

# Observations on the Equality (Miscellaneous Provisions) Bill 2017

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**Coimisiún na hÉireann um Chearta  
an Duine agus Comhionannas**  
Irish Human Rights and Equality Commission



## Introduction

The Irish Human Rights and Equality Commission ('IHREC' or the 'Commission') was established by the *Irish Human Rights and Equality Commission Act 2014* (the '2014 Act').<sup>1</sup> The Commission has a statutory remit to protect and promote human rights and equality in the State, to promote a culture of respect for human rights, equality and intercultural understanding, to promote understanding and awareness of the importance of human rights and equality, to encourage good practice in intercultural relations and to work towards the elimination of human rights abuses and discrimination.<sup>2</sup> The Commission's functions include the examination of any legislative proposal and reporting its views on any implications for human rights and equality.<sup>3</sup>

The Commission welcomes the publication of the *Equality (Miscellaneous Provisions) Bill 2017* (the 'Bill') and the emerging consensus on the principle of prohibiting discrimination on the basis of 'disadvantaged socio-economic status'.<sup>4</sup>

The Commission makes preliminary observations on the proposals set out under the Bill, addressing the following matters:

1. [Context of the legislative proposal](#)
2. [Legal bases for the new ground of discrimination](#)
3. [Proposal to define 'socio-economic status'](#)
4. [Conclusion](#)

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<sup>1</sup> The *Irish Human Rights and Equality Commission Act 2014* merged the former Irish Human Rights Commission and the former Equality Authority into a single enhanced body.

<sup>2</sup> Section 10(1)(a)–(e) of the 2014 Act.

<sup>3</sup> Section 10(2)(c) of the 2014 Act.

<sup>4</sup> Dáil Éireann heard cross-party support, in principle, for the proposal to prohibit discrimination on the basis of disadvantaged socio-economic status, see 'Equality (Miscellaneous Provisions) Bill 2017: Second Stage [Private Members]' *Parliamentary Debates: Dáil Éireann*, 8 November 2017, Vol. 961 No. 2 (available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2017110800042>)

## 1. Context of the legislative proposal

The Commission supports the proposal to prohibit in law discrimination based on a person's socio-economic status.<sup>5</sup> The incorporation of this additional protected ground under equality law can contribute to securing better equality outcomes and greater social cohesion.

### **The Commission reaffirms its position that Irish equality law should be amended to prohibit discrimination based on socio-economic status.**

The Commission has emphasised that employment discrimination against people living in areas facing socio-economic challenges, should be prohibited in law under the Employment Equality Acts (EEA). This approach would allow people seeking employment to ensure that their applications are assessed on their skills, qualifications and ability rather than on social background or postal address. The Commission is of the view that:

‘Adding a new prohibition in law to provide equal opportunities for people irrespective of their socio-economic status in seeking and securing employment, can be a catalyst in breaking cycles of deprivation’.<sup>6</sup>

The Commission noted that while Ireland's current equality legislation does not contain a socio-economic status ground, a number of European countries, such as Belgium have already moved to prohibit discrimination on the ground of social and economic backgrounds, while France has introduced a provision focused around postal addresses in their discrimination grounds.<sup>7</sup>

The *Equality (Miscellaneous Provisions) Act 2015* introduced ‘housing assistance’ as a ground of protection against discrimination in accommodation and represents a step towards the recognition of socio-economic inequalities in equality law. It prohibits the less favourable treatment of people who receive rent supplement, housing assistance payments or other social welfare payments in the provision of accommodation or related services. Thirty per cent of the equal status queries received by the Commission in 2016 related to the housing assistance ground which illustrates the necessity of the reform introduced by the *Equality (Miscellaneous Provisions) Act 2015*.<sup>8</sup>

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<sup>5</sup> See previous statements set out, for example, in: pp 22-23 IHREC (2015) *Ireland and the International Covenant on Economic, Social and Cultural Rights* (available at [https://www.ihrec.ie/app/uploads/download/pdf/icescr\\_report.pdf](https://www.ihrec.ie/app/uploads/download/pdf/icescr_report.pdf)), hereafter IHREC (2015) *ICESCR Submission*; pp 33-34 IHREC (2017) *Ireland and the Convention on the Elimination of All Forms of Discrimination Against Women* (available at <https://www.ihrec.ie/app/uploads/2017/02/Ireland-and-the-Convention-on-the-Elimination-of-All-Forms-of-Discrimination-Against-Women.pdf>).

<sup>6</sup> IHREC (2017) *Challenging Employment Discrimination Directly Can Boost Disadvantaged Areas Such as Dublin Inner City* [press release] (available at <https://www.ihrec.ie/challenging-employment-discrimination-directly-can-boost-disadvantaged-areas-dublin-inner-city/>).

<sup>7</sup> See Tamas Kadar (2016) *An Analysis of the introduction of socio-economic status as a discrimination ground*, Equality & Rights Alliance (available at <http://www.eracampaign.org/uploads/Analysis%20of%20socio-economic%20status%20as%20discrimination%20final.pdf>).

<sup>8</sup> See p 31 IHREC (2017) *Annual Report 2016* (available at <https://www.ihrec.ie/app/uploads/2017/06/IHREC-Annual-Report-2016.pdf>).

Discrimination on the socio-economic ground, in combination with discrimination on other grounds, can result in additional harm and social exclusion. The UN Committee on Economic, Social and Cultural Rights has found that ‘cumulative discrimination has a unique and specific impact and merits particular consideration and remedying’.<sup>9</sup>

Research carried out in 2004 by UCC on behalf of the then Department of Justice, Equality and Law Reform, found that many groups currently protected under equality law are identified as experiencing ‘a higher risk of poverty and social exclusion’ which adds ‘impetus to proposals to prohibit discrimination on the basis of socio-economic status/social origin’.<sup>10</sup>

Also, recent ESRI research carried out for the Irish Human Rights and Equality Commission shows that, in the complex relationship between discrimination and resources, socio-economic status affects both exposure and responses to discrimination.<sup>11</sup>

## 2. Legal bases for a new ground of discrimination

### Constitutional law

Article 40.1 of the Irish Constitution guarantees that:

‘All citizens shall, as human persons, be held equal before the law.

This shall not be held to mean that the state shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.’

The Commission has recommended that a referendum be held to amend Article 40.1 of the Constitution to guarantee equality to all and to proscribe discrimination (direct or indirect) in any area of law on non-exhaustive grounds.<sup>12</sup>

There is Irish jurisprudence to support the proposition that the socio-economic background of a person cannot be the basis for differential treatment.

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<sup>9</sup> See para 17 UN Committee on Economic, Social and Cultural Rights (2009) *General Comment No 20 - Non-discrimination in economic, social and cultural rights* E/C.12/GC/20 (available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolNo=E%2FC.12%2FGC%2F20&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=E%2FC.12%2FGC%2F20&Lang=en)), hereafter Committee on Economic, Social and Cultural Rights (2009) *General Comment No 20*.

<sup>10</sup> See p xxi Kilcommins *et al* (2004) *Extending the Scope of Employment Equality Legislation: Comparative Perspectives on the Prohibited grounds of Discrimination* Report Commissioned by the Department of Justice, Equality and Law Reform (available at <http://www.inis.gov.ie/en/JELR/Discrimination.pdf/Files/Discrimination.pdf>), hereafter ‘Kilcommins *et al* (2004) *Extending the Scope of Employment Equality Legislation*’.

<sup>11</sup> The ESRI referred to the capacity to access resources such as economic status, educational qualifications and housing tenure. See p 14 ESRI (2017) *Who experiences discrimination?* (available at <https://www.ihrec.ie/app/uploads/2017/11/Who-experiences-discrimination-in-Ireland-Report.pdf>).

<sup>12</sup> See p 3 IHREC (2015) *Submission to the to the Second Universal Periodic Review Cycle for Ireland September 2015* (available at [https://www.ihrec.ie/app/uploads/download/pdf/irish\\_human\\_rights\\_and\\_equality\\_commission\\_upr\\_submission\\_ireland\\_2016.pdf](https://www.ihrec.ie/app/uploads/download/pdf/irish_human_rights_and_equality_commission_upr_submission_ireland_2016.pdf)).

In a custody dispute between a natural father and proposed adoptive parents, Article 40.1 prevented the Court from distinguishing between the parties on the basis of socio-economic differences, as:

‘to do otherwise would be to favour the affluent as against the less well-off which does not accord with the constitutional obligation to hold all citizens as human persons equal before the law’.<sup>13</sup>

In the case of *Redmond v Minister for the Environment*, Judge Herbert held that ‘discriminating between human persons on the basis of money is an attack upon the dignity of those persons as human beings who do not have money’.<sup>14</sup> In academic commentary, the Court was seen to have understood equality under Article 40.1 of the Constitution in this case, to mean ‘the absence of relative levels of disadvantage’<sup>15</sup>

The Judge in *Redmond v Minister for the Environment* explicitly linked poverty and social deprivation to ‘the essential dignity of persons as human beings’.<sup>16</sup> According to academic commentary, the Judge was concerned with the ‘systemic harm of poverty’ as ‘something which is fundamentally problematic’ according to Fredman’s multidimensional conception of equality.<sup>17</sup>

In a case concerning equality of access to the courts, Judge O’Malley in the High Court confirmed the right of an individual litigant to be treated ‘without arbitrary, capricious or invidious discrimination’ in a case where that difference of treatment ‘could be based only on her supposed lack of means’.<sup>18</sup> The Judge went on to characterise the only basis of opposition to the applicant’s claim as resting on the proposition that the applicant was poor.<sup>19</sup>

In 2017, the Supreme Court considered whether the unenumerated right to work under the Constitution is:

‘something that goes to the essence of human personality so that to deny it to persons would be to fail to recognise their essential equality as human persons mandated by Article 40.1.’<sup>20</sup>

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<sup>13</sup> Barron J in *K v W (No. 2)* [1990] ILRM 791, cited by Irish Human Rights Commission (2005) *Extending the Scope of Employment Equality Legislation* (available at <https://www.ihrec.ie/documents/submission-on-extending-the-scope-of-employment-equality-legislation/>).

<sup>14</sup> See para 61 *Redmond v Minister for the Environment* [2001] 4 IR 61.

<sup>15</sup> See p 45 Ben Mitchell (2015) ‘Process Equality, Substantive Equality and Recognising Disadvantage in Constitutional Equality Law’ *The Irish Jurist* 53(1), 36-57.

<sup>16</sup> See para 61 *Redmond v Minister for the Environment* [2001] 4 IR 61.

<sup>17</sup> Sandra Fredman’s four dimensional conception of substantive equality covers the redistribution dimension (breaking the cycle of economic disadvantage), the recognition dimension (of dignity and worth), the transformative dimension (facilitating diversity) and the participative dimension (the capacity to participate fully in society). See pp 43-45 Ben Mitchell (2015) ‘Process Equality, Substantive Equality and Recognising Disadvantage in Constitutional Equality Law’ *The Irish Jurist* 53(1), 36-57.

<sup>18</sup> Para 65 *Health Service Executive v OA* [2013] IEHC 172.

<sup>19</sup> Para 65 *Health Service Executive v OA* [2013] IEHC 172.

<sup>20</sup> See para 13 *N.H.V. v Minister for Justice and Equality and ors* [2017] IESC 35 (available at <http://www.supremecourt.ie/Judgments.nsf/1b0757edc371032e802572ea0061450e/bba87f6e90ea3c5d80258130004199fe?OpenDocument>). This case concerned the right of a person seeking asylum to look for work

Judge O'Donnell recognised that work is connected to the dignity and freedom of the individual. Being able to work allows an individual to live in dignity.<sup>21</sup> This socio-economic right to seek work is thus part of the human personality and concerns the Constitutional guarantee that individuals, as human persons, are held equal before the law.<sup>22</sup>

### International instruments

The Commission has noted the tendency for anti-discrimination law in international jurisdictions (in particular in Canada) to correlate strongly with international human rights obligations, highlighted in comparative analysis carried out by UCC in 2004.<sup>23</sup> The Commission has emphasised the value of a 'non-exhaustive list of grounds of discrimination' reflecting the rights protected in the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, described below.<sup>24</sup>

The **International Covenant on Economic, Social and Cultural Rights (ICESCR)** lists 'social origin, property, birth or other status' amongst the grounds in the non-discrimination protection provided for under Article 2.

According to the UN Committee on Economic, Social and Cultural Rights, 'social origin' refers to a person's inherited social status. The 'property' ground of discrimination is a broad concept covering real and personal property or the lack of either. Rights protected under the Covenant (such as access to water services) should not be conditional on a person's land tenure status.<sup>25</sup> The term 'other status' according to the UN Committee on Economic, Social and Cultural Rights may include 'place of residence' or 'economic and social situation'.

'Individuals and groups of individuals must not be arbitrarily treated on account of belonging to a certain economic or social group or strata within society. A person's social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatization and negative stereotyping which can lead to the refusal of, or unequal access to, the same quality of education and health care as others, as well as the denial of or unequal access to public places.'<sup>26</sup>

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and the Commission's *amicus curiae* submissions in that case are available at:

<https://www.ihrec.ie/documents/nhv-v-minister-justice-equality-july-2016/>.

<sup>21</sup> At para 16 of the judgment, O'Donnell J drew upon the work of the Committee on Economic, Social and Cultural Rights (2005) *General Comment No. 18 - the Right to Work* E/C.12/GC/186 February 2006 (available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f18&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f18&Lang=en)).

<sup>22</sup> See para 17 *N.H.V. v Minister for Justice and Equality and ors* [2017] IESC 35. This analysis served to prove that non-citizens, as human persons, enjoyed protection under Article 40.1 of the Constitution with regard to the right to seek work.

<sup>23</sup> See p 2 IHRC (2005) *Extending the Scope of Employment Equality Legislation* (available at <https://www.ihrec.ie/documents/submission-on-extending-the-scope-of-employment-equality-legislation/>) commenting upon findings in Kilcommins *et al* (2004) *Extending the Scope of Employment Equality Legislation*.

<sup>24</sup> See p 3 IHRC (2005) *Extending the Scope of Employment Equality Legislation*.

<sup>25</sup> See Committee on Economic, Social and Cultural Rights (2009) *General Comment No 20*.

<sup>26</sup> See para 35 Committee on Economic, Social and Cultural Rights (2009) *General Comment No 20*.

Ireland ratified the ICESCR in 1989 and in 2015 was examined by the UN Committee on Economic, Social and Cultural Rights with regard to its compliance with the provisions of the Covenant. In its report to the UN Committee, the State noted that it did not intend to extend the grounds of protection against discrimination as it considered Irish equality law to fully protect ICESCR rights.<sup>27</sup>

The UN Committee raised the concern that Ireland's equality laws do not provide comprehensive protection against discrimination on all of the grounds set out in the Covenant and recommended that the State align its laws accordingly.<sup>28</sup>

The **International Covenant on Civil and Political Rights** (ICCPR) prohibits discrimination in the enjoyment of Covenant rights based on, amongst other grounds, 'national or social origin, property, birth or other status' under Article 2. Equality before the law is protected under Article 26, with reference to the same grounds.

In 1999, Ireland ratified **ILO Convention Number 111** which prohibits discrimination based on national extraction or social origin.

### Regional instruments

Article 14 of the **European Convention on Human Rights** (ECHR) prohibits discrimination in the enjoyment of ECHR rights on the basis of 'national or social origin, association with a national minority, property, birth or other status' amongst other grounds. The phrase 'other status' has been given a wide interpretation, to include, in certain circumstances, a distinction based on place of residence. There is no formal requirement to establish a personal characteristic to come under the 'other status' ground of discrimination.<sup>29</sup>

A recent dissenting opinion of the Grand Chamber of the European Court of Human Rights described discrimination which is based on a person's social and economic status as 'something which is repugnant in the eyes of the Convention'.<sup>30</sup> In the same case, separate dissenting opinions considered that the express inclusion of poverty among the discrimination criteria prohibited under Article 14 ECHR would be an essential development in European case-law, pointing to the emerging consensus in international human rights instruments. They considered the *Garib* case to be a 'missed opportunity' to do so.<sup>31</sup>

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<sup>27</sup> 'Ireland has comprehensive and robust equality legislation in place, prohibiting discrimination on nine specified grounds. It is not intended to extend these grounds, which already fully protect the rights recognised in ICESCR', para 13 Government of Ireland (2015) *CESCR: Reply of Ireland to the List of Issues in relation to its third periodic report* E/C.12/IRL/Q/3/Add.1 (available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolNo=E%2fC.12%2fIRL%2fQ%2f3%2fAdd.1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=E%2fC.12%2fIRL%2fQ%2f3%2fAdd.1&Lang=en)).

<sup>28</sup> Para 12 UN Committee on Economic, Social and Cultural Rights (2015) *Concluding observations on the third periodic report of Ireland* E/C.12/IRL/CO/3 (available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/150/67/PDF/G1515067.pdf?OpenElement>).

<sup>29</sup> See *Carson and others v United Kingdom* (Application No. 42184/05). See p 571 Jacobs, White and Ovey (2014) *The European Convention on Human Rights* (6<sup>th</sup> ed.)

<sup>30</sup> See para 11 of the dissenting opinion of Judge Kūris in the case of *Garib v. the Netherlands* (Application number 43494/09).

<sup>31</sup> Paras 24-40, Dissenting Opinion of Judge Pinto De Albuquerque joined by Judge Vehabović *Garib v. the Netherlands* (Application number 43494/09).



Protocol 12 to the ECHR extends protection against discrimination to all rights set out in law, and not just those rights protected by the ECHR (as is the case with Article 14 ECHR).<sup>32</sup> Ireland signed Protocol 12 in 2000, but the Protocol has not been ratified by the State. This appears to be due to the breadth of protection afforded by the Protocol.<sup>33</sup> This additional protection has potential to strengthen Irish equality law, as a free standing right to protection from discrimination.<sup>34</sup>

The **Revised European Social Charter (RESC)** lists ‘social origin’ as a ground of discrimination under Article E. Article 30 of the RESC also provides for a right to protection against poverty and social exclusion. By introducing Article 30 RESC, Council of Europe member states ‘considered that living in a situation of poverty and social exclusion violates the dignity of human beings’ and Article 30 represents the first binding human rights provision offering this protection.<sup>35</sup>

The European Committee of Social Rights links Article 30 with the enjoyment of other Charter rights,<sup>36</sup> as the fight against social exclusion is one area where the notion of indivisibility of fundamental rights takes a special importance’.<sup>37</sup> It has affirmed that the non-discrimination protection under Article E ‘obviously includes non-discrimination on grounds of poverty’.<sup>38</sup> Ireland ratified the European Social Charter in 2000 and expressly accepted Article 30.

Article 21 is the non-discrimination provision of the **Charter of Fundamental Rights of the European Union** and names social origin and property as protected grounds in a non-exhaustive list. The Charter’s application is limited to reviewing acts of EU institutions and bodies when exercising powers conferred under the treaties, i.e. ‘falling within the scope of EU law’. Article 21 is connected to the large body of EU law on equality and non-discrimination.

### 3. Proposal to define socio-economic status

The *Equality (Miscellaneous Provisions) Bill 2017* (the ‘Bill’) proposes to amend Irish equality law to prohibit discrimination on the basis of a person’s ‘disadvantaged socio-economic status’.

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<sup>32</sup> Article 1.1 of Protocol 12 to the ECHR provides that the ‘enjoyment of any right set forth by law shall be secured without the discrimination on any ground such as [...] national or social origin, association with a national minority, property, birth or other status’.

<sup>33</sup> In 2012, the then Minister for Justice, Equality and Defence stated that: ‘The major issue is the lack of clarity as to the precise extent of the obligations imposed on State parties by the very broad general prohibition on discrimination in Article 1 of the Protocol. My Department will continue to watch closely how the European Court of Human Rights interprets the scope of the article when it comes to rule on individual cases. In the meantime, I have no plans to ratify the Protocol at this time.’ Mr Alan Shatter, ‘Written Answers: International Agreements’ *Parliamentary Debates: Dáil Éireann*, 25 January 2012.

<sup>34</sup> See p 3 IHRC (2005) *Extending the Scope of Employment Equality Legislation*.

<sup>35</sup> See p 2 Council of Europe (2016) *The Right to be Protected against Poverty and Social Exclusion under the European Social Charter* (available at <https://rm.coe.int/16806f597e>).

<sup>36</sup> European Committee of Social Rights (2014) *Statement of interpretation on Article 30* (available at [http://hudoc.esc.coe.int/eng?i=2013\\_163\\_06/Ob/EN](http://hudoc.esc.coe.int/eng?i=2013_163_06/Ob/EN)).

<sup>37</sup> See para 99 *ERRC v France* (Complaint No. 51/2008) Decision on the merits of 19 October 2009 (available at <http://hudoc.esc.coe.int/eng?i=cc-51-2008-dmerits-en>).

<sup>38</sup> European Committee of Social Rights (2014) *Statement of interpretation on Article 30*.

This reform would introduce a tenth ground of protection against discrimination, in addition to the nine grounds of protection currently afforded under the *Employment Equality Acts 1998-2015*<sup>39</sup> and under the *Equal Status Acts 2000-2015*<sup>40</sup>.

The sponsors of the Bill explain that the change in law would mean that:

‘employers could not discriminate against a job applicant because he or she came from a disadvantaged local authority estate or an area that is associated with higher levels of criminality or anti-social behaviour. Further, it would not be permissible for service providers to discriminate against people because of where they live.’<sup>41</sup>

The Bill proposes to insert a new definition of: ‘Disadvantaged socio-economic status’, in the respective pieces of equality legislation and proposes to define ‘Disadvantaged socio-economic status’ as follows:

“‘Disadvantaged socio-economic status’ means a socially identifiable status of social or economic disadvantage resulting from poverty, level or source of income, homelessness, place of residence, or family background;”<sup>42</sup>

In this way, the Bill names an exhaustive list of indicators or causes of social or economic disadvantage.

The Commission has established that the definition of socio-economic status is best developed by listing key practical and identifiable features of difference across social classes, suggesting the following indicators:<sup>43</sup>

- Family background such as inter-generational history of occupation
- Geographical location such as living in areas of relatively high concentrations of socio-economic disadvantage
- House tenure or home ownership
- Educational background
- Economic situation

These indicators are comparable to the suggested indicators set out in the Bill, though ‘educational background’ has not been included in the Bill, as initiated.<sup>44</sup>

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<sup>39</sup> The *Employment Equality Acts 1998-2015* prohibit discrimination in respect of employment, access to employment and in vocational training on the basis of: Gender, Civil status, Family status, Sexual orientation, Religion, Age, Disability, Race or Membership of the Traveller Community.

<sup>40</sup> The *Equal Status Acts 2000-2015* prohibits discrimination in the provision of goods and services, of accommodation and discrimination by educational establishments on the basis of: Gender, Civil status, Family status, Sexual orientation, Religion, Age, Disability, Race or Membership of the Traveller Community. Specifically in the provision of accommodation or related services, people cannot be discriminated against because they receive rent supplement, housing assistance payments or other social welfare payments.

<sup>41</sup> Explanatory Memorandum accompanying the *Equality (Miscellaneous Provisions) Bill 2017*.

<sup>42</sup> Section 2 of the *Equality (Miscellaneous Provisions) Bill 2017*.

<sup>43</sup> See p 5 Equality Authority (2002) *Review of the discriminatory grounds covered by Employment Equality Act 1998*.

<sup>44</sup> In 2002, the Equality Authority reported on ESRI findings that ‘where employers rely on indicators of educational achievement they are capable of quite fine discriminations’ Equality Authority (2002) *Review of the discriminatory grounds covered by Employment Equality Act 1998*.

The Bill was debated in Dáil Éireann on 8 November 2017 and the proposal received broad support.<sup>45</sup> The Bill's sponsors recognised the difficulties which arise in enforcing equality legislation but argued for the continual evolution of the equality protections. They also argued that the greatest benefit of the reform would be to convey the message that the State does not accept discrimination, on any grounds. The Bill's sponsors consider the proposed reform to be a tool in tackling inequality and breaking down barriers faced by those living in disadvantaged areas.<sup>46</sup>

### Clarity and precision in equality law

The Government's principal objection to the Bill appears to focus on the lack of precision and clarity provided in the definition of 'disadvantaged socio-economic status'. The Dáil debate heard that the Bill is 'characterised by ambiguities and subjectivity', in contrast to the 'clear characteristics' set out in current equality legislation.<sup>47</sup>

The nine grounds currently protected under equality law are of varying degrees of clarity and objectivity. While grounds such as age and civil status may be amenable to objective categorisation, the grounds of race, disability and membership of the Traveller community may be seen to contain both objective and subjective components. Definitional challenges have not precluded the advancement of equality law in these areas.<sup>48</sup>

The Commission is of the view that any potential ambiguities in the law can, in the same way that the understanding of the other grounds has evolved, be advanced through interpretation by the Workplace Relations Commission and the courts.<sup>49</sup> Challenges posed by introducing a new ground which is more open to interpretation are counterbalanced by the potential benefits to be gained from making Irish equality law more effective in tackling a real source of discrimination.<sup>50</sup>

The Commission has found the experience in Canadian state law to be instructive. The state of Ontario is currently debating the addition of 'social condition' to the grounds of protection against discrimination<sup>51</sup> while the states of Alberta, Manitoba, New Brunswick, Québec<sup>52</sup>, Newfoundland and Labrador and the Northwest Territories already protect

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<sup>45</sup> 'Equality (Miscellaneous Provisions) Bill 2017: Second Stage [Private Members]' *Parliamentary Debates: Dáil Éireann*, 8 November 2017, Vol. 961 No. 2 (available at

<http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2017110800040>)

<sup>46</sup> Jim O'Callaghan TD and Fiona O'Loughlin TD sponsored the Private Members' Bill.

<sup>47</sup> See Minister of State for Equality, Immigration and Integration Denis Stanton, speaking at the Second Stage debate 'Equality (Miscellaneous Provisions) Bill 2017: Second Stage [Private Members]' *Parliamentary Debates: Dáil Éireann*, 8 November 2017, Vol. 961 No. 2 (available at

<http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2017110800042>)

<sup>48</sup> See p xiii Kilcommins *et al* (2004) *Extending the Scope of Employment Equality Legislation*.

<sup>49</sup> 'The IHRC is of the view that the Irish courts will be in a position to apply this flexible concept in the appropriate manner'. See p 6 IHRC (2005) *Extending the Scope of Employment Equality Legislation*.

<sup>50</sup> See p 77 Kilcommins *et al* (2004) *Extending the Scope of Employment Equality Legislation* for an analysis of comparable discussions in the context of Canadian reforms.

<sup>51</sup> Under the proposed *Bill 164, Human Rights Code Amendment Act, 2017*, 'social condition' is defined as social or economic disadvantage arising from (a) employment status; (b) source or level of income (c) housing status, including homelessness; (d) level of education, or (e) any other circumstance similar to those mentioned (available at [http://ontla.on.ca/web/bills/bills\\_detail.do?locale=en&Intranet=&BillID=5136](http://ontla.on.ca/web/bills/bills_detail.do?locale=en&Intranet=&BillID=5136)).

<sup>52</sup> The state of Québec recognised 'social condition' as a discrimination ground in 1975.

against discrimination based on: social condition, social disadvantage or source of income.<sup>53</sup> The meaning of ‘social condition’ in Québec has been elaborated in jurisprudence. In 1993, the term was recognised as containing both objective aspects (status is often determined by occupation, income, education level, or family background) and subjective components (associated with perceptions drawn from objective points of reference).<sup>54</sup> The Ontario Human Rights Commission comments on the difficulties associated with defining and operationalising the concept of discrimination based on social condition:

‘It is a term that lacks a well-accepted meaning and does not lend itself to a precise definition. Rather, it must be interpreted in a broad, liberal and flexible manner and must take into account a variety of factors including social origins, level of education, occupation and income. The factors may not be exhaustive and may need to be adjusted to meet the circumstances of the particular case.’<sup>55</sup>

Following an examination of the experiences in Québec, New Brunswick and the Northwest Territories, a report commissioned by the Canadian Human Rights Commission supported including a definition of ‘social condition’ in the Canadian Human Rights Act, in seeking to ensure sufficient certainty for claimants and defendants. Conversely it warned against defining the ground too narrowly, at the risk of losing ‘many of the benefits yielded by the dynamic and flexible nature of social condition’.<sup>56</sup> That report recommended the introduction of a minimal statutory definition, which could be fleshed out in binding regulations or non-binding policy directives.<sup>57</sup>

Developments in New Zealand and several European jurisdictions are instructive, in showing how obstacles have been overcome in States where comparable ‘new grounds’ have been introduced.<sup>58</sup>

The Commission is of the view that the recognised challenges posed in terms of clarity in the law can be overcome through refinement of definitions, guidance on the indicators of disadvantaged socio-economic status and ultimately through interpretation. Awareness raising and guidance on what the law means will assist in ensuring that employers and service providers understand their obligations.

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<sup>53</sup> Nicole Simes (2017) ‘Ontario adding social condition, other protected grounds of Human Rights Code’ *The Lawyer’s Daily* 4 December 2017 (available at <https://www.thelawyersdaily.ca/articles/5335/ontario-adding-social-condition-other-protected-grounds-to-human-rights-code>).

<sup>54</sup> *Québec (Comm. des droits de la personne) v Gauthier* (1993), 19 C.H.R.R. D/312 [English Summary].

<sup>55</sup> See the website of the Ontario Human Rights Commission, ‘The Concept of “Social Condition”’ [no date] (available at <http://www.ohrc.on.ca/en/human-rights-commissions-and-economic-and-social-rights/social-condition-%E2%80%93-option-human-rights-commissions>).

<sup>56</sup> See p 5 MacKay and Kim (2009) *Adding Social Condition to the Canadian Human Rights Act* Report Commissioned by the Canadian Human Rights Commission (available at <https://www.chrc-ccdp.gc.ca/eng/content/adding-social-condition-canadian-human-rights-act>).

<sup>57</sup> See pp 127-130 MacKay and Kim (2009) *Adding Social Condition to the Canadian Human Rights Act* Report Commissioned by the Canadian Human Rights Commission (available at <https://www.chrc-ccdp.gc.ca/eng/content/adding-social-condition-canadian-human-rights-act>).

<sup>58</sup> See Tamas Kadar (2016) *An Analysis of the introduction of socio-economic status as a discrimination ground*, Equality & Rights Alliance (available at <http://www.eracampaign.org/uploads/Analysis%20of%20socio-economic%20status%20as%20discrimination%20final.pdf>).

**The Commission is of the view that sufficient clarity and precision in defining socio-economic status can be achieved to secure the foreseeability and transparency which is required in the law.**

#### 4. Conclusion

The Commission reaffirms its position that Irish equality law should be amended to prohibit discrimination based on socio-economic status.

Various international instruments which bind Ireland require recognition of discrimination on the basis of, for example, 'social origin, property, birth or other status'. The Irish courts have recognised the socio-economic dimension of Article 40.1 of the Irish Constitution.

The Commission is of the view that sufficient clarity and precision in defining socio-economic status can be achieved to secure the foreseeability and transparency which is required in the law.



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