



Transgender Rights in the Education Context

The Irish Human Rights and Equality Commission ('the IHREC') was established in 2014 under the Irish Human Rights and Equality Commission Act 2014. The IHREC was established to protect and promote human rights and equality, and it has a range of legal, policy, research and regulatory functions with a view to furthering this overall objective.

The IHREC was established following the merger of the Equality Authority and the Irish Human Rights Commission, both of which had a significant role in relation to protecting and promoting the rights of transgender persons, including the provision of legal assistance to transgender persons, and the making of legislative observations on the general scheme of the Gender Recognition Bill when it was published in 2013.

Are transgender persons protected under equality legislation?

Yes – transgender persons are protected on both the gender ground and the disability ground by the Employment Equality Acts 1998 – 2015, which prohibit discrimination in employment and occupation and vocational training, and the Equal Status Acts 2000 – 2015, which prohibit discrimination in the disposal of goods and the provision of services.

What is the gender ground?

For the purpose of equality legislation, the gender ground refers to differences in treatment between males and females.

The Court of Justice of the EU, in the context of pensions, has accepted that transgender persons are covered by the gender ground. This traditionally involved a comparison between the treatment of the person in their preferred gender and the opposite gender, but has now evolved to address less favourable treatment that arises from the transgender status of the person. Accordingly, in considering whether a person has been subject to less favourable treatment on the gender ground, a comparison may be drawn between a person of the same gender who is not transgender, i.e. a person assigned as female at birth and a transgender woman. The law is not yet clear in relation to the protection afforded to a person who is intersex, or whose gender is fluid.

The case of *Deirdre O'Byrne v AIB* [Equality Tribunal, 2013], for example, concerned a bank which insisted that a transgender woman close her current account and open a new account in her new name, on the basis that her "legal identity" has changed. The Equality Officer decided that the appropriate comparator was a woman who was not transgender, and looked at the treatment by the bank of women who changed their names after marriage or on entering a civil partnership, finding that such women were not obliged to close their bank



accounts. The Equality Officer concluded that the complainant had been discriminated against by the bank on the gender ground.

What is the disability ground?

For the purpose of equality legislation, the disability ground refers to differences of treatment where one person has a disability, and the other person either does not have a disability, or has a different disability. The term 'disability' in this context includes a range of physical and psychological conditions.

Whilst equating being transgender with having a disability is not appropriate or relevant in most circumstances, nonetheless the protection afforded by the disability ground can be useful in a legal context, as it imposes a positive obligation on an employer or service provider to afford reasonable accommodation to the person concerned (see below). Gender dysphoria or gender identity disorder is a recognised medical condition, and medical intervention may also be implicated for a person who is transitioning to their preferred gender.

For example in the case of *Louise Hannon v First Direct Logistics Ltd* [Equality Tribunal, 2011] it was found that the less favourable treatment of an employee by an employer, after the employee informed the employer of her transgender status and her intention to live in her preferred gender, constituted discrimination on both the gender and disability ground.

What does 'reasonable accommodation' mean?

Discrimination on the grounds of disability includes a failure or refusal by a service provider to do all that is reasonable to accommodate the needs of a persons with a disability, by providing special treatment or facilities, unless such provision would give rise to more than a nominal cost to the service provider in question.

What is the relevance of Equal Status Acts 2000-2015 to transgender young people?

The Equal Status Acts prohibit discrimination in the provision of a wide range of services, including those provided by educational establishments. While treating people who have not yet reached 18 years of age cannot amount to discrimination on the age ground, a young person (and in particular a transgender young person) may be protected by other discriminatory grounds, such as gender or disability.

Which educational establishments are covered under the Equal Status Acts?

- Public and private educational establishments;
- Pre-schools (pre-school, play group, day nursery, crèche, or other similar day care service);



- Primary schools;
- Post primary schools, and
- Third level institutions (for example, institutions providing adult, continuing or further education, or universities).

(Discrimination by an educational or training body, who offers a course of vocational training, is prohibited separately by section 12 of the Employment Equality Acts 1998-2015.)

What is prohibited?

Educational establishments may not discriminate on any of the protected grounds under the legislation (including gender and disability) in relation to:

- The **admission**, or terms of admission of a person as a student to the establishment;
- Any other **term or condition** of participation in the establishment by a student; or
- The **expulsion** of a student from the establishment or any **other sanction** against the student.

In addition, a person (including a legal person, such as a school board of management) responsible for the operation of an educational establishment shall not permit a person who has a right to be present in the establishment (such as a student) to suffer sexual harassment or any other harassment at that place.

Harassment is defined as any form of unwanted conduct related to any of the discriminatory grounds, and which has the effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person.

Who is protected?

The Equal Status Acts protect students or prospective students from discrimination by educational establishments. A parent/guardian can bring a complaint on behalf of their child, where the child is a minor, or where the child is an adult with an intellectual disability such that they lack capacity to bring proceedings.

Are there any exemptions?

In relation to **admission policies**, the Equal Status Acts allow for the existence of a single gender primary and secondary schools. (**NB** – there is no express exemption in relation to expulsion – this could assist children who transition whilst in a single sex school).



The Equal Status Acts also provide that where an institution is established for the purpose of providing training to ministers of religion and admits student of only one gender it may validly refuse to admit a person who is not of that gender.

This has two implications in the education context:

1. **Admissions:** A school may be obliged to admit a student in their preferred gender, and refusal of that person on the basis of their assigned gender may be discrimination.
2. **Expulsion:** As above, the expulsion of a transgender student because they have transitioned to their preferred gender may be discriminatory as this is not expressly exempted under the Equal Status Acts.

Educational establishments are however permitted to provide for differences of treatment to the extent that compliance with the Equal Status Acts in relation to a student with a disability would, by virtue of that disability, make impossible, or have a seriously detrimental effect on, the provision by an educational establishment of its services to other students.

Educational establishments are allowed to provide for differences of treatment in relation to the provision of sporting events on certain grounds, including those of gender and disability, to the extent that the differences in treatment are reasonably necessary having regard to the nature of the facilities or the events.

The Gender Recognition Act 2015

The Gender Recognition Act 2015 was introduced in the wake of the of the decision of the European Court of Human Rights in *Goodwin v United Kingdom*, and the decision of the High Court in *Foy v An tArd-Chláraitheoir*, where it was found that Irish law was incompatible with the European Convention on Human Rights – namely Article 8 which provides for respect for private and family life.

Who is covered by the Gender Recognition Act 2015?

A person who:

- Has their birth recorded in either the register of births or the adopted children register maintained by An tArd-Chláraitheoir (the Registrar General) or,
- Is registered on the foreign birth register maintained by the Minister for Foreign Affairs and Trade or,
- Is ordinarily resident in Ireland and,



- Is at least 18 years of age on the date of application (see below for more information on legal recognition of 16 and 17 year old applicants).

The application

Those who are covered may apply for a gender recognition certificate from the Minister for Social Protection and complete a statutory declaration declaring that he or she:

- Has a settled and solemn intention of living in the preferred gender for the rest of his/her life;
- Understands the consequences of the application; and
- Makes the application of his or her free will.

However, **16 and 17 year olds** must get an order from the Circuit Court before applying and this requires:

- Consent of a parent/guardian
- Medical certificate affirming the child has sufficient maturity and understands the consequences of the decision; the decision is freely and independently made; and has transitioned/is transitioning into their preferred gender; and
- A second independent medical report from an endocrinologist/psychiatrist concurring with the first medical certificate.

Legal consequences of gender recognition certificate:

Where a gender recognition certificate is issued to a person, the person's gender from the date of issue becomes for all purposes the preferred gender.

Implications of the Gender Recognition Act 2015 for schools:

- It is unlikely to have a major impact for primary schools due to the age restrictions.
- It may impact to a limited extent on secondary schools and children in the senior cycle – this will also depend on whether the school is single sex or co-educational.
- There may be practical issues where the school is acting on behalf of a student in relation to educational matters – e.g. registration for the leaving certificate or other interactions with the Department of Education if the students recorded gender changes.
- However, the main legal obligations for schools remain live under the Equal Status Acts in relation to all students, as described above.



Public Sector Duty

Most schools are also subject to the new public sector duty under section 42 IHREC Act 2014. The duty applies to ‘public bodies’, a term which is defined broadly at section 2 IHREC Act 2014 and includes most schools apart from wholly private schools that are not funded wholly or partly by the State. Therefore, most schools must now have regard to the need to:

- eliminate discrimination;
- promote equality of opportunity; and
- protect human rights.

This duty applies to the persons to whom a public body provides services, which in the context of the provision of service by an educational establishment will include students and prospective students.

Section 42 of the IHREC Act 2014 also requires a public body to set out in its strategic plan an assessment of the human rights and equality issues it believes to be relevant to the functions and purpose of the body, together with the policies, plans and action in place (or proposed to be put in place) to address those issues. Therefore, when budget-setting or creating admissions, exclusions, curricular, or other core education policies a school should have due regard to these three aims.

These equality and human rights considerations should be demonstrably part of policy formation from an early stage, as opposed to being a rearguard box-ticking exercise. Whilst section 42 of the IHREC Act 2014 does not require a public body to produce a particular outcome, but merely to ‘have regard’ when exercising its functions, this may be a useful additional way of encouraging schools to improve the quality of services provided to all children, and to plan for transgender equality early on before issues arise.

If there is a failure to comply with the duty, IHREC may conduct a review under section 42(5) amongst other powers to assist the public body to comply with its obligations.

These duties coexist alongside the Equal Status Acts and Employment Equality Acts, which allow for individual discrimination complaints to be brought to the Workplace Relations Commission and through the courts if necessary.

Please note this factsheet is for information purposes only. It does not constitute legal advice and should not be relied upon as such. It is a statement of the law as of 29 July 2016.

For more information, please see our website www.ihrec.ie
