

# Submission on the Review of the Equality Acts

Irish Human Rights and Equality Commission  
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The Irish Human Rights and Equality Commission was established under statute on 1 November 2014 to protect and promote human rights and equality in Ireland, to promote a culture of respect for human rights, equality and intercultural understanding, to promote understanding and awareness of the importance of human rights and equality, and to work towards the elimination of human rights abuses and discrimination.

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## Foreword

Section 18 of our founding legislation provides that IHREC can establish an Advisory Committee to bring in expertise from outside of the organisation to advise on certain matters. In considering how best to engage with the review of equality legislation initiated by the Department of Children, Equality Disability, Integration and Youth, we established just such a committee in order to gather and leverage the best expertise in the equality law space to help us shape our thinking. We called it the Future of Equality Law Advisory Committee or FELAC, which brought together a hard-working, committed group of individuals to help us set out a vision for what equality law in Ireland might look like into the future.

The membership of the FELAC (listed below), comprised an interdisciplinary mix of academics, including legal academics, subject matter experts relating to specific grounds, practicing lawyers in the equality space, activists in the area, and members of our own Commission. In particular, the FELAC identified priority issues to be addressed and advised on the following: a principles and purpose clause; core concepts underpinning the legislation; the inclusion of new grounds of discrimination; exemptions and exceptions in the Equality Acts, reasonable accommodation, and positive duties and positive actions.

What has been compiled is intended to assist with the current review, serve as a guide into the future, and so help shape future equality legislation in the State.

We would like to thank and acknowledge the FELAC and all of the members, researchers and external speakers who worked with us on these issues, and express our deep appreciation for their important contributions to the advancement of equality legislation in Ireland. Thanks are also due to the Office of the Director in IHREC who unstintingly supported FELAC as Secretariat, and to the Policy & Research team who helped prepare this final submission.

The Commission, together with the FELAC, trusts that the recommendations contained in this submission will stand to identify and resolve some of the key issues to be addressed in order to strengthen the foundations of Ireland's equality legislation and ensure its fitness to promote equality and combat discrimination into the future.

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and  
Vice- Presiding Member of the Future of  
Equality Law Advisory Committee

Professor Emerita Caroline Fennell,  
Commission Member May 2018 – May  
2023 and  
Presiding Member of the Future of Equality  
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## Membership of FELAC

Prof Caroline Fennell, Presiding Member, Commission member

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Sara Philips, Transgender Equality Network Ireland

Judy Walsh, Assistant Professor, University College Dublin

## Summary of Recommendations

The Commission makes the following recommendations on the review of the Act/s:

### Purpose and Principles Clause

The Commission recommends that a purpose and principles clause be included in the Equality Acts to give clear expression to the purpose of the legislation, and to guide its interpretation.

### Structural Discrimination

The Commission recommends:

- the inclusion of the term 'structural discrimination' in the Equality Acts.
- that the Equality Acts include clear provision for the recognition of the standing of trade unions and non-governmental organisations and allow for representative actions on behalf of named complainants, as well as in an organisation's own name.
- that section 23(1)(a) of the Equal Status Act and section 85(1) of the Employment Equality Act should be amended to enable the referral of complaints to the Workplace Relations Commission by a wider range of bodies, including, at a minimum, NGOs and trade unions.

### Indirect Discrimination

The Commission recommends that:

- sections 19(4)(c) and 22(1A) of the Employment Equality Act, and section 3(3A) of the Equal Status Act be amended to specify that statistics are 'admissible but not required' when seeking to establish proof of indirect discrimination.
- sections 19(4)(c) and 22(1A) of the Employment Equality Act and section 3(3A) of the Equal Status Act be amended to reflect the test for indirect discrimination that is already applicable in areas to which EU law applies.
- the three definitions of indirect discrimination in sections 19, 22 and 31 of the Employment Equality Acts be replaced by a consolidated definition of indirect discrimination.

- a programme of training on equality legislation should be implemented for Workplace Relations Commission adjudicators, the Labour Court and members of the judiciary. This should give particular attention to improving understanding of the prohibition of indirect discrimination in Irish and European law.

## Access to Justice & Legal Aid

The Commission recommends that:

- section 21 of the Equal Status Act is amended to remove the mandatory nature of the notification procedure.
- section 77(5)(a) of the Employment Equality Act and section 21(6)(a) of the Equal Status Act are amended to provide that the time limits for discrimination complaints run from the date of knowledge of the discrimination, or from the date a grievance procedure or internal procedure in relation to the discrimination ended.
- section 77 of the Employment Equality Act and section 21 of the Equal Status Act both provide clearly for the manner in which a complaint may be lodged.
- section 21 Equal Status Act and section 26 of the Employment Equality Act be amended to provide clearly for the manner in which information may be sought from an employer or respondent.
- the forms used for the purposes of section 21 of the Equal Status Act, and sections 26 and 77 of the Employment Equality Act should be accessible, available in a range of languages, and available on and offline.
- the inclusion of a general power for the Director of the Workplace Relations Commission to direct that matters are dealt with by way of a preliminary hearing within section 79 of the Employment Equality Act and section 25 of the Equal Status Act.
- the inclusion of a provision which allows for applications and directions for urgent hearings within section 79 of the Employment Equality Act and section 25 of the Equal Status Act, both of which deal with investigations by the Director of the Workplace Relations Commission.



- provisions should be added to section 79 of the Employment Equality Act and section 25 of the Equal Status Act to provide that the Workplace Relations Commission may decide on applications for hearings in private and for anonymity of decisions in advance of hearing cases in full and, if necessary, hear such applications as preliminary issues.
- the Workplace Relations Commission should make and communicate such decisions to the parties within a reasonable length of time before the substantive hearings.
- the inclusion in the Equality Acts of a provision providing a legislative basis for the power of the Workplace Relations Commission to investigate and make findings on prohibited conduct not raised by a complainant in referring a case to the Workplace Relations Commission.
- the inclusion in the Equality Acts of a provision providing a legislative basis for the power of the Workplace Relations Commission to correct technical errors in the naming of respondents in complaints/references to the Workplace Relations Commission.
- provisions should be introduced to the Equality Acts providing for regulations in relation to the investigative functions of the Workplace Relations Commission.
- section 82 of the Equality Employment Act and section 27 of the Equal Status Act be replaced with provisions that explicitly provide that orders for redress must be effective, proportionate and dissuasive; remove the limits on compensation which may be ordered; provide for the payment of interest; provide that orders for compensation may be made in favour of IHREC; and provide that, where an order has been made against a licenced premises under the Employment Equality Act or Equal Status Act, any person may make an objection, related to the prohibited conduct concerned, to the renewal of the licence.
- the Employment Equality Act and Equal Status Act be amended to provide that all decisions on Equality Act claims may be enforced by the complainant, or the Commission, the Workplace Relations Commission or a trade union on their behalf.
- provisions limiting the use of non-disclosure agreements be inserted in the Equality Acts, and section 78 of the Employment Equality Act and section 24 of the Equal Status Act be amended to clarify that the provisions limiting the use of non-disclosure agreements apply

to mediated settlements reached through mediation under those Acts and the Workplace Relations Act 2015.

- the State return complaints of discrimination in licensed premises to the purview of the Equal Status Acts and the jurisdiction of the Workplace Relations Commission by repealing section 19 of the Intoxicating Liquor Act 2003.
- the Workplace Relations Commission is renamed with an alternative that represents and reflects the full extent of its remit, beyond 'workplace relations' alone, by amending the Workplace Relations Commission Act 2015.
- a tailored approach to the provision of legal aid for minority and structurally vulnerable groups to redress a systemic imbalance and a culture of discrimination.
- the Civil Legal Aid Scheme is expanded to include a wider range of areas including, at a minimum, employment and equality cases before the Workplace Relations Commission.

## Exemptions

The Commission recommends that:

- a review of exemptions under the Equality Acts, guided by the general principles of proportionality; accessibility and clarity; consistency with Ireland's EU and international obligations; coherence; and effectiveness.

The Commission reiterates its previous recommendations that:

- the Equal Status Acts be amended to expressly include public functions within the definition of services and that any exceptions to same are necessary, proportionate and justifiable.
- section 9 of the Equal Status Acts be amended by clarifying that the 'principal purpose' refers to the activities of the club and not the category of persons whose needs are being catered for and by defining 'needs' to limit its meaning to refer to the needs of the group qua that group thereby excluding matters of subjective choice. An objective justification requirement could also be of assistance here.

- section 14(1)(aa) of the Equal Status Act be more narrowly applied by restricting the exemption only to matters relating to a migrant's entry or residence in the State. A requirement of objective justification would further narrow the scope of this provision.
- the law be amended to include domestic workers in the definition of employee and bring them under the protection of the Employment Equality Acts.
- section 34(6) of the Employment Equality Act, which provides for age related remuneration, be removed.

The Commission reiterates its previous recommendations that:

- section 35(1) on different rates of remuneration for disabled people be removed from the Employment Equality Acts.
- section 15(1) and (2) of the Equal Status Acts be removed.

## Grounds

The Commission recommends that:

- the broad scope and effective practical application of the current definition of disability be retained.
- consideration be given to reviewing any outdated and stigmatising language used in the current definition, in close consultation with Disabled Persons Organisations, but any proposals for amending the definition must avoid unintended negative consequences and maintain the broad scope and effective practical application of the current definition.
- the human rights model of disability should be fully integrated across all other relevant legislation, including the Disability Act 2005, to ensure harmonisation.

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

The Commission recommends that:

- an asymmetric approach be applied in defining a new socio-economic ground.

- the inclusion of indicators within the definition of the socio-economic ground.
- thorough research, including consultation with structurally vulnerable groups, be carried out by the State to determine the most effective indicators to be included in the socio-economic ground.
- the removal of the provision 'other than on a temporary basis' from the definition of socio-economic disadvantage in the 2021 Bill.
- the removal of the provision 'socially or geographically identifiable group' from the definition of socio-economic disadvantage in the 2021 Bill.
- further consideration be given to the rationale for the comparisons between persons of different socio-economic status in sections 3, 4 and 8 of the 2021 Bill.
- the gender ground in the Equality Acts be amended to include explicit reference to, and define gender identity, gender expression, and sex characteristics. The ground should continue to be called the gender ground, to facilitate and ensure retention of protections under the case law of the current gender ground.
- in reforming the gender ground, consideration should be given to reframing the exemptions relating to gender to ensure the current protections for trans men and women are not diluted. Consideration should also be given to reframing exceptions relating to gender to ensure discriminatory treatment between different groups within the gender ground is not unintentionally facilitated.
- the 'family status' ground be renamed the 'carer' status ground, and be defined to ensure a broader range of parents and persons who provide care to adults are protected.
- the definitions sections of the Equal Status Act should define the term 'child' as "a person who has not attained the age of 18 years".
- the current Equal Status Act definition that covers 'being pregnant' should be explicitly included instead under the revised gender ground, aligning it with the Employment Equality Act.

- the civil status ground be renamed the marital status ground, to clarify that the ground refers to one's family type and to re-align the language with that used in human rights instruments and discrimination laws in other countries. It should include being married, single, widowed, divorced or separated. It should also include being a cohabitant or being in a civil partnership, or being a former cohabitant or civil partner where such a relationship has ended by death or been dissolved.
- the inclusion of a broad prohibition on discrimination on the ground of criminal conviction that is not limited to spent convictions, in both the Employment Equality Act and the Equal Status Act, and further research be conducted to determine the appropriate exemptions needed in relation to this ground.
- consideration be given to reframing the housing assistance ground as a 'source of income' ground which would apply to the entire material scope of the Equality Acts.
- any appropriate exemptions needed in relation to the source of income ground, for example to permit the lending practices of financial institutions, should be limited by the principles of proportionality; accessibility and clarity; consistency with Ireland's EU and international obligations; coherence; and effectiveness.
- sections 25(1A) of the Equal Status Act and 79 (1A) of the Employment Equality Act be amended to provide for intersectional discrimination by removing reference to a decision being made on each claim, and including the clause 'or on a combination of the grounds' in subsection (a).

## Positive Duties

The Commission recommends that:

- the powers under section 42(5) of the 2014 Act be strengthened by providing that the Commission may 'require' public bodies to undertake an equality and human rights review or action plan.

- section 42(11) of the 2014 Act be deleted to allow for a cause of action to be conferred on a person against a public body in respect of the performance of its functions under the Public Sector Equality and Human Rights Duty.
- the Public Sector Equality and Human Rights Duty be expanded to include schools and other educational establishments.
- reporting obligations under the Public Sector Equality and Human Rights Duty should be strengthened by mandating the collection of adequate disaggregated data to enable ongoing assessment of effectiveness.
- that the requirements for reporting compliance with the Public Sector Equality and Human Rights Duty be strengthened.
- the introduction of positive equality duties for the private sector that are goal oriented, plan-based and comprehensive into the Irish legislation.
- all reporting data under the Gender Pay Gap Information Act 2021 should be kept within a central location to allow public access to all employer reports.
- a requirement to undertake detailed joint pay assessment where reporting has shown a pay gap of at least 5% should be introduced into Irish legislation in line with the EU Pay Transparency Directive.
- legislation be introduced to extend pay gap reporting to all grounds in the Employment Equality Act.
- if private sector duties are included, they be accompanied by robust reporting obligations to ensure that adequate disaggregated data is collected to enable ongoing assessment of the effectiveness of positive duties.

## Positive Action

The Commission recommends that:

- the current approach to positive action in the Equal Status Acts be replaced with a single overarching provision which permits specific group-based measures to ensure full equality in practice is achieved across all grounds of discrimination.
- Directive 2022/2381/EU on improving the gender balance among directors of listed companies should be transposed into Irish law in the context of the Equality Acts review.
- consideration be given to extending the provisions of Directive 2022/2381/EU on improving the gender balance among directors of listed companies permitting employers to take positive action measures across all grounds under the Employment Equality Act, and to broaden its scope to positions outside of director roles.
- the definition of reasonable accommodation in the Equal Status Act should be amended to bring it into compliance with the UN Convention on the Rights of Persons with Disabilities.
- the definition of reasonable accommodation in the Employment Equality Act should be amended to establish a duty to consult the person affected when considering the provision of reasonable accommodation.
- the definition of reasonable accommodation should specify that transfer to another role in an organisation is an appropriate measure if there are other vacant roles.
- reasonable accommodation is extended across all grounds under the Equal Status Act and Employment Equality Act.

## Measuring Effectiveness & Data Collection

The Commission recommends that:

- urgent action is taken by the State to develop and roll out disaggregated equality data collection, processing and communication systems across relevant public bodies in order to monitor the effectiveness and impact of the legislation in Ireland, and that the relevant bodies publish statistics and analysis on an annual basis.
- an obligation be placed on the Workplace Relations Commission in particular to collect disaggregated equality data that would allow for assessment of the impact of the

legislation; and this data is anonymised and published on an annual basis to facilitate public scrutiny, research and allow for recommendations for law reform where appropriate.

- the development of existing data such as administrative datasets in a way that allows for intersectional analysis, data linkages and data harmonisation, and that such be accessible and publicly available.



## Abbreviations

2014 Act	Irish Human Rights and Equality Commission Act 2014
UNCRPD	United Nations Convention on the Rights of Persons with Disabilities
FELAC	Future of Equality Legislation Advisory Committee
DAC	Disability Advisory Committee
EU	European Union
PSD	Public Sector Equality and Human Rights Duty
EEA	Employment Equality Act 1998
ESA	Equal Status Act 2000
WRC	Workplace Relations Commission
IHREC	Irish Human Rights and Equality Commission
CSO	Central Statistics Office
CJEU	Court of Justice of the European Union
NDA	Non-disclosure agreement
LAB	Legal Aid Board
The Scheme	Civil Legal Aid Scheme
1995 Act	Civil Legal Aid Act 1995
CAT	Committee Against Torture and Other Cruel, Inhuman or Degrading Treatment
CESCR	Committee on Economic, Social and Cultural Rights
UN	United Nations
ECHR	European Convention on Human Rights
ECTHR	European Court of Human Rights

## Introduction

The Irish Human Rights and Equality Commission ('the Commission') is both the national equality body and national human rights institution for Ireland, established under the *Irish Human Rights and Equality Commission Act 2014*. We are also the Independent National Rapporteur on the Trafficking of Human Beings<sup>1</sup>; and the Independent Monitoring Mechanism for Ireland under the United Nations Convention on the Rights of Persons with Disabilities ('CRPD').<sup>2</sup> In accordance with our founding legislation, we are mandated to keep under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights and equality<sup>3</sup> and to examine any legislative proposal and report its views on any implications for human rights or equality.<sup>4</sup> In our Strategy Statement 2022-2024, we have prioritised economic equality; access to justice; respect and recognition, promoting the eradication of racism, ableism, ageism and sexism through public understanding and State action; futureproofing; and encouraging, reporting on and enforcing the compliance of public bodies with the Public Sector Equality and Human Rights Duty.<sup>5</sup> Advancing economic equality involves challenging and changing policies and laws that exacerbate income and wealth inequalities, including promoting the introduction of a new socioeconomic status ground in equality legislation,<sup>6</sup> to build an inclusive Ireland, in which equality and human rights are respected.

In the 2020 Programme for Government, there was a commitment given to examine the introduction of a new ground of discrimination, based on socio-economic status, into the Equality Acts.<sup>7</sup> In June 2021, the Minister for Children, Equality, Disability, Integration and Youth launched a consultation seeking the public's view on the review of the Equality Acts.<sup>8</sup> The aim of the review

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<sup>1</sup> The Commission's designation was provided for by S.I. No. 432/2020 - European Union (Prevention and Combating of Human Trafficking) (National Rapporteur) Regulations 2020.

<sup>2</sup> Section 103 of the Assisted Decision-Making (Capacity) (Amendment) Act 2022 amends section 10(2) of the Irish Human Rights and Equality Act 2014 to provide that one of our functions is to promote and monitor the implementation in the State of the CRPD.

<sup>3</sup> Section 10(2)b of the Irish Human Rights and Equality Commission Act 2014.

<sup>4</sup> Section 10(2)(c) of the Irish Human Rights and Equality Commission Act 2014.

<sup>5</sup> IHREC, Strategy Statement 2022-2024 (2022)

<sup>6</sup> IHREC, Strategy Statement 2022-2024 (2022) at p.11.

<sup>7</sup> Programme for Government (2020) p. 77 (available at: <https://www.gov.ie/en/publication/7e05d-programme-for-government-our-shared-future/>)

<sup>8</sup> Department of Children, Equality, Disability, Integration and Youth, Minister O'Gorman announces review of the Equality Acts (press release, 22 June 2021).

was to examine the operation of the Acts. Views were sought on the scope of the current definitions of the nine equality grounds, and whether new grounds should be added such as the ground of socio-economic status discrimination. The Review has been taking place in the wider context of developments in equality standards at an EU level. In December 2022, the European Commission adopted two proposals which aim to ensure a better application and enforcement of EU anti-discrimination rules by creating binding standards for Equality Bodies to ensure people in all Member States enjoy a common minimum level of protection against discrimination.<sup>9</sup>

In our first submission to the Review, we highlighted the structural inequalities which were exacerbated due to the Covid-19 pandemic and called on the State to ensure the next generation of equality legislation adopted a proactive model of promoting equality by combating all emerging and cumulative forms of discrimination, addressing the procedural and accessibility issues impacting on access to justice, and ensuring awareness of rights.<sup>10</sup> As part of our ongoing engagement with the Review and in recognition of the significant opportunity to reform the equality code, we established an ‘Advisory Committee on the Future of Equality Legislation’ (‘the FELAC’). The FELAC brought relevant legal and civil society experts together with Commission members to assist the Commission in identifying and examining the key issues that must be addressed to build a more comprehensive and effective framework of equality legislation and to support equality infrastructure. We also sought advice from our Disability Advisory Committee (‘DAC’) on the definition of disability in the Equality Acts and other relevant issues to the Review.

Whilst we have considered some of the key issues required to be addressed in order to strengthen Ireland’s equality laws in this submission, it was not feasible to examine every such issue. To that end, we consider that other matters, including but not limited to the following, will require further scrutiny in order to achieve comprehensive, fit for purpose equality legislation that promotes equality and combats discrimination into the future:

- Artificial Intelligence and algorithmic discrimination.
- The ‘digital divide’ in access to digital technology.

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<sup>9</sup> Equinet, [Standards for Equality Bodies](#)

<sup>10</sup> IHREC, Submission to the Equality Acts Review (2021)

- Discrimination on the grounds of physical appearance, for example in relation to obesity, natural hair, tattoos.
- Menopause, and the potential for its explicit inclusion under the Disability ground.
- Naming specific forms of discrimination such as ableism, sexism, racism and ageism in the Equality Acts.
- Expanding the Commission's powers of enforcement regarding discriminatory advertising.
- Extending the scope of Equal Status Acts to cover the investigation and prosecution of crime (as per the National Action Plan Against Racism).
- Post-retirement fixed-term contracts.

We welcome the opportunity to make a further submission to the Department of Children, Equality, Disability, Integration and Youth on the Equality Acts Review. We, as the national Equality Body, look forward to engaging further with the Department on all aspects of the Review and on the much needed reform of equality legislation.

## Human Rights and Equality Framework

The Equality Acts engage a number of human rights and equality frameworks, including:

- The Irish Constitution;
- The European Union Charter of Fundamental Rights;
- EU Directives;
- European Convention on Human Rights;
- European Social Charter; as well as
- International Standards.

This Review provides an opportunity to proactively assess the extent to which the Irish legislative framework is in compliance with European Union (EU) law and adopt positive measures, not only

to realise the full potential of the EU Equality Directives,<sup>11</sup> but to go beyond their provisions to ensure systemic protection for victims of discrimination.

## Public Sector Equality and Human Rights Duty

Since 2014, the Public Sector Equality and Human Rights Duty ('Public Sector Duty' or 'PSD') has been part of the legislative framework governing human rights and equality in Ireland. The Public Sector Duty requires public bodies to undertake an assessment of the equality and human rights issues pertaining to their purpose and functions; to devise an action plan to address the issues raised in the assessment; and to report annually on progress and achievements with regard to identified actions. To fulfil this requirement, our guidance recommends that public bodies consult with staff and service users, including those from minority groups, to identify issues and actions and monitor progress.<sup>12</sup>

We are of the view that compliance with the PSD is fundamental to the Equality Acts, and the State's ability to meet its obligations under national, regional and international norms. The PSD is an important mechanism through which the implementation of international human rights norms can be progressed by public bodies at a national level.

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<sup>11</sup> Council Directive (EC) 42/2000 on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('the Racial Equality Directive'); Council Directive (EC) 78/2000 on establishing a general framework for equal treatment in employment and occupation ('the Framework Employment Directive'); Council Directive (EC) 113/2004 on implementing the principle of equal treatment between men and women in the access to and supply of goods and services ('the Gender Goods and Services Directive'); and Council Directive (EC) 54/2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) ('the Gender Recast Directive').

<sup>12</sup> Further information and guidance on the Duty can be found at: <http://www.ihrec.ie/our-work/publicsector-duty>

## Purpose and Principles Clause

We are of the view that a provision within the Equality Acts is required to assist with consistent interpretation and application of the legislation. In this regard, we have been guided by the careful analysis conducted by the FELAC of the potential for a purpose and principles clause.

Purpose clauses are operative parts of legislation, with the same status as other provisions, intended to give clear legislative expression to the underlying purpose of the statute and to set out its overall aims and objectives – as well as sometimes the meaning of key concepts. These clauses are used to great effect in other jurisdictions,<sup>13</sup> and are similar to ‘recitals’ used in EU legislation to provide an interpretative context for the subsequent operative provisions of Directives.<sup>14</sup> A ‘purpose clause’ would assist in guiding how equality legislation is applied and in promoting public understanding of its underlying aims.

To function meaningfully, a purpose clause should set out the underlying equality principles that should underpin anti-discrimination law,<sup>15</sup> and make express reference to human rights concepts, the recognition of diversity and accommodations, and the need to combat intersecting and structural or systemic forms of discrimination.

Further, it is useful to draw a distinction between the purpose of the legislation, and the principles that should guide its interpretation and application by courts, tribunals, public officials, and others.<sup>16</sup> It may also be useful in this regard for the standard interpretation clause included in

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<sup>13</sup> Such clauses have been used in Canada, South Africa, Australia and elsewhere to provide a ‘steer’ to courts and tribunals interpreting the legislation in question. These can be very effective – a Review of the Canadian federal human rights legislation in 2000 suggested that purpose clauses had been invaluable in influencing the approach adopted by the Canadian courts to anti-discrimination law, as it had helped to ensure that more purposive and outcome-centred interpretations were adopted in judicial and tribunal decisions. In the same year, a review of the New Zealand legislation reached a similar conclusion. In the UK, the 2000 Independent Review of Anti-Discrimination Legislation (the “Hepple Report”) made a strong case for a purpose clause to be included in any future equality legislation.

<sup>14</sup> While not directly applicable as part of EU law, recitals are used by the European Court of Justice as interpretative tools. For a recent example, see the disability discrimination case of Case C-485/20, *HR Rail SA*, Judgment of the Court (Third Chamber) of 10 February 2022

<sup>15</sup> This approach is adopted in the Canadian and South African purpose clauses, and in the recent Victorian Gender Equality Act 2020.

<sup>16</sup> This approach can be seen in the South African legislation, which contains (i) an objectives clause, setting out the purpose and aims of the legislation, (ii) an interpretation clause setting out some guidelines as to how specific elements of the legislation should be interpreted by courts and tribunals, and (iii) a guiding principles clause, setting out some underpinning principles and values that are supposed to guide how the legislation should be applied more generally, with a similar approach taken in the Victorian Gender Equality Act 2020. Hepple and Lester suggested a

legislation<sup>17</sup> to be expanded to define a wider range of terms than is customary, for example 'structural discrimination'.

**The Commission recommends a purpose and principles clause be included in the Equality Acts to give clear expression to the purpose of the legislation, and to guide its interpretation.**

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similar approach for the UK in their 'Equality Bill' of 2003, also contained interpretative provisions which were designed to steer interpretation away from 'levelling down' readings and to ensure that exceptions to the principle of equal treatment should be construed narrowly.

<sup>17</sup> For example, s. 2 of the Employment Equality Act 1998.

## Structural discrimination

We recognise the importance of eliminating structural discrimination in society and in considering this issue further, we have been informed by the work of the FELAC which examined this matter in detail. We have previously called on the State to eradicate structural and institutional discrimination to ensure the equal protection of civil and political rights for all individuals and groups.<sup>18</sup> We are of the view that in order to allow for full vindication of rights, the term ‘structural discrimination’ should be included and defined in a broad manner in the Equality Acts.<sup>19</sup> Structural discrimination could be defined as follows:

Structural discrimination refers to inequalities of outcome in terms of privileges, rights, participation, inclusion, access, and opportunities for particular social groups that are usually the result of apparently neutral legislation, policies, procedures, and institutionalised practices, and of embedded and interrelated norms, attitudes, behaviours, routines, and values found in organisations or in broader society.<sup>20</sup>

This would not result in structural discrimination becoming a cause of action, but rather its inclusion in the Acts would ensure that there is a better appreciation that one of the central purposes of the Acts is to combat and remedy structural discrimination.

**The Commission recommends the inclusion of the term ‘structural discrimination’ in the Equality Acts.**

## Possible Provisions to be revised in the Equality Acts

### Sections 2 ESA and EEA – Interpretation

An overarching provision about ‘structural discrimination’ should be included in the current sections on ‘interpretation’ in the Equality Acts. This could be a stand-alone subsection, or

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<sup>18</sup> IHREC [Submission to the Human Rights Committee on Ireland’s 5th Periodic Report](#) 2022 (ICCPR), p.7

<sup>19</sup> While the terms ‘structural discrimination’, ‘systemic discrimination’, and ‘institutional discrimination’, are sometimes used interchangeably, we consider that the concept of ‘structural discrimination’ encompasses the other two forms.

<sup>20</sup> This definition has been coined by the FELAC who took inspiration from a review of existing definitions used by various international organisations, including the European Commission for Racism and Intolerance, and definitions found in other jurisdictions, such as Australia and Canada.



subsections, in Section 2 of ESA and EEA defining ‘structural discrimination’ and providing that tackling this should be a broad objective in implementing the legislation.

### Section 23(1)(a) ESA; Section 85(1) EEA: Discrimination complaints

Broadening legal standing can support a stronger fundamental rights culture in which more people report and claim violations of their rights to equality and non-discrimination. Trade unions and NGOs can be in a position to bring strategic cases raising important points of law under the equality legislation, which contributes to developing Irish jurisprudence in the area of anti-discrimination law.<sup>21</sup> This is particularly the case when claims can be brought in the absence of an identifiable victim, as practices resulting in discrimination against a large number of individuals can be challenged. The participation of trade unions and NGOs can also help to reduce the financial and personal burden on individual victims, giving them greater access to justice.<sup>22</sup> We have previously called for the Equality Acts to include clear provision for the recognition of the standing of trade unions and non-governmental organisations and to allow for representative actions on behalf of named complainants, as well as in an organisation’s own name.<sup>23</sup> Having considered the advice of the FELAC, we are also of the view that as an additional means of challenging structural discrimination, section 23(1)(a) ESA and section 85(1) EEA could be substantially upgraded to enable the referral of complaints to the Workplace Relations Commission (‘WRC’) by a wider range of bodies. Currently IHREC has the exclusive power, under both sections, to refer complaints as follows:

Section 23(1)(a)(i) ESA provides that where it appears to IHREC that prohibited conduct is being generally directed against persons, the matter may be referred by IHREC to the Director of the WRC.

Section 85(1)(a) EEA provides that IHREC may refer a case to the WRC where it appears that discrimination or victimisation is being “generally practiced against persons” or that an employer has in place “rules or instruction which would result in discrimination against an employee or class of employees”.

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<sup>21</sup> IHRC, Observations on the Equality Bill (2004), p. 3.

<sup>22</sup> European Agency for Fundamental Rights, The Racial Equality Directive: application and challenges (2012), p.14.

<sup>23</sup> IHREC, Submission on the Review of the Equality Acts (2021), p.12.

At a minimum, standing to bring such actions should be extended to NGOs and trade unions. Reform of this provision could be considered in tandem with proposals to enable representative actions, class actions and actio popularis. Such reform would provide for important mechanisms for tackling structural discrimination.

**The Commission recommends the Equality Acts include clear provision for the recognition of the standing of trade unions and non-governmental organisations and allow for representative actions on behalf of named complainants, as well as in an organisation's own name.**

**The Commission recommends that section 23(1)(a) of the Equal Status Act and section 85(1) of the Employment Equality Act should be amended to enable the referral of complaints to the Workplace Relations Commission by a wider range of bodies, including, at a minimum, NGOs and trade unions.**

## Indirect discrimination

We have previously highlighted the difficulties with the burden of proof in claims of indirect discrimination under the Equality Acts,<sup>24</sup> and have benefitted from the input of the FELAC in considering this further, as well as in relation to the definition of indirect discrimination.

Indirect discrimination is the cause of action most closely associated with structural discrimination. Several elements of the Supreme Court's judgment in *Stokes v Christian Brothers High School Clonmel* undermine the potential of the indirect discrimination prohibition.<sup>25</sup> In particular, we are of the view that the requirement in *Stokes* that there be 'some degree of statistical analysis' to establish particular disadvantage set the bar too high for complainants<sup>26</sup> and it is not consistent with EU law.<sup>27</sup> We have previously called for clarity with regard to the use of statistical evidence in discrimination claims and for equality training for the courts.<sup>28</sup>

Noting the divergence between EU law and the Supreme Court's approach in *Stokes*, a recent decision of the WRC suggests that *Stokes* should be applied to those grounds of discrimination and/or fields of activity that fall outside the scope of EU law.<sup>29</sup> This would create a hierarchy between the grounds, divergence within and between the Acts, and undermine any effort to provide for intersectional discrimination complaints.

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<sup>24</sup> IHREC, Submission to the Equality Acts Review (2021), p.44-45.

<sup>25</sup> [2015] IESC 13.

<sup>26</sup> This is particularly so given the absence of accessible equality data, especially disaggregated data, in both the public and private sectors, and the absence of data on equality and discrimination at a national level. IHREC, Submission to the Equality Acts Review (2021), p.45.

<sup>27</sup> Recital 15 of Employment Equality Directive states: 'The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide, in particular, for indirect discrimination to be established *by any means* including on the basis of statistical evidence'. (emphasis added). The Court of Justice of the EU (CJEU) has not made the existence of statistical data a pre-condition to making a finding of particular disadvantage. The CJEU has not elaborated precise guidelines for how particular disadvantage can be established in the absence of statistics, but its approach permits a broad appreciation of any contextual information. A good illustration can be found in several cases where the Court held that measures that negatively affect employees because of their rate of sickness absence are liable to put disabled workers at a particular disadvantage (see Cases C-335/11 and 337/11 *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab*; *HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S* EU:C:2013:222; para. 39, Case C-270/16, *Ruiz Conejero v Ferroservicios Auxiliares SA, Ministerio Fiscal*, EU:C:2018:17; para. 59, Case C-397/18 *DW v Nobel Plásticos Iberica SA* EU:C:2019:703)

<sup>28</sup> IHREC, Submission to the Equality Acts Review (2021), p.45.

<sup>29</sup> Workplace Relations Commission, *Kearney v Workplace Relations Commission*, ADJ-00031944, 17 December 2021, <https://www.workplacelrelations.ie/en/cases/2021/december/adj-00031944.html>.

The current drafting of the EEA on indirect discrimination has particular shortcomings. Section 6 is titled ‘discrimination for the purposes of this Act’. This sets out the definition of direct discrimination. Logically, and in keeping with the approach found in EU legislation, this section should also define indirect discrimination. Instead, the Act contains three definitions of indirect discrimination scattered across later parts of the legislation (ss. 19, 22, 31). In the interests of clarity and consistency, these should be replaced by a consolidated definition of indirect discrimination, which should be located in section 6, alongside the prohibition of direct discrimination, and would reflect the test for indirect discrimination that is already applicable in areas to which EU law applies, and to ensure that this applies consistently across all grounds of discrimination and fields of activity covered by both Acts. A straightforward amendment might assist in displacing the *Stokes* precedent at least on the role of statistical evidence in indirect discrimination complaints. For example, the inclusion of “but not required” to section 3(3A) ESA, which would then read as follows:

In any proceedings statistics are admissible, *but not required*, for the purpose of determining whether discrimination has occurred by virtue of subsection (1)(c).

In order to resolve the divergence between Irish and European law on indirect discrimination, sections 19(4)(c) and 22(1A) of the EEA should be similarly amended.

**The Commission recommends sections 19(4)(c) and 22(1A) of the Employment Equality Act, and 3(3A) of the Equal Status Act be amended to specify that statistics are ‘admissible but not required’ when seeking to establish proof of indirect discrimination.**

**The Commission recommends sections 19(4)(c) and 22(1A) of the Employment Equality Act and section 3(3A) of the Equal Status Act be amended to reflect the test for indirect discrimination that is already applicable in areas to which EU law applies.**

**The Commission recommends the three definitions of indirect discrimination in sections 19, 22 and 31 of the Employment Equality Acts be replaced by a consolidated definition of indirect discrimination.**

**The Commission recommends a programme of training on equality legislation should be implemented for Workplace Relations Commission adjudicators, the Labour Court and members**

**of the judiciary. This should give particular attention to improving understanding of the prohibition of indirect discrimination in Irish and European law.**

## Access to Justice

Access to justice is a fundamental right and is recognised as such under a range of regional and international instruments.<sup>30</sup> CSO data from 2019 demonstrates that just 3% of people who experienced discrimination made an official complaint or took legal action.<sup>31</sup> Full vindication of the right to access justice would have a significant impact on the extent to which individuals and groups are able to claim their rights, challenge inequalities and discrimination, hold decision-makers accountable and combat social and economic exclusion.

To improve access to justice for victims of discrimination, there are a range of procedural and jurisdictional issues, as well as issues relating to remedies and compensation that need to be addressed. The following section includes and builds on our recommendations made in our Submission to the Review of the Equality Acts (2021) and has been informed by the advice of the FELAC and their examination of these issues.

## Complaints procedure

Whilst it is intended that the WRC should provide an informal and accessible means of pursuing a complaint under equality legislation, we have concerns that some of the procedures and practices of the WRC may present unnecessary barriers to prospective complainants.

### Two-month period for written notification

Under section 21 of the ESA, complainants are required, within two months of the most recent occurrence of the discriminatory act, to notify the respondent in writing of the nature of their complaint and their intention to bring a complaint before the WRC if not satisfied with the respondent's response. We have previously raised concerns regarding the mandatory nature of this notification period, namely that it raises compliance issues with EU law, and in reality is either particularly onerous, or constitutes an impossible barrier to overcome.<sup>32</sup> No such requirement is

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<sup>30</sup> Article 40 of the Irish Constitution; Articles 6 and 13 of the European Convention of Human Rights; Article 47 of the Charter of Fundamental Rights of the European Union; Article 14 of the International Covenant on Civil and Political Rights; Article 13 of the International Covenant on the Rights of Persons with Disabilities;

<sup>31</sup> Central Statistics Office, Equality and Discrimination (2019).

<sup>32</sup> IHREC, Submission to the Review of the Equality Acts (December 2021) at p. 50-51. In the case of race and gender complaints, is likely to be contrary to the principle of equivalence and the right to an effective remedy under EU law.

included in either the EEA or section 19 of the Intoxicating Liquor Act 2003. We have previously called for the two month notification period to be optional.<sup>33</sup> In some cases, there may be benefits to bringing a complaint within an optional time period such as the provision of information and expedited resolution, however, it is imperative that persons who have suffered discrimination who do not opt to notify the respondent within a set period do not experience any disadvantage.

**The Commission recommends section 21 of the Equal Status Act is amended to remove the mandatory nature of the notification procedure.**

### Six-month time limit

The six-month time limit poses particular problems under the EEA, including in circumstances when an employee is pregnant or on maternity leave. Further, the six-month time limit makes no allowances for attempts to resolve issues through internal procedures or invoking grievance procedures. The Labour Court has repeatedly found that the same strict time limit applies even where an employee is delayed in making their complaint because they are using an internal grievance procedure.<sup>34</sup>

**The Commission recommends section 77(5)(a) of the Employment Equality Act and section 21(6)(a) of the Equal Status Act are amended to provide that the time limits for discrimination complaints run from the date of knowledge of the discrimination, or from the date a grievance procedure or internal procedure in relation to the discrimination ended.**

### Complaint Form

The WRC uses a single online complaint form for all employment, equality and equal status cases. This means that persons making a claim of discrimination in relation to the provision of goods and services must complete a form designed for employment claims. We reiterate our concern that this is unnecessarily confusing, particularly where the person is unrepresented; and that an online-only complaint mechanism is problematic as it requires connectivity, material access and a level of

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<sup>33</sup> IHREC, Submission to the Review of the Equality Acts (December 2021) at p. 50-51

<sup>34</sup> For example, in two 2019 cases, the Labour Court underlined that the pursuit of an internal grievance does not stop the time limit running: [Pfizer Pharmaceuticals Ireland Ltd. v Whelan](#), EDA1924, 12 July 2019; [Beaumont Hospital v Kaunda](#), EDA1930, 3 September 2019.

digital competency in order to pursue a complaint, which exacerbates existing social inequalities and further isolates already structurally vulnerable communities.<sup>35</sup>

**The Commission recommends section 77 of the Employment Equality Act and section 21 of the Equal Status Act both provide clearly for the manner in which a complaint may be lodged.**

**The Commission recommends section 21 of the Equal Status Act and section 26 of the Employment Equality Act be amended to provide clearly for the manner in which information may be sought from an employer or respondent.**

**The Commission recommends the forms used for the purposes of section 21 of the Equal Status Act, and sections 26 and 77 of the Employment Equality Act should be accessible, available in a range of languages, and available on and offline.**

### Preliminary hearings

A general power for the Director of the WRC to direct that matters are dealt with by way of a preliminary hearing would also improve the efficiency of the complaint process and potentially reduce delays.

**The Commission recommends the inclusion of a general power for the Director of the Workplace Relations Commission to direct that matters are dealt with by way of a preliminary hearing within section 79 of the Employment Equality Act and section 25 of the Equal Status Act.**

### Listing Times and urgent hearings

There is no clear system for how cases are listed nor for how cases may be expedited at the WRC. We have previously raised concerns regarding the inconsistencies with the listing times, and notice given for hearings.<sup>36</sup> Given the nature of some cases that appear before the WRC, there should be clearly identifiable procedures in place to apply for expedited proceedings. Furthermore, there should also be an appeals process available where a request for expedition has been rejected.

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<sup>35</sup> IHREC, Submission to the Review of the Equality Acts (December 2021) at p. 46

<sup>36</sup> IHREC, Submission to the Equality Acts Review (2021) at p.47



We reiterate that provision should be made in the Equality Acts for interlocutory relief in urgent cases<sup>37</sup> and where there is a risk that the duration of proceedings could render any redress effectively moot. Applications for interlocutory relief could be made by way of preliminary hearings.

**The Commission recommends the inclusion of a provision which allows for applications and directions for urgent hearings within section 79 of the Employment Equality Act and section 25 of the Equal Status Act, both of which deal with investigations by the Director of the Workplace Relations Commission.**

### Anonymity

The Government introduced a number of reforms to WRC procedure through the Workplace Relations (Miscellaneous Provisions) Act 2021. On foot of these reforms, we have a significant concern with the absence of specific procedures to allow a complainant to apply for a hearing to be heard in private (or that any decision in relation to a complaint should be anonymised) before the case is heard in full.

**The Commission recommends that provisions should be added to section 79 of the Employment Equality Act and section 25 of the Equal Status Act to provide that the Workplace Relations Commission may decide on applications for hearings in private and for anonymity of decisions in advance of hearing cases in full and, if necessary, hear such applications as preliminary issues.**

**The Commission also recommends that the Workplace Relations Commission should make and communicate such decisions to the parties within a reasonable length of time before the substantive hearings.**

### Investigative powers

While not specifically provided for in the legislation, Equality Officers and Adjudicators have, on occasion, adopted a flexible approach to some technical aspects of pursuing a complaint. The WRC

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<sup>37</sup> IHREC, Submission to the Equality Acts Review (2021) at p.47; Equality Authority, Embedding Equality in Immigration Policy: Submission on the discussion document of the Department of Justice, Equality and Law Reform on the Immigration and Residence Bill (2006) 43. Equality Authority, Overview of the Employment Equality Act 1998 and the Equal Status Act 2000 (2003) 60-61.

has allowed claims to proceed where the precise ground or type of discrimination was not specified by the complainant in making their complaint.<sup>38</sup> In *County Louth VEC v The Equality Tribunal* [2009] IEHC 370, McGovern J found that the tribunal was entitled to hear matters that went beyond those set out in the complaint form provided that the general nature of the complaint remained the same and the respondent was afforded a reasonable opportunity to deal with the matters raised in compliance with the principles of natural and constitutional justice. Given the issues involved in cases before the WRC, flexibility of this nature is welcomed.

An investigative or inquisitorial process in discrimination cases should reduce the burden placed on the claimant to make complex legal arguments and their responsibilities in relation to evidence. However, in practice, the WRC exercises a predominantly adjudicative rather than investigative function in hearing equality cases. The investigative functions of the WRC could be strengthened and clarified by ensuring that there is a clear statutory basis for investigative powers, alongside regulations which specify when and how these powers may be exercised.

**The Commission recommends the inclusion in the Equality Acts of a provision providing a legislative basis for the power of the Workplace Relations Commission to investigate and make findings on prohibited conduct not raised by a complainant in referring a case to the Workplace Relations Commission.**

**The Commission recommends the inclusion in the Equality Acts of a provision providing a legislative basis for the power of the Workplace Relations Commission to correct technical errors in the naming of respondents in complaints/references to the Workplace Relations Commission.**

**The Commission recommends that provisions should be introduced to the Equality Acts providing for regulations in relation to the investigative functions of the Workplace Relations Commission.**

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<sup>38</sup> For example, an Equality Officer investigated an allegation of victimisation in [A Post-Leaving Certificate Student v An Educational Institution](#) [DEC-S2009-043] even though the issue was not specifically raised in the complaint form. The equality officer considered that the respondent had adequate notice of the allegation through subsequent correspondence, was afforded the opportunity to make oral submissions on the matter and to make further written submissions following the hearing.

## Compensation Limits

We have repeatedly recommended the removal of the limits on the amount of compensation that can be awarded under the EEA and ESA.<sup>39</sup> The levels of compensation available have been criticised as particularly inadequate for egregious violations of the law such as the discriminatory denial of access to education,<sup>40</sup> and cases involving the HAP ground.<sup>41</sup> However, complaints on the gender ground may be referred to the Circuit Court where the compensation limit is substantially higher.<sup>42</sup> This distinct treatment is due to judgments by the CJEU which found that compensation ceilings are not compatible with the right to an effective judicial process under the Equal Treatment Directive.<sup>43</sup> The compensation limits were found to arguably undermine the clear requirement across the Directives that remedies for discrimination must be ‘effective, proportionate and dissuasive’.<sup>44</sup> There is symbolic value to the limit at which compensation is set, which demonstrates the seriousness with which discrimination is taken by the legislature. There is also an obvious link between the maximum amount of compensation that can be awarded and the dissuasive and deterrent effect of the law. We again reiterate our recommendation that the compensation limits in both EEA and ESA cases be removed.<sup>45</sup>

**The Commission recommends that section 82 of the Equality Employment Act and section 27 of the Equal Status Act be replaced with provisions that explicitly provide that orders for redress**

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<sup>39</sup> IHREC, Submission to the Equality Acts Review (2021) 41-43; Equality Authority, Overview of the Employment Equality Act 1998 and the Equal Status Act 2000 (2003) 20; Equality Authority, Embedding Equality in Immigration Policy: Submission on the discussion document of the Department of Justice, Equality and Law Reform on the Immigration and Residence Bill (2006) 12; IHRC, Observations on the Equality Bill (2004) 3-4; IHREC, Submission to UN Committee on the Elimination of Discrimination Against Women (2017) 35-36; IHREC, Comments on Ireland’s 16th National Report on the European Social Charter(2019) 46; and IHREC, Submission to the Citizens’ Assembly on Gender Equality (2020) 28-29.

<sup>40</sup> European Commission, [European Network of legal experts in gender equality and non-discrimination: Country report on non-discrimination – Ireland](#) (2020) p.84.

<sup>41</sup> Workplace Relations Commission, *Tenant C v A Landlord*, ADJ-00004705, 9 August 2017. The Adjudication Officer in their decision stated: ‘I am constrained by the maximum award of €15,000 which by virtue of Section 27(2) is fixed at the maximum District Court civil jurisdiction, and in my view does not reflect the seriousness of the discrimination.’

<sup>42</sup> The civil jurisdiction of the Circuit Court is limited to a compensation claim of €75,000.

<sup>43</sup> Council Directive (EEC) 76/207 of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. See Case-14/83 *Von Colson v Land Nordrhein-Westfalen* EU:C:1984:153, [1984] ECR 01891; Case C-271/91 *Marshall v Southampton & SW Hants AHA* EU:C:1986:84, [1986] ECR 00723 and Case C-177/88 *Dekker v VJV Centrum* ECLI:EU:C:1990:383, [1990] ECR I-03941. See also, J. Walsh, *Equal Status Acts 2000-2011: Discrimination in the Provision of Goods and Services* (Dublin: Irish Council for Civil Liberties and Blackhall Publishing, 2012) 329, 349.

<sup>44</sup> Framework Equality Directive, art. 17; Racial Equality Directive, art. 15; Gender Goods and Services Directive, art. 14; and the Gender Recast Directive, art. 25.

<sup>45</sup> IHREC, Submission to the Equality Acts Review (2021) at p. 42

**must be effective, proportionate and dissuasive; remove the limits on compensation which may be ordered; provide for the payment of interest; provide that orders for compensation may be made in favour of IHREC; and provide that, where an order has been made against a licenced premises under the Employment Equality Act or Equal Status Act, any person may make an objection, related to the prohibited conduct concerned, to the renewal of the licence.**

### Enforcement of decisions

We are of the view that provisions in relation to the enforcement of decisions of the WRC and the Labour Court should be more expansive. We consider that, in addition to existing enforcement provisions, the WRC should be empowered to bring enforcement proceedings in respect of EEA claims, and trade unions should be able to bring proceedings to enforce Labour Court decisions. The Equality Acts should also be amended to provide that the IHREC may bring enforcement proceedings in respect of decisions of the Labour Court and decisions of the WRC under the ESA *without the consent of the complainant*. These more expansive powers should assist in ensuring that decisions are enforced where a respondent is non-compliant, thus creating a deterrent to non-compliance, and reduce the obligation on the individual who may have already undergone a stressful and time consuming process in the WRC or Labour Court. Furthermore, allowing IHREC to take proceedings without the consent of the complainant would allow it to enforce decisions that include an order for a course of action that is intended to benefit society more broadly and that the individual complainant cannot be expected to enforce.

**The Commission recommends that the Employment Equality Act and Equal Status Act be amended to provide that all decisions on Equality Act claims may be enforced by the complainant, or the Commission, the Workplace Relations Commission or a trade union on their behalf.**

### Non-disclosure agreements

We are concerned by the prevalence of confidentiality clauses in agreements to settle equality cases. It is acknowledged that in certain circumstances, such clauses may be appropriate; however, the almost default position that they are a necessary aspect of any settlement agreement, coupled with the increasingly broad and restrictive nature of their content, raises significant concerns. The normalisation of non-disclosure agreements ('NDAs') potentially impedes

the ability of equality proceedings to seek the elimination of discrimination and promotion of equality, as well as the ability of complainants to pursue redress.<sup>46</sup> The elimination of discrimination and promotion of equality, as well as the ability of complainants to pursue redress, must be primary considerations in all equality proceedings and the normalisation of non-disclosure agreements potentially impedes this. A dearth of information or research on this subject outside of our own casework has made it difficult to identify the true extent of such agreements.<sup>47</sup>

A guiding principle of any efforts to reform the law in this area is that respondents may not impose these agreements and complainants may only enter them freely, having been fully informed of their rights. We acknowledge the current Private Member's Bill on this issue but note that the reforms contained within its provisions are exclusive to employment equality complaints relating to sexual harassment and discrimination, and there is no proposal to extend its provisions to similar complaints relating to the provision of goods and services.<sup>48</sup> We are of the view that it should extend to the use of NDAs in the settlement of cases under the ESA.

It is also unclear whether the provisions of the Bill extend to the use of confidentiality clauses in mediated settlements reached through WRC mediation. It is noted that mediation facilitated by the WRC is confidential under the Workplace Relations Act 2015. We recognise the benefits of mediation in appropriate cases but have concerns that some claimants who have not had the benefit of legal advice and/or representation may agree to participate in this process where they might otherwise have elected for an adjudication hearing. As a result, there may be less visibility with regard to the nature and extent of discrimination in the State.

We are of the view that the use of NDAs should be limited in scope with adequate safeguards including that the NDA should be the express wish and preference of the employee; the employee must have been offered independent legal advice, there is no undue influence of the employee,

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<sup>46</sup> See Department of Children, Equality, Disability, Integration and Youth, [The Prevalence and Use of Non-Disclosure Agreements \(NDAs\) in discrimination and sexual harassment disputes](#), 2022. .

<sup>47</sup> It is noted that NDAs preclude the issuing of press releases or any media engagement, with the result that cases of public interest are often settled/mediated without public record.

<sup>48</sup> Employment Equality (Amendment) (Non-disclosure Agreements) Bill 2021. It is noted that this Bill has been at Committee Stage since July 2022.

the NDA does not harm a third party or the public interest, there is an option for the employee to waive confidentiality in the future, and the NDA is for a set and limited period of time.

**The Commission recommends that provisions limiting the use of non-disclosure agreements be inserted in the Equality Acts, and that section 78 of the Employment Equality Act and section 24 of the Equal Status Act be amended to clarify that the provisions limiting the use of non-disclosure agreements apply to mediated settlements reached through mediation under those Acts and the Workplace Relations Act 2015.**

## Jurisdictional Issues

We have repeatedly highlighted that the transfer of jurisdiction to the District Court in relation to complaints of discrimination that occur on or at the point of entry to licensed premises, imposes a fundamentally more onerous process for people wishing to bring complaints.<sup>49</sup> Bringing a case under section 19 of the Intoxicating Liquor Act 2003 Act is procedurally complex due to strict formal rules, burden of proof requirements and technical documentation, and it carries a higher risk of costs and court fees.<sup>50</sup> This raises particular concerns about a deterrent effect and inequality of arms, particularly as it is the complainant who is more likely to have no access to legal representation. Furthermore, criticisms have been raised that the District Court is less efficient and takes place in an adversarial and public context, as opposed to the more complainant-centric approach of the WRC.<sup>51</sup> Incidents that take place in a part of the premises not covered by the licence also remain under the jurisdiction of the WRC, which can create confusion in the case of mixed-use premises such as hotels or restaurants.<sup>52</sup>

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<sup>49</sup> IHREC, Submission to the Review of the Equality Acts (December 2021) at p. 63; IHREC, Submission to the United Nations Committee on the Elimination of Racial Discrimination on Ireland's Combined 5th to 9th Report (2019) 18-19 and IHREC, Developing a National Action Plan Against Racism: Submission to the Anti-Racism Committee (2021) 61.

<sup>50</sup> For groups who may have lower incomes or rely on social welfare payments, including those who have disabilities, members of the Traveller Community and other groups, the risk of a costs order may act as a barrier to instituting a claim.

<sup>51</sup> D. Fennelly, Selected Issues in Irish Equality Case Law 2008-2011 (2012) 83 and IHREC, Submission to the United Nations Committee on the Elimination of Racial Discrimination on Ireland's Combined 5th to 9th Report (2019) 18-19.

<sup>52</sup> J. Walsh, Equal Status Acts 2000-2011: Discrimination in the Provision of Goods and Services (Dublin: Irish Council for Civil Liberties and Blackhall Publishing, 2012) 329. For example, in *Workplace Relations Commission, Dunne & Anor v. Planet Health Club*, DEC-S2011-018, 27 April 2011 the respondent argued that the gym in which the alleged discrimination had taken place was part of a larger entertainment centre with a licence and that the complaint fell within the jurisdiction of the District Court. In *Workplace Relations Commission, Rosemarie Mongan v Donal and Martha Duffy Limited T/A Supervalu Edgeworthstown*, DEC-S2017-044, 23 November 2017 jurisdiction was removed by the WRC on the basis that the prohibited conduct took place in the off-licence area of the supermarket.

**The Commission recommends that the State return complaints of discrimination in licensed premises to the purview of the Equal Status Acts and the jurisdiction of the Workplace Relations Commission by repealing section 19 of the Intoxicating Liquor Act 2003.**

Most discrimination complaints are heard by the WRC. The WRC's name may be a source of confusion for people seeking to make discrimination complaints especially under the ESA. The WRC should be renamed to improve accessibility and to represent and reflect its equality function.

**The Commission recommends that the Workplace Relations Commission is renamed with an alternative that represents and reflects the full extent of its remit, beyond 'workplace relations' alone, by amending the Workplace Relations Commission Act 2015.**

## Access to Legal Aid

In Ireland, the Civil and Criminal Legal Aid Systems are two of the main avenues by which the State enables the realisation of the right to access justice. In 2015 the UN's Sustainable Development Goals included, for the first time, providing access to justice for all.<sup>53</sup> Addressing the gaps in the provision of civil legal aid is part of ensuring access to justice.

The Scheme of Civil Legal Aid and Advice was first established in Ireland in 1979.<sup>54</sup> During this time, the Legal Aid Board ('LAB') was established as the administrative body to oversee the Civil Legal Aid Scheme and Law Centres were established throughout the country to provide free legal advice. In 1995, the Civil Legal Aid Scheme ('the Scheme') was placed on a statutory footing under the Civil Legal Aid Act ('1995 Act') with amendments to the Scheme between 1996-2021. In June 2022, the Minister for Justice announced the Independent Review of the Scheme and established a Review Group with a tenure of 12 months.<sup>55</sup> In our submission to the Review Group we highlighted the shortcomings with the Civil Legal Aid Scheme, and we have previously made recommendations, including to extend the scope of the LAB<sup>56</sup>, to review the financial

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<sup>53</sup> UN Sustainable Developments, Goal 16

<sup>54</sup> Legal Aid Board, [Providing Access to Justice since 1979](#) (January 2020)

<sup>55</sup> Department of Justice, [Minister announces review of Civil Legal Aid Scheme](#) (Press Release, 2 June 2022)

<sup>56</sup> IHREC, Submission to the Independent Review of the Civil Legal Aid Scheme (March 2023); IHREC, Housing Assistance and Discrimination Report (April 2022) p.52; IHREC, Ireland and the Convention on the Elimination of All Forms of Racial Discrimination (March 2022) p.16; IHREC, Developing a National Action Plan Against Racism (August 2021) p.62-63; IHREC, Submission on the Review of the Equality Acts (December 2021) p.8-11; IHREC, Submission to the Third Periodic Review Cycle for Ireland (March 2021) at p.10; IHREC, Submission to the United Nations Human Rights Committee on the List of Issues for the Fifth Periodic Examination of Ireland (August 2020) p.13; IHREC,

contribution<sup>57</sup>, and to ensure the LAB is adequately resourced.<sup>58</sup> The next generation of the Scheme needs to ensure access to justice is a priority, ensure awareness of rights, address the existing procedural and accessibility issues impacting the most structurally vulnerable, and mandate disaggregated equality data.<sup>59</sup>

The Independent Review and any resulting Scheme must be underpinned by human rights and equality principles, the Public Sector Equality and Human Rights Duty, and recognise the public benefit of investing in a properly functioning and resourced Civil Legal Aid Scheme. Experience from other jurisdictions has shown that investment in civil legal aid services can result in economic and social benefits for both the individual and the State such as preventing people from falling into homelessness, limiting negative health experiences, and savings in the provision of other social services.<sup>60</sup> Effective access to civil legal aid for all is a cornerstone of a functioning democracy that seeks to uphold the rule of law. It is an essential element in allowing individuals to vindicate their rights, and in holding the State and institutions to account. We are concerned that the blanket exclusion of some areas of law, and the preclusion of legal representation before quasi-judicial tribunals,<sup>61</sup> from the remit of the Scheme will deny some individuals their right of access to justice. This is especially concerning as the areas of law affected by these exclusions disproportionately affect individuals covered by the discriminatory grounds under equality legislation or from minorities or other structurally vulnerable groups, who are thus impeded in accessing an effective remedy where there is a potential violation of fundamental rights.<sup>62</sup> Over the last decade in particular, multiple international human rights organisations have criticised Ireland for the

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Submission to UN Committee on the Elimination of Racial Discrimination (October 2019) p.143; IHREC, Comments on Ireland's 14th National Report on the Implementation of the European Social Charter (April 2017) p.16; IHREC, Ireland and the International Covenant on Economic Social and Cultural Rights (May 2015), p.53.

<sup>57</sup> IHREC, Submission to the Independent Review of the Civil Legal Aid Scheme (March 2023); IHREC, Review of the Intoxicating Liquor Act (February 2022) p.39; IHREC, Ireland and the International Covenant on Economic, Social and Cultural Rights (December 2021) p. 3.

<sup>58</sup> IHREC, Submission to the Independent Review of the Civil Legal Aid Scheme (March 2023); IHREC, Developing a National Action Plan Against Racism (2021) 62 and IHREC, Submission to the United Nations Human Rights Committee on the List of Issues for the Fifth Periodic Examination of Ireland (August 2020) 13.

<sup>59</sup> IHREC, Submission to the Independent Review of the Civil Legal Aid Scheme (March 2023)

<sup>60</sup> IHREC, Submission to the Independent Review of the Civil Legal Aid Scheme (March 2023)

<sup>61</sup> Per section 27 of the 1995 Act, the LAB cannot provide legal aid for proceedings in any administrative tribunal unless prescribed by the Minister. Per the Civil Legal Aid (International Protection Appeals Tribunal) Order 2017, the LAB can provide legal aid in relation to proceedings in the International Protection Appeals Tribunal.

<sup>62</sup> IHREC, Submission to the Independent Review of the Civil Legal Aid Scheme (March 2023); IHREC, Submission to the Equality Acts Review (2022) at p. 9; IHREC, Submission to the United Nations Committee on the Elimination of Racial Discrimination on Ireland's Combined 5th to 9th Report (2019) 142-143.



restrictive nature of the 1995 Act, including the CAT,<sup>63</sup> the Committee on the Elimination of Racial Discrimination,<sup>64</sup> and the CESCR.<sup>65</sup> Specifically, they note the disproportionate impact that the blanket exclusions have on marginalised populations and the resulting implications on effective access to justice.

We have recommended on multiple occasions that the State extend the scope of the LAB to cover quasi-judicial tribunals, and the WRC in particular.<sup>66</sup> The WRC is the tribunal of first instance for employment cases, including employment equality cases under the EEA, and complaints of discrimination under the ESA. The Labour Court is the appellate tribunal for appeals under the EEA. However, the 1995 Act excludes tribunals from its remit, unless these are specifically prescribed by the Minister.<sup>67</sup> Thus legal aid is not available for the majority of equality cases,<sup>68</sup> which disproportionately impacts upon minority and structurally vulnerable groups, for whom tribunals, are often the mechanism by which they access the law.<sup>69</sup> Therefore, having such an exclusion in place leaves many structurally vulnerable individuals without access to legal support. These cases can involve complex issues of law, including EU law, and can result in a significant impact on a person's rights and circumstances. In addition, many employers, service-providers, or public bodies, who are often the respondents in such cases, will have legal representation, thus creating a potential inequality of arms. Therefore, we are of the view that these cases should have the right to legal representation through civil legal aid.

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<sup>63</sup> The Committee Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in their Concluding Observations recommended the State enhance its funding for legal aid and other supports for victims of domestic violence (17 June 2011), CAT/C/IRL/CO/1, para. 27(b).

<sup>64</sup> The Committee on the Elimination of Racial Discrimination recommended in their Concluding Observations on the combined fifth to ninth reports of Ireland that the State extend the scope of the Legal Aid Board to areas of law that are particularly relevant to Traveller and other ethnic minorities (12 December 2019), CERD/C/IRL/CO/5-9, para 44.

<sup>65</sup> The Committee expressed concern in their Concluding Observations on the Third Periodic Report of Ireland at the lack of free legal aid services which particularly impact disadvantaged and marginalised individuals and groups from exercising their rights and obtaining appropriate remedies (8 July 2015), E/C.12/IRL/CO/3, para. 8.

<sup>66</sup> IHREC, Submission to the Independent Review of the Civil Legal Aid Scheme (March 2023); IHREC, Submission to the Review of the Equality Acts (2022) at p. 8.

<sup>67</sup> Section 27, 1995 Act

<sup>68</sup> It is noted that cases involving discrimination on or at the point of entry to licensed premises are dealt with under the Intoxicating Liquor Act 2003, and gender related complaints under the Equality Acts may be initiated in the Circuit Court.

<sup>69</sup> IHREC, Submission to the Independent Review of the Civil Legal Aid Scheme (March 2023); IHREC, Ireland and the International Covenant on Civil and Political Rights (June 2022) at p. 88

The effective enjoyment of the right to equality and non-discrimination as protected by international human rights law necessitates sufficient and accessible provision of legal aid.<sup>70</sup> It is our view that there may in fact be a legal requirement that the blanket impediment to provide legal aid in respect of claims under the Equality Acts be lifted.<sup>71</sup> Cases under both the EEA and ESA adjudicate upon matters of significant consequence for the complainant, are often technical and complex in nature, and can involve a significant amount of emotional involvement for the complainant. Many of the groups protected by the grounds of discrimination are characterised by a particular level of structural vulnerability and/or constitute socially disadvantaged groups within society.<sup>72</sup>

In our submission to the Review Group we recommended that the Civil Legal Aid Scheme is expanded to include a wider range of areas including, at a minimum, employment and equality cases before the WRC,<sup>73</sup> and that a tailored approach to the provision of legal aid for minority and structurally vulnerable groups be established to redress a systemic imbalance and a culture of discrimination. The provision of legal aid, advice and support is crucial in allowing individuals to vindicate their rights under equality law and we reiterate these recommendations here.

**The Commission recommends a tailored approach to the provision of legal aid for minority and structurally vulnerable groups to redress a systemic imbalance and a culture of discrimination.**

**The Commission recommends that the Civil Legal Aid Scheme is expanded to include a wider range of areas including, at a minimum, employment and equality cases before the Workplace Relations Commission.**

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<sup>70</sup> IHREC, Submission to the Independent Review of the Civil Legal Aid Scheme (March 2023) at p. 20; IHREC, Review of Intoxicating Liquor Act at p. 34

<sup>71</sup> Where EU equality Directives such as the Race Equality Directive or the Gender Goods and Services Directives are engaged, the Charter of Fundamental Rights of the European Union may also apply. The Charter provides for the right to an effective remedy as protected by Article 47, a corollary of which is legal aid, which “[s]hall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.” IHREC, Review of Intoxicating Liquor Act at p. 40 and 53.

<sup>72</sup> IHREC, Submission to the Independent Review of the Civil Legal Aid Scheme (March 2023) at p. 20; IHREC, Review of Intoxicating Liquor Act at p. 36-37

<sup>73</sup> As well as housing and eviction cases, and social welfare matters - IHREC, Submission to the Independent Review of the Civil Legal Aid Scheme (March 2023), p.24.

## Exemptions

We have previously highlighted issues with a number of exemptions in the Equality Acts, and have benefitted from the input of the FELAC in considering this area further.

Irish equality legislation is characterised by a very large number of exceptions which limit the scope of the substantive equality and non-discrimination provisions, and exemptions which exclude certain activities or organisations from the scope of the legislation. These provisions also add significantly to the complexity and inaccessibility of the legislation. While some of the exemptions serve important purposes, in other cases, the purpose and scope of the exemptions is unclear. The exemptions in the Acts should therefore be reviewed, and this review should be guided by the following general principles.<sup>74</sup>

## General Principles

### Proportionality

Any exemptions in Irish equality legislation should comply with the principle of proportionality. In line with general principles of proportionality recognised in Irish and European law, any exemption should satisfy three conditions:

It must pursue a legitimate objective.

It must be an appropriate means of pursuing that legitimate objective.

It must go no further than is necessary in order to achieve that objective.

Where the exemption does not pursue a legitimate objective or is not an appropriate means of doing so, it should, in principle, be removed. Where the exemption goes further than is necessary (for example, it is not subject to any limitation), it should be reviewed in order to ensure compliance with the requirement of proportionality. This could be achieved by including reference to proportionality in the individual exemption provision as appropriate, or by including an

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<sup>74</sup> Because of the number and complexity of the exceptions/exemptions in the Acts, it is not possible to undertake detailed analysis and make detailed recommendations regarding each and every provision.

overarching proportionality provision in the Acts, which would be applicable to any exemption under the legislation.

### Accessibility and Clarity

It is a fundamental principle of the rule of law that the law should be clear and foreseeable. This is relevant at two levels in the context of exemptions in Irish equality legislation.

First, individual exemptions in the Equality Acts should be accessible in that they are capable of being identified and understood by persons to whom they apply. Their content and scope should also be clearly defined and circumscribed.

Second, the structure of the legislation must allow individuals to identify clearly the exemptions which may be applicable to their situations. At present, exemptions are scattered across the legislation, in both interpretation provisions and substantive provisions, and without any clear presentation of the circumstances in which they apply. As a result, the manner in which the legislation is currently framed in and of itself presents a barrier to individuals seeking to understand the scope and limits of their rights under Irish equality law.

Consideration should be given to presenting any exemptions that remain after review in as clear and accessible manner as possible. This could be achieved by including an appropriate exception section, and by clearly identifying general exceptions, multi-ground exceptions, and ground-specific exceptions, with the scope and subject-matter clearly defined in each case.

### Consistency with Ireland's EU and International Obligations

Irish equality legislation must comply with the State's obligations under EU and international law. Where exemptions are inconsistent, or in direct conflict, with these obligations, the exemptions must be reviewed and removed or revised as appropriate.

### Coherence

Exemptions should be coherent and consistent with the overarching purpose of Irish equality law. Exemptions should be internally coherent and should not conflict with other exemptions or other substantive provisions of the legislation. Care will need to be taken to ensure that relevant exemptions are consistent with any new or revised grounds under the Equality Acts.

Exemptions should also be externally coherent and consistent with other relevant obligations in the wider field of equality law, including the constitutional equality guarantee under Article 40.1 and the public sector equality and human rights duty under section 42 of the Irish Human Rights and Equality Commission Act 2014. More broadly, consideration should be given to the coherence of the legislation with other relevant legislation (e.g. section 19(c) of the Irish Nationality and Citizenship Act 1956).

## Effectiveness

One of the stated ambitions of the Review of the Equality Acts is to ensure the legislation is as effective as possible in combatting discrimination and promoting equality.<sup>75</sup> In this regard, it is important that the equality legislation is effective in practice. It should also be consistent with best practice and the ambition that Ireland show leadership in this field, as it did when initially adopting the Equality Acts.

**The Commission recommends a review of exemptions under the Equality Acts, guided by the general principles of proportionality; accessibility and clarity; consistency with Ireland’s EU and international obligations; coherence; and effectiveness.**

## Amendment, Removal, and Review

In our first submission to the Review of the Equality Acts,<sup>76</sup> we made a number of recommendations relating to various exemptions. Guided by careful consideration of the advice of the FELAC, a number of exemptions are highlighted here for particular attention.

### Amendment

In light of the above guiding principles, a number of exemptions in particular should be amended.

**The Commission reiterates its recommendation that the Equal Status Acts be amended to expressly include public functions within the definition of services and that any exceptions to same are necessary, proportionate and justifiable. 77**

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<sup>75</sup> Department of Children, Equality, Disability, Integration, and Youth, [Launch of Consultation on the Review of the Equality Acts](#) (July 2021)

<sup>76</sup> IHREC, Submission to the Equality Acts Review (December 2021)

<sup>77</sup> IHREC, Submission to the Equality Acts Review (December 2021), pp.51-52

**The Commission reiterates its recommendation that section 9 of the Equal Status Acts be amended by clarifying that the ‘principal purpose’ refers to the activities of the club and not the category of persons whose needs are being catered for and by defining ‘needs’ to limit its meaning to refer to the needs of the group qua that group thereby excluding matters of subjective choice. An objective justification requirement could also be of assistance here.<sup>78</sup>**

**The Commission reiterates its recommendation that section 14(1)(aa) of the Equal Status Act be more narrowly applied by restricting the exemption only to matters relating to a migrant’s entry or residence in the State. A requirement of objective justification would further narrow the scope of this provision.<sup>79</sup>**

## Removal

In light of the guiding principles, a number of exemptions in particular are not justified and should be removed.

**The Commission reiterates its recommendation that the law be amended to include domestic workers in the definition of employee and bring them under the protection of the Employment Equality Acts.<sup>80</sup>**

**The Commission recommends that section 34(6) of the Employment Equality Act, which provides for age related remuneration, be removed.**

**The Commission reiterates its recommendation that section 35(1) on different rates of remuneration for disabled people be removed from the Employment Equality Acts.<sup>81</sup>**

**The Commission reiterates its recommendation that section 15(1) and (2) of the Equal Status Acts be removed.<sup>82</sup>**

## Review

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<sup>78</sup> IHREC, Submission to the Equality Acts Review (December 2021), pp.33-34

<sup>79</sup> IHREC, Submission to the Equality Acts Review (December 2021), p.37

<sup>80</sup> IHREC, Submission to the Equality Acts Review (December 2021), p.38

<sup>81</sup> IHREC, Submission to the Equality Acts Review (December 2021), p.39

<sup>82</sup> IHREC, Submission to the Equality Acts Review (December 2021), p.39

In light of the guiding principles, there are some exceptions or exemptions that should be reviewed. To the extent that such exceptions or exemptions are to be retained following review and/or amendment, they should be presented in the legislation in a manner that is clear and accessible e.g. by being grouped according to the relevant grounds to which the exception/exemption applies.

## Section 14(1)(a)

Section 14(1)(a) of the Equal Status Act is a wide-ranging exemption which presents particular challenges in practice by excluding a broad swathe of activity, including activity by public bodies, from the scope of Irish equality legislation in the field of goods and services. It is perhaps the most significant limitation in the Equal Status Act and is problematic both in practice and at the level of principle.

In our first submission to the Review of the Equality Acts, we recommended that section 14(1)(a) should be amended to allow the Equal Status Acts to be used to challenge other discriminatory legislation and that further consideration is given as to how the WRC would be equipped to deal with such cases.<sup>83</sup>

Guided by the advice of the FELAC, we have developed this recommendation and recommend that section 14(1)(a) of the Equal Status Act be repealed in its entirety for the following reasons:

Section 14(1)(a) is inconsistent with EU law. Neither the Racial Equality Directive nor the Gender Goods and Services Directive permit a broad exemption of this kind and character. Indeed, Article 14 of the Racial Equality Directive<sup>84</sup> and Article 13 of the Gender Goods and Services Directive<sup>85</sup> require Member States to take all necessary measures to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment within the scope of those Directives are abolished. It follows that this exemption – insofar as it applies to the grounds of gender, race and membership of the Traveller Community – runs contrary to EU law.

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<sup>83</sup> IHREC, Submission to the Equality Acts Review (December 2021), pp.32-33

<sup>84</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

<sup>85</sup> Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services

If the exemption cannot be applied on the grounds of gender, race and membership of the Traveller Community, it also should not be applied on the other grounds of discrimination under the Equal Status Act. If it were otherwise, there would be two tiers of protection among the grounds of discrimination depending on whether or not the ground is covered by EU law. In this regard, it is important to note that no similar exemption is found in the Employment Equality Acts. Accordingly, retaining section 14(1)(a) would not be consistent with the principle of coherence or with the ambition of the Review to ensure that Ireland's revised equality legislation is as effective as possible in combatting discrimination and promoting equality.

Section 14(1)(a) is inconsistent with the Public Sector Equality and Human Rights Duty under section 42 of the Irish Human Rights and Equality Commission Act 2014. While section 42 imposes a duty on public bodies to eliminate discrimination and to promote equality of opportunity, the practical effect of section 14(1)(a) is to shield large parts of the activity of public bodies from the application of equality legislation. As a result, a lower standard of protection may apply in the context of discrimination by public bodies as opposed to other bodies or individuals.

Insofar as the rationale behind section 14(1)(a) is to make clear that the Equal Status Act, of itself, does not purport to invalidate other legislation or laws, the provision is superfluous. Where issues arise as to the possible tension or conflict between different acts of the Oireachtas, such issues can be adequately addressed by reference to general principles of interpretation.

Indeed, rather than having a provision such as section 14(1)(a), positive measures should be adopted within the Equal Status Acts to ensure, to the extent possible, that other measures are interpreted and applied in a manner consistent with Ireland's Equality Acts:

Provision could be made to require the equality-proofing of legislation prior to its adoption.

Provision could be made to require the WRC or court as appropriate to interpret an enactment, as far as possible, in line with the requirements of the Equal Status Act (see e.g. section 2 of the ECHR Act 2003) or to apply a presumption that the Oireachtas did not intend to legislate contrary to the requirements of the Equal Status Act unless there is evidence to the contrary.

In view of the limitations on the jurisdiction of the WRC (at least in cases not involving EU law where the remedy of disapplication of national law is not available), consideration could be given to incorporating a form of mechanism permitting the WRC - in appropriate cases where there



appears to be a conflict between the requirements of the Equal Status Acts and another Act of the Oireachtas - to make a reference or case stated to the High Court: see by analogy section 90(2) of the Employment Equality Acts 1998-2015.

**The Commission recommends that section 14(1)(a) of the Equal Status Acts should be repealed and positive measures should be adopted within the Equal Status Acts to ensure, to the extent possible, that other legislative measures are interpreted and applied in a manner consistent with Ireland's Equality Acts.**

## Grounds

### Disability Definition

We have previously highlighted the need for the definition of disability in the Equality Acts to be compliant with the human rights model enshrined in the UNCRPD, particularly as the legislation pre-dates Ireland's ratification of the UNCRPD.<sup>86</sup> In considering this matter further, we have been guided by the careful analysis conducted by the FELAC on this issue.

Under Article 5(2) UNCRPD, there is a positive duty on Member States to enact disability inclusive anti-discrimination laws that have a broad scope and provide effective legal remedies by eradicating and combatting all discrimination linked to disability. The current definition of disability in the Equality Acts has been interpreted expansively by the WRC and the Labour Court. It is inclusive of a wide range of impairments<sup>87</sup> and does not require that a duration or threshold of disability be established. The broad scope of the definition is welcomed. However, we have previously noted our concern that the conceptual approach of the current definition is based on the medical model of disability and fails to recognise the existence of barriers that hinder the full participation of disabled people in society on an equal basis with others. By focusing on medical deficit, it has also resulted in the development of diagnosis-led systems.<sup>88</sup> The definition also uses outdated and stigmatising language that reflects structural bias and ableist attitudes.

We are very concerned that the outcome of the review of this definition should not result in any diminution of rights for disabled people.<sup>89</sup> In examining this issue again, we have reflected carefully on the FELAC's advice that the current definition appears to align broadly with the CRPD

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<sup>86</sup> IHREC, Submission on the Review of the Equality Acts (2021) at p. 24.

<sup>87</sup> For example, case law has established that the definition includes depression, epilepsy, claustrophobia and agoraphobia, alcoholism, facial scarring, HIV infection, diabetes and dyslexia, as well as anxiety and stress under certain circumstances. Note that many of the successful cases to date on this ground involve discrimination as between persons with different disabilities: J. Walsh, *Equal Status Acts 2000-2011: Discrimination in the Provision of Goods and Services* (Dublin: Irish Council for Civil Liberties and Blackhall Publishing, 2012) 23, 104; Workplace Relations Commission, *A Hair Stylist v A Hairdressing Salon*, ADJ-00015823, 10 July 2020.

<sup>88</sup> Centre for Disability Law and Policy and the Ombudsman for Children's Office, *Mind the Gap: Barriers to the realisation of the rights of children with disabilities in Ireland* (2021) 22.

<sup>89</sup> We have previously recommended the broad scope of the definition should be retained, including its applicability to transient and fluctuating conditions and the absence of a requirement for an impairment to be of a certain severity - IHREC, Submission on the Review of the Equality Acts (2021), p.24. Our Disability Advisory Committee has noted that it is positive that the broad definition allows for the use of mental and emotional health as a ground in discrimination cases.

model of disability and the relevant guidance of the Committee on the Rights of Persons with Disabilities,<sup>90</sup> and that there is a significant risk that amending the definition may have the unintended negative consequence of narrowing its broad scope, or may introduce barriers to its application in practice.<sup>91</sup>

Therefore, we are of the view that consideration could be given to reviewing the outdated and stigmatising language in the definition, in close consultation with Disabled Persons Organisations, but any proposals for amending the definition must avoid unintended negative consequences and maintain the broad scope and effective practical application of the current definition. Further, we have previously recommended that the limited definition of disability in the Disability Act 2005 is also reviewed to ensure coherence across the statutory frameworks.<sup>92</sup>

**The Commission recommends the broad scope and effective practical application of the current definition of disability be retained.**

**The Commission recommends consideration be given to reviewing any outdated and stigmatising language used in the current definition, in close consultation with Disabled Persons Organisations, but any proposals for amending the definition must avoid unintended negative consequences and maintain the broad scope and effective practical application of the current definition.**

**The Commission recommends that the human rights model of disability should be fully integrated across all other relevant legislation, including the Disability Act 2005, to ensure harmonisation.**

## New Grounds

Nearly twenty years have passed since the initial report ('the 2004 Report'), commissioned by the Department of Justice, into the equality legislation in Ireland, in which the need to introduce new

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<sup>90</sup> Committee on the Rights of Persons with Disabilities, [General Comment No. 6 on Equality and Non-Discrimination](#) (2018) CRPD/C/GC/6

<sup>91</sup> The FELAC are of the view that opening the definition up for amendment would pose questions as to: which of the terms should be changed; what these terms would be replaced with; and what implications would such changes have for the existing body of case-law.

<sup>92</sup> IHREC, Ireland and the International Covenant on Economic, Social and Cultural Rights (2015) 44.

discriminatory grounds, including the ground of socio-economic status was examined.<sup>93</sup> Whilst the Irish equality legislation was both novel and impressive when first enacted nearly a quarter of a century ago, there have been no new grounds added to the legislation since then, aside from the housing assistance ground. In fact, arguably Irish equality legislation has “lost its teeth” and persons are using both the EU equal treatment and non-discrimination Directives<sup>94</sup> and case-law of the Court of Justice of the European Union to bring, and/or defend cases.

The Commission has previously argued that the list of discriminatory grounds in the equality acts should be broadened to reflect the grounds identified in international and regional human rights treaties and should be non-exhaustive.<sup>95</sup> In particular, the Commission has recommended that the grounds of discrimination be expanded to prohibit discrimination on the ground of socio-economic status, that the Equality Acts should explicitly prohibit discrimination against transgender, non-binary and intersex people, and that the equality legislation be amended to include a broad prohibition on discrimination on the ground of criminal conviction.<sup>96</sup>

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<sup>93</sup> S. Kilcommins, E. McClean, M. McDonagh, S. Mullally and D. Whelan (2004) “Extending the Scope of the Employment Equality Legislation: Comparative Perspectives on the Prohibited Grounds of Discrimination”, Department of Justice, Equality and Law Reform. This Report was commissioned as a response to the submission of the Equality Authority to the Employment Equality Act Review (2001).

<sup>94</sup> The Equal Treatment Directive (2006/54/EC) ; The Racial Equality Directive (2000/43/EC); The Employment Equality Directive (2000/78/EC)

<sup>95</sup> IHREC, Submission to the Review of the Equality Acts (December 2021) at p. 16; IHREC, Submission to the United Nations Human Rights Committee on the List of Issues for the Fifth Periodic Examination of Ireland (2020) 9.

<sup>96</sup> IHREC, Submission to the Review of the Equality Acts (December 2021) at p. 16

## Socio-Economic Status

For more than two decades, there have been calls in Ireland for the inclusion of socio-economic status as a ground of discrimination into the Equality Acts.<sup>97</sup> Such a ground would recognise that those with a disadvantaged socio-economic status do face discrimination on this basis and are, therefore, often excluded from both services and employment which, in turn, exacerbates income and wealth inequalities.<sup>98</sup> A lack of economic equality affects all marginalised groups and prevents the realisation of many fundamental rights.<sup>99</sup> We are of the view that reducing this gap is crucial for social cohesion, social inclusion and improving the quality of life for those experiencing or at risk of poverty.<sup>100</sup> Not only is there a myriad of international treaty obligations<sup>101</sup> that require Ireland to provide protection against discrimination on grounds relating to socio-economic status, it is a matter of justice that this ground be incorporated into Irish legislation. The introduction of this ground would not only strengthen the effectiveness of the Equality Acts, but would constitute a crucial shift in the equality landscape in Ireland. Prohibiting socio-economic discrimination would be a fulfilment of the objectives underpinning the Equality Acts and furthermore, would be a significant step towards greater recognition of intersectional discrimination.<sup>102</sup> The incorporation of this ground provides Ireland with the opportunity to further protect and advance equality legislation; and would become a powerful tool in tackling the discrimination encountered by structurally vulnerable groups.<sup>103</sup> In the 2020 Programme for Government, there was a

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<sup>97</sup> S. Kilcommins, E. McClean, M. McDonagh, S. Mullally and D. Whelan (2004) “Extending the Scope of the Employment Equality Legislation: Comparative Perspectives on the Prohibited Grounds of Discrimination”, Department of Justice, Equality and Law Reform. This Report was commissioned as a response to the submission of the Equality Authority to the Employment Equality Act Review (2001).

<sup>98</sup> See analysis of Paul McKeon provided during the FLAC Equal Status Check Seminar (June 2021); ATD Ireland, *Does it only happen to me? Living in the shadows of socio-economic discrimination* (2019).

<sup>99</sup> IHREC, *Strategy Statement 2022-2024* (2022)

<sup>100</sup> IHREC, *Strategy Statement 2022-2024* (2022)

<sup>101</sup> European Convention on Human Rights, art. 14: ‘social origin’ ‘property’ ‘other status’; European Social Charter, art. E: ‘social origin’ and art. 30: right to protection against poverty and social exclusion; European Charter of Fundamental Rights, art. 21: ‘social origin’ ‘property’; ICESCR, art. 2.2: ‘social origin’ ‘property’ ‘other status’; and ICCPR, art. 26: ‘social origin’ ‘property’ ‘other statuses’.

<sup>102</sup> For further comment on intersectional discrimination, see section on Intersectionality below. See also IHREC, *Review of the Equality Acts* (2021) at p. 21

<sup>103</sup> We define a structurally vulnerable group as one who is particularly vulnerable to violations of their rights due to political, economic, social and cultural structures. Instead of focusing on the personal characteristics of individuals and groups and viewing them as lacking agency, ‘structural vulnerability’ refers to the structures in place, which render certain sectors of the population particularly vulnerable to inequality and human rights abuses. See: Irish Human Rights and Equality Commission, *Submission to the Department of Social Protection’s public consultation on the Roadmap for Social Inclusion: Mid-Term Review*, (October 2022), p.7.

commitment given to examine the introduction of a new ground of discrimination, based on socio-economic status, into the Equality Acts.<sup>104</sup> Subsequently, the Government has referred to this legislative reform at both European and UN levels.<sup>105</sup>

We reiterate our position that a new ground relating to socio-economic discrimination should be included within the Equality Acts.<sup>106</sup> There is an increasing number of studies showing that discrimination on the grounds of socio-economic status is widespread and needs to be tackled,<sup>107</sup> with research finding socio-economic discrimination is a reality in Ireland,<sup>108</sup> in accessing public amenities, and in employment;<sup>109</sup> and that a person's socio-economic status has a significant impact on both their exposure to discrimination and their response to it.<sup>110</sup> Research has also shown there is a lack of comprehensiveness in the coverage of our equality legislation.<sup>111</sup> Our Your

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<sup>104</sup> Programme for Government (2020) p. 77 (available at: <https://www.gov.ie/en/publication/7e05d-programme-for-government-our-shared-future/>)

<sup>105</sup> In Ireland's [19th National Report to the European Committee of Social Rights](#) on the implementation of the revised European Social Charter, the Government reiterated this commitment to examine the introduction of a new ground of discrimination based on socio-economic status; At Ireland's recent [examination by the UN Human Rights Committee](#), Minister O'Gorman also asserted that the State intended to introduce two new protected grounds of discrimination within domestic equality legislation, one of which was a ground based on socio-economic status

<sup>106</sup> Equality Authority, Overview of the Employment Equality Act 1998 and the Equal Status Act 2000 (2003) 66-71; Irish Human Rights Commission, Submission on Extending the Scope of Employment Equality Legislation (2005) 4-6; IHREC, Ireland and the International Covenant on Economic, Social and Cultural Rights (2015) 22-23; IHREC, Submission to the UN Committee on the Elimination of Discrimination Against Women on Ireland's combined sixth and seventh periodic reports (2017) 33-34; IHREC, Challenging Employment Discrimination Directly Can Boost Disadvantaged Areas Such as Dublin Inner City (press release, 17 February 2017); IHREC, Submission to the United Nations Committee on the Elimination of Racial Discrimination on Ireland's Combined 5th to 9th Report (2019) 17-18; IHREC, Observations on the Equality (Miscellaneous Provisions) Bill 2017 (2017); IHREC, Submission to the Citizens' Assembly on Gender Equality (2020) 27-28; and IHREC, Comments on Ireland's 15th National Report on the Implementation of the European Social Charter (2018) 4-6.

<sup>107</sup> S. Atrey, The Intersectional Case of Poverty in Discrimination law, Human Rights Law Review 18 (2018): 411-440; T. Kadar, An analysis of the introduction of socio-economic status as a discrimination ground (Equality and Rights Alliance, 2016); J.C. Benito Sánchez, Towering Grenfell: Reflections around Socio-economic Disadvantage in Anti-discrimination Law, Queen Mary Human Rights Law Review 5, no. 2 (2019): 1; A. Benn, The Big Gap in Discrimination Law: Class and the Equality Act 2010, Oxford Human Rights Hub Journal 3, no. 1 (2020): 30; S. Ganty, Poverty as Misrecognition: What Role for Antidiscrimination Law in Europe? Human Rights Law Review 21, no. 4 (2021): 962-1007; Equinet, Equality Bodies contributing to the protection, respect and fulfilment of Economic and Social Rights (2015);

<sup>108</sup> See ATD, Does it only happen to me? Living in the shadows of socio-economic discrimination (2019) generally at p. 25 – 43

<sup>109</sup> See ATD, Does it only happen to me? Living in the shadows of socio-economic discrimination (2019) generally at p. 25 – 43; S. Kilcommins, E. McClean, M. McDonagh, S. Mullally and D. Whelan (2004) "Extending the Scope of the Employment Equality Legislation: Comparative Perspectives on the Prohibited Grounds of Discrimination", Department of Justice, Equality and Law Reform; See also account of lived experience highlighted by Paul McKeon during the FLAC Equal Status Check Seminar (June 2021)

<sup>110</sup> F. McGinnity, R. Grotti, O. Kenny and H. Russell, Who experiences discrimination in Ireland? Evidence from the QNHS Equality Modules (IHREC and ESRI) (2017) 14.

<sup>111</sup> According to the Quarterly National Household Survey equality module, 29.6% of those who reported discrimination stated that it was on grounds other than those covered by the current equality legislation (2014).

Rights helpline has received complaints of socio-economic discrimination in the areas of education, employment, and advertising, and in service provision areas such as insurance, banking and recreation – although none of these complaints were actionable as socio-economic status is not a protected ground.<sup>112</sup> The relationship between discrimination and socio-economic disadvantage is a complex one.<sup>113</sup> Those with lower socio-economic status are also subject to “stereotyping, prejudice, stigma, and discrimination” as a result of their often precarious situation.<sup>114</sup> Socio-economic discrimination is often combined with discrimination on another ground, and it is important that suitable provision is also made for intersectional discrimination to ensure that the socio-economic aspect of discrimination is not lost because it is more effective to pursue a complaint on a single, more established, ground of discrimination.

Ireland is a signatory to a number of international human rights treaties that contain equal protection or non-discrimination guarantees that address inequalities within the state and are addressed to state organs as duty bearers and non-state actors as rightsholders.<sup>115</sup> However, these norms are generally not designed to capture problems of domestic socio-economic inequality. As such, it is essential that a socio-economic status ground be introduced under the Equality Acts. Discrimination on the basis of socio-economic status leads to and materialises as a barrier to full enjoyment of human rights and particularly economic and social rights.<sup>116</sup> Disadvantaged socio-economic status results in a weaker position from which to vindicate one’s human rights.<sup>117</sup> The inclusion of this proposed ground in national equal treatment legislation would reflect the “need for a comprehensive approach to equality that encompasses all groups that experience inequality and discrimination”<sup>118</sup> and its purpose would be to cease structural discrimination of persons from a disadvantaged background.

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<sup>112</sup> IHREC, Submission on the Review of the Equality Acts (2021) p. 20

<sup>113</sup> Equinet, Expanding the list of Grounds in Non Discrimination Law (2021)

<sup>114</sup> According to Equinet, this discrimination is often based on a reliance on social or housing assistance, a lack of education, a neighbourhood, economic vulnerability, appearance etc. See Equinet, Expanding the list of Grounds in Non Discrimination Law (2021) at p. 30; for a comprehensive overview, UN Special Rapporteur on extreme poverty and human rights, Olivier De Schutter, The persistence of poverty: how real equality can break the vicious cycles A/76/177 (19 July 2021).

<sup>115</sup> Article 14 of the ECHR; Articles E and 30 of the Revised European Social Charter; Article 21 of the Charter; Article 2 ICESCR; Article 26 ICCPR; Article 1 ILO Convention Number 111.

<sup>116</sup> Equal Rights Trust, “Economic and social rights in the courtroom”, London, Equal Rights Trust (2014) at p. 69

<sup>117</sup> Equinet, Addressing poverty and discrimination: two sides of the one coin (2010) at p. 10

<sup>118</sup> Equinet, Addressing poverty and discrimination: two sides of the one coin (2010) at p. 101

A socio-economic ground would not only provide a practical means to challenge discrimination on this ground, it would provide “symbolic” recognition that such discrimination cannot be tolerated, which may have a “knock-on effect” on the stigma and stereotyping faced by structurally vulnerable individuals. Poverty and social exclusion create barriers to equal opportunities<sup>119</sup>, and a socio-economic status ground has the potential to offer some counterbalance by providing protection from discrimination.<sup>120</sup> Discrimination on the ground of socio-economic status is often combined with discrimination on other grounds, resulting in additional harm and social exclusion.<sup>121</sup> The ground would therefore assist in the acceptance of a more sophisticated approach to intersectionality and multiple discrimination.<sup>122</sup>

Socio-economic discrimination is egregious and a form of structural discrimination and explicitly recognising this ground would address cycles of poverty and disadvantage.<sup>123</sup> In this regard, this ground could pave the way for a positive form of discrimination where a group could show intergenerational unemployment. The introduction of this ground would also enhance access to justice for structurally vulnerable individuals and groups as access to the courts for a constitutional action involving socio-economic interests is both costly and time consuming.

This ground would also enhance the PSD as provided for in s.42 of the Irish Human Rights and Equality Commission Act 2014, which requires public bodies to promote equality, prevent discrimination and protect the human rights of their employees, customers, service users and everyone affected by their policies and plans. Public bodies currently have an ongoing requirement to inform themselves of, and give reasonable consideration to this duty in the performance of their functions. The inclusion of a socio-economic ground in the equality legislation would require public bodies to consider this in complying with their ongoing obligations under the PSD.

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<sup>119</sup> Equinet, *Addressing Poverty and Discrimination: Two Sides of the One Coin* (2010)

<sup>120</sup> Research shows that people with disadvantaged socio-economic status face clear discrimination where the ‘traditional’ grounds cannot provide protection to them - *An Analysis of the Introduction of socio-economic status as a discrimination ground* at p.20.

<sup>121</sup> Equinet, *Addressing Poverty and Discrimination: Two Sides of the One Coin* (2010) at p. 9

<sup>122</sup> IHREC, *Submission to the Review of the Equality Acts* (2021) at p. 21; *An Analysis of the Introduction of socio-economic status as a discrimination ground* at p. 20; and *Extending the Scope of Employment Equality Legislation: Comparative Perspectives on the Prohibited grounds of discrimination* at page xiii.

<sup>123</sup> Equinet, *Expanding the List of Grounds in Non-Discrimination Law* (2021) at p. 46



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

## The definition

An asymmetric approach<sup>124</sup> limits the application of this ground to only those who are disadvantaged. We recognise the need to achieve sufficient clarity and precision in defining the ground in order to secure foreseeability and transparency, which is required in the law.

**The Commission recommends an asymmetric approach be applied in defining this new ground.**

We are of the view that the definition of socio-economic status is best developed by listing key practical and identifiable features of difference across social classes, and we have previously suggested that these could include family background, geographical location, home ownership, educational background and economic situation.<sup>125</sup> While the listed indicators do not need to be defined precisely, it would be beneficial if their scope is considered, and where necessary set out in explanatory memorandum. We recommend consideration be given to the inclusion of a non-exhaustive list of objective indicators that reflect the lived experience of those facing socio-economic discrimination.<sup>126</sup>

**The Commission recommends the inclusion of indicators within the definition of the ground.**

**The Commission recommends thorough research, including consultation with structurally vulnerable groups, be carried out by the State to determine the most effective indicators.**

## Previous attempts to legislate for a socio-economic ground

The Equality (Miscellaneous Provisions) Bill 2017, a private member's bill, which lapsed with the dissolution of the Dáil and the Seanad in January 2020, proposed to amend Irish equality law to

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<sup>124</sup> A ground that is asymmetrical prohibits discrimination only against only those people who are disadvantaged on the basis of the protected trait. In relation to a socio-economic status ground, this would mean that only people who are disadvantaged because of their socio-economic status would be protected; In contrast, a symmetric socio-economic status ground would prohibit discrimination against everyone on the basis of their socio-economic status. This would mean, for example, that wealthier people could use the ground to say they were discriminated against. We are of the view that using a symmetrical approach would create too broad a ground and would not address the intended purpose of the Acts or the purpose of including the ground itself.

<sup>125</sup> IHREC, [Observations on the Equality \(Miscellaneous Bill\) 2017](#) at p.10; Review of Discriminatory Grounds Covered by the Employment Equality Act 1998 at p. 5

<sup>126</sup> See further on this in the context of the Equality (Miscellaneous Provisions) Bill 2021 below.

prohibit discrimination on the basis of a person's social and economic background. This Bill proposed to insert a new definition of disadvantaged socio-economic status into the respective pieces of equality legislation. A subsequent private member's bill entitled the Equality (Miscellaneous Provisions) Bill 2021<sup>127</sup> ('the 2021 Bill') also proposed to amend Irish equality law to prohibit discrimination on the basis of a person's social and economic background. This Bill proposed to insert a new definition of disadvantaged socio-economic status into the respective pieces of equality legislation, and proposed to define 'socio-economic disadvantage'.

The spirit of the proposed definition in the 2021 Bill is welcome, as it would provide inclusive, open ended, asymmetric protection, and is more expansive than similar definitions in other jurisdictions.<sup>128</sup> There are, however, some key issues with the definition that should be addressed to ensure there is clarity as to the scope of the ground and inclusivity in its application.

The inclusion of the provision 'other than on a temporary basis' stands to narrow the scope of the ground's protection. It would also add an additional level of complexity to determining the scope of the ground, as the threshold for what constitutes 'temporary' will not be clear and could result in differing judicial interpretations.

**The Commission recommends the removal of the provision 'other than on a temporary basis' from the definition of socio-economic disadvantage in the 2021 Bill.**

The requirement of the complainant to show they are part of a socially or geographically identifiable group is onerous. This would be particularly problematic in Ireland where many complainants are likely to be unrepresented. It is also complex for adjudicators to establish a person's inclusion in a socially or geographically identifiable group.<sup>129</sup> In addition, some indicators like source of income are not necessarily related to a disadvantaged socially or geographically

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<sup>127</sup> The 2021 Bill has been before the Dáil at Second Stage since January 2021.

<sup>128</sup> According to some commentators, the definition provided for in the 2021 Bill is preferable to that provided in the 2017 Bill as it is more workable and more enforceable. See analysis of Siobhán Phelan SC (as she was then) provided during the FLAC Equal Status Check Seminar (June 2021); Tamas Kádár, Co-Director of Equinet (the European Network of Equality Bodies) agreed with this analysis (available at: <https://www.youtube.com/watch?v=KawIHWn697w>).

<sup>129</sup> The definition proposed in the Bill appears to be based on the definition provided in section 1(1) of the Canadian Northwest Territories Human Rights Act 2002. The main precedent on that ground is *WCB v. Mercer* 2012 NWTSC 57 which gave significant consideration to what is required to establish a person's inclusion in a socially or geographically identifiable group.

identifiable group,<sup>130</sup> and unlike other grounds (such as race or membership of the Traveller community), people may move in and out of this list of indicators, and may not necessarily be part of an identifiable group.

The Commission recommends the removal of the provision 'socially or geographically identifiable group' from the definition of socio-economic disadvantage in the 2021 Bill.

In sections 3, 4 and 8 of the 2021 Bill, the ground is defined in a way that would enable comparisons between persons of a different socio-economic status. The rationale for this requires clarification.

**The Commission recommends further consideration be given to the rationale for the comparisons between persons of different socio-economic status in sections 3, 4 and 8 of the 2021 Bill.**

The 2021 Bill proposes a number of indicators, including "source of income", however, it is unclear how this would relate to the housing assistance ground in the Equal Status Acts. The implication would seem to be that all discrimination on the housing assistance ground would equate to discrimination based on socio-economic status. This would not be logical, however, as the source of income indicator is not necessarily a marker of having a disadvantaged socio-economic status (unlike accent, address etc.). A solution that should be considered is to remove the 'source of income' indicator from the socio-economic status ground, and to reframe and extend the housing assistance ground as a standalone 'source of income' ground applying across both of the Acts. More detail on this recommendation can be found in the 'Source of Income' section.

Based on the 2021 Bill, an effective definition of socio-economic status could be as follows: "Socio-economic status means social or economic disadvantage resulting from one or more of the following: (a) poverty, (b) illiteracy, (c) level of education, (d) address, type of housing or homelessness, (e) employment status, (f) social or regional accent, or from any other similar

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<sup>130</sup> For example, a middle class person with a professional occupation may be in receipt of housing assistance payment.

circumstance.” However, as noted above, further research may be required to determine the most appropriate indicators and the extent of same.<sup>131</sup>

## Gender Identity

We previously recommended amendment of the Equality Acts to explicitly prohibit discrimination against transgender, non-binary and intersex people, and that that further research and analysis of the effectiveness of different legislative approaches be undertaken before an approach in the Irish context is settled on.<sup>132</sup> In this regard, we have been guided by the careful analysis conducted by the FELAC of the approach that should be taken to including protection on the basis of gender identity, gender expression, and sex characteristics in the Equality Acts.

The Equality Acts do not provide specific protection from discrimination on the ground of gender identity. ‘Gender’ is not defined under the Acts, but the gender ground is defined as

“6(2) of the EEA: As between any 2 persons, the discriminatory grounds (and the descriptions of those grounds for the purposes of this Act) are— (a) that one is a woman and the other is a man (in this Act referred to as “the gender ground”).

3(2) of the ESA: As between any two persons, the discriminatory grounds (and the descriptions of those grounds for the purposes of this Act) are: (a) that one is male and the other is female (the “gender ground”)...”

Limited protection of gender identity has however been, in effect, incorporated into the gender ground through international and EU law, in particular, through decisions of the ECtHR<sup>133</sup> and the

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<sup>131</sup> For example, the multi-dimensional nature of poverty is reflected in the many existing definitions, including at risk of poverty, deprivation and consistent poverty. We also note principles-based approaches to poverty measurement, including the European Network of National Human Rights Institutions (ENNHRI) guide to a human rights-based approach to poverty reduction and measurement. We further note the national and European targets set out in the Roadmap for Social Inclusion 2020 – 2025. See: Central Statistics Office (CSO), [Poverty and Deprivation](#), (2022); European Network of National Human Rights Institutions (ENNHRI), [Applying a Human Rights Based Approach to Poverty Reduction and Measurement](#), (2019). Government of Ireland, [Roadmap for Social Inclusion 2020-2025](#), (2020).

<sup>132</sup> IHREC, Submission to the Review of the Equality Acts (December 2021) pp.16-19

<sup>133</sup> ECtHR judgements in this area have primarily concerned a violation of Article 8 of the ECHR, the right to respect for private and family life - See, for example. *Goodwin v. United Kingdom* (2002) (App No. 28957/95) [(2000) 35 EHRR 18], where the ECtHR found that the refusal to issue an amended birth certificate to a transgender woman who had undergone gender reassignment surgery violated Article 8 (right to respect for private and family life) and Article 12 (right to marry) of the Convention. ECtHR judgements in this area have also engaged and Article 14 of the ECHR, which prohibits discrimination in the enjoyment of ECHR rights and freedoms on the basis of a non-exhaustive list of grounds

CJEU.<sup>134</sup> Despite the limited protections provided by EU law, many EU Member States have legislation that goes much further.<sup>135</sup> Other international human rights instruments to which the State is party also include protections on the grounds of gender identity.<sup>136</sup>

The WRC has dealt with a number of cases in this area. It is not clear what the threshold to be met by a transgender complainant is in order to be afforded protection under equality law. However, from its decisions, it is apparent that the WRC does not necessarily examine whether the transgender person has surgically transitioned or formally changed gender under the Gender Recognition Act 2015 ('the 2015 Act').<sup>137</sup> The comparator in these cases is not always clear.

The position is less clear regarding non-binary or gender fluid people,<sup>138</sup> and the legal position of intersex people has not been clarified. Trans men and women who have a Gender Recognition Certificate under the 2015 Act are 'male' and 'female' for purposes of EEA and ESA. This means that while the 2015 Act does permit movement between genders, recognised people must still identify as men or women and those with an intersex or non-binary identity are not accommodated.

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- See *Identoba and Others v Georgia* [2015] 39 BHRC 510, where the ECtHR confirmed that Article 14 covered questions related to "gender identity." The ECtHR also held in that case the State has a "compelling positive obligation" to protect members of the LGBT community against foreseeable discriminatory inhuman and degrading treatment.

<sup>134</sup> The CJEU has recognised since 1996 that the scope of the Equal Treatment Directive included discrimination arising from the 'gender reassignment' of a person - see *P v. S and Cornwall County Council* (1996) (C-13/94). Recital 3 of the EU Gender Recast Directive 2006 confirms that the principle of equal treatment for men and women applies to discrimination arising from the 'gender reassignment' of a person. The CJEU case law to date has concerned transgender individuals who intended to undergo, or had undergone, surgical gender reassignment. The CJEU has held the comparator to be a woman or man of the same gender as the complainant whose identity is not the result of 'gender reassignment' (*Richards v Secretary of State for Work and Pensions* (2006)). It is unclear what rights under the EU anti-discrimination law apply to transgender individuals who cannot or will not access gender reassignment healthcare. It also remains unclear whether intersex people are implicitly covered under these provisions.

<sup>135</sup> According to Equinet, 31 out of 37 of its European member countries offer some protection on the ground of gender identity, most of them both in the field of employment and beyond (Equinet [Brochure](#) 2020). Where countries have incorporated protections, Equinet report that some recognise gender identity, fewer protect gender expression, and very few explicitly protect sex characteristics (Equinet report: [Expanding the List of Protected Grounds within Anti-Discrimination Law in the EU](#) (2021))

<sup>136</sup> The UN Committee on Economic, Social and Cultural Rights (CESCR) confirmed in 2009 that, under the International Covenant on Economic, Social and Cultural Rights (ICESCR), "other status" as recognised in Article 2(2) includes "gender identity ... as among the prohibited grounds of discrimination", adding that "persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the workplace". Similarly, the Council of Europe's Istanbul Convention provides in Article 4 that protection under the Convention shall be provided without discrimination, including on the ground of gender identity.

<sup>137</sup> See *O'Byrne v. AIB* (DEC-S2013-015)

<sup>138</sup> See *Customer Service Advisor v Financial Services Provider*, ADJ-00012014, 30 October 2018 -the Complainant 'identifies as a nonbinary transgender person' and was therefore covered by the gender ground.

The failure to explicitly reference gender identity, gender expression, and sex characteristics in the Equality Acts creates uncertainty, which could be used to enable an exclusionary interpretation of rights arising on this basis, and does not sufficiently protect all people from discrimination. Inclusion of explicit reference to gender identity, gender expression, and sex characteristics would fill the current gaps in protection, and improve visibility of the protections in place for these groups.

## Reform of the Gender Ground

We are of the view that the wording of the gender ground in both the ESA and the EEA should be amended to make explicit reference to gender, gender identity, gender expression and sex characteristics. It should continue to be called the 'gender ground, in order to provide assurance that the protections under the case law of the current gender ground are retained.

In line with the current gender ground, 'gender' should be defined as including being male or female. This is to ensure that the protections under the case law of the current ground are retained, including protections for somebody who holds a Gender Recognition Certificate under the 2015 Act. It is vital that it remains impermissible to differentiate between cis and trans people of the same legal gender.

The terms gender identity, gender expression, and sex characteristics should be defined in line with internationally recognised definitions, such as those provided for in Malta's Gender Identity, Gender Expression and Sex Characteristics Act.<sup>139</sup> The universal and inclusive wording of these definitions would move legislative interpretation generally to an inclusive rights based approach.

## Exemptions

Exemptions under the Equality Acts related to gender have become a point of contention in the discussion on the inclusion of gender identity, gender expression, and sex characteristics in the legislation. Exemptions in the EEA relating to gender include genuine occupational requirement,<sup>140</sup> and service in An Garda Síochána and the prison service where the assignment of a man or a woman to a particular post "is essential [inter alia] in the interests of privacy or decency".<sup>141</sup>

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<sup>139</sup> [Gender Identity, Gender Expression and Sex Characteristics Act 2015](#) (Malta).

<sup>140</sup> Section 25

<sup>141</sup> Section 27(1)

There are other references in the EEA to ‘woman’, ‘man’, ‘women’ ‘men’, for example, regarding discrimination related to pregnancy and maternity leave.<sup>142</sup>

Exemptions under the ESA that relate to gender include some cosmetics services,<sup>143</sup> where embarrassment or infringement of privacy can reasonably be expected to result from the presence of a person of ‘another gender’,<sup>144</sup> accommodation,<sup>145</sup> education,<sup>146</sup> and sports events and facilities.<sup>147</sup>

Currently, most exemptions apply in a binary way (given the definition of the ground as male-female, man-woman). The WRC decision in *McLoughlin*<sup>148</sup> suggests it is impermissible to differentiate as between cis and trans people of same gender (e.g. between cis and trans women) in applying exceptions. In reforming the gender ground, it is important that consideration is given to reframing the exceptions relating to gender to ensure the current protections for trans men and women are not diluted.<sup>149</sup>

Consideration should also be given to reframing the exceptions relating to gender to ensure discriminatory treatment between different groups within the gender ground is not permitted unintentionally. For example, it should not be permissible to apply an exception relating to the gender ground to discriminate against a trans person because they are of a different gender

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<sup>142</sup> See, for example, Section 26(1).

<sup>143</sup> Section 5(2)(c) – exception for “services of an aesthetic, cosmetic or similar nature which require physical contact between the service provider and the recipient”

<sup>144</sup> Section 5(2)(g), applied in a number of cases concerning bridal shops, for example *McMahon v Bridal Heaven Ltd*, DEC-S2008-015; *Blaney v The Bridal Studio*, DEC-S2008-032

<sup>145</sup> Section 6(2)(e)– exception for ‘the provision of accommodation to persons of one gender where embarrassment or infringement of privacy can reasonably be expected to result from the presence of a person of another gender’, applied in *Tunney v Hyland*, ADJ-00018069 (room in private home) and *Stralkowski v Crosscare*, DEC-S2012-020 (permissible to reserve section for women in a hostel for homeless people)

<sup>146</sup> Section 7(3)(a) – it is permissible for schools to admit students ‘of one gender only’. See *Mr. X and Ms. Y (on behalf of their daughter Z) v A Boys National School*, DECS2009-017: an autism unit that admitted boys and girl did not change single-gender status of school.

<sup>147</sup> Section 5(2)(f) permits “differences in the treatment of persons on the [gender ground] in relation to the provision or organisation of a sporting facility or sporting event to the extent that the differences are reasonably necessary having regard to the nature of the facility or event and are relevant to the purpose of the facility or event.” See e.g., *A Juvenile Football Player v The Football Association of Ireland*, ADJ-00026402, *Byrne v Woodenbridge Golf Club*, ADJ-00009125

<sup>148</sup> *McLoughlin v Charlies Barbers*, ADJ-00011948, 12 July 2018

<sup>149</sup> If, for example, the gender ground is expanded, that may inadvertently make it permissible for differentiation as between sub-groups (e.g. as between cis men and trans men).

identity or gender expression, despite them being of the gender that could otherwise not be discriminated against in that circumstance.

**The Commission recommends the gender ground in the Equality Acts be amended to include explicit reference to, and define gender identity, gender expression, and sex characteristics. The ground should continue to be called the gender ground, to facilitate and ensure retention of protections under the case law of the current gender ground.**

**The Commission recommends that, in reforming the gender ground, consideration should be given to reframing the exemptions relating to gender to ensure the current protections for trans men and women are not diluted. Consideration should also be given to reframing exceptions relating to gender to ensure discriminatory treatment between different groups within the gender ground is not unintentionally facilitated.**

## Family Status and Care

We have previously recommended the ‘family status’ ground be amended to capture and protect the full range of caring responsibilities present in modern Irish society,<sup>150</sup> and have benefited from the input of the FELAC in considering this further, as well as in relation to the definition of the ground. We have previously recommended the State overhaul its policy to ensure that care work is adequately supported, publicly valued and equally shared.<sup>151</sup> The intention behind the family status ground was to reconcile work and family life and ensure people did not have to forsake family responsibilities in the course of their employment.<sup>152</sup> It is still the case, however, that care remains a highly gendered aspect of Irish society and this may have been exacerbated by the Covid-19 pandemic.<sup>153</sup> Women are far more likely than men to be engaged in care work and those that do provide care work provide substantially more than their male counterparts.<sup>154</sup>

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<sup>150</sup> IHREC, Submission to the Equality Acts Review (2021), p.24-26.

<sup>151</sup> IHREC, Submission to the Equality Acts Review (2021), p.24; IHREC, Ireland and the International Covenant on Economic, Social and Cultural Rights (2015) 44.

<sup>152</sup> Dáil Éireann Debate, Employment Equality Bill, 1997 [Seanad]: Second Stage, 26 March 1998.

<sup>153</sup> National Women’s Council of Ireland, Women’s Experiences of Caring during COVID-19 (2020). This survey found that 85% of women said their caring responsibilities had increased since the outbreak of COVID-19 with 52% responding that they believe this increase had been significant. Many respondents also reported that caring responsibilities were not shared equally in their household, with the lion’s share falling to them.

<sup>154</sup> OH. Russell, R. Grotti, F. McGinnity and I. Privalko, Caring and Unpaid Work in Ireland (IHREC and ESRI) (2019). Key findings included the following: 40% of women are involved in childcare compared to 26% of men. Of persons aged



The current definition of the ‘family status’ ground does not go far enough to capture and protect the full range of caring responsibilities present in Ireland.<sup>155</sup> Whilst we have previously recommended that consideration be given to renaming this the ‘care’ ground,<sup>156</sup> having had the benefit of the advice of the FELAC, we now consider that the ground should be renamed the ‘carer’ status ground and defined more broadly to ensure a wider range of parents and persons who provide care to adults are protected.

In relation to adults, the objective is to ensure that discrimination law reflects the reality of social life in Ireland. As Ireland is a highly migratory society, both internally and externally, care provision is not confined to co-resident family members - informal care providers may be siblings, partners, adult children, grandparents, aunts, uncles, cousins, friends, and/or neighbours. It may be objected that the proposed definition is too broad, however, its purpose is to tackle discrimination and not to confer substantive entitlements such as carer’s leave, which are regulated by separate enactments. By analogy, the disability ground is defined far more broadly under ESA and EEA than under, for example, the Disability Acts 2005. It is therefore appropriate to remove the current requirement that the carer be ‘primary’ or ‘resident’.

At present, different forms of parent-child relationship are also inadequately protected. For example, foster parents cannot claim that they have been treated less favourably than other parents. The definition proposed below would enable such comparisons. The element of the current ESA definition that covers ‘being pregnant’ should be explicitly included instead under the revised gender ground; aligning it with the EEA position.

As the employment sphere and the nature of care work have evolved since the introduction of the Equality Acts, the protection given to this area must be made more robust. Care work is recognised in article 41.2 of the Constitution as constituting the ‘common good’. Extending the ground found in the Acts can be seen as furthering the fulfilment of constitutional principles.

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35-49, 70% of women were involved in childcare compared to 48% of men. Average weekly hours spent caring for women were 42.6 hours compared to men with 25.2 hours. Women in Ireland are estimated to undertake 38.2 hours of unpaid work per week which is among the highest levels in the EU28. Men in Ireland are estimated to undertake 19.8 hours of unpaid work and this is also among the highest in the EU28.

<sup>155</sup> See section 2(1) ESA and EEA: Family status is defined as having responsibility for a child and/or being the parent or primary carer of an adult with a disability that gives rise to the need for care on an ongoing basis. For the purposes of this section, the carer must be residing with them in order to be considered the primary carer.

<sup>156</sup> IHREC, Submission to the Equality Acts Review (2021), p.26.

There is clear support for a broader, more progressive understanding of what constitutes a ‘family’ in Irish law.<sup>157</sup> This logically requires extending the prohibition on discrimination beyond what was envisaged by the Equality Acts to protect the variety of care relationships found in modern Irish society.

Carer status could be defined as follows:

‘carer status’ means being a parent of a child, a foster parent, an adoptive parent, a person in loco parentis, or the carer of an adult who requires care or support on a continuing, regular or frequent basis.

Child could be defined as follows:

Child means a person who has not attained the age of 18 years.

The Carer Status ground should be defined as follows:

As between any two persons, the discriminatory grounds (and the descriptions of those ground for the purposes of this Act) are that

they are of different carer status, or that one has a carer status and the other does not (the “carer ground”),

**The Commission recommends the ‘family status’ ground be renamed the ‘carer’ status ground, and be defined to ensure a broader range of parents and persons who provide care to adults are protected.**

**The Commission recommends the definitions sections of the Equal Status Act should define the term ‘child’ as “a person who has not attained the age of 18 years”.**

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<sup>157</sup> Debate around article 41.2 has already highlighted widespread acknowledgement that this area has evolved significantly over the last twenty years, while the recognition by the Supreme Court of childless married couples as constituting a ‘family’ for the purposes of article 41.2 shows that the care work envisaged by the Constitution goes beyond childcare and could therefore take place outside the context of the home. See *Murray v Ireland* [1985] IR 532, para 537; See also the Department of Justice, Report of the Task Force on Implementation of the Recommendations of the Second Report of the Convention on the Constitution (2016) 23-24.

**The Commission recommends the current Equal Status Act definition that covers ‘being pregnant’ should be explicitly included instead under the revised gender ground, aligning it with the Employment Equality Act.**

## Civil Status

We have been informed by the advice of the FELAC in considering this issue. We are of the view that the ‘civil status’ ground should be renamed the ‘marital status’ ground, to clarify that the ground refers to one’s family type and to re-align the language with that used in human rights instruments and discrimination laws in other countries. We note that the ground was re-named the civil status ground to include civil partnership related discrimination. However, the enactment of the Marriage Act 2015 means that a diminishing number of people are covered by that element of the ground (namely, those who entered into a civil partnership and did not opt to convert it to a marriage). We consider that that cohort of persons should still be included, but the ground renamed and the definition simplified by splitting off the reference to civil partnership into a second sentence. Cohabiting couples should also be included.

Marital status could be defined as follows:

‘Marital status’ means the status of being married, single, widowed, divorced or separated, and includes being the child of a person with one of these statuses;

Marital status includes being a cohabitant or being in a civil partnership within the meaning of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, or being a former cohabitant or civil partner where such a relationship has ended by death or been dissolved;

The Marital status ground could be defined in the Equality Acts as follows:

As between any two persons, the discriminatory grounds (and the descriptions of those ground for the purpose of this Act) are:

that they are of different marital status (the “marital status ground”).

**The Commission recommends the civil status ground be renamed the marital status ground, to clarify that the ground refers to one’s family type and to re-align the language with that used in human rights instruments and discrimination laws in other countries. It should include being married, single, widowed, divorced or separated. It should also include being a cohabitant or**

**being in a civil partnership, or being a former cohabitant or civil partner where such a relationship has ended by death or been dissolved.**

## Criminal Conviction

We recognise the importance of eliminating discrimination against those with a criminal conviction and in considering this issue further, we have been informed by the work of the FELAC which examined this matter in detail.

Ireland does not currently provide any protection against discrimination on the basis of a criminal conviction.<sup>158</sup> Core international treaties have recognised that rehabilitation and reintegration fall within the human rights framework.<sup>159</sup> We have previously noted the impact that the lack of protection on this ground is likely to have on particular groups. In this regard, research has identified that high rates of offending and reoffending can be linked to homelessness, a person's socio economic status, and drug and alcohol addiction.<sup>160</sup> We have also noted that, structural discrimination can lead to over-representation of certain groups within the criminal justice system including, for example; men, people with mental health conditions, people with intellectual disabilities, and minority ethnic groups, including members of the Traveller community. This disadvantage is further compounded as research shows that the rate of recidivism in Ireland is high once a person enters the prison system.<sup>161</sup> The Commission's Your Rights service has received reports from members of the public that illustrate the real life impact of having to disclose their

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<sup>158</sup> The Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016, while permitting those with a spent conviction to not disclose it, does not include any explicit anti-discrimination provisions.

<sup>159</sup> Article 10(3) ICCPR places an obligation on States to seek the reformation and social rehabilitation of prisoners, while the Human Rights Committee in General Comment No. 21 stated that "no penitentiary system should be only retributory; it should essentially seek the reformation and social rehabilitation of the prisoner"; according to the Council of Europe standards, the use of information on criminal records outside of criminal proceedings must be as limited as possible, so as not to compromise the chances of social rehabilitation of the convicted person and should therefore be restricted "to the utmost" See Committee of Ministers, Recommendation on the Criminal Record and Rehabilitation of Convicted Persons (June 1984); Council Framework Decision 2008/675/JHA on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings, 24 July 2008 referenced in Recital 11 of Framework Decision 2009/315/JHA and the Report from the Commission to the European Parliament and the Council on the implementation by the Member States of the Framework Decision 2008/675/JHA, 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings; the ECtHR has linked the concept of human dignity to the prospect of rehabilitation, holding that this includes "meaningful" access to employment, education and vocational training, see *Murray v. the Netherlands*, Application No 10511/10, 26 April 2016, at para 110.

<sup>160</sup> IHREC, Response to the Public Consultation on the Review of the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016 (2020), p.5-6.

<sup>161</sup> IHREC, Response to the Public Consultation on the Review of the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016 (2020), p.6.

previous convictions to third parties, including the withdrawal of employment offers, exclusion from third level education, loss of housing and refusal of insurance policies.<sup>162</sup> As such, we have previously recommended that the equality legislation be amended to include a prohibition on discrimination on the ground of criminal conviction.<sup>163</sup>

Explicit prohibition of discrimination on the basis of criminal conviction has been employed in other jurisdictions, for example, Canada<sup>164</sup> and Tasmania.<sup>165</sup> The Criminal Justice (Rehabilitative Periods) Bill 2018 (as amended at Committee stage) addresses the lack of prohibition of discrimination on this ground to a certain extent, by proposing an amendment to the EEA that would make it unlawful discrimination for an employer to treat a person less favourably by reason of their spent conviction. However, the Bill is limited in two respects:

- (i) It only prevents discrimination in the employment sphere; and
- (ii) It applies only where a person has been discriminated against on the basis of their spent conviction (as opposed to a criminal conviction more generally).

We have previously recommended that the equality legislation be amended ‘to include a broad prohibition on discrimination on the ground of criminal conviction’, providing cover beyond spent convictions and the employment sphere only.<sup>166</sup> Having taken account of the advice of the FELAC on this matter, we recognise that further research is required to clarify how this would work in practice, in particular with reference to the appropriate exemptions that would be needed in relation to such a provision. Such exemptions would include those to ensure that relevant criminal

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<sup>162</sup> IHREC, Response to the Public Consultation on the Review of the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016 (2020), p.7.

<sup>163</sup> IHREC, Submission to the Review of the Equality Acts (2021) at p. 16; IHREC, Response to the Public Consultation on the Review of the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016 (2020).

<sup>164</sup> In Canada, legislative provisions at both the federal and provincial level address such discrimination, with the Canadian Human Rights Act 1985 including within its prohibited grounds of discrimination a “conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered”. See s.3 of the federal Canadian Human Rights Act 1985, available at: <https://laws-lois.justice.gc.ca/eng/acts/h-6/page-1.html#h-256801>. See also s.18(2) of the Quebec Charter of Human Rights and Freedoms, available at: <http://legisquebec.gouv.qc.ca/en/showdoc/cs/c-12>; s.13 of the British Columbia Human Rights Code, available at: [https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/00\\_96210\\_01](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/00_96210_01).

<sup>165</sup> In Tasmania, the Anti-Discrimination Act 1998 prohibits discrimination on the ground of an “irrelevant criminal record”. See s.16(q) of the Anti-Discrimination Act 1998, available at: <https://www.legislation.tas.gov.au/view/html/inforce/current/act-1998-046>.

<sup>166</sup> We have stated that prohibiting discrimination in respect of a spent conviction only ‘is too limited and does not address the more general discrimination faced by ex-offenders’ and that ‘Discrimination on the ground of criminal conviction should also extend to the Equal Status Acts 2000- 2018’. See IHREC, [Response to the Public Consultation on the Review of the Criminal Justice \(Spent Convictions and Certain Disclosures\) Act 2016](#), November 2020.

convictions can be considered appropriately in recruitment where there is a genuine occupational requirement, for example in care and teaching professions which entail access to structurally vulnerable groups. Appropriate exemptions in respect of a criminal conviction ground should be limited by the principles of proportionality; accessibility and clarity; consistency with Ireland's EU and international obligations; coherence; and effectiveness. Garda vetting should be aligned with these principles to ensure it is limited to relevant criminal convictions only.

**The Commission recommends the inclusion of a broad prohibition on discrimination on the ground of criminal conviction that is not limited to spent convictions, in both the Employment Equality Act and the Equal Status Act, and further research be conducted to determine the appropriate exemptions needed in relation to this ground.**

### Source of Income

This section has been informed by the work of the FELAC, including on the introduction of a new socio-economic status ground.

The definition of a socio-economic status ground proposed under the Equality (Miscellaneous Provisions) Bill 2021 ('2021 Bill') includes a "source of income" indicator. It is unclear how this would relate to the housing assistance ground in the ESA. The implication would seem to be that all discrimination on the housing assistance ground would equate to discrimination based on socio-economic status. This would not be logical, however, as the source of income indicator is not necessarily a marker of having a disadvantaged socio-economic status.

We are of the view that the 'source of income' indicator should be removed from the socio-economic status ground in the 2021 Bill and the housing assistance ground could be reframed as a 'source of income' ground. Currently, the housing assistance ground protects people from discrimination based on their source of income, defined as including receipt of rent supplement, housing assistance payments, or other social welfare payments.<sup>167</sup> The scope of the ground is confined to the provision or termination of accommodation and related services or amenities. A revised ground could be defined in a similar manner, renamed the 'source of income' ground, and

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<sup>167</sup> The Equality (Miscellaneous Provisions) Act 2015 amended the Equal Status Act to include section 3B, the housing assistance ground, which states: the discriminatory grounds shall include the ground that as between any two persons, that one is in receipt of rent supplement, housing assistance or any payment under the Social Welfare Acts and the other is not.

extended to the entire material scope of the EEA and the ESA. The revised ground would replace the housing assistance ground.

Any appropriate exemptions needed in relation to the source of income ground, for example to permit the lending practices of financial institutions, should be limited by the principles of proportionality; accessibility and clarity; consistency with Ireland's EU and international obligations; coherence; and effectiveness.

**The Commission recommends consideration be given to reframing the housing assistance ground as a 'source of income' ground which would apply to the entire material scope of the Equality Acts.**

**The Commission recommends any appropriate exemptions needed in relation to the source of income ground, for example to permit the lending practices of financial institutions, should be limited by the principles of proportionality; accessibility and clarity; consistency with Ireland's EU and international obligations; coherence; and effectiveness.**

## Intersectionality

We have repeatedly called for the Equality Acts to be amended to provide for intersectional discrimination.<sup>168</sup> Intersectional discrimination in this context is not intended to be synonymous with 'multiple' or 'compound' discrimination, which describe discrimination on multiple grounds which are then examined independently.<sup>169</sup> Intersectional discrimination describes the unique disadvantage experienced by a person as a result of a combination of grounds which can only be understood by examining them together, rather than apart.<sup>170</sup>

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<sup>168</sup> IHREC, Submission to the Review of the Equality Acts (December 2021) 27-31; IHREC, Submission to the United Nations Committee on the Elimination of Racial Discrimination on Ireland's Combined 5th to 9th Report (2019) 17-18; IHREC, Submission to UN Committee on the Elimination of Discrimination Against Women (2017) 34-35; and IHREC, Submission to the Citizens' Assembly on Gender Equality (2020) 28

<sup>169</sup> The three forms of multiple discrimination are 'sequential multiple discrimination' which is discrimination on multiple grounds stemming from different events; 'additive multiple discrimination' which is discrimination on multiple grounds, stemming from the same event but that can be proven independently; and intersectional discrimination which is discrimination on multiple grounds that produces a qualitatively different outcome than separate grounds applying separately. For more see: S. Fredman, Intersectional discrimination in EU gender equality and non-discrimination law (European Commission and European network of legal experts in gender equality and non-discrimination) (2016) 27-28.

<sup>170</sup> See generally: K. Crenshaw, 'Demarginalising the intersection of race and sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1 University of Chicago Legal Forum 139.

Section 25(1A) of the ESA and Section 79 of the (1A) EEA provide that complaints may be referred on more than one ground but specify that a “decision must be made on each of the claims”. In practice, adjudication officers deal with the grounds in turn, requiring a case to be established separately on each ground. These sections could be amended in a relatively straightforward manner to allow for intersectional discrimination.

**The Commission recommends sections 25(1A) of the Equal Status Act and 79 (1A) of the Employment Equality Act be amended to provide for intersectional discrimination by removing reference to a decision being made on each claim, and including the clause ‘or on a combination of the grounds’ in subsection (a).**



## Positive Duties

Positive duties impose legal obligations on bodies to proactively take equality and non-discrimination considerations into account in making and giving effect to policies, and in undertaking activities. There are two broad types of positive duties – those imposed on public bodies, and those imposed on private sector bodies. Positive duties imposed on public bodies have proven effective in other jurisdictions.<sup>171</sup>

### Public Sector Duty

The Public Sector Duty ('PSD') as provided for in s. 42 of the Irish Human Rights and Equality Commission Act 2014 requires public bodies to promote equality, prevent discrimination and protect the human rights of their employees, customers, service users and everyone affected by their policies and plans. Public bodies currently have an ongoing requirement to inform themselves of, and give reasonable consideration to this duty in the performance of their functions.

Despite being in effect for over eight years, the implementation of the PSD is still limited and fragmented.<sup>172</sup> At present, we have the sole responsibility for the enforcement of the PSD. As part of our role, we can give guidance to and encourage public bodies in developing policies and good practice in relation to human rights and equality. Where there is evidence of a failure by a public body to perform its functions in line with the PSD, we may invite a public body to carry out a review, or to prepare and implement an action plan related to the performance of its functions, or both. However, section 42(11) of the 2014 Act explicitly excludes a cause of action by any person against a public body.

We have recognised the need to strengthen the PSD and 'a stronger Duty with effective enforcement mechanisms' is one of our current strategic objectives.<sup>173</sup> In our Strategy Statement 2022-2024, we have made a commitment to enhance the role of the PSD in the conduct of public

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<sup>171</sup> For example, the High Court in Northern Ireland has described the duties under section 75 of the Northern Ireland Act 1998 as being "of paramount importance in contemporary Northern Ireland society" and has described the Equality Commission of Northern Ireland as "a statutory watchdog to be reckoned with". See *Re Worton* [2017] NIQB 131 [15].

<sup>172</sup> As recognised in the Commission's [Strategy Statement 2022-2024](#), at p.18.

<sup>173</sup> [Strategy Statement 2022-2024](#), at p.18-19.

bodies and in the execution of their functions,<sup>174</sup> and have prioritised reporting on and enforcing the compliance of public bodies with the PSD.<sup>175</sup>

In further considering the potential to strengthen our powers in the context of the review of the Equality Acts, we have been guided by the careful analysis conducted by the FELAC in this regard. We also note a recent Equinet report on equality mainstreaming that concluded that there is a need for ‘more legally binding equality duties and equality impact assessments, as well as appropriate and enforceable sanctions where duty bearers fail to meet their responsibilities’.<sup>176</sup>

**The Commission recommends the powers under section 42(5) of the 2014 Act be strengthened by providing that the Commission may ‘require’ public bodies to undertake an equality and human rights review or action plan.**

**The Commission recommends section 42(11) of the 2014 Act be deleted to allow for a cause of action to be conferred on a person against a public body in respect of the performance of its functions under the Public Sector Equality and Human Rights Duty.**

**The Commission recommends the Public Sector Equality and Human Rights Duty be expanded to include schools and other educational establishments.**

**The Commission recommends reporting obligations under the Public Sector Equality and Human Rights Duty should be strengthened by mandating the collection of adequate disaggregated data to enable ongoing assessment of effectiveness.**

**The Commission recommends that the requirements for reporting compliance with the Public Sector Equality and Human Rights Duty be strengthened.**

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<sup>174</sup> Our objectives include “a stronger duty with effective enforcement mechanisms” which will we achieve through “recommendations to Government on enforcement mechanisms and supports for implementation” and “conduct a review under Section 42(7) of the IHREC Act and where considered appropriate make recommendations to Government on amendments to the IHREC Act to include enforcement mechanisms”.

<sup>175</sup> IHREC, [Strategy Statement 2022-2024](#) (2022)

<sup>176</sup> Equinet, [Compendium of Good Practices on Equality Mainstreaming: The Use of Equality Duties and Equality Impact Assessments](#), 2021.

## Potential for Private Duties

In considering this issue, we have been informed by the work of the FELAC which examined the potential for private sector duties in detail.

Private sector equality and human rights duties are not a feature of Ireland's equality legislation, but have been used to great effect in other jurisdictions, such as in Northern Ireland,<sup>177</sup> and Canada,<sup>178</sup> and are becoming a more common feature of EU legislation.<sup>179</sup>

The public sector duty applies to the procurement function of public sector bodies, and so applies to some private organisations where their services are procured by public sector bodies. Further, many private sector bodies undertake proactive action towards equality of their own volition. We recommend the introduction of a private sector duty which would ensure equality measures are uniformly applied across the private sector. In addition, firms that employ these types of policies are less vulnerable to both direct and indirect discrimination claims.<sup>180</sup> Some EU Member States have robust positive private sector duties included in their national employment legislation.<sup>181</sup>

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<sup>177</sup> See, for example, the Fair Employment and Treatment Order 1998 as amended, which places positive obligations relating to equality of employment between Catholics and Protestants for private sector employers with more than 25 employees. These positive duties are accompanied by extensive reporting obligations.

<sup>178</sup> See, for example, Ontario's Pay Equity Act, which applies to all public sector employers and all private sector employers with more than ten employees.

<sup>179</sup> For example, gender balance in company directorships. See, for example, Directive (EU) 2022/2381 on improving the gender balance among directors of listed companies and related measures, and the proposed directive of the European Parliament and of the Council on corporate sustainability due diligence and amending Directive (EU) 2019/1937(COM(2022) 71)

<sup>180</sup> In the UK, for example, there are moves to allow the Courts to take positive duty compliance into account when awarding damages for third party harassment claims. See the UK's Worker Protection (Amendment of Equality Act 2010) Bill, which would place a positive duty on all employers to prevent sexual harassment, and gives a Tribunal the power to award up to 25% more compensation if it is found that an employee had been harassed and this duty had not been complied with.

<sup>181</sup> See, for example, Finland where employers are required to evaluate the achievement of equality in the workplace and develop the working conditions and methods for selecting personnel and making decisions about personnel including through positive action measures as per their Non-Discrimination Act 2004. The requirement covers all grounds under the Act and requires employers with at least 30 employees to prepare a plan of the necessary measures to promote equality. The Act covers the grounds of age, origin, nationality, language, religion, belief, opinion, political activity, trade union activity, family relationships, state of health, disability, sexual orientation or other personal characteristics. Employers are under a separate positive duty to promote gender equality in a number of ways, including through gender equality plans and assessments. Employers may also be ordered by the National Non-Discrimination and Equality Tribunal to implement these duties or face a financial penalty; and in Sweden where a duty is placed on employers to take a goal oriented approach to advance equality through active measures on all seven grounds covered under the Discrimination Act 2008. The Act covers sex, transgender identity or expression, ethnicity ("national or ethnic origin, skin colour or other similar circumstances"), religion or other belief, disability, sexual orientation, and age. Employers with more than 25 employees must also draw up a gender equality plan every three years. An employer may be required to submit information to the Equality Ombudsman, which supervises

While there are also other relevant examples of private sector equality duties,<sup>182</sup> the models in Finland and Sweden are goal orientated and plan based, and require companies to undertake an analysis and subsequently plan to remedy the issues found. If introduced in Ireland, a similar model could tie in with the existing gender pay gap reporting requirements and would be coherent with the PSD.

**The Commission recommends the introduction of positive equality duties for the private sector that are goal oriented, plan-based and comprehensive into the Irish legislation.**

## Pay Gap Reporting

Pay gap reporting is a positive duty that has been imposed on the private sector in Ireland. The Gender Pay Gap Information Act 2021 requires organisations with over 250 employees to report and publish information relating to their gender pay gap, and, where there is a gap, to explain why and what measures are being taken to reduce it.<sup>183</sup> While the pay gap reporting legislation will be a useful tool for advancing equality of pay, we consider there to be a number of issues that should be addressed.

There is no central location to view the data reported by employers.<sup>184</sup> The lack of transparency is unsatisfactory, in terms of the reliance currently placed on private companies for analysis. We are of the view that a central location should be developed to house all reporting data, and to allow public access to all employer reports.

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employers' compliance under the Discrimination Act. Employers may be ordered by the Board against Discrimination, on foot of an application from the Equality Ombudsman, to fulfil these duties subject to a financial penalty. See Equinet, [Making Europe More Equal: A Legal Duty? \(2016\) at p.24](#)

<sup>182</sup> Such as in Northern Ireland where employers are required to conduct triennial reviews to examine whether there is fair participation of the two main religious communities and, if not, then the employer must determine 'the affirmative action (if any) which would be reasonable and appropriate'. See Article 55(1), Fair Employment and Treatment Order (NI) 1998; and Spain where companies with 50 or more employees have to draw up a gender equality plan and register it formally. Regulations prescribe the scope of the equality plans, the negotiation procedure, its content and the necessary monitoring and evaluation measures. The plans must include measures to address any under-representation on the grounds of sex and such measures can include positive action with the aim of eliminating women's occupational segregation, both horizontal and vertical. Equinet, [Exploring Positive Action as a Means to Fight Structural Discrimination in Europe](#), 2021, p.45.

<sup>183</sup> IHREC [Press Release: New Codes of Practice to Tackle Pay Inequality and Workplace Harassment](#) [2022]

<sup>184</sup> It is only through investigations by media, or analysis by private companies that information on the gender pay gap in Ireland becomes available. See as an example PwC's [Gender Pay Gap Analysis](#) 2023

Employers will have further obligations under legislation introduced to transpose the new EU Pay Transparency Directive.<sup>185</sup> Irish law has moved ahead of a number of the requirements of the Directive. However, Article 10 provides that where the reporting has shown a pay gap of at least 5%, a detailed joint pay assessment must be taken by the employer in consultation with employees and representatives. This is not a current feature of the Irish legislation. We recommend legislation be introduced to extend pay gap reporting to all grounds in the EEA to address other disparities in earning. For example, recent research by the ESRI found that non-Irish nationals as a whole earned 22% less per hour than Irish nationals.<sup>186</sup> We are of the view that broader pay gap information legislation would be a useful tool in achieving greater equality in pay across all grounds in the EEA. Consideration could also be given to extending the obligation to other grounds under the new EU Pay Transparency Directive to undertake a joint pay assessment where a 5% pay gap is identified.<sup>187</sup>

**The Commission recommends all reporting data under the Gender Pay Gap Information Act 2021 should be kept within a central location to allow public access to all employer reports.**

**The Commission recommends that a requirement to undertake detailed joint pay assessment where reporting has shown a pay gap of at least 5% should be introduced into Irish legislation in line with the EU Pay Transparency Directive.**

**The Commission recommends legislation be introduced to extend pay gap reporting to all grounds in the Employment Equality Act.**

## Data

For both the PSD, and any private sector duties implemented, we are of the view that these must be accompanied by specific and robust reporting obligations, and the collection of adequate disaggregated data. This is essential to the ongoing assessment of the effectiveness of positive duties, and minimises the risk of vague reporting obligations that can limit the impact of positive

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<sup>185</sup> Directive (EU) 2023 of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms. Text of the Directive available at <https://data.consilium.europa.eu/doc/document/PE-81-2022-INIT/en/pdf>

<sup>186</sup> ESRI, [Wages and working conditions of non-Irish nationals in Ireland](#), January 2023

<sup>187</sup> Article 10.

duties. Identifiers across all grounds under the Equality Acts should be included in reporting obligations underpinning positive duties.

**The Commission recommends that if private sector duties are included, they be accompanied by robust reporting obligations to ensure that adequate disaggregated data is collected to enable ongoing assessment of the effectiveness of positive duties.**

## Positive Action

Positive action deliberately uses one or more of the protected grounds such as race or gender to remedy the past harms against people from structurally vulnerable groups, compensate for ongoing disadvantage, prevent that disadvantage from happening and to ensure full equality. In this sense, it is a fundamental tool to fight against structural discrimination.<sup>188</sup> Positive action is permissible but not mandatory under both Irish and EU anti-discrimination law.<sup>189</sup> We are of the view that the provisions providing for positive action within the Equality Acts be strengthened to permit specific group-based measurements to ensure full equality in practice is achieved across all grounds of discrimination. In this regard, we have been guided by the careful analysis conducted by the FELAC.

## Positive Action in the Equal Status Acts

Under the ESA, positive action provisions essentially function as a defence, protecting positive action measures from challenge on the basis of direct discrimination.<sup>190</sup> The ESA contains several vague measures that permit different treatment of groups covered by the non-discrimination grounds. A key issue with positive action in the ESA is incoherence and lack of cohesion, with provisions scattered across the legislation,<sup>191</sup> and different thresholds used throughout. Case law is sparse,<sup>192</sup> and has added to the difficulties of interpreting the provisions.<sup>193</sup> The legislation contains one primary positive action provision.<sup>194</sup>

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<sup>188</sup> Equinet, [Exploring Positive Action as a Means to Fight Structural Discrimination in Europe](#), 2021.

<sup>189</sup> *Stevens v The Helix Theatre*, DEC-S2008-033

<sup>190</sup> Walsh 2012: Chapter 8

<sup>191</sup> For example, measures are contained in sections 5(2)(h), & (l), 6, and 16(1)(a).

<sup>192</sup> There is no thorough case law on section 5(2)(h), but see for example *Keane v World Travel Centre*, DEC-S2011-035 (discount for Filipino nationals did not meet the requirements of the exception), and *Toner v Monart*, DECS2013-006 (acceptable not to permit child in a restaurant that catered for customers of adult only spa). Similarly, there are few cases on section 5(2)(l), but see *Shanahan v One Pico Restaurant*, DEC-S2003-056 (can't avail of exception to exclude children unless can demonstrate that environment caters exclusively for adults). On section 16, see *Dalton v Limerick City Council*, DEC-S2004-042 (acceptable to have a preferential rate re refuse collection for over 65 age group).

<sup>193</sup> Per MacMenamin J. in *Cahill*, discussing section 5(2)(h) – “The section is not at all easy to interpret”

<sup>194</sup> Section 14(1)(b) provides that “nothing in this Act shall be construed as prohibiting ... preferential treatment or the taking of positive measures which are bona fide intended to (i) promote equality of opportunity for persons who are, in relation to other persons, disadvantaged or who have been or are likely to be unable to avail themselves of the same opportunities as those other persons, or (ii) cater for the special needs of persons, or a category of persons, who, because of their circumstances, may require facilities, arrangements, services or assistance not required by persons who do not have those special needs”. For case law, see *Parent v Department of Education and Skills*, ADJ-00009625, 9 July 2018, *Hogan v Westwood Health Club*, ADJ-00020951, 23 September 2019.

We are of the view that positive action will assume greater significance if the exemption for treatment required by law is removed.<sup>195</sup> It is essential, therefore, that robust provisions on positive action are included in the reformed Equality Acts. The ESA contains one primary positive action provision in section 14(1)(b). We recommend section 14(1)(b) be replaced with a single overarching provision which permits specific group-based measures to ensure full equality in practice is achieved across all grounds of discrimination. The provision could be modelled on the text on positive action in the proposal for a ‘Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation’.<sup>196</sup> Further to this, we recommend an illustrative list of measures be supplied to give greater clarity to service providers on the types of measures allowed, and to encourage more frequent use of positive action measures.

We also recommend consideration be given to amending the Equality Acts to require public bodies to adopt positive action measures where it would be proportionate to do so in order to comply with the PSD. Public bodies should be collecting local data on their staff and service users to inform their implementation of the duty, and this data should be used to inform positive action measures to be taken in this regard.<sup>197</sup>

**The Commission recommends that the current approach to positive action in the Equal Status Acts be replaced with a single overarching provision which permits specific group-based measures to ensure full equality in practice is achieved across all grounds of discrimination.**

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<sup>195</sup> For more detailed discussion on removal of s.14(1)(a) of the ESA see Exemptions section above.

<sup>196</sup> Article 5 of the proposed Directive provides that: “With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to religion or belief, disability, age, or sexual orientation.” See [Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation. Brussels, 2.7.2008 COM\(2008\) 426 final. 2008/0140 \(CNS\)](#).

<sup>197</sup> Recommendations for the review of some of the other current positive action provisions in the ESA have been set out elsewhere in this submission, for example, recommendations that sections 5(2)(h) and 5(2)(l) be reviewed for proportionality, and section 6 (6) provisions be reviewed to ensure coherence and consistency with EU/international law.



## Positive Action in the Employment Equality Acts

There are a number of provisions under the EEA relating to positive action.<sup>198</sup> There is limited case law on these provisions in Ireland. However, the wording is modelled on EU law, and the CJEU has held in cases relating to the gender ground that it is lawful to give preference to members of the under-represented sex who are equally qualified, so long as such measures permit an objective assessment of the personal circumstances of all candidates.<sup>199</sup>

New EU legislation explicitly requires the application of such a ‘tie-break’ system. Directive 2022/2381/EU on improving the gender balance among directors of listed companies creates an obligation on a company to take positive action for increasing women’s representation on company boards if the target is not met.<sup>200</sup>

The revision of the Equality Acts provides an opportunity to not only implement the minimum requirements of the Directive into Irish law, which is required to happen by December 2024, but to expand on them. The Directive creates a precedent for extending the provisions to permit employers to take similar positive action measures across all grounds under the EEA, and for broadening its scope to positions outside of director roles, when proportionate to do so. Irish legislation implementing Directive 2022/2381/EU could specify that priority may be given to

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<sup>198</sup> Most notably section 24(1) on the gender ground which states: ‘This Act is without prejudice to any measures—(a) maintained or adopted with a view to ensuring full equality in practice between men and women in their employments, and (b) providing for specific advantages so as—(i) to make it easier for an under-represented sex to pursue a vocational activity, or (ii) to prevent or compensate for disadvantages in professional careers.’; and section 33 for the other grounds which states: ‘(1) Nothing in this Part or Part II shall prevent the taking of such measures as are specified in subsection (2) in order to facilitate the integration into employment, either generally or in particular areas or a particular workplace, of—(a) persons who have attained the age of 50 years, (b) persons with a disability or any class or description of such persons, or (c) members of the traveller community. (2) The measures mentioned in subsection (1) are those intended to reduce or eliminate the effects of discrimination against any of the persons referred to in paragraphs (a) to (c) of that subsection. (3) Nothing in this Part or Part II shall render unlawful the provision, by or on behalf of the State, of training or work experience for a disadvantaged group of persons if the Minister certifies that, in the absence of the provision in question, it is unlikely that that disadvantaged group would receive similar training or work experience. Savings and exceptions related to the family, age or disability’. See also sections 26, 34, and 35(2)

<sup>199</sup> See e.g. Case C-158/97 *Badeck* [2000] ECR I-1875

<sup>200</sup> Art 6(2): As regards the selection of candidates for appointment or election to director positions, Member States shall ensure that, when choosing between candidates who are equally qualified in terms of suitability, competence and professional performance, priority is given to the candidate of the underrepresented sex unless, in exceptional cases, reasons of greater legal weight, such as the pursuit of other diversity policies, invoked within the context of an objective assessment which takes into account the specific situation of a candidate of the other sex and which is based on non-discriminatory criteria, tilt the balance in favour of the candidate of the other sex.

candidates from under-represented groups when choosing between candidates who are equally qualified, unless there are reasons of greater legal weight to favour of another candidate.

**The Commission recommends that Directive 2022/2381/EU on improving the gender balance among directors of listed companies should be transposed into Irish law in the context of the Equality Acts review.**

**The Commission recommends that consideration be given to extending the provisions of Directive 2022/2381/EU on improving the gender balance among directors of listed companies permitting employers to take positive action measures across all grounds under the Employment Equality Act, and to broaden its scope to positions outside of director roles.**

## Reasonable Accommodation

We are of the view that the reasonable accommodation provision within the Equality Acts should be strengthened to protect rights holders and assist with consistent interpretation and application of the legislation. We have previously called for, amongst other things, the provisions on reasonable accommodation in the Equality Acts to be extended to all grounds of discrimination<sup>201</sup>, the right to reasonable accommodation provision in the ESA be made compliant with the UNCRPD,<sup>202</sup> and specifically for the EEA to be amended to provide that denial of reasonable accommodation is discriminatory.<sup>203</sup>

## Reasonable Accommodation in the Equal Status Act

Reasonable accommodation is currently defined under section 4 of the ESA as:

(1) For the purposes of this Act discrimination includes a refusal or failure by the provider of a service to do all that is reasonable to accommodate the needs of a person with a disability by providing special treatment or facilities, if without such special treatment or facilities it would be impossible or unduly difficult for the person to avail himself or herself of the service.

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<sup>201</sup> IHREC, Submission to the Equality Acts Review (2021) at p.61; Equality Authority (2004) Overview of the Employment Equality Act 1998 and the Equal Status Act 2000; also generally, IHREC, Observations on the General Scheme of the Equality / Disability (Miscellaneous Provisions) Bill (2016)

<sup>202</sup> IHREC, Submission to the Equality Acts Review (2021) at p.55

<sup>203</sup> IHREC, Submission to the Equality Acts Review (2021) at p.59

(2) A refusal or failure to provide the special treatment or facilities to which subsection (1) refers shall not be deemed reasonable unless such provision would give rise to a cost, other than a nominal cost, to the provider of the service in question...

The duty is further provided for under sub-sections (3) to (5).<sup>204</sup> The FELAC has raised some concerns with this definition, finding that it is not compliant with the UNCRPD in a number of ways, including:

- the reference to ‘*special* treatment or facilities’;
- the ‘impossible or unduly difficult’ participation threshold;<sup>205</sup>
- the ‘nominal cost’ ceiling;<sup>206</sup>
- the term ‘reasonable’ being used to assess extent of measures required on a case-by-case basis<sup>207</sup> (the threshold should be assessed instead solely with reference to disproportionate burden);
- the scant guidance for service providers; and
- the duty to avail of government supports is not explicit.

The government has previously proposed amendments to reasonable accommodation in the Disability (Miscellaneous Provisions) Bill 2016 and the General Scheme of the Assisted Decision-Making (Capacity) (Amendment) Bill 2021. These proposals intended to leave the current definition intact, but add a subsection raising the applicable threshold to ‘disproportionate

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<sup>204</sup> For example, the subsections provide that exceptions provided for elsewhere under the ESA (for example, s.14(1)(a)), also apply to reasonable accommodation (a provision which is superfluous). It also allows for a derogation from the duty where there is a risk of harm to person or others (a provision that is arguably superfluous & derogatory, as a measure that could lead to harm would not be ‘reasonable’ under current law. Further, there is no parallel under EEA).

<sup>205</sup> See for example *Harrington v Cavan Crystal Hotel*, DEC-S2008-117

<sup>206</sup> The ‘nominal cost’ standard was introduced by the Oireachtas in response to the case of *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321 where the Supreme Court found that the EEA reasonable accommodation provision was unconstitutional and imposed constraints on reasonable accommodation. The EU Framework Directive on Employment Equality, transposed in 2004, extended the threshold in the employment context only from ‘nominal cost’ to the standard that employers should not incur a disproportionate burden.’ The respondent should seek out available supports: *Two Complainants v A Primary School*, DEC-S2006-028; *Parents (on behalf of their son) v Board of Management of a Gaelscoil*, DEC-S2016-053. However, case law on this is inconsistent, and ‘nominal cost’ is often not interrogated.

<sup>207</sup> See for example, *Cahill v Minister for Education* [2017] IESC 29.

burden' for public bodies, credit unions, financial institutions, telecommunications and public transport providers.<sup>208</sup> The FELAC has advised that such proposals are inadequate to bring reasonable accommodation into alignment with the UNCRPD.<sup>209</sup>

It is also important to note that although the UNCRPD is useful as a baseline, it is still reactive and individualised in nature, rather than striving for universal access for all. To remedy this, it may be useful to have regard to draft reasonable accommodation provisions in a proposed EU Directive,<sup>210</sup> which include an anticipatory element to the duty.<sup>211</sup> The inclusion of an anticipatory element to the reasonable accommodation duty would be an effective method of bridging the divide between an individualised conceptualisation of reasonable accommodation, and universal access measures.

An effective definition of reasonable accommodation, based on the UNCRPD, the EU framework employment directive, and the draft EU provision, could be the following:

- (1) In order to guarantee compliance with the principle of equal treatment and ensure equality of access, inclusion and participation in relation to disabled people, reasonable accommodation shall be provided.
- (2) For the purposes of this Act, discrimination includes a refusal or failure to provide reasonable accommodation to a person with a disability.
- (3) Reasonable accommodation means appropriate modifications and adjustments, where needed in a particular case to ensure effective non-discriminatory access to services, unless this would impose a disproportionate burden.

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<sup>208</sup> The proposals also provide some guidance on 'disproportionate burden': that account shall be taken, in particular, of (i) the financial and other costs entailed, (ii) the scale and financial resources of the service provider, and (iii) the possibility of obtaining public funding or other assistance.

<sup>209</sup> See also the Law Society, [Submission on the Review of the Equality Acts](#), (2021: 3.37-38) which states that reliance on the 1997 Supreme Court judgment is 'flawed'. Further, the rationale for selection of particular private service providers (those regulated for quality of service provision) may be constitutionally suspect.

<sup>210</sup> [Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM2008/426](#).

<sup>211</sup> COM2008/426, Article 4(1)(a) – measures necessary... "shall be provided by anticipation"; an anticipatory element of the reasonable accommodation duty is provided for in the UK and Norway, see Lawson & Orchard 2021; Liisberg 2015

(4) A service provider shall consult with the person concerned in determining the modifications and adjustments required.

(5) In determining whether the provision of appropriate modifications and adjustments would impose a disproportionate burden, account shall be taken, in particular, of

(i) the financial and other costs entailed,

(ii) the scale and financial resources of the service provider,

(iii) the possibility of obtaining public funding or other assistance, and

(iv) any third party benefits

(6) In the case of a 'public body' within the meaning of section 2(1) of the Irish Human Rights and Equality Commission Act 2014, the measures necessary to enable persons with disabilities to have effective non-discriminatory access to services shall be provided by anticipation, including through appropriate modifications or adjustments. Such measures should not impose a disproportionate burden.<sup>212</sup>

**The Commission recommends that the definition of reasonable accommodation in the Equal Status Act should be amended to bring it into compliance with the UN Convention on the Rights of Persons with Disabilities.**

### Reasonable Accommodation in the Employment Equality Acts

Reasonable accommodation is outlined under Section 16 of the EEA with a definition based on EU law. It is less complex than the definition under the ESA, and a large body of case law under this provision has proven it to be a valuable source of protection for disabled people. However, the Supreme Court<sup>213</sup> has found a failure to consult with the employee is not in itself discrimination, has limited the duty and is a departure from preceding case law. Further, while the Supreme Court held that it was appropriate to consider redistribution of tasks as a reasonable accommodation

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<sup>212</sup> It should be noted that public bodies should already be undertaking these measures in order to comply with the public sector duty under s.42 of the IHREC Act 2014.

<sup>213</sup> Nano Nagle School v Daly [2019] IESC 63

measure, an employer “cannot be under a duty entirely to re-designate or create a different job to facilitate the employee”.<sup>214</sup> This is at odds with a recent decision of the CJEU.<sup>215</sup>

To remedy these limitations, we recommend the definition of reasonable accommodation under the EEA be amended to establish a duty to consult the person affected when considering the provision of reasonable accommodation. It is important that this duty explicitly permits consultation with an affected person’s chosen representative, given the vital role that independent advocacy support can play in facilitating disabled people to realise their rights. It is also important that this duty to consult be provided for in the strongest possible terms.<sup>216</sup>

However, should there be consideration of limiting the duty to consult, for example by making it subject to a reasonableness test, preferable formulations of such a limitation could include: that it would be a duty to *normally* consult; or that it would be a duty to consult *if appropriate in the circumstances*. The definition should also specify that transfer to another role in an organisation is an appropriate measure if there are other vacant roles.<sup>217</sup>

**The Commission recommends that the definition of reasonable accommodation in the Employment Equality Act should be amended to establish a duty to consult the person affected when considering the provision of reasonable accommodation.**

**The Commission recommends that the definition of reasonable accommodation should specify that transfer to another role in an organisation is an appropriate measure if there are other vacant roles.**

## Extending Reasonable Accommodation

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<sup>214</sup> *Nano Nagle School v Daly* [2019] IESC 63, at [89]

<sup>215</sup> Case C-485/20 HR Rail ECLI:EU:C:2022:85. Here, the CJEU accepted that it could be an appropriate measure to reassign an employee to a different role in the organization. The Court emphasised, however, that this was subject to not creating a disproportionate burden for the employer and that there needed to be a vacancy to which the employee could be transferred.

<sup>216</sup> The UN Committee on the Rights of Persons with Disabilities has stated that ‘To fall within the concept of reasonable accommodation, the changes need to be negotiated with the individual’. See Committee on the Rights of Persons with Disabilities, [General comment No. 8 \(2022\) on the right of persons with disabilities to work and employment, CRPD/C/GC/8](#), at paragraph 19.

<sup>217</sup> For example, in large organisations.

We have previously recommended that provisions on reasonable accommodation be extended to all grounds across the Equality Acts,<sup>218</sup> and reiterate this recommendation here. Reasonable accommodation requires a focus on the tangible and less obvious barriers that effectively inhibit equal opportunities. It is of central importance in advancing substantive equality on the ground of disability, and captures a practical understanding of diversity that is relevant to all grounds. A wider understanding of reasonable accommodation is central to any ambition for substantive equality across all grounds under the Equality Acts.

Legislative provisions in Ireland could be based on extensive reasonable accommodation provisions already in place in other jurisdictions. While there are currently no specific provisions for reasonable accommodation on the full spectrum of grounds beyond the ground of disability in the EU, some Member States do provide for reasonable accommodation in labour legislation on gender, family status, religion or age grounds.<sup>219</sup> There are provisions in the USA requiring reasonable accommodation to be provided on the religion or belief ground.<sup>220</sup> The comprehensive approach taken in Canada<sup>221</sup> in particular provides a model for extending reasonable accommodation.

**The Commission recommends that reasonable accommodation is extended across all grounds under the Equal Status Act and Employment Equality Act.<sup>222</sup>**

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<sup>218</sup> IHREC, Submission to the Equality Acts Review (2021) at p.60-61; Equality Authority, Overview of the Employment Equality Act 1998 and the Equal Status Act 2000 (2003).

<sup>219</sup> Equinet, [Equality Bodies and Reasonable Accommodation Beyond the Ground of Disability](#), 2023, p.17

<sup>220</sup> Civil Rights Act of 1964 (Pub. L. 88-352) (Title VII) prohibits employers with at least 15 employees, as well as employment agencies and unions, from discriminating in employment based on race, colour, religion, sex, and national origin. Discrimination on the religion ground includes denial of a requested reasonable accommodation of an applicant's or employee's sincerely held religious beliefs or practices, or lack thereof, if an accommodation will not impose more than a de minimis cost or burden on business operations.

<sup>221</sup> Under the Canadian Human Rights Act 1985, which prohibits discrimination in employment and in the provision of goods, services, facilities or accommodation, reasonable accommodation provisions apply to all grounds covered by the Charter of Rights and Freedoms: race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted. Note there is no obligation to provide reasonable accommodation where an employer or a service provider can objectively demonstrate that the only accommodation available would cause undue hardship – where the cost is too high for a company to absorb, it interferes with the proper operation of the organization, or it significantly impairs the security of others or infringes on the rights of others.

<sup>222</sup> The FELAC recommend the comprehensive multi-ground approach taken in Canada.

## Measuring Effectiveness & Data Collection

We have previously called on the State to take urgent action to roll out disaggregated data collection across relevant public bodies in order to monitor the effectiveness and impact of equality legislation in Ireland.<sup>223</sup> Available research highlights the prevalence of persistent discrimination across equality groups in Ireland, in spite of the presence of equality and non-discrimination legislation.<sup>224</sup> There are also studies that consider the impact of discrimination on the lived experience of those who are affected.<sup>225</sup> Despite the significant body of evidence revealing trends of persistent discrimination against protected groups, we note the lack of disaggregated data that specifically interrogates the effectiveness of equality and non-discrimination legislation.<sup>226</sup> A limited number of studies have commented on the need for the realisation of rights beyond legislation,<sup>227</sup> and the need to monitor equality in Ireland.<sup>228</sup> However, the State does not collect sufficient disaggregated data to allow a timely and regular assessment of the efficacy and impact of the legislation or the extent to which the State is meeting its international obligations.<sup>229</sup> The National Equality Data Strategy will put in place a strategic approach to improving the collection, use and dissemination of equality data.<sup>230</sup>

**The Commission recommends that urgent action is taken by the State to develop and roll out disaggregated equality data collection, processing and communication systems across relevant public bodies in order to monitor the effectiveness and impact of the legislation in Ireland, and that the relevant bodies publish statistics and analysis on an annual basis.**

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<sup>223</sup> IHREC, Submission to the Equality Acts (2021) at p.66-68.

<sup>224</sup> From 2017-2021, the Commission commissioned a research programme on human rights and equality with researchers from the Economic Social and Research Institute (ESRI). This led to the publication of ten separate reports on equality and discrimination across the grounds covered by equality legislation and across domains such as housing, employment, etc. See IHREC, [Research Reports](#).

<sup>225</sup> See IHREC, Human Rights and Equality Grants 2020 and 2021.

<sup>226</sup> We have also noted a need for more baseline research on equality and poverty, including on the impact of Covid-19. See IHREC, Submission to the Third Universal Periodic Review Cycle for Ireland (2021).

<sup>227</sup> S. Perry and M. Clarke, 'The law and special educational needs in Ireland: perspectives from the legal profession' (2015) 30(4) *European Journal of Special Needs Education* 491

<sup>228</sup> E. Kelly, G. Kingston, H. Russell, F. McGinnity, 'The equality impact of the unemployment crisis' (2014) 44 *Journal of the Statistical and Social Inquiry Statistical Society of Ireland* 81.

<sup>229</sup> While the CSO conducted a survey into Equality and Discrimination in 2019, this is only conducted every five years. Similarly, the Survey of Income and Living Conditions (SILC) does not provide data disaggregated across equality grounds, and information on the impact of Covid-19 case numbers and deaths among ethnic minorities is poor.

<sup>230</sup> See Department of Children, Equality, Disability, Inclusion and Youth, [Minister O'Gorman announced the development of a National Equality Data Strategy](#) (March 2022)



It is noted that the WRC is not the only body which hands down decisions. A tool to synthesise the data and decisions from all relevant public bodies according to disaggregated equality groups would offer significant insights into overall trends and interactions with the legislation.

**The Commission recommends that an obligation be placed on the Workplace Relations Commission in particular to collect disaggregated equality data that would allow for assessment of the impact of the legislation; and that this data is anonymised and published on an annual basis to facilitate public scrutiny, research and allow for recommendations for law reform where appropriate.**

**The Commission also recommends the development of existing data such as administrative datasets in a way that allows for intersectional analysis, data linkages and data harmonisation, and that such be accessible and publicly available.**



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