NGO, such as GLEN. As discussed below, the EA has worked with the Irish Traveller Movement to support advocacy by local Traveller organisations in cases under the ESA (see Chapter 4.4.2).

The Northern Ireland Law Centre works with LGB groups and publicises relevant consultation processes in a quarterly magazine, which is distributed to members.⁸⁴ One example was an 'Immigration and Marriage' briefing that covered the rights of civil partners and other same-sex couples. The Law Centre also provides advice to LGB people through its advice line, in all areas of work, such as immigration, social security, community care, mental health and employment. The Law Centre generally refers employment casework related to discrimination to the ECNI, but it processes cases that involve discrimination along with other issues. A course on civil partnership was offered to the legal profession and to LGB organisations. Through its magazine, *Frontline*, it has recently published an analysis of the SO GFS Regulations (Fitzpatrick 2007).

Disability Action (NI) has used a grant from the charitable foundation Atlantic Philanthropies to establish the Centre for Human Rights for Disabled People.⁸⁵ The Centre undertakes education, capacity building, lobbying, advocacy, litigation and other efforts designed to bring about concrete improvements in the lives of disabled people. The Centre plans to bring together a forum of disabled people to be trained as advocates for disability rights, particularly in engagement with public bodies.

⁸² The Independent Law Centres Network also includes the Irish Traveller Movement Legal Unit and the Immigrant Council of Ireland.

⁸³ The Irish Traveller Movement has a Legal Unit since 2003. It has developed a range of public law initiatives designed to advance the human rights of the Traveller community:

http://www.itmtrav.com/Legal_Unit.html

⁸⁴ <http://www.lawcentreni.org/>

⁸⁵ <http://www.disabilityaction.org/humanRights.aspx>;

http://www.atlanticphilanthropies.org/rights/grantees_in_action/profiles/14181_securing_hr_disability_action

One NGO that has already been involved in strategic litigation is the NI Council for Ethnic Minorities (NICEM). It has been the Lead Partner in SOLID (Strategies on Litigation Tackling Discrimination in EU countries),⁸⁶ a collaboration in training on strategic litigation, along with the European Network Against Racism (ENAR) and other organisations such as Interrights. Hence there is a rising tide of interest in public interest litigation in Northern Ireland.

2.3.2.8 LGB NGOS

While trade unions are an important resource for discrimination claims under the EEA, such an infrastructure is not available in social contexts beyond the workplace. Voluntary organisations can hold goods and services providers to account by taking preventative action and engaging in advocacy, which may or may not entail legal action (see Chapter 2.4.5). LGB NGOs can also function as additional or alternative sources of support for employment grievances, especially for people who are not ‘out’ at work or require particular emotional supports (Colgan et al 2006, ch. 7.5.4). Reports on access to justice for minority groups have found that ideally advice should be sourced from a service provider that is attuned to the needs of a given constituency (Piehl 2006; Rights of Women 2002). For this reason, members of minority groups frequently turn to representative NGOs when challenging violations of their rights (ibid.).

The empirical element of this study reinforces the important place of NGOs in the realm of access to rights: representative organisations seem to be a valuable port of call for LGB individuals based in either jurisdiction on redress under equality legislation. For example, the Dublin-based community resource centre, Outhouse, has held a series of legal rights seminars⁸⁷, and for those undergoing third level education, students unions are vital points of contact. A LGBT

⁸⁶ <http://www.solid-eu.org/>.

⁸⁷ <http://www.outhouse.ie/>

Campaign has been operational within the Union of Students in Ireland (USI) since 1993.⁸⁸

According to the LGB representatives interviewed for this study, NGOs often contact the EA and ECNI on behalf of individuals. All described some level of familiarity with the legislation but described myriad ways in which they had gained that familiarity. While both the ECNI and the EA were generally well regarded and had provided speakers to attend briefing sessions (Chapter 4.2.1.2), no organisation had received formal training on the applicable laws through either of the bodies. All however, felt that they could be a much better resource to the community if they received such training.

2.4 Seeking Redress

Once individuals conclude that their rights under equality law may have been breached a decision must be taken on whether to seek redress. This section considers the barriers that may deter LGB individuals from pursuing justice at this stage.

2.4.1 Visibility

Interviewees argued that the issue of visibility is unique to this ground: people have to 'come out' in order to assert their rights. People may not be open about their sexuality in all domains of their lives and a decision to seek redress means identifying as gay, lesbian or bisexual to an employer and co-workers, or a service provider as the case may be. Fears of being 'outed' within one's workplace are noted as material barriers in one EU report that dealt with employment-related partnership benefits (European Group of Experts on Combating Sexual Orientation Discrimination 2004, Appendix 1). Chapman's (1995) research points to 'coming out' as the main reason for the relative lack of recourse to the sexuality ground under Australian equality law.

⁸⁸ <http://www.usilgbt.org/>

According to the research participants, personal capacity to take a case is very much affected by the perceived impact of litigation on family relationships. Similar to the sexually harassed women interviewed by Morgan (1999), the attitudes of loved ones to the prospective case, whether supportive or adverse, play a fundamental role in mediating an individual's own understanding of what has happened and what should be done about it. For one interviewee in particular, family members were concerned about the visibility implications of seeking redress and so objected to the individual's decision to lodge a complaint. People working with young LGB people described how they might not be 'out' to their families and that parents may not be particularly supportive. In a school context, LGB pupils are reluctant to report harassment out of fear that they may become a greater target for abuse and ostracism.

Should the case proceed to adjudication, disclosing one's sexual orientation to the public at large assumes central significance and we deal with the question of visibility in that context separately below (Chapter 3.3.4).

2.4.2 Victimisation

Unlike some discrimination encountered in the course of accessing goods and services, by definition that occurring in a workplace setting takes place within the context of an ongoing relationship, unless it concerns access to employment. According to Rodrigues (1997) experience with Dutch law reveals that fear of victimisation is a major consideration in discrimination cases generally. A Europe-wide study of sex equality litigation found that:

Fear of adverse consequences, in a wide sense, is a major deterrent to litigation. This does not only involve the obvious fear of victimisation by the employer... Such victimisation could (at least in theory) be tackled by sufficient legal protection for the complainant. ... At times, a negative reaction is also feared from colleagues. Potential litigants can be deterred from bringing a case because they fear the relatively good atmosphere at the workplace will be jeopardised if they do, and because they are afraid of being branded troublemakers. Such concerns are particularly acute for women who consider bringing a case against their own employer, which is

one reason why the majority of equality cases are brought outside an existing employment relationship. But from a number of national reports (e.g. Ireland and Luxembourg which have small populations but also in Greece) it transpires that employees can even fear that taking a case would give them a bad reputation which would be more widely known and endanger future job prospects (Blom et al 1995, 3.1.2).

These findings correlate with those of participants in the current study, but here the question of visibility is again pivotal.

Equality law prohibits the adverse treatment of those taking action around the enforcement of equality legislation. Casework in NI⁸⁹ and the ROI⁹⁰ demonstrates how seriously the equality bodies, courts and tribunals view such incidents.

Taking an anti-discrimination case under the SO ground seemed to entail greater fears about the potential threat to one's career given the risk of being 'outed'. Regardless of success, a shared perception was that lodging a complaint might threaten one's future prospects within an entire employment sector. In the context of a small country the perception was that even where the facts did not become public, informal knowledge of the case could circulate. Such was the rationale employed by a participant who decided not to pursue a case. As discussed below, religious ethos exemptions have a considerable 'chilling effect' on LGB people working within the health and education sectors (Chapter 3.2.2).

2.4.3 Financial Costs

The financial implications of seeking redress are of course not specific to LGB individuals, but nonetheless are a material consideration.

⁸⁹ See for example, *Duffy-v-Ulsterbus Ltd*, a victimisation case brought under the Fair Employment and Treatment (NI) Order 1998 and upheld in Tribunal in March 2007.

⁹⁰ For example, substantial compensation was awarded in Tribunal decisions on Section 74(2) EEA issued in 2006: *Ms A v A Candle Production Company* (DEC-E2006-035): claimant was awarded €7,000 for the sexual harassment and €10,000 for the victimisation; *O'Brien v Computer Scope Limited* (DEC-E2006-030) an award of €5,000 for the effects of discrimination in an equal pay claim and €10,000 for the victimisation; *Sanni v Tesco* (DEC-E2006-030) discrimination claim not upheld but claimant was awarded €8,000 for victimisation.

In the ROI, Equality Tribunal proceedings are not covered by the civil legal aid scheme (Chapter 2.3.2). In contrast with proceedings before the ordinary courts, where costs generally follow the event, each party before the Equality Tribunal and Labour Court must bear their own costs.⁹¹ As the other party may appeal it is not within a complainant's control to retain a case within the Tribunal system. Potential complainants are advised of this at the outset and it can lead to the decision not to litigate or to withdraw. According to the Equality Authority (2007, p.20): "The risk of incurring costs continues to be a substantial disincentive to claimants to pursue or defend appeals of the decisions of the Equality Tribunal under the Equal Status Acts 2000 to 2004 to the Circuit Court, and in relation to claims to the District Court under the Intoxicating Liquor Act, 2003." Since courts are adversarial forums, litigants will usually require the services of a legal professional, generating potentially considerable expense.

NI-based interviewees also referred to the financial cost as an obstacle to pursuing a case. The position is broadly similar to that in the ROI: preliminary free legal advice and assistance is technically available but not utilised in practice. Aid in the form of legal representation is not available for Industrial Tribunal claims but may be applied for before the County Court. A Tribunal Chairman may require a complainant to pay a deposit in order to continue with proceedings.⁹² Otherwise the parties are responsible for their own costs.⁹³ In the County Court costs will be awarded against the losing party.

⁹¹ The Equality Act 2004 effected an amendment to the Equal Status Act 2000, which empowers the Director to award expenses where an investigation is obstructed or impeded. Legal costs are excluded from the definition of 'expenses' for these purposes: Section 37A. See DEC-S2004-099/101, in which the Equality Officer indicated that failure to attend a hearing without adequate notice or provision of an appropriate reason could trigger an award of expenses.

⁹² Para 20, Schedule 1, the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005.

⁹³ It is possible for Tribunals to make a costs order against an 'unreasonable' litigant but these are infrequent and involve modest sums (Para 40(3), Schedule 1).

If the EA or the ECNI assists an individual the legal costs are covered. This is also the case for individuals who pursue a claim with the assistance of a trade union.

2.4.4 Remedies

Interviewees across all participant groups in the ROI felt that the level of damages awarded in equality cases is low, particularly in light of the heavy personal toll it can place on a complainant and the long delays encountered (Chapter 3.3.6). Under the Equal Status Acts compensation of up to €6,348 in total can be ordered; the average award in 2005 was €565 and €627 the previous year (Equality Tribunal 2006a, p.14).⁹⁴ In 2006 these figures increased; the average award was €1,187 and the highest award was €6,000 compared to €1,500 in 2005 (Equality Tribunal 2007a, p. 13).

Remedies under the EEA are linked in some instances to the employee's salary subject to maximum thresholds; re-instatement or re-engagement may also be ordered if appropriate.⁹⁵ Where the claimant is not an employee of the respondent the maximum award is €12,697. In 2006 the average Equality Tribunal award was €10,113 and the highest was €40,000 (Equality Tribunal 2007a, p.13).

Significantly Equality Officers can also order persons to take specified courses of action.⁹⁶ Prominent examples within the employment arena include the production and dissemination of workplace equality policies, the adoption of good practice in recruitment, and staff training (Equality Tribunal 2007a, pp.10-11). The usual remedy for equal status cases is compensation but on occasion service

⁹⁴ Section 27 ESA. The Equality Authority has been critical of low awards in cases concerning Travellers and of the nature of the remedy in some instances (Equality Authority 2003, p.28).

⁹⁵ See Section 84 EEA.

⁹⁶ Section 84(1)(e) EEA; Section 27(1)(b) ESA.

providers have been tasked with ensuring that relevant policies⁹⁷ and procedures⁹⁸ are compliant with the legislation (Equality Tribunal 2007a, p.13). Such measures, particularly where the respondent is a large organisation, can have significant positive effects beyond the immediate complainant. For instance, in a 2006 decision on the disability ground the Department of Education and Science was “ordered to formally investigate the feasibility of creating and implementing an examination system which can create an individually suited accommodation which meets the need of each particular student with disabilities, based on individual assessment” (Equality Authority 2007, p.18).⁹⁹

Monetary reward was not considered a motivating factor for cases under this ground, but interviewees drew attention to the wider deterrent and symbolic impact of damages awards. An individual that had pursued a claim commented:

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 representatives in the ROI valued the successful case outcomes to date but emphasised that the sanctions imposed weren't entirely satisfactory. For example, an interviewee discussed the first SO ground case under the Intoxicating Liquor Act 2003 in the following terms¹⁰⁰:

They won that case but... to me it wasn't really a success. It was only a slap on the wrists to the bar owner. He should have been told he was way out of line and ordered to pay them 5,000 euro for their distress and discomfort. That would have been a success. But to award them nothing...I wouldn't be jumping from the rooftops. So thinking about that, who would take a case? If that Judge had treated those women as being equal to a heterosexual couple, then that would have been a success.

⁹⁷ See for instance, *Ms. T. O'Brien on behalf of Ms. K. Quilligan v Daly's Supermarket, Killarney* (DEC-S2005/098).

⁹⁸ See for example, *A Nigerian National v A Financial Institution* (DEC-S2005/114).

⁹⁹ *Two Complainants v The Department of Education & Science*, DEC-S2006-077. As of October 2007 the decision is under appeal to the Circuit Court.

¹⁰⁰ *McGuirk and Twomey v Malone's Public House*. For an account of the decision see Equality Authority 2007, pp.30-31.

This outcome reflects a wider reality: An ‘individual justice’ approach involves, not just engagement with legal specialists but also with courts and tribunals that may not necessarily be sympathetic to LGB rights or equality claims more generally (Chapman 1995).

Representatives of the ROI equality bodies noted that the low level at which awards are capped in relation to employment equality claims, means that employers are not sufficiently dissuaded from acts of discrimination. Under EU law sanctions must be effective, proportionate and dissuasive and the European Court of Justice has established that compensation ceilings are not compatible with those requirements (Bolger and Kimber 2000, pp.424-427; Higgins 2003). A report by the European Network of Independent Experts in the Non-Discrimination Field (2005, p.39) singles out the disparity between Irish provisions on remedies for sex discrimination and other claims, going on to state “there can be no doubt that upper limits on compensation for discrimination are not acceptable either in the case of either the Race or Employment Framework Directives”.

The remedies available through the NI system are almost exclusively compensatory. In line with EU law there are no ceilings on the compensation payable in discrimination cases before the Tribunals (OITFET 2006) or in County Court proceedings. It is open to the Tribunals to make other recommendations but these have proved to be ineffective and are not utilised.¹⁰¹ This issue has been raised by the ECNI (2004a, 10.13):

The Commission is unconvinced that remedies in NI courts and tribunals are “effective, proportionate and dissuasive”. It would wish to see creative and imaginative thinking on issues such as exemplary compensation in some individual cases, reinstatement and re-engagement for dismissed workers and proactive remedies to require changes to policies and practices, to require equality audits and to require liaison with the Commission. It should also be possible for courts and tribunals, in some

¹⁰¹ See Regulation 36, SO Employment Regulations.

exceptional circumstances, to issue injunctive relief in order to prevent an act of discrimination occurring or being repeated.

2.4.5 Extra-Legal Strategies

Extra-legal strategies involve attempts to resolve a discrimination claim without using a formal redress process. In interview representative organisations described engaging in local level advocacy when an LGB person has encountered discrimination in settings such as workplaces, pubs or schools. LGB representatives have approached personnel departments, school principals, and pub owners or managers outlining how an incident amounted to a breach of the person's rights and asking them to ensure this did not continue. These reported practices accord with studies of how people mobilise the law, often highly effectively, outside official mechanisms (McCann 1994). From the perspective of an LGB individual, what might be termed 'rapid advocacy' may be far more satisfactory than protracted legal proceedings.

However, some insights offered by a representative of an employers' organisation illustrates how such an approach misses an important opportunity for the legislation to have real impact. The representative described the role of case law in strengthening the visibility of an equality ground within workplaces. Training on equality legislation for human resource professionals is driven by case law in two ways: Each 'judgment' against an employer is noted and the case is also used to illustrate scenarios of how the legislative protection translates into practice. In this way case law is considered to be crucial to giving visibility to an issue so that employers, human resource professionals and service providers take notice.

A survey of workplace employment policies conducted by the Commission for Racial Equality Scotland (2000) found that fewer private sector employers had policies relating to sexual orientation than to other discrimination categories such as sex, disability, ethnicity and age. While the particular reasons for this

divergence were not unpacked some inferences can be drawn from the reported reasons behind enactment of equal opportunities policies generally. The two most significant factors were the prospect of being involved in an employment tribunal and a desire to be considered 'looking forward'. It would appear that the greater the perceived 'risk' of litigation the greater the incentive for putting in place appropriate policies. Moreover, the social status of a particular group may affect employers' readiness to tackle discrimination against that group proactively.

2.4.6 Pre-Judicial Processes

A controversial innovation in Northern Irish employment law provides that a complainant must use the employer's grievance procedure.¹⁰² Failure to invoke the procedures invalidates the complainant's application. A waiver from the grievance procedure requirements applies where "the party has been subjected to harassment and has reasonable grounds to believe that commencing the procedure or complying with the subsequent requirement would result in his being subjected to further harassment".¹⁰³ However, the invocation of this exception is fraught with difficulty, as a harassed person has to decide to forego invoking a grievance procedure and then establish at tribunal that this was the correct decision.

NI-based research participants raised the internal grievance process consistently. An interviewee who decided not to pursue a case was advised by the ECNI and also by the LRA to resolve the matter internally. She however, felt that this was not satisfactory as one of the individuals involved in the incident, the CEO of the organisation, also sat on the grievance committee. Another participant exhausted the internal process having been advised to do so by a solicitor, but felt that it did not prompt the employer to even acknowledge that there was a problem:

¹⁰² See Employment (Northern Ireland) Order 2003 (Dispute Resolution) Regulations (Northern Ireland) 2004.

¹⁰³ Regulation 11(2)(b).

I had hoped for three things, for the harassment to stop, to get help to accommodate this problem, but what I wanted most was for the company to acknowledge that this had been going on...this was the most important thing for me...just for them to admit to it and to sort it out.

A further participant had also been advised to pursue a case internally after contacting both the LRA and the ECNI, but decided not to proceed as it would mean being 'outed' and attracting 'unnecessary attention'.

There may be employment situations in which such pre-judicial processes are a valuable way of resolving a dispute but given the controversy surrounding their operation, it is not clear that this statutory framework is achieving its objectives. There is obvious concern at their impact in discrimination cases¹⁰⁴ and these concerns must be heightened in SO ground claims. In considering any 'pre-judicial' processes, a balance must be struck between the resolution of disputes in circumstances where an LGB litigant may be unwilling to proceed to full judicial process and the publicity and effect on other LGB individuals, sometimes called 'the ripple effect' (O'Neill 2004), of pursuing litigation to a successful conclusion.

2.5 Conclusion

A number of key barriers were identified in this Chapter, which discourage LGB individuals from using equality legislation. These barriers include a lack of awareness and recognition of SO discrimination within society generally, as well as limited knowledge and understanding of the specific protections provided by equality legislation among the LGB communities. The importance of promotional campaigns to raise awareness together with the engagement of specific stakeholders, for example employer and trade union organisations, has been highlighted. The potentially significant role of the Citizens Information Centres

¹⁰⁴ Reservations were expressed by the ECNI at the time of the Draft Employment (NI) Order 2003 that the requirement to utilize internal grievance procedures could have a detrimental effect in many discrimination cases. There are now plans in Great Britain to abolish the procedures (Gibbons 2007).

and Citizens Advice Bureaux was identified in the context of their regional networks. LGB NGOs are often an important port of call in equality cases; their capacity to act as advocates could be tapped into further given adequate resources. An individual's capacity to act is largely contingent on the degree to which they are 'out' and have access to emotional supports.

Chapter 3: Access to Rights: Bringing a Case

3.1 Introduction

This Chapter focuses on the 'dispute' phase and deals with the mechanics of bringing a sexual orientation ground complaint before a tribunal or court. During this stage the external environment interacts to a greater degree with the personal factors that predict pursuit of grievances during the formative stages of discrimination law cases (Felstiner et al 1981). Claimants must follow various formal requirements when framing and taking a case, such as completing and filing documentation within strict time limits.

The profile of those who have pursued complaints to date under this ground was described as politicised, passionate and determined by interviewees. Such individuals tend to be completely 'out', at home, at work, with friends and to be supported by an LGB network.¹⁰⁵ There is also a tendency for SO complainants to have good personal resources, that is, to be self-assured and well resourced in terms of income and status. Moreover, the primary reported motivation was not financial compensation but justice.¹⁰⁶

¹⁰⁵ Paradoxically, Yoshino (2001) considers that 'out' LGB people are more likely to suffer discrimination, in his terms a failure to 'cover', for example, from an LGB perspective, asserting sexual orientation through openness and activism or, from a homophobic perspective, 'flaunting' sexual orientation.

¹⁰⁶ A review of the advice and support available for making discrimination claims in Wales reported similar findings: "Whatever the outcome, only the most resilient, well-resourced and well-networked individuals and often those who had had some contact with the equality bodies or RECs and were rights aware appear to reach tribunal. Those who had embarked on the process of complaint were some of the most equipped to do so, that is because of the strength of their contacts, support networks and their personal knowledge base." (Williams et al 2003, p.79)

It is very difficult to take a case; it is rough on a person and is time consuming. So yes, it takes a pioneer to take a case and be ground breaking.

Equality Body Representative

The LGB people who decide to exercise their rights then tend to be empowered and in both jurisdictions tribunal proceedings aspire to a level of accessibility that enables these individuals to represent themselves or avail of a lay advocate. In this regard it is important to note the value of the investigative function of the Equality Tribunal (see Chapter 1.3.3; 3.3.5.2). However, given the personal costs involved in pursuing a claim, LGB interviewees felt that legal representation was indispensable. This was even more so the case for adversarial court proceedings. Research conducted on parallel UK legislation has established that those who have the benefit of legal advice and representation enjoy higher success rates (Baker 2005). Further, the un-represented litigant may be faced with a 'repeat player' (Galanter 1974), such as an employer represented by an employers' or industry association, leading to a serious imbalance of resources and institutional knowledge.

3.2 Framing a Case: Substantive Law

3.2.1 Introduction

All prospective litigants must fit their claim within the applicable equality law. A person seeking redress is faced with immediate legal literacy requirements and there was consensus across the participant groups in this study that the legislation is difficult to read and understand. Even where professional advice is available translating one's experiences for entry into a legal process can be alienating. Legal concepts often "reframe" disputes in narrow and confining ways. Indeed claims may be reformulated so that litigants no longer recognise their original account of events (Conley and O'Barr 1998; Mather and Yngvesson 1980). Research participants drew out several features of equality law that

generate particular obstacles for LGB individuals and we now turn to consider these.

3.2.2 The Material Scope of Equality Law

Once a decision to seek redress is made a claimant may find out or, in the absence of sufficiently specialist advice, assume that a discriminatory practice falls outside the ambit of equality law. In both jurisdictions the legislation contains numerous exceptions that have particular implications for LGB people. These fall into two broad categories: those concerning various rights and benefits that attach to personal relationships and those related to genuine occupational requirements (GOR).

Employment benefits that are defined by reference to marital status cannot be challenged as discriminatory under the Northern Irish SO Employment Regulations.¹⁰⁷ However, the Civil Partnership Act 2004 effectively displaced this exception, since civil partners and spouses must now be treated equally in relation to workplace benefits.

The SO Employment Regulations provide for two GOR exceptions, one that is of general application and another that applies only to employment ‘for the purposes of an organised religion’.¹⁰⁸ The general GOR can be applied by any employer if the nature of the employment or the context in which it is carried out means that being of a particular sexual orientation is a “genuine and determining occupational requirement” and it is “proportionate” to apply that requirement in the particular case. According to the Department of Trade and Industry’s explanatory notes: “It is very rare indeed that being of a particular sexual orientation is a genuine occupational requirement for a job.” The ECNI’s Guidance states, “This exception is unlikely to apply where a person is employed for another purpose, for example, for the purposes of education or healthcare.

¹⁰⁷ Regulation 28, SO Employment Regulations 2003.

¹⁰⁸ Regulations 8(2) and Regulation 8(3), SO Employment Regulations 2003.

This exception is therefore unlikely to apply, for example, to the employment of teachers in a faith based school or nurses in a faith based organisation” (ECNI, 2004b, p. 17). A general GOR may be justified in some limited situations, for example, “it may be possible to establish a GOR to be gay or lesbian, having regard to the context of the work, for persons in a position of leadership in, or representing the public face of, an organisation concerned with advising gay men and lesbians about their rights, or promoting those rights.”¹⁰⁹ In relation to employment which is “for purposes of an organised religion”, the employer may apply a requirement as to sexual orientation “to comply with the doctrines of the religion” or “because of the nature of the employment and the context in which it is carried out, so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers”.

In 2004, the English High Court considered whether parallel GB Regulations complied with EU law.¹¹⁰ Although the Court rejected the challenge mounted by a group of unions, the judgment emphasised that the scope of the exceptions is limited. With respect to the organised religion exception, the Court held that those in pastoral roles, such as ministers and priests, would be covered but teachers in faith-based organisations would not be. This approach will be persuasive for tribunals interpreting the NI Regulations. Despite the ruling, there is still some misconception about the scope of this exception and it may have a ‘chilling effect’ on LGB people.

The SO GFS Regulations came into force in Northern Ireland on 1 January 2007. The Regulations also contain an extensive exception for faith-based organisations.¹¹¹ Again the discriminatory act must be necessary so as to comply with the doctrines of the religion, or so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers. These

¹⁰⁹ <http://www.berr.gov.uk/files/file29350.pdf>

¹¹⁰ *R (on application of Amicus – MSF and others) v Secretary of State for Trade and Industry* [2004] EWHC 860 (Admin) [2004] IRLR 430.

¹¹¹ Regulation 16, SO GFS Regulations 2006.

criteria have yet to be interpreted. A significant positive element of the law, not present in the GB equivalent, was a harassment definition, which would have been particularly appropriate in education and housing cases. A number of faith-based organisations challenged the Regulations, by means of judicial review, both on grounds of inadequate consultation but also on their alleged incompatibility, particularly of the harassment provision, with freedom of religion provisions in the ECHR. In September 2007, the Northern Ireland High Court substantially upheld the validity of the Regulations, however, the harassment provisions in the Regulations were quashed.¹¹² Consequently the provisions relating to harassment in the provision of goods, facilities and services no longer apply.

Discrimination by public bodies in the performance of some, but not all, of their functions is explicitly prohibited by the GFS Regulations.¹¹³ However, the prohibition is subject to a 'statutory authority' defence, which exempts acts of discrimination that are done "(a) in pursuance of any statutory provision; or (b) in order to comply with any condition or requirement imposed by a Minister of the Crown or government department by virtue of any statutory provision."¹¹⁴

The scope of the statutory authority defence should become apparent when the Regulations are applied in practice. It may transpire that significant aspects of public action are not covered: For instance, it is arguable that the production of the curriculum is not one of the functions protected or that it falls within the

¹¹² http://www.courtsni.gov.uk/en-GB/Judicial+Decisions/Judgments/j_j_weac5888final.htm

¹¹³ Regulation 12 provides:

"(1) It is unlawful for a public authority —

(a) to discriminate against a person on the grounds of his sexual orientation;

(b) to subject a person to harassment,

in the course of carrying out any functions of the authority, which consist of the provision of:

(a) any form of social security;

(b) healthcare;

(c) any other form of social protection; or

(d) any form of social advantage, which does not fall within regulation 5 [provision of goods, facilities and services]".

¹¹⁴ Regulation 49(1).

statutory authority defence. It is however clear that the Civil Partnership Act renders the exemption less significant than the ROI parallel discussed below. The Act provides for equal treatment between spouses and civil partners across a range of government services and functions, including social welfare and pensions.

Both of the ROI equality laws also contain exemptions that have particular implications for LGB people. According to Equality Authority interviewees, low levels of litigation under the SO ground are in part due to the fact that many incidents of discrimination are not captured by the ESA or the EEA.

Section 37 of the EEA permits medical, educational and religious organisations that are run in accordance with the rules of a particular denomination to discriminate with a view to protecting their religious ethos (Ryan 2005, pp.108-9; Whyte 2005a). While the exemption is not directed at LGB individuals the empirical element of this report confirms that it has a considerable impact on that constituency. The perception amongst many LGB representative organisations and individuals was to the effect that Section 37 sanctions blanket discrimination against LGB people and so effectively forces such persons either to avoid seeking employment in given sectors or to take up employment in conditions where they are compelled to conceal their sexuality. Its impact on those working in education or health – teachers and nurses in particular, both female dominated professions – was emphasised. As the Equality Authority (2002a, p.60) observes, “the inclusion of this clause has reinforced fear of discrimination against workers in religious-run institutions...and makes it even more difficult for such workers to be open about their sexuality”.

Representative organisations highlighted how the exemption affects both employees and recipients of services. In the education field LGB staff engage in self-censorship, avoiding certain conversations, and tend not to assert any claims for entitlements that might reveal their SO. For example, a non-biological mother

in a lesbian family decided not to make an application for parental leave because of concerns that the religious ethos exemption could be used to dismiss her. According to an LGB representative:

That fear is a huge barrier for people. [I know of] one guy teaching for years and the natural progression would be Vice Principal but he wouldn't go for it as he felt that a VP is expected to be married and he wasn't, and also it would put him in a much more prominent position, which meant much more visibility. So indirectly he was prevented from going for promotion because of recognition.

The effect of the Section is to make LGB individuals invisible and according to representative organisations it means young people do not see positive examples of open LGB individuals among their teachers.¹¹⁵ Such invisibility also facilitated the pervasiveness of homophobic bullying (see Chapter 1.4.3), as teachers were concerned that if they took on the issue they might come under scrutiny from Boards of Management.¹¹⁶ A study conducted by researchers at Dublin City University found that teachers “see themselves as powerless to address much of the homophobic bullying that goes on in schools. In some cases this may be due to the pervasiveness of homophobic behaviour and the restrictions of the religious ethos of their schools where sexuality is concerned” (Norman et al 2006, p.119).

Although the ROI exemption reflects in part Article 4(2) of the Framework Directive that measure is more tightly drawn. Article 4(2) permits discrimination on the religious belief ground where necessary to maintain religious ethos, but any measures taken cannot amount to discrimination on other grounds covered by the Directive including sexual orientation (Bell 2003, pp.336-39). Additionally the European provision applies to a more limited set of circumstances, that is, only in respect of forms of employment where “...by reason of the nature of these

¹¹⁵ O'Carroll and Szalacha (2000) maintain that homophobia has negative repercussions for straight students as well in that the fear of being labeled gay or lesbian may cause them to adopt rigid gender roles, affecting their ability to form close emotional ties with members of the same sex.

activities or of the context in which they are carried out, a person's religious belief constitutes a genuine, legitimate and justified occupational requirement".

The Supreme Court has upheld the constitutionality of the exemption¹¹⁷ but it has not been interpreted by the Equality Tribunal or by the ROI courts in light of the applicable EU provisions. LGB representatives agreed that the high risk to an individual's career made the prospect of a case unlikely. Bell (2003, p. 337) suggests that "legislative revision of section 37(1) is necessary and desirable" and the Equality Authority has called for its amendment (Equality Authority 2002b, p.64). Trade union opposition to the exemption has gained momentum in recent years: Its removal is currently the primary goal of the INTO LGBT Group¹¹⁸ and the 2007 ICTU Biennial Conference adopted a motion proposed by the ASTI calling on the Minister for Justice, Equality and Law Reform to engage in a consultative process designed to effect the repeal of Section 37.¹¹⁹

Other exemptions found in the EEA permit employers to prefer certain family forms, paradigmatically marriage, to others.¹²⁰ Employers are entitled to grant employees or members of their families certain benefits on account of their relationship.¹²¹ "Member of the family" for this purpose is defined as a person related to the employee by blood, marriage or adoption, and so excludes same-sex partners.¹²² As a result, LGB employees may not be entitled to given benefits or at least be uncertain as to whether they are covered by a particular scheme. While entitlements that are available to opposite-sex unmarried partners must also be extended to their same-sex counterparts (Walsh and Ryan 2006, pp.118-122), LGB employees may not have the requisite information at their disposal

¹¹⁶ Similar points have been raised by Scottish LGBT organisations (McLean and O'Connor 2003, p.11).

¹¹⁷ *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321.

¹¹⁸ <http://www.into.ie/lgbt/Section371/>

¹¹⁹ <http://www.asti.ie/pr2007/prjul07.htm#ictu2>

¹²⁰ The Pensions Acts 1990-2004 also contain a specific exception to the principle of non-discrimination on the grounds of sexual orientation -Section 72(3).

¹²¹ Section 34, EEA.

¹²² Section 2(1), EEA.

and be reluctant to make inquiries for reasons of confidentiality (European Group of Experts on Combating Sexual Orientation Discrimination 2004, Appendix 1).

Several significant exemptions also arise in the context of goods and services provision.¹²³ Section 14 ESA has proved in practice to be especially detrimental to those seeking protection against SO discrimination. Essentially it precludes use of equal status provisions to challenge any discriminatory treatment *required by law*. For instance, the Department of Social and Family Affairs is permitted by Section 19 of the Social Welfare (Miscellaneous Provision) Act, 2004 to discriminate between same-sex and opposite-sex couples in the operation of certain social welfare schemes. As noted in Chapter 1.3.4, sexual orientation discrimination in that arena was successfully challenged in a 2003 settlement, that possibility has now been effectively removed. However, where some element of discretion exists in relation to the grant of a benefit other good or service, it can be argued that the statutory exemption is inapplicable since it relates only to discriminatory treatment *required by law*. Such an argument was advanced by the Equality Authority in a 2006 settlement of a social protection claim under the ESA (Equality Authority 2007, p.30). The government department in question decided to pay an allowance to the partner of a gay man on an *ex gratia* basis.

Representative organisations felt that the exemption undercut the purpose of equality law and that the prospect of challenging discrimination entrenched in legislation was remote. The Equality Authority notes that Section 14 limits the contribution it can make in relation to discrimination by public bodies and has called for its amendment (Equality Authority 2003, p.9; Equality Authority 2004, p.35). Additionally, unlike the SO GFS Regulations the ESA does not explicitly prohibit discrimination by public bodies in the exercise of their functions. Equality Tribunal decisions concerning discrimination on other grounds have confirmed

¹²³ Section 16 of ESA, for example, sanctions the imposition or maintenance of a “reasonable preferential fee, charge or rate,” in respect of goods and services offered *inter alia* to persons with their children and married couples. Since same-sex couples cannot marry this measure allows indirect discrimination on the sexual orientation ground.

that the definition of a “service” as set out in the Act does not cover certain key activities of public bodies, such as many policing and immigration functions, and the enforcement of tax, social welfare and planning codes.¹²⁴

Contrary to undertakings in the Belfast (Good Friday) Agreement an equivalence of rights protection in the field of equality law is not secured on the island. (O’Cinnéide 2005) The scope of ROI legislation is deficient in several respects: public functions are not explicitly covered and the religious ethos exemption appears to be broader than the NI workplace counterpart. LGB people based in NI acquire equal rights to those of married couples if they register a civil partnership, an option that is not currently open to people in the ROI.

3.2.3 Proving Discrimination

Research participants reported several difficulties related to the general area of proving discrimination in the first instance. While all claimants face significant hurdles in securing adequate evidence to mount a case (Blom et al 1995, 4.3), it was felt that the SO ground generates distinct problems. First because sexuality goes to the heart of a person’s identity the issues raised in litigation are by definition intimate. Many people are simply unwilling to proceed when they realise that their sexuality will be continually discussed before a Tribunal, and possibly in wider circles (see Chapter 3.3.4 below on visibility). Some limited research on Australian anti-discrimination law suggests that lesbian women have lodged claims under the gender ground in order to avoid revealing their sexuality (Mason 2002, p.605).

Amongst LGB representative organisations and individuals a shared perception is that an individual has to prove that the incident was targeted at them due to their sexual orientation and that they were *known* to be lesbian, gay or bisexual

¹²⁴ *Donovan v Garda Donnellan*, DEC-S2001-011; *A Complainant (Represented by A.C Pendred Solicitors) -v- An Garda Siochána (Represented by David Keane BL instructed by the Chief State Solicitors Office)*, DEC-S2005/037.

by the perpetrator. Technically the legislation in both jurisdictions does not require a complainant under the SO ground to prove they *are* lesbian, gay or bisexual. In the ROI, although it must be established that they were treated less favourably than a person of a different sexual orientation is, has been or would have been treated¹²⁵, discrimination may occur because of an assumption about another person which may not be factually correct.¹²⁶ ROI law covers cases of discrimination by imputation since 2004 and people's understanding may reflect the position that prevailed prior to those changes.¹²⁷ In Northern Ireland direct discrimination involves proving discrimination 'on grounds of sexual orientation'. A preliminary tribunal decision has established that a complaint was covered by the SO ground where an academic claimed he was not short-listed for a job interview on the basis that one of his stated research interests was 'homosexuality in Ireland'. The Tribunal was satisfied that a claim could be 'on grounds of sexual orientation' whether or not the complainant was LGB. It is therefore accepted that 'perceived SO' or discrimination by association with LGB people is covered by the SO Employment Regulations.¹²⁸

LGB representatives and individuals felt that discrimination and harassment could be subtle or veiled and so difficult to prove. These observations accord with those recorded in Mason's (2002) study of Australian women that had experienced sexuality-based harassment and a more recent UK study of LGB workplace experiences (Colgan et al 2006, ch.7). Taken out of context

¹²⁵ See Section 6 and Section 28 EEA, Section 3 ESA.

¹²⁶ Section 6(1)(iv) EEA; Section 3(1)(iv) ESA. Discrimination in the case of imputed disability was made out in two 2006 Tribunal decisions: *A Health Service Employee v The Health Service Executive* (DEC-E2006-013), *Ms. X (Represented by the Equality Authority) v An Electronic Component Company (represented by IBEC)* (DEC-E2006-042).

Persons are also protected from discrimination by association under Section 6(1)(b) EEA and Section 3(1)(b) ESA.

¹²⁷ In a case decided before the EEA was amended to include discrimination by imputation, the Labour Court did not uphold a claim of discriminatory dismissal since it "was satisfied that the respondent did not know the complainant's sexual orientation and could not have discriminated against him on that account": *A Company – and – A Worker*, (Determination No. EED042). Although it is not possible to fully analyse the Court's reasoning on the basis of the case note, it may be that a different outcome would now issue in a similar claim.

¹²⁸ Case Ref: 970/05IT *Lacey v University of Ulster*, 05/01/07.

unwelcome and insulting comments may seem innocuous (Mason 2002, p.619). Mason reports that lesbian women experience harm not only through homophobic remarks but also through the transfer of knowledge about their sexuality. She concludes that, “both experiences of harassment are tied to the negotiation of sexual visibility”; to be “publicly named as a lesbian...is to be marked in a way that is rarely neutral or does not involve some risk of homophobia” (Mason 2002, p.620). Exchanging information about a colleague’s sexuality, although deeply harmful to many LGB individuals, is not behaviour that meshes with current harassment definitions, which centre on conduct that has the purpose or effect of violating a person’s dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person.

A union representative alluded to the proof of difficulties encountered even where harassment and discrimination takes more overt forms:

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. If people feel they’re being bullied or harassed, we would say record everything, write down everything that’s happened, and note if there are any witnesses. If you get to the stage of engagement with management, then all that evidence is there.

Also a complainant may need support from other individuals in terms of witness statements and the perception is that they may not be forthcoming: Aligning oneself with an open LGB could result in speculation about a person’s own sexuality.

According to some individuals and representatives from NI-based LGB organisations, people that had approached solicitors or the ECNI had often felt that their accounts had been met with disbelief. For instance, a participant who had been in contact with the Commission said that questions posed such as ‘are you sure’ and ‘you know you need a lot of evidence’ brought about a feeling of not being believed and they therefore decided not to pursue a case. Again since

these observations are confined to a limited number of individuals they should not be regarded as suggestive of any general pattern. Nonetheless, they shed some insight on the difficulties associated with conveying complex burden of proof requirements in an accessible format and often over the phone.

3.3 Taking a Case: Procedural Issues

3.3.1 Introduction

Participation in a legal process inevitably takes place within set frameworks, over which an individual has little control (Sarat 1998). LGB individuals and representative organisations regarded the procedures for taking a case under equality legislation as complicated and somewhat opaque. Indeed both interview groups, save those individuals that had pursued claims, recorded limited awareness of what the process involved.

While the Republic's Equality Tribunal is considered amenable to self-representation (Bolger and Kimber 2000, ch.12) there was a strong consensus to the effect that legal representation was required.¹²⁹ So also the NI Industrial Tribunals are intended to be more informal than the ordinary courts but have inevitably become more legalistic, particularly when a case involves complex areas of law, such as discrimination law.

3.3.2 Time Requirements

In the ROI, strict time limits apply with respect to claims under the ESA and the EEA. Both sets of legislation require referral within six months of the last alleged

¹²⁹ "During 2003, 42% of complainants, and 28% of respondents, in equal status decisions did not use legal representation. In employment decisions in 2003, 70% of complainants, and 55% of respondents, did not use legal representation. Roughly one-quarter of all parties in equal status decisions, and one-third of all parties in employment equality decisions, were unrepresented, and the others used alternative representation, such as trade unions, employers' representative bodies, community groups, or a family member." (Equality Tribunal 2004b, p.4)

incident or most recent occurrence in a chain of incidents.¹³⁰ ESA claims are subject to a further hurdle in that written notification must be forwarded to the goods or services provider within two months of the alleged discriminatory event. Such notification must state the nature of the allegation and the complainant's intention to seek redress if not satisfied by any reply received. Material information may also be elicited.¹³¹ The Director of the Equality Tribunal can extend the time limit for notification up to a maximum of four months for "reasonable cause" and in exceptional circumstances may dispense with the notification requirement.¹³²

As for Northern Ireland, in employment cases potential litigants need to begin the process within three months of the incident complained of occurring. The time limit can be extended by three months where an internal grievance procedure is invoked. However, this has proved to be controversial and is being reviewed (Gibbons 2007). The time limit in the county courts is six months.

Interviewees agreed that a detailed knowledge of the equality legislation is required in order for potential complainants to know that they need to begin the process of litigation within the statutory time limits. For those based in the ROI the written notification requirement contained in the ESA was considered especially onerous. It was argued that under the SO ground it may take some time before a person identifies the incident as discriminatory and recovers from it sufficiently to act or mobilise their personal resources to tell others. The need to effectively threaten litigation was regarded as a commitment many people could not make at such an early juncture. As discussed in Chapter 2 the negotiation of sexual visibility renders the process that occurs before redress is sought especially complicated and protracted for LGB people. According to the EA

¹³⁰ Section 77(5) EEA, Section 21 ESA. The Director may extend that period for a further 6 months if s/he is satisfied that 'reasonable cause' prevented timely referral.

¹³¹ Section 21 (2), ESA.

¹³² Section 21(3), ESA. The power to dispense with notifications was introduced in the Equality Act 2004.

interviewees the notification requirement has featured consistently in the Equality Authority's case work. Apparently several potential claims under the SO ground have not proceeded because the time limits had passed.

3.3.3 Preparation of Submissions

In both jurisdictions the skills required to prepare a case were raised consistently. Interviewees that had pursued claims found this stage of the process challenging and often stressful. Two individuals based in NI dropped their legal cases primarily because of inadequate support systems at this juncture. The experiences of these individuals cannot be taken as evidence of any general pattern, but both referred to being overwhelmed by the complexity of the processes and the need for clear and accessible advice on the various steps to be taken.

ROI equality body representatives acknowledged that the preparation of submissions is daunting. Complaints must be made in writing using forms that are available on request from the Tribunal and can also be downloaded from its website.¹³³ Concise papers allow a case to proceed more efficiently. LGB representative organisations have helped individuals to complete forms and written submissions, while also providing moral support. Other third parties such as trade unions and NGOs regularly assist complainants.

For NI employment cases a claim form, known as an IT1, is available from OITFET, the Job Market, the ECNI, or the Citizens Advice Bureaux. OITFET provides detailed information on making a claim in its publication, 'Industrial Tribunals Procedures'.¹³⁴ The ECNI has also produced an extensive guide (ECNI 2006c).

¹³³ <http://www.equalitytribunal.ie/>

¹³⁴ http://www.employmenttribunalsni.co.uk/industrial_tribunals_procedures.pdf. (Revised April 2005). These are based on the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005.

A strong preference emerged from LGB individuals and representative organisations in both jurisdictions for face-to-face meetings as opposed to contact by phone. One participant had found telephone conversations with an ECNI advisor very taxing because the papers were so 'legally oriented' and the jargon was difficult to decipher. Subsequent contact took place in person and this significantly improved the claimant's general experience and understanding of the procedures. The first face-to-face meeting was described in the following terms:

I came into the meeting and she spread all the papers out on the table and she talked me through everything. A couple of times she had to say to me just take a deep breath and I'll talk you through.

3.3.4 Visibility and Anonymity

LGB individuals and organisations consistently flagged anonymity as a crucial factor in decisions to pursue cases: As noted previously a decision to seek redress involves 'outing' oneself in the immediate context where discrimination was encountered. Many individuals are reluctant to take that step (Chapter 2.4). Should the grievance go further and become a 'dispute' the complainant must 'come out' to a much wider range of people, such as neighbours, acquaintances and potential employers. Decisions may attract media coverage and so the public at large will know about the person's sexuality. A comment from one LGB individual illustrates the prevalent opinion that SO cases may differ from the other grounds in this regard:

If you are black or a woman, you don't have to "come out" to neighbours or in your job to protect yourself from victimisation.

As Chapman (1995, p.335) observes: "Staying 'in the closet' may be perceived as a viable, and in some instances, the only realistic choice. People in other outsider groups generally do not have that choice."

How being 'out' will impact upon members of a person's immediate family is often taken into consideration. LGB parents highlight the particular issues they face in being open about their sexuality given the risk this can put their children at from homophobic abuse and discrimination.

The key problem here is that anonymity cannot be secured for complainants in either jurisdiction. One representative had raised this concern on several occasions in dialogue with the ECNI and other bodies. The same representative made the following point:

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

Equality body interviewees confirmed that from experience privacy was a particular concern for complainants under this ground. However, they noted that there are some parallels with other grounds in this regard, in particular the disability ground. Securing anonymity for LGB individuals and disabled people in particular has been raised consistently in the EA's annual reports (Equality Authority 2005, pp. 53-54; 2006b, p.54; 2007, p.20). The ECNI has made similar suggestions concerning the SO ground in the NI context (ECNI 2006e).

In NI, once a case is lodged before the Industrial Tribunal the name of the claimant as well as that of the respondent is made public in the tribunal register and anonymity can only be preserved in limited defined circumstances.¹³⁵ It is open to the County Court to make restricted reporting orders in sexual orientation cases, but applications are rarely granted. A recent decision of the Northern

¹³⁵ Under the Industrial Tribunals (NI) Order 1996, Industrial Tribunals can provide for restricted reporting orders in relation to cases involving national security (Article 12), sexual misconduct, which includes sexual harassment (Article 13), and disability (Article 14). See also paragraph 49 (public register) and paragraph 50 (restricted reporting orders) of the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005.

Ireland Court of Appeal may however lead to a change in practice.¹³⁶ The case involved a judicial review of an Industrial Tribunal finding concerning anonymity for a transsexual complainant. Although it involved the gender ground and so raised compliance with the relevant EU gender equality directive, the principle established should hold in cases under the SO Employment and GFS Regulations. The Court found that the Tribunal had erred in law in determining that it did not have power to make an order to delete the names of the claimant and respondent from the public register:

Member States are required by the Directive to ensure that procedures for the enforcement of obligations under the Directive are available to all persons who consider themselves wronged by failure to apply the principles of equal treatment to them. If it is established by the evidence that the appellant will be unable to enforce an obligation because of the risk to her physical safety, unless the procedure can afford her sufficient protection as to allow her to do so, the obligation under the Directive will not be met.

Since the Court of Appeal judgment was delivered in May 2007 it remains to be seen how such reasoning will apply to the SO ground. It is clearly preferable that express legislative provision be extended to transsexual, SO and other cases in which harm may result from publicity.

In the Republic, while hearings before the Equality Tribunal and Labour Court are held in private¹³⁷, claims before the ordinary courts are conducted in public (Fahey 2003; Kelly 2003, pp. 731-751). Individuals may also be afforded greater privacy within the Tribunal system since the parties' identities may be concealed in published decisions. This is established practice in the case of sexual harassment complaints and those concerning the sexual orientation ground

¹³⁶ *JR5 v the Department of Agriculture and Rural Development*, [2007] NICA 19.

¹³⁷ Under Sections 78(4) and 79(2) of the 1998-2004 Acts; Sections 24(3) and 25(2) of the 2000-2004 Acts. Appeals to the Labour Court from decisions of the Tribunal are heard in private "unless, at the request of one of the parties, it determines to hold the appeal, or so much of it as it does not consider should be treated as confidential, in public" (Section 83(2) EEA). The Labour Court has determined that hearings should normally be held in private and that it is for the party seeking to have an appeal conducted in public to establish that the special circumstances

(Equality Tribunal 2005b, p. 10). Complainants can waive anonymity if they wish, as occurred in an SO ground case where the individual wanted the outcome publicised in order to bring an incident of discriminatory treatment by a service provider to public attention.¹³⁸

At the outset the Equality Authority has to advise people that anonymity is not guaranteed, as the respondent may challenge an application. Further, if the outcome of an equal status case is appealed it will be referred to the Circuit Court, if it relates to licensed premises it goes automatically to the District Court in the first instance and these are public forums (see Chapter 1.3.3).

With respect to the ROI, given the overarching constitutional position, which prescribes that justice must be administered in public, a specific statutory exemption would be required to secure the conduct of hearings in private (Kelly 2003, pp. 731-751). Our findings strongly endorse the pursuit of legislative change to ensure that option is available for cases under this ground in both jurisdictions.

3.3.5 Format of Proceedings

3.3.5.1 Mediation

In the ROI the Equality Tribunal offers mediation as an alternative to investigation of claims.¹³⁹ Indeed all cases are now referred to mediation unless either party objects. This process is capable of addressing the anonymity concern discussed above; absolute confidentiality is secured since mediated agreements are not published.¹⁴⁰ Mediation also potentially addresses a second barrier just outlined in that it does not rely on the exchange of written submissions in advance of a

envisaged under the legislation exist: *A Government Department – and – A Complainant*, ADE/02/10 Determination No. 0515.

¹³⁸ *O'Regan v Bridge Hotel*, DEC-S2004-0037.

¹³⁹ Section 78 EEA; Section 24 ESA. Mediation has been offered as an alternative mechanism for resolving disputes since December 2000.

hearing or meeting. It can also have a more meaningful outcome for the complainant, for example, they may be offered an apology and an explanation of the incident that satisfies them and represents adequate redress. However, both parties must consent and so it is outside the complainant's control if such agreement is not forthcoming. The mediation route appears to be relatively expedient (Equality Tribunal 2002c; 2005a, p.3), taking in the region of a third of the time currently involved in an investigation.¹⁴¹ A mediation survey conducted in 2004 reported high levels of satisfaction with all aspects of the service (Equality Tribunal 2005a). However, there has also been some dissatisfaction expressed with the mediation process (Equality Authority 2005, p.55).

Since the basis of the mediation process is one of consensus it can be said to provide a "just alternative" as opposed to being "just an alternative" (Miller 2001). Bolger and Kimber (2000, p. 428) point out that it may not be a feasible option in the event of a direct conflict on the facts and may prove most attractive in cases where an employee complains about adverse treatment on the part of a colleague. For LGB people it would seem that the primary attraction of this option lies in the privacy extended to claimants.

The Tribunal's experience over three years of operations has thrown up many different motives as to why parties in dispute use mediation. In some cases it is simply the wish to bring the dispute to a speedy end, whereas in others it is to avoid the formality and stress of a quasi-judicial Equality Officer investigation. While some parties come to mediation with possible compromise in mind, others wish to resolve the dispute by convincing the other side that they will lose if the dispute goes on into investigation. Many parties come to mediation with a view to testing the other side's case. The dialogue that results frequently helps to identify issues which the parties

¹⁴⁰ However, a Mediation Review forms part of the Tribunal's Annual Report. The Review supplies general information about the Mediation Service along with data on resolutions achieved disaggregated according to ground.

¹⁴¹ In 2002 the mediation process took on average 7 months from the date of referral compared to 18 months for employment investigations (Equality Tribunal 2003c, p.11). The subsequent year "agreements were achieved, on average, within 8 months of the date of referral compared to employment investigations that, on average, take 20 months (Equality Tribunal 2004c, p.11). An average period of 8 months was also recorded in the Tribunal's most recent Mediation Review (Equality Tribunal 2007c, p.8).

can agree on and which may form the basis for a settlement (Equality Tribunal 2004c, p.10)

The only provision for conciliation in NI equality law applies to disability ground cases in the area of goods and services.¹⁴² It allows for conciliation by a body contracted by the ECNI but has yet to be activated. Individuals who lodge complaints of discrimination on grounds of SO with the Industrial Tribunal, can avail of a free conciliation service provided by the Labour Relations Agency (LRA). Once a claim is lodged with the Tribunal it is forwarded to the LRA and the Agency may then invite the parties to attempt to resolve the dispute. Participation in the process is voluntary and is designed to assist both parties to a complaint to reach a resolution.¹⁴³

3.3.5.2 Tribunal Hearings

Tribunals are generally considered to provide a more expedient, less formal and cost-effective alternative to court action (Hogan and Morgan 1998, pp.259-263). While the Republic's Equality Tribunal is an investigative forum, in practice the process has been criticised on the basis that the format is overly adversarial, which can intimidate and disempower a complainant. Information produced by the parties at a hearing is usually the only evidence an Officer relies on in coming to a decision. This explains the importance of the submission to the success of a case. If the investigative role of the Tribunal were maximised this could offset some of difficulties inherent in the current processes.

While acknowledging the critical concerns about anonymity and how vital it is that privacy be maintained for the SO ground in particular, accountability and transparency must also be ensured. Transparency is desirable so that complainants can be briefed on what to expect in advance. Although the Tribunal has produced guides to procedures, which are sent out to every party involved in

¹⁴² See Section 28 of the Disability Discrimination Act 1995 as inserted by Article 12 of the Equality (Disability) Order 2000. Equivalent provisions have been activated in Great Britain by the Disability Rights Commission.

a claim and updated regularly following consultation with the Users Forum (see Chapter 4.3.3) (Equality Tribunal 2004a, p.32), the generic nature of the information provided may not be adequate to allay the fears of some claimants. While prospective litigants or defendants in a court process can visit a courtroom to prepare themselves for their own hearing, this is not possible in relation to the Equality Tribunal. When advocates are present some insights can be gleaned but this occurs on an opportunistic basis without any formal mechanism to harness the learning acquired. The introduction of a standardised format for Tribunal hearings could address many of the current procedural difficulties. In its 2005 Annual Report the Equality Authority (2006b, p.22) states that the “the preparation of such procedures would allow an opportunity to examine ways that the procedures could be evolved and harmonized and speeded up without interfering with the unique investigative role of the Equality Tribunal. The current situation means that the preparation of these procedures is required as a matter of some urgency.” An EA representative emphasised the need for a rules committee to address such procedural issues within the Tribunal.¹⁴⁴

The debate in Northern Ireland on the effectiveness of tribunals has been driven by a GB debate (Leggatt 2001). The Leggatt Report rejected arguments that Employment Tribunals should become full courts although it recognised that discrimination cases were particularly complex.

Tribunals’ other great strength is that their procedures should be simple enough, and hearings informal enough, for users to represent themselves. Although we were told that the increasing complexity of the law was making this progressively more difficult in some areas of ET work (predominantly discrimination cases), a majority of ET users continue to be unrepresented. Key elements in enabling that proportion to grow, and enabling more users to look out for themselves, are the provision of all the information which they require to prepare their own cases, and the training

¹⁴³ See further: www.lra.org.uk. The LRA’s duties are set out in the Employment (NI) Order 2003.

¹⁴⁴ The Equal Status Acts 2000-2004 state that the Minister may, after consultation with the Director and Authority, issue regulations specifying “(a) procedures to be followed by the Director in carrying out investigations (or any description of investigation) under this section, and (b) time limits applicable to such investigations, including procedures for extending those limits in certain circumstances...”: Section 25(3). Parallel provision is made under Section 79(4) EEA. See further discussion in the 2005 Annual Report of the Equality Authority (2006b, p.22).

of chairmen and members in the skills needed to facilitate their presentation. We recommend in Chapters Four and Seven a package of measures to improve services in both respects. ETs should have a high priority in the implementation of that programme. (ibid., 3.23)

The ECNI wishes to see a single Equality Tribunal with enhanced powers to deal with all discrimination law cases. The Commission's response to OFMDFM's consultation on a Single Equality Bill (ECNI 2004a, 10.1) states:

A significant aspect of the Commission's proposals on enforcement is the merging of the jurisdiction of the tribunal system and the ordinary courts into a Single Equality Tribunal. There is a natural progression from a Single Equality Commission to a Single Equality Act including a Single Equality Tribunal. On the one hand, traditional 'simple justice' models of judicial process, frequently set up to provide dispute resolution in employment and welfare cases, are not suited to cope with the complexities of equality law, given that they are underpinned by the distinctive legal system of the European Union. Hence, it is necessary to develop a system of judicial process which can manage the complexities of equality law. Northern Ireland already has a specialist equality tribunal in the FET, which has played a vital role in the development of the fair employment model in NI. Rather than see the FET merged back into a general tribunal system, the Commission wishes to see the expertise in the tribunal system applied across the full range of SEA cases.

As of October 2007, there are no concrete plans to introduce single equality legislation in NI¹⁴⁵, although with the restoration of a devolved Assembly and NI Executive progress may be anticipated.

3.3.6 Delay

The Equality Authority's Annual Reports for 2005 and 2006 allude to ongoing delays in the appointment of Equality Officers, the scheduling of hearings and the delivery of recommendations before the Equality Tribunal (Equality Authority 2006b, p.15; 2007, pp.18-20). For ROI-based complainants three years is the expected timeframe from embarking on a case to completion (Equality Authority 2006b, p.22). The Equality Tribunal witnessed a 343% increase in its caseload

¹⁴⁵ As of October 2007 consultation on proposals for a Single Equality Bill for GB are ongoing (DCLG 2007).

from 2000-2005 and this “has put enormous pressure on resources” (Equality Tribunal 2006a, p.16). Indeed, the empirical element of this study revealed some limited evidence of ‘forum shopping’ whereby potential complainants have regard to the expediency of other potential hearing forums and decide on a route other than Equality Tribunal in the interests of an earlier resolution. Such forum shopping may take place where the facts disclose evidence of harassment, for example. Claims concerning harassment, stress-induced illness in the workplace and breach of contract are frequently initiated in the civil courts (Bolger 2006).

In Northern Ireland, complainants have to wait for a period of twenty-six months on average (OITFET 2006, p.9). The Tribunal Office has set a target of a 10% reduction in waiting times year-on-year (ibid.). As a result of the Leggatt Report reforms, there is extensive use of case management hearings and preliminary hearings to clarify the issues. There has also been a significant increase in the number of part-time Chairs in the NI Industrial Tribunal system. Such measures should ultimately reduce delays to more manageable periods.

Across the interview groups for this study there was consensus to the effect that delay has a heavy psychological toll on complainants and may cause withdrawal from the process, or inhibit the lodgement of claims in the first place. As Day and Brodsky (1999, p.7) note in the context of the Canadian systems of redress:

Complainants report that the extensive delays discourage people with legitimate discrimination claims from filing complaints, dishearten and disempower those who do, and often have the effect of denying human rights complainants the appropriate remedy. If there is delay, the job, the promotion, or the service is sometimes no longer available, or the dispute has been outstanding for so long that reinstatement, for example, is no longer a realistic remedy. Overall, excessive delay results in justice being denied, and has caused complainants to lose confidence in the human rights system.

3.4 Conclusion

This Chapter has focused on the processes involved in an equality law case. In several respects equivalent rights protection is not secured to litigants under ROI law, with significant exemptions undermining the potential of the legislation for LGB people. In both jurisdictions the intimate nature of SO ground claims and the need to 'come out' to a wide range of people, means that LGB people are unwilling or unable to take cases. This position could be alleviated by securing anonymity before courts and tribunals. Difficulties generated by delays, short time limits and complex processes, are faced by all claimants but are heightened for LGB individuals.

Table 1: Individual Claimants: Emerging Barriers

Complaint Stage	Barriers
<i>'Naming'</i>	<p>Failure to identify harmful practices</p> <p>Absence of positive culture of respect for LGB people within workplaces and context of accessing services</p>
<i>'Rights Realisation'</i>	<p>Lack of awareness of legal rights and avenues of redress</p> <p>Inadequate sources of advice and assistance</p>
<i>Seeking Redress</i>	<p>Visibility</p> <p>Fear of victimisation</p> <p>Financial costs</p> <p>Inadequate remedies</p>
<i>Dispute Resolution</i>	<p>Anonymity</p> <p>Time limits</p> <p>Delays</p> <p>Operation of legislative exceptions that impact on LGB people</p> <p>Complex and opaque processes</p>

Chapter Four: The Role of Specialised Equality Bodies

4.1 Introduction

This Chapter considers the position of the specialised equality bodies. Section 4.2 sets out their mandate in global terms and outlines the work undertaken to date by the ECNI and EA on the sexual orientation ground. It also highlights tensions that can arise when pursuing strategies that seek to advance ‘group justice’ while also securing justice for individuals. How these agencies can best further access to rights for LGB individuals during the formative stages of discrimination law claims is explored in Section 4.3. To a large extent this phase involves the promotional and advisory functions of the Commission and the Authority. Section 4.4 addresses issues that arise once a formal grievance process has been triggered. During this ‘dispute’ stage the advocacy functions of both bodies assume central importance and at this juncture the Republic’s Equality Tribunal, as the independent and impartial forum for hearing complaints, is also a vital stakeholder. Finally, we examine the potential for enhancing LGB access to equality rights through the exercise of the collective enforcement powers of the EA and ECNI.

4.2 The Mandate and Remit of Specialised Equality Bodies

4.2.1 LGB Equality Initiatives Undertaken

4.2.1.1 Development, Communications and Research

Equality bodies in both jurisdictions reach out to LGB communities through various means, recognising the importance of a strong communications strategy linked to the development of a robust culture of equality. The ECNI hosts a quarterly meeting with the Coalition on Sexual Orientation (CoSO): the Coalition representatives report back to individuals and groups within the LGB sector.¹⁴⁶ In

¹⁴⁶ CoSO came into existence to provide a consultative voice for the LGB community following the introduction of the Section 75 duty. CoSO is represented on a wide range of consultative bodies

a parallel manner the EA hosts a forum, with quarterly meetings for national organisations from the nine grounds on which GLEN are the LGB representatives. Tailored communications strategies are conducted through various forms of publicity, including billboard and radio commercials in NI, and advertisements in LGB publications such as Gay Community News (GCN) in the ROI. Equality bodies in both jurisdictions have engaged with the annual PRIDE festivals. For instance, the ECNI's Chief Commissioner spoke at the Belfast PRIDE launch in 2006 and cards were handed out asking individuals to send to the ECNI comments on experiences of harassment. The Commission has also produced handouts and leaflets, called 'promotional cards', on equality rights for the LGB community, which include contact details for the ECNI. Both the EA and the ECNI take part regularly in newspaper and broadcast media opportunities in relation to legislative and other policy developments around equality, and over the last few years these have specifically included issues around SO discrimination and equality.

Much of the EA's development and research work is based on initiatives that embrace all nine grounds and seek to progress all, including the SO ground, simultaneously. A range of activities has focused specifically on LGB people and we now turn to outline these.

One of the first actions of the newly constituted Equality Authority was to establish an 'Advisory Committee on Equality for Lesbians, Gays and Bisexuals' to consider issues specific to this ground (Equality Authority 2001, p.47; Equality Authority 2002b, p. 47). The Committee, which was convened in December 1999, included representatives of LGB organisations, government departments, as well as nominees from ICTU and IBEC. It produced a comprehensive report entitled *Implementing Equality for Lesbians, Gays and Bisexuals* (Equality Authority 2002a). According to the Equality Authority interviewees the core aim of

and is a founder member of the Equality Coalition that brings together all the Section 75 umbrella groups: <http://www.coso.org.uk>.

the exercise was to consider the difficulties encountered by LGB people and to recommend changes that would realise greater equality for this group. The process was also intended to forge strong relationships between the EA and LGB organisations and to give increased visibility to the SO ground.¹⁴⁷ The resulting publication acted as a catalyst for wider debate on LGB relationships (ICCL 2006, p.34) and has been a valuable reference point for statutory reports in the field of partnership rights (Law Reform Commission 2006; Walsh and Ryan 2006; Working Group on Domestic Partnership 2006). Indeed, the EA gave particular priority to participating on and inputting to the Working Group on Domestic Partnership. It welcomed the Options Paper produced by the Group as a key step forward on the issue of partnership rights for same sex couples. In May 2006 the Equality Authority, GLEN and the Working Group on Domestic Partnership co-hosted a conference on 'The Legal Status of Cohabitants and Same-Sex Couples'.¹⁴⁸

Implementing Equality for Lesbians Gays and Bisexuals was subsequently referred to the National Economic and Social Forum (NESF). The EA consider that this was a very significant elevation of LGB issues within the policy domain. Referral to the NESF led to a publication that relates the recommendations of the Equality Authority to the respective functions of various government departments (NESF 2003). The Government has directed that each department treat the NESF report as a blueprint in considering their responsibilities under this ground. The Department of Justice, Equality and Law Reform (DJELR) has assumed a co-ordination role in this process. The DJELR in turn has appointed Liaison Officers on Sexual Orientation in each government department. In 2005 funding was provided to the Gay and Lesbian Equality Network (GLEN) to employ a policy officer who advises the DJELR on the implementation of these recommendations.

¹⁴⁷ An Information Seminar on the Report was held during Dublin Pride 2002 (Equality Authority 2003, pp. 55-56).

¹⁴⁸ <http://www.glen.ie/events/past.html>.

The EA has undertaken further joint initiatives with LGB organisations.¹⁴⁹ Two prominent examples are a schools-based campaign against homophobic bullying in partnership with the LGB youth NGO BeLonGTo¹⁵⁰ and a research project with the North Western Health Board/HSE North West in relation to access for LGB patients to healthcare (Equality Authority 2004, pp.61-62). This project explores the extent and nature of challenges to equality of access to health services in the North Western region for lesbian, gay and bisexual people and the lessons for healthcare policy and practice (ibid.).

In Northern Ireland, policy on sexual orientation issues initially emerged through the inclusion of sexual orientation as a Section 75 ground. As the statutory equality duty is based on a strong participatory model (Nott 2000), CoSO and other LGB groups have been involved in consultations throughout the drafting of equality schemes and in screening processes. There have been notable legislative successes as a result of this process. One was the introduction of a specific homophobic hate crime law in Northern Ireland which goes further than equivalent provisions in Great Britain. According to LGB representatives any doubts that civil partnership law, and indeed the GFS Regulations, might apply to NI were confounded by the need to justify such an inclusion under Section 75. So also the Northern Ireland Housing Executive (NIHE) amended its harassment policy to give equal status to re-housing the victims of homophobic abuse as already applied to the victims of sectarian and racial abuse. OFMDFM has produced a Sexual Orientation Strategy after extensive dialogue with LGB NGOs and the NIHE is in the process of consulting on its Sexual Orientation Strategy.

The introduction of the Employment Regulations were driven by adoption of the Framework Directive and the GFS Regulations by developments in Great Britain. During the progress of the Equality Act 2006, which upgraded the GB equality

¹⁴⁹ Seminars have been held including one on sexual orientation and disability entitled 'Identity at the Crossroads' in June 2001 (Equality Authority 2002b, p. 16)

¹⁵⁰ <http://www.equality.ie/index.asp?locID=109&docID=593>;
<http://www.belongto.org/images/schools/AboutCampaign.doc>

regime, it was agreed to introduce complementary measures in Northern Ireland in the form of the GFS Regulations. The decision to proceed with the GFS Regulations was a political one but the content of the Regulations was strongly influenced by submissions made by the ECNI and by CoSO.

The Commission produced a comprehensive and well-received publication, *Sexual Orientation Discrimination in Northern Ireland: The Law and Good Practice* (2004b), after consultations with CoSO. It ran an advertising campaign when the Employment Regulations were launched in 2003 and is currently running a programme of activities to raise awareness of the GFS Regulations. 'Equal Rights – It's the Law!' is the slogan for a targeted campaign on the new SO legislation. It is aimed at those who have rights and those who have responsibilities. Whilst the campaign aims to inform all service providers of their duties there has been a particular focus on two sectors - hospitality and education. The ECNI has used a number of mediums such as press advertising, washroom advertising, direct mail, advertising in LGBT magazines, and the production of flyers for distribution in bars. More in-depth partnership work is planned in the future with the hospitality and education sectors. An NI-based participant felt that the Commission's public advertisements were especially useful:

I was aware of my rights through the advertising that the Equality Commission had undertaken. I think it was the billboards and radio ads and obviously I think some advertising I'd heard from the Rainbow Project as well.

In November 2005 the Commission hosted a conference on sexual orientation equality as part of the Anti-Homophobia (NI) Campaign led by CoSO. Over 180 people attended, including employers from the public and private sectors and representatives from the voluntary sector and LGB community. The programme included an update on sexual orientation law; practical guidance for employers on how to prevent discrimination; and an overview of public authorities' statutory

duties. This conference was widely advertised in the press and media aimed at the business community; letters were sent out to all employers in Northern Ireland along with a rights guide and examples of good practice.

An ECNI conference, held in February 2006, focussed on LGB issues in further and higher education. It was also organised after consultation with LGB representatives, was well-attended and provided an opportunity for the Commission to liaise with organisations such as students unions and also ANIC (Association for Northern Ireland Colleges).

4.2.1.2 Advice and Assistance

Equality bodies in both jurisdictions have sought to resource NGOs under each ground to assist their constituency group asserting their rights under equality law. In 2005 the ECNI organised training events with CoSO and other LGB organisations and awareness seminars on the Employment Regulations are available on request. At the quarterly meetings with CoSO representatives are briefed on case law and there is an opportunity for requesting further information. The EA has provided speakers to brief LGB groups on ROI equality legislation. To date this occurs in response to requests from NGOs. Briefing sessions have been held in Outhouse and EA personnel have participated in the 'Pink Training' initiative organised by the Union of Students in Ireland.¹⁵¹ The EA and ECNI recognise that this work could be developed into a more proactive strategy as resources allow.

Materials produced to date by both the EA on rights under ROI equality law and by the Equality Tribunal on its procedures and processes are generic in nature and, as such, not tailored to complaints lodged under any specific ground.¹⁵² To an extent this is desirable since it reflects the reality that because inequalities

¹⁵¹ <http://www.usi.ie/pages/lgbt/pink-training.php>

¹⁵² The Equality Tribunal has worked with the National Adult Literacy Association (NALA) in the revision of its leaflets. Copies of information leaflets are also available in large print, Braille or audio tape on request and in Irish, French, Russian, Polish and Chinese at reception and on the website (Equality Tribunal 2006a, p.17).

intersect many cases will straddle several grounds (see Chapter 1.4.2). However, a greater balance could perhaps be struck by producing information packs which foreground LGB issues but also incorporate material on the other eight grounds.

In the absence of a single equality act the ECNI has published guides to the two primary SO ground laws in place in Northern Ireland. In 2007 it produced a 'Short Guide' to sexual orientation discrimination law, which provides an overview of the legal provisions with illustrative examples of discriminatory practices, along with brief notes on making a complaint and the advice services available from the Commission (ECNI 2007c). *Sexual Orientation Discrimination in Northern Ireland: The Law and Good Practice* (ECNI 2004b) deals in greater detail with the Employment Equality (Sexual Orientation) Regulations (NI) 2003, and contains advice on compliance pitched at employers. Its FAQ publication - *Lodging a Claim at the Industrial Tribunal or the Fair Employment Tribunal* (ECNI 2006c) – is, however, generic in nature. Some illustrations of claims are included, involving sex discrimination and disability discrimination, but none specific to SO. The ECNI's website has dedicated 'Sexual Orientation' pages, which provide an overview of the legal position with reference to concrete examples. A further section of the site sets out links to the main LGB organisations in Northern Ireland and Stonewall UK.

In relation to legal assistance, sexual orientation cases account for a small but significant portion of the EA's files (see Appendix B, Tables C and D). It has represented claimants in three highly publicised cases, two of which resulted in settlements with government departments (see Chapter 1.3.2); the other involved the first SO ground case taken under the Intoxicating Liquor Act (Equality Authority 2007, pp.30-31). To date the ECNI has received very few SO ground queries and complaints (ECNI 2006a, p.21); it has represented claimants in two employment cases that were resolved prior to hearing before the Industrial Tribunal (see Appendix B). It remains to be seen whether this pattern will be replicated in the context of goods, services and public functions.

4.2.2 Individual and Group Justice Concerns

In the context of assistance for victims of discrimination there is a certain tension between the individual justice model of equality law and the pursuit of group justice (Baker 2005). Given their broad statutory mandate and finite resources equality bodies such as the ECNI and the EA have to consider the strategic value of a particular case according to what are essentially 'group justice' criteria, namely the 'ripple effect' (O'Neill 2004) which a case could have in terms of changing policies and practices or clarifying the law. That tension is managed by applying assistance criteria that take account of an individual's circumstances (see Chapter 4.4.1). However, our research revealed an amount of confusion as to the advocacy role of the EA and ECNI among LGB people and organisations (Chapter 4.3.3; 4.4.1).

It is not possible, nor necessarily desirable, that a single agency should become the sole depository of discrimination claims (PLS Ramboll 2002). There is a further range of organisations with an interest in access to rights for LGB people and other disadvantaged groups, including trade unions and NGOs, most obviously in this context LGB NGOs. Intersecting with the potential roles of these supportive organisations lies a wider issue of the extent to which there is an infrastructure of community legal services that can pursue strategic litigation and support individuals who do not seek or do not obtain the full extent of specialised agency assistance.

Attempts to settle disputes informally reflect a further tension between the 'individual justice' and 'group justice' models, in that the outcome may resolve a particular matter but has little impact outside the confines of that dispute (Chapman 1995, p. 339). In the ROI many cases that qualify for assistance from the Equality Authority are resolved prior to reaching the Equality Tribunal. Significantly, settlements are publicised in the case review section of the EA's Annual Reports, as well as through press releases and accompanying media

work. The claimants are generally not identified. ECNI (2007b) policy explicitly recognises the educative potential of casework and to that end adopts a default publicity requirement for claims supported. These practices seek to ensure that the value of settled cases is not entirely lost to the wider LGB constituency, even though no legal precedent is generated. Nonetheless, evidence from other jurisdictions suggests that the inclusion of case studies in annual reports and other generic publications may have little impact as these documents are not widely read nor very detailed (Chapman 1995, p. 339).

Securing independence in the exercise of functions and powers is vital if specialised equality bodies are to work effectively with a range of stakeholders.¹⁵³ To that end the Equality Authority's activities are underpinned by core values including the promotion of partnership, achieving solidarity and the maintenance of independence (Equality Authority 2006a, pp.12-13). Similarly the ECNI's business is informed by its core values including to be 'independent and challenging', to 'promote co-operation' and to promote 'inclusivity and accessibility' (ECNI 2006d).

Of particular concern for the ECNI and EA is the reconciliation of promotional or development and enforcement powers in a manner that is attentive to the concerns of all relevant constituencies. O'Cinnéide (2002, p.13) concludes that this task has been achieved successfully to date:

Both Irish Commissions appear to have struck a reasonably well-received balance in being constructive yet critical, keeping lines of communication and advice open with public authorities and employers while also representing NGO views. The Irish Equality Authority has received

¹⁵³ O'Cinnéide's (2002, p.12) review of the work carried out by a number of equality bodies including the EA and ECNI, the Australian Human Rights and Equal Opportunities Commission (HREOC), the Canadian Human Rights Commission, the New Zealand Human Rights Commission, and the US Equal Employment Opportunity Commission (EEOC) concludes that the institutions "perennially find themselves caught in a tension between meeting stakeholder expectations, in particular by representing disadvantaged groups and individual complainants and implementing strong enforcement measures, while functioning as an agency of the state and acting as a go-between with other public authorities and employers."

considerable stakeholder approval for its combination of constructive engagement with employers and public authorities in providing advice, guidance and in devising equality schemes, while at the same time pursuing a vigorous and effective enforcement strategy across the nine equality grounds covered by the Irish legislation. For both Irish commissions, striking this balance may be made easier by a degree of positive political support for the equality agenda, and by the comparatively small scale of the relevant populations.

4.3 'Naming' to Redress: Promotion, Information and Advice

4.3.1 Promotion

The promotion and development strands of the EA and ECNI's work seek to achieve several cross cutting objectives. Through raising public awareness of equality law and equality issues, and by encouraging and supporting the adoption of good practice models, the specialised bodies strive to prevent discriminatory practices, to create institutional capacity to promote equality and accommodate diversity and secure a positive equality culture. Although a range of LGB-specific activities and campaigns have been undertaken (see Chapter 4.2.1), the research participants generally argued that the SO ground has not adequately asserted itself in the public consciousness. In the ROI it is, however, encouraging that in 2006 queries under the SO ground were the second highest for all those concerning the EEA dealt with by the Authority's Public Information Centre (Equality Authority 2007, p.72). As noted above, the EA has been concerned to contribute to policy formation in relation to LGB people and in particular on the issue of partnership rights (Chapter 4.2.1.1). The equality bodies are conscious of the need to further evolve initiatives on the promotion of equality principles, particularly through strengthening partnerships with the LGB NGO sector.

4.3.2 Information and Advice

Equality bodies are seen as the principal source of information on equality law and representative organisations when approached by an individual tended to

call such agencies first with a query. In the ROI there was some criticism of the response potential complainants or organisations seeking information on their behalf receive when they contact the EA by telephone. LGB NGOs suggested that when a person makes a query they should be fully briefed on all avenues of legal redress open to them, even if they are not eligible to take a case under equality legislation. The EA advised that callers are referred to other advice providers where possible but that they cannot provide information and advice on matters that fall outside the remit of the equality legislation. Enquirers to the PIC frequently provide scant information on the nature of their legal problem. A number of callers under the ground are turned away because the subject matter of the complaint falls outside the scope of the legislation. Many allegations of discrimination in the area of immigration, taxation and welfare are effectively immune from challenge due to the statutory exemptions considered above (Chapter 3.2).

More broadly, our empirical research indicated a lack of clarity on the part of LGB interviewees as to the level of advice that can be supplied by the Information Centres of both equality bodies. While callers may be advised that their claim falls outside the ambit of equality law or that the time limits have elapsed, Information Officers cannot provide legal advice as such.

Given that they often act as an important port of call, LGB representatives noted the need for them to be informed about equality law. Such information would inform their on-going advocacy work. On the whole LGB NGOs described their relationship with equality bodies in both jurisdictions as positive, yet there was strong support for the development of enhanced processes of communication and, in particular, information and training provision. The provision of dedicated training to the representative organisations would resource groups to address any misinformation or misperceptions that arise.

LGB individuals and NGOs consistently identified the need for a specific LGB information/advocacy pack during the course of this study. It should bring together, in an accessible format, information on how to bring a case, draft a submission and negotiate all aspects of the process, as well as supplying concrete examples of claims that have or could be taken.

4.3.3 Outreach through Citizens Information

Interviews and feedback seminars held with equality bodies, NGOs and other stakeholders sought to explore the optimum infrastructure for providing information to LGB representatives and individuals.

In the ROI, the EA has worked towards the Citizens Information Centres (CICs) operating as local providers of information on equality law throughout the country. Each CIC has been provided with all the relevant information, leaflets and publications on equality legislation; staff and volunteers in each office have received training with the EA. Working with CICs and the CIB is regarded as furthering the goal of maintaining and developing a profile and presence for the Equality Authority at a local level (in the absence of a regional office network for the EA) and broadening the range of information sources (Equality Authority 2006a, p.35). The EA considers that it enjoys good links with CICs and explains that cases are often referred to the EA by the Centres.

Given the limited regional spread of LGB representative organisations, it was accepted that CICs are an important stakeholder at local level in informing individuals about the operation of equality legislation. One of the LGB individuals interviewed in the ROI that had taken a case successfully to completion had initially contacted a CIC. The response of the CIC was considered to be helpful and the outcome of the contact was that the person was informed of the next outreach information session that the EA was hosting in the area. The session took place within a month, the individual attended and then initiated a case.

Some LGB representative organisations have established a strong relationship with their local CIC. Concerns were, however, raised as to the level of equality law expertise available in Centres and on the SO ground more specifically. A further common thread in discussions as to the role of CICs was that in rural areas an LGB person might be reluctant to contact their local Centre for confidentiality reasons. In general representative organisations would welcome any outreach or other proactive 'gay friendly' initiatives the CICs may be able to offer.

The extensive network of CAB in Northern Ireland has not particularly focused on equality law. However, the potential for such a network is clear. Citizens Advice developed an equality and diversity strategy in 2004, which sets out CA's aims to become a first point of contact for discrimination advice in partnership with others. The Belfast Citizens Advice Bureau was one of the reporting centres involved in a pilot scheme led by the Northern Ireland Office, Project RIOH (Recording Incidents of Hate), which ran in South Belfast until December 2006. The hate incidents covered included those based on sexual orientation. In 2006 the CAB engaged in a range of outreach measures designed to address the needs of minority ethnic communities (CAB 2006, p.23). To date there has not been any formal communication between CAB in NI and LGB organisations. CAB staff frequently attend ECNI seminars and events. However there is no specific training link between the bodies.

Significantly, there was consensus across all of the groups interviewed that CICs and CAB comprise the most viable and accessible infrastructure for disseminating information on equality law for LGB individuals.

4.4 Dispute Resolution: Advocacy and Adjudication

4.4.1 Advocacy – The Equality Bodies

Both the ECNI and EA assist select individual complainants over the course of the dispute phase. The Equality Authority may, at its discretion, provide legal assistance to those making complaints of discrimination under the EEA, the ESA or the Intoxicating Liquor Act 2003.¹⁵⁴ Given available resources it is not possible to provide legal assistance for all those who request it (Equality Authority 2007, Appendix 5). It provides such assistance only in a small percentage of the overall number of cases pursued according to criteria that have been set down by the Board of the Equality Authority (*ibid.*). The ECNI also has a casework capacity; Legal Officers give advice to potential complainants, prepare applications for legal assistance to the Legal Funding Committee, act as in-house lawyers, and provide legal representation. The ECNI provides legal assistance in accordance with statutory criteria, partly on the basis of the perceived ‘ripple effect’ that a case will have (ECNI 2007b; O’Neill 2004). As such these factors are balanced with assistance criteria that look to the particular circumstances of the complainant, including the complexity of the case, access to alternative supports, and the relationship between the applicant and respondent. The EA conditions encompass similar considerations. Equality bodies in both jurisdictions emphasised that due to the low number of SO claims to date, cases presenting to the agencies under the ground are likely to meet the current legal assistance criteria.

Meanwhile in interviews with LGB representatives and individuals significant confusion emerged in relation to the advocacy capacity of equality bodies. The assistance role of both bodies has generated the expectation that claimants will be supported in every instance. The capacity to take a case oneself or with the support of a third party such as a trade union, an advocate or even a solicitor was not raised as an avenue to the same extent. There is a perception that a decision not to ‘take on a case’ is tantamount to a value judgement on its merits.

¹⁵⁴ Section 67 of the Employment Equality Act, 1998 as amended by paragraph 1 of the schedule to the Equal Status Act, 2000, and Section 19(7) of the Intoxicating Liquor Act, 2003.

Equality body representatives explained that where potential complainants under the SO ground have approached them, and they have decided not to proceed, it is most likely to have been because the claim fell down on technical grounds, the expiration of time limits being the most usual reason. As noted above, many ROI queries fall outside the ambit of equality law (Chapter 4.3.2).

This indicates a significant area of possible misunderstanding by LGB people and representatives on the implementation of equality law. It is an issue that could perhaps damage the goodwill between the LGB communities and equality bodies. Confusion over the positive role representative organisations can play in supporting an LGB individual through the claim process also emerged in the course of interviews and we now turn to consider that issue.

4.4.2 Third Party Participation

Under European Union law associations, organisations and entities with a legitimate interest in ensuring compliance with equality law must be permitted to support complainants.¹⁵⁵ As of yet the nature of the measures required has not been probed in case law and a variety of approaches have been adopted throughout the Union (Chopin et al 2004; European Commission 2004, p.18; European Network of Independent Experts in the Non-Discrimination Field 2006, pp. 68-70).

The approach adopted in the ROI is minimalist: the legislation permits representation by any body or individual authorised by the complainant. However, organisations such as trade unions and representative NGOs do not have the legal right to *initiate* an action.¹⁵⁶ Further, the enabling provisions only apply to proceedings before the Equality Tribunal and the Labour Court. NGOs cannot, therefore, represent an individual pursuing a case against licensed

¹⁵⁵ See Article 9 (2) and Recital 29 of the Framework Directive.

¹⁵⁶ Section 77(11) EEA; Section 25A ESA.

premises under the Intoxicating Liquor Act. Third-party associations do not enjoy legal standing in Northern Ireland.

In the ROI context legislative provisions stipulate that in the course of an investigation the Director shall “hear all persons appearing to the Director to be interested and desiring to be heard.”¹⁵⁷ This latter clause opens up the possibility that LGB NGOs can participate in proceedings by making submissions on relevant matters. Representatives of the Irish Travellers Movement have been called as expert witnesses in cases to give information on the difficulties experienced by Travellers in gaining access to services and on other matters.¹⁵⁸

Consultations with representative organisations in the ROI revealed an amount of confusion and caution as to the role they could play in supporting an individual member of the LGB community through a case. Despite the Equality Authority and Equality Tribunal representatives highlighting the important role played to date by complainant advocates in the form of trade union representatives or members of the NGO sector, the tendency among members of LGB representative organisations was to assume that they had no part in the process. In fact concern was expressed that should they assume a visibly supportive role in relation to a complainant, this might taint the case with the appearance of political activism. It was felt that dubious motives could be ascribed to the person lodging a complaint and that NGO involvement might generally prejudice the outcome of the case.

The effect of this pervasive perception to date is that representative organisations have felt hampered in the support that they can provide to a potential complainant. Throughout the sector the tendency has been to adopt a ‘hands-off’ approach. In relation to children the perception was that no action could be taken.

¹⁵⁷ Section 79 EEA, Section 25 ESA.

¹⁵⁸ See *Patrick Reilly v The License, the Foxhunter Pub, Lucan, Dublin*, DEC-S2003-026; *Sweeney v Saehan Media Ireland Ltd.*, DEC-E2003-017.

The Equality Authority could usefully engage with LGB agencies in order to provide clarification on the role that NGOs can play in supporting an LGB complainant.

According to the EA “community advocacy seeks to build a capacity within the community sector to advocate for the rights contained in equality legislation, to promote knowledge of casework outcomes as a preventative measure and to develop a capacity to support claimants who feel they have been discriminated against under the Equal Status Act” (ibid.). As noted above the EA has acted as a partner in providing training for the Community Advocates that work in Citizens Information Centres (see Chapter 2.3.2). An advocacy programme was undertaken with representatives of Traveller Community organisations because of the high level of equal status claims arising under that ground (Equality Authority 2002b, p.13).¹⁵⁹ Training covered the process of making complaints and general information as to how members of the community could invoke their rights under the legislation. Advocates had access to the Equality Authority’s in-house solicitors as part of the initiative.

An EA representative highlighted that the potential of the programme had not been fully realised. To a significant extent this was attributable to the delays encountered in processing cases; people did not have an opportunity to put the skills they had acquired into practice within a reasonable time frame. They also noted, however, that a number of cases were successfully supported by Traveller organisation advocates.

The ECNI has been the primary source of legal assistance in discrimination cases. However, in recent years, the Commission has acted more strategically and, although there is a wide range of professional lawyers who will provide

¹⁵⁹ A partnership was forged with a national NGO, the Irish Traveller Movement: <http://www.itmtrav.com/>. The Irish Traveller Movement has a Legal Unit since 2003. It has developed a range of public law initiatives designed to advance the human rights of the Traveller community: http://www.itmtrav.com/Legal_Unit.html

representation in discrimination cases, community legal services are under-developed. Trade union representation before Industrial Tribunal is generally low, running at about 5% of claimants during the period from April 2002 to March 2005. Legal representation is high, given the informal nature of the proceedings, running at about 40% for claimants and about 55% for respondents (OITFET 2005b, p 12).

Research participants based in both jurisdictions regarded trade unions as a largely untapped resource in the field of LGB advocacy. It was suggested that unions could be more proactive in supporting claims by appointing dedicated SO representatives. Moreover, given their substantial experience in representing individuals before tribunals and courts, union officials could perhaps provide advocacy training to LGB NGOs.

4.4.3 Adjudication

This section centres on the role of the Equality Tribunal, as the only specialised equality body on the island dedicated to the impartial adjudication of complaints. The adjudication role of the ECNI in relation to Section 75 is dealt with towards the conclusion of the section.

Chapter 3 uncovered a number of barriers that LGB complainants meet when they decide to seek redress under equality law. Those that have particular implications for the Tribunal include substantial delays in hearing claims and a perception that the procedures involved are not transparent.

The number of decisions issued by the Equality Tribunal in the ROI has increased considerably in recent years (Equality Tribunal 2006a; 2007a). Staffing levels have clearly been inadequate to meet the caseload (Equality Tribunal 2006a, p.6). In her contribution to the Tribunal's most recent Annual Report the Director notes that additional posts have been secured to enable the elimination of delays "over the next two years" (Equality Tribunal 2007a, p.4).

The Tribunal has a number of mechanisms in place which are designed to secure accountability to members of all nine grounds covered by the legislation. In 2005 the Tribunal “established a formal complaints procedure whereby all complaints are logged and investigated fairly and impartially. There were four complaints to the Tribunal's Customer Services Manager and these were dealt with promptly and in an objective and courteous manner” (Equality Tribunal 2006a, p.18). Periodic Users’ Surveys are also conducted (Equality Tribunal 2004a, Appendix 8; Equality Tribunal 2005a, Appendix 5).

In addition, the Tribunal initiated a Users Forum comprising legal personnel, employers’ representative organisations, ICTU and participants from NGOs covering many of the nine equality grounds including an LGB NGO – the National Lesbian and Gay Federation (Equality Tribunal 2006a, Appendix 5). The Forum was set up in 2001 and meets 3 times per annum. It discusses procedures of the Tribunal in a general way and provides an opportunity for those represented to voice any criticisms or suggestions for change arising in relation to their area of interest (Equality Tribunal 2004a, pp.17-18). For example, the idea not to publish names when reporting on certain cases emerged from the Forum. The quasi-judicial functions of the Tribunal are excluded from discussion, due to the statutorily independent role of the Director and the Equality Officers. One LGB representative had not attended for some time because it was felt that the Forum was not an effective platform for developing best practice in relation to SO cases. While this feedback is not generalisable, an evaluation of the Forum’s operations to date may be a useful exercise.

Equality Tribunal staff undertook ‘sensitivity training’ on sexual orientation issues during 2005 (Equality Tribunal 2006a, Appendix 3). This initiative may alleviate reported fears about the discussion of one’s sexuality in Tribunal proceedings (Chapter 3.2.3). The education of staff on SO issues should be publicised on the Tribunal’s website and in various publications about its services, as should the fact that hearings take place in various locations around the country.

Equality Officers enjoy significant powers in carrying out their functions.¹⁶⁰ These include the power to enter premises, obtain information and inspect work, and the ability to seek court orders directing that persons cooperate with investigations. As noted above, some interviewees felt that the Tribunal's potential as an investigative forum was not being fully realised (Chapter 3.3.5.2).

Concerns were also expressed in relation to case management issues and the lack of a standardised format for Tribunal hearings. The introduction of a rules committee for the Tribunal could address these matters effectively and contribute to addressing current delays in processing cases. In addition it could provide an opportunity to clarify the meaning of the legislative provisions, which stipulate that in the course of an investigation the Director shall "hear all persons appearing to the Director to be interested and desiring to be heard."¹⁶¹ This latter clause opens up the possibility that LGB NGOs could participate in proceedings by making submissions on relevant matters, enhancing greatly their capacity to support claimants (see Chapter 4.2.2).

To date Equality Officers have consistently used the redress provisions under the EEA and ESA in a creative manner.¹⁶² Decisions have recommended that respondents introduce various measures aimed at improving how they operate for the benefit of all employees or service users. As noted in Chapter 2.4.3 provision of training for staff, and the introduction of equal opportunities and harassment policies are frequently included with compensation orders.¹⁶³ Such good practice on the part of the Tribunal ought to continue and be replicated in

¹⁶⁰ Sections 94-97 EEA, Sections 33-38 ESA.

¹⁶¹ Section 79 EEA, Section 25 ESA.

¹⁶² Section 84(1)(e) EEA; Section 27(1)(b) ESA.

¹⁶³ Such discretion is not untrammelled, however: The Labour Court overturned an Equality Officer's order which had directed the respondent to provide training seminars for all staff on the EEA in *A Distribution Company - and - A Worker*, ADE/04/10 Determination No. 0414. The Court reasoned that, "adequate arrangements are already in place within the employment whereby management and staff of the respondent are aware of their rights and responsibilities under equality legislation. In these circumstances, and having regard to the costs involved, the Court is satisfied that the training requirement ordered by the Equality Officer would place an unnecessary and disproportionate burden on the respondent."

NI. It should be noted that the appropriateness of some Equality Tribunal orders has been questioned by the EA (Equality Authority 2004, pp.22-23). Further, where a successful case has been taken on the SO ground, Tribunal officers could recommend the production of specific policies on combating homophobia and eliminating heterosexism. In the successful SO ground cases to date Equality Officers have ordered the following forms of redress:

ESA Cases

- €1,000 compensation; arrangements to be put in place to ensure that complainant treated in same manner as heterosexual customers of hotel in future; respondents to ensure that all staff are made fully aware of obligations under ESA.¹⁶⁴
- €1,000 compensation.¹⁶⁵

EEA Case

- €10,000.00 compensation (for harassment, distress and breach of rights does not contain any element of lost income); respondent to revise and redraft its Respect and Dignity document to take account of the provisions of the Code of Practice on Harassment and Sexual Harassment and effectively communicate the document to all relevant persons; an equality training seminar on EEA to be provided for all staff within three months.¹⁶⁶

The ECNI has an adjudication role in relation to the statutory equality duty contained in Section 75 of the Northern Ireland Act 1998.¹⁶⁷ Paragraph 10 is directed towards individual complaints of failures to comply with equality schemes:

¹⁶⁴ *O'Regan v Bridge Hotel Waterford*, DEC-S2004-037.

¹⁶⁵ *A Female v A Publican*, DEC-S2005-026.

¹⁶⁶ *Piazza v Clarion Hotel*, DEC-E2004-033.

¹⁶⁷ This is set out in Paragraphs 10 and 11 of Schedule 9 of the 1998 Act.

- (1) If the Commission receives a complaint made in accordance with this paragraph of failure by a public authority to comply with a scheme approved or made under paragraph 6 or 7, it shall-
 - (a) investigate the complaint; or
 - (b) give the complainant reasons for not investigating.
- (2) A complaint must be made in writing by a person who claims to have been directly affected by the failure.
- (3) A complaint must be sent to the Commission during the period of 12 months starting with the day on which the complainant first knew of the matters alleged.
- (4) Before making a complaint the complainant must-
 - (a) bring the complaint to the notice of the public authority; and
 - (b) give the public authority a reasonable opportunity to respond.

O'Neill (2004, p. 23) points out that: "This is clearly a qualitatively different role for the Commission than either legal assistance or formal investigation. Firstly it is an adjudicatory role and in determining whether or not a breach of approved equality scheme has been established the Commission must act impartially between the complainant and the public authority. There is also less opportunity to act strategically as the Commission must investigate a complaint by a person who claims to be directly affected unless it has reasons not to do so."

According to an ECNI interviewee, four potential Paragraph 10 complaints were logged with the Commission regarding the use of Lisburn City Council's Cherry Room for the purposes of civil partnerships from the end of July through to September 2005 (two from Lisburn Councillors and two from individuals). There were also a number of queries from people wishing to remain 'anonymous', seeking advice regarding the issue. Each person was given a verbal or written explanation of the Section 75 process, including the complaint mechanism. There was correspondence between ECNI staff and Lisburn City Council and following legal advice obtained by the Council, it overturned the initial decision on 13th September 2005.

In this context the litigation known as *Re Neill's Application*¹⁶⁸ also takes on significance. In that case, a range of bodies, including the Children's Law Centre (CLC), complained that the Northern Ireland Office (NIO) had failed to comply with its equality scheme in the enactment of Anti-Social Behaviour Order legislation. The Commission decided, on the admissibility of the CLC's complaint under Paragraph 10, that the CLC was a "person who claims to have been directly affected by the failure" of the NIO to comply with its scheme.

The ECNI took the view that it did not have to decide upon the 'standing' of a *bona fide* organisation representing a Section 75 constituency, in this case children and young people, members of which were unlikely to be able to complain themselves. It was open to it to filter out unmeritorious complaints by giving reasons not to investigate under Paragraph 10(1)(b). The High Court disapproved of this course of action, although its conclusion does not form part of the binding elements of the judgment. The Court of Appeal approved the High Court judgment although the legal standing aspect was not addressed.¹⁶⁹

While the Commission has a wide discretion in regard to whether to investigate under Paragraph 11, which is considered below, individual LGB people may be reluctant to complain under Paragraph 10. The effect of the *Neill* judgment may be to inhibit the ECNI accepting Paragraph 10 complaints from LGB NGOs.

4.5 Collective Enforcement Mechanisms

4.5.1 Introduction

Both the ECNI and Equality Authority enjoy a range of collective enforcement powers, which facilitate macro-level enforcement and, as such, correlate with the group model of justice embedded in equality law (Barry 2003; McColgan 2005, pp.357-407; White 2006). Significantly the onus is not placed on particular LGB claimants and in the case of some provisions entire sectors may be the subject of

¹⁶⁸ [2005] NIQB 66 (07 October 2005).

¹⁶⁹ [2006] NICA 5.

review thereby getting around the confines of individual litigation explored in Chapters 2 and 3.

4.5.2 Inquiries and Investigations

One of the potentially hard-hitting functions of the EA is that of conducting inquiries for any purpose connected with its functions.¹⁷⁰ The statutory provisions appear to empower the Authority to carry out both ‘named person’ and general inquiries (White 2006). To date neither form has been undertaken. The ECNI enjoys similar powers to conduct formal investigations under the terms of various laws (O’Neill 2004). It has agreed an investigations strategy (ECNI 2005, pp.29-31) and published a report into the exception of teachers from the fair employment legislation (ibid.). The Commission is currently conducting an investigation on the accessibility of health information for people with a learning disability. A significant weakness in the SO Employment Regulations is that the ECNI is not mandated to conduct investigations into employment discrimination. By contrast it has a full range of such powers under the SO GFS Regulations.¹⁷¹

Barry (2003, p.426) observes that the “carrying out of an inquiry would require substantial resources. It is a particularly useful power in situations where claimants may be very vulnerable or where there is a dearth of information.” Experience from other jurisdictions suggests that apart from resource constraints, ‘named person’ inquiries have often been subject to successful and lengthy court challenges (McColgan 2005, pp.357-407). Recent years have witnessed renewed use of general investigations and inquiries by the UK equality bodies (O’Brien 2005; White 2006).

Separate functional divisions are involved in enforcement and development activities, thereby avoiding conflicts of interest. However, in other jurisdictions a

¹⁷⁰ Sections 58-66 EEA. The Authority may also conduct an inquiry at the request of the Minister for Justice, Equality and Law Reform.

¹⁷¹ Section 30, The Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006.

risk has been identified that the external perception of the equality body could be comprised if the power to investigate is wielded in a 'heavy-handed' manner.¹⁷² The Commission's strategy expresses a preference for sector-wide investigations, as opposed to ones that focus on a given organisation (ECNI 2005, pp.29-31).

At this early juncture in the development of SO equality law it may be that 'named person' investigations or inquiries could be too adversarial in tone. A report on specialised equality bodies cites the following example of a successful LGB and gender based inquiry conducted in Sweden (PLS Ramboll 2002, p.74):

Together with the Ombudsman for Gender Equality, the Swedish Ombudsman Against Discrimination Because of Sexual Orientation (HomO) took the initiative of investigating the criteria for appointing the defence officials at Sweden's foreign embassies. The provisions were from December 2000. In the definition of the officials it was stated that "the person should be *married*, and in order for the *wife* to function in social settings *her* language competences should be developed," which thereby implied the expected gender of the official, his sexual orientation and his marital status. The investigation ensured quite a lot of media attention.

As indicated above, the ECNI can also launch its own investigations into perceived failures to abide by Section 75 equality schemes (Chapter 4.4.3). Depending on the impact of the *Neill* judgment, many complaints in relation to failure to comply with equality schemes concerning the SO ground will be brought under Paragraph 11. However, although a number of issues have been raised with the Commission in relation to SO, none have matured into a full investigation under either Paragraph 10 or 11 (Chapter 4.4.3).

4.5.3 Equality Reviews and Plans

The Development Section of the EA deals with the promotion of equal opportunities and to that end engages in a range of activities including the use of

¹⁷² For examples of good practice from New Zealand and Australia see O'Cinneide 2003, pp.20-22.

voluntary equality reviews and equality action plans.¹⁷³ These cover nine grounds including the SO ground. “An equality review is an audit of the level of equality of opportunity and an examination of the policies, practices and procedures to determine whether these are conducive to the promotion of equality. An action plan is a programme of actions to be undertaken to further the promotion of equality of opportunity” (Barry 2004, p.13). The equality legislation also enables the EA to carry out reviews on an enforcement basis.¹⁷⁴

During 2000 and 2001 the EA developed a template and voluntary scheme in consultation with representative community organisations, IBEC and ICTU (Equality Authority 2001, p. 56). The Employment Equality Reviews and Action Plans (ERAP) Scheme is intended to promote a culture of equality within organisations. The Scheme provides guidance in developing an equality infrastructure within an organisation, and supports the emergence of good practice in promoting equality, combating discrimination and accommodating diversity through the development of an Equality Action Plan. To date several reviews have been conducted annually with large-scale employers, private and public sector, on a co-operative basis. Equal status reviews involving the North Western Health Board and Kerry VEC have also been undertaken (Equality Authority 2005, p.85; 2007, p.10). Recent years have witnessed increased engagement with the local authority sector (Equality Authority 2007).

The Equality Authority works with the social partners, IBEC and Congress, through the Equal Opportunities Framework Committee to support Small and Medium Enterprises to be planned and systematic in their approaches to equality. This work covers the nine grounds including SO. In 2006 one hundred and thirty-three companies were provided with consultancy support to put in place equality policies and to develop equality and diversity training strategies for their staff (Equality Authority 2007, p. 12).

¹⁷³ See Part VI EEA.

¹⁷⁴ Section 69 EEA.

The ECNI has used its experience in relation to fair employment legislation to develop a system of Employment Equality Plans (EEPs).¹⁷⁵ EEPs are voluntary and have been adopted by a significant number of public and private sector organisations. As with their ROI counterparts the Plans are designed to facilitate the spread of good practice across the equality agenda. The Commission's Employment Development Division works with employers to build models that are tailored to their particular needs. A series of 'Equality Indicators'¹⁷⁶ assist in the audit process and allow for an integrated approach to the promotion of equality across nine grounds, including sexual orientation and marital or civil partnership status. Last year at the invitation of the ECNI, representatives of Stonewall UK advised over 40 employers on workplace equality measures aimed at LGB individuals.

The ongoing ECNI and EA initiatives provide an interesting opportunity for developing good practice models in relation to heterosexism and homophobia (as part of a multi-ground plan) given the emphasis on promoting equality of opportunity, accommodating diversity and non discrimination. As noted previously, while the standard discrimination prohibition invoked in individual complaints can tackle homophobia in workplaces, the less overt institutionalized forms of inequality experienced by LGB individuals are best addressed through proactive and positive measures.

The LGB sector could usefully develop an "E-Quality Mark". In Great Britain, Stonewall has introduced a successful programme of *Diversity Champions* and a related *Workplace Equality Index*, which focuses specifically on good practice in relation to SO.¹⁷⁷ The sector could also draw on material developed through the Transnational Partnership for Equality (TRACE).¹⁷⁸ This EU-funded project

¹⁷⁵ <http://www.equalityni.org/sections/default.asp?secid=3>

¹⁷⁶ [http://www.equalityni.org/archive/word/EqualityIndicators\(June2006\).doc](http://www.equalityni.org/archive/word/EqualityIndicators(June2006).doc).

¹⁷⁷ <http://www.stonewall.org.uk/workplaceold/32.asp>. A US-based NGO - the Human Rights Campaign – operates a similar annual 'Corporate Equality Index': <http://www.hrc.org/>

¹⁷⁸ http://www.atviri.lt/index.php/about_trace_transnational_cooperation/about_trace/1277

involved collaboration between employers, trade unions, governmental public bodies, academics and NGOs on SO equality. It has produced two guides (Alsterhag 2007; Martinsson 2007) that move beyond the standard focus on homophobia by providing practical guidance on countering heteronormativity.

A recognition-driven initiative would encourage voluntary adherence to good practice on LGB equality, and also act as an incentive to prospective LGB employees and clients.

4.5.4 Litigation

4.5.4.1 Introduction

As noted above the EA and ECNI play a crucial role in supporting certain claims taken by individuals. In common with counterparts in other jurisdictions the equality bodies may also commence litigation on their own initiative (McColgan 2005, p.357; Obura and Palmer 2006; PLS Ramboll 2002).

4.5.4.2 Judicial Review Proceedings

Specialised bodies can elucidate important areas that fall within their particular remit by acting as an *amicus curiae* in a pre-existing legal action (Barry 2006). Intervening is widely viewed as a more cost effective avenue than assistance throughout individual cases (Klug and O'Brien 2004, p.9). Although it has not been conferred with express statutory powers, in October 2006 the Supreme Court confirmed that the Equality Authority could act as *amicus curiae* in a case concerning Travellers rights.¹⁷⁹

It is open to the ECNI to launch an application for judicial review or to intervene in judicial review proceedings. The Commission has intervened in a number of cases including the litigation concerning the SO GFS Regulations (Chapter 3.2.2).¹⁸⁰ It has yet to commence judicial review proceedings on its own initiative.

¹⁷⁹ *Doherty & anor. -v- South Dublin County Council & ors.* [2006] IESC 57 (31 October 2006).

¹⁸⁰ http://www.courtsni.gov.uk/en-GB/Judicial+Decisions/Judgments/j_j_weac5888final.htm

4.5.4.3 References by the ECNI and Equality Authority

In certain circumstances the EA can refer discriminatory practices or instances of discrimination against an individual to the Director of the Equality Tribunal.¹⁸¹ One such reference was made under the ESA in 2004 (Equality Authority 2005, p. 58). Potential individual SO cases and/or more general discriminatory practices may be identified. For instance, LGB representatives in the ROI reported that it is common practice for providers of assisted human reproductive technology to refuse treatment to lesbian women, yet such a policy would appear to contravene the ESA (Commission on Assisted Human Reproduction 2005). Moreover, Chapters 2-3 highlight the particular obstacles that need to be surmounted by especially vulnerable LGB individuals, such as children and those working in the health and education sectors. In these instances the EA's power to refer an instance of individual discrimination, where the claimant cannot be reasonably expected to litigate, could be significant. Particular considerations apply to children given that they do not have standing to pursue cases in their own right.

The ECNI has a limited power to litigate in cases of 'persistent discrimination': It may apply for an injunction to secure compliance with a tribunal or court judgment, or failure to abide by the terms of a non-discrimination notice.¹⁸² This power only applies at present to the SO GFS Regulations and not to the SO Employment Regulations. Additionally, the Commission is exclusively empowered to litigate in cases concerning discriminatory practices¹⁸³, discriminatory advertising¹⁸⁴, and instructing or pressuring others to commit unlawful acts.¹⁸⁵ The ECNI would wish to see the full complement of these

¹⁸¹ Section 85 EEA; Section 23 ESA. Referrals of individual cases of discrimination or victimisation may take place where it is not reasonable to expect the potential complainant to make such a reference.

¹⁸² Regulation 41, SO GFS Regulations.

¹⁸³ Regulation 19.

¹⁸⁴ Regulation 20.

¹⁸⁵ Regulations 21 and 22

powers extended to the field of employment and to have standing in cases of discrimination involving vulnerable individuals.

4.5.5 Section 75

Although there have been no statutory duty investigations into SO issues, the inclusion of SO in Section 75, and therefore in equality schemes, has placed SO discrimination 'on the agenda' of the public sector in NI (see Chapter 4.2.1.1).

A review of the effectiveness of Section 75 (ECNI 2007d) concludes that the statutory duty has created salient opportunities for SO issues to be mainstreamed. Discrimination against LGB people is now better understood in NI. It was however, not possible to establish whether improvements in this area are traceable to Section 75 as such or to other initiatives. What the research did establish was that "representative groups reported a significant increase in involvement in the policymaking process; with positive policy outcomes" (ibid., p.29). The ECNI findings echo those contained in an earlier report on the positive duties operative in Northern Ireland, Scotland, Wales and Greater London, which concludes that their implementation can have a valuable impact on the practical consideration given to equality issues in policy making, decision making and service delivery (O'Cinnéide 2003). The study found that, by compelling the taking of adequately implemented procedural steps, positive duties create a climate of openness to new diversity initiatives and ensure a greater focus upon the proactive promotion of equality.

The EA and the Irish Human Rights Commission¹⁸⁶ (2004) have called for the enactment of a parallel duty in the ROI, citing as support the equivalence provisions contained in the Belfast Agreement (O'Cinnéide 2005). The National

¹⁸⁶ The Irish Human Rights Commission was established in July 2001 as a consequence of undertakings set out in the Good Friday Agreement. The Commission's powers and functions derive from the Human Rights Commission Acts 2000 and 2001. A Joint Committee comprising the Commissions North and South has been operative since November 2001 as a forum to

Economic and Social Forum and the Partnership 2000 Working Group on Equality Proofing have made similar recommendations (Equality Authority 2002b, pp.67-68).

Writing in the context of racial discrimination Hepple (2004) argues that such 'fourth generation equality laws' are required to tackle institutional forms of discrimination. Indirect discrimination prohibitions may capture discrete unintentional practices but they do not place an onus on employers and service providers to change their organisational cultures in a proactive and positive fashion (ibid.; Baker et al 2004, ch.7; Griffiths 2006). Unlike discrimination prohibitions, positive duties can be expected to have a considerable impact on heterosexual service provision or employment practices. As such, positive duties are a vital tool for tackling a major manifestation of LGB inequality within the public sector.

Hansson, Hurley Depret and Fitzpatrick (2007) have examined the role of the statutory equality duty in relation to the SO ground. There is no doubt that the inclusion of SO in a statutory duty, as opposed to the voluntary Policy Appraisal and Fair Treatment guidelines which preceded it, has had a dramatic effect on the mainstreaming of SO into public policy formation in NI. Nonetheless, despite an emphasis in ECNI guidance on the collection of both quantitative and qualitative data (ECNI 2005), there appears to be unwillingness on the part of public authorities to conduct full equality impact assessments on the SO ground, in the absence of apparent evidence of adverse impact on LGB individuals on particular policies.

In the context of this report, it is essential that access to statutory duty investigations on the part of LGB individuals and organisations is facilitated. Hansson, Hurley Depret and Fitzpatrick (2007) express disquiet that a High Court

ruling on enforcement of Section 75¹⁸⁷ appeared to question the capacity of NGOs to make complaints as to failure on the part of a public authority to comply with its equality scheme under Paragraph 10. Ultimately the potential of that complaint route may be diminished. However, the ECNI has a wide discretion to investigate of its own volition under Paragraph 11 and when considering whether to authorise an investigation the Commission will “take into account the fact that it is unlikely that a complaint would be pursued by a person who is directly affected...” (ECNI 2006f, 41).

4.6 Conclusion

Several challenges for the specialised bodies have been identified in the course of this research. At the level of the individual complaint the EA and ECNI face the difficulty of encouraging SO ground cases in situations where LGB complainants must compromise their privacy. In the ROI inadequate resources have contributed to considerable delays in the processing of individual claims and have limited use of collective enforcement powers. Additional statutory powers would enhance the bodies’ work in certain fields and secure a greater role for civil society organisations in the enforcement of LGB equality rights. The following chapter turns to look at aspects of good practice in this regard from other jurisdictions.

¹⁸⁷ *Re Neill’s Application*, High Court, 7 October 2005 (Girvan J). The judgment was upheld in the Court of Appeal but without reference to this point ([2006] NICA 5 (08 March 2006)).

Table 2: Legislative Framework on SO Issues

	Northern Ireland	Republic of Ireland
Scope of SO equality law	Employment, training, goods and services, education, accommodation, performance of public functions	Employment, training, goods and services, education, accommodation
Direct discrimination	All aspects	All aspects
Indirect discrimination	All aspects	All aspects
Harassment	Employment and training	All aspects
Victimisation	All aspects	All aspects
Genuine occupational requirement	Employment and training	Employment and training
Faith-based exceptions in employment	Employment 'for the purposes of religion' exception	'Religious ethos' exception
Faith-based exceptions in GFS etc	Wide exceptions for non-commercial faith-based organisations	'Religious purposes' exception
Dwellings exception	Small dwellings exception	Family home exception
Clubs and associations	Main object test in relation to SO	Principal purpose test in relation to SO
Enforcement		
<i>Individual complaints</i>		
Forum of redress	Claims to Industrial Tribunal (Employment) Claims to County Court (Goods, Facilities, Services, Public Functions and Education)	Complaints to Equality Tribunal (appeals to: Circuit Court for ESA, Labour Court for EEA) Claims to District Court (Licensed Premises)
Remedies	Largely compensatory in tribunals. ECNI can seek injunctions against persistent discrimination.	Tribunal can order changes in practices. Ceiling on damages
<i>Collective enforcement</i>		
Investigations by equality bodies	Only in relation to GFS by ECNI	Across all aspects by EA
Cases brought by equality bodies	ECNI can initiate application for judicial review but cannot litigate in its own name except in cases of persistent discrimination and discriminatory advertising	EA can refer complaints to Equality Tribunal in its own name and has powers to litigate in cases of general practice discrimination and discriminatory advertising

Associated legislation		
Civil partnership	Civil Partnership Act 2005	No equivalent
Statutory duty on public authorities	Northern Ireland Act 1998, Section 75	No equivalent
Homophobic hate crime	Public Order (NI) Order 1987, as amended in 2005	Incitement to Hatred Act 1989

Chapter 5: Comparative Review

5.1 Introduction

A comparative review was carried out in order to examine the extent to which the issues that have emerged on the island of Ireland have also surfaced in other jurisdictions and whether examples of 'good practice' can be identified to feed back into the project. Four jurisdictions were selected: Belgium, The Netherlands, Scotland and Sweden.

The most obvious mechanism to support and complement individual litigation is the creation of specialised equality bodies. Each of the comparator countries has established bodies whose mandate includes SO equality and we have drawn on their expertise.

Belgium and the Netherlands were chosen because both equality bodies have been operational for a considerable period of time. The Belgian Centre for Equal Opportunities and Opposition to Racism (CNTR) is an 'assistance-based' body.¹⁸⁸ CNTR was originally established in 1993 to combat racism, and assumed responsibility for sexual orientation discrimination in 2003. Unlike the EA and the ECNI, the Dutch Equal Treatment Commission (CGB)¹⁸⁹ has an adjudicatory role; individuals, but also trade unions and NGOs, can request an opinion from the CGB before, or more frequently instead of, initiating litigation in the ordinary courts. However, the CGB combines its quasi-judicial powers with advisory and promotional functions. The CGB has been in existence since the 1980s, although it was originally concerned only with gender equality issues. Dutch equal treatment law was amended in 1994 to expand the list of prohibited

¹⁸⁸ See further: www.diversite.be. On Belgian measures that address sexual orientation discrimination within employment see, European Group of Experts on Combating Sexual Orientation Discrimination 2004, ch. 4.

¹⁸⁹ See further: www.cgb.nl/cgb. For an account of Dutch SO employment discrimination law see, European Group of Experts on Combating Sexual Orientation Discrimination 2004, ch.14.

grounds to include, amongst others, sexual orientation and the CGB was reconstituted accordingly.

The Ombudsman Against Sexual Orientation Discrimination, HomO, established in 1999, is one of a range of Equality Ombudsman in the Swedish system.¹⁹⁰ It is a single ground body, and was selected given this exclusive focus on SO issues. Scotland was chosen as a fourth element of this comparative review on the basis of its similarities to the Irish and Northern Irish systems. The Scottish sections of the established specialised agencies in Great Britain, namely the Commission for Racial Equality (CRE), the Disability Rights Commission (DRC) and the Equal Opportunities Commission (EOC) advance the equality agenda in that jurisdiction.¹⁹¹ A distinctive feature of the Scottish bodies is the high degree of cooperation between them, particularly on strategies in relation to legal assistance.

It is important to appreciate that each legal system has differing characteristics, which influence the choice of institutions and of strategies in each country. For example the Dutch system encompasses a strong 'group justice' element in that trade unions and NGOs can make complaints to the CGB and can also initiate proceedings in the court system.

On a more general note, it is typical of many European legal systems, including the three continental jurisdictions included in this comparative review, that litigation is generally seen as an act of last resort. Consequently there is an emphasis in each jurisdiction on mechanisms to resolve disputes without recourse to judicial processes.

¹⁹⁰ See generally: www.homo.se. On Swedish SO equality law within the employment arena see further, European Group of Experts on Combating Sexual Orientation Discrimination 2004, ch. 16.

A further important factor, which was helpfully identified by colleagues in ILGA-Europe,¹⁹² is that there is not a necessary correlation between the priorities of LGB organisations and the legal rights that LGB people may enjoy. For example, the Framework Directive is solely concerned with issues of employment and training. However, core LGB issues in many States may be hate crime or civil partnerships. Even where SO discrimination law has been extended to cover the provision of goods and services, such as in the four jurisdictions under review, the focus of LGB groups may be on political lobbying, campaigning and moral/counselling support for LGB people rather than involvement with a legal system with which they may be unfamiliar.

5.2 ‘Naming’ to Redress: Promotion, Information and Advice

5.2.1 Introduction

Chapter 2 established that LGB people face significant obstacles during the formative stages of equality claims. Principal barriers include the absence of a positive culture of respect in workplaces and society more generally; insufficient sources of advice and assistance; fear of victimisation; and concerns about potential costs.

5.2.2 Promotion

HomO supplied several examples of good practice in the general arena of promotion. It is especially active in the university sector where over half of the universities have action plans monitored by HomO. It has established a good working relationship with the RFSL, The Swedish Federation for Lesbian, Gay, Bisexual and Transgender Rights.¹⁹³ The bodies collaborated in the *Access to*

¹⁹¹ These bodies are to be replaced by the Commission for Equality and Human Rights (CEHR), which will commence work in October 2007. See further the CEHR’s interim website:

<http://www.cehr.org.uk/>

¹⁹² An interview was held with Christine Loudes and Evelyne Paradis of ILGA-Europe. ILGA-Europe is the regional section of the International Gay and Lesbian Association (ILGA). It is an NGO that works for human rights and equality for lesbian, gay, bisexual and transgender people at European level: <http://www.ilga-europe.org/>.

¹⁹³ <http://www.rfsl.se/>

Justice project that is discussed below in more detail. RFSL is also involved in an EU-funded project, the Transnational Partnership for Equality (TRACE), which involves collaboration between employers, trade unions, governmental public bodies, academics and NGOs on SO equality. It has produced two guides (Alsterhag 2007; Martinsson 2007) that move beyond the standard focus on homophobia by providing practical guidance on countering heteronormativity (see Chapter 4.5.3).

5.2.3 Information and Advice

As is the case for the EA and ECNI, the specialised equality bodies have websites and phone lines that can be accessed by persons seeking general information on equality law and complaints processes. CNTR's website has dedicated sexual orientation pages, which significantly include examples of cases in which SO discrimination was established. For example, a young baker is pestered in his work place because of his homosexuality after having spoken with a colleague. A group of young people are prosecuted for harassing a couple of lesbians because they were walking hand in the hand in the street. A couple of LGB individuals were refused accommodation, as the owner did not wish to rent other than to "traditional" couples. These examples assist potential complainants to relate the law to their own experiences.

HomO's website was identified as a further example of good practice in the area of general information provision. In addition to viewing every complaint received by the Ombudsman, a range of Government fact sheets on subjects such as 'Cohabitees and their Joint Home' can be accessed online. As noted in Chapter 3 many LGB issues may fall outside the material scope of equality law, and so it is important to facilitate access to other relevant protections if this is possible.

5.2.4 Outreach: Community Legal Services

As noted in Chapter 2 partnerships between specialised equality bodies and other agencies can build capacity at local levels and so be expected to have a significant “multiplier effect”. Key stakeholders in this regard include trade unions, legal advice bodies (statutory and voluntary sector) as well as LGB NGOs.

In terms of relationship with LGB organisations the Belgian CNTR’s position is very strong. With respect to French-speaking Belgium, it has collaboration agreements with *la Fédération des Associations Gayes et Lesbiennes (FAGL)*, *Tels Quels*, and *Alliège*, and in Dutch-speaking Belgium with the *Holebi Federation* and *Wel jong niet hetero*. It also has collaboration agreements with a range of Belgian trade unions. In CNTR’s 2005 Annual Report, Mieke Stessens, of the Flemish LGB federation (*Holebfederatie*), states that:

The Holebi federation works with the Centre for equality of opportunities on the basis of a collaboration protocol. All breaches of the anti-discrimination law can be signalled to the Centre, but if they specifically concern acts based on discrimination on grounds of sexual orientation, the case can equally be retained by the Holebi federation. The Federation and the Centre have a mutual understanding of their respective work and exchange relevant information. This collaboration has proved to be constructive. For its own needs, the Holebi federation does also call upon the legal and other knowledge of the assistants of the Centre. (CNTR 2006, p.39)

However, the focus of this collaboration is not necessarily upon legal issues. For example, in 2005, a meeting was organised by the CNTR between Belgian blood transfusion services and LGB groups to discuss restrictions upon the giving of blood by LGB individuals.

In Sweden, the RFSL has a widespread network of centres across the country and through its various activities has the capacity to identify SO discrimination cases. When this occurs RFSL automatically refers LGB people to HomO, with which it has a close working relationship. NGOs have no standing to bring cases in their own name under the Swedish system.

RFSL and HomO have been involved in an EU-funded EQUAL project with Help the Aged (UK) and ACCEPT a Romanian LGBT group.¹⁹⁴ A resultant publication, *Equal at Work* (Piehl 2006), is a guide for NGOs on supporting LGBT individuals, older people and disabled people to identify discrimination claims, get advice and support and pursue cases through specialised bodies and to court. In interview ILGA-Europe mentioned the guide as a significant development for LGB groups in Europe.

The purpose of this guide is to:

- Raise awareness of discrimination on the grounds of sexual orientation, age and disability
- Raise awareness of anti-discrimination measures provided under the EU Employment Directive
- Provide tools to help discriminated persons and their agents recognise and take action when discrimination has occurred (Piehl 2006, p.4).

It is this third objective which is of most interest in relation to this project. Valuable advice is given under the heading, 'Examples of what your organisation can do':

Different organisations can provide different sorts of support. Legal organisations can provide legal support and social organisations can provide social support. Providing professional yet sympathetic support is essential. This support can take various forms such as:

- Providing a helpline
- Providing discriminated persons with information about their rights
- Providing specialist information and advice to discriminated persons
- Providing realistic information and advice about the likely outcome of pursuing a complaint
- Providing (or providing access to) professional counselling
- Putting discriminated persons in touch with other discriminated persons
- Providing the necessary legal support (ibid., p.25).

Valuable contributions that LGB groups can make, even if a specialised agency may also be involved, can be identified, particularly in the sphere of emotional and moral support. From this NGO perspective, it is stated: "Putting the discriminated person's needs and aspirations at the centre of the entire process,

¹⁹⁴ See further <http://www.accesstojustice.se/>

and giving her/him the power to decide which alternative strategy of action is convenient, represent the fundamental elements of this phase” (ibid., p.30).

The proposed ‘Strategy of Action’ entails:

- Deciding on the legal remedies and most appropriate place for resolution.
- Considering all levels of national and supranational jurisdictions available.
- Drafting the legal argument and the claim.
- Taking any time limits into account.
- Engaging resources for supporting the case of discrimination (legal aid, financial support, human resources, expertise, and so on).
- Considering the role of each actor in the strategy: seeking help or assistance from other government or non-governmental organisations with expertise in the field, the role of the national equality bodies, and the role of the media.
- Anticipating any possible adverse treatment towards the alleged discriminated person and witnesses (victimisation) and the means of protecting them (ibid., pp.30-31).

Finally, the anticipated outcomes are set out. The strategy can contribute to:

- Providing support service capacity building for NGOs and other entities.
 - Creating relevant national or international jurisprudence in the field.
 - Raising awareness of the general public or legal practitioners and other actors with respect to discrimination.
 - Serving as good practice models of action against discriminatory conduct and behaviour.
 - Promoting public policy changes or the adoption of further legislation.
- Note:* When using examples of cases to act as levers of change, anonymity of all parties should be respected” (ibid., p.31).

The guide supplies an accessible template for NGO advocacy work that could inform the generation of an advocacy system in NI and the ROI.

There has been close cooperation between the three specialised bodies in Scotland. The EOC developed a network of CAB workers and discrimination lawyers across Scotland who can take on cases that the specialised bodies are unable to assist. The CRE and DRC became involved in 2000-01. The specialised equality bodies spend some time training and keeping this network

informed in relation to developments in discrimination law and practice. The DRC has an agreement with the Law Centres Federation in England and Wales whereby lawyers with particular expertise in wider aspects of disability law, funded by the DRC and the Legal Services Commission, have been placed in 15 law centres. So also in Scotland, the DRC is part of a consortium, partly funded by the Scottish Legal Aid Board, to provide legal services to disabled people in Lanarkshire on a wide range of issues, including discrimination.

There is also a wider Scottish Employment Rights Network, which involves the specialised bodies, law centres, trade unions, CAB, and other advice providers.¹⁹⁵ The Network provides regular training in employment developments. So also the Scottish Discrimination Law Association is active in providing conferences and seminars on developments in discrimination law.

Stonewall Scotland plays a proactive role in promoting LGB rights and in providing training to employers and public authorities,¹⁹⁶ while Equality Network is the major campaigning LGBT group in Scotland.¹⁹⁷ They are aware of a number of tribunal cases but to date have not been involved in supporting or assisting LGB complainants.

The Belgian and Dutch specialised equality bodies enjoy a significant advantage over their NI and ROI counterparts: In addition to its office in Brussels, CNTR has established several local anti-discrimination centres in cities across the country. There has also been a significant expansion of Anti-Discrimination Bureaux throughout the Netherlands. Their focus has traditionally been on race discrimination cases and we have no evidence of them becoming involved in SO cases as of yet. Nonetheless, the provision of advice at regional levels provides better access for LGB individuals based outside the capital cities and eases pressure on the central specialised equality bodies considerably. Such a national

¹⁹⁵ <http://www.eoc.org.uk/default.aspx?page=19194>

¹⁹⁶ <http://www.stonewallscotland.org.uk/scotland/>

infrastructure is not immediately feasible in either NI or the ROI. However both the CICs and the CABx could, if adequately resourced, function as local discrimination law advice providers (Cohen et al 2006).

5.3 Dispute Resolution: Advocacy and Adjudication

5.3.1 Introduction

Chapter 3 identified a range of barriers that affect LGB access to rights at the dispute resolution stage. Litigants must grapple with complex laws and processes, meet strict time limits and encounter delays, but primarily are concerned about the visibility implications of taking a case.

Concerns about relatively low levels of complaints by LGB individuals are not unique to the ROI and NI: None of the jurisdictions surveyed reported satisfactory numbers of SO ground cases. Indeed, prompted by concern about litigation in the employment field the Belgian agency CNTR is conducting a major survey of LGB attitudes towards discrimination and harassment in an effort to identify the major sources of discrimination in the labour market. Despite this in 2005 SO was the second highest ground for complaint to the CNTR outside of race. There were 28 disability complaints followed by 16 SO complaints with other grounds in single figures. However, while there is an even balance between employment and non-employment cases across the grounds, there is a lower than expected number of SO employment cases. Homophobic abuse accounted for the great majority of non-racist hate crime complaints.¹⁹⁸

HomO's 2006 Annual Report underscores the high attrition rates in employment cases and attributes this to fear of victimisation (HomO 2007, p.8). The Ombudsman had 43 complaints in 2005, 12 in employment, 3 in universities, 14

¹⁹⁷ <http://www.equality-network.org/>

¹⁹⁸ Unlike specialised bodies in the UK and Ireland, the CNTR also has responsibility for criminal law, e.g. hate crime. It can investigate examples of hate crime, which it considers to be a significant problem in Belgium (insults in the street) and can pass the file to the public prosecutor. HomO also plays a significant role in relation to hate crime (HomO, 2006).

on GFS and 14 other. The Dutch CGB is also probing the reasons for low numbers of SO ground complaints.¹⁹⁹ It is engaging in discussions with an LGBT NGO, the COC, about SO discrimination issues which might form the basis for complaints to the CGB but are not materialising. It is also liaising with the Director of the Anti-Discrimination Bureaux to consider the encouragement of more complaints. The CGB Guide to its work sets out figures for SO complaints between 1994 and 2003: Sexual preference 13 (94-5) 13 (96) 17 (97) 22 (98) 9 (99) 7 (00) 7 (01) 6 (02) 5 (03) 99 (total).²⁰⁰ This is out of a total of 2558 complaints across the CGB's remit. It can be seen that the number of SO cases has tailed off radically over the past few years.

There have been very few SO cases in Scotland, only forty-two tribunal applications since 2003. In comparison there have been thirty-three religion or belief cases, 175 race cases, 505 disability cases and 1131 sex discrimination cases. This may improve when the CEHR is formally established. There have been a number of Tribunal judgments, the most significant being *Ditton v CP Publishing*,²⁰¹ a case in which the respondent did not appear. However the complainant had corroborating evidence of homophobic remarks, amounting to harassment, against him during 8 days' employment with CP Publishing. At the end of this period, his employment was terminated. The Tribunal awarded Ditton nearly £125,000 in compensation, including £10,000 for injury to feelings. As noted in Chapter 2.4.4 the ceiling set on awards under ROI equality law means that in many cases remedies cannot be effective, proportionate and dissuasive as required by EU law (Equality Authority 2005, p.22).

¹⁹⁹ For a sample of CGB case law on the SO ground see the paper by Kees Waaldijk: 'Not Quite Paradise Forty Sexual Orientation Cases Decided by the Dutch Equal Treatment Commission between 1994 and 2001', <http://www.cersgosig.informagay.it/documentiuk/wandijk.html>.

²⁰⁰ The CGB has produced an extensive guide in English on its work, 'Equality law and the work of the Dutch Equal Treatment Commission': <http://www.cgb.nl/media/downloadables/Booklet%20Dutch%20Equal%20Treatment%20Commission.pdf>

²⁰¹ *Mr Jonah Ditton v C P Publishing Ltd* (Case Nos S/101638/06 and S/107918/05 (Decision No F080/199) May 2006.

5.3.2 Advocacy

In general across the comparator countries there is an emphasis on mediated settlements. The CNTR investigates each complaint that it receives, seeking information from the respondent party. Although it may ultimately bring cases to court, or intervene in cases, it seeks to resolve the matter without recourse to litigation. This will include bringing the parties into a roundtable in an attempt to achieve a conciliated settlement. The CNTR has a strong mediation function and the great majority of cases will be resolved by agreement. The CNTR thinks this is particularly appropriate in SO cases where LGB individuals may be unwilling to litigate. An element of the 'individual justice' model, which has been central to this research, is the question of the privacy of complainants. Certainly, the CNTR website does not identify specifically any of the complainants involved in complaints to the CNTR. However, although the CNTR may lodge proceedings on behalf of an individual, there is no provision in Belgian law to protect the identity of litigants.

HomO's advocacy role is distinct from that of the EA and ECNI. First there is an attempt to resolve a dispute, secondly, there is an investigation report and only thirdly is there resort to litigation. The outcome of a HomO investigation that cannot be resolved informally is an opinion on the merits of the case. It is only if this opinion is not acted upon by the respondent party that HomO may initiate legal proceedings, but this is a very rare occurrence. The Ombudsman's power to issue an opinion, means the vast bulk of cases are filtered out of the system at an early juncture. For example, HOMO had 43 complaints in 2005, 12 in employment, 3 in universities, 14 on GFS and 14 other. 5 employment cases were settled and the rest not pursued, 1 settlement was agreed in university cases, 2 in GFS and 3 in other cases, although critical comments were made in 2 further cases. There are only 3 ongoing court cases at the moment and 40 open cases.

There are numerous examples, in the 'Complaints' section of the HomO website, of the successful resolution of disputes and it is clear that HomO is free to publicise these outcomes. A recent employment-related example is as follows:

Employment – Harassment – Recruitment

A gay man, who applied for a job as a nurse at a home for the elderly run by a local town government, complained of harassment during the recruitment procedure and also claimed that harassment, now in the form of his superior repeatedly 'outing' him to his colleagues continued after he was hired. During the Ombudsman's investigation of the case an out of court settlement was reached including the payment by the local government of 80 000 SEK (approx. 8 800 Euros or 11 200 US dollars) to the employee. With this settlement the Ombudsman closed the file.

(Decision 9 November 2006, dossier no 246/06)

A GFS case is as follows:

Goods and Services – Same-sex families

A woman complained that the local town swimming pool complex offered reduced fare entry to families according to a "mom-dad and kids" concept, which the woman found discriminatory on grounds of sexual orientation. After the Ombudsman had contacted the town council the system was changed into a "parents and kids" fare including all families, regardless of sex or sexual orientation. The Ombudsman then closed the file as resolved on 22 February 2005.

(Decision 22 February 2005, Dossier no 26/05)

Settlements may often involve agreements to change practices and policies as well as financial compensation. This mirrors the position in the ROI and NI. As discussed below, HomO's investigation reports, particularly in the public sector, may result in changes to policies and practices.

5.3.3 Third Party Participation

The Dutch system is a good example of an individual justice system augmented by significant group justice aspects. As outlined above the CGB promotes and monitors compliance with Holland's equality laws. Significantly it may receive petitions or complaints from NGOs, provided such organisations were officially established to promote the interests of people covered by the anti-discrimination legislation (Havinga 2002; Rodrigues 1997). Trade unions and other employee's associations may also file petitions with the Commission, but only concerning equal treatment within their own company or organisation. Some 8% of the Commission decisions issued in the 1990's were initiated by NGOs (Havinga 2002, p.82).

In terms of SO ground representative actions, COC (*Cultuur en Ontspannings-Centrum*) is a highly active LGBT federation in The Netherlands.²⁰² COC did have some involvement in cases before the CGB in the 1990s but more recently would informally advise LGB individuals about the CGB without becoming involved in assisting cases. The opportunities provided by the group justice aspects of the CGB system have not been exploited, at least with respect to LGB complainants. In the absence of an 'assistance-based' agency, such as the ECNI and EA, representative organisations have not been adequately resourced to support cases before the CGB.

It is also possible for trade unions and NGOs to litigate in their name in the Belgian system. We are aware of the Holebi Federation being involved in court cases. Although other Belgian LGB groups do include promoting the rights of LGB people within their objectives, it is clear that their priorities do not lie in this direction.

Practices known as 'situation testing' are commonly, albeit not universally employed, in other European jurisdictions (De Schutter 2003; European Roma

Rights Center et al 2004; Rorive 2006). Rorive (2006, p.33) explains that it entails “setting up a situation, a sort of role play, where a person is placed in a position to commit discrimination without suspecting that he or she is being observed. This person is presented with fictional ‘candidates’, some of whom possess a characteristic that may incite discriminatory behaviour. Observers aim to compare his or her attitude towards people bearing this characteristic compared to others without it.”

An example would be where there is informal knowledge that a service provider such as an insurance company is discriminating against LGB people: the company’s response to people from two comparator groups, some straight and some LGB, can be recorded. Situation tests can serve various ends such as highlighting discriminatory practices as part of an NGO campaign, or more controversially as evidence of discrimination in tribunal or court proceedings (European Roma Rights Center et al 2004, p.22; Rorive 2006). As a form of evidence the tests are designed to shift the burden of proof from claimant to respondent in a direct discrimination case (Rorive 2006, p.35). The validity of situation testing has not yet been established before the tribunals or courts in either the ROI or NI. It has been employed in several European legal systems, including those of the Czech Republic, Hungary, France and Belgium (DeSchutter 2003; Rorive 2006).

²⁰² <http://www.coc.nl/>

5.4 Collective Enforcement Mechanisms

5.4.1 Introduction

In each of the selected jurisdictions a 'rights-based' model is in place, as is inevitable in States governed by EU law (European Network of Independent Experts in the Non-Discrimination Field 2007). Collective enforcement mechanisms embody group justice concerns and shift the onus of enforcement from the individual to an equality body (Chapter 4.5). In this section we examine the extent to which the specialised equality agencies concerned have deployed their enforcement powers to alleviate some of the intrinsic difficulties of an individual justice model.

5.4.2 Inquiries/ Investigations

It is possible for the CGB to launch its own investigations. A controversial SO discrimination case is described as follows:

The seventh medical case [2000-04] was started by the Commission itself, using its power to investigate a certain field of society. The investigating (*sic*) dealt with the eight hospitals in the Netherlands that provide in vitro fertilisation treatment. It appeared that some of these hospitals refused the treatment to unmarried women, to single women and or to women with female partners. In its opinion the Commission did not use the medical exception they had created in the other cases, probably because the exceptions were not so much based on reasons of health, but on morals (although some hospitals clearly thought it healthier for a child if it also had a "father" present in the house). The Commission ruled that it is always unlawful in this field to discriminate against women whose partner is female, that it is always unlawful to discriminate against women who are not married to their partner, and that depending on the actual reasons used it may also be against the law to discriminate against single women. This was one of the most controversial opinions of the Commission so far.²⁰³

HomO is particularly concerned at discrimination in the health service and is pursuing an investigation in this area.

²⁰³ <http://www.cersgosig.informagay.it/documentiuk/wandijk.html>

5.4.3 Litigation

HomO can bring a case on behalf of a complainant with the complainant's consent. HomO also has the power to bring a case entirely in its own name. CNTR is entitled to initiate legal proceedings in its own name, particularly where a victim is not identified or where the alleged act is against LGB people collectively, e.g. incitement to discrimination or consistent patterns of discrimination. Where there is an identified complainant his/her consent must be obtained prior to litigating. As discussed above, the CNTR performs a strong conciliation role. It has therefore been involved in relatively few court cases. This involvement is as likely to be an intervention in litigation as the initiation of litigation itself. In one housing case, the CNTR intervened successfully at the appeal stage (CNTR 2006, p.37).

5.5 Conclusion

In terms of the two 'assistance-based' bodies with responsibility for sexual orientation discrimination, both CNTR and HomO engage in extensive investigations into a complaint, including interaction with the respondent while retaining the power to initiate litigation at a later stage. It may be a reflection on legal cultures, but neither CNTR nor HomO adopts an entirely adversarial approach to their assistance for an LGB complainant.

The number of SO ground complaints are relatively low in Belgium and Sweden and very low in The Netherlands. So the modest rates in both parts of Ireland are not exceptional. It is interesting that both the CNTR and also the CGB, even as an 'adjudication-based' body, are exploring ways of encouraging further complaints. The CNTR is conducting a major research project on employment discrimination and the CGB is engaging with the network of anti-discrimination bureaux and with COC.

In terms of group justice issues, both CNTR and HomO initiate litigation in their own name but on behalf of named complainants. HomO can also initiate an investigation leading to litigation without a particular complainant as can the CGB. Technically, the CGB could initiate litigation but, as an adjudication-based body, it has decided to forego this possibility.

NGOs and trade unions can bring cases to both the CGB and the courts in The Netherlands and trade unions can bring cases to the Labour Court in Sweden. It is therefore significant that the possibilities of Article 9 of the Framework Directive are satisfied in various forms in Belgium, The Netherlands and Sweden. So also, in Belgium and The Netherlands, it is possible to obtain more proactive remedies from the judicial process, including orders to change practices.

Hence these States under review have moved further in the direction of a group justice model than Northern Ireland and, to some extent, the Republic of Ireland.

We see a strong emphasis in Belgium, The Netherlands and Sweden on attempts to reach constructive settlements of disputes without recourse to litigation. Indeed, the CNTR and HomO have a statutory obligation to attempt to settle cases. However, any settlement reached by HomO or any action taken in consequence of his reports are publicised so that there is a public statement of good practice in relation to sexual orientation discrimination.

In terms of community legal services in Scotland, the three existing equality bodies collaborate to ensure that there is a network of specialist advisers spread across country to assist cases that the bodies cannot support. In Belgium and The Netherlands there is a network of anti-discrimination bureaux that can provide advice and assistance in SO discrimination cases.

The work of the RSFL and HomO on the 'Access to Justice Project' is of interest. Their guide does envisage LGB friendly lawyers taking cases on behalf of LGB

people but the focus is more on the support, which LGB NGOs can give potential complainants. This is particularly the case in terms of moral and emotional support including sufficient knowledge of the processes of specialised bodies and the judicial process to advise a complainant on what to expect in the processes.

Chapter 6: Recommendations

6.1 Introduction

This Chapter sets out recommendations aimed at enhancing access to equality rights for LGB people. Such access has been impeded for complex reasons that lie in the status and visibility of LGB people within society, as well as in more specific matters associated with the legal framework (Chapters 1-4). Several barriers to individual enforcement as well as challenges for the specialised bodies have been identified in the course of this research. These are attributable to three primary factors, (1) heterosexism and homophobia; (2) problems with the existing legislative framework; and (3) mechanisms of access.

The EA and ECNI have developed collaborative networks and enjoy considerable stakeholder approval and so in that sense are well placed to drive a programme of concerted action to enhance LGB access to equality rights. The equality bodies should consider establishing a structured dialogue with LGB representative organisations to consider how the recommendations set out in this report can be progressed. Other stakeholders, in particular trade unions and the citizens advice providers/citizen information centres, could also usefully be included in this process.

6.2 Recommendations

In line with the analysis of barriers and challenges uncovered in Chapters 2-4 recommendations are presented under three headings:

- Homophobia and Heterosexism
- The Legislation
- Mechanisms of Access

Separate proposals are addressed to equality bodies, representative NGOs and the numerous other stakeholders identified in the course of this report.

6.2.1 Homophobia and Heterosexism

Equality Bodies

The ECNI and EA have engaged in a range of LGB centred initiatives, as well as undertaking multi-ground work that encompasses sexual orientation. Despite these efforts SO claims are not forthcoming in significant numbers. LGB visibility and the stigma associated with minority sexual orientations is the most salient factor in this context. Certain LGB populations, most notably young people, persons who live in rural settings and those that are employed in certain occupations, are especially vulnerable. For such groups the prospect of taking a case may be remote. These populations will rely on the specialised equality bodies to drive proactive compliance with equality law through promotional, development, and outreach work on SO issues. The EA and ECNI should continue efforts to generate a positive culture of respect for LGB individuals across all sectors of society.

The multi-ground promotional work carried out by the EA and ECNI via equality review and action plan schemes should be monitored to ensure that good practice concerning SO features strongly.

Under the umbrella of its ongoing *Equal Rights - It's the Law* campaign the ECNI could consider a specific initiative to address the area of homophobic bullying in schools, perhaps sharing good practice in this regard emanating from the joint Equality Authority BeLonGTo initiative.

The Equality Authority: Relationship Recognition and Mainstreaming

A significant contextual issue, which differentiates the two jurisdictions, is the absence of LGB relationship recognition laws in the ROI. Another key difference is the statutory equality duty in NI, which the EA has recommended should be introduced in the ROI. Securing legal recognition of LGB partnership rights is one of the two core project areas specific to the ground identified in the Equality Authority's strategic plan, the other being implementation of the broader agenda

set out under *Implementing Equality for Lesbians, Gays and Bisexuals* (Equality Authority 2006a, p.31). The EA played a significant role in the Working Group on Domestic Partnership on foot of these commitments. Our research findings strongly endorse the continuation of that strategy as a central pillar in bringing about greater social justice generally for LGB people based in the ROI.

LGB Representative Organisations

E-quality Marks

LGB NGOs could explore the feasibility of implementing an 'E-quality mark' scheme recognising the achievements of employers or service providers who comply with and promote good practice in the field of SO equality. Stonewall GB have introduced a successful programme of *Diversity Champions* and a related *Equality Index*. An all-island 'E-quality' programme would be of interest. As such these promotional measures move beyond the focus on overt discrimination, providing an ideal platform for tackling one of the primary forms of inequality experienced by LGB individuals – heterosexism. Further, the programme would enable LGB individuals seeking employment or access to particular services, to identify 'gay-friendly' organisations (Chapter 4.5.3).

Situation Testing

LGB representative organisations engage in advocacy work on behalf of individuals. A strategy such as situation testing, designed to generate proof of discrimination in particular fields could be a valuable complement to such work. As an extra-legal strategy situation testing is appealing because it can be undertaken by an NGO, and may have the effect of unmasking discrimination against LGB people without the fear of victimisation and the anonymity concerns that impact on individual LGB claimants (Chapter 5.3.3)

Trade Unions

In both jurisdictions trade unions have developed equality training and resource materials, some of which deal specifically with the SO ground. Examples of good

practice include the creation of LGBT sections by several unions including the INTO, UNISON and PCS and the establishment of an LGBT Committee by the NI Committee of ICTU. However, unlike many UK-based unions, those on the island of Ireland do not have dedicated sexual orientation officers.

This report has established that because LGB employees have particular needs and experiences, there is a need for the development of further tailored and proactive initiatives. The establishment of LGB sections and the appointment of SO representatives may go some way towards meeting this need. Research participants raised the need for dialogue between unions and LGB NGOs. In NI, a number of CoSO representatives are participating in ICTU (NIC)'s LGBT Committee. In the ROI the amendment of section 37 EEA was identified as an issue that is being progressed by the trade union movement and is encouraging that ICTU highlighted this issue at its most recent biennial conference

Human Rights Commissions

Sexual orientation issues should be raised as a possible area for future collaboration at meetings held between the EA and IHRC, and at those between the NIHRC and ECNI. In both jurisdictions the human rights and equality bodies enjoy complementary powers and functions, such as those pertaining to law reform recommendations and research, which if exercised in an aggregate manner, have the potential to further advance LGB rights.

6.2.2 The Legislation

Chapter 3 identified significant problems with the scope and content of the equality laws currently in place in both jurisdictions.

Equality Bodies; ROI Government; NI Government

Both the EA and ECNI are charged with keeping equality law under review and where appropriate making proposals for its amendment to government. At

various junctures the bodies have presented legislative reform proposals to OFMDFM and the DJELR designed to ensure that the law is workable for LGB people. Key changes required include:

- Extension of time limits under ROI legislation which apply to the making of a claim of discrimination (including removal of the notification requirement under the ESA) and the harmonisation of time limits in NI to the County Court standard.

Identifying acts of discrimination and harassment may be difficult and also involve LGB people coming to terms with issues of 'outing' themselves, at least to some extent, as well as dealing with the complexities of lodging a complaint. In this context time limits present particular problems.

- The introduction of representative actions in both jurisdictions on behalf of named complainants and also in an organisation's own name.

Additional statutory powers are required to enhance the bodies' work in certain fields and to secure a greater role for civil society organisations in the enforcement of LGB equality rights. The EA already has a power to refer complaints to the Equality Tribunal in its own name but the power to bring such cases is not available to TUs and NGOs in either part of the island. The ECNI also does not enjoy any such power. If the rights of all LGB people are to be protected, it is essential that identifiable examples of discrimination and harassment should be subject to judicial process even if individual LGB people face insurmountable obstacles to litigating in their own name. In some situations, it may be sufficient that the equality bodies, TUs and NGOs act on behalf of named complainants but there will be situations in which legal proceedings against discrimination and harassment need to be pursued without identified complainants (Chapter 4.2.2).

- Enactment of statutory equality duties to promote equality in the ROI and their development in NI.

The inclusion of SO as a ground in the statutory equality duty in NI has put LGB issues firmly on the public policy agenda. From the access to rights perspective adopted in this report, it is essential that alternative forms of access to individual and NGO complaints must be explored both in relation to the NI duty and also the equivalent duty which is recommended for the ROI. In relation to the ROI the EA and the Irish Human Rights Commission have sought equivalence in this area to secure a legal basis for equality mainstreaming in a manner similar to Northern Ireland. Such a statutory duty would be a significant addition to access to rights through litigation and is capable of identifying and eliminating discrimination and harassment at source. Unlike discrimination prohibitions, positive duties can be expected to have a considerable impact on heterosexist service provision or employment practices. As such, positive duties are a vital tool for tackling a major manifestation of LGB inequality within the public sector.

- Amendment of Section 37 EEA and extension of ESA to explicitly cover public functions in the ROI; reconsideration of the breadth of 'faith-based' exceptions in the SO GFS Regulations.

Faith-based organisations play a significant role in the provision of education and healthcare in both parts of the island. In the ROI Section 37 EEA has a significant 'chilling effect' on LGB people working in these sectors. Doubts have been expressed as to its compatibility with EU law and its amendment is a priority for the LGB community in the ROI. In NI, the 'purposes of religion' exception in employment has been narrowly interpreted but there is disquiet that the SO GFS Regulations contain very wide exceptions for faith based organisations in the provision of goods and services (Chapter 3.2.2.). There is a clear lack of equivalence between the two jurisdictions in that public functions are not explicitly covered under the ESA, unlike under the parallel NI law (Chapter 3.2.2), and this needs to be addressed.

- Provisions that would secure anonymity for the SO ground and other 'sensitive' claims before tribunals and in the wider court system.

This is a vital recommendation. Although it is preferable to have common rules on matters of access to rights, it is essential that obstacles to access for particular groups are recognised. The publicity attached to assertion of rights is seen as the major obstacle for access to rights for LGB people. The EA and ECNI are faced with the difficulty of encouraging SO ground cases in situations where LGB complainants must compromise their privacy. Although anonymity is regularly provided by the Equality Tribunal, this is not guaranteed in the ordinary courts in the ROI. Tribunals and courts in NI can grant anonymity but this appears to be problematic. It is therefore essential that anonymity is provided for LGB individuals in judicial processes (and other investigative procedures) unless the LGB person agrees to waive this protection (Chapter 3.3.4)

- Improved Redress Provisions

The Equality Tribunal can make orders in relation to changes in practices and tribunals in NI can make recommendations but these have fallen into disuse. However, the NI County Courts can only award compensation. The ECNI has campaigned for remedies which accord with EU equality law standards and consideration should be given, as part of discussions around single equality legislation, to remedies which will effectively counter acts of discrimination and harassment. The ceiling set on awards under ROI equality law means that in many cases remedies cannot be effective, proportionate and dissuasive as required by EU law (Chapter 2.4.4). Disparities as to the redress available means that an equivalence of rights is not secured for claimants in the two jurisdictions.

ROI Government: Relationship Recognition

Bearing in mind the equivalence of rights commitments discussed in the body of this report, the undertaking to legislate for civil partnerships in the ROI Programme for Government should be fulfilled at the earliest possible opportunity.

6.2.3 Mechanisms of Access

Equality Bodies

Monitoring and analysis of data

The EA and ECNI should consider analysing data on queries from LGB people and data on case files opened under the SO ground. Such a 'query to case' review is designed in particular to explain attrition rates, analysing the reasons why some queries are, and others are not, referred to the agencies' Legal Sections for assistance, and how those referred are resolved. Points of learning from successful and unsuccessful cases should be highlighted.

Development of Resource Materials and Internet Referrals Pages

A particular need, which emerged from both the comparative review and the empirical element of this study, is for an LGB equality law resource pack. The pack would provide accessible information to potential claimants and could also be used in training programmes with various stakeholders. As with the materials developed by the Equality Authority for its Traveller Advocacy initiative and for more general use, material should be produced in different formats, including electronic formats such as DVDs.

Both bodies already provide a range of materials in hard copy and also on their respective websites. It is also recognised that the EA produces generalised materials, while the ECNI equivalent are ground-specific. However, materials should cover the following issues:

- Technical requirements e.g. time limits
- How to prepare a 'good' submission
- An explanation of the steps through which a case may proceed
- An explanation of who may provide support to a complainant and the nature of that support e.g. services provided by the ECNI and the EA, advocates in the form of representative organisations/NGOs, family or friends and legal representatives

- Concrete examples of types of claim that may be taken

Consultation with relevant stakeholders, in relation to the development of a resource pack should take place, particularly with LGB NGOs but also with trade unions and others who have been involved in similar kind of initiatives. Relevant materials can then be brought together into a resource pack which should be available for download from the equality bodies' websites (Chapter 4.2.1.2).

Chapter 4 identified a specific information deficit surrounding the implications of a decision not to provide assistance to an individual claimant. In order to counter the perception that a case is effectively at an end without its support, the EA and ECNI should continue to direct people to alternative sources of advice. In the ROI while it is standard practice to refer individuals to trade unions where appropriate, there was some evidence that equal status inquirers were confused as to further steps that could be taken. Mirroring practice of the GB Equal Opportunities Commission, a 'Funding and Representation' website section could be developed which gives advice about means of funding cases and details voluntary and statutory organisations that may be able to supply legal advice to potential complainants.²⁰⁴ This would cover all grounds and could be developed in conjunction with NGOs and the potential advice providers identified in Chapter 2.3.

Briefings and Training Programmes

The ECNI and EA could make targeted approaches to LGB NGOs concerning training on equality law. Such training could also continue to be included in the Equality Authority's ongoing work with the CICs and be initiated with the CAB and the Law Centre in Northern Ireland. Both training strands could potentially share resources, drawing primarily on the proposed LGB Resource Pack.

Dialogue with CABx and CICs

A legal 'needs gap' may exist in cases which the equality bodies are unable to assist. This needs gap could be filled by other stakeholders. Dialogue should take place between the equality bodies, the CICs and the CABx, in each respective jurisdiction, with a view to supporting their capacity to provide second-tier specialist legal advice in discrimination cases and examining the resource implications of any such development. Experience in Scotland could be drawn upon in this regard (Chapter 5.2.4).

Investigations/Inquiries and References of Discriminatory Practices

In light of the significant obstacles to individual litigation outlined in this report, the equality bodies should also consider how the full ambit of their powers might be utilised to challenge instances of discrimination and harassment where individual litigation is unlikely. One of the stated goals of the EA (2006a, p.25) under its third and current strategic plan is to “test the full range of functions and powers” it enjoys “in order to assess and identify the most effective mix of these for the implementation of its mandate.” In this connection it alludes to the conduct of a small number of inquiries and equality reviews (ibid.). A corporate objective of the ECNI is to “use our powers of promotion, advice, policy development, research and enforcement effectively” (ECNI 2006d, p. 17).

As noted in Chapter 4 both the EA and ECNI enjoy collective enforcement powers designed to address systemic instances of discrimination. Consideration should be paid to the strategic use of powers of investigation or inquiry in areas where SO discrimination may be present (Chapter 4.5.2). Evidence from other jurisdictions is that such investigations can be effective, particularly where individual litigation is unlikely (Chapter 5). Further, the equality bodies' power to refer 'discriminatory practices' to NI and ROI adjudication forums should be probed (Chapter 4.5.4.3). The ECNI could also consider initiation of its investigative powers in relation to the statutory equality duty. Participants in the

²⁰⁴ See <http://www.eoc-law.org.uk/Default.aspx?page=4274/>

interview component of this project and in the feedback seminars suggested two areas, apart from section 37 of EEA in ROI, that might be suitable for a strategic litigation initiative: with respect to both jurisdictions, the provision of assisted reproductive services to lesbian women²⁰⁵, and homophobic bullying within a school environment.

Amicus Curaie Interventions

Equality bodies should explore further their potential to act through interventions in ongoing litigation should the occasion arise (Chapter 4.5.4.2). It is also significant that, although in a 'defensive' context, the ECNI, NIHRC and CoSO all intervened in the judicial review on the SO GFS Regulations, indicating a willingness to act strategically in defence of LGB rights.

LGB NGOs; NI Government and ROI Government

Community Advocacy Initiative

A principal recommendation that emerged throughout both the consultations and the comparative review is the development of an **advocacy initiative** to support those reporting discrimination on the SO ground. Such advocates should primarily be drawn from within the LGB community (Piehl 2006) and be trained to accompany a complainant through the early stages of claims, including applications for assistance to the equality bodies, through to the dispute phase if necessary in a given case. The first priority of the advocacy initiative would be to provide emotional, personal and social support, meeting an acute need that cannot be fulfilled by the specialised equality bodies. Such a support system would focus particularly on the field of goods and services provision (and also private sector employment) where other advocates, such as trade unions, are less likely to be present.

²⁰⁵ On the application of the Equal Status Acts 2000-2004 to the general area of assisted human reproduction see Commission on Assisted Human Reproduction (2005, Appendix IX).

All of the constituencies involved in the empirical element of this project agreed that advocates could enhance the redress system in general. The Equality Tribunal representative highlighted how a well-trained advocate could improve the quality of submissions, which is in the best interests of all parties involved: An Equality Officer is then equipped to ask better questions during an investigation and respondents find it easier to deal with well-drafted submissions in preparing for a hearing. Advocate intervention may in many cases lead to early settlement of a discrimination law claim. The NI legal system is well-served by a range of experienced solicitors and barristers. Nonetheless, the need for a parallel 'advocate' to guide an LGB claimant through the process remains acute. It may be that this form of advocacy could develop into legal representation at some future date, particularly within a formal and properly funded structure (Chapter 2.3.2.7).

As discussed in Chapter 4 there are a number of existing models that should inform the development of an advocacy system in relation to the SO ground. The Traveller Advocacy initiative run by the EA in partnership with the Irish Traveller Movement is a prominent example, as is the 'buddy' system proposed by the *Access to Justice* project partners (Chapter 5). So also the recent initiative, the Human Rights Centre for Disabled People in NI, is a significant precedent of how the NGO sector, appropriately funded, can develop an advocacy structure in pursuit of human and equality rights.

For such a development to be feasible the under funding of the LGB NGO sector at local level would have to be addressed, including in relation to lesbian and LGB youth organisations. Further, given the limited regional spread of LGB NGOs the research participants agreed that ideally the CIC and CAB infrastructure could also be involved. In a similar vein the comparative review highlights the importance of a regional network of anti-discrimination bureaux (as has been developed in Belgium and The Netherlands) with the potential to provide community legal services to victims of discrimination. LGB representative

organisations in partnership with the equality bodies could work with dedicated CIC and CAB staff in order to generate a wider pool of community advocates than can be mobilised from within the LGB sector itself.

Consideration of how an advocacy process would work with young people/minors needs specific attention. Representatives of the LGB youth sector highlighted how young people may not be out to their families or, those who have been open about their sexuality with families may not have received unconditional support from them. This raises concerns in a situation where an advocate embarks on seeking redress with a young person without either full knowledge or consent of a parent. Meanwhile uncertainty about the extent of support a young LGB can expect from parents and family may mean that advocacy has a particularly important role to play. In this context it is important that appropriate child protection procedures and protocols be developed and fully incorporated into advocacy training and adhered to in the process.

It is envisaged that the first priority of the advocacy initiative is to provide informed moral and emotional support for LGB complainants. However, it is also envisaged that the initiative could mature into a scenario whereby advocacy could include assistance with tribunal applications. For relatively straightforward claims lay advocates would be well placed to assist complainants in negotiating the technical requirements involved in lodging a complaint and accompanying individuals involved in tribunal proceedings. Certain complex discrimination claims will require higher-level legal expertise, such as that provided on a strategic basis by the ECNI and EA.

Trade Unions

As discussed in Chapters 2-3 trade unions are important providers of advice and assistance for claimants in the employment arena. In the ROI, and to a lesser extent in NI, unions act as advocates before tribunals and courts. Given their

substantial experience in representing individual claimants, union officials could perhaps provide advocacy training to LGB NGOs.

The Legal Profession

With respect to the ROI the Bar Council's Voluntary Assistance Scheme is potentially a highly valuable resource for LGB representative organisations. To date take-up has been disappointing, perhaps because no particular outreach steps have been taken (see Chapter 2.3.2). Given the complexity of equality law in the area of SO discrimination and the operation of exemptions which generate a high degree of uncertainty amongst prospective LGB claimants, the Bar Council should approach the LGB community with a view to discussing a joint venture.

Across the research it was generally acknowledged that solicitors have not to date become a significant resource for LGB individuals considering taking a case under equality legislation. However, solicitors were considered a potentially crucial source of advice. The professional bodies could take three measures:

- The development of an accreditation system for specialists in discrimination law (Williams et al 2003) along with an 'LGB-friendly' register, which could be used in solicitors' advertising material.
- The delivery of further and ground-specific education and training on equality legislation on legal education courses, in particular Continuing Professional Education programmes and in judicial training
- Facilitation of a Discrimination Law Forum (perhaps in conjunction with the Equality Authority) similar to that which operates in Scotland (Chapter 5.2.4).

The Law Societies in both jurisdictions could also resource the development of texts along the lines of the UK publication *Advising Gay and Lesbian Clients* (Barlow et al 1998).

Citizens Advice Centres and Bureaux

Particular knowledge and skills are required to provide discrimination advice and training designed to acquire these should be a priority for the CICs and the CABx (Cohen et al 2006). While the Equality Authority and Citizens Information Centres cooperate in this regard, SO ground cases bring additional complexities that may require the input of LGB organisations. Establishing training partnerships through local outreach initiatives with LGB NGOs is vital to the development of the proposed community advocacy initiative. As discussed above, such training would not remove the need for access to second-tier or specialist legal advice, such as that provided by the ECNI, the Equality Authority, private practitioners and potentially the statutory legal aid bodies in both jurisdictions.

Significantly, there was consensus across all those interviewed that CICs and the CAB comprised the most viable and accessible infrastructure for disseminating information on equality law for LGB people. Selected CICs and CABx could be supported to host outreach sessions with LGB representative organisations and service providers within their geographic area.

Legal Aid Bodies; NI Government; ROI Government

Establishment of a comprehensive system of legal aid in relation to claims under the ROI and NI equality laws.

Even in the quasi-judicial setting of the Equality Tribunal, individuals interviewed considered it necessary to have legal representation in order to pursue a discrimination case. This is also considered to be the case in other tribunals and courts. Not all LGB cases will be assisted by the equality bodies, TUs, CICs, CABs or NGOs. Although a wider issue in relation to access to rights generally, it is clear that financial considerations are a major obstacle to access to rights for LGB people and hence that a system of legal aid should be introduced in tribunals in both parts of the island.

In terms of legal representation at present, the role of the statutory legal aid providers in both jurisdictions is apparently possible but not availed of in relation to cases before the ordinary courts and precluded by law with respect to tribunal proceedings. Subject to financial eligibility criteria, legal assistance falling short of representation is technically possible, but again not availed of in practice. Following a suggested dialogue with the ECNI and EA, the Northern Ireland Legal Services Commission and the Legal Aid Board (ROI) should develop and then publicise a policy on their capacity to fund legal advice and/or assistance in discrimination claims. In addition, the LAB should invite key LGB NGOs to take part in the envisaged legal needs review with a view to establishing links with this constituency and addressing LGB issues that merit particular attention.

Equality Tribunal; NI Tribunal; County Court (NI)

The Equality Tribunal adheres to several models of good practice that ought to be publicised further: for instance Tribunal staff have undergone ‘sensitivity training’ on sexual orientation issues and hearings take place in various locations around the country (Chapter 4.4.3). In order to ensure that it is meeting stakeholder expectations the operation of Users Forum should be evaluated. Equality Officers should continue to use the redress provisions to effect changes in organisational practices and consider recommending the production of specific policies on combating homophobia and eliminating heterosexism in successful SO ground cases (Chapter 4.4.3). A rules committee should be established to address procedural and case management issues.

There is acknowledgement in NI that tribunal procedures have been modernised in recent times. In particular, case management hearings have been introduced.. Employment tribunals in NI should carefully consider their powers to grant restricted reporting orders, particularly in light of the recent Court of Appeal ruling on anonymity (Chapter 3.4.4).

NI Government

Forums of Redress

The ROI has developed an enviable system whereby the promotion and enforcement of equality law and policy resides with one body, the EA, and specialised, quasi-judicial adjudication on equality disputes resides with a separate body, the Equality Tribunal. In terms of equivalence of equality rights in both parts of the island, it is recommended that serious consideration be given in NI to the merits of the ROI system. It is suggested that the environment in which the Equality Tribunal operates is significantly more conducive to access to rights for LGB individuals than the formal processes of the NI system.

It is also significant that, with some exceptions, all equality cases go to the Equality Tribunal. With the advent of the SO GFS Regulations in NI, it is considered essential that LGB GFS, education, accommodation and public function cases should be heard in a specialised Equality Tribunal, even if this is to be modelled on the present tribunal system rather than on that of the ROI. The County Courts in NI have virtually no experience of equality cases under other grounds and it is perceived to be a significant obstacle to LGB GFS cases that they have to be brought to the ordinary courts.

NI Government; ROI Government

Resources for Tribunals

Another obstacle of general concern is the delay in processing cases. This is an obstacle for all complainants but an acute one for LGB people who are effectively revealing aspects of their private lives during the course of proceedings. There has been some valuable reform in the NI tribunal system but the situation should be monitored to ensure that the targets set for reducing time frames are met. Significant delays are encountered by claimants using the Equality Tribunal system. This innovative system of quasi-judicial adjudication is under-resourced and renewed efforts should be made to ensure that staffing levels in particular are augmented.

Table 3: Recommendations

<i>Underlying Cause</i>	<i>Barrier</i>	<i>Proposed Recommendation</i>	<i>Responsibility</i>
Homophobia and heterosexism	Failure to identify harmful practices	Targeted promotional campaigns	ECNI EA Trade Unions
	Absence of positive culture of respect for LGB people within workplaces and in other social contexts	E-quality mark to encourage and acknowledge good practice on LGB equality	LGB NGOs
	Fear of victimisation	Specific initiatives with employer and service provider organisations in relation to SO equality issues	ECNI EA Trade Unions
Legislative Framework	Time limits	Extended time limits; removal of notification requirement under ESA	ROI Government NI Government
	Operation of legislative exceptions that impact on LGB people	Amendment of section 37 EEA	ROI Government
		Extension of ESA to cover public functions	
	Fear of victimisation and privacy concerns	Consideration of breadth of faith-based exceptions in SO GFS Regulations	NI Government
		Anonymity for SO ground claimants	ROI Government NI Government
	Introduction of representative actions	ROI Government NI Government	

	Inadequate redress	Establishment of proactive remedies in NI	NI Government
		Removal of ceiling on awards in ROI	ROI Government
	Absence of positive culture of respect for LGB people within workplaces and in other social contexts	Enactment of statutory equality duty in ROI	ROI Government
		Introduction of relationship recognition laws in ROI	

Mechanisms of Access	Lack of awareness of legal rights and avenues of redress	Development of LGB-specific briefings for inclusion in resource pack on equality law	EA ECNI LGB NGOs
		Educational programmes with LGB organisations	EA ECNI
	Inadequate sources of advice and assistance	Outreach work in order to enhance discrimination law expertise in CAB and CICs	ECNI EA CA CIB
		Establishment of advocacy programme to provide social and emotional support to LGB complainants	LGB NGOs CA CIB
		Proactive LGB employee supports Advocacy training with LGB NGOs	Trade unions
		Proactive equality law, LGB- friendly educational and outreach initiatives	Legal professions
	Financial costs	Extension of civil legal aid scheme to tribunal hearings	ROI Government NI Government
		Clarification of role of statutory legal advice providers in	EA ECNI LAB

		equality law cases	NILSC
	Inadequate redress	Use of proactive remedies by courts and tribunals	Equality Tribunal Industrial Tribunals County Court
	Complex and opaque processes	Establishment of rules committee to review Equality Tribunal procedures	Equality Tribunal
		Creation of specialised equality law tribunal	NI Government
	Delays	Resources for tribunals to reduce waiting periods	ROI Government NI Government

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APPENDIX A

Research Methodology

Each strand of the research identified in Chapter 1.1.2 of the report is elaborated upon here.

1. Literature and Policy Review

The first element canvasses theoretical and empirical literature on access to justice with a particular focus on equality law and LGB specific themes. The second element comprises a review of legislation, policy, and practice related to enabling LGB individuals to access their rights under the equality laws currently in place on the island. Drawing out commonalities and differences between the two jurisdictions, it considers the substantive legislative provisions, associated enforcement mechanisms and the equality infrastructure in place.

2. Interviews with LGB Representatives

Representatives of LGB organisations are considered to be key informants with a unique vantage point to gain an insight into a range of experiences of LGB individuals regarding areas of potential discrimination, levels of awareness of rights afforded by equality legislation among the LGB community and attitudes on how accessible justice is for LGB individuals under these equality regimes. In addition they provide an insight into the role of LGB organisations in promoting access to justice. This entails an exploration of awareness of equality legislation among LGB organisations; their role in disseminating information and raising awareness on this area and; examples of good practice and initiatives promoting access to justice under equality legislation. The capacity for LGB organisations to play an enhanced role in promoting access to justice is also explored as well as their views on how equality bodies, equality legislation and its related institutions could better promote access to justice.

In the case of Northern Ireland, a range of LGB organisations were selected because they had a significant number of members who describe themselves as LGB. Interviews were held with representatives from the following organisations:

- The Coalition on Sexual Orientation (CoSO)²⁰⁶
- Lesbian Advocacy Service Initiative (LASI)²⁰⁷
- Cara Friend²⁰⁸
- The Rainbow Project²⁰⁹
- Lesbian Line²¹⁰

²⁰⁶ <http://www.cara-friend.org.uk/coso/>

²⁰⁷ <http://www.lasionline.org/>

²⁰⁸ <http://www.cara-friend.org.uk/>

²⁰⁹ <http://www.rainbow-project.org/>

- Queerspace²¹¹
- Gay and Lesbian Youth of Northern Ireland (GLYNI)²¹²

In the Republic of Ireland LGB organisations were selected that covered a range of perspectives including youth and rural issues and included some regional spread. Interviews were held with the following organisations:

- GLEN, Gay and Lesbian Equality Network (national level organisation)²¹³
- Outhouse (Dublin-based resource and community centre for LGBT community)²¹⁴
- BeLonG To (LGBT Youth project)²¹⁵
- L.inC, Lesbians in Cork²¹⁶
- Cork Gay Community Development Project²¹⁷
- Dundalk Outcomers (resource and community centre for LGBT community in the North East with a cross border focus)²¹⁸

In both jurisdictions, researchers conducted face-to-face interviews with representatives of each participating organisation. All organisations were invited to attend the Feedback Seminar discussed below.

3. Interviews with LGB Individuals

Interviews with LGB individuals who had encountered discrimination or an infringement of their rights in the recent past and either:

- (a) pursued justice to completion;
- (b) initiated a process of accessing justice but did not proceed or;
- (c) had a complaint but did not enter into any process for redress

were sought in both jurisdictions. A target group of two individuals from each category was sought; however, individuals from category (b) were not forthcoming in the ROI, yielding a total of ten interviews with LGB individuals.

This element of the project sought to access individuals' experiences and perspectives on the extent to which their rights are protected, how effective equality legislation is in offering protection in relation to discrimination based on sexual orientation and; on the effectiveness of equality bodies and other stakeholders supporting a person to seek redress if they encounter discrimination.

²¹⁰ <http://www.lesbianlinebelfast.org.uk/>

²¹¹ <http://www.queerspace.org.uk/>

²¹² <http://www.glyni.org.uk/>

²¹³ <http://www.glen.ie/>

²¹⁴ <http://www.outhouse.ie/>

²¹⁵ <http://www.belongto.org/>

²¹⁶ <http://www.linc.ie/>

²¹⁷ <http://www.gayprojectcork.com/>

²¹⁸ <http://www.outcomers.org/>

Interviews with Individuals in the Republic of Ireland

In the Republic of Ireland a snowballing approach was taken to the recruitment of individuals for interview involving two main points of contact. The Legal Section of the Equality Authority agreed to assist in making contact between the researchers and individuals identified as appropriate to the research. In addition LGB representative organisations participating in the research were asked to facilitate contact between the researchers and relevant individuals. Finally, researchers supplemented these avenues with their own social networks within the LGB community to source potential research participants.

This yielded the following profile of interviewees:

- two individuals who pursued justice to completion, N = 2
- two individuals who had/have a complaint but have not entered into any process for redress, N = 2.

No individual who initiated a process of accessing justice but did not proceed was sourced despite specific efforts in this regard. The Equality Authority representative explained that ethical considerations made it inappropriate for an approach to be made to people they had identified who fitted this description having regard to duty of care considerations. Representative organisations also cited this as a reason they could not refer us to individuals in this category, as well as either not knowing of anyone in this situation or not securing agreement to participate in the research.

The following is summary profile of the four individuals who took part in the research from the ROI:

Identifier	Category	Nature of Complaint
Participant A	Pursued case to completion	Discriminatory treatment under social protection scheme.
Participant B	Did not enter into process of redress	Discriminatory treatment in access to employment rights.
Participant C	Did not enter into process of redress	Encountered harassment on grounds of sexual orientation in workplace.
Participant D	Pursued case to completion	Self and partner refused access to a service on grounds of sexual orientation.

Interviews with all four individuals were conducted by telephone following an unstructured interview format guided by a thematic interview schedule. Interviews lasted for between 40 minutes and 80 minutes. Interviews were recorded and transcribed either in full or as abridged versions.

Interviews with Individuals in Northern Ireland

In the case of Northern Ireland, letters were sent out to individuals from the LGB communities who had been in contact with the Equality Commission since the initiation of the process. 81 letters were sent out, and 5 of those who responded were willing to take part in the research. The sixth respondent, who had a complaint but did not take any steps to seek redress, was contacted through an LGB organisation.

Identifier	Category	Nature of complaint
Participant E	Pursued case to completion	Discriminatory treatment in workplace
Participant F	Initiated a process of redress but subsequently withdrew	Discriminatory treatment when applying for post
Participant G	Initiated a process of redress but subsequently withdrew	Discriminatory treatment when applying for post
Participant H	Initiated a process of redress and case is still ongoing	Encountered harassment on grounds of sexual orientation in workplace
Participant I	Did not enter into process of redress	Encountered harassment on grounds of sexual orientation in workplace
Participant J	Initiated a process of redress but subsequently withdrew	Encountered harassment on grounds of sexual orientation in workplace

Two of the interviews were conducted in person (Participant E and H) the remainder were conducted by telephone.

4. Issues of Consent and Confidentiality

Where interviewees were recruited through an LGB NGO, they were approached initially by a representative of the NGO who explained the research to them and asked if they would consent to being contacted by telephone by the researchers to discuss taking part in the study. Once the individual consented to the release of their telephone number to a researcher, the researcher contacted them by telephone to explain the research further and ask if they would be willing to be interviewed. In all cases individuals gave their verbal consent to participate and were interviewed by telephone.

Where interviewees were recruited through an equality body letters were sent out to individuals from the LGB communities who had been in contact with the Equality body. The letters outlined the nature of the study and what participation in an interview would entail. Individuals who were interested in taking part in an interview returned a signed document confirming their willingness to participate in the research. The equality body then released the individual's contact details to

the researchers who contacted them directly to arrange their participation in the study.

To safeguard confidentiality researchers undertook to ensure that individuals' names would not appear anywhere in the research report and information they provided to the study would be reported on and presented in a way that would ensure participants' anonymity. No identifying information would appear in the report.

5. Interviews with Equality Bodies and Stakeholders

Representatives of specialised equality bodies as well as other stakeholder organisations including legal advice or support services, legal professionals/professional representative bodies, as well as employer and union bodies were interviewed. These interviews focused particularly on the role of these organisations in supporting LGB individuals invoking their rights under equality law. Insights gleaned on obstacles for the LGB communities in invoking their rights under the equality legislation and in accessing the equality bodies were a particular focus. Strategies of organisations to promote access to justice under the equality legislation generally and specifically targeting the LGB communities were also considered.

In the ROI the following equality bodies and stakeholders were interviewed²¹⁹:

- The Equality Authority (Chief Executive Officer and Legal Advisor)
- The Equality Tribunal (Director)
- Legal Aid Board
- Free Legal Aid Centres
- Northside Community Law Centre
- Solicitors (2)
- Barrister (1)
- Irish Congress of Trade Unions
- Irish National Teachers Organisation (LGBT Group)
- Irish Business and Employers Confederation

All but one interview was conducted face-to-face. Interviewees were sent a structured interview guide in advance (see sections 7 and 8 below). One interview was conducted by e-mail; the interviewee wrote replies to the interview guide and returned them to the researchers in electronic format.

In the case of Northern Ireland, the research team conducted interviews with²²⁰:

²¹⁹ Unsuccessful attempts were made to engage the following organisations in interview: the Labour Court, the Human Rights Commission, Comhairle (now the Citizens Information Board), and the Law Society.

²²⁰ Unsuccessful attempts were made to engage the following organisations in interview: Industrial Tribunal and the Engineering Employers Federation (EEF) and the employers' organisation, CBI.

- Labour Relations Agency
- Northern Ireland Law Centre
- Industrial Tribunals and Fair Employment Tribunal
- Equality Commission for Northern Ireland (Chief Executive, case work director and case worker)
- Northern Ireland Human Rights Commission (NIHRC)
- Trade Unions – Unison and Irish Congress of Trade Unions
- Office of the First Minister and Deputy First Minister (OFMDFM)
- Staff Commission for Local Government

6. Feedback Seminars

After the interview data from the three strands of empirical data collection outlined under heads 2 3 and 4 above was subjected to initial analysis, a seminar was convened in each jurisdiction to which all participants were invited. Emerging findings and proposed strategies arising from the research were presented and participants were asked to give their response to these strategies with regard to whether they would be worthwhile, attendant resource, policy and other implications and the stakeholders that should be involved in each. The proceedings of each seminar were recorded and incorporated into the full analysis and conclusions reflected in this report.

The ROI Seminar was held on January 17th 2007 and was attended by twelve participants representing LGB NGOs, equality bodies and stakeholders. In Northern Ireland, eight persons, LGB individuals and representatives of LGB organisations, attended the event.

7. Comparative Review

Comparative experiences in the Netherlands, Sweden and Belgium, as examples of equality law regimes into which specialised bodies with responsibility for SO discrimination law have been introduced, are considered in the project. Scotland has also been included as a jurisdiction of comparable size to the island of Ireland in which specialised agencies have developed networks of trusted advisers on discrimination law. Representatives of specialised equality bodies were interviewed, together with national level LGB NGOs, in each case with a view to determining, if appropriate, examples of good practice in overcoming barriers to access to rights identified on the island of Ireland. Interviews were held with: Dirk de Meirleir, Coordinator for non-racial discrimination at the Belgian Centre for Equal Opportunities and Opposition to Racism (CNTR); Domenica Ghidei, Commissioner of the Dutch Equal Treatment Commission (CGB); Gea Zijlstra of COC, the Dutch LGB federation; Tim Hopkins, Director of the Scottish Equality Network; Muriel Robison, Equal Opportunities Commission (Scotland); Anette Sjödin, project manager of RFSL, the Swedish LGB Federation; Anne Lingham, Development Director, Ombudsman Against Sexual Orientation Discrimination (HomO) (Sweden); and Mattias Falk, legal adviser, HomO.

8. Interview Schedule for Equality Bodies

Enhancing Access to Justice for Lesbian, Gay or Bisexual (LGB)
Individuals through Equality Legislation

1. How has the sexual orientation ground been addressed under the different functions of your organisation?
2. Has your organisation undertaken any access to justice initiatives specifically related to the sexual orientation ground?
3. Has your organisation undertaken any access to justice initiatives related to any other grounds under the legislation? How could learning from these initiatives be applied to the sexual orientation ground?
4. How do you think this ground has developed in comparison with other grounds under the legislation?
5. What responsibilities and challenges do you consider the provisions of equality legislation with respect to sexual orientation specifically raise for your organisation?
6. Do you consider there are specific issues for different sectors e.g. young LGB, lesbian women and gay men?
7. Have you forged any partnerships with LGB specific organisations in the course of your work?
8. What could be done at the level of society to enhance access to justice for lesbian, gay or bisexual individuals under equality legislation?
9. What supports, resources and infrastructure are necessary to facilitate this?
10. What specifically could your organisation do to enhance access to justice for lesbian, gay or bisexual individuals under equality legislation?
11. What supports, resources and infrastructure are necessary to facilitate this?
12. What barriers or limitations exist to promoting access to justice under the sexual orientation ground?

9. Interview Schedule for Stakeholder Bodies

Enhancing Access to Justice for Lesbian, Gay or Bisexual (LGB)
Individuals through Equality Legislation

1. How does equality legislation (Employment Equality Acts and Equal Status Acts) impact on your organisation?
2. How has your organisation responded to equality legislation?
3. Has your organisation become involved in any special projects/initiatives related to equality legislation, particularly addressing access to justice issues?
4. Taking the sexual orientation ground specifically, has your organisation undertaken any initiatives addressing the responsibilities entailed to LGB

- individuals or promoting the rights of LGB individuals under the legislation?
5. What responsibilities and challenges do you consider the provisions of equality legislation with respect to sexual orientation specifically raise for your organisation?
 6. Have you forged any partnerships with LGB specific organisations in the course of your work generally and/or specifically in relation to the equality legislation?
 7. What barriers can you identify to enhancing access to justice under the sexual orientation ground?
 8. What could your organisation do to enhance access to justice for lesbian, gay or bisexual individuals under equality legislation?
 9. What supports, resources and infrastructure are necessary to facilitate this?

APPENDIX B

Invocation of the Sexual Orientation Ground

Table A: Sexual Orientation Ground Decisions Issued by the Equality Tribunal
under the EEA 2001-2005

	2005	2004	2003	2002	2001
Number	1	3	4	1	0
Subject Matter	Complainant failed to establish prima facie case of harassment (<i>Mr. X v A Supermarket</i> DEC-E2005/019)	Harassment on SO ground established (<i>Piazza v Clarion Hotel</i> , DEC-E2004-033) Lesbian woman failed to establish prima facie case of direct discrimination (<i>HR v TG</i> DEC-E2004-053) Multiple ground claim – Failed to establish prima facie case of SO discrimination in relation to promotion (<i>Sinclair v Intel</i> DEC-E2004-051)	Harassment claim taken by heterosexual man – failed to establish prima facie case (<i>An Employee v An Employer (in Liquidation)</i> , DEC-E2003-002) Outside time limit (<i>A Named Female v A Named Company</i> , DEC-E2003-047; <i>A Male Complainant v A Bar and Restaurant</i> , (DEC-E2003-005) Complainant failed to establish that he was an employee of respondent (<i>A Named Complainant v A Named Company</i> DEC-E2003-015)	No jurisdiction as complainant based outside jurisdiction (<i>A Complainant v a Company</i> , DEC-E2002-036)	N/a

Percentage	1.6%	3.9%	6.7%	1.8%	0%
Representation	Barrister (1)	Self (2) Trade Union (1)	Self (2) Trade Union (2)	Solicitor (1)	N/a

Table B: Sexual Orientation Ground Decisions Issued by the Equality Tribunal under the ESA 2001-2005

	2005	2004	2003	2002	2001
Number	1	1	0	0	0
Subject Matter	Complainant discriminated against when refused service in a pub (<i>A Female v A Publican</i> , DEC-S2005/026)	Complainant discriminated against when asked to leave hotel (<i>O'Regan v Bridge Hotel</i> DEC-S2004-0037)	N/a	N/a	N/a
Percentage	1.2%	0.9%	0%	0%	0%
Representation	Self (1)	Self (1)	N/a	N/a	N/a

Sexual Orientation Ground in Case Files of Equality Authority

Table C: Employment Equality Acts 1998 and 2004 - Casework Activity

	2000	2001	2002	2003	2004	2005	2006
Access to Employment	1	1	2	2	1	0	0
Access to Promotion	0	0	0	0	0	1	1
Access to Training	0	0	0	0	0	0	0
Working Conditions	0	3	5	4	0	0	0
Harassment	3	7	4	2	0	2	2
Dismissal	6	7	5	4	0	2	2
Equal Pay	0	0	0	0	4	0	0
Sexual Harassment	0	0	0	0	0	1	0
Victimisation	0	1	1	1	0	0	0
Advertising	0	0	0	0	0	0	0
Advice	0	0	0	1	0	0	0
Outside scope	0	0	0	0	0	1	0
<i>Total</i>	<i>10</i>	<i>19</i>	<i>17</i>	<i>14</i>	<i>5</i>	<i>7</i>	<i>5</i>
Percentage on SO ground	4.95%	4.69%	3.47%	2.49%	1.35%	1.94%	1.2%

Sexual Orientation Ground in Case Files of Equality Authority

Table D: Equal Status Acts 2000 to 2004 - Casework Activity

	2000	2001	2002	2003	2004	2005	2006
Licensed Premises	0	11	16	8	1	0	0
Access to Restaurant	0	0	0	0	0	0	0
Insurance	2	2	1	2	2	0	0
Accommodation	0	1	0	0	0	0	0
Access to Shop	0	0	0	0	0	0	0
Education	0	0	1	2	1	0	1
Registered Clubs	0	0	1	0	0	0	0
Social Welfare	0	4	2	3	2	0	1
Banking/Financial Services	0	2	1	1	0	0	
Harassment	0	0	1	0	0	0	0
Transport	1	0	0	1	0	0	0
Misc. Issues	0	1	9	5	2	2	1
Victimisation	0	0	0	0	0	0	0
Life Insurance	2	0	0	0	0	0	1
Health Agencies	0	0	0	0	0	0	0
Local Authorities	0	0	0	0	0	0	0
State Dept. and Bodies	0	0	0	3	0	0	0
Total	3	21	32	25	8	2	4/366
Percentage on SO ground	21.42%	3.11%	4.02%	3.15%	1.57%	0.55%	

Sexual Orientation Grounds Cases in Northern Ireland

Extract from *Decisions and Settlements Review 2005-2006*

(ECNI 2007a, pp.47-48)

Settlements

Paul Hindley –v- Fannin Health Care Ltd.

Sexual orientation discrimination proceedings in the Industrial Tribunal which settled on 31 May 2005. This was the first sexual orientation discrimination settlement supported by the Equality Commission and illustrates the need to raise awareness of the duty on employers not to discriminate or harass employees on the grounds of sexual orientation.

Summary

The Claimant who is gay was employed as Sales Specialist selling medical equipment from April 2003 until his resignation in December 2004. He alleged that he was forced to resign as a result of his manager's treatment of him, and the Respondent's lack of effective action in dealing with his complaint about it. He alleged that his manager referred to him in derogatory and homophobic terms to other staff.

On settlement of the case the Respondent agreed to pay the Claimant compensation of £6000. The Respondent reaffirmed its commitment to equality and to ensuring that its practices and procedures complied with its legal obligations. The Respondent also undertook to liaise with the Equality Commission, to review and develop its equal opportunities policies and procedures. The Respondent agreed to implement such recommendations as the Commission may make as far as practicably possible. The Respondent also agreed to communicate its equal opportunities policies and procedures to its staff.

Oliver Reid –v- Gavin Feehily & Next Plc

Sexual orientation discrimination proceedings in the Industrial Tribunal which settled on 2 March 2006. This case challenges harassment on grounds of sexual orientation in the workplace. The case illustrates the importance of training short term workers in the company's policies and procedures.

Summary

The Claimant, who is gay, was employed by the Respondent as a Warehouse Operative on a short term basis. He complained that he was subjected to homophobic harassment during his period of employment and left his job as a result. He claimed he was subjected to verbal abuse including name-calling and insults and his voice was mimicked in a way that was designed to insult him. He

alleged that he was also humiliated by inappropriate questions about his sexual preferences.

The second Respondent, Next Plc, agreed to pay the Claimant compensation of £5000. The Respondents maintained a denial of liability in respect of the claim. The Respondents acknowledged that the Claimant had brought the proceedings in good faith. The second Respondent reaffirmed its continued commitment to the principle of equality of opportunity. The second Respondent undertook to communicate its equal opportunities policies and procedures to all the temporary staff employed in its warehouse on a short term basis.

Contacting the Equality Commission

If you need information or advice or would like to request copies of our publications, please contact our Enquiry line at:

The Equality Commission for Northern Ireland
Equality House
7-9 Shaftesbury Square
Belfast
BT2 7DP

Telephone: 028 90 890 890 (enquiry line)
Reception: 028 90 500 600
Textphone: 028 90 500 589
Fax: 028 90 248 687
Email: information@equalityni.org
Website: www.equalityni.org

You can also use Typetalk to contact us.

Contacting the Equality Authority

The Equality Authority
Clonmel Street
Dublin 2
Ireland

Public Information Centre:
Lo Call: 1890 245 545

Telephone: (01) 417 3333
Business Queries: (01) 417 3336
Text Phone: (01) 417 3385
Fax: (01) 417 3331
Email: info@equality.ie
Website: www.equality.ie

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Contacting the Equality Authority

The Equality Authority
Clonmel Street
Dublin 2
Ireland

Public Information Centre:

Lo Call: 1890 245 545

Telephone: (01) 417 3333

Business Queries: (01) 417 3336

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