



Supporting LGBTI+  
Young People in Ireland

## **BeLong To Youth Services Submission on the Review of the Equality Acts**

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**Contact: Moninne Griffith ([Moninne@belongto.org](mailto:Moninne@belongto.org)), Neasa Candon  
([Neasa@belongto.org](mailto:Neasa@belongto.org))**

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## Introduction

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BeLonG To Youth Services is the national organisation supporting lesbian, gay, bisexual, transgender, and intersex (LGBTI+) young people in Ireland. Since 2003, the organisation has worked with LGBTI+ young people aged 14-23 years old to create a world where they are equal, safe, and valued in the diversity of their identities and experiences. BeLonG To also advocates and campaigns on behalf of young LGBTI+ people and offers a specialised LGBTI+ youth service with a focus on mental and sexual health, alongside drug and alcohol support. BeLonG To responds to the needs of LGBTI+ young people in Ireland and helps them thrive.

BeLonG To draws attention to the requirement for positive action, both within legislation and through broader policy reforms and resourcing, for the recommendations outlined herein to be fully effective. We refer to the positive actions outlined in the submission of the Free Legal Advice Centre (FLAC) for this review.

It is also important to stress the need for each of the recommendations outlined in this submission to be understood as complementary to each other. Only through a comprehensive suite of reforms can the equality legislation be fully effective in preventing and addressing discrimination experienced by members of protected groups and marginalised or disadvantaged communities.

For example, a key recommendation in this submission is expansion of the gender ground to explicitly include trans, non-binary, gender non-confirming and intersex persons. However, without an amendment to current restrictions regarding time limits for claims and requirements for written notice, this protection may not be effective for all persons the ground intends to protect.

Similarly, an amendment to allow for equality legislation to be used to challenge discriminatory laws is welcome. However, without amendments allowing persons under the age of 18 to make a claim on the grounds of age-related discrimination, or the introduction of representative actions, the capacity for a young person or

BeLonG To to challenge restrictive provisions in legislation such as the Mental Health Act, 2001, is greatly reduced.

Finally, BeLonG To wishes to thank FLAC and the National Women's Council for their support in drafting this submission.

## **Structure of Submission**

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This submission is organised into six sections, in accordance with the six key areas of consultation detailed on the Department's website. The submission addresses key recommendations regarding the Employment Equality Acts and the Equal Status Acts. When referred to together, these Acts are termed 'equality legislation'.

## **1. Functioning and Effectiveness of the Acts**

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This section examines the functioning of the Acts and their effectiveness in combatting discrimination and promoting equality.

### **Interim orders and Injunctions**

#### **Recommendation:**

- **BeLonG To recommends that claimants be able to seek interim/interlocutory orders pending the hearing of their claims in appropriate circumstances.**

#### **Current Scope**

- There is currently no mechanism for interim orders to be made by the Workplace Relations Commission pending the hearing of a claim.

## Context of Recommendation

- The 2016 LGBTIreland Report discusses the challenges faced by LGBTI+ young people with regard to bullying and harassment in schools and workplaces.<sup>1</sup>
- The report further outlines difficulties faced by trans young people in the workplace, particularly in the context of transitioning while in employment.<sup>2</sup>

## Reasoning for Recommendation

- A provision to empower the Workplace Relations Commission to make an interim order where the discrimination or harassment is allegedly ongoing, for example in a school or workplace, would be helpful for claimants in the interim period before a claim is decided.
- This provision is particularly important for LGBTI+ persons, given the higher rates of discrimination and harassment experienced in workplaces and educational settings.
- This provision is also important where the damage may be irreparable and compensation alone is not sufficient, for example should a young trans or non-binary person be refused admission to a school on the basis of their gender identity or expression.

## **The Definitions of Direct & Indirect Discrimination**

### **Recommendation:**

- **BeLonG To recommends that the definition of “indirect discrimination” in the Employment Equality Acts is amended in line with the EU Equality Directives.**

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<sup>1</sup> Higgins, A. et al (2016) The LGBTIreland Report: national study of the mental health and wellbeing of lesbian, gay, bisexual, transgender and intersex people in Ireland. Dublin: GLEN and BeLonG To Youth Service. Available at: <https://belongto.org/wp-content/uploads/2018/05/LGBT-Ireland-Full-Reportpdf.pdf>

<sup>2</sup> Higgins, A. et al (2016) The LGBTIreland Report: national study of the mental health and wellbeing of lesbian, gay, bisexual, transgender and intersex people in Ireland. Dublin: GLEN and BeLonG To Youth Service. Available at: <https://belongto.org/wp-content/uploads/2018/05/LGBT-Ireland-Full-Reportpdf.pdf>

- **BeLong To further recommends that the burden of proof for indirect discrimination cases should be clearly provided for in the Acts (in line with EU law), and the legislation should state that statistical evidence is not required in all indirect discrimination cases.**

### Current Scope

- The Equal Status Acts does not contain a definition of either direct or indirect discrimination.
- The Employment Equality Acts contains multiple definitions of indirect discrimination.

### Context of Recommendation

- The Equality Authority has stated that the Equality Acts should clearly adopt the definition of “indirect discrimination” from the EU Equality Directives.
- In accordance with EU law, statistical information is just one means by which indirect discrimination can be established.<sup>3</sup>
- However, a Supreme Court judgement relating to the alleged indirect discrimination of a school admission policy against a member of the Traveller community stated that statistical information was required to establish that a person belonging to a protected group is at a ‘particular disadvantage’.<sup>4</sup>

### Reasoning for Recommendation

- Failure to define indirect discrimination, and the requirement to provide statistical evidence for the particular disadvantage of protected groups, greatly limits the scope and effectiveness of equality legislation.

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<sup>3</sup> Mel Cousins (2015), *Education and the Equal Status Acts - Stokes -v- Christian Brothers High School Clonmel*, Dublin University Law Journal. Available at: [https://works.bepress.com/mel\\_cousins/86/](https://works.bepress.com/mel_cousins/86/)

<sup>4</sup> For an overview of the case, see: [Mary Stokes v. Christian Brothers High School Clonmel & Ors – 13 Dec 2012 - IHREC - Irish Human Rights and Equality Commission](#)

- There are a number of ways in which this could directly impact upon a claim taken by an LGBTI+ young person. An example is given below:
- The 2019 School Climate Survey found that, in schools, 34% of LGBTI+ young people avoid using bathrooms and 24% avoid using locker rooms.<sup>5</sup>
  - The report recommended provision of gender-neutral bathrooms and changing facilities so as to accommodate LGBTI+ young people, and increase their feeling of safety in school.
  - Should a school or educational setting fail to provide gender-neutral bathrooms and changing facilities, a trans or non-binary young person may experience indirect discrimination in their ability to access these facilities.

## **2. Awareness and Accessibility of the Acts**

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This section examines the degree to which those experiencing discrimination are aware of the legislation and whether there are obstacles which deter them from taking an action.

### **Two months written notification**

#### **Recommendation:**

- **BeLong To recommends that the written notification requirement in the Equal Status Act be removed or made optional.**

#### **Current Scope**

- The Equal Status Acts require potential claimants, within two months of the most recent occurrence of the act of discrimination, to send a written notification to the potential respondent, setting out the nature of their complaint and their intention to bring a complaint to the Workplace Relations Commission if not satisfied with the Respondent's response.

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<sup>5</sup> See p. 30, [Microsoft Word - BeLong To School Climate Report 2019.docx](#)

### Context of Recommendation

- The notification requirement is unique to complaints under the Equal Status Acts.
- There is no equivalent in the Employment Equality legislation or other employment legislation.
- Further there is no equivalent in discrimination complaint mechanisms across Europe.

### Reasoning for Recommendation

- An analysis undertaken by FLAC of all published WRC decisions on Equal Status complaints between 2015 and 2019, shows that the number of complaints which were unsuccessful on the basis of a failure to comply with the notification requirement is increasing year on year.
- It creates in effect a two-month time limit for bring an Equal Status Claim and constitutes a significant unnecessary barrier for bring a complaint of discrimination under the Equal Status Acts.
- It is also likely to be in breach of EU requirements for effective and equivalent remedies.

## **Time Limits for Brining Complaints**

### **Recommendation:**

- **BeLong To recommends that time limits for discrimination complaints should not run where a grievance/internal procedure in relation to the discrimination is ongoing.**

### Current Scope

- The Equality Acts set a six-month time limit for making discrimination complaints.

## Context of Recommendation

- The Labour Court has decided that the same strict time limit applies even where an employee is delayed in making their complaint because they are using an internal grievance procedure.<sup>6</sup>

## Reasoning for Recommendation

- This time limit is restrictive and may present particular problems where discrimination or harassment is ongoing.
- The six-month time limit makes no allowances for attempts to resolve issues through internal procedures or invoking grievance procedures.

## **3. Scope and Definition of Equality Grounds**

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This section examines the scope of the current definitions of the nine equality grounds, including consideration of the gender ground, the disability ground and whether new grounds should be added, such as the ground of socio-economic discrimination.

The Equality Legislation currently prohibits discrimination in employment, goods and services, accommodation and education on the nine grounds of gender, marital status, family status, age, disability, sexual orientation, race, religion, and membership of the Traveller community. Proposed amendments to existing grounds, and proposed inclusion of additional grounds, are outlined below.

### **Existing Grounds - Gender**

#### **Recommendation:**

- **BeLonG To recommends that the definition of the gender ground contained in the Equal Status Acts and Employment Equality Acts is amended to explicitly prohibit discrimination on the basis of gender identity, gender expression and sex characteristics.**

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<sup>6</sup> Dr Judy Walsh (2020), *Country Report: Non-Discrimination, Ireland 2020*. European Commission Directorate-General for Justice and Consumers. Available at: <https://www.equalitylaw.eu/country/ireland>



- The above recommendation is in the interest of providing explicit protection to trans persons under Equality Legislation, and to extend protection to non-binary, gender non-conforming and intersex persons, within the existing gender ground.

### Current Scope

- The current definition of the gender ground does not explicitly reference gender identity, gender expression and sex characteristics. However, the definition has previously been interpreted to include trans and non-binary persons.
- In 2011, the Equality Tribunal of Ireland found in favour of a trans complainant who filed a complaint of discrimination against her employer on the ground of gender, in accordance with the Employment Equality Acts.<sup>7</sup> Citing EU law, the Equality Officer stated that it was “well established in law that the gender ground protects transgender persons”.<sup>8</sup>
- The Workplace Relations Commission has also found in favour of a trans person who filed a complaint of discrimination on the gender ground in the provision of goods and services, in accordance with the Equal Status Acts.<sup>9</sup>
- In 2018, the Workplace Relations Commission accepted that a complaint filed by a non-binary person fell within the scope of the gender ground under the Employment Equality Acts.<sup>10</sup>
  - The decision to consider a non-binary complainant within the gender ground was based on the principle established regarding the inclusion of trans persons within the gender ground.<sup>11</sup>
  - As such, there is no obligation on future Workplace Relations Commission Adjudication Officers to also find that alleged

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<sup>7</sup> Hannon v First Direct Logistics Ltd [2011] ELR 215

<sup>8</sup> The Equality Officer cited European Courts of Justice in P v S and Cornwall County Council (Case C-13/9).

<sup>9</sup> Lee McLoughlin V Paula Smith Charlies Barbers [2018].

<sup>10</sup> Customer Service Advisor v Financial Services Provider [2018].

<sup>11</sup> In relation to the previously mentioned Hannon v First Direct Logistics Ltd [2011] ELR 215

discrimination against non-binary persons falls within the scope of the gender ground.

### Context of Recommendation

- The LGBTI+ National Youth Strategy 2018-2020 commits to “Consider the nine grounds of discrimination outlined in the Equal Status Act and Employment Equality Act to establish if sufficient protection is afforded to transgender young people”.<sup>12</sup>
- The National LGBTI+ Inclusion Strategy 2019-2021 commits to “Review the Employment Equality and Equal Status Acts to ensure that transgender, non-conforming and intersex people have explicit protection within the equality grounds.”<sup>13</sup>
- IHREC has recommended that Equality Legislation be amended to explicitly prohibit discrimination against trans persons, intersex and non-binary persons.<sup>14</sup>
- The European Commission against Racism and Intolerance has recommended that the Employment Equality Acts and the Equal Status Acts be amended to explicitly to include the ground of gender identity.<sup>15</sup>
- Discussed in further detail below, FLAC has recommended the explicit protection of trans, non-binary and intersex persons within the gender ground of the Employment Equality Acts and Equal Status Acts.<sup>16</sup>

### Reasoning for Recommendation

#### *Clarifying Protection for Trans People*

- While the gender ground has been interpreted to include trans persons, FLAC has recommended “clear specific protections for transgender

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<sup>12</sup> See Action 8(a), <https://assets.gov.ie/24459/9355b474de34447cb9a55261542a39cf.pdf>.

<sup>13</sup> See Action 10.1, [LGBTI+Inclusion Strategy 2019-2021.pdf \(justice.ie\)](https://assets.gov.ie/24459/9355b474de34447cb9a55261542a39cf.pdf).

<sup>14</sup> See p.28, [IHREC-Submission-to-the-Citizens-Assembly-on-Gender-Equality-March-2020\\_fin.pdf](https://assets.gov.ie/24459/9355b474de34447cb9a55261542a39cf.pdf)

<sup>15</sup> European Commission against Racism and Intolerance, 2019, ECRI Report on Ireland (fifth monitoring cycle). Available at: <https://rm.coe.int/fifth-report-on-ireland/168094c575>

<sup>16</sup> FLAC (2018), *Submission of FLAC to the Review Group on the Current Operation of the Gender Recognition Act 2015*. Available at:

[https://www.flac.ie/assets/files/pdf/flac\\_submission\\_to\\_the\\_review\\_of\\_the\\_gender\\_recognition\\_act\\_2015.pdf](https://www.flac.ie/assets/files/pdf/flac_submission_to_the_review_of_the_gender_recognition_act_2015.pdf)

persons” in both the Equal Status Acts and the Employment Equality Acts, “for the avoidance of doubt in Irish law”.<sup>17</sup>

- Explicit prohibition of discrimination against trans persons within the gender ground is an important legal clarification. It ensures that trans people are aware of the protection they are entitled to under the law, therefore facilitating access to justice.
- The specific inclusion of trans people under the gender ground also removes any uncertainty for employers and service providers as to the protection of trans people under Equality Legislation.

#### *Including Protection for Non-Binary, Gender Non-Conforming and Intersex People*

- As previously recommended by FLAC,<sup>18</sup> non-binary and intersex persons should also be explicitly protected under Equality Legislation.
- IHREC have also recommended that Equality Legislation be amended to explicitly prohibit discrimination against trans persons.<sup>19</sup>
- Protection for non-binary and intersex persons can be through the inclusion of ‘actual or perceived sex characteristics, gender identity and gender expression’ within the definition of the gender ground.

#### *A Single Ground*

- The protection of trans, non-binary and intersex persons under Equality Legislation is best achieved through the expansion and clarification of the current gender ground, rather than the creation of a new, separate protected characteristic.

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<sup>17</sup> FLAC (2018), *Submission of FLAC to the Review Group on the Current Operation of the Gender Recognition Act 2015*. Available at: [https://www.flac.ie/assets/files/pdf/flac\\_submission\\_to\\_the\\_review\\_of\\_the\\_gender\\_recognition\\_act\\_2015.pdf](https://www.flac.ie/assets/files/pdf/flac_submission_to_the_review_of_the_gender_recognition_act_2015.pdf)

<sup>18</sup> FLAC (2018), *Submission of FLAC to the Review Group on the Current Operation of the Gender Recognition Act 2015*. Available at: [https://www.flac.ie/assets/files/pdf/flac\\_submission\\_to\\_the\\_review\\_of\\_the\\_gender\\_recognition\\_act\\_2015.pdf](https://www.flac.ie/assets/files/pdf/flac_submission_to_the_review_of_the_gender_recognition_act_2015.pdf)

<sup>19</sup> See p.28, [IHREC-Submission-to-the-Citizens-Assembly-on-Gender-Equality-March-2020\\_fin.pdf](#)

- As detailed in the above 'Current Scope' subsection, the gender ground has already been expansively interpreted by decision-making bodies to include the protection of trans persons.
- The creation of a separate ground relating to trans, non-binary and intersex persons and/or gender expression, gender identity and sex characteristics risks being too narrow in scope and definition to effectively prevent discrimination against all persons it is intended to protect.
- The European Network of Legal Experts in Gender Equality and Non-Discrimination note that a single, broad gender ground is more effective in dealing with intersectional discrimination.<sup>20</sup> This position is supported by FLAC.<sup>21</sup>
- The European Network of Legal Experts in Gender Equality and Non-Discrimination further stress that "causes of many forms of discrimination of both cisgender people, women in particular, and trans and intersex people, may have similar roots (i.e. gender bias, stereotypical thinking on gender roles, etc.)", and is therefore best addressed through a single gender ground.<sup>22</sup>

## Existing Grounds – Age

### **Recommendation:**

- **BeLonG To recommends Section 3(3)(a) of the Equal Status Acts be amended to remove age limits and allow persons under the age of 18 to submit complaints on the basis of their age.**

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<sup>20</sup> European Network of Legal Experts in Gender Equality and Non-Discrimination (2018), *Trans and intersex equality rights in Europe – a comparative analysis*. Available at: [https://ec.europa.eu/info/sites/default/files/trans\\_and\\_intersex\\_equality\\_rights.pdf](https://ec.europa.eu/info/sites/default/files/trans_and_intersex_equality_rights.pdf)

<sup>21</sup> FLAC (2018), *Submission of FLAC to the Review Group on the Current Operation of the Gender Recognition Act 2015*. Available at: [https://www.flac.ie/assets/files/pdf/flac\\_submission\\_to\\_the\\_review\\_of\\_the\\_gender\\_recognition\\_act\\_2015.pdf](https://www.flac.ie/assets/files/pdf/flac_submission_to_the_review_of_the_gender_recognition_act_2015.pdf)

<sup>22</sup> European Network of Legal Experts in Gender Equality and Non-Discrimination (2018), *Trans and intersex equality rights in Europe – a comparative analysis*. Available at: [https://ec.europa.eu/info/sites/default/files/trans\\_and\\_intersex\\_equality\\_rights.pdf](https://ec.europa.eu/info/sites/default/files/trans_and_intersex_equality_rights.pdf)

## Current Scope

- In accordance with Section 3(3)(a) of the Equal Status Acts, persons under the age of 18 are prevented from taking a claim of discrimination on the basis of their age.

## Context of Recommendation

- The Equality and Rights Alliance previously highlighted a need to: “Redefine the age ground, without age limits, to include people under eighteen”.<sup>23</sup>
- This position is supported by FLAC.<sup>24</sup>
- This exemption has further been described as “unduly broad in that it also exempts discrimination as between children of different ages. For instance a health authority could decide that speech therapy will only be afforded to children under 6, introducing an arbitrary cut-off point for access to a vital service. Such a decision cannot be challenged using the ESA because of section 3(3)(a)”.<sup>25</sup>

## Reasoning for Recommendation

- There are a number of existing legislative provisions which could be considered discriminatory on the age ground, but which persons under the age of 18 cannot challenge under the current exemption.
- Two examples which directly impact LGBTI+ young people are detailed below:
- The Mental Health Act, 2001, does not grant young people aged 16 and 17 years of age the right to consent to and refuse treatment for their mental health.
  - In the best interests of young people aged 16 and 17, an amendment to the Mental Health Act, 2001 is required so as to

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<sup>23</sup> The Equality and Rights Alliance (2011), *A Roadmap to A Strengthened Equality and Human Rights Infrastructure in Ireland*. Available at: <http://17october.ie/the-equality-rights-alliance-reports/>

<sup>24</sup> See FLAC’s submission to the Review of Equality Legislation (2021).

<sup>25</sup> Judy Walsh, *Equal Status Acts 2000-2011: Discrimination in the Provision of Goods and Services* (Lonsdale Law Publishing, 2013) page 59.

allow persons over the age of 16 to consent to or refuse mental health care.

- This would bring the Mental Health Act, 2001 line with Section 23 of the Non-Fatal Offences against the Person Act, 1997 which grants similar rights to persons over the age of 16 for treatment relating to physical health.
- The Gender Recognition Act, 2015, does not contain provisions for an administrative process for the legal gender recognition for under 18-year-olds, or for the recognition of non-binary identities.
  - In 2017, a review of the Gender Recognition Act 2015 was carried out by a review group consisting of trans people and representatives from community organisations and relevant state departments.
  - The review group made several recommendations based on their review of the existing legislation, including the introduction of an administrative process for legal gender recognition for 16 and 18 year olds, and recognition of non-binary identities.<sup>26</sup>

## **New Grounds - *Socio-economic Status***

### **Recommendation:**

- **BeLong To recommends the introduction of a socio-economic disadvantage ground, that includes all of the elements contained in the Equality (Miscellaneous Provisions) Bill 2021 Bill.**

### Context of Recommendation

- Jurisprudence and case law in countries where a socio-economic status ground already exists clearly demonstrates the practical use of this ground. The number of cases on this ground is significant, particularly in certain fields such as housing and employment, where they feature among the grounds most often raised in claims.

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<sup>26</sup> <https://assets.gov.ie/36889/825dd1e75f1b43b284a1a245a1710e1c.pdf>

- The research into the perception of discrimination incidents conducted in Hungary shows that socio-economic status features among the most often reported grounds of discrimination. This underlines that there are situations where people in a disadvantaged socio-economic status face clear discrimination and where the 'traditional' discrimination grounds do not provide adequate protection to them.

#### Reasoning for Recommendation

- Discrimination on any ground represents a violation of rights, impeding full and effective participation in society. In particular, this ground limits chances to secure quality education and healthcare, employment matching one's skills, or adequate housing and it often results in a disadvantaged social and economic situation and status. On the other hand, disadvantaged socio-economic status dramatically increases the chances of being discriminated against in all fields of life.
- Persons living in poverty, or in 'poor neighbourhoods', unemployed, or persons relying on social protection experience discrimination based on their socio-economic status, creating a vicious circle that is difficult to escape and perpetuating their disadvantaged status. Some of these instances of discrimination can only be tackled effectively using a socio-economic status ground.

## **4. Intersectionality and Intersectional Discrimination**

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This section examines whether the legislation adequately addresses intersectionality or the intersection of discrimination across a number of grounds.

### **Recommendation:**

- **BeLong To recommends that the Equal Status Acts and Employment Equality Acts are amended to provide for intersectional discrimination, discrimination on a combination of**

## **grounds and recognition of the cumulative impact of multiple discriminations and inequalities.**

### Current Scope

- Currently, individuals can bring complaints under equality legislation on one ground only. Complaints which involve discrimination on multiple or intersecting grounds must be brought, pleaded, and defended separately.<sup>27</sup>

### Context of Recommendation

- The 2019 School Climate Survey found that 77% of young LGBTI+ people had been verbally harassed at school on the basis of personal characteristics including sexual orientation, gender identity, gender expression or ethnic origin.<sup>28</sup>
- Young LGBTI+ people living with disabilities have also highlighted to BeLonG To the multiple and intersecting discrimination they face on account of these personal characteristics.

### Reasoning for Recommendation

- At present, equality legislation does not adequately meet many people's lived experience of discrimination, which often occurs as a response to their identity as a whole and cannot be distinctly and artificially categorised into separate grounds.<sup>29</sup>
- The requirement to submit individual complaints regarding discrimination on multiple grounds places an unnecessary burden on complainants, and creates a barrier to justice and resolution of the complaint.
- Consideration of instances of discrimination on individual grounds also fails to take into account the cumulative or unique nature of the discrimination experienced. This creates a protection gap, as the nature

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<sup>27</sup> As held by the Labour Court in *Freeman V Superquinn* DEC-E 2002/13, and by the Equality Tribunal in *Lawless V Eurozone Investment Options Ltd* E/2007/101.

<sup>28</sup> See p. 30, [Microsoft Word - BeLonG To School Climate Report 2019.docx](#)

<sup>29</sup> Judy Walsh, *Equal Status Acts 2000-2011: Discrimination in the Provision of Goods and Services* (Lonsdale Law Publishing, 2013) at page 142. Judy Walsh has noted that "a legislative amendment could explicitly allow for a flexible approach by specifying that dual or even multiple grounds could be applied with reference to a single hypothetical comparator



of discrimination experienced on a single ground may not reach the threshold required by equality legislation.

## 5. Exemptions

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This section examines whether existing exemptions in the legislation should be modified or removed.

### **Educational establishments**

#### **Recommendation:**

- **BeLonG To recommends that Section 7 of the Equal Status Acts be reviewed to ensure that the exemption applied to schools 'of one gender only' regarding admission and access does not discriminate against trans, non-binary and gender non-conforming young people.**

#### Current Scope

- In accordance with Section 7(3)(a) of the Equal Status Acts, an educational establishment does not discriminate in admission, access, expulsion or participation where admission is for students of "one gender only".
- In accordance with Section 7(4)(a), an educational establishment does not discriminate on grounds of gender in the case of differences in treatment for sporting events.

#### Reasoning for Recommendation

- The right to education of trans, non-binary and gender non-conforming young people must not be undermined by the above mentioned exemptions.
- A review of Section 7 of the Equal Status Acts is required to ensure that trans, non-binary and gender non-conforming young people are protected from expulsion, transfer, refusal of admission or other

discriminatory treatment on the basis of their gender identity or gender expression, where a school caters for “one gender only”.

## **Public Bodies**

### **Recommendation:**

- **BeLong To recommends that the Equal Status Acts be amended so that the definition of “services” includes the functions of public bodies, and the blanket exemptions for the State under section 14 be removed.**

### Current Scope

- Section 14 of the Equal Status Acts excludes from challenge any action that is required by legislation.
- This means that any legislation, or the provisions of any legislation, which discriminates on one of the nine grounds cannot be challenged under the equality legislation.
- A recent High Court judgment appears to exempt any policy that is derived from legislation as well, which makes this an extraordinarily wide exemption.
- Section 14(1) of the Equal Status Acts contains another broad exemption to the Equal Status Acts, which means it does not apply to certain actions by public authorities “in relation to a non-national”.

### Context of Recommendation

- In 2019, the UN Committee on the Elimination of Racial Discrimination (UNCERD) highlighted a range of deficiencies in the “legislative framework for the elimination of racial discrimination”.<sup>30</sup>
- UNCERD’s recommendations noted:
  - “The unclear definition of “services” in section 5 of the Equal Status Acts, which may exclude the provision of services provided by

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<sup>30</sup> UN Committee on the Elimination of Racial Discrimination (2019), *Concluding observations on the combined fifth to ninth reports of Ireland*, Geneva, OHCHR. Available at: [https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/IRL/INT\\_CERD\\_COC\\_IRL\\_40806\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/IRL/INT_CERD_COC_IRL_40806_E.pdf)

public authorities such as the police, the prison service and the immigration service”

- “Preclusion of complaints against legislative provisions in Section 14 of the Equal Status Acts”.
- UN CEDAW has also called on Ireland to “ensure that an effective remedy is available for discrimination that has a legislative basis”.<sup>31</sup>

### Reasoning for Recommendation

- There are a number of existing legislative provisions which could be considered discriminatory on the age ground, but which cannot be challenged under equality legislation.
- Two examples which directly impact LGBTI+ young people are detailed below:
- The Mental Health Act, 2001, does not grant young people aged 16 and 17 years of age the right to consent to and refuse treatment for their mental health.
  - In the best interests of young people aged 16 and 17, an amendment to the Mental Health Act, 2001 is required so as to allow persons over the age of 16 to consent to or refuse mental health care.
  - This would bring the Mental Health Act, 2001 line with Section 23 of the Non-Fatal Offences against the Person Act, 1997 which grants similar rights to persons over the age of 16 for treatment relating to physical health.
- The Gender Recognition Act, 2015, does not contain provisions for an administrative process for the legal gender recognition for under 18-year-olds, or for the recognition of non-binary identities.
  - In 2017, a review of the Gender Recognition Act 2015 was carried out by a review group consisting of trans people and

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<sup>31</sup> UN on the Committee on the Elimination of Discrimination against Women (2017), *Concluding observations on the combined sixth and seventh periodic reports of Ireland*, Geneva: OHCHR. Available at: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fIRL%2fCO%2f6-7&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fIRL%2fCO%2f6-7&Lang=en)

representatives from community organisations and relevant state departments.

- The review group made several recommendations based on their review of the existing legislation, including the introduction of an administrative process for legal gender recognition for 16 and 18 year olds, and recognition of non-binary identities.<sup>32</sup>

## **Equal Pay for People with Disabilities**

### **Recommendation:**

- **BeLonG To recommends that Section 35(1) of the Employment Equality Acts be removed.**

### Current Scope

- In accordance with Section 35(1) of the Employment Equality Acts, it not discriminatory to pay a person with a disability a lesser rate of pay if their output is less than that of a person without a disability.

### Reasoning for Recommendation

- This exemption must be removed, as it is a major limitation on the principle of equal pay and is likely to be in breach of the Framework Employment Directive.

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<sup>32</sup> <https://assets.gov.ie/36889/825dd1e75f1b43b284a1a245a1710e1c.pdf>

## 6. Other Issues

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This section examines any other issues arising from the legislation which have not been addressed in the preceding sections.

### Equality Data

#### **Recommendation:**

- **BeLonG To recommends that the current review should examine introducing measures which put a duty on public bodies to collect equality data, and giving IHREC specific enforcement powers in this regard.**
- **BeLonG To further recommends the establishment of a coordinated, disaggregated data collection system that is publicly accessible.**

#### Context of Recommendation

- A landscape and research gap analysis published by NUI Galway and the Department of Children, Equality, Disability, Integration and Youth identified a need to improve data collection regarding gender identity and sexual orientation.<sup>33</sup>
- In addition, the State does not collect sufficient disaggregated data<sup>34</sup> to allow timely and regular assessment of the efficacy and impact of the legislation or the extent to which the State is meeting its international obligations.<sup>35</sup>

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<sup>33</sup> [4d466c48-34d9-403a-b48e-fdcfb7931320.pdf \(www.gov.ie\)](https://www.gov.ie/publications/uploads/system/uploads/attachment_data/file/44666c48-34d9-403a-b48e-fdcfb7931320.pdf)

<sup>34</sup> The gaps and shortcomings in equality data in Ireland are outlined in CSO's 2020 *Equality Data Audit*. See <https://www.cso.ie/en/methods/methodologicalresearch/rp-eda/equalitydataaudit2020/dataissuesandrecommendations/>. The audit found particular gaps or weakness in ethnicity, disability, sex and gender identity, and sexual orientation data. It also found that much of the data that is already available is only high level information and does not always allow for analysis of minority groups. There was also a reported lack of intersectional data.

<sup>35</sup> While the CSO conducted a survey into Equality and Discrimination in 2019, this is not a regularly conducted exercise. The next most recent similar exercise was in 2014, conducted via data from the Quarterly National Household Survey, and used too small a sample size to be meaningful with regard to minority groups. Similarly, the Survey of Income and Living Conditions (SILC) does not provide data disaggregated across equality grounds, and information on the impact of COVID-19 case numbers and deaths among ethnic minorities is poor.

## Reasoning for Recommendation

- Data disaggregated across all equality grounds would give more visibility to diversity and intersectional issues.
- Regular collection of disaggregated data would assist in the timely development of evidence-based policy making, informed by the experiences of specific populations such as LGBTI+ young people and persons living with disabilities.

## **Dedicated Legal Services**

### **Recommendation:**

- **BeLong To recommends that dedicated legal services for those who are protected by the Equality Acts be introduced.**

### Context of Recommendation

- The European Commission has stated that “real change often requires a critical mass of cases”.<sup>36</sup>
- The Commission’s guidelines for Equality Bodies suggest that promoting the achievement of a critical mass of casework under each protected ground should be amongst such body’s aims.
- In addition, the State does not collect sufficient disaggregated data<sup>37</sup> to allow timely and regular assessment of the efficacy and impact of the legislation or the extent to which the State is meeting its international obligations.<sup>38</sup>

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<sup>36</sup> European Commission DG-JUST (2015) Know Your Rights: Protection from Discrimination. Available at: <https://op.europa.eu/en/publication-detail/-/publication/5a511c88-b218-47b5-9f3e-4709d650e28b>

<sup>37</sup> The gaps and shortcomings in equality data in Ireland are outlined in CSO’s 2020 *Equality Data Audit*. See <https://www.cso.ie/en/methods/methodologicalresearch/rp-eda/equalitydataaudit2020/dataissuesandrecommendations/>. The audit found particular gaps or weakness in ethnicity, disability, sex and gender identity, and sexual orientation data. It also found that much of the data that is already available is only high level information and does not always allow for analysis of minority groups. There was also a reported lack of intersectional data.

<sup>38</sup> While the CSO conducted a survey into Equality and Discrimination in 2019, this is not a regularly conducted exercise. The next most recent similar exercise was in 2014, conducted via data from the Quarterly National Household Survey, and used too small a sample size to be meaningful with regard to minority groups. Similarly, the Survey of Income and Living Conditions (SILC) does not provide data disaggregated across equality grounds, and information on the impact of COVID-19 case numbers and deaths among ethnic minorities is poor.

### Reasoning for Recommendation

- It is noted that FLAC has called for the introduction of dedicated legal services for those who are protected by the Equality Acts.
- While these services cannot be viewed as an alternative to a comprehensive system of civil legal aid, they seek to address unmet legal need to the greatest extent as their resources allow, as well as bringing strategic litigation which has the potential to benefit communities as a whole.

## **Class Actions and Representative Actions**

### **Recommendation:**

- **BeLonG To recommends that Equality legislation be amended to allow for class actions and representative actions.**

### Current Scope

- Only individual persons can act as claimants under the equality legislation so civil society groups, bodies such as BeLonG To or unions cannot bring claims on behalf of their members.<sup>39</sup>

### Context of Recommendation

- The EU's Fundamental Rights Agency has stated that one of the ways by which the existing frameworks to combat discrimination on the grounds of race and ethnic origin could be strengthened is to widen access to complaints mechanisms" by allowing NGOs to take discrimination cases on behalf of those they represent.<sup>40</sup>

### Reasoning for Recommendation

- Representative actions would have a particular importance where the issue would be too large for one individual claimants to have to deal with

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<sup>39</sup> In *Gloria (Ireland's Lesbian and Gay Choir) v Cork International Choral Festival Ltd*, DEC-S2008-078, the Equality Tribunal found that Gloria as an unincorporated association of persons, did not have locus standi.

<sup>40</sup> European Union Fundamental Rights Agency (2012). *The Racial Equality Directive: Application and Challenges*. Available at: <https://fra.europa.eu/en/publication/2012/racial-equality-directive-application-and-challenges>

or where the remedy for an individual complaint would not constitute a sufficient remedy, for example in case of systemic discrimination.