

# Housing Assistance and Discrimination

*Scoping Study on the 'Housing Assistance  
Ground' under the Equal Status Acts  
2000-2018*

Rory Hearne and Judy Walsh





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

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## Foreword

On behalf of the Irish Human Rights and Equality Commission I'm delighted to welcome this research report, which makes an important contribution to knowledge on the 'housing assistance ground' under equality legislation in Ireland. It provides particular insight into case law analysis and access to justice, as well as the potential barriers that tenants continue to face in accessing, or maintaining, a rented home in Ireland.

The Equality (Miscellaneous Provisions) Act 2015 introduced 'housing assistance' as a new ground of discrimination in the provision of accommodation under the Equal Status Acts. From the outset the Commission strongly welcomed this important new provision. We have actively promoted public awareness and understanding of the housing assistance ground, and specifically amongst landlords. We have, in certain instances, provided legal assistance to those who have reported discrimination under this ground and we've also challenged discriminatory advertising practices in the private rental sector.

Since 2015 the Workplace Relations Commission (WRC) has decided a proportionately high number of complaints on the housing assistance ground and discrimination on this ground has become a prevalent issue in the equality law landscape. As this report shows, the WRC case law on this ground has established important overarching principles in regard to the operation of the law and has delivered important results for individuals who have experienced discrimination. By critically analysing the case law data and primary research with those affected and people working in the field, the report presents important findings on the character of discrimination experienced on the housing assistance ground. It also identifies a shift over time in the type of cases being brought - from discrimination in accessing accommodation to complaints arising in respect of existing tenancies.

The report also highlights potential barriers to access to justice where those discriminated against have to pursue their cases to seek vindication. This includes fear of victimisation, the lack of alignment between the Residential Tenancies Board (RTB) and WRC, issues related to the compensation ceiling and notification requirement, and the excessive length of time involved in the WRC process, which undermines the effectiveness of legal remedies. The report also highlights the need for the Residential Tenancy Board to be empowered to share information with the WRC and other statutory bodies where appropriate (e.g. Revenue in the case of unregistered landlords). These reforms would strengthen protections for tenants in protecting their rights and ensuring access to legal remedies.

The reality is that people who suffer discrimination on the HAP ground, are often desperately seeking accommodation, and getting involved in a formal complaints process is the last thing on their minds as they seek a roof over their heads for themselves and their families. This report shows that much more needs to be done to tackle systemic discrimination against tenants in receipt of housing assistance

and proposes a number of clear and tangible recommendations to achieve this. Here at IHREC, we welcome this report and these recommendations which should be considered as a priority for action in the Review of the Equality Acts, a process currently underway for the Minister of Children, Equality, Disability, Integration and Youth.

We are very grateful to the authors – Rory Hearne and Judy Walsh – for their expert work and their insights in preparing this research report.



**Sinéad Gibney**  
Chief Commissioner

April 2022

Section 1

# **Research Context**

## Introduction

Access to affordable, safe, secure, and decent standard housing is essential for individuals' physical health, psychological wellbeing, and to live a life with dignity. A home provides the secure base from which to carry out all of life's function (Hearne, 2020). Given this essential role, the right to adequate housing is recognised under international human rights law. The right to adequate housing includes the right to equal and non-discriminatory access to adequate housing (UNHCR, 2009).

Discrimination in accessing accommodation often occurs on multiple grounds such as ethnic origin, disability, health status, age, family status, citizenship, or gender, resulting in an intersectional impact of social exclusion (UN Human Rights Council, 2019). Homelessness and discrimination also intersect, as discrimination often acts as a structural precursor to homelessness and, in turn, the experience of homelessness can lead to discrimination (Canadian Observatory on Homelessness, 2019).

There is limited research on discrimination in the Irish private rental sector (PRS). Moreover, it focuses on access to accommodation. As in other countries, discriminatory practices across the entire rental relationship are under-examined (Greenberg et al., 2016; Verstraete and Moris, 2019). Successive CSO surveys have recorded people's perception of experiencing discrimination in looking for housing or accommodation, which encompasses but extends beyond the PRS. Grotti et al.'s (2018) analysis of the first three such surveys concludes that certain groups are liable to be especially affected by housing discrimination include Travellers<sup>1</sup>, younger households, those of non-white background, those with a disability, lone parents, private renters, and those from a lower socio-economic background (Grotti et al., 2018). According to the fourth such survey, the Equality and Discrimination module of the General Household Survey 2019, 3.2% of respondents experienced housing discrimination in the previous two years (CSO, 2019).<sup>2</sup> Discrimination in relation to looking for housing and accommodation had the most serious effect on people's lives out of ten social areas surveyed.<sup>3</sup>

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1 The UN Committee on the Elimination of Racial Discrimination (2019: 6) has expressed concerns "that ethnic minority groups such as Travellers, Roma, people of African descent, and migrant communities, who have limited access to social housing, face serious discrimination and inequality in the competitive private rental sector and are disproportionately at risk of being homeless."

2 The 2019 CSO Equality and Discrimination module of the General Household Survey records that out of the ten social settings where people were asked about experiencing discrimination, just under one in five (or 18%) experienced it looking for housing or accommodation, compared to the workplace (33%), looking for work (27%), and in shops, pubs, and restaurants (22%).

3 According to the latest CSO data, 17.9% of people who experienced discrimination in obtaining housing or accommodation reported that it had a 'very serious' effect on their lives while a further 28.2% said that it had a 'serious effect' (CSO, 2019: Table 5). This was the highest figure for any domain.

Audit studies have been used extensively in other countries to assess the extent and nature of discrimination in access to accommodation. Much of this research centres on the race ground (Grotti et al., 2018: Ch. 2). To date, one such study has been undertaken in Ireland. Gusciute et al. (2020) conducted a list experiment to assess ethnic discrimination in the PRS. It concluded, inter alia, that Irish applicants are more likely to be invited to view an apartment than Polish and Nigerian applicants.

The Equality (Miscellaneous Provisions) Act 2015 introduced 'housing assistance' as a new ground of discrimination in the provision of accommodation under the Equal Status Acts 2000–2018 (hereafter the ESA). With respect to the housing assistance ground, some qualitative research suggests that people who access social housing assistance encounter discrimination from landlords, and increased vulnerability to homelessness (Hearne and Murphy, 2018; Threshold and the Society of Saint Vincent de Paul, 2019; Walsh and Harvey, 2017).

## Irish social housing provision

Over the last three decades, low-income households unable to afford housing in the private market have increasingly been provided with housing 'benefits', or supplementary rental supports, rather than traditional local authority (council) housing (Byrne and Norris, 2018). This policy shift resulted in the proportion of households in social housing falling from 18% of households in the 1960s to just 9% in 2010 (Hearne, 2020).

The first rental support scheme for private rental tenants was the Rent Supplement (RS) scheme, introduced in 1987 and administered by the Department of Social Protection. Over time, RS became a de-facto housing benefit, as claimant numbers increased from 28,800 households in 1994, to 60,694 in 2007 (Hearne, 2020). Two new housing subsidy schemes, administered by local authorities, were introduced to replace RS. Firstly, the Rental Accommodation Scheme (RAS) in 2004, and then the Housing Assistance Payment (HAP) scheme in 2014. Under RAS, the local authority sourced the property, and provided long term agreements with landlords at below the market rent. RAS was not as successful as intended, with landlords reluctant to partake (Hearne and Murphy, 2017). HAP was regarded as a more 'landlord friendly' scheme with less obligations, higher rents, and shorter leases. HAP tenants are obliged to source their own accommodation, with the landlord agreeing to rent their property to the HAP tenant. The private landlord and the tenant make the rental agreement, and then the local authority pays the HAP payment (rent) directly to the landlord. The tenant pays the local authority a weekly rent contribution based on their income. This means tenants can retain their benefit and take up or remain in employment. Policy aims to transfer long term recipients of rent supplement to HAP (Department of Housing, Planning, and Local Government, 2016).

The government's 2011 Housing Policy Statement redefined private rental benefit schemes, such as the RAS and HAP, as 'long-term social housing support' (Hearne and Murphy, 2017). From 2010 onwards, most new social housing being delivered for those in housing need (people on the social housing waiting lists and those who are homeless) has been through these schemes and has almost entirely replaced direct building of social housing. For instance, 5,373 new social housing units were built in 2009, but just 75 were built in 2015. The majority (65%) of new social housing provision under the previous national housing plan, *Rebuilding Ireland* (2016-2021) came from HAP tenancies (Department of Housing, Planning and Local Government, 2016). The number of HAP recipients increased from 16,000 in 2016 to 40,000 in 2018 and reached 60,000 in 2021 (Comptroller and Auditor General, 2021: Chapter 8). Rent Supplement and RAS also still provide housing support to significant numbers of households. There are currently 24,000 RS recipients and 18,000 RAS recipients. The new national housing plan *Housing for All* (2021-2030), places a greater emphasis on the delivery of new build social housing, and aims for a reduced reliance on HAP over time, but nonetheless retains HAP as an important component of social housing delivery (Government of Ireland, 2021). For example, the Social Housing Construction Status Report Q2 2021 states that 7,146 "additional housing supports" were provided in Q2 2021. Of these, a majority (61%) 4,325 were HAP tenancies, in comparison to 1,864 (26%) new build units (Department of Housing, Local Government and Heritage, 2021). The Homeless HAP is also identified in *Housing for All* (Government of Ireland, 2021) as a preventative measure to address homelessness. While there has been an increase in supply of new build social housing in recent years it is still below previous decades and remains inadequate to compensate for decades of inadequate supply (Hearne, 2020). The Affordable Housing Act 2021, passed in July 2021, contains the first national scheme for the delivery of cost rental housing, that is, public affordable rental housing for those above social housing income limits.

## Housing assistance ground under the Equal Status Acts 2000-2018

With effect from 1 January 2016, 'housing assistance' may be invoked as a discriminatory ground under the Equal Status Acts 2000-2018 (the ESA).<sup>4</sup> People in receipt of rent supplement, housing assistance payments, or other social welfare payments, are protected from discrimination in the provision or termination of accommodation and related services or amenities.<sup>5</sup> In announcing the decision to

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<sup>4</sup> The ground was provided for under the Equality (Miscellaneous Provisions) Act 2015.

<sup>5</sup> Section 3(3B) of the ESA provides for the housing assistance ground: "For the purposes of section 6(1)(c), the discriminatory grounds shall (in addition to the grounds specified in subsection (2)) include the ground that as between any two persons, that one is in receipt of rent supplement (within the meaning of section 6(8)),

provide for this tenth discriminatory ground, the Minister of State referred to the prevalence of rental accommodation advertisements stating that rent supplement was not accepted (Department of Justice, 2015). Irish anti-discrimination law is now aligned with that of several other jurisdictions in prohibiting discrimination based on source of income, albeit only in the context of private rental accommodation.

Both direct and indirect discrimination on the ground is prohibited.<sup>6</sup> To date, no indirect discrimination complaints have been referred to the Workplace Relations Commission (hereafter the WRC).<sup>7</sup> Technically, harassment on the ground is not provided for, since the phrase 'discriminate' (employed in section 6(1)(c)) does not encompass harassment. Nonetheless, some harassment complaints have been upheld (Section 3.4.2). Because discrimination on any ground amounts to 'prohibited conduct'<sup>8</sup>, discriminatory advertising on the housing assistance ground is prohibited<sup>9</sup> as is the procurement of discrimination.<sup>10</sup> IHREC has exclusive legal standing with respect to discriminatory advertising under the ESA.<sup>11</sup> It referred a successful complaint to the WRC in 2019.<sup>12</sup> Procurement of discrimination is a criminal offence, and proceedings may be instigated by the WRC or by IHREC. People who believe that they have been subjected to adverse treatment for invoking their rights under the ESA, or supporting others to do so, may also lodge

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housing assistance (construed in accordance with Part 4 of the Housing (Miscellaneous Provisions) Act 2014) or any payment under the Social Welfare Acts and the other is not (the 'housing assistance ground')". Section 6(8) defines 'rent supplement' as "a payment made under section 198 (3) of the Social Welfare Consolidation Act 2005 towards the amount of rent payable by a person in respect of his or her residence."

6 Direct discrimination on the housing assistance ground entails less favourable of a person in receipt of HAP (or other social welfare payment), than someone in a comparable situation not in receipt of such payments. Indirect discrimination occurs where an apparently neutral provision would put a person in receipt of housing assistance at a particular disadvantage compared with other persons, unless the provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Both forms of discrimination are defined under section 3 ESA.

7 Although no indirect discrimination complaints have been referred by individuals, IHREC did so when it used its power under section 23 ESA to refer a complaint of discriminatory advertising (prohibited under section 12 ESA). IHREC's submission, as recorded in the WRC decision, refers to the text of several advertisements that it argued were discriminatory on the housing assistance, family status, and age grounds. Two of the three advertisements implicated the indirect discrimination prohibition: *Irish Human Rights and Equality Commission v Daft Media Ltd t/a Daft.ie*, ADJ-00005960, 6 August 2019. The WRC upheld IHREC's complaint, finding that it had established a *prima facie* case on all three grounds. However, the decision does not specify whether direct or indirect discrimination was at issue. Having reached an agreement with IHREC, Daft Media Limited withdrew an appeal it referred to the Circuit Court. The agreement includes the adoption of measures to identify and remove discriminatory advertising (IHREC, 2021).

8 Under section 2(1) "prohibited conduct" means discrimination against, or sexual harassment or harassment of, or permitting the sexual harassment or harassment of, a person in contravention of this Act

9 Section 12, ESA

10 Section 13, ESA.

11 E.g., *Alamazani v Daft Media Limited*, ADJ-00006704, 23 February 2018.

12 *Irish Human Rights and Equality Commission v Daft Media Limited t/a Daft.ie*, ADJ-00005960, 6 August 2019.

victimisation complaints.<sup>13</sup> In other words, individuals who have taken steps to assert their right not to be discriminated against under the housing assistance ground, are protected from victimisation.

People may refer complaints on more than one discriminatory ground. However, the legislation specifies that a decision must be made on each of the claims<sup>14</sup> and in practice, adjudicators deal with the grounds in turn, requiring a case to be established separately on each ground (Walsh, 2020: 18-19). The ESA does not, therefore, recognise intersectional or compound discrimination, although a few such claims have been upheld (Walsh, 2020: 18-19), including one on the housing assistance and race grounds (Section 3.4).<sup>15</sup>

IHREC has repeatedly raised concerns about discrimination on the housing assistance ground and issues of barriers in access to justice, such as the difficulty of demonstrating that discrimination has occurred and the lack of capacity of those affected to pursue cases (IHREC, 2019a; IHREC, 2015: 18). The housing assistance ground consistently comprises a high proportion of the queries received by IHREC from members of the public (Table 1.1).

Table 1.1

**Queries to IHREC on the housing assistance ground 2016 -2020<sup>16</sup>**

Year	No of housing assistance (HA) ground queries	HA as % of total ESA queries	HA as % of private rental queries	Rank compared to other discrimination grounds
2020	118	19%	79%	2nd highest
2019	112	17%	70%	2nd highest
2018	113	22%	75%	2nd highest
2017	125	23%	70%	2nd highest
2016	154	30%	79%	Highest

13 Section 3(2)(j), ESA.

14 Section 25(1)(A) ESA.

15 'Compound' discrimination entails discrimination on multiple grounds where the role of the different grounds can still be differentiated. Intersectional discrimination results from a combination of discriminatory grounds (Makkonen, 2002: 10-11; Schiek, 2009: 12-13). IHREC (2017b: 34) notes that in failing to provide for "compound discrimination" domestic equality legislation is not in full compliance with the UN Convention on the Elimination of All Forms of Discrimination against Women. It recommends that, "equality legislation be amended to include a definition of multiple discrimination" (ibid.).

16 This data is derived from the Commission's annual reports, available at: <https://www.ihrec.ie/publications/>.

A proportionately high number of complaints on the housing assistance ground have been determined by the WRC. From 1 January 2016 to 31 December 2020, the WRC issued decisions in 148 cases on the housing assistance ground. Over the same period, 14 complaints of discrimination concerning private rental accommodation were determined on the other nine grounds combined.<sup>17</sup> It is thus apparent that discrimination on the ground has become a prevalent issue in the overall equality law landscape.

## Access to Justice

There is no single definition of 'access to justice' under national or international law. It is a broad concept that is embedded in various human rights recognised in national, European, and global instruments. "Core elements of these rights include effective access to a dispute resolution body, the right to fair proceedings and the timely resolution of disputes, the right to adequate redress, as well as the general application of the principles of efficiency and effectiveness to the delivery of justice" (FRA and Council of Europe, 2016: 17). The concept is essentially concerned then with securing the realisation of rights and interests in an effective manner through legal processes. Allied to these legal developments, policy increasingly seeks to make domestic legal systems not only formally but also practically accessible, in particular for poor and marginalised individuals and groups (Pleasence and Balmer, 2018).

The UN underlines that access to justice must be ensured for all components and dimensions of the right to adequate housing (UN Human Rights Council, 2019: 5), while addressing barriers to accessing justice is an immediate and urgent obligation (UN Human Rights Council, 2019: 10). Remedies should address the structural causes and policies that gave rise to the violation and ensure non-repetition (UN Human Rights Council, 2019: 7).

Measures aimed at securing access to justice must be non-discriminatory and take account of inequalities amongst potential complainants. Marginalised groups and individuals are most likely to experience discrimination and face the most barriers to accessing justice owing to lack of knowledge of their rights and entitlements, deep asymmetries of power, socioeconomic disadvantage, fear of reprisal, and stigma (UN Human Rights Council, 2012). Research from other jurisdictions suggest that people who perceive that they have experienced housing discrimination rarely file complaints with the authorities, in the belief that it would be a futile pursuit or may lead to retaliation (Silver and Danielowski, 2019).

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<sup>17</sup> This data is derived from the WRC's online database of decisions.

The European Union Agency for Fundamental Rights (FRA, 2012) has developed a framework to delineate the main elements of access to justice in discrimination cases using three categories: *structures, procedures, and support*. It is derived from an analysis of applicable discrimination law principles and empirical research conducted with 371 stakeholders across eight EU countries. The framework is, therefore, especially useful in this research context and is deployed in Section 4 of the report in assessing the key barriers to and enablers of access to justice in tackling discrimination on the housing assistance ground. Table 1.2 sets out the components of the FRA framework.

Table 1.2

***The main elements of access to justice in cases of discrimination (FRA 2012)***

<b>Structures</b>	<ul style="list-style-type: none"> <li>» Complaint mechanisms</li> <li>» Legislation</li> <li>» Geographical distance</li> </ul>
<b>Procedures</b>	<ul style="list-style-type: none"> <li>» Collective dimensions</li> <li>» Fairness</li> <li>» Timely resolution</li> <li>» Effectiveness</li> </ul>
<b>Support</b>	<ul style="list-style-type: none"> <li>» Legal advice and assistance</li> <li>» Other forms of support, such as emotional, personal and moral</li> <li>» Awareness of rights</li> <li>» Creating a fundamental rights culture</li> <li>» Accommodation of diversity</li> </ul>

Structures refer to the legal provisions, institutional structures, and paths available to potential complainants (FRA, 2012). Some of the key barriers related to structures include complainants' difficulties in establishing which paths to follow to access justice and the complexity of definitions and provisions in equality legislation. There is also a need to "bridge physical distance to first contact points when accessing justice" (FRA, 2012: 7). For example, through equality bodies and other institutions that deal with discrimination cases, strong institutional cooperation agreements and clear cross-referral systems.

Procedures refer to legal and non-legal processes before a court or quasi-judicial-type equality body or administrative/judicial institutions. Barriers related to procedures include a lack of protection of complainants and witnesses from victimisation; overly lengthy procedures; insufficient powers to remedy a situation; low levels of compensation awarded; and insufficient resources available for equality bodies and other institutions with an equality remit. Enabling

factors for procedures include approaches that reduce the stigma of individual complainants and increase the effectiveness of complaints, by allowing, for example, for collective complaints and redress.

Supports include the provision of legal advice and representation, other forms of support, awareness of rights, the creation of a 'fundamental rights culture', and accommodation of diversity (FRA, 2012: Ch.4). Barriers related to support structures include; limitations in resources of those providing legal advice and assistance; costs of legal advice, and a lack of awareness of rights and remedies.

This report outlines the findings from research undertaken into the character of discrimination experienced on the housing assistance ground and barriers in access to justice in respect of discrimination under this ground. Section 1 provides a contextual introduction to the right to adequate housing, Irish social housing provision, the applicable legal provisions on discrimination, and access to justice. Section 2 describes the research design and methodology. Research findings as to the nature of discrimination are set out in Section 3. Section 4 presents an analysis of the barriers that persons affected may face in challenging such discrimination. The concluding section outlines recommendations for how such barriers could be addressed so that there is more effective access to justice.

Section 2

# **Research Design and Methodology**

## Research design

A literature review was undertaken to identify the key issues relating to the project aims (the nature of housing assistance discrimination and access to justice), to provide policy context and develop the conceptual frameworks, as set out in Section 1. This guided the construction of the key research questions. The questions covered the thematic areas of the nature of discrimination experienced on the housing assistance ground, the impact of discrimination, and associated access to justice barriers (see Appendix 1). In addition to drawing on relevant research literature from the Irish context, the report also triangulates case law and primary research findings to explore the nature of housing assistance ground in the Irish context (see Table 2, Appendix 1).

## Case law analysis

Case law can provide an insight into patterns of discrimination and discrimination law enforcement in given contexts (Pager and Shepherd, 2008: 185-186). An analysis was undertaken of the 120 housing assistance ground complaints determined by the WRC from 2016 to 31 March 2020. This analysis set out the type of reported behaviour that amounted to 'prohibited conduct' (including omissions to act) in access to accommodation cases and those concerning existing tenancies. It also assessed the reasons why complaints were not upheld. Access to justice issues arising in the determinations were analysed with reference to the framework developed by FRA (FRA, 2012).

The determinations were retrieved from the WRC's online database. A sample of cases on the ground were identified by examining the text of every WRC decision issued under the ESA since the entry into force of the Equality (Miscellaneous Provisions) Act 2015 until end March 2020. Subsequently, the country went into its first 'lockdown' due to the COVID-19 pandemic and a range of policy measures came into force including a temporary moratorium on evictions. Because of associated public health measures, considerably fewer WRC hearings were conducted in 2020 than in 2019, leading to a 46% decrease in decisions delivered (Workplace Relations Commission, 2021a: 22).

While there is at least one Circuit Court case on the ground during this period, this and other Circuit Court appeals are not generally published and, therefore, could not be factored into the analysis.

## Primary research data collection

With a view to capturing the way in which housing assistance discrimination might manifest in different situations, or how indeed it is interpreted across different actors, primary research was conducted for the purpose of this study. This included semi-structured interviews with key stakeholders, documentary analysis of case files from a tenancy support service, and an online survey of those directly affected.

- » **16 semi-structured interviews** were conducted with key stakeholders. These were practitioners and/or experts working in housing support organisations, NGOs, IHREC, community law centres. One estate agent and one landlord were also interviewed. These interviews were conducted via phone or, in some cases email (see Table 3, Appendix 1 for details). All interviews were transcribed and coded thematically.
- » Documentary analysis of **98 case files pertaining to housing assistance discrimination**, accessed through a tenant support organisation in Ireland. These cases came before the support workers during Q4 2019.
- » **Online survey** of those who have been directly affected by housing assistance discrimination. A total of 47 respondents participated (recruited through social media) while an additional seven engaged in email or telephone interviews (recruited through a housing advocacy group). This data does not claim to provide a representative sample or determine the rate or nature of housing discrimination as a whole but rather provides an additional insight into personal accounts of housing discrimination. A participant profile is outlined in Table 5, Appendix 1.

It is important to note the sampling frame adopted when interpreting the primary research presented in this report. The core objective of the primary research was to capture the broad characteristics and dynamics of housing discrimination as a discriminatory ground in terms of how it was experienced and negotiated. It did not set out to capture the scale of the issue. For this reason, purposive sampling was adopted to specifically target those who have experienced discrimination on the housing assistance ground (both lived and professional experience). Likewise, the integration of the service level data from a housing support organisation offered further insight into the nature of the queries received over a particular period.

The primary research is drawn upon across this report in a way which triangulates and supplements the case law analysis – all with a view to offering a more rounded analysis of discrimination on the housing assistance ground in Ireland.

## Ethical considerations

A robust ethical protocol was adhered to across all primary data collection. Firstly, participation in interviews or online survey was voluntary, and participants were offered the opportunity to withdraw at any point. Written consent was obtained from all research participants for the use of the data they provided while survey respondents were asked to complete the consent form online. All the data has been anonymised and identifiable information removed. The researcher shared relevant contact details for support organisations to participants who were in need of advice in relation to their housing situation or otherwise. Ethical requirements and responsibilities relating to the access, storage, disposal and secondary use of data were adhered to, following GDPR guidelines. This included access to anonymous case files as supplied by the housing support organisation.

## Section 3

# **The Nature of Housing Assistance Discrimination**

## Introduction

This Section examines the nature of discrimination on the housing assistance ground, and the particular subgroups affected. It begins by setting out an overview of the discrimination case law, drawing on WRC data, and then outlines the nature of discrimination relating to access to accommodation, including the changing nature of discrimination, and subgroups affected. It then discusses discrimination affecting existing tenants, with a focus on harassment and victimisation findings. The final two sub-sections tentatively analyse the rationale for discrimination, and the impact of housing assistance discrimination on those directly affected.

## Overview of WRC Determinations

Table 3.1. outlines the number and outcomes of complaints on the housing assistance ground determined by the WRC from 2016 to 31 March 2020.<sup>18</sup> As noted above, this case sample comprises all WRC determinations issued on the ground until the advent of measures associated with the COVID-19 pandemic (Section 2.2).

Table 3.1

### **WRC Determinations and Outcomes**

	<b>Upheld</b>	<b>Unsuccessful</b>	<b>Non-attendance by Complainant</b>	<b>Total</b>
2016	1	-	1	2
2017	7	8	2	17
2018	16	11	11	38
2019	30	18	5	53
2020 (to 30 March)	2	4	4	10
<b>Totals</b>	<b>56</b>	<b>41</b>	<b>23</b>	<b>120</b>

As indicated in Table 3.1, 58% of the 97 complaints that proceeded to investigation were upheld. A considerable number of complainants did not attend the WRC hearing, and when such complaints are factored in, the success rate drops to 47%. Of the 97 complaints that were investigated, three (3%) were referred against advertisers. One of these, referred by IHREC, was successful.<sup>19</sup> The other two

18 The first substantive determination on the ground was issued in November 2016: *Ms A v A Letting Agent*, ADJ-00004056, 16 November 2016.

19 *Irish Human Rights and Equality Commission v Daft Media Limited t/a Daft.ie*, ADJ-00005960, 6 August 2019.

cases were dismissed since the complainant did not have locus standi.<sup>20</sup> 66 of the complaints investigated were referred against landlords (68%), while letting or estate agents were the respondents in 25 cases (26%).<sup>21</sup> 35 of the complaints that proceeded to hearing, or 36%, addressed access to accommodation. The remaining 59 cases (61%) concerned existing tenancies.

Several important overarching principles have been established in the case law analysed. A 2017 decision affirmed that the discrimination prohibition applies to existing tenants, as well as to persons seeking access to accommodation.<sup>22</sup> The WRC has also clarified that a complainant need not have been approved for HAP to be covered by the ground.<sup>23</sup> Estate or letting agents cannot evade liability by arguing that they were acting on the instructions of the landlord.<sup>24</sup> In line with established principles, landlords have been fixed with liability for the conduct of other persons acting as their agents.<sup>25</sup> In an early decision the WRC underlined:

[F]rom the moment discrimination on the housing assistance ground became unlawful, any contractual obligation on the part of the respondent to accept an instruction to reject tenants in receipt of same from its clients became likewise illegal, and hence cannot avail the respondent as a defence.<sup>26</sup>

In a decision issued in November 2020, the WRC established that the housing assistance ground cannot be used to challenge a refusal to enable a tenant to change from one form of housing assistance to another.<sup>27</sup> At the time of writing, this case is under appeal to the Circuit Court (FLAC 2021a: 41). If the WRC finding is upheld, it could have significant implications for the operation of the ground. It also runs counter to government policy, which envisages that tenants who have

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20 *Alamazani v Daft Media Limited*, ADJ-00006704, 23 February 2018; *Alamazani v Daft Media Limited*, ADJ-00003299, 23 February 2018.

21 The remaining three complaints were referred against a house owner who was unaware that the complainants were sub-letting his house and so was not a service provider (comprising two complaints), and a property management company acting on behalf of a receiver.

22 *Tenant A v A Landlord*, ADJ-00004100, 9 August 2017.

23 *A Tenant v A Property Company*, ADJ-00009705, 19 September 2018, in which the WRC found that a person, who is an applicant for HAP, but not yet approved for the payment, is covered by the provisions of the ESA. The WRC established that the term "in receipt of", employed in the definition of the housing assistance ground under Section 3(3B), must be interpreted as including "qualified applicants deemed eligible for the payment of HAP once they have sourced a dwelling and all the conditions have been met." To hold otherwise "would fail to reflect the plain intention of the Oireachtas" and "would render the Section 6(1)(c) provisions nugatory not only in relation to existing tenants but also in relation to prospective tenants."

24 *A Service User v A Letting Agency*, ADJ-00004073, 20 March 2017.

25 E.g., *A Tenant v A Landlord*, ADJ-00013893, 5 March 2019, in which the respondent property owner was liable for harassment carried out by his son, who acted as a point of contact for the respondent.

26 *A Service User v A Letting Agency*, ADJ-00004073, 20 March 2017.

27 *Murphy v O'Toole*, ADJ-00027797, 19 November 2020. This decision was issued outside the time frame for the case sample analysed in this report but is referred to here to provide a current picture of the law as interpreted by the WRC.

been receiving RS for a significant period will be switched to HAP on a phased basis (Section 1.2).

## Access to accommodation

### *Findings from the WRC complaints data*

Across 2016-17, the majority of WRC complaints on the housing assistance ground concerned access to accommodation, comprising 11 of the 16 cases (69%) that proceeded to hearing. That pattern subsequently changed. In 2018, 12 of the 27 (44.5%) investigations related to prospective tenants, and proportionately decreased to 12 of the 48 complaints (25%) heard on the ground by the WRC in 2019. There were no such complaints in the first quarter of 2020. Accordingly, while the number of complaints concerning access to accommodation is relatively consistent for each full year, they have steadily decreased as a proportion of the cases.

Across the period examined in this report, 35 complaints of discrimination in access to accommodation were investigated by the WRC. 16 of these (46%) were upheld. A few harassment<sup>28</sup> and victimisation complaints have been considered but none was upheld and there is no substantive discussion of the applicable principles in the case law analysed. No indirect discrimination complaints were referred. Consequently, the case law largely helps to illuminate the nature of discrimination encountered in the form of less favourable treatment (direct discrimination).

Several respondents acknowledged that they had declined to engage with or offer tenancies to HAP-eligible prospective tenants. Some respondents in the WRC cases simply reported being unaware of the legal obligation not to discriminate.<sup>29</sup> While others in this cohort said they couldn't comply with the regulatory requirements associated with the HAP scheme. In an early WRC case, the respondent letting agent asserted that it had been instructed by the landlord not to accept tenants in receipt of HAP because he would be unable to obtain insurance for loss of rental income.<sup>30</sup> The respondent was liable for implementing the discriminatory instruction and accepted that it had not asked to view its client's insurance policy. Another WRC respondent informed a couple, who had viewed the property and sent on the HAP paperwork, that there was an issue with the title on

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28 As noted in Section 1.3, harassment is not technically prohibited on the housing assistance ground.

29 *A Tenant v A Landlord*, ADJ-00021680, 22 November 2019; *Smyth v Vaughan*, ADJ-00018960, 25 June 2019; *Crawford v Johnson*, ADJ-00019274, 27 November 2019.

30 *A Service User v A Letting Agency*, ADJ-00004073, 20 March 2017.

the property and compliance with fire regulations; an email submitted in evidence stated:

I got that paperwork thanks, managed to get a read on them this morning. Unfortunately, I don't see a huge benefit to me in going the HAP route. Would be three years before I can claim the relief on mortgage interest. Not to mention a couple came in last evening and offered €2200 per month, 2 months up-front and a three-year lease... difficult to turn down... You guys seemed great and I do wish you all the best in your search for a new home.<sup>31</sup>

This case exemplifies the more 'benign' instances of discrimination that surface in the case law.

A woman who was renting a self-contained studio attached to her family home asserted that she declined to accept a HAP-approved applicant because "she believed that she had to register for HAP and she was not set up at that time to take HAP applicants."<sup>32</sup> However, the WRC observed that if she "was unsure of the terms of HAP and if she believed that she was required to register for the scheme surely, she would have made some enquires before refusing the complainant. I also note that in the advertisement the respondent was looking for a friendly professional/student to rent the property to and it is my view, that the respondent was of the view that a person on a HAP scheme would not fit this description." Issues with regulatory compliance are further discussed in Section 3.5.

In a number of the successful cases, complainants provided written evidence in the form of advertisements, which stated that rent allowance or HAP was not accepted.<sup>33</sup> Other complainants provided emails or text messages written by landlords or estate agents declining to accept HAP.<sup>34</sup> In two complaints, which were upheld at the WRC, the complainants were discriminated against when they were advised that the property had been let to someone else, but they were able to demonstrate that it was still on the market.<sup>35</sup>

Of the cases not upheld by the WRC, five complaints, four of which concerned the same set of facts, were dismissed for failure to comply with the notification

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31 *Power v O'Shea*, ADJ-00018091, 24 July 2019.

32 *A Tenant v A Landlord*, ADJ-00015004, 5 December 2018. The WRC's decision was upheld on appeal to the Circuit Court. FLAC represented the complainant, who was unrepresented at first instance, in the appeal proceedings (FLAC, 2019).

33 *A Tenant v A Landlord*, ADJ-00002816, 8 May 2017; *A Complainant v An Estate Agent*, ADJ-00003291, 4 July 2017.

34 *A prospective tenant v A landlord*, ADJ-00010006, 3 April 2018; *A Complainant v A Respondent*, ADJ-00012072, 24 July 2018; *A Tenant v A Landlord*, ADJ-00015004, 5 December 2018; *Batas v Halpenny*, ADJ-00022515, 26 November 2019; *Crawford v Johnson*, ADJ-00019274, 27 November 2019.

35 *Maxim v Satis Delivering Excellence Limited / Satis Property*, ADJ-00019818, 5 June 2019; *Tenant v Property Letter*, ADJ-00009741, 1 February 2018.

requirement. Four complaints were referred outside the six-month time limit. The implications of those decisions for access to justice is considered in Section 4.2. Further complaints were unsuccessful because they were referred against the incorrect respondent<sup>36</sup> or covered by the exemption for renting part of one's home.<sup>37</sup>

Of the unsuccessful cases decided 'on the merits', one concerned a man who agreed to rent a property and paid a deposit.<sup>38</sup> The estate agent refused to proceed with the letting because, it argued, the references supplied by the complainant were unacceptable and he had behaved in an "aggressive and threatening" manner towards staff. The WRC was satisfied that the complainant's "conduct and behaviour was unacceptable". It also found, "that the reason why his application was declined was because he was unable to supply satisfactory references both personal and professional. Also, he was unable to supply a rental history." Many of the references provided were missing key information and a professional reference related to a period of employment from the 1980s. The WRC in that case did not address whether requiring certain types of reference is discriminatory and so this issue remains to be clarified.<sup>39</sup> In two related complaints, lodged against a landlord and an estate agent, the respondents succeeded in rebutting a prima facie case of direct discrimination; a tenancy offer was withdrawn because a previous client required the premises and was not related to the complainant's eligibility for HAP.<sup>40</sup>

## Primary Data Findings

Similar issues encountered before the WRC were identified across the primary research with practitioners and those with lived experience. Over a third (39%) of the survey participants reported they experienced discrimination when trying to access a property, almost all of these (36%) were when dealing with estate agents.

According to the research participants, discrimination in the area of access to accommodation is still 'widespread', but is becoming less overt, and, therefore, more difficult to prove. Many participants described situations where landlords and estate agents are not explicitly refusing HAP, as they are aware it is illegal, but they are finding other ways to discriminate in a more 'subtle' manner that is difficult to prove. This includes landlords asking prospective tenants about the source of income that

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36 *A Tenant v A Landlord*, ADJ-00015000, 5 December 2018. A second complaint referred against the respondent landlord was upheld: *A Tenant v A Landlord*, ADJ-00015004, 5 December 2018.

37 Section 6(2)(d) of the ESA: *Bushe v Jarvis*, ADJ-00014453, 6 September 2018.

38 *An Accommodation Seeker v An Estate Agent*, 10 April 2018, ADJ-00010445.

39 In a subsequent discriminatory advertising case, the WRC found that advertisements stating, inter alia, "suit family or professionals only", "would suit young professionals" and "references required" gave rise to a prima case of discrimination on the housing assistance, age and family status grounds. However, the indirect discrimination prohibition was not discussed in the decision: *Irish Human Rights and Equality Commission v Daft Media Ltd t/a Daft.ie*, ADJ-00005960, 6 August 2019.

40 *Koneva v Hickey*, ADJ-00013238, 3 April 2019; *Koneva v Dng Glen Corcoran*, ADJ-00013239, 1 May 2019.

will be used to pay the rent. Once the prospective tenant informs the potential landlord the rent will be paid via HAP, the prospective tenant does not hear back from the landlord or estate agent. One individual who experienced discrimination described how

“[t]he landlord .... asked if we would pay ourselves or if there was HAP or other social payments involved.”

According to a community law centre interviewee:

“the discrimination is taking place, but in a subtle manner, and a ‘clued in’ landlord knows enough not to say that they don’t accept HAP or rent supplement, but will just go with a non-HAP applicant”.

This makes housing assistance discrimination

“difficult to prove, as landlords know enough not to explicitly say it” (Community Law Centre Interviewee).

Failure to follow up with prospective tenant, upon disclosure of HAP eligibility, was also cited:

“as soon as I mention it (HAP), I’m turned down”.<sup>41</sup>

Another survey participant, a single mother, related her experience of discrimination where the estate agents “are very clever in the way they do it”, as they “do not reply if you ask, ‘is HAP accepted?’”. She also reported that it is: “impossible to find landlords that accept HAP”.

Other participants explain how they can only access viewings if they do not mention their HAP eligibility. Furthermore, if participants do get a viewing they may not hear back from the agent/landlord once HAP eligibility is revealed. A Traveller representative reported that:

“it could be a positive call with a landlord and then when they say they are paying using HAP/RAS, the tone changes and a few days later they say “oh actually we have someone else for the house, it’s gone”.

There are evidently circumstances where landlords and estate agents are believed to be ‘getting around’ the equality legislation. According to the estate agent who participated in the study, agents might reschedule the viewings when they find out someone is on HAP due to instructions from their landlord clients:

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41 See Appendix 2 for detailed case examples of this discrimination from the Housing Assistance/HAP Discrimination Survey.

“landlords do not see it as actively screening but safe guarding themselves... Landlords say to you – ‘no HAP – screen out the HAP people’.”

A housing practitioner recounted similarly that this situation is normalised for those searching for a property:

“it is par for the course for HAP eligible tenants, to the point that they expect to be rejected at viewings, if they get a viewing, or to not hear back from the landlord or agent as soon as HAP is mentioned.”

It was also reported across the interviews that prospective tenants were sometimes asked to provide employment-related or ‘professional’ references. Such practices could give rise to an indirect discrimination complaint, but as mentioned above, that provision of the ESA has not been considered in the case law to date. Other potential forms of indirect discrimination highlighted by research participants included landlords looking for, ‘payment up front’, ‘two- or three-month’s rent in advance’, or viewings being only offered to tenants ‘paying cash’.

### *Subgroups affected*

The online surveys and interviews identified subgroups particularly affected by housing assistance discrimination including single parents, Travellers, Roma, people living in Direct Provision, those with larger families, and those with a disability. For example, one respondent related that she was

“facing homelessness as no property (landlord) wants a single parent HAP family” (Respondent 15).

Multiple discrimination was also alluded to. For example, those from ethnic minorities experiencing discrimination on the housing assistance ground also described experiencing discrimination based on ethnicity, race, and family size (number of children) from prospective landlords. A Traveller representative explained that, in their experience, HAP is a system where Travellers

“suffer systemic exclusion – basically leaving them to inevitably become homeless”,

as they are

“suffering huge (hidden and difficult to prove) discrimination”

in trying to access private rental housing. Landlords were found to cite family size and references as a way to indirectly discriminate against Travellers. For example, as a result,

“you often hear of Travellers hiding their identity when looking for a rental

property” (Traveller Representative Interviewee).

A Traveller interviewee who was seeking HAP rental accommodation and has been homeless for over two months described how this discrimination is operating:

“I’ve been to every auctioneer in my home town and they have houses advertised both on the window and online but yet when I walk in and ask, they tell me time and time again that there is nothing available. So, then I called them up and used a different surname and they would inform me that the houses were available and would I like to arrange a viewing? I’d agree and come to view the property and as soon as they see that I’m a Traveller and hear my surname they would tell me ‘oh I’m sorry I’ve just received a call that this property is not available - I’m sorry I must have made a mistake’. (Interviewee 2).

Several groups covered by the race ground, whether because of their ethnicity, skin colour or nationality, also record experiencing discrimination on that basis. A support worker with the Roma community explained that they

“see a lot of discrimination in relation to prospective landlords and letting agents...Once racial background is identified with Roma Community, lots of excuses start being invented. It is clear that once they are identified with Roma, the property is pulled from the market or rented to someone else- and they are never given any reason for this”.

The support worker outlined that of the Roma families who are eligible for HAP/ Homeless HAP

“very few of them even tried contacting agencies out of certainty that they will be turned down and some were told that properties were already leased when they presented themselves”.

The representative of the asylum seekers support organisation explained that they suffer discrimination when looking for housing as when landlords “hear their accent” they do not respond to them. This then intersects with also being reliant on HAP, meaning that when they also mention they have HAP they will ‘never get the house’. So, people of colour and people coming out of direct provision accommodation, may be particularly exposed to discrimination from landlords, as described by this support worker:

“It is very hard for people who are looking for housing, having experienced this myself. It is hard for people of colour and people living in direct provision. The accent over the phone is a direct giveaway. The minute you see a house available and call and speak to the landlord, the house becomes unavailable- because your accent gives away that you are not Irish and you are not welcomed. You don’t even get an appointment. Whenever you mention you are under HAP, you will never get the house because most people don’t want

to accept it, so they discriminate you if you are on HAP because someone else will come with money. You are directly and indirectly affected because you are on HAP” (Asylum Seeker Support Worker Interviewee).

A respondent who experienced discrimination on housing assistance ground and disability relayed that in their experience once a landlord sees them as a guide dog handler with a disability – ‘they don’t want to know’. One interviewee with a disability described the barriers in accessing housing:

“If I call a landlord and am straight up about my disability, I am virtually guaranteed not to be offered a viewing, I’ve tested this with a sighted friend calling the same advertiser and she will get viewings, as soon as she mentions HAP they don’t want to know (Interviewee 1).”

She explained, that if you have a disability you are in a very vulnerable place as regard accessing housing with landlords considering you ‘at the bottom of the pile’.

While several multiple-ground discrimination complaints were referred to the WRC in the domain of access to accommodation,<sup>42</sup> just one was upheld, and this was only in relation to the ‘housing assistance’ ground. In that case, the complainant was informed by a letting agent that the property was not available to persons in receipt of rent allowance. The WRC determination states that the complainant was of a “non-Irish background” and according to his evidence was dealt with in an abrupt manner, but apparently offered no further evidence that would have established a prima case of race-ground discrimination.<sup>43</sup> Another complaint on the housing assistance and race grounds was not upheld because the letting agent was able to demonstrate that it had followed the same procedures in relation to all applicants and had rented the property to a person who had completed the requisite paperwork before the complainant. There was no evidence that the complainant was subjected to less favourable treatment on the race ground and the property was rented to an applicant in receipt of HAP.<sup>44</sup> Several other complaints on the same grounds were submitted out of time or dismissed because the complainant was found to have not been genuinely seeking access to accommodation. A complaint on the family status and victimisation grounds concerning information sought on a rental application form failed because the complainant was offered the tenancy and had not experienced any detriment.<sup>45</sup> Thus, the case law to date provides little insight into the interface between discrimination on the housing assistance and other grounds.

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42 Race, gender, age, family status and victimisation are the other grounds relied upon. The civil status, disability, sexual orientation, religion, and Traveller community grounds do not feature in the access to accommodation complaints referred to date.

43 *A Complainant v An Estate Agent*, ADJ-00003291, 4 July 2017.

44 *Smith v Smith Harrington Limited*, ADJ-00008341, 23 August 2018.

45 *A Tenant v A Letting Agency*, ADJ-00006003, 12 April 2017.

## Existing Tenancies

### *Findings from the WRC complaints data*

Tenants may become entitled to HAP while renting a property due to their circumstances changing, such as an illness or injury affecting them or their family, taking up a carer role, losing their job or getting reduced hours and wages. A salient WRC determination, issued in August 2017, established that sitting tenants are covered by the housing assistance ground.<sup>46</sup> Since then the number of cases concerning existing tenancies has increased proportionately each year. The six complaints that proceeded to hearing in the first three months of 2020, were all referred by sitting tenants. Overall, 59 of the 97 cases investigated (61%) concerned existing tenancies.

The primary forms of direct discrimination (less favourable treatment) in the case law relating to existing tenants are, refusals to participate in the HAP or RS schemes; omissions to complete the necessary paperwork; delays in processing HAP or RS applications; and the termination of tenancies triggered by requests to complete the applicable documentation. The first set of complaints involving sitting tenants established that refusing to participate in the HAP or RS schemes amounts to less favourable treatment on the housing assistance ground.<sup>47</sup> Approximately two-thirds of the successful complaints entailed express refusals to engage with the schemes. A few of these refusals occurred shortly after the commencement of the tenancy.<sup>48</sup> Many complainants experienced repeated denials over an extensive period of time, and inevitably struggled to pay the rent.<sup>49</sup> The WRC has determined that landlords are not entitled to refuse HAP in circumstances where there are rent arrears.<sup>50</sup>

Several complainants in the WRC cases were issued with notices of termination following requests to complete the HAP or RS forms. In the bulk of these cases, the respondent refused to sign the forms and then sought to terminate the tenancy, and the WRC found that both acts constituted direct discrimination on the ground.<sup>51</sup> A large proportion of the cases taken by sitting tenants have involved

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46 *Tenant A v A Landlord*, ADJ-00004100, 9 August 2017. This was one of 3 interrelated complaints referred against the same landlord.

47 *Tenant A v A Landlord*, ADJ-00004100, 9 August 2017; *Tenant B v A Landlord*, ADJ-00004101, 9 August 2017; *Tenant C v A Landlord*, ADJ-00004705, 9 August 2017.

48 E.g., *A Tenant v A Landlady*, ADJ-00009225, 2 August 2018; *Kavanagh v Cahill*, ADJ-00011058, 3 August 2018.

49 E.g., *Tenant A v A Landlord*, ADJ-00004100, 9 August 2017; *A Tenant v A Landlord*, ADJ-00013079, 6 December 2018.

50 *A Tenant v A Landlord*, ADJ-00013079, 6 December 2018; *Complainant v Respondent*, ADJ-00021854, 17 January 2020.

51 *Kavanagh v Cahill*, ADJ-00011058, 3 August 2018; *Tenant A v A Landlord*, ADJ-00014956, 4 September

evictions or threats of eviction (15 of 39 successful cases). As discussed in Section 4.2.4, these tend to attract higher than average compensation awards.

In several cases, the WRC has pointed out that short-term tenancies are not excluded from the HAP scheme.<sup>52</sup> In one such case, the respondent said he had refused to complete the HAP application form because the property was due to be sold and so a two-year tenancy would not be feasible:

[The respondent] submitted a HAP information document, *Housing Assistance Payment (HAP), Tenant Information* which states "Once approved for HAP, the local authority will expect you to stay in the same property for at least two years". This is a guide. The same paragraph qualifies this by allowing for a change in circumstances which could change the length of the tenancy... There is no minimum period for a tenancy to attract the benefits of HAP and the respondent is mistaken in this belief.<sup>53</sup>

The text in the booklet referenced above remains in place at the time of writing (Government of Ireland, 2017).

Omissions to complete the HAP paperwork on the part of the landlord have also amounted to less favourable treatment. In most of those cases, there were several requests to complete the form in question often with no reply or follow-up.<sup>54</sup> Some tenants waited to hear back from the respondent for an extensive period, with consequent financial hardship.<sup>55</sup> In a 2019 determination, the WRC found that one unanswered request by the complainant was adequate to establish an omission, they were not obliged to continually pursue the landlord.<sup>56</sup>

The WRC upheld several direct discrimination complaints where the respondents had delayed in filling out their part of the HAP paperwork, but ultimately completed it. In one of those cases, the respondent had initially refused to participate in the HAP scheme but was compliant at the date of the WRC hearing.<sup>57</sup> An 11-month delay in completing an application in a further case was also preceded by an initial

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2018; *Tenant B v A Landlord*, ADJ-00013971, 4 September 2018; *A Tenant v A Property Company*, ADJ-00009705, 19 September 2018; *McConnell v Horan Estates*, ADJ-00024143, 17 December 2019. Exceptionally, the landlord signed the rent supplement form and then issued a notice of termination in, *A Tenant v A Landlord*, ADJ-00013893, 5 March 2019.

52 *Noorzie v Reilly*, ADJ-00019395, 7 May 2019; *A Complainant v A Respondent*, ADJ-00019273, 5 June 2019.

53 *Tenant v Landlord*, 2 September 2019, ADJ-00020669.

54 E.g., *Mullane v La Repubbilca Limited*, ADJ-00012832, 14 January 2019; *Tenant v Landlord*, ADJ-00023545, 7 February 2020.

55 E.g., *Lukovic v Blake*, ADJ-00019245, 29 October 2019: an initial refusal to complete the HAP documentation, and then omission to engage with requests extended over a 12-month period.

56 *A Tenant v A Landlord*, ADJ-00018341, 11 November 2019.

57 *Adebowale v Petchris Management*, 24 September 2019, ADJ-00020953.

refusal.<sup>58</sup> In that instance, the tenancy was due to be terminated and so the letting agent mistakenly understood that it was entitled to decline a HAP application. Further delays were attributed to the agent's heavy workload. In *Pusi v McNally & Handy, Estate Agents*<sup>59</sup>, an issue between HAP Shared Services and the landlord about the designated bank account for rental payments, led to a 13-month delay in processing an application. The final case involved a seven-month delay in completing forms by property managers acting on behalf of a receiver.<sup>60</sup> A missing tax number was not a valid reason for failing to complete the form, since it could have been forwarded to the local authority within five months. The WRC noted that a further delay was "difficult to understand, particularly given the respondent was writing to the complainant about rent arrears."

### *Primary data findings*

The primary research findings also showed that the length of time which landlords delay or refuse to process or accept HAP can be quite considerable, sometimes over several months or longer. This causes tenants difficulties in paying rent and, therefore, exposes them to rent arrears. In some instances, the landlord served termination notices for rent arrears which had resulted from the landlord's refusal to process HAP.

The refusal to process the HAP can also take place verbally, and therefore is difficult to evidence as one survey participant described, "I never missed a single payment. Never caused a single issue. I estimated that I've paid the landlord over €100k since I've been here. He has now refused HAP from me. Verbally though, and refuses to give me an address. So, I've technically no evidence of his refusal". [Respondent 28]

### *Harassment and victimisation*

Both harassment findings issued by the WRC concern the treatment of existing tenants. There was a notable finding of harassment on race *and* housing assistance grounds in 2019.<sup>61</sup> The adjudication officer found that the tone and contents of the landlord's communication changed after the tenant applied for rent supplement. In reply to an email complaining about the behaviour of the respondent landlord's son, the respondent referred to the complainant's family as "street brawlers" and made disapproving comments about how she spent and managed her money. That conduct amounted to harassment on the housing assistance ground. The

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58 *A Complainant v A Respondent*, ADJ-00019273, 5 June 2019.

59 ADJ-00019284, 4 December 2019.

60 *A Tenant v A Property Management Company*, ADJ-00011156, 1 May 2018.

61 *A Tenant v A Landlord*, ADJ-00013893, 5 March 2019.

landlord was also liable for harassment on the race ground, perpetrated by his son. The other finding of harassment on the housing assistance ground concerned the service of a notice of termination following receipt of an ES1 form.<sup>62</sup> The adjudication officer does not explain how the unwanted conduct in question (service of a notice of termination), had the purpose or effect of violating the complainant's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment. The facts as recorded in the determination would also amount to victimisation under section 3(2)(j). Each element of a *prima facie* case of victimisation was made out by the complainant, in the form of a protected act, and less favourable treatment by the respondent as a reaction to that protected act.<sup>63</sup>

The facts of several cases disclose possible victimisation, although it appears such complaints were not referred to the WRC. In one of these, a notice of termination was issued the day after Threshold contacted the respondent landlord informing him *inter alia* of the obligation not to discriminate on the housing assistance ground and that an action would be taken should he not engage with the complainants.<sup>64</sup> A notice of termination was issued in another case following receipt of an ES1 form, with the respondent acknowledging that the ESA notification "may have been a 'trigger'" for the termination of the tenancy.<sup>65</sup> In a further case, the adjudication officer referred to "an attempt to "victimise the Claimant in having him withdraw his equality complaint as a condition to receiving back his deposit", but again, a victimisation complaint was apparently not referred to the WRC.<sup>66</sup>

Neither of the two victimisation complaints referred to the WRC by existing tenants was upheld. One case was straightforward; a victimisation complaint was not sustained because it emerged at the hearing that there was no retaliation by the respondent.<sup>67</sup> In the other, direct discrimination on the housing assistance ground was established but victimisation was not.<sup>68</sup> The factual background was contested, with the complainant asserting that he had unsuccessfully sought signature of rent supplement forms and then HAP forms over several years. Arrears of rent had accumulated, and notices of termination issued on foot of those arrears were upheld by the RTB. The landlord asserted that a request to sign the HAP paperwork was only submitted after the commencement of the RTB proceedings and was an attempt to frustrate that process. The WRC preferred the complainant's evidence and found that multiple refusals to complete the

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62 *A Tenant v A Landlord*, ADJ-00012156, 19 September 2018.

63 *Collins v Champions Public House*, DEC-S2003-071, 15 August 2013.

64 *Tenant A v A Landlord*, ADJ-00014956, 4 September 2018. A separate complaint referred by the complainant's partner was also upheld: *Tenant B v A Landlord*, ADJ-00013971, 4 September 2018.

65 *Erinfolami v Equare*, ADJ-00014215, 25 October 2018. The RTB found that the notice was invalid.

66 *Lukovic v Blake*, ADJ-00019245, 29 October 2019. See also, *Pusi v McNally & Handy, Estate Agents*, ADJ-00019284, 4 December 2019.

67 *Manning v Cotter*, ADJ-00018222, 8 October 2019.

68 *A Tenant v A Landlord*, ADJ-00013079, 6 December 2018.

paperwork amounted to direct discrimination. As for the victimisation, “the complainant submits that upon repeatedly seeking the co-operation of the respondent in respect of the HAP scheme (which the complainant submits amounts to opposing by lawful means an act which is unlawful under the Act) he was served with a termination notice.” The adjudication officer found that the complainant did not establish a prima facie case on the victimisation ground but does not explain why.

The complainant’s argument to the effect that in repeatedly requesting signature of the HAP forms, he had “opposed by lawful means an act which is unlawful under” the ESA, was interesting and novel. Perhaps the WRC did not agree that such actions constituted a protected act.<sup>69</sup> Alternatively, the adjudication officer may have concluded that the third element of a prima facie case was not established, that is, the notices of termination did not amount to less favourable treatment on the ground because notices would have been issued to someone who had not requested signature of the HAP forms but was due instead to the rent arrears that had accumulated. This case perhaps illustrates broader difficulties with the formulation of victimisation as a discriminatory ground under the ESA. There is no comparator requirement under the Racial Equality Directive, that is, the requirement that a complainant show that they were treated in a less favourable manner than another person was or would have been in a similar situation.

The primary research data also revealed cases of retaliatory conduct from landlords against tenants who requested to participate in the HAP scheme. Examples recorded include landlords issuing notices of termination immediately after HAP was requested by the tenant (this happened in 16% of the housing assistance ground cases processed by the tenant support organisation during Q4 2019). Landlords were also cited as having declined to accept HAP upon request and then issued notices of termination on foot of arrears, which had accrued as a direct result of tenants not being able to avail of HAP income support.

### *Multiple-ground cases*

As highlighted above, there were only two successful complaints of discrimination on multiple grounds in the case law analysed for this report. In a 2019 decision, the WRC found that a complainant was subjected to direct discrimination on the housing assistance ground and was also harassed on the housing assistance and race grounds.<sup>70</sup> In that case, a notice of termination was issued two days after the

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69 To fall under Section 3(2)(j)(iv), the unlawful act in question must concern rights protected under the ESA, but it need not have been established by a court or the WRC that the act was unlawful: *Curran v Total Fitness*, DEC-S2004-164, 5 November 2004.

70 *A Tenant v A Landlord*, ADJ-00013893, 5 March 2019.

complainant informed the landlord that she was applying for rent supplement. The respondent had signed and returned the application form immediately and he argued that the notice was issued because of delayed payments of rent. However, the WRC found that this argument was not supported by the facts. It determined that the termination of the tenancy amounted to less favourable treatment on the housing assistance ground given *inter alia* the proximity between the two events. The complainant failed to establish a *prima facie* case of discriminatory treatment on the race ground in relation to the termination of her tenancy.

In the second case, direct discrimination on the race and housing assistance grounds was established where a landlord continually refused to sign HAP forms for a Latvian tenant.<sup>71</sup> The complainant relied on an Irish national comparator, who moved in around the same time and whose HAP form was completed by the respondent. While the respondent provided evidence that it rented properties in the same estate to people of seven different nationalities, none of these appeared to be HAP recipient tenants. On that basis, the WRC concluded that the respondent had not rebutted the inference of discrimination established by the complainant. Notably, this appears to be a finding of intersectional discrimination.

## Factors underpinning discrimination on the housing assistance ground

This sub-section highlights some factors that emerged from the primary data and the case law, which may explain why discrimination occurred. Interviewees pointed to assumptions that persons from low income households are more likely to be 'bad tenants'. As a housing practitioner explained, there is a perception amongst landlords and estate agents that

“if you are on a low income you are a sc\*mbag- and the landlord doesn't want you. And certainly, does not want a lone parent with a few kids – the view is there is something wrong with them.”

There can be a perceived stigma attached to those in receipt of housing benefits that they are not 'good tenants' and a belief that “those in need of housing supports are in some way less reliable, trustworthy or desirable” (Estate Agent Interviewee).

There was also an indication that landlords perceived HAP to have bureaucratic

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<sup>71</sup> *Enners v McCarthy*, ADJ-00020413, 23 September 2019.

or administrative challenges for landlords, difficulties of payment of rent, or other commercial risk issues. Some landlords may be concerned with meeting the requirements to undertake the HAP Scheme such as tax compliance, property registration with the RTB, and meeting certain minimum standards. HAP rent can also be lower than the market rent, as it is within set limits. This was also identified across several respondents in WRC cases, in seeking to explain or justify their conduct<sup>72</sup>, alluded to being 'locked into' long-term arrangements (sometimes it was argued that the property would be required by family members or themselves at a future date)<sup>73</sup>, others expressed concerns about changes to the rental agreement and rent being paid on time<sup>74</sup>, and taxation implications such as the requirement to have a tax clearance certificate.<sup>75</sup> On occasion, landlords asserted that the decision not to participate in the HAP scheme was made following advice received from lawyers<sup>76</sup> or accountants.<sup>77</sup> Landlords also highlighted the challenge that local authorities pay HAP rent in arrears - at the end of the month, unlike regular rent where the payment is in advance - and other delays in the processing of payments. Indeed, all of these issues can undermine the scheme overall and result in low uptake of prospective landlords. The landlord's representative pointed out that this makes landlords

"afraid to engage with HAP as they could be stuck with a non-paying tenant".

This is "a financial and commercial discrimination", as an estate agent outlined,

"landlords are not looking at the people - but as HAP recipients or not. They are not judging them for who they are but where their rent is being paid from" (Estate Agent Interviewee).

Both of these issues merit further research.

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72 As might be expected, respondents at the WRC have not admitted that class-related bias may have underpinned the discriminatory conduct. On occasion the evidence presented by complainants refers to comments made by landlords which suggests that such prejudice played a role in their treatment of the tenants. See e.g. *A Tenant v A Landlord*, ADJ-00013893, 5 March 2019; *O'Fayoumi v Walsh*, ADJ-00012771, 26 April 2019.

73 *Erinfolami v Eguare*, ADJ-00014215, 25 October 2018; *A Tenant v A Landlord*, ADJ-00015202, 3 December 2018; *Dziurbajko v Daygrove Properties Ltd*, ADJ-00017106, 12 June 2019; *Tenant v Landlord*, ADJ-00023545, 7 February 2020; *A Complainant v A Respondent*, ADJ-00019273, 5 June 2019.

74 *Noorzie v Reilly*, ADJ-00019395, 7 May 2019.

75 *Tenant A v A Landlord*, ADJ-00014956, 4 September 2018. A separate complaint referred by the complainant's partner was also upheld: *Tenant B v A Landlord*, ADJ-00013971, 4 September 2018.

76 *A Tenant v A Landlady*, ADJ-00009225, 2 August 2018.

77 *Tenant A v A Landlord*, ADJ-00014956, 4 September 2018; *Carr v Paul and Mary McNeill*, ADJ-00017356, 23 September 2019.

## Impact of discrimination

A broader understanding of the nature of discrimination on the housing assistance ground is aided by an analysis of the impact of discrimination on those directly affected. The survey data found that those affected by housing assistance discrimination reported a very negative impact of discrimination on their wellbeing and mental health, with some becoming homeless as a result. Over half of the survey participants said they were affected by anxiety or stress related to housing assistance discrimination, with some linking the experience to more severe mental health issues such as depression. A third of participants said they were affected by a sense of worthlessness and being belittled as a result of the discrimination. Words and phrases which demonstrate the feelings cited in the surveys included "humiliation", "shame", "upset", "stress", "insecurity", "a sense of worthlessness", and "being degraded".<sup>78</sup>

Homelessness, living in unstable or overcrowded accommodation, or housing precariousness, can lead to adversities such as moving away from support networks, interruptions to work or education, and overall can be highly disruptive for individuals and families particularly if precariousness in housing continues over time. Half of the survey participants (46%) reported that they became, or faced the threat of, homelessness as a result of the discrimination. 18% were directly made homeless by being evicted or becoming homeless due to not being able to find a landlord that would accept HAP/RAS/RS. The unequal power dynamic between tenant and landlord also emerged as a theme with respondents describing feeling "powerless", "despondent" and as having "no control". Along with demonstrating the destructive nature of housing assistance discrimination, these findings point to the impact of discrimination itself being a barrier to accessing justice, as discussed in Section 4.3.4.

One survey respondent described, for example how she received a notice of termination due to her landlord selling the property and could not find a landlord or an estate agent that would accept HAP:

"I'm just worn out and feel hopeless, I just cannot find a home that's willing to accept HAP for me and my son" [Respondent 10].

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<sup>78</sup> Detailed respondent replies are outlined in Appendix 3. For example, one respondent explained that they now suffer anxiety as a result of the discrimination: "*I find it hard to now speak with landlords due to my anxiety and fear of rejection because I am homeless ...I know it is him (the landlord) in the wrong but I feel constantly anxious*" [Respondent 32].

# Section 4

## **Access to Justice Barriers**

## Introduction

This section discusses the barriers in access to justice on the housing assistance ground identified from the research, which is analysed and presented using the schema developed by the FRA (2012). As outlined in the introduction to this report, the categories proposed by FRA are *structures, procedures, and support* and this section is structured accordingly.

## Structures

### General

The FRA (2012: 7) defines 'structures' as the format of equality legislation and complaints mechanisms, as well as geographical proximity to complaint mechanisms. As a quasi-judicial investigative forum, the WRC provides complainants with a relatively accessible means of pursuing discrimination complaints. The fact that no fees are payable and that complainants may be represented by anyone they authorise, are significant factors in supporting access to justice. Moreover, respondents and interviewees reported no difficulties of the type associated with 'geographical distance' by the FRA (FRA, 2012: Ch. 2.2). The WRC holds hearings in several locations across the country (WRC, 2019), and advice bodies such as the Citizen's Information Service and Threshold also have regional offices. As noted above, the ground has been invoked before the WRC frequently, relative to the other discriminatory grounds (Section 1.3)

However, several factors were identified that militate against this apparent ease of access to the redress system. Some of the barriers to access to justice identified by the FRA (2012) appear to be heightened for people seeking a remedy under the ESA in general. The complexity of the legislation is one such factor. Prospective complainants rely heavily on the legal advice and assistance services provided by NGOs, as detailed in Section 4.3. While bodies such as IHREC (2020)<sup>79</sup> and Community Law and Mediation (2021) have developed guides to the ESA, the process for submission of online forms which might be particularly challenging for those who have a low digital literacy. Moreover, the single complaint form is unduly complex for equal status complaints, in that it contains unnecessary fields such as details about the complainant's employment. The FRA recommends that measures should be put in place that makes it easier for complainants to determine which institution they need to approach. Several interviewees highlighted that the WRC's name doesn't reflect its remit over housing issues and

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79 IHREC's 'Your Rights' publication on the ESA (2020) is available in multiple languages: <https://www.ihrec.ie/publications/>.

is confusing for some people affected by discrimination.

Further issues pertaining to structures arose in the research, which apply specifically to the housing assistance ground and the PRS. These are now outlined.

### *The interface between RTB and WRC*

The Residential Tenancies Board (RTB) deals with most disputes between landlords and tenants, while jurisdiction over discrimination complaints lies solely with the WRC. Yet there is no alignment between the mechanisms for addressing general tenancy disputes with the system for determining discrimination law complaints.<sup>80</sup> This has impact in practice. For example, significant problems arise where rent arrears have accrued because of putative discrimination. The RTB can proceed to determine on notices of termination served on foot of arrears, even where an ES1 notification has been sent or a complaint is pending before the WRC. The RTB explains,

“it is important for tenants to be aware of this along with the obligation to pay rent even when there is an issue in dispute and, where possible, to attempt to bridge the gap until the WRC matter is processed in full” (Haplin, 2019).

As a community law centre interviewee pointed out, a successful complaint on the housing assistance ground is not a defence to a notice of termination.

There are contradictory WRC decisions on the interface between RTB and WRC proceedings. In the first, the WRC rejected the proposition that because similar subject matter had been dealt with before the RTB, the WRC claim was ‘res judicata’.<sup>81</sup> The adjudication officer pointed out, correctly, that separate causes of action are provided for under the Residential Tenancies Act 2004, and the ESA. She underlined that section 196(b) of the 2004 Act provides that nothing in the Act operates to prejudice the powers to award redress for prohibited conduct under the ESA. However, in a subsequent case the WRC declined jurisdiction on the basis that an ‘identical claim’ had been determined by the RTB.<sup>82</sup> The basis for that finding is unclear, since the complainant was informed by the RTB that his discrimination complaint should be pursued instead before the WRC. The principles set out in the first decision were applied in a more recent case.<sup>83</sup> This is the correct application of the law.

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80 Section 196(b) of the Residential Tenancies Act 2004, provides that nothing in the Act “authorises conduct prohibited by section 6 of the Equal Status Act 2000.” We could not ascertain whether this provision is invoked or in what manner before the RTB. A search of the RTB’s database did not yield any reference to that provision: <https://www.rtb.ie/dispute-case-outcomes>.

81 *O’Donohue v Rowlands*, ADJ-00009960, 4 January 2019.

82 *Vaikasas v O’Keeffe*, ADJ-00016558, 6 February 2019.

83 *Lukovic v Blake*, ADJ-00019245, 29 October 2019.

## Landlord's address

Further challenges arise in pursuing cases of discrimination on the housing assistance ground because of difficulties in identifying the landlord's address, which is sometimes withheld by estate agents according to a stakeholder interviewee. An address is required in order to send an ES1 notification form within the two-month timeframe. The WRC may accept that notification submitted to a landlord via a letting or estate agent is valid. But it is not clear what the position is where correspondence is not sent on. Lack of a landlord's address also affects enforcement of WRC case outcomes. A legal representative describes this issue:

"I've had three cases where the landlord didn't turn up – it only happened in HAP cases. In all the cases the WRC was satisfied it had notified the landlord. So, if a landlord doesn't turn up when properly notified - the adjudication officer will run the case and hear our evidence and a decision - such as an award for €5,000 is made. But the difficulty is you only have a partial name of a landlord and the rental address. They have 56 days from the WRC decision to pay the money – if they don't pay it you take enforcement proceedings – which means going to the district court to get an enforcement order and sending that to the local sheriff. The sheriff goes out to the address – if it's only a rental address they can't do anything – they can't seize a tenant's property. So, if they don't have landlord's full name or home address it can be difficult to enforce a WRC decision against them".

## Status of licensees

Clarification is required as to whether licensees are protected by the housing assistance ground.<sup>84</sup> In a 2019 decision, the WRC suggests that persons occupying premises under certain form of license are not protected.<sup>85</sup> However, the precise basis for that finding is unclear since the applicable ESA provisions do not appear to apply exclusively to tenancies. The operative provisions, section 6(1)(c) and section 3(3B) do not specify what form of interests are covered by the term 'providing accommodation'.<sup>86</sup> Nor is the term defined elsewhere in the ESA. The adjudication officer in a case about a mobile home occupied under a 'loose arrangement', noted that his function was "to determine whether or not discriminatory acts

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84 In a complaint concerning discrimination on the race ground, the WRC found that section 6 applied to a licensee, albeit the finding centred on the phrase 'other interest in premises' under section 6(1)(b) and the housing assistance ground applies only to section 6(1)(c): *A Licensee v A Licensor*, ADJ-00005303, 31 August 2017.

85 *Manning v Cotter*, ADJ-00018222, 8 October 2019.

86 A complaint concerning the provision of holiday accommodation at a caravan park was determined under section 6(1)(c) in, *McDonagh v O'Keefe, Ocean View Park*, DEC-S2005-161/164, 29 October 2005. Hotel and other overnight accommodation is usually dealt with under section 5: *Martin v Esplanade Hotel*, DEC-S2010-034, 6 July 2010, at para 5.2.

occurred irrespective of the actual legal definition of an “accommodation”<sup>87</sup>. As a remedial social statute, the ESA should be interpreted ‘widely and liberally’.<sup>88</sup> That interpretive approach suggests that persons living in accommodation with the knowledge or permission of the owner and paying ‘rent’, should be covered by its terms, as are persons seeking access to accommodation.

## Procedures

### *Introduction*

This section addresses the second cluster of access to justice issues identified as significant by the FRA (2012): ‘procedures’, which encompasses timely resolution of disputes; effective remedy or redress; efficiency and effectiveness of procedures; and ‘collective dimensions’, such as broadened legal standing.

### *Fairness: Efficiency and Effectiveness of Procedures*

#### *‘Equality of arms’*

Equality of arms reflects the resources at the disposal of the complainant and the defendant (FRA, 2012: 8). Power imbalances as between landlords/estate agents and tenants were raised consistently as a formidable access to justice barrier by the project interviewees and survey participants. Interviewees raised no issues about the conduct of WRC proceedings but highlighted that starting the process and ‘staying the course’ required expert legal advice and considerable emotional support (Section 4.4).

According to a legal expert interviewee, the prospect of an appeal to the Circuit Court can undermine the effectiveness of the WRC process because of the costs and time involved. Housing assistance ground complainants are, by definition, in need of income supports, and so are liable to be especially affected by the costs associated with accessing legal services. Yet civil legal aid is unavailable, even for Circuit Court appeals. In general, landlords and estate agents have greater capacity to engage in litigation.

The majority of housing assistance ground complainants in the case sample, an

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87 *A Citizen v A Property Owner*, ADJ-00019824, 28 November 2019, at para 2.3.

88 Per Ms Justice O’Malley in, *G v Department of Social Protection* [2015] IEHC 419, at para 161.

estimated 67%, were unrepresented before the WRC. NGOs play a salient role in supporting people to navigate the complexities of discrimination law. In addition to representing people at the WRC (11% of complainants in the sample), they provide a range of advocacy services, which have enabled unrepresented complainants to pursue claims and operate in a context of limited and often unpredictable funding and resources. A legal expert referred to an ongoing case in which they managed to source pro bono legal representation for a tenant who could not otherwise afford it. FLAC supported a complainant, who was homeless at the time of his successful WRC complaint, in defending an appeal. Significantly, the judge reduced the WRC award from €2,000 to €1,000 but awarded costs against the landlord (FLAC, 2019).

### ***Burden of proof***

The term 'burden of proof' refers to who bears the legal burden of proving a case. FRA notes a shift that has taken place under EU law, "under which complainants no longer need to prove that discrimination actually took place, but only that it might plausibly have taken place while the opposing side must prove that it did not take place" (FRA, 2012:8; Ch. 3.2). Research participants underlined that there are significant problems in garnering evidence that would meet the threshold required to establish a prima facie case for access to accommodation complaints.

Over a third (36%) of survey participants explained that they did not take action because they could not prove the discrimination. According to a community law centre advisor,

"our experience is that few landlords explicitly state that they are not making an offer of a tenancy because the prospective tenant is in receipt of HAP. It can therefore be hard to show that there has been...discrimination".

As discussed above, there is a shared perception amongst survey participants and interviewees that estate agents and landlords are effectively 'getting around' the legislation, by not replying to prospective tenants, or by failing to supply reasons why their application was unsuccessful. The competitive marketplace also allows for landlords to choose from a very broad pool of applicants and there is no transparency as to how particular applicants are selected. A housing advisor summed up the position as follows: "when 50 people are going for a viewing for a property...how do you show you are discriminated against and not just that others are selected?".

Challenges in meeting the burden of proof can also arise in relation to existing tenancies. A community law centre interviewee pointed out that the primary difficulty lies in establishing a "clear refusal" to accept HAP or rent supplement since ordinarily tenants encounter "fobbing off and delays". Delays or omissions in completing paperwork have constituted less favourable treatment in several WRC cases. It is important to highlight that in a WRC case the complainant's testimony about the content of a phone call was accepted as prima facie evidence

of discrimination in circumstances where the respondent said she could not recall the conversation.<sup>89</sup>

In general, the adjudication officers seek to apply principles on the shifting burden of proof whilst also requiring respondents to substantiate claims that applications were declined for non-discriminatory reasons.

### ***Fear of Retaliation***

The research findings suggest that fear of retaliation prevents many tenants from even raising discrimination with landlords. They can be very reluctant to send an ES1 form because they believe it may trigger an eviction. As a housing advisor explained:

“the scarcity of accommodation accentuates tenants’ fear of being served with a notice to quit. As a result, tenants prefer to keep their head under the parapet than raise an issue with the landlord. They don’t claim HAP even if they are eligible as they don’t want to upset the landlord”.

A third of survey participants reported they did not seek redress because they were concerned about possible retaliatory conduct from the landlord or estate agent. This, combined with the case law analysis, suggests that the formal prohibition of such conduct is not effective. Whereas victimisation in the form of an eviction (or other adverse treatment) may be challenged at the WRC, the provision is not invoked to the extent warranted (Section 3.4.3) and monetary redress cannot reverse the effect of an eviction. Moreover, unlike other jurisdictions (Lonegrass, 2015), Irish residential tenancies legislation does not afford specific protection against retaliatory evictions. According to Byrne and McArdle (2020: 58), the provision on penalisation “does not appear to be employed in practice”.<sup>90</sup>

In sum, protection from discrimination on the housing assistance ground under the ESA is not always adequate or effective in practice: fear of eviction in a competitive housing market is likely to dissuade many from accessing justice.

### ***Failure to Notify***

Complainants who do decide to take action often encounter difficulties in complying with section 21(2) of the ESA which requires a complainant to initiate a complaint by notifying the respondent in writing, within two months of the occurrence of the incident, of the nature of the allegation and of their intention

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89 *No title*, ADJ-00018945, 10 September 2019.

90 Section 14, Residential Tenancies Act 2004.

to seek redress under the ESA.<sup>91</sup> This is evidenced by the fact that a substantial number of complaints are dismissed annually at hearing stage for failure to comply (Walsh, 2019: 77-78; Walsh 2020: 78). Stakeholders underlined that the two-month time limit impedes access to justice, since it requires people experiencing housing insecurity to obtain legal advice, complete and send a form within a very short time frame. Relying on the discretion to extend the time limit to four months for reasonable cause or to dispense with the requirement in exceptional circumstances at hearing stage is unsatisfactory. No similar notification requirement is required under the EEA, or under either the Racial Equality Directive or the Gender Goods and Services Directives (which the ESA seeks to transpose).

The WRC has considered the requirement in several housing assistance ground cases. In *Mullane v La Repubblica Limited*<sup>92</sup>, it held that notification was validly served on the respondent landlord via a letting agent. Although the relationship between the landlord and the letting agent was subsequently terminated, correspondence about the ES1 had been forwarded to the landlord. Five complaints about access to accommodation, four of which concerned the same set of facts, were dismissed for failure to comply with the notification requirement. In *Tunney v McMahon*<sup>93</sup> the complainant was unaware of the requirement and so had not notified the respondent nor sought an extension. The other four interrelated complaints concerned members of the same family.<sup>94</sup> A tenancy arranged with a letting agency “fell through” when it emerged that the landlord would not accept a tenancy for one family member who was in receipt of social welfare. Significantly, the complainant said that the delay in sending the notification was attributable to a fear that she would be victimised if she did so; the letting agent had threatened retaliation if a complaint was made. Despite these serious allegations, the substance of the complaint wasn’t heard because the extension request was submitted six months after the incident. The option of disapplying the notification required wasn’t alluded to by the WRC.

Five complaints about existing tenancies were also dismissed for failure to notify in accordance with section 21(2). In a 2018 case, the adjudication officer declined to extend the notification period from two to four months for reasonable cause.

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91 Under section 21(3) of the ESA, the time limit for notification can be extended to a maximum of four months for ‘reasonable cause’ and in exceptional circumstances the WRC may disapply the notification requirement. The complainant must seek the extension of time and provide reasons that both explain and justify the delay. The power to waive the notification requirement may only be exercised where it is fair and reasonable in all the circumstances of the case. In particular, the Director must have regard to the extent to which the respondent is, or is likely to be, aware of the circumstances raised in the complaint and the risk of any prejudice to the respondent’s ability to deal with the complaint.

92 ADJ-00012832, 14 January 2019.

93 ADJ-00016813, 8 February 2019.

94 *Applicant A v A Property Letting Company*, ADJ-00005547, 27 July 2017; *Applicant B v A Property Letting Company*, ADJ-00005546, 27 July 2017; *Applicant C v A Property Letting Company*, ADJ-00005989, 27 July 2017; *Applicant D v A Property Letting Company*, ADJ-00005541, 27 July 2017.

<sup>95</sup> Although the complainant was in a vulnerable position, the decision seemed to rest on fact that she had legal representation. Two complaints involving existing tenants were dismissed for failure to comply in 2019. In the first, the WRC found that the complainant could not rely on the notification sent to the letting agent by her partner but was required to submit a separate notification.<sup>96</sup> Both parties in the second case were unrepresented.<sup>97</sup> The complainant submitted the ES1 form two weeks after her complaint was lodged with WRC. While the adjudication officer explained the circumstances in which the notification requirement could be relaxed under section 21, the complainant did not make any further submissions for an extension of time or a direction to dispense with the notification. A further complaint was dismissed in 2020 for failure to notify and submit the complaint within the statutory time limits.<sup>98</sup>

In one case, the WRC waived the notification requirement.<sup>99</sup> The parties were previously involved in RTB proceedings. The adjudication officer was satisfied that exceptional circumstances applied and that the respondent was on notice of the complaint but doesn't elaborate further. In *O'Donohue v Rowlands*<sup>100</sup> the notification requirement was disapplied in relation to elements of the complaint that arose following the service of an ES1 form. The WRC noted that the complainant was unrepresented at the material time and couldn't afford legal advice; her rent supplement had been withdrawn on four occasions causing difficulties in paying rent and the burden of attempting to resolve matters with the Department and before the RTB. Given the nature of the dispute, the WRC was satisfied that the respondent was "very much aware" of the circumstances raised in the complaint and his ability to deal with it was not prejudiced.

In an early ESA case, an equality officer outlined that notification serves a dual purpose:

Firstly, it is designed to alert the respondent at an early stage to the nature of the allegation and the fact that a complaint is being considered against them and, secondly, it affords the respondent the opportunity of communicating directly with the complainant with a view to resolving the issue between themselves without recourse to the Equality Tribunal.<sup>101</sup>

The primary research findings suggest there is some evidence that notification

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95 *A Tenant v A Property Asset Management Company*, ADJ-00013204, 7 August 2018.

96 *Gasiorowska v Daygrove Properties Ltd.*, ADJ-00017107, 13 June 2019.

97 *A Tenant v A Landlord*, ADJ-00017228, 8 October 2019.

98 *Ullah v Cumberton*, ADJ-00026087, 24 March 2020.

99 *A Complainant v A Respondent*, ADJ-00008200, 1 May 2018.

100 ADJ-00009960, 4 January 2019, applying *Ennis v Navan O'Mahony's Football and Hurling Club*, DEC-S2010-031, 16 June 2010.

101 *O'Brien v Ruari's Bar, Tralee*, DEC-S2007-039, 30 March 2007.

can lead to the resolution of a potential complaint, provided the complainant is supported by an experienced advocate. However, this may be outweighed by the findings which suggest that notification triggers victimisation and is perceived by tenants as an act that could result in the loss of their homes.

### ***Time Limits***

No access to justice concerns emerged in the case law dismissing complaints for failure to comply with the six-month time limit.<sup>102</sup> The substance of one complaint concerning a former tenancy was not addressed for failure to refer within six months.<sup>103</sup> The complainant was unrepresented. In finding that she could not demonstrate 'reasonable cause' warranting an extension of time, the WRC took account of the fact that she had received advice from FLAC.

### ***Anonymity***

Following a Supreme Court judgment, the ESA was amended in 2021 to provide that WRC investigations shall be held in public.<sup>104</sup> In 'special circumstances', the WRC may determine that an investigation (or part thereof) should be held 'otherwise than in public'. The WRC has published a guidance note, which underlines that the parties to a case may request that the proceedings be conducted in private or that names be anonymised in the published decision, due to the existence of 'special circumstances' (Workplace Relations Commission, 2021b). However, the final decision will rest with the adjudication officer. The note provides an illustrative list of such circumstances including, cases involving a minor, a disability or medical condition that a party does not want to be revealed, sexual harassment or other 'sensitive issues', or where a real risk of harm might result from publicity. Because the new provision came into effect at the end of July 2021<sup>105</sup>, its impact cannot yet be assessed. The Minister for Enterprise, Trade and Employment is obliged to commence a review of the operation of the amendment

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102 Four access to accommodation complaints were referred outside the six-month time limit: *Alamazani v Keegan*, ADJ-00010801, 2 July 2018 (period for submitting complaint was not extended because the complainant had submitted numerous other complaints during time period in question); *A Prospective Tenant v An Estate Agent*, ADJ-00005572, 11 July 2018 (complainant did not seek an extension of time); *Alamazani v Bernadette Gibbons*, ADJ-00014160, 9 January 2019 and *Alamazani v Martin Gibbons*, ADJ-00014175, 9 January 2019 (an illness certificate only covered part of the period in question and the complainant was unable to explain why he was able to participate in other WRC proceedings and lodge complaints at the material time).

103 *A Former Tenant v A Landlord*, ADJ-00018084, 28 June 2019.

104 Section 12(a), Workplace Relations (Miscellaneous Provisions) Act 2021, amending section 25 of the ESA.

105 Workplace Relations (Miscellaneous Provisions) Act 2021 (Commencement) Order 2021 (S.I. No. 397 of 2021).

by end July 2022, and subsequently to report to the Oireachtas.<sup>106</sup>

Prior to this change, WRC hearings were conducted in private and adjudication officers frequently exercised their discretion to anonymise one or both parties in a case (Walsh, 2019: 76).<sup>107</sup> In 2018, for example, the names of both parties were anonymised in 19 of the 27 housing assistance ground cases that were heard by the WRC.<sup>108</sup>

Anonymity poses a dilemma from an access to justice perspective. As discussed in this report, some survey participants were reticent about lodging complaints because of concerns that if their names were published, they might be victimised (Section 4.3.2). Anonymity can thus afford prospective complainants a greater sense of security. From a policy perspective, 'naming and shaming' discriminators can advance the goal of securing a culture of compliance with the law. Following the change outlined above, anonymity will be granted in fewer cases, which may exacerbate concerns about victimisation. Bodies that advise complainants should ensure that unrepresented complainants know they can make submissions on the matter to the WRC. Such submissions could request the WRC to use its discretion to anonymise the names of one party only.<sup>109</sup>

### *Timely resolution of complaints*

According to the FRA (2012:44)

“[p]rocedures that take too long or uncertainty about the length of complaints’ procedures discourage potential complainants from filing.”

To that end, steps should be taken to facilitate faster procedures and adequate resources should be put in place to avoid undue delays and backlogs. The length of time involved in the WRC process was highlighted throughout the research as a barrier to accessing justice for existing tenants.<sup>110</sup> The core issue is the accumulating financial impact of discriminatory refusals or omissions to accept HAP or RS, which can lead to rent arrears. As noted above, notices of termination can be upheld by the RTB in such circumstances. A facility for interim orders or

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106 Section 13, Workplace Relations (Miscellaneous Provisions) Act 2021.

107 The previous process was explained in some detail in the housing assistance ground case of *Lukovic v Blake*, ADJ-00019245, 29 October 2019.

108 This figure does not include complaints that were dismissed because the complainant did not attend the WRC hearing.

109 In at least two decisions issued in 2018, the complainants’ names were anonymised, but not that of the respondent: *3 Complainants, Mr. M, Ms. K and G (a minor) v Multiplex Cinemas Limited*, DEC-S2018-012, 15 May 2018; *Complainant v Kildare Sports and Leisure Facilities Limited*, ADJ-00007882, 27 April 2018.

110 In 2019, the median time from receipt of a complaint to a decision was eight months for WRC hearings under all statutes within its remit (WRC, 2019: 24). Separate data is not available on complaints under the ESA.

expedited WRC hearings in urgent cases, would enhance access to justice for tenants who face the prospect of a discriminatory eviction.

## *Effective remedy or redress*

Enhancing access to justice requires equipping redress forums and equality bodies with a range of tools that make sanctions and enforcement effective, including dissuasive sanctions, proportionate compensation and powers to make relevant orders to improve the situation of the claimant and others in similar circumstances (FRA, 2012). The redress system for ESA complaints has many positive features. The WRC issues legal binding decisions and has the power to award compensation and/or direct respondents to take specified courses of action. Compensation of up to €15,000 in total can be ordered, even in cases of multiple-ground discrimination or breaches of several provisions. Exceptionally, a finding of victimisation can result in a separate compensation order.<sup>111</sup> In line with FRA recommendations, the availability of non-financial sanctions as redress enables remedies to have an impact beyond the parties to the case, since they may entail changes to respondents' practices and procedures (Lordache and Ionescu, 2014: 19; Milieu, 2011: 61). However, the research findings suggest that the form of redress available does not meet the goals of many housing assistance complainants, which is principally to secure a home or retain their current home, and the compensation limits may be inadequate to repair the harm encountered in this context.

Survey participants and interviewees stressed that the priority of people who encounter discrimination in accessing accommodation is securing a home. For that reason, compensation is not an appropriate remedy. A stakeholder interviewee pointed out that "the WRC cannot oblige a landlord to retrospectively offer the house to the prospective tenant."

Several survey respondents reported that they didn't seek redress because winning a case wouldn't have made a difference. Interviewees considered that redress has a more positive impact for sitting tenants, but that in many instances the level of compensation available does not reflect the adverse impact of discrimination.

The average compensation award across all years for discrimination in access to accommodation is €2,125. An order for a specified course of action, in the form of staff training, was issued in one of the 16 successful complaints (6%). The

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111 Section 27(2)-(3), ESA. The ESA provides that compensation may be awarded for 'the effects of the prohibited conduct concerned'. No further statutory guidance is provided as to the factors that should be considered in deciding on the appropriate form of redress or the level of compensation. For cases with an EU law dimension (those on the gender, race, and Traveller community grounds), account must be taken of the requirement set out in the equality directives that sanctions be effective, proportionate, and dissuasive (Chopin and Germaine, 2021: 94-98).

remedies granted in cases concerning existing tenancies tend to be more robust. Across the analysed case sample, €6,213 (N39) was the average compensation award for sitting tenants. An order for a specified course of action was issued in eight of the 39 successful cases (20.5%). Since the WRC does not publish relevant data, it has not been possible to compare these figures with average awards for other grounds or fields.

There are no discernible patterns in the level of compensation awarded in the access cases, save that adjudication officers often refer to the adverse living conditions of complainants.<sup>112</sup> In cases involving existing tenants, adjudication officers frequently refer to the financial loss incurred by complainants in the form of HAP payments that would have accrued absent discrimination. This is a distinctive feature of case law on the housing assistance ground. Compensation levels tend to be higher where tenants were evicted or threatened with eviction, with an average award of €7,033 across the 15 such cases identified. An award of €12,000 resulted where a letting agent issued a tenant with a notice of termination shortly after the complainant had requested signature of the HAP forms.<sup>113</sup> He explained that the compensation was designed to reflect the serious nature of the discrimination, noting that the loss of a family's home could, depending on the facts, have more serious consequences than the termination of employment. Both successful cases on the housing assistance and race grounds, attracted compensation awards of €12,000.<sup>114</sup> This may suggest that discrimination on multiple grounds results in higher awards, but given the numbers involved no conclusions as such can be drawn.

Ireland is out of sync with the majority of EU countries in setting a ceiling on compensation (Chopin and Germaine, 2021: 96; Ionescu and Lordache, 2014: 14). In three interrelated cases, the adjudication officer commented that she was "constrained" by that limit and that it did not "reflect the seriousness of the discrimination". The complainants had incurred financial losses of between €12,253 and €13,977 and in assessing compensation within the set scale, the officer noted that she had "to nominally allow for a theoretically more serious situation such as where eviction has resulted."<sup>115</sup>

Adjudication officers used their power to direct courses of action relatively infrequently in the case sample analysed. Such orders were issued in nine of the 55 successful housing assistance ground complaints (16%), three of which were

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112 See e.g. *A Complainant v A Respondent*, ADJ-00012072, 24 July 2018; *A Tenant v A Landlord*, ADJ-00015004, 5 December 2018.

113 *A Tenant v A Property Company*, ADJ-00009705, 19 September 2018.

114 *A Tenant v A Landlord*, ADJ-00013893, 5 March 2019 (direct discrimination on the housing assistance ground and harassment on the housing assistance and race grounds); *Enners v McCarthy*, ADJ-00020413, 23 September 2019 (direct discrimination on the housing assistance and race grounds).

115 *Tenant A v A Landlord*, ADJ-00004100, 9 August 2017; *Tenant B v A Landlord*, ADJ-00004101, 9 August 2017; *Tenant C v A Landlord*, ADJ-00004705, 9 August 2017.

directed at the same respondent. Two types of action were ordered across those cases: the provision of training on the ESA to staff (three cases); and the taking of steps to enable the complainant to take part in the HAP scheme and to accept HAP payments from the relevant local authority (six cases). As Fennelly (2012: 29) notes, this remedial power is “not without its limits” and some uncertainty remains about the extent to which the WRC can fashion orders which go beyond the facts of the specific case before it. In cases concerning private rental accommodation on the other nine grounds, respondents have been directed to:

- » “immediately review all customer service practices and ensure that they are fully compliant with the obligations set out in the Equal Status Acts.”<sup>116</sup>
- » “formulate guidelines for staff and letting clients on their statutory obligation not to discriminate on the protected grounds in providing accommodation...”<sup>117</sup>
- » review “policies and procedures to formulate guidelines for its staff and customers setting out how it complies with its statutory obligation not to discriminate. This should also set out any objective reasons that may be taken into account when considering the suitability of properties for letting purposes.”<sup>118</sup>
- » “implement a system which can afford reasonable accommodation to disabled clients in terms of Section 4 of the Equal Status Act 2000.”<sup>119</sup>

Such orders go beyond rectifying the situation of an individual complainant, they are formulated in a manner that has “a radiating or more systematic effect in combating discriminatory practices” (Fennelly, 2012: 28). Greater use of remedies by the WRC could play a role in enhancing the impact of the redress system.

### *‘Collective Dimensions’*

‘Collective dimensions’ refers to procedures that enable collective redress or complaints. It includes multiple processes that enable discrimination to be challenged other than by means of an individual complaint, such as representative actions, *actio popularis* and class actions (Lahuerta, 2018: 787-788). These measures can reduce the individual stigma and effort of bringing a case (FRA, 2012:

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116 *Ward v Paddy Keane, Auctioneer and Valuer*, DEC-S2008-119, 23 December 2008.

117 *De Burca and Fernandez v Home Locators*, DEC-S2004-030-031, 12 March 2004.

118 *Markusson v Vincent Finnegan Ltd.*, DEC-S2014-005, 11 June 2014.

119 *Cantwell v Giles & Co. Tralee*, DEC-S2007-010, 7 February 2007.

8). This facet of Irish anti-discrimination law is under-developed. The Irish Human Rights and Equality Commission has the power to take a case in its own name that relates to discrimination directed against an individual.<sup>120</sup> However, this facility is not available to NGOs.

From this research, it was apparent that because of the narrow rules on locus standi, organisations such as Threshold were limited in their ability to support those affected in accessing justice. As highlighted above, in several cases of putative discrimination, the person's mental health and overall wellbeing was severely affected (Section 3.6). Such individuals had no capacity to pursue a discrimination case. Fear of victimisation also prevents people from referring complaints (Sections 4.3.2; 4.4.5). Given these conditions, access to justice would be enhanced if organisations were enabled to take a case on behalf of an individual. The fact that associations or organisations cannot initiate a case "considerably diminishes the role they could play in ensuring an effective access to justice" (Milieu, 2011: 16).

## Support

### *Introduction*

'Support' refers to access to legal advice and representation, the provision of emotional, personal, and moral support, awareness of rights, the creation of a 'fundamental rights culture', and accommodation of diversity (FRA, 2012: 8). These themes are now discussed in relation to the findings of the case law and primary research data.

### *Legal advice and assistance*

The FRA underlines the importance of the provision of high-quality legal advice and assistance to secure justice under discrimination law (FRA, 2012). No fees are payable under the WRC system and it is aimed at enabling people to represent

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120 Section 23 of the ESA enables IHREC to refer a complaint to the WRC, where it appears to the Commission that discrimination or victimisation has occurred in relation to a particular person who has not made a reference to the WRC and that it is not reasonable to expect that person to make such a reference. The legislation does not specify whether the consent of persons affected by the purported discrimination must be obtained by IHREC. Any amendment to section 23 should clarify that the consent of the person affected is required and set out other criteria that must be satisfied for an organisation to establish locus standi. In several other European countries legal standing has been extended to organisations that fulfil certain requirements, such as a certain number of years of existence and/or explicit mention of an anti-discrimination mandate in their statutes (Chopin and Germaine, 2021: 81-83).

themselves. But the complexity of discrimination law and the relative resources at the disposal of the complainant and respondent, mean that access to legal advice is imperative. Since housing assistance ground complainants are, by definition, in need of income supports, they are liable to be especially affected by the costs associated with accessing legal services. A legal expert interviewee estimated that representation by a private solicitor would cost “€500 at a minimum”. Several stakeholders argued, as has FLAC (2021b), that the exclusion of WRC proceedings from the civil legal aid scheme amounts to an access to justice barrier. It might be counter-argued that the Irish Human Rights and Equality Commission Act 2014 put in place a parallel mechanism for discrimination law cases. However, while it empowers IHREC to provide legal assistance to prospective complainants, it does so in a limited number of cases in accordance with the applicable statutory criteria (Walsh, 2020: 89-91).

The majority of housing assistance-ground complainants in the case sample, an estimated 67%, were unrepresented before the WRC.<sup>121</sup> Private solicitors or barristers were engaged in nine of the 97 (9%) cases that were investigated, while lay representatives appear to have been used in five of those complaints. 11 complainants (11%) were represented by non-governmental organisations (NGOs). Threshold is the lead organisation in this respect, providing representation in eight cases. FLAC represented three individuals in a salient set of interrelated complaints, which were taken against the same landlord and established that existing tenants are covered by the housing assistance ground. The North Leinster Citizens’ Information Service represented a complainant in one WRC referral.<sup>122</sup> IHREC provided legal representation in two cases.<sup>123</sup>

Respondents availed of legal representation in 25% of the complaints examined in this report. A further 6% relied on a lay representative. 54% of respondents were unrepresented. 15% of respondents did not attend the WRC hearing. As noted above, non-attendance of the respondent can lead to difficulties with enforcing awards.

A considerable number of unrepresented complainants referred to receiving advice and advocacy services from Threshold in their submissions to the WRC. The Citizens Information Service was alluded to in several determinations, while FLAC and Focus Ireland were also mentioned. Such assistance took the form of

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121 Determining whether the parties were represented and by whom is not entirely straightforward, since the field that identifies representatives in WRC determinations is not universally used by adjudication officers. In cases where that field is missing, we searched the text of the decisions in order to ascertain whether the parties were represented. Cases in which no representative was mentioned or evident from the text of the determination were counted as unrepresented in the figures set out here. Percentages are rounded up or down to the nearest percentage point.

122 *Lukovic v Blake*, ADJ-00019245, 29 October 2019.

123 *Smyth v Vaughan*, ADJ-00018960, 25 June 2019; *A Tenant v A Landlord*, ADJ-00021680, 22 November 2019.

general advice about the HAP scheme and discrimination law rights, writing letters to landlords informing them of their legal obligations, and assisting with ES1 notification forms.<sup>124</sup>

### *Other forms of support*

It is evident that the form of support required by people who experience housing assistance ground discrimination goes beyond legal advice. It often entails supporting people to navigate the multiple processes and institutions involved in delivery of housing and social welfare supports, while encouraging them to challenge discrimination. The work that NGOs in the housing field do is often, therefore, intensive and takes place over a considerable period. Stakeholders consistently underlined complainants' need for emotional support and encouragement in coping with reported high levels of anxiety and stress related to housing insecurity, the impact of experiencing discrimination (Section 3.6), and the prospect of taking action against discrimination. In their experience, people are far less likely to follow up on a discrimination complaint without such reassurance. This support is offered principally by NGOs, which can only represent clients within their resourcing capacity and strategic planning approach. As a legal representative explained, "If everyone who experienced discrimination on the grounds of HAP wanted to and could take a case – IHREC and Threshold would not be able to handle that level of cases."

### *Awareness of rights*

The primary research highlighted how not everyone is aware that the housing assistance ground is covered under equality legislation or that they can take a case to the WRC. As a housing advisor noted, "I don't think they are aware of the housing assistance ground .... They have a sense it is not fair, but they do not know about what they can do and they don't know about the WRC." This is especially important for particular sub-groups. For example, a representative of the Roma community interviewed suggested that rights awareness was a particularly acute issue for that community in light of language difficulties and a lack of familiarity with systems that require documentation. Concerns were also raised about the official information material on HAP, which does not refer to discrimination on the housing assistance ground or direct tenants and landlords to sources of further information and support on their rights and obligations under the ESA.<sup>125</sup>

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124 See e.g. *A Tenant v A Property Management Company*, ADJ-00011156, 1 May 2018; *Tenant A v A Landlord*, ADJ-00014956, 4 September 2018.

125 See the leaflets and booklets for tenant and landlords published here: <http://hap.ie/> (site accessed on 28 October 2021).

## *A 'fundamental rights culture'*

A 'fundamental rights culture' refers to whether complainants perceive their social environment as supportive or hostile to their attempts to seek access to justice, and what equality bodies and intermediaries do to promote equal treatment (FRA, 2012). There was substantial evidence across the primary research data to suggest that tenants were more likely to consider their social environment to be hostile given the difficulties accessing housing and perceived unequal power dynamics between tenant and landlord, all affecting access to justice. Stressful situations such as transience in housing can further impede an individual's ability to pursue equal treatment. As one legal stakeholder interview stated:

"Not infrequently we get complaints from people who have been faced with homelessness as a result of [perceived discrimination] – when faced with this you have far more important things to do – people do not have reserves. We are expecting people who are facing a major life event to get in touch with [our service], and go to the WRC, which will play out over 6 months, with an unpredictable result that may or may not be of any benefit when they get it. That is an access to justice issue – there are real reasons why people might not want to go forward it on this."

Tenants are dependent on ensuring a positive relationship with their landlord to maintain their home, and potentially obtain a future home via a good reference (particularly relevant when unemployed and unable to provide employers reference). This dependency relationship of the tenant on the landlord can make victims of discrimination reluctant to access justice:

"It makes people even reluctant to raise issues ...they still have to live with the real-life consequences. They are dealing with it in a practical way – they have to deal with the landlord, or the landlord bad mouthing them to others. It puts them at a huge disadvantage if they don't have a landlord's reference. Taking action doesn't get them a home, which is what matters to them."  
(Stakeholder Interviewee)

An interviewee who experienced discrimination described this fear:

"If I had (taken action) I'd be known for it, and I can't do that when we are so reliant on landlords. The council will never house us. It'll always be landlords. If they were to Google me and see I took a case. I can't do that to my kids"  
(Interviewee 5).

## *Accommodation of diversity*

The FRA (2012: Ch. 4.5) underlines that measures should be taken to accommodate diversity, which entails assessing and meeting particular needs complainants may have before lodging a complaint or participating in redress

procedures. For example, stakeholders underlined that completing and submitting the ES1 and complaint forms can be very challenging for people with literacy, language, or cognition issues. According to one such interviewee:

“The initial stages of the WRC process do not take into account literacy or language barriers i.e. the completion of the ES1. The time limits are strict and deadlines can be missed by tenants as they are managing many stressful tasks, sustaining the home, finding money for rent, likely looking for a new home and facing into the prospect of homelessness.”

Pursuing action also requires digital competency and digital access, which is not always available to vulnerable and low-income households. As one legal advisor explained, “a lot of our clients wouldn’t have the capability to do these forms or understand that you have to do the forms – it is grand if you are computer literate and it’s second nature to you but if it’s not then it can be very off-putting”.

# Section 5

## **Conclusion and Recommendations**

## Conclusion

Despite its prohibition under the Equal Status Acts, the research findings show discrimination continues to take place on the housing assistance ground, with those seeking to access accommodation, and in existing tenancies, continuing to face discrimination by landlords and estate agents because they are recipients of social housing assistance (HAP, RS or RAS). The character of the discrimination appears to have shifted over the last three years, with a higher proportion of complaints being brought to the WRC relating to existing tenancies, than access to accommodation. This could be due to the increasing difficulty of proving discrimination in access to accommodation specifically. The research suggests that some estate agents and landlords are effectively 'getting around' the ESA legislation.

The research identified subgroups affected by housing assistance discrimination including, single parents, Travellers, Roma, people living in Direct Provision, those with larger families, and those with a disability.

Regarding the process of access to justice on the housing assistance ground, the research suggests that for those who pursue action in the WRC and get their complaint heard, the process can be quite positive in terms of complaints being upheld. However, barriers to access to justice were identified such as the fear of victimisation, the lack of alignment between the RTB and the WRC, the compensation ceiling, the notification requirement, and the length of time involved in the WRC process (which undermines the effectiveness of remedies). Additionally, the form of redress available does not meet the goals of many housing assistance complainants, which is principally to secure a home, or maintain their existing home.

The primary research notes the unequal power dynamic between tenant and landlord or agent, which can compromise a person's ability to contest discrimination. The situation is further complicated if rent arrears begin to accrue, resulting in possible grounds for eviction.

The research identified measures to improve access to justice on the housing assistance ground, some of which include; strengthening tenants' rights and protections in law, clarifying the discrimination ground, and improving the ESA provisions on victimisation. Finally, there is a need to promote a fundamental rights culture through measures aimed at systemic compliance, supporting those affected to access justice, and raising awareness of the legislation and the WRC process and findings.

## Recommendations

The research findings point to a number of key considerations around the structures, procedures and supports which merit attention in order to improve access to justice on the housing assistance ground under the Equal Status Acts 2000-2018.

Firstly, the findings detailed here point to a need for a review, under Section 30(2) of the IHREC Act 2014, in relation to the working or effect of the Equal Status Acts, including a review of the procedural requirements involved with making a complaint of discrimination and how these may operate to create barriers in accessing justice for individuals experiencing discrimination on the housing assistance ground (and the other protected grounds). Many of the issues identified in this paper relate not just to discrimination on the housing assistance ground but to broader structural issues with the ESA. It is hoped that these issues will be addressed on foot of the planned government review of the Equality Acts, the first phase of which involves a public consultation process.<sup>126</sup>

Specific recommendations include:

- » **Anonymity of cases** – the WRC should be resourced to collect and publish data on the exercise of its discretion to hold hearings in private and to anonymise the names of parties in published decisions; this data should inform the review of the recently enacted provision, which obliges the WRC to conduct investigations in public unless ‘special circumstances’ apply.
- » **Multiple and intersectional discrimination** – the ESA should be amended to include a definition of multiple and intersectional discrimination and to permit such complaints;
- » **Prohibit harassment on the ground** - the ESA should be amended to prohibit harassment on the housing assistance ground.
- » **Legal standing** - Section 23 of the ESA should be amended to enable organisations to refer a complaint to the WRC on behalf of an individual.
- » **Notification requirement** - notification should be rendered optional, as is the request for information under the Employment Equality Acts 1998-2015.

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126 <https://www.gov.ie/en/consultation/066b6-review-of-the-equality-acts/>.

- » **Landlord's address** - there is no legal obligation for a landlord to provide a tenant with their address, leading to a significant barrier in tenants accessing justice in cases of discrimination as it makes it difficult to embark on the WRC process with difficulties in sending ES1 forms, lodging complaints, and enforcing successful ESA complaints. This lacuna should be addressed.
- » **Effective redress** - the compensation ceiling should be removed to enable WRC awards to reflect the harm caused by the more detrimental instances of discrimination outlined in this report. The WRC could make greater use of its power to direct courses of action, thereby enhancing the impact of its determinations.
- » **Victimisation** - the ESA should be amended to frame victimisation as a distinct form of prohibited conduct (as it is under the Employment Equality Acts 1998-2015); several cases disclosed evidence of victimisation that were not referred to the WRC which is particularly problematic in the context of housing disputes.
- » **Complaints procedure** – the ES1 form (which should be optional) and the WRC complaint form should be revised to take account of diversity in digital literacy, digital access and language barriers and the impact this may have in pursuing complaints. The WRC could take immediate steps to improve accessibility of the documents used to initiate complaints.
- » **Timely resolution of complaints** – the WRC should put be resourced to put in place procedures, including a formal case management system, to ensure complaints are resolved without undue delay and to allow for the prioritisation of urgent cases; this is particularly apt in cases of ongoing discrimination on the housing assistance ground where the impact of same on sitting tenants can mean the accumulation of rent arrears and notices of termination being upheld by the RTB.
- » **Provision of legal advice and assistance** – people who are especially vulnerable are unlikely to be in a position to represent themselves at the WRC and the 'equality of arms' principle is compromised by the prospect of appeals to the Circuit Court. The civil legal aid scheme should be extended to cover ESA proceedings before the WRC and the Circuit Court and tailored supports should be provided for particular subgroups which may face multiple discrimination;
- » **Funding for organisations** – NGOs and other organisations providing advice and advocacy support to individuals experiencing discrimination on the housing assistance ground should be adequately funded and resourced;

- » **Provision of information** - the official HAP documentation should outline that discrimination on the housing assistance ground is unlawful and direct tenants and landlords to sources of information and support in understanding their rights and obligations under the ESA;
- » **Greater cooperation between the RTB and WRC** - An institutional cooperation agreement and cross-referral system as between the two bodies could help complainants to navigate the redress systems.





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an Duine agus Comhionannas  
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