

# **GENDER EQUALITY IN GOODS AND SERVICES**

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# EQUINET REPORT ON THE GOODS AND SERVICES DIRECTIVE

## THE EXPERIENCES OF EQUALITY BODIES WITH DIRECTIVE 2004/113/EC SURVEY TAKEN WITH 22 EQUALITY BODIES, EQUINET MEMBERS

### EQUALITY BODIES TAKING ACTION

- COMPLIANCE WITH ARTICLE 12 OF THE DIRECTIVE (“BODIES FOR THE PROMOTION OF EQUAL TREATMENT”)
- CHALLENGE TO EQUALITY BODIES TO BUILD A STRATEGY TO EXPLORE THE POTENTIAL OF THIS DIRECTIVE AND TO MAKE IT MORE EFFECTIVE.
- PROMOTIONAL, COMMUNICATION, POLICY AND RESEARCH WORK AS TOOLS TO COMBAT HIGH LEVEL UNDERREPORTING AND LOW GENERAL AWARENESS.

### EQUALITY BODIES ACTION – INDEPENDENCE AND EFFECTIVENESS

- EQUALITY BODIES NEED **INDEPENDENCE AND EFFECTIVENESS** TO PURSUE THEIR MANDATE AND ENSURE THEIR ROLE.
- EQUALITY BODIES REPORTED ON SEVERAL OCCASIONS THE LACK OF SUFFICIENT **RESOURCES** TO ENSURE FURTHER WORK IN THE AREA OF GOODS AND SERVICES AND TO OPEN UP THE POTENTIAL OF THIS DIRECTIVE.

# EU DIRECTIVES

- DIRECTIVE 2004/113 PRINCIPLE OF EQUAL TREATMENT BETWEEN MEN AND WOMEN IN THE ACCESS AND SUPPLY OF GOODS AND SERVICES

## OTHER RELEVANT DIRECTIVES:

- 'RACE' DIRECTIVE 2000/42/EC: REFERENCES TO GENDER AND MULTIPLE DISCRIMINATION AND GENDER MAINSTREAMING
- RECAST DIRECTIVE 2006/54/EC (EMPLOYMENT)
- COUNCIL DIRECTIVE 79/7/EEC PRINCIPLE OF EQUAL TREATMENT BETWEEN MEN AND WOMEN IN MATTERS OF SOCIAL SECURITY

# **EQUINET REPORT ON THE GOODS AND SERVICES DIRECTIVE**

**HETEROGENEOUS EXPERIENCE AND VARIATION OF INTERPRETATION OF THE GOODS AND SERVICES PROVISIONS AMONG THE EQUALITY BODIES, ALSO RELATED TO DIFFERENT NATIONAL LEGISLATION.**

- NEED FOR FURTHER CLARIFICATION OF SOME PROVISIONS OF THE DIRECTIVE
- NEED TO ENSURE HARMONISATION OF NATIONAL LAWS AND INTERPRETATION OF THE DIRECTIVE

# ART 4.5 & RECITALS 16 AND 17

- **ARTICLE 4.5 AND RECITALS 16 AND 17** ALLOWING DIFFERENCES IN TREATMENT
- WHICH AIMS ARE LEGITIMATE?
- WHICH MEANS OF ACHIEVING AN AIM ARE APPROPRIATE AND NECESSARY (AND PROPORTIONATE) ?
- BODY OF CASE LAW AT NATIONAL AND EU-LEVEL NEEDS TO BE DEVELOPED
- RISK OF INTERPRETING THESE EXCEPTIONS TOO WIDELY OR TOO NARROWLY
- CASE-LAW INTERPRETATION VARIES FROM COUNTRY TO COUNTRY IN SIMILAR SITUATIONS

# LEGITIMATE AIM & PROPORTIONATE MEANS TO ACHIEVE THAT AIM

- **RECITAL 16** E.G. PROTECTION OF VICTIMS OF GENDER BASED VIOLENCE; REASONS OF PRIVACY AND DECENCY; PROMOTION OF GENDER EQUALITY; FREEDOM OF ASSOCIATION; SPORTING ACTIVITIES; SINGLE-SEX VOLUNTARY BODIES; SINGLE-SEX CLUBS; HEALTHCARE SERVICES.
- **RECITAL 17:** FACILITIES DO NOT NEED TO BE PROVIDED ON A SHARED BASIS AS LONG AS THEY ARE NOT PROVIDED MORE FAVOURABLY TO ONE GENDER OVER ANOTHER
- **TEST-ACHATS CASE** – CJEU – INVALIDATING THE PROVISION (ARTICLE 5.2) ALLOWING PROPORTIONATE DIFFERENCES IN INDIVIDUAL PREMIUM AND BENEFITS WHERE THE USE OF SEX IS A DETERMINING FACTOR IN RISK ASSESSMENT (= BASED ON ACCURATE ACTUARIAL AND STATISTICAL DATA) – INCOMPATIBILITY WITH ART. 21 AND 23 OF THE CHARTER OF FUNDAMENTAL RIGHTS
- EUROPEAN COMMISSION ISSUED GUIDELINES ON TEST-ACHATS

# NATIONAL CASE-LAW



## EMERGING AREAS WHERE EQUALITY BODIES HAVE DEALT WITH CASES:

- HOTEL FLOOR FOR WOMEN ONLY (DENMARK) – DISCRIMINATORY/ NOT A LEGITIMATE AIM
- HEADGEARS BAN IN GYMS – INDIRECT DISCRIMINATION (SWEDEN)
- DIFFERENT PRICING FOR WOMEN AND MEN IN RESTAURANTS, CLUBS (GERMANY) FOUND DISCRIMINATORY
- HOUSING – TENANCY CONTRACTS TO WOMEN ONLY (AUSTRIA - ALLOWED)
- TRANSGENDER PEOPLE IN TRANSITION AND ACCESS TO HEALTHCARE, FINANCIAL SERVICES, ETC.
- INSURANCE COMPANY REFUSING TO INSURE TRANSGENDER PEOPLE (GERMANY)

Table 1

	yes	no
a) insurances	8	9
b) financial services	6	11
c) access to gyms/hotels/restaurants etc.	14	3
d) sexual harassment in healthcare	2	15
e) trans people in transition period or trying to access healthcare for transition	10	7
f) taxation	9	8
g) housing	9	8
h) employment related insurance schemes	4	13
i) access to public transport	7	10
j) equal access to pension	9	8
k) self-employed workers and access to private insurance	0	17
l) education	12	5
m) advertisement	12	5
n) media	9	8



# GAPS IN THE DIRECTIVE'S LEGAL PROVISIONS

THE EXPERIENCE OF EQUALITY BODIES SHOWS THE IMPORTANCE OF COVERING AREAS/SCOPE CURRENTLY NOT OR NOT CLEARLY COVERED IN THE DIRECTIVE:

- **ADVERTISEMENT**
  - **MEDIA**
  - **EDUCATION**
  - **PUBLIC HEALTHCARE**
  - **TRANS AND INTERSEX PERSONS**
- IS THE DIRECTIVE'S REQUIREMENT FOR SANCTIONS TO BE DISSUASIVE, PROPORTIONATE AND EFFECTIVE CURRENTLY FULFILLED?
  - THE DIRECTIVE COVERS **ONLY** GOODS AND SERVICES THAT ARE PAID FOR
  - IMPORTANCE OF GENDER MAINSTREAMING AND PUBLIC SECTOR DUTIES

# OTHER FINDINGS – PROMOTIONAL, POLICY AND RESEARCH

## BUILD A CULTURE OF RIGHTS BY:

- **ADDRESSING UNDERREPORTING** BY RAISING AWARENESS ON THIS DIRECTIVE; COOPERATION WITH CIVIL SOCIETY ORGANISATIONS; WOMEN'S GROUPS; PUBLIC BODIES, ETC.
- **CHALLENGE STEREOTYPES** ABOUT GENDER ROLES IN THE AREAS OF GOODS AND SERVICES AND BUILD A SHARED CULTURE AWARE OF STEREOTYPING IN THE FIELD.
- THE AREA OF GOODS AND SERVICES CAN BE CONSIDERED RELATIVELY **NEW** TO EQUAL TREATMENT PROVISIONS AND THEREFORE LESS RESEARCHED UPON.
- PROMOTE AND PRODUCE RESEARCH - NEED TO ESTABLISH
  - **HOW AND WHERE** DISCRIMINATION OCCURS IN THIS FIELD,
  - THE **EXTENT** OF THIS DISCRIMINATION,
  - HOW PEOPLE ARE **RESPONDING** TO THIS DISCRIMINATION
  - THE **IMPACT** OF THIS DISCRIMINATION.

# EQUINET REPORT ON HARASSMENT ON THE BASIS OF GENDER AND SEXUAL HARASSMENT

GOODS AND SERVICES DIRECTIVE 2004/113/EC AFFIRMS THAT:

“DISCRIMINATION BASED ON SEX, INCLUDING HARASSMENT AND SEXUAL HARASSMENT, ALSO TAKES PLACE IN AREAS OUTSIDE OF THE LABOUR MARKET. SUCH DISCRIMINATION CAN BE EQUALLY DAMAGING, ACTING AS A BARRIER TO THE FULL AND SUCCESSFUL INTEGRATION OF MEN AND WOMEN INTO ECONOMIC AND SOCIAL LIFE” (PREAMBLE)

- **MEDIA, ADVERTISEMENT AND EDUCATION** ARE EXCLUDED FROM THE SCOPE OF THE GENDER GOODS AND SERVICES DIRECTIVE
- EU POLICY MAKERS TO **REVIEW THIS EXCEPTION** AS IMPORTANT ROOTS OF SEXISM TAKE PLACE IN MEDIA
- IN PARTICULAR, **SEXUAL HARASSMENT IN EDUCATION** AMONG TEENS IS A WORRYING PHENOMENON THAT SHOULD BE FIRMLY COMBATED AT EU LEVEL
- **CYBER HARASSMENT** NEEDS TO BE EFFECTIVELY MONITORED. INTERNATIONAL OR EU COORDINATION MAY BE NEEDED IN THIS AREA BECAUSE OF THE WORLD-WIDE NATURE OF INTERNET AND SOCIAL MEDIA NETWORKS.
- EU INSTITUTIONS COULD ESTABLISH A **COHERENT SYSTEM FOR COLLECTING STATISTICS ON GENDER VIOLENCE INCLUDING SEXUAL HARASSMENT.**
- **TRANSPHOBIA AND MISOGINY; INCITEMENT TO HATRED; HATE SPEECH**

# THE IRISH CONTEXT

THE EQUAL STATUS ACTS 2000 – 2015 WENT **BEYOND THE SCOPE OF THE DIRECTIVE** TO COVER NINE GROUNDS OF DISCRIMINATION: GENDER, AGE, SEXUAL ORIENTATION, DISABILITY, RACE (INCLUDING NATIONALITY), FAMILY STATUS, CIVIL STATUS, MEMBERSHIP OF THE TRAVELLER COMMUNITY, RELIGION. THE 2015 ACT CREATED A FURTHER GROUND IN RELATION TO ACCOMMODATION (HOUSING ASSISTANCE GROUND).

**THE ACT REFERS TO ALL GOODS AND SERVICES, FREE OR SOLD, HIRED OR EXCHANGED;**

- PUBLIC SERVICES
- BANKING, INSURANCE, GRANTS, LOANS, CREDIT OR FINANCING
- ENTERTAINMENT, RECREATION OR REFRESHMENT
- CULTURAL ACTIVITIES
- TRANSPORT OR TRAVEL
- A SERVICE OR FACILITY PROVIDED BY A CLUB
- A PROFESSIONAL TRADE OR SERVICE
- EDUCATIONAL ESTABLISHMENTS
- ACCOMMODATION

# DIFFERENTIAL TREATMENT (1)

## SERVICE AREA: ACCOMMODATION/HOUSING

### DISCRIMINATION IS PROHIBITED RE:

- DISPOSING OF AN ESTATE
- TERMINATING A TENANCY
- PROVIDING ACCOMMODATION
- CEASING TO PROVIDE ACCOMMODATION
- **DIFFERENT BUT NOT LESS FAVOURABLE TREATMENT IS ALLOWED ON THE GROUNDS OF: FAMILY SIZE, FAMILY STATUS, MARITAL STATUS, DISABILITY, AGE, MEMBERSHIP OF THE TRAVELLER COMMUNITY**
- DIFFERENT TREATMENT IS ALLOWED ON ALL GROUNDS RE: WILLS / GIFTS, A PERSON'S HOME, USE OF ACCOMMODATION FOR RELIGIOUS PURPOSES, REFUGE, NURSING HOME, RETIREMENT HOMES)

## DIFFERENTIAL TREATMENT (2)

### SERVICE AREA: EDUCATION

THE ACTS ALLOW DIFFERENT TREATMENT UNDER CERTAIN CIRCUMSTANCES:

1. **SINGLE SEX SCHOOLS**: WHERE PRIMARY AND SECONDARY SCHOOLS MAY BE FOR ONE GENDER ONLY
2. ON THE GROUNDS OF **RELIGION AND GENDER**  
(RELIGIOUS TRAINING)
3. **ETHOS OF THE SCHOOL**

# DIFFERENTIAL TREATMENT (3)

- (C) DIFFERENCES IN THE TREATMENT OF PERSONS ON THE **GENDER GROUND** IN RELATION TO **SERVICES OF AN AESTHETIC, COSMETIC OR SIMILAR NATURE**, WHERE THE SERVICES REQUIRE PHYSICAL CONTACT BETWEEN THE SERVICE PROVIDER AND THE RECIPIENT
- (G) DIFFERENCES IN THE TREATMENT OF PERSONS ON THE GENDER GROUND WHERE **EMBARRASSMENT OR INFRINGEMENT OF PRIVACY** CAN REASONABLY BE EXPECTED TO RESULT FROM THE PRESENCE OF A PERSON OF ANOTHER GENDER
- OTHER EXEMPTIONS/ ALLOWANCES FOR DIFFERENT TREATMENT IN RELATION TO **CLUBS, PENSIONS, INSURANCE, SPORTING FACILITIES, CULTURAL EVENTS**

# EMERGING ISSUES: EQUALITY CASES ON GENDER IDENTITY/TRANSGENDER

**DEC-S2014-020 THE EQUALITY TRIBUNAL - EQUAL STATUS ACTS 2000 TO 2011- DECISION NO: DEC-S2014-020; A PATIENT-V- A HOSPITAL: DISCRIMINATION AND HARASSMENT ON THE GENDER GROUND - NOT SUCCESSFUL**

- TRANS-WOMAN RECEIVING TREATMENT IN A HOSPITAL AND HER IDENTITY ALWAYS BEING REFERRED TO AS A MALE BY THE DOCTOR/CONSULTANT
- FAILED TO ESTABLISH A PRIMA FACIE CASE OF DISCRIMINATION
- *EQUAL STATUS ACTS: (2) TREATING A PERSON DIFFERENTLY DOES NOT CONSTITUTE DISCRIMINATION WHERE THE PERSON — (A) IS SO TREATED SOLELY IN THE EXERCISE OF A CLINICAL JUDGMENT IN CONNECTION WITH THE DIAGNOSIS OF ILLNESS OR HIS OR HER MEDICAL TREATMENT, OR (B) IS INCAPABLE OF ENTERING INTO AN ENFORCEABLE CONTRACT OR OF GIVING AN INFORMED CONSENT AND FOR THAT REASON THE TREATMENT IS REASONABLE IN THE PARTICULAR CASE.*

**DEC-S2013-015: THE EQUALITY TRIBUNAL - EQUAL STATUS ACTS 2000 TO 2011- DECISION NO: DEC-S2013-015 DEIRDRE O'BYRNE –V- AIB (ALLIED IRISH BANKS) – DISCRIMINATION ON THE GENDER AND DISABILITY GROUND - SUCCESSFUL**

BANK DID NOT RESPECT NEW NAME (BY DEED POLL) AND KEPT WRITING TO THE CLIENT WITH HER PREVIOUS MALE NAME AND ASKING HER TO CLOSE DOWN HER ACCOUNT IN THE OLD NAME AND OPEN ANOTHER ONE IN HER NEW NAME

COMPENSATION 5000 EUROS AND REVIEW OF POLICIES BY BANK



# **NATIONAL TRANS-YOUTH FORUM REPORT (WWW.TENI.IE)**

- GENDER-SPECIFIC CLOTHING REQUIREMENTS (MORE IN SECONDARY SCHOOLS) - UNIFORMS
- BULLYING AND HARASSMENT – PEER ABUSE
- NO TRANS-RELATED POLICIES IN SCHOOLS
- NON BINARY YOUTH UNABLE TO EXPRESS THEIR GENDER IDENTITY
- GENDER-SEGREGATED FACILITIES (BATHROOM, LOCKERS, CHANGING ROOMS)
- TRANSGENDER NOT A DISABILITY
- EXTRA-CURRICULAR ACTIVITIES SUCH AS SPORTS
- RESPECT FOR PREFERRED NAME OR PRONOUN
- LACK OF KNOWLEDGE BY HEALTHCARE PROVIDERS AND GENERAL PRACTITIONERS
- LACK OF TRANS-SPECIFIC MEDICAL SERVICES, LACK OF CLEAR MEDICAL PATHWAY

# **SPEAKING FROM THE MARGINS- TRANS MENTAL HEALTH AND WELLBEING IN IRELAND – TENI REPORT 2013**

“DESPITE HIGH RATES OF STRESS, DEPRESSION AND ANXIETY OVER THE LIFE COURSE, 40% OF RESPONDENTS AVOIDED SEEKING URGENT HELP OR SUPPORT WHEN DISTRESSED BECAUSE OF THEIR TRANS STATUS. AVOIDANCE OF MENTAL HEALTH SERVICES WAS COMMON WITHIN THIS GROUPING AND WAS LARGELY A RESULT OF PREVIOUSLY NEGATIVE EXPERIENCES WITHIN THIS SETTING. THIRTY-SEVEN PERCENT OF PARTICIPANTS HAD THEIR GENDER IDENTITY TREATED AS A SYMPTOM OF MENTAL ILL HEALTH RATHER THAN AS A GENUINE IDENTITY; 19% WERE TOLD THAT THEY WERE NOT REALLY TRANS; AND 26% WERE DISCOURAGED FROM EXPLORING THEIR GENDER”

# THE INTRODUCTION OF A PUBLIC SECTOR DUTY

THE IHREC ACT 2014 (SECTION 42) HAS ESTABLISHED A POSITIVE DUTY ON PUBLIC SECTOR BODIES TO:

- ELIMINATE DISCRIMINATION
- PROMOTE EQUALITY OF OPPORTUNITY AND TREATMENT
- PROTECT HUMAN RIGHTS

THIS MEANS THAT ALL PUBLIC BODIES WILL HAVE REGARD TO HUMAN RIGHTS AND EQUALITY WHEN:

- EXERCISING THEIR FUNCTIONS,
- WHEN PROVIDING SERVICES,
- IN THE WAY THEY DEAL WITH THEIR EMPLOYEES

# SECTION 14(1): EQUAL STATUS ACTS

- THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION (IHREC) RECOMMENDED THAT THE EQUAL STATUS ACTS BE AMENDED TO ENSURE PROTECTIONS FOR ALL MOTHERS CLAIMING MATERNITY BENEFIT.
- THE IHREC'S RECOMMENDATION FOLLOWED A DECISION OF THE HIGH COURT IN *G V THE DEPARTMENT OF SOCIAL PROTECTION*, A CASE CONCERNING THE EXCLUSION FROM ENTITLEMENT TO A PAYMENT EQUIVALENT TO MATERNITY BENEFIT TO AN IRISH WOMAN WHO HAD A CHILD BY MEANS OF A SURROGACY ARRANGEMENT IN THE US.
- THE HIGH COURT FOUND THAT THE WOMAN HAD EXPERIENCED DISCRIMINATION ON THE BASIS OF HER DISABILITY, AS SHE COULD NOT SUSTAIN A PREGNANCY HAVING HAD A HYSTERECTOMY.
- **NONETHELESS, THE EQUAL STATUS ACTS (SECTION 14) COULD NOT OVERRIDE THE TERMS OF ANOTHER STATUTORY SCHEME, IN THIS CASE, THE DEPARTMENT OF SOCIAL PROTECTION'S STATUTORY SCHEME FOR MATERNITY BENEFIT AND ADOPTIVE BENEFIT.**
- **"THE DEPARTMENT OF SOCIAL PROTECTION AS A PUBLIC BODY HAS A DUTY TO HAVE REGARD TO THE NEED TO ELIMINATE DISCRIMINATION AND PROTECT THE HUMAN RIGHTS OF PERSONS TO WHOM IT PROVIDES SERVICES. THIS DUTY IS ESTABLISHED UNDER SECTION 42 OF THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION ACT 2014.**



**THANKS**

- QUESTION AND COMMENTS

