YOUR RIGHTS INFORMATION NOTE

GENERAL EXEMPTIONS FROM EQUALITY LAW: ACTIONS REQUIRED BY LAW AND POSITIVE ACTION UNDER THE EQUAL STATUS ACTS 2000 to 2018

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EQUALITY AND DISCRIMINATION LAW

The Equal Status Acts 2000 to 2018 *("the ESA"),* prohibit discrimination on ten specific grounds in the provision of goods and services, obtaining or disposing of accommodation and in relation to educational establishments.

What is discrimination?

In Irish law, discrimination will be found to occur where a person who has a protected characteristic is treated less favourably than another person, who does not have the protected characteristic, is, has been, or would be treated in the same or similar situation. The ten protected grounds of discrimination covered by the ESA are:

- gender;
- civil status (e.g. marital status or civil partnership);
- family status (e.g. parental and caring responsibilities);
- sexual orientation;
- religion;
- age;
- disability;
- race (including colour, nationality, or ethnic or national origins);
- membership of the Traveller community;
- housing assistance (in relation to the provision of accommodation services).

EXEMPTIONS UNDER THE EQUAL STATUS ACTS

A number of provisions in the ESA provide for specific exceptions to the general prohibition on discrimination, which apply to particular discriminatory grounds and/or particular settings, e.g. schools. Information on specific exceptions can be found in IHREC Your Rights guides on specific issues in equality law.

In addition to the specific exceptions, there are some general exemptions made for certain acts that might otherwise amount to discrimination. This guide provides information on two exemptions provided for in section 14 of the ESA: actions that are required by law and positive action which is intended to promote equality of opportunity for disadvantaged groups.

ACTIONS REQUIRED BY LAW

The ESA creates a blanket exemption for any action that is required by law.

Section 14(1)(a) of the ESA provides:

Nothing in this Act shall be construed as prohibiting—

(a) the taking of any action that is required by or under—

(i) any enactment or order of a court,

(ii) any act done or measure adopted by the European Union, by the European Communities or institutions thereof or by bodies competent under the Treaties establishing the European Communities, or

(iii) any convention or other instrument imposing an international obligation on the State.

This exception covers actions which are required to be taken by or under statute, court order, European Union law or international convention. It operates where measures, for example the allocation of social welfare payments, appear on their face to be discriminatory but are required by the law governing the benefit in question. When a difference in treatment is required by law, the Workplace Relations Commission ('WRC') has no power to find that the treatment constitutes discrimination.

AB v Road Safety Authority [2021] IEHC 217, decision of Ms Justice Creedon, High Court, 25 March 2021

The Appellant, AB, was an international protection applicant who sought asylum in 2015 and resided in Direct Provision accommodation. She held a Temporary Residence Certificate which allowed her to remain in the State pending the determination of her application for international protection. She applied to the National Driver Licence Service (NDLS) for a

learner driver permit. The application was not accepted on the basis that she had failed to include valid evidence of her residency entitlement.

Applications for driver's licences are governed by Road Traffic (Licensing of Drivers) Regulations 2006 (S.I. No. 537/2006) (as amended by S.I. No. 420 of 2013). Regulation 20 of the 2006 Regulations required that an applicant for a learner have their "normal residence" in the State. The Appellant argued that the Respondent's application and interpretation of the 2006 regulations was discriminatory in that it imposed an additional requirement of "residency entitlement", which went beyond "normal residence" and which was not found in the Regulations themselves. She argued that this requirement excludes international protection applicants and adversely affects applicants such as the Appellant from a different ethnic background.

She filed a complaint to the WRC claiming that the refusal of her application for a learner permit amounted to discrimination on the ground of race contrary to the ESA. The WRC found that AB had been subjected to indirect discrimination during her application for a learner permit and directed the respondent to take various courses of action as well as granting compensation to AB.

The RSA appealed to the Circuit Court, and submitted, inter alia, that section 14(1) of the ESA provided a complete defence to any allegation that the requirement to provide evidence of normal residence was discriminatory, as the requirement arose under statute, i.e. an "enactment" in accordance with Section 14(1) and was, as such, exempt from the application of the Equal Status Acts. The Circuit Court accepted the Respondent's arguments. It found that in reality the action was not just a challenge to the operation of the Regulations, but rather was in effect, a challenge to the law governing the issuing of driving licences and their requirement to provide evidence of residency entitlement in Ireland. It held that the decision of the WRC went substantially beyond its remit under the ESA and allowed the appeal.

The Appellant further appealed to the High Court. The High Court rejected AB's appeal. It held at Paragraphs 100-102:

"Despite the Appellant's assertion that this is a claim of discrimination under the Equal Status Acts and not a challenge to the 2006 Regulations this assertion is not borne out by the Appellants arguments which go to the principles and policies underpinning the statutory framework. These arguments cannot be advanced in a claim of discrimination under the Equal Status Acts.

…

The Court finds that the actions of the Respondent as they relate to the Appellant are required by legislative enactment and cannot be the subject of an adverse finding pursuant to the Equal Status Acts. The Court therefore agrees with the Respondent that the complaint under the Equal Status Acts made herein is misconceived as to what is in issue, which is the meaning and effect of the statutory enactments and not the individual treatment of the Appellant by the Respondent."

The exemption has the effect that an apparently discriminatory policy in another Act or statutory scheme cannot be challenged as constituting discrimination contrary to the ESA.

G v Department of Social Protection [2015] 4 IR 167, decision of Ms Justice O'Malley, High Court.

In this case, the appellant was the genetic mother and primary carer of a child born as the result of a surrogacy arrangement necessitated by her medical condition. She did not qualify for either maternity benefit (not having been pregnant and given birth) or adoptive benefit (since, being the registered mother of the child on its birth certificate, she had not sought to adopt it). She claimed that she had been discriminated against on the grounds of disability, gender and family status by virtue of the respondent's refusal to grant her a payment equivalent to those benefits.

O'Malley J held that the ESA could not override the terms of another statutory scheme. She said at paragraphs 141-145:

"On the face of it, the appellant has, certainly, been discriminated against because she did not bear her child. As noted above, less favourable treatment on the basis that the complainant had not been pregnant would satisfy one of the statutory grounds. She says that this is a discriminatory exclusion from the social welfare legislation, within the terms of the equal status legislation, and that the refusal of the respondent to grant her an equivalent non-statutory payment is a matter entitling her to compensation.

The difficulty that I have with the appellant's case lies in the fact that the payment, from which she says she has been excluded for discriminatory reasons, is one created by statute. A claim to be legally entitled to compensation necessarily involves a claim that one has been subjected to a legal wrong, but in this particular instance such a wrong can only be established on the assumption that one statute can be held to be legally deficient by reference to another – that is, by reference to the Act of 2000. Despite the submission that she is not to be taken either as attacking the validity of the social welfare legislation, or as attempting to measure those provisions against the Act of 2000 as if it were the Constitution, I cannot see how the appellant can maintain a claim of unlawful discrimination without saying, in effect, that the Social Welfare Act 2005 discriminates unlawfully. In the proceedings as constituted before this court, the only legal standard by which she can make that claim is the standard set by the Act of 2000. Since both are Acts of the Oireachtas, embodying policy choices made by the legislature, it is not open to a court to make a finding of unlawfulness in one on the basis of the policy of the other. There has been no assessment of the constitutionality of the choices made in the social welfare code, which would be the only legitimate basis for such a finding.

….

That raises the problem of whether the Act of 2000 can be relied upon in this fashion to find that there is discrimination contrary to that Act embodied in another Act. In my view it cannot, whether by this court, or by the Equality Tribunal acting as the body primarily charged with dealing with complaints under the Act of 2000."

The exemption has resulted in various apparently discriminatory social welfare provisions being immune from challenge. For example, in A Complainant v Department of Social and Family Affairs DEC-S2008-013, the Equality Tribunal found that the method of calculating PRSI

contributions for the purpose of the old age old contributory pension could not be challenged by reference to the ESA, as the scheme was governed by statute. Challenges to the administration of child benefit on the gender ground have failed for the same reason.

Parent v Government Department **ADJ-00027821, decision of the Workplace Relations Commission, 26 July 2021**

The complainant was the married father of two children. He was informed by the Department of Social Protection that he could not receive child benefit payments. The Department advised him that under the legislation in force, child benefit was paid to the "the qualified person" who is presumed to be the mother where a child is resident with both parents. Section 220(1) of the Social Welfare Consolidation Act 2005 provides that "*a person with whom a qualified child normally resides shall be qualified for child benefit in respect of that child and is in this Part referred to as "a qualified person"*." The section allows the Minister to make rules for determining with whom a qualified child shall be regarded as normally residing. These rules are set out in the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007, S.I. 142/2007, Regulation 159 of which provides:

159. For the purposes of Part 4, the person with whom a qualified child shall be regarded as normally residing shall be determined in accordance with the following Rules:

"1. Subject to Rule 2, a qualified child, who is resident with more than one of the following persons, his or her—

mother,
step-mother,
father,
step-father,

shall be regarded as normally residing with the person first so mentioned and with no other person."

The result of the above rule is that where the children live in the same household as both parents, child benefit is paid to the mother. The Department also explained that in a situation where custody is shared on a 50/50 basis, the mother would be entitled to benefit as she would be considered the qualified person in line with the legislation. Child benefit can only be paid to one customer and cannot be shared between customers.

The Department submitted that the complaint related to the legislative regime set out in the 2005 Act and the 2007 Regulations, that in that that context it was not a "service provider" and that the determination of benefit entitlement was not a service pursuant to section 2 of the ESA, and also that the exemption provided for in section 14(1)(a) of the ESA applied. The Adjudication Officer accepted the submissions on behalf of the Department and determined that he had no jurisdiction to hear the matter and that the complaint could not succeed.

See also Gesio Da Rocha Campos v Department of Social Protection DEC-S2016-007, decision of the Equality Tribunal, 1 February 2016.

What is an "enactment or order of a court"?

The exception relating to domestic (Irish) law is limited to actions required by or under "any enactment or order of a court". "Any enactment" includes Acts of the Oireachtas (statutes / legislation) and statutory instruments (secondary legislation, usually called 'Regulations', enacted pursuant to a power under a statute, for example social welfare or tax regulations).

Dowd v Minister for Finance DEC-S2011-061, decision of the Equality Tribunal, 15 December 2011

This case is an example of the Equality Tribunal (now the WRC) having to decide whether a decision was an action required by or under an enactment, so as to bring it within the section 14 exemption.

The complainant had a disability and was assessed by the HSE for a Primary Medical Certificate in respect of a tax concession from the Revenue Commissioners for the adaptation of a car seat to meet his needs as a passenger with a disability. He was assessed by the HSE in accordance with the criteria set down in the Disabled Drivers and Disabled Passengers (Tax Concessions) Regulations 1994 (S.I. No. 353/1994), made by the Minister for Finance pursuant to Section 92 of the Finance Act 1989. His application was unsuccessful. The complainant's complaint related to the how the medical assessment criteria were defined and interpreted under the Regulation. He contended that the definition was too narrow and did not take account of the effects that a combination of a mental and physical disability could have on a person.

The respondent argued that the complaint was inadmissible as it related to the eligibility criteria which were set out in a Regulation, which it argued was 'an enactment' and was exempt from being challenged under section 14(1)(a)(i) of the ESA.

In deciding what was an enactment for the purpose of section 14(1)(a)(i) of the ESA, the Equality Officer relied on section 2 of the Interpretation Act 2005, which defines an "enactment" as "an Act or a statutory instrument or any portion of an Act or statutory instrument".

She concluded that she did not have jurisdiction to hear the complaint because the exemption applied. She said:

"I note that the complainant's complaint of discrimination on the disability ground solely relates to the interpretation and application of the medical assessment criteria contained in the S. I. Disabled Drivers and Disabled Passengers (Tax Concessions) Regulations, 1994 and not to any other matter outside of the Regulations. Taking into consideration the matters cited above, I am satisfied that the above cited Regulations are exempt from consideration by me pursuant to Section 14(1)(a)(i) of the ES Acts. It could be argued that the definition of the terms "*enactment" and "statutory instrument*" in the Interpretation Act 2005 are strictly

speaking for the purposes of that Act. However, it is clear that the Interpretation Act also governs the interpretation and construction of Acts and by implication also governs the meaning of the term "enactment" contained in section 14(a)(i) of the ES Acts."

The wording of section 14(1)(a) makes it clear that the exception does not apply to discrimination provided for under administrative schemes or departmental circulars unless and insofar as these have statutory underpinning.

When is an action required by law?

The exemption in section 14(1) is limited to actions which are required by the relevant law. It does not therefore apply where, for example, a statute authorises discriminatory treatment but does not require it. This means that where a decision maker has a discretion in relation to a decision and is not obligated to make it in a particular way, the exemption does not apply as the discriminatory treatment is not required by law.

Mrs A (on behalf of her Sister Ms B) v Aer Lingus DEC-S2009-038, decision of the Equality Tribunal, 3 June 2009

This case is an example of a respondent attempting to rely on the exemption where the discriminatory action was found not to be required by law.

The Complainant instituted proceedings on behalf of her sister, Ms B, who had an intellectual disability. The respondent airline had refused to provide a 'meet and assist' service. The respondent itself had stated that it would provide wheelchairs and assistance to incapacitated passengers but would not provide 'meet and assist' for those with intellectual disabilities. The respondent submitted that it was required to seek medical clearance for Ms B in advance of her flying for safety reasons. It therefore sought to rely on the exemption provided in section 14. The Equality Officer rejected this argument, pointing to the fact that the respondent had failed to point to any particular provision requiring it to insist on medical clearance. He said:

"I would reiterate that in order to avail of the exemption to the operation of the Acts that is provided for in Section 14, the respondent must show that its insistence that Ms B obtain medical clearance in advance of flying must be required by a particular obligation. Having taken all things into account, I am not convinced that it was required. There is no doubt that, in certain circumstances and in the interests of protecting safety and security on board its aircraft, the respondent has a right, indeed an obligation, to require certain passengers to obtain medical clearance in advance of flying. However, in all the circumstance of the present complaint, the onus is on the respondent to show that there are genuine health and safety concerns for its actions, as provided for in Section 14 of the Acts. In this case, I am not convinced that it had such genuine concerns. I find, therefore, that the respondent has failed to prove to my satisfaction that it was obliged to require the complainant to seek further medical clearance in advance of flying in order to comply with its international obligations, or any other obligations, in relation to health and safety."

If a person believes they have been subjected to unlawful discrimination, how and where can they seek redress?

If a person believes that they have been discriminated against and that their treatment is not required by an enactment or a court order, a complaint can be made to the Workplace Relations Commission ('WRC') under the ESA. Information in respect of the procedures in place at the WRC and what is involved in submitting a claim can be found here.

The IHREC recommends that you seek legal advice before instituting a claim under the ESA.

If a person believes they have been discriminated against but the difference in treatment in question is required by law, they may be able to challenge the particular legal provision on the basis that it is inconsistent with the Constitution, incompatible with EU law, or incompatible with the State's obligations under the European Convention on Human Rights. Such cases must generally be instituted in the High Court.

The Constitution provides in Article 40.1 that: "All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the state shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function." Article 14 of the European Convention on Human Rights prohibits discrimination in the enjoyment of Convention rights. It states: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

It has yet to be determined whether the blanket exemption for discriminatory measures required by law is compatible with EU law, insofar as it requires equal treatment in the provision of goods and services on the grounds of gender and race. The Race Equality Directive (2000/43/EC) and the Gender Goods and Services Directive (2004/113/EC) set frameworks of minimum rules for ensuring equality in the access to and supply of goods and services on the gender and race grounds, and do not provide for a blanket exemption for actions required by domestic law.

In order to have "legal standing", or the right to take a case challenging an enactment, a person must be able to demonstrate that they are, or may be, prejudicially affected (in other words negatively impacted or injured) by the operation of that law.

East Donegal Co-operative v The Attorney General [1970] IR 317, page 333 (Judgment of Mr Justice O'Keeffe, High Court of Ireland):

A person "[w]ho may possibly be prejudicially affected by the operation of a statute which is unconstitutional, need not wait until what he apprehends may happen has in fact happened before bringing proceedings to have the statute declared repugnant to the Constitution."

The burden of proof, in other words the responsibility of proving that the legislation is unconstitutional, is on the person who institutes a claim challenging the legislation.

If a person believes there may be a basis to challenge any legal provision relating to religious discrimination in education, the IHREC recommends that they seek legal advice prior to instituting proceedings.

POSITIVE ACTION

The ESA creates an exemption for actions which appear to discriminate but which are intended to promote equality of opportunity for persons who are disadvantaged or who have special needs.

***Section 14(1)(b) of the ESA provides**:*

"Nothing in this Act shall be construed as prohibiting—

(b) 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."

What is positive action?

Positive or affirmative action involves measures which are designed to secure greater participation of groups which have traditionally been disadvantaged or under-represented groups, in areas like education and work. For example, measures might be taken to encourage

the participation of women and minority groups in fields of work traditionally dominated by others.

The following are examples of positive action measures that might be taken:
Gender quotas in politics;
Designated parking spaces for people with disabilities;
Provision of additional resources or training opportunities for disadvantaged groups in employment, e.g. English classes for refugees;
Grants or subsidies for students from backgrounds underrepresented in education;
Mentoring schemes for women in business;
Programmes to increase participation of women and girls in certain sporting activities;
Concessions on transport for older and younger people;
Special facilities for breastfeeding women;

Are service providers obliged to take positive action?

Section 14(1)(b) only allows for positive action to be taken. It does not therefore place any duty on service providers to take any measures to promote equality of opportunity for marginalised groups or to cater for special needs. An individual who believes that positive action should have been taken to promote their opportunities cannot use a failure or refusal to undertake positive action as the basis for a complaint under the ESA.

Andizej Selenke v Social Welfare Local Office **DEC-S2011-048, decision of the Equality Tribunal, 1 November 2011**

"In my view, section 14(1)(b) arises only in circumstances where a respondent requires as a defence concerning action that has been undertaken in relation to a person who is particularly disadvantaged or who had special needs in relation to the protected grounds. Positive action is not a requirement or an obligation in law. It is an action, facility, service or arrangement which may be allowed in specific circumstances. This means that while it may be advisable for

a service provider to take positive action in certain circumstances, no requirement to provide services in other than the official languages of the state exist per se."

How does the exemption for positive action work?

Where a particular group is given preferential treatment over others, it is a defence for the service provider to show that the differential treatment is intended to promote equality of opportunity for persons who are disadvantaged or to cater for the special needs of particular individuals or groups. If this is demonstrated, the difference in treatment will not amount to discrimination against a group or individual who does not qualify for the preferential treatment.

Where a measure is disputed and the service provider claims it comes within the positive action exception, it will be for the WRC to determine whether there is a bona fide intention to assist disadvantaged persons.

Hoey v Area Development Management Ltd **DEC-S2008-010, decision of the Equality Tribunal, 31 January 2008**

[Section 14(b)(ii)] covers treatment which is bona fide intended for a particular purpose and, once it is so intended, it is not for the equality officer to assess whether or not the treatment is reasonable. Even if it is not reasonable, the exemption still applies. It seems to me that the following elements are necessary for the exemption to be invoked:
(i) there must be a special need;
(ii) the preferential treatment must be bona fide intended to cater for this need; and
(iii) the persons benefiting must be persons who, because of their circumstances deriving from the special need, may require assistance (i.e. the preferential treatment) not required by persons without that need.

An action may be found to be discriminatory, despite a service provider's claim that it constitutes positive action, if the service provider cannot supply any evidence that those receiving preferential treatment are disadvantaged in respect of the service being provided.

O'Connor v Icon Night Club **DEC-S2004-001, decision of the Equality Tribunal, 5 December 2004**

In this case, the complainant (who was male) complained that he was discriminated against on the gender ground by the respondent's policy of allowing female customers free entry to its nightclub on Thursday evening. The respondent sought to rely on the exception in section 14(b). The Equality Officer found that the respondent had not supplied any evidence establishing that women as a group were disadvantaged in their ability to enter nightclub. She therefore rejected the argument that the policy was a positive action measured aimed at women within the terms of section 14(b), and found that the policy did constitute discrimination on the gender ground. She said (paragraphs 4.5 and 4.6):

"I note that positive measures are permitted by the Act as an exception to the general principle that discrimination based on the gender ground is unlawful. I would need therefore to be satisfied that the particular situation in this case does in fact come within the terms of section 14(b)(i) above. The requirement under this section is that the measures taken are in "good faith" intended to promote "equality of opportunity for persons who are ...disadvantaged...". The respondent has not provided any evidence to suggest that women as a group are disadvantaged relative to men as a group in their ability to get into nightclub before 1a.m.

4.6 In considering this point in relation to relative disadvantage, I have referred to the Labour Court decision in an employment case, NBK Designs Ltd v Inoue ED/02/3Determination No. 0212. This is where the Court held that an expert tribunal could take account, even in the absence of specific evidence, matters such as risk of disparate impact on a protected ground under the Act which are well established and are obvious from its specialist experience. In Inoue, the Labour Court held that it was obvious that measures impacting on part-time workers, or on those caring for small children, would impact disproportionately on

women. It would be reasonable therefore to infer from this rationale that an expert tribunal such as the Equality Tribunal could similarly take account of matters such as relative disadvantage supporting positive action, which are obvious from its specialist experience. However, the Tribunal is not aware of any such disadvantage from its own specialist experience which could be taken into account in this case. It may be that some groups of women find it more difficult to go out to nightclubs in the evening due to economic disadvantage or lack of childcare support, but the entrance fee involved is relatively small one, which would not appear in my view to present difficulties for women generally, and the waiver of the entrance fee is not targeted to any groups of women experiencing particular disadvantage. I am satisfied therefore, that the free entrance to the nightclub for females up to 1a.m. is not a positive action measure, taken in good faith in order to reduce barriers confronting women as a disadvantaged group. I believe the measure was taken for commercial reasons aimed at attracting more customers into the nightclub. For the above reasons this defence fails. I find therefore, that the respondent has failed to rebut the prima facie case of less favourable treatment on the gender ground raised by the complainant."

If a person believes they have been subjected to unlawful discrimination, how and where can they seek redress?

If a person believes that they have been discriminated against and that their treatment is not truly a positive action measure, a complaint can be made to the Workplace Relations Commission ('WRC') under the ESA. Information in respect of the procedures in place at the WRC and what is involved in submitting a claim can be found here.

The IHREC recommends that you seek legal advice before instituting a claim under the ESA.

Contact details for the IHREC "Know Your Rights" Service

Call us on 018583000 or Lo call 1 890 245545

- Email us on YourRights@ihrec.ie

- Or you can write to us at: Your Rights, Irish Human Rights and Equality Commission, 16-22 Green Street, Dublin 7.