Expanding Equality Protections in Goods and Services
Irish and EU Perspectives

Conference Proceedings

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Expanding Equality Protections in Goods and Services

Irish and EU Perspectives

Proceedings of a Conference held in Dublin on 21 May 2010

Expanding Equality Protections in Goods and Services

Irish and EU Perspectives

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Foreword

Ireland's Equal Status Acts 2000 to 2008 prohibit discrimination and promote equality of opportunity in the provision of goods and services across nine equality grounds – gender, family status, marital status, age, sexual orientation, disability, religion, race and membership of the Traveller community. In the decade since this pioneering legislation first came into force, the Equality Authority has used its mandate to take strategic cases upholding individuals' rights to be protected from discrimination in the provision of goods and services. We believe this work to be of great importance, as access to services, particularly education and accommodation, can influence fundamentally an individual's quality of life and future potential.

Ireland's equality legislation is situated within an EU context. The European Union has worked over the past two decades to strengthen equality protections in the areas of employment, goods and services. The EU is currently discussing the parameters of a new Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation that should expand the equality protections available in terms of access to and delivery of goods and services.

In this context, the Equality Authority considered it opportune to organise a conference that would provide an opportunity to examine the implementation of the equal status legislation and to explore EU perspectives on adopting multi-ground approaches. We were delighted that the **Expanding Equality Protections in Goods and Services: Irish and EU Perspectives** conference, held on 21 May 2010, enabled us to bring together leading EU and Irish legal experts and practitioners to debate the legal complexities involved in implementing equality protections in goods and services, expanding those protections, adopting multi-ground approaches and in adjudicating between competing rights.

The Equality Authority would like to thank the European Union Programme for Employment and Social Solidarity – PROGRESS (2007–2013) which provided the funding both for the conference and for these subsequent proceedings.

We would also like to thank Ms Mary White T.D., Minister for Equality, Integration and Human Rights, for agreeing to launch the conference and for her continuing support for our work in this area.

We would like to extend a special thanks to our contributors – Professor Mark Bell, Dr Colm O'Cinneide, Ms Lilla Farkas, Dr Tony McGleenan, Ms Carol Ann Woulfe, Ms Geraldine Hynes and Mr Garrett O'Neill – who presented papers at the conference and have prepared insightful articles for this publication. I believe that these articles greatly enhance our understanding of this key area.

Renée Dempsey
CEO
Equality Authority

Contributors' Biographies

Mary White T.D., Minister of State

Minister of State Mary White is Minister of State for Equality, Integration and Human Rights. She was born in Co. Wicklow and educated at the Ursuline Convent, Waterford and Trinity College Dublin. She was the founder member of the English Society at Trinity College and was awarded a "Pink" at University for sporting excellence.

In June 1999 she topped the poll in Borris, a three-seater in Carlow County Council. In October 2001 she was elected Green Party Deputy Leader. In 2002, Minister White ran as a candidate for the Carlow–Kilkenny constituency and received 4,961 first preference votes (8% of the poll). In canvassing for this seat she walked over 3,000 miles – the equivalent of walking to Berlin and back!

In the same year she narrowly missed out on a winning a Seanad seat, but was re-elected to Carlow County Council in 2004. She was elected to Dáil Éireann in 2007 and re-elected Green Party Deputy Leader the same year.

Minister White has written a Walk guide to the Blackstairs with Joss Lynam and "Environment, Mining and Politics" – an account of an anti-mining campaign which acts as a bible for DIY environmental campaigners.

Professor Mark Bell

Mark Bell is a Professor of Law at the Centre for European Law and Integration, University of Leicester. He conducts research in the areas of national and European anti-discrimination law and labour law. He is the author of *Racism and Equality in the European Union* (Oxford University Press, 2008) and *Anti-discrimination Law and the European Union* (Oxford University Press, 2002). He is a member of the European Commission's Network of Legal Experts in the Non-Discrimination Field, an active participant in the European Working Group on Labour Law and a member of the Executive Committee of the Society of Legal Scholars. In 2008, he chaired an Ad Hoc Expert Group on Anti-Discrimination Law for the European Network Against Racism. During 2008–2009, he was a partner in an EU-funded research project studying the use of positive action in Europe and beyond. His current research focuses on EU law and precarious work, such as part-time, fixed-term and agency work.

Dr Colm O'Cinneide

Colm O'Cinneide is a Reader in Human Rights Law at University College London and a member of the Irish Bar. He has published extensively in the field of human rights and anti-discrimination law, and was a member of the UK Task Force on the establishment of the new Commission for Equality and Human Rights. He is also currently Vice-President of the European Committee of Social Rights which supervises state compliance with the European Social Charter.

Geraldine Hynes

Geraldine Hynes is a solicitor with the Equality Authority, representing claimants in discrimination cases at courts and tribunals. She is a regular contributor to legal conferences and publications and is chair of the Employment and Equality Law Committee of the Law Society.

Garrett O'Neill

Garrett O'Neill joined the Equality Authority as a solicitor in 2007 having previously worked for the Office of the Director of Corporate Enforcement. He is based in the Roscrea office and has acted for complainants in various discrimination cases in the Equality Tribunal and courts.

Carol Ann Woulfe

Carol Ann Woulfe has been working with the Equality Authority since the Employment Equality Act 1998 came into force in October 1999. She has been involved in numerous discrimination cases over the past ten years in the Equality Tribunal, Labour Court and the higher courts. She has spoken at conferences on equality and discrimination both in Ireland and abroad. She is a contributor to the Continuing Professional Development Programme of the Law Society and contributes to courses for trainee solicitors in the Law Society.

Lilla Farkas

Lilla Farkas is a Hungarian human rights lawyer. She holds an LLM degree from the University of London, King's College. She has served as president of the Hungarian Equal Treatment Authority's Advisory Board and as Roma ground coordinator for the European Commission's Network of Independent Experts in the Non-discrimination Field.

Dr. Tony McGleenan

Dr Tony McGleenan is a barrister practicing at the Bar of Northern Ireland. He was called to the Bar having studied at Queen's University, Belfast and the Honorable Society of the King's Inns, Dublin. He was previously lecturer and senior lecturer in Law at Queen's University, Belfast from 1992 to 2002 and was Professor of Law at the University of Ulster from 2002 to 2006. Now a recovering academic, he has a specialist practice in public law, human rights and discrimination law.

Address by the Minister of State with Special Responsibility for Equality, Integration and Human Rights, Ms Mary White, T.D.

Chairperson, speakers, distinguished colleagues and friends, I am honoured to have been invited by the Equality Authority to formally open today's conference.

I would like, first of all, to express my appreciation to the Authority for organising this timely and important event, bringing together a wealth of expertise in the field of anti-discrimination law, both Irish and from across the EU.

Today's programme looks to the past, but also to the future. It looks back over the expansion of legal protection against discrimination, from its origins in the confines of the working environment, and out into the wider social sphere of access to services and to goods. It also looks forward, in seeing opportunities for the future in the pooling of individual experiences from across the EU.

When planning this conference, I know that the Equality Authority was conscious of the importance of bringing the Irish experience to the attention of a European audience. This conference has been planned as an opportunity to highlight the Irish experience of implementing equality legislation in the area of goods and services across the nine equality grounds. I believe that our Irish and European audience will find much of interest in hearing of our experience. Equally, this conference provides an exciting opportunity to hear of broader EU developments and of ways in which other EU Member States have tackled difficult areas of discrimination, particularly in the complex area of multiple discrimination.

This conference is situated within a European perspective, with funding from the European Commission's PROGRESS fund. I am glad we will hear both European and Irish speakers who will underline the importance of this equality legislation to protect vulnerable people from discrimination, particularly when seeking to access key services such as education and housing.

There is, of course, a broader European audience which will be interested to learn of Ireland's experience in this area. The publication of conference proceedings will offer another opportunity for legal practitioners, policymakers and academics across Europe to be made aware of Irish case-law in equality in goods and services. I look forward to the launch of these proceedings at the conference to mark the 10th anniversary of the equal status legislation to be held in October.

Ireland has been a pioneer within the EU at expanding equality protections to include goods and services. What is more, from the beginning, Ireland's equal status legislation was explicitly designed to protect a broad spectrum of individuals. The inclusion of marital status, family status, age, disability, sexual orientation and religion within the equality grounds protected under Ireland's equal status legislation ensured that Ireland's equality legislation went well beyond the EU norm. As a result, at a time when the EU is now considering a directive on equality protections in the areas of disability, sexual orientation, belief and age, Ireland has a body of case-law in this area. I believe that Irish case-law under the equal status legislation offers valuable lessons for the EU and

for other Member States beginning the process of developing legislative frameworks on equality in goods and services. We must always be open-minded, however, and I am open to the possibility that it is perhaps time to increase the grounds of equality in this country.

I am conscious that the society for which equal status legislation was produced was a dramatically different society to the Ireland of today. Over a four-year period, from 2002 to 2006, Ireland's migrant population has doubled to almost 12%. The OECD in their Economic Survey of Ireland, from 2008, reflected that, in this regard, Ireland has now surpassed the United States, the United Kingdom and France, three countries with much longer immigration histories. Attitudes to lesbian, gay and bisexual people have changed for the better, leading to more and more people being able to live their lives openly with the support and respect of family, friends, neighbours and work colleagues. The current passage of civil partnerships legislation through the Oireachtas marks another step in the right direction. Ireland has changed significantly, not just with regard to economic matters, but in becoming a more diverse and open society in which it is increasingly the case that to discriminate against people is unacceptable.

This is not to say that this legislation is perfect, or its implementation complete.

We should have great ambitions for Ireland. We should seek to foster a society which is safe and secure for young and old. It should provide a supportive, invigorating environment that encourages self-confidence, creativity and entrepreneurship. We should strive for an inclusive society that cherishes the many diverse communities living within it and is justifiably famed for its welcome for all visitors.

The Taoiseach has taken the initiative, as part of the reconfiguration of Government departments in March of this year, to create a new junior ministerial position with responsibility for equality, integration and human rights across Government. I feel immensely privileged to have been appointed.

This has brought with it opportunities to bring a new focus on equality and give an added impetus to national equality and human rights policy. These areas, integration policy and some aspects of social inclusion, along with the equality and human rights agencies, are transferring shortly from the mantle of the Department of Justice to the renamed Department of Community, Equality and Gaeltacht Affairs.

In striving for a fairer society, we should not be afraid to turn a critical eye on our existing assumptions and practices and seek new ideas and different approaches.

At its simplest level, anti-discrimination law does two things. In prohibiting certain behaviour as discriminatory, it provides redress to its victims and dissuades against re-offending. It also provides a means in law for the State and for individuals to create an environment which is more conducive to respectful and fair treatment of all persons. That fairer society which I spoke about must be our aim.

The development of EU equality law is welcomed, particularly for its benefits to those of our many citizens who travel and work across Europe. However, it should not set a limit to our ambitions. As EU equality law is limited in scope to areas of Community competence, significant areas of life, such as education, social welfare and health, fall largely outside its domain.

We will take the initiative at national level to ensure that Irish equality law remains appropriate to our needs, that we share the best of our learning with our neighbours across Europe and are open to learning from them in turn.

In this regard, I have recently announced my intention to look at how we can better support state structures and institutions active in the fields of equality, human rights and social inclusion. I want to signal once more my intention to review how the existing bodies – the Equality Authority, the Equality Tribunal and the Irish Human Rights Commission – work, and how their work can complement Government formulation of social inclusion policy. I have drafted tenders seeking scoping papers from outside experts to review best practice and various issues which affect the operation of equality and human rights bodies in countries. These papers will define the kind of aspirations the consequent review group will adopt in looking at how Ireland's equality and human rights bodies operate.

I am determined to protect the independence and work of these bodies and to see how we can move forward the equality agenda in Ireland.

I have no doubt that the broken society and the broken economy have arisen from a growth in inequality. I want to make sure that the review I will carry out will not be a cost-cutting measure – a further trimming of our sails. In tough times we need to do some creative lateral thinking to ensure that, even when budgets are strained, the equality framework cannot be compromised. This is my mission. Equality is important. It makes for a fairer society.

I also want to signal my commitment to enhancing gender equality; working to remove the gender pay gap, to helping women in business, women at home, women in communities, women on the margins.

I am pleased that today's conference looks set to make a significant contribution to this debate.

As you can see, I will therefore be following today's proceedings with great interest. I would like to wish you all success with your deliberations. Go raibh maith agaibh.

Combating Discrimination in Areas Outside Employment: the Anticipated Impact of the Proposed New Directive

Professor Mark Bell

—Centre for European Law and Integration, University of Leicester

Introduction

The European Union reached a turning point with its anti-discrimination legislation in 2000. Initially, its legislation had predominantly focused on discrimination against EU migrant workers, as well as gender discrimination connected to participation in the labour market. Using new competences introduced by the 1999 Treaty of Amsterdam, the Union adopted two Directives that altered the character of EU anti-discrimination law. The Racial Equality Directive[1] prohibited discrimination on grounds of racial or ethnic origin in a wide range of areas including employment, vocational training, education, social protection, housing and the provision of goods and services. The Employment Equality Directive[2] prohibited discrimination on a longer list of grounds (religion or belief, disability, age and sexual orientation), but across a more limited material scope (employment and vocational training).

These Directives have always carried an aura of unfinished business. No coherent argument of principle was advanced as to why the prohibition of racial discrimination was much more extensive in its application than that which applies to the other grounds. At the time of making the proposal for the Directives, the European Commission frankly acknowledged that there was much stronger political will amongst the Member States to take an initiative against racism and the Commission wanted to capitalise upon that in order to produce as far-reaching a Directive as possible.[3] Unsurprisingly, it was not long before civil society organisations began campaigning for further legislation to remove the gap in protection between the two Directives.[4]

The political case for additional legislation appeared to have been conceded in 2004 by the incoming Commission President, José Manuel Barroso. Before the European Parliament, he stated:

> *I also intend to initiate work with a view to a framework directive on the basis of Article 13 of the European Community Treaty, which will replace the directives adopted in 2000 and extend them to all forms of discrimination.*[5]

1 Council Directive 2000/43/EC [2000] implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L180/22.

2 Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation , OJ L303/16.

3 European Commission, *Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on certain Community Measures to Combat Discrimination,* COM/99/0564, at 8.

4 For example, the European Disability Forum collected over one million signatures in favour of a further Directive on disability discrimination.

5 European Parliament Debates, 26 October 2004.

Nevertheless, there followed a lengthy period of studies and consultations, which seemed to risk losing the momentum for a new Directive. Under pressure from the Parliament and civil society to follow through on the commitment given in 2004, the Commission finally published its proposal for an additional Directive in July 2008.[6]

In brief, this seeks to prohibit discrimination on grounds of religion or belief, disability, age and sexual orientation in the fields of social protection, social advantages, education and goods and services, including housing. The main political hurdle to the adoption of the Directive lies in the need for unanimous agreement within the Council of Ministers from all 27 EU Member States. Negotiations actively commenced in autumn 2008 and are ongoing at the time of writing. This article will provide an overview of the contents of the proposed Directive and an initial evaluation of its potential strengths and weaknesses, with particular reference to the law in Ireland. Given the material scope of the proposed Directive, its impact will be primarily on the Equal Status Acts 2000-2008 (Equal Status Acts). The article begins by considering the grounds of discrimination, before progressing to examine the definition of discrimination; the Directive's material scope; the exceptions to the prohibition of discrimination; and the enforcement mechanisms.

The grounds of discrimination

As mentioned above, the proposed Directive covers the grounds of religion or belief, disability, age and sexual orientation. Accordingly, the mission of the Directive is confined to addressing some of the perceived shortcomings of the Employment Equality Directive and it does not attempt to make a wider reform of EU anti-discrimination legislation. It also follows the pattern of the existing Directives in not providing any definition of the discrimination grounds. This choice was particularly contested in relation to disability. The first decision of the Court of Justice on disability adopted a relatively rigid approach:

> *The concept of "disability" must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life.*[7]

The focus here on the individual's impairment seemed to adopt a medicalised model of disability, whereas the general trajectory of disability law reform has been to reduce the emphasis on the individual's impairment and instead to concentrate on the disabling effects of the surrounding environment, such as building design or social prejudices. The proposed Directive could be regarded as a missed opportunity to give the Court a clearer steer on how it should interpret the concept of disability. This critique has filtered through; the European Parliament[8] proposed inserting a definition of disability drawn

6 European Commission, *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, COM (2008) 426.

7 Case C-13/05 *Chacón Navas v Eurest Collectividades* [2006] ECR I-6467, at para 43.

8 European Parliament legislative resolution of 2 April 2009 on 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, Amendment 17.

from the UN Convention on the Rights of Persons with Disabilities.[9] This appears to have been accepted by the Council of Ministers.[10] Recital 19a currently states:

> *Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others.*[11]

It should be noted that the use of the term 'include' implies that this is not an exhaustive definition. The definition of disability within the Equal Status Acts is already relatively broad[12], so this aspect of the Directive may not require change to Irish legislation.

The proposed Directive did not expressly address the issues of discrimination based on an assumption (e.g. that someone is a Muslim, even if he is actually Hindu), or discrimination based on association (e.g. a non-Roma woman denied entry to a bar because she is accompanied by a Roma man). Shortly after the proposed Directive was published, the European Court of Justice (the ECJ) decided that the existing Employment Equality Directive should be interpreted in a way which addressed associative discrimination. In *Coleman*[13], the Court held that the Directive prohibits discrimination on particular *grounds* rather than protecting a particular class of persons. Therefore, discrimination against the primary carer of a disabled child could be discrimination on grounds of disability. It did not matter that the person encountering the discrimination was not personally disabled. The broad language used within the decision suggests that its reasoning will be applied to other discrimination grounds, so it could be argued that the Court has resolved this issue without the need for legislative intervention. Yet the Court's judgment is carefully worded to respond to the facts of the case before it, and in the operative part of the judgment it does not explicitly refer to discrimination by association.[14] On balance, reasons of transparency and legal certainty suggest that it would be preferable for the Directive to include an express prohibition of discrimination based on association or assumption.[15] This appears to have been accepted by the Council of Ministers. Article 2(1)(f) in recent drafts of the Directive defines discrimination as including:

> *direct discrimination or harassment due to a person's association with persons of a certain religion or belief, persons with disabilities, persons of a given age, or of persons of a certain sexual orientation.*[16]

9 See further, 'Promoting a Paradigm Shift' (2008) 2 *Equal Rights Review*, 83-93, at 87.

10 Council Document 16594/08 ADD 1, 9 December 2008.

11 Council Document 6092/10, 11 February 2010.

12 Equal Status Acts 2000-2008, ss 2(1) and 3(1)(a).

13 Case C-303/06, *Coleman v Attridge Law and Steve Law* [2008] ICR 1128.

14 See further, Waddington, Case Note, (2009) 46 *Common Market Law Review*, 665-681, at 672.

15 Amendment 41 adopted by the European Parliament would introduce such a clause. See European Parliament legislative resolution of 2 April 2009 on 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, Amendment 41.

16 Council Document 6092/10, 11 February 2010.

Although this provision does not refer to discrimination based on an assumption, this is dealt with in the preamble of the Directive.[17] Irish law already expressly recognises the possibility of discrimination based on assumption[18] and association[19]; however, this is in relation to less favourable treatment, i.e. direct discrimination. The text currently found within the proposed Directive includes an additional reference to harassment and this might require revision of the Irish legislation.

The final issue to be considered in this section is multiple discrimination. One of the oft-cited reasons for adopting additional EU anti-discrimination legislation was multiple discrimination. The lacunae in the existing legal framework frustrated the ability of the law to respond effectively to situations where individuals face discrimination on more than one ground. For example, a gay Asian tenant facing harassment on grounds of ethnic origin and sexual orientation is currently protected under EU law from the harassment he experiences on grounds of his ethnic origin, but not from that based on his sexual orientation. By seeking to 'level up' the legal protection on grounds of religion, disability, age and sexual orientation to that already existing for racial or ethnic origin, the Directive would contribute to combating multiple discrimination insofar as it plugs some of the gaps in the present law. There are, though, notable shortcomings in the engagement with multiple discrimination. First, intersections between gender and other discrimination grounds are typically the best recognised instances of multiple discrimination.[20] Nonetheless, a side-effect of the current proposal, if adopted, is that gender discrimination would become the least protected of the grounds covered by EU anti-discrimination legislation. Presently, discrimination on grounds of sex is forbidden in employment, vocational training, aspects of social security law and in the provision of goods and services. There is no protection against discrimination in education.[21]

The second weakness in the Directive's approach to multiple discrimination is its failure to tackle some of the difficulties in using the legal framework. Even if there were comprehensive legislation prohibiting discrimination across all the grounds mentioned, problems can still arise in practice. These issues range from locating an appropriate comparator for a complainant alleging discrimination on multiple grounds, to determining whether the remedy awarded should be adjusted if the discrimination has been on more than one ground.[22] The Commission's explanatory memorandum, which accompanied the proposal for the Directive, rather dismissively states that '*these issues go beyond the scope of this Directive but nothing prevents Member States taking action in these areas*.'[23] The legal foundations for this assertion seem tenuous. A Directive dealing

17 Council Document 8889/10, 28 April 2010, Recital 12.

18 Equal Status Acts 2000-2008, s3(1)(a) includes the situation where a discriminatory ground '*is imputed to the person concerned*'.

19 Equal Status Acts 2000-2008, s3(1)(b).

20 European Commission, *Tackling Multiple Discrimination – Practices, Policies and Laws* (Office for the Official Publications of the European Communities, 2007), at. p 47.

21 Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L373/37, Art 3(3).

22 See further Uccellari, 'Multiple Discrimination: How Law can Reflect Reality' (2008) 1 *Equal Rights Review*, 24-49.

23 European Commission, *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, COM (2008) 426, at 4.

simultaneously with four grounds of discrimination seems entirely apt for addressing the question of multiple discrimination and there is no apparent question of legal competence that would restrain the EU from legislating in this direction. In the European Parliament's first reading of the proposal, it has endorsed a more penetrating response, notably by the addition of provisions expressly prohibiting multiple discrimination.[24] These proposals do not appear to have found support within the Council of Ministers.

The definition of discrimination

In the period between 2000 and 2006, various EU Directives have converged towards a settled definition of discrimination.[25] This has four limbs: direct discrimination, indirect discrimination, harassment and instructions to discriminate. Article 2(2) of the proposed Directive largely replicates this structure by adopting equivalent definitions of these four concepts to those already found in the other Directives. Aside from the discussion on how these definitions operate in relation to multiple and associative forms of discrimination, this aspect of the Directive has generated relatively little controversy. The main discussion appears to be around the definition of harassment and the extent to which this needs any adjustment in order to protect freedom of expression. Recent drafts of the Directive have inserted qualifying language in the preamble:

> *…the mere expression of a personal opinion or the display of religious symbols or messages are presumed as not constituting harassment. Conduct protected under international and European instruments providing for freedom of expression and freedom of religion shall be deemed not to create an intimidating, hostile, degrading, humiliating or offensive environment.* [26]

The Spanish Presidency has proposed to remove this wording; however, its 'progress report' on the negotiations acknowledges that one of the sticking points amongst the Member States is 'freedom of speech and religion'.[27] Insofar as this provision seeks to restate the need for the Directive to be compatible with fundamental rights, such as freedom of expression, then this is relatively uncontroversial. It is evident that the Court of Justice will have to interpret the Directive in a manner that respects the legally-binding status of the Charter of Fundamental Rights, which includes freedom of expression.[28] Yet this text seems to go further in providing a shield for any 'personal opinion'. This risks undermining the essence of protection from harassment. For example, a

24 European Parliament legislative resolution of 2 April 2009 on 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, Amendment 37.

25 In addition to the Racial Equality and Employment Equality Directives, there have been three significant Directives relating to gender equality: Directive 2002/73/EC amending Council Directive 76/207/EEC 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, OJ L 269/15; Directive 2004/113/EC implementing the principle of equal treatment between women and men in the access to and supply of goods and services, OJ L373/37; Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L204/23.

26 Council Document 6092/10, 11 February 2010, Recital 12b.

27 Council Document 9535/10, 17 May 2010, at p 7.

28 Charter of Fundamental Rights of the European Union, Art 11.

personal opinion might include the view that homosexuality is an abomination. The expression of such an opinion, especially if it was repeatedly voiced against the wishes of the recipient, would seem to be an evident example of conduct that gives rise to a humiliating or offensive environment. Fundamentally, whether the expression of a personal opinion constitutes harassment needs to be determined in the light of the entire context in which this takes place. This is a task best suited to tribunals and courts, rather than attempting to provide excessively prescriptive rules within the Directive.

The genuine novelty in the definition of discrimination is the proposal to create a fifth limb to the concept of discrimination: 'denial of reasonable accommodation' (Art 2(2)(5)). The Employment Equality Directive already includes a duty on employers to provide reasonable accommodation for disabled persons (Art 5). This is prefaced by the statement '*in order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities*'. Logically, this can be interpreted as meaning that a failure to provide reasonable accommodation is a breach of the principle of equal treatment, but the Directive does not include such a failure within its actual definition of 'discrimination' (Art 2). This has resulted in inconsistency within national legislation over whether failure to provide reasonable accommodation amounts to direct or indirect discrimination; whether it is a *sui generis* wrong or whether it is treated as an aspirational duty with no specific sanction in the event of a breach.[29] The proposed Directive clarifies this conundrum by ensuring that denial of reasonable accommodation is a specific form of unlawful discrimination, thereby drawing inspiration from the approach in the UN Convention on the Rights of Persons with Disabilities.[30] The original text proposed by the Commission did not include any definition of reasonable accommodation, but this has since been added during the negotiations. Article 4a currently defines reasonable accommodation as '*necessary and appropriate modifications and adjustments where needed in a particular case, to ensure to persons with disabilities access on an equal basis with others.*'[31] With regard to Irish law, perhaps the most significant aspect is the threshold for applying the reasonable accommodation duty. Section 4(2) of the Equal Status Acts provides that:

> *a refusal or failure to provide the special treatment or facilities … 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 draft version of the Directive sets the threshold at a '*disproportionate burden*'[32], which appears to be more demanding than '*nominal cost*'. The Directive would, therefore, require an amendment to the Equal Status Acts. This should ensure more consistency with the Employment Equality Acts 1998-2008 (the Employment Equality Acts), which already incorporate the disproportionate burden test.[33]

29 Waddington, 'Reasonable Accommodation' in Schiek, Waddington and Bell, *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart Publishing, 2007) 740-745.

30 UN Convention on the Rights of Persons with Disabilites, Art 5(3). The Convention entered into force on 3 May 2008.

31 Council Document 7349/1/10 REV 1, 15 March 2010.

32 European Commission, *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, COM (2008) 426, Art 4(1)(a).

33 Employment Equality Acts 1998-2008, s16(3)(b).

In addition to the reasonable accommodation duty, the Commission proposed that the Directive would establish an anticipatory duty to provide 'e*ffective non-discriminatory access to social protection, social advantages, health care, education and access to and supply of goods and services which are available to the public, including housing and transport*' (Art 4(1)(a)). The proposed Directive does not spell out on whom this duty falls, but it implies that Member States and service-providers have a positive obligation to take measures to ensure equal access for disabled persons. It is not enough to respond on a case-by-case basis to the needs of individual disabled people as they seek to access the service. The scope of this accessibility duty has proven a thorny issue in the negotiations within the Council of Ministers and its terms have been substantially revised. For example, the current text would exclude its application to the '*design and manufacture of goods*'.[34] The duty is now firmly characterised as a progressive obligation, with Member States reporting every two years on the steps taken to ensure accessibility. As regards new and significantly renovated buildings, the duty would apply within five years of the Directive coming into effect, but Member States would be permitted up to 20 years for existing buildings and infrastructure.[35] There is no provision for legal standing for a national equality body to bring proceedings where it finds evidence of the state or private service-providers failing to ensure accessibility. The sole means for legal enforcement would be infringement proceedings by the Commission.

The material scope of the prohibition of discrimination

The material scope of the Directive will be particularly significant in determining its impact upon Irish law. On the surface, the Equal Status Acts cover similar terrain to that found within the proposed Directive. The main areas found within the Equal Status Acts are: goods and services; accommodation; education; clubs. The Commission's original proposal for the Directive replicated those parts of the material scope of the Racial Equality Directive that were not included in the Employment Equality Directive: social protection, including social security and healthcare; social advantages; education; access to and supply of goods and other services which are available to the public, including housing.[36] Some of these fields are evidently already found within the Equal Status Acts (e.g. goods and services), but some would appear to require a revision in the Acts' scope. Notably, the proposed Directive expressly covers social protection and social security. Insofar as these are services provided by the State to the public, there is an argument that they already fall within the scope of the Equal Status Acts.[37] The Directive would, though, imply that any ambiguity around the application of the Acts to these fields must be removed.

Given that the intended material scope of the proposed Directive merely replicates that found in the Racial Equality Directive, it might have been assumed that there should

34 Council Document 7349/1/10 REV 1, 15 March 2010, Art 4(3).

35 Council Document 9535/10, 17 May 2010 at p 4.

36 European Commission, *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, COM (2008) 426, Art 3(1).

37 For a discussion of this point, see O'Farrell, 'Report on Measures to Combat Discrimination: Directives 2000/43/EC and 2000/78/EC. Country report: Ireland' (2008) at para. 3.2.6. See further: http://www.non-discrimination.net.

be little controversy over whether, in principle, the EU enjoys the necessary legal competence to legislate in these fields. In retrospect, the limits to the EU's competence were rather glossed over in the rush to adopt the Racial Equality Directive (which became a short-term political response to the entry into the Austrian government of a party from the far-right). When the Commission subsequently sought to legislate on gender equality in areas outside the labour market, much more resistance was encountered and the final Directive was limited to goods and services, with an express exclusion of media, advertising and education.[38] Similarly, the documentation from the Council of Ministers' negotiations reveals that many Member States are querying the scope of the Union's powers to legislate on topics such as education, health and social protect ion.[39]

The ambiguity surrounding the legal competence of the EU can be traced to two factors. First, the Lisbon Treaty (the Treaty on the Functioning of the European Union) heavily circumscribes the capacity of the EU to legislate on education and health. In education, for example, Article 165(4) of the Lisbon Treaty provides a power to '*adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States*'. So the Union can create educational programmes, such as the Erasmus student exchange programme, but it cannot harmonise the organisation of the school system. Against this restrictive view of the Union's role, it has to be acknowledged that EU law relating the free movement rights of EU citizens penetrates deeply into national social policy, including health and education. For instance, the ECJ has upheld the right of citizens, in certain situations, to seek healthcare in another Member State and to receive a reimbursement for the costs of this treatment, even within publicly-funded healthcare systems such as the British NHS.[40] In practice, such decisions are likely to have some implications for the organisation of the healthcare system, even if the Lisbon Treaty elsewhere deems this to be a responsibility of the Member States.[41]

The Racial Equality Directive squared this circle by listing the areas to which it applies (including health and education), but prefacing this with the statement: '*within the limits of the powers conferred upon the Community, this Directive shall apply … in relation to …*'. On the surface, the Racial Equality Directive appears to apply unreservedly to all aspects of education, but it would be possible in a given case to dispute whether or not that aspect of education is one that actually fell within the limits of the Community's powers. Ultimately, this is a pragmatic response to the reality of fuzzy boundaries between what is exclusively national competence and what may be a matter of shared competence with the EU. Any attempt to delineate more closely EU legal competence is likely to produce an undesirable difference in the material scope of the Racial Equality Directive and the proposed Directive. Indeed, this would undermine one of the core benefits of the proposed Directive, which is to render consistent the prohibition of discrimination across a range of grounds. Nevertheless, this is precisely the path that is being followed in the ongoing Council negotiations.

38 Directive 2004/113/EC implementing the principle of equal treatment between women and men in the access to and supply of goods and services, OJ L373/37, Art 3(3).

39 Council Document 16594/08 ADD 1, 9 December 2008, at 15-16.

40 Case C-372/04 *R (on the application of Watts) v Bedford Primary Care Trust and Secretary of State for Health* [2006] ECR I-4325.

41 Lisbon Treaty, Art 168.

The 'progress report' from the Spanish Presidency on the negotiation of the Directive, published in May 2010, notes the need for further discussion with a view to '*demarcating the division of competences between the Member States and the European Union even more precisely than hitherto in the light of the legal basis*.'[42] This objective has led the Council to introduce provisions that seek to place a boundary between those aspects of social protection, education and healthcare that are covered by the Directive, and those that are not. In relation to social protection and health services, it is proposed that the Directive will not apply to 'conditions of eligibility'.[43] If retained, this would be a significant dilution of the Directive. For example, a social welfare benefit for low income families that was subject to the condition of the family being based on marriage or an opposite-sex partnership would risk falling outside the remit of the Directive (despite entailing direct discrimination on the ground of sexual orientation). In relation to education, the draft text is confusing; '*the definition of examination processes*' is deemed to be within the '*exclusive competence*' of Member States, but discrimination would be forbidden in '*the evaluation of students' performance*'.[44] It would seem very difficult to predict in advance how such a distinction would operate in practice. A good example is the ongoing litigation on whether it constitutes disability discrimination to annotate the Leaving Certificate in relation to dyslexic students where a marking adjustment has been made.[45] Would this be treated as 'examination processes' (outside the scope of the Directive) or 'evaluation of students' performance' (inside the scope of the Directive)? Moreover, there is a very substantial omission in Article 3(2)(d), which states that the Directive does not apply to '*the organisation of education for people with special needs*'.[46]

Alongside the contentious division of national and EU competences runs a thorny debate around the boundary between public and private provision of services. In relation to goods, services and housing, the Commission's proposal stated that the Directive '*shall apply to individuals only insofar as they are performing a professional or commercial activity*'.[47] The antecedents of this clause can be traced back to the polemics provoked in Germany during the transposition of the Racial Equality Directive. There was a hot debate over whether or not the Directive violated the freedom of contract and privacy rights. The German federal anti-discrimination law takes a generous view of the private sphere; in principle, if a landlord does not rent out more than 50 flats, then she is not subject to the legislation.[48] The Commission's text evidently anticipates a similar debate, but the approach taken threatens to open a loophole.

The ECJ has already recognised, in the context of gender equality legislation, that the principle of equal treatment has to be interpreted in the light of the right to private

42 Council Document 9535/10, 17 May 2010, at 7.

43 Council Document 8889/10, 28 April 2010, Art 3(2).

44 Council Document 8889/10, 28 April 2010, Recital 17g.

45 *Two Named Complainants v Minister for Education and Science*, DEC-S2006-077. See further the chapter by Carol Ann Woulfe in this collection.

46 Council Document 8889/10, 28 April 2010.

47 European Commission, *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, COM (2008) 426, Art 4(1)(a).

48 Mahlmann, Report on measures to combat discrimination: Directives 2000/43/EC and 2000/78/EC: Germany, (2007), para 3.2.9, available at: http://www.migpolgroup.org/public/docs/125.Germany_DiscriminationCountryReport_EN_01.07.pdf.

life.[49] Consequently, the Court was willing to accept that there could be *some* forms of employment within the private household where restrictions on the principle of equal treatment could be applied.[50] This should be a sufficient safeguard that if there is a clash between non-discrimination and private life, then the Court will strike an appropriate balance. In its explanatory memorandum, the Commission suggests the following example: 'letting a room in a private house does not need to be treated in the same way as letting rooms in a hotel'.[51] Nevertheless, the wording of the proposed Directive goes beyond that found in either the Racial Equality Directive or Directive 2004/113 on gender equality in goods and services. This creates the risk that Member States (and the courts) will interpret this as favouring a more extensive concept of private transactions. Indeed, Germany has advocated for the Directive to be limited to transactions which are conducted impersonally and in a standardised fashion (as in its domestic legislation).[52]

The exceptions to the prohibition of discrimination

Some of the most controversial elements of the proposed Directive relate to the exceptions foreseen within the text. Some of these are general in nature, while there are others that specifically relate to disability and age. The exceptions permitted are particularly significant in relation to the eventual alterations that may be required to the Equal Status Acts. The Acts contain numerous exceptions and there will need to be a careful auditing of the extent to which they are compatible with the final text of the Directive.

Beginning with the general exceptions in the Directive, Article 2(8) permits:

> *general measures laid down in national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and the protection of the rights and freedoms of others.*

The difficulty with this provision is determining what sorts of measures would be regarded as justified. The wording resembles similar provisions within the European Convention of Human Rights, so it seems likely that the proportionality test used by the European Court of Human Rights would also be imported into the interpretation of this provision.[53] Nevertheless, it would be preferable if this was explicitly mentioned within the text. Despite the breadth and flexibility of this exception, it would still seem more limited than the very wide 'statutory authority' exception in s 14(1) of the Equal

49 Case 165/82 *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* [1983] ECR 3431.

50 Case 165/82 *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* [1983] ECR 3431, at para 14.

51 European Commission, *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, COM (2008) 426, Explanatory Memorandum, at p 8.

52 Council Document 16594/08 ADD 1, 9 December 2008 at p 16.

53 It should be noted, however, that when the European Court of Justice considered the equivalent provision in the Employment Equality Directive, it did not make reference to any requirement for proportionality: Case C-341/08 *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* (12 January 2010).

Status Acts. This states that '*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 court …*'. There is nothing within the proposed Directive that would permit a blanket exception for a discriminatory rule merely because it was found within another statutory enactment. Indeed, the rationale of the Directive is to require a screening of national legislation in order to remove any unjustified discriminatory provisions.

More detailed exceptions are found in Art 3 of the Directive. This article concerns the material scope of the Directive, so, strictly speaking, these provisions are not exceptions to the prohibition of discrimination, but simply limitations on the scope of application of the Directive.[54] In the Commission's original proposal, there were exclusions in relation to:

- national laws on marital or family status and reproductive rights;
- differences in treatment in access to educational institutions based on religion or belief;
- national legislation on the secular nature of the State;
- national legislation on churches and other organisations based on religion or belief.

Although the exact wording continues to evolve through the negotiations in the Council, these are all still present in the most recent drafts of the Directive. Indeed, a new Article 3(3a) would clarify that the Directive is '*without prejudice to national measures authorising or prohibiting the wearing of religious symbols*'.[55]

Evidently, these exclusions relate to matters of political sensitivity for many Member States. In relation to Ireland, there are various provisions in the Equal Status Acts that permit differences of treatment based on marital status or in relation to religion; these exceptions will be crucial in any subsequent review of the legislation. For example, s 16(1) authorises '*imposing or maintaining a reasonable preferential fee, charge or rate in respect of anything offered or provided to … married couples*'. Alternatively, s 7(3)(c) permits the preferential admission of persons of a particular religious denomination where a school has the objective of providing '*education in an environment which promotes certain religious values*' and where this is '*essential to maintain the ethos of the school*'. Given the uncertainty over the final wording of the Directive, it is difficult to forecast whether such provisions will ultimately be compatible. It is, though, obvious that a thorough reappraisal of all exceptions within the Equal Status Acts will be required.

Exceptions relating to age and disability

There are two further exceptions of relevance to the grounds of age and disability. Article 2(7) authorises '*proportionate differences in treatment*' in financial services, provided that '*age or disability is a key factor in the assessment of risk based on relevant and accurate actuarial or statistical data*'. In the explanatory memorandum, the Commission argues that '*the use of age or disability by insurers and banks to*

54 Article 3(5) of the European Commission, *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, COM (2008) 426 reproduces Article 3(2) of the Racial Equality Directive specifying that the Directive does not cover differences of treatment based on nationality.

55 Council Document 8889/10, 28 April 2010.

assess the risk profile of customers does not necessarily represent discrimination: it depends on the product.'[56] This perspective can be challenged as not recognising the stereotyping which underpins the use of any discrimination ground as a basis for setting different premiums for financial products. A 72 year old man who is refused travel insurance is suffering from a stereotype that older men are at greater risk of experiencing ill-health. Although this is factually true, it takes no account of the specific health record of the individual customer.[57] As Baroness Hale observed in *R (European Roma Rights Centre) v Immigration Officer at Prague Airport and another*:

> *The whole point of the law is to require suppliers to treat each person as an individual, not as a member of a group. The individual should not be assumed to hold the characteristics which the supplier associates with the group, whether or not most members of the group do indeed have such characteristics, a process sometimes referred to as stereotyping.*[58]

On a more pragmatic level, this exception can also be criticised for not building in the same safeguards which are found in the equivalent exception in the Directive on gender equality in goods and services.[59] In comparison to the Equal Status Acts, it is worth underlining that the Directive only contemplates this exception applying to the age and disability grounds. This implies a need to revise the Equal Status Acts, which apply a similar exception in respect of all discrimination grounds.[60]

The widest exception relates to age discrimination. Article 2(6) states:

> *… Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are justified by a legitimate aim, and if the means of achieving that aim are appropriate and necessary. In particular, this Directive shall not preclude the fixing of a specific age for access to social benefits, education and certain goods or services.*

The first sentence of this paragraph echoes Art 6(1) of the Employment Equality Directive.[61] This permits direct discrimination on grounds of age and opens the door for any form of age discrimination to be potentially capable of justification. The uncertainty generated by this wide scope for justification is already reflected in the preponderance of preliminary references from national courts under the Employment Equality Directive,

56 European Commission, *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, COM (2008) 426, Explanatory Memorandum at p 5.

57 See further the chapter in this collection by Geraldine Hynes.

58 *R (European Roma Rights Centre) v Immigration Officer at Prague Airport and another* [2005] 2 AC 1 (House of Lords), at para 74.

59 Article 5(2) of Directive 2004/113/EC implementing the principle of equal treatment between women and men in the access to and supply of goods and services, OJ L373/37, requires Member States to ensure that the data used in determining actuarial factors are published and regularly updated. In addition, Member States must review this exception after a period of 5 years.

60 Equal Status Acts 2000-2008, s 5(2)(d). Arguably this is already in breach of the Racial Equality Directive where no such exception is foreseen.

61 In contrast to the Employment Equality Directive, the proposed text omits the words '*objectively and reasonably*' prior to '*justified*'.

many of which have concerned the interpretation of Article 6(1).[62] There is relatively little controversy over the fact that there is a variety of circumstances where direct age discrimination should be permitted. This ranges from minimum age requirements for access to alcohol, tobacco, pornography or firearms, through to qualification ages for state retirement pensions or other social benefits (such as free/discounted travel on public transport). The difficulty is how to protect and permit schemes that provide benefits for younger and older persons, whilst still ensuring judicial scrutiny of other, less warranted age-based differences in treatment. In the most recent drafts of the Directive, Article 2(6) is elaborated with the following text:

> *… differences of treatment under national regulations fixing a specific age for access to social protection, including social security, social assistance and healthcare; education; and certain goods and services which are available to the public, or providing for more favourable conditions of access for persons of a given age, in order to promote their economic, cultural or social integration, are presumed to be non-discriminatory.*

This approach holds open the possibility that age-based criteria in 'national regulations' can still be challenged, but the burden of proof would seem to fall entirely on the complainant, given the statutory presumption that such rules are not discriminatory. This could assist the courts in refuting speculative litigation about minimum age requirements for alcohol, tobacco, etc, however, it poses the risk that a wider swathe of age-based criteria in state-provided services will be shielded from scrutiny. Notwithstanding the flexibility that this would offer to national legislators, it would not permit the exclusion of age discrimination complaints in relation to the under 18s, as currently provided in s 3(3)(a) of the Equal Status Acts.

The discussion above may also have implications for disability. This is another ground where there are numerous instances of preferential treatment that are conducive to the realisation of full equality in practice, even though they collide with formal equal treatment of disabled and non-disabled persons. Most, if not all, Member States will provide a range of social welfare benefits that are limited to disabled persons, such as mobility and living allowances. It is presumably not the intention of Commission that such programmes should be vulnerable to challenge as direct discrimination against non-disabled persons. Nevertheless, the proposed Directive does not expressly address the legal foundation for permitting such measures. The Council has debated adding disability into Art 2(6).[63] However, that would considerably weaken the protection against disability discrimination by allowing the justification of direct discrimination. A more suitable approach would be to recognise an asymmetrical objective for disability discrimination legislation; in other words, it is concerned with protecting disabled persons against discrimination rather than conferring parallel protection for the non-disabled.[64]

62 For example, Case C-411/05 *Palacios de la Villa v Cortefiel Servicios SA* [2007] ECR I-8531; Case C-388/07 *R (the Incorporated Trustees of the National Council for Ageing (Age Concern England)) v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] ECR I-1569.

63 Council Document 16594/08 ADD 1, 9 December 2008.

64 This approach would, though, need specific provision to be made for discrimination due to association with a disabled person.

Remedies and enforcement

For the most part, the Commission has eschewed any innovation in how the Directive approaches procedures for enforcement or remedies. Instead, the Directive replicates standard provisions from existing EU anti-discrimination legislation. For example, there is protection from victimisation and provision for a shift in the burden of proof where the complainant establishes facts from which it may be presumed that discrimination has occurred. The principal novelty, compared to the Employment Equality Directive,[65] is the obligation on Member States to designate a body or bodies for the promotion of equal treatment. This duty already exists in EU legislation in respect of discrimination on grounds of sex and racial or ethnic origin. Yet the Commission's proposal timidly refrains from addressing the loophole that is inherited from the Employment Equality Directive. If the text were adopted as it stands, Member States would be obliged to have a body which assists individuals facing discrimination on grounds of religion, age, disability and sexual orientation in the relevant areas outside employment, but there would be no requirement for this body's mandate to cover discrimination in the labour market.

The overall direction of the remedies and enforcement chapter of the Directive is to continue the heavy focus in EU legislation on an anti-discrimination model reliant on complaint-based enforcement, primarily brought by individuals. This jars with the announced direction of EU policy. In 2005, the Commission published a 'Framework Strategy' on non-discrimination and equal opportunities. This acknowledged the limitations in the complaint-based model:

> *It is clear that implementation and enforcement of anti-discrimination legislation on an individual level is not enough to tackle the multifaceted and deep-rooted patterns of inequality experienced by some groups.*[66]

Instead, the '*positive and active promotion of non-discrimination and equal opportunities for all*' was identified as the core objective of the new strategy.[67] There is little evidence of this thinking in the 2008 proposal. There is the *option* for Member States to take positive action measures[68], but there are no duties on Member States and/or public authorities to promote equality. Even the modest steps in the EU's gender equality legislation, such as a duty to '*actively take into account the objective of equality*' when formulating laws and policies[69], has not been transplanted into this proposal.

65 Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation OJ L303/16.

66 European Commission, *Communication from the Commission to the Council, the European Parliament, the European and Economic Social Committee and the Committee of the Regions - Non-Discrimination and Equal Opportunities for all – a Framework Strategy* COM (2005) 224, at 2.

67 European Commission, *Communication from the Commission to the Council, the European Parliament, the European and Economic Social Committee and the Committee of the Regions - Non-Discrimination and Equal Opportunities for all – a Framework Strategy* COM (2005) 224, at 12.

68 European Commission, *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, COM (2008) 426, Art 5.

69 Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L204/23, Art 29.

Conclusion

In approaching the prospect of the new Directive, Ireland benefits from its substantial experience in the operation of the Equal Status Acts. Unlike some Member States, the basic principle of prohibiting discrimination in areas outside employment and across a wide range of grounds has been established in Irish law for a decade. Indeed, it should be recognised that the Equal Status Act 2000 was a pioneering piece of legislation that has been influential in shaping European approaches to combating discrimination. Although the Directive will not demand a fundamental change in the direction of domestic legislation, it provides a valuable opportunity to strengthen the Equal Status Acts and to address weaknesses that have emerged with the experience of operation in practice. Perhaps the most notable reform demanded is in relation to the disability ground, and the promised changes to the reasonable accommodation duty. More generally, it will be a timely occasion for scrutinising the range of exceptions found within the Act. There needs to be a careful examination as to which of these remain necessary and whether they can be worded with more precision. At the time of writing, the eventual fate of the proposed Directive remains uncertain. Consensus within the Council of Ministers appears to remain elusive. Even if agreement is not forthcoming at European level, there is nothing to prevent the Irish Government from taking the initiative at national level to enhance the Equal Status Acts in the light of the proposals advanced by the Commission. The voluntary revision and strengthening of domestic legislation would allow Ireland to recapture the ambition for anti-discrimination law that prevailed when the Employment Equality Acts and the Equal Status Acts were first introduced.

Multiple Discrimination and the Distinctions between Discrimination Grounds in EU Law

Colm O'Cinneide

—Reader in Law, University College London.

Introduction

It is entirely possible to have a multi-ground unified anti-discrimination legislative framework that can be made to work reasonably well in practice, as the Irish experience demonstrates. However, it is also apparent that, even where a well-established comprehensive unified framework is in place, distinctions, hierarchies and tensions between equality grounds tend to emerge in various forms, albeit often in camouflaged guise. Also, such frameworks struggle to cope with multiple discrimination and the problems associated with 'intersectionality'. This paper makes the case for engaging with these issues honestly and critically.

Unified Anti-Discrimination Legislation

Irish equality legislation adopts a harmonised, cross-ground approach. National anti-discrimination legislation, in particular the Employment Equality Acts 1998-2008 and the Equal Status Acts 2000-2008 (the Equal Status Acts), impose general prohibitions on discriminatory behaviour which is based upon or linked to any of the different 'equality grounds' of gender, race, age, membership of the Traveller community, and so on. The legislation does make provision for some specific exceptions and special rules that apply to one or more of the different grounds. For example, special rules apply in the context of age when it comes to differential treatment of workers who have reached 'normal retirement age'[1]. Differences in treatment on age grounds are also permitted when it comes to the provision of goods and services, access to sporting events or facilities and the provision of insurance services.[2] However, in general, discrimination is dealt with via a shared basic legislative framework, which prohibits direct and indirect discrimination, harassment and victimisation across all the different equality grounds, while permitting positive action in certain limited circumstances.

This contrasts with the approach adopted in the UK until recently, where separate and specialist legislation such as the Sex Discrimination Act 1975, the Race Relations Act 1976 and the Employment Equality (Age) Regulations 2006 dealt with each individual equality ground. In addition, the Irish legislation establishes the Equality Authority and the system of equality tribunals to act as a common enforcement mechanism: there are no specialist bodies dealing with gender equality, race equality and so on, as was common in other EU States until recently.[3]

1 Employment Equality Acts 1998-2008, s 34(4).

2 Equal Status Acts 2000-2008, s 5. See O'Cinneide, 'Age Discrimination and Irish Equality Law', in O'Dell (ed.) *Older People in Modern Ireland: Essays on Law and Policy* (Ashgate, 2005).

3 See O'Cinneide, *Single Equality Bodies: Lessons from Abroad* (Equal Opportunities Commission Research Paper Series, November 2002).

EU anti-discrimination law for the most part also adopts a similar 'common framework' approach. The race and gender equality Directives which address race and gender equality have a wider scope of application than those dealing with discrimination on the grounds of age, sexual orientation, disability and religion or belief.[4] The latter are confined to the areas of employment and occupation, while the former extend to the provision of goods and services and the provision of 'social advantages' and 'social protection'.[5] However, as with the Irish legislation, the EU anti-discrimination Directives taken together adopt a common cross-ground approach when it comes to defining the types of acts that constitute prohibited discrimination: common definitions of direct and indirect discrimination, harassment, victimisation and positive action are applied across the six equality grounds recognised in EU law, as are the provisions of the Directives that require EU Member States to ensure that effective enforcement mechanisms are in place to provide redress to victims of discrimination.[6]

In addition, the European Commission and other European institutions have in recent years begun to adopt cross-ground common equality policy frameworks, whereby emphasis is placed on adopting proactive equality strategies across the different grounds and encouraging Member States to do likewise.[7] Separate policy frameworks still exist in respect of gender, reflecting the well-established position of gender equality within EU law and institutional frameworks. However, in general, the EU is moving towards the adoption of a common anti-discrimination law and/policy framework. This is reflected in the European Commission's proposal for a new draft framework equality Directive, which would level up and harmonise protection against discrimination across all the six 'EU' equality grounds.[8]

Similar developments are taking place at national level. Throughout the EU, national anti-discrimination is being standardised and harmonised across the different equality grounds. A recent example of this is the UK's new Equality Act 2010. National enforcement bodies are increasingly being given responsibility for all facets of anti-discrimination legislation, while countries like the UK and Sweden which had separate equality bodies for different equality grounds have now merged these bodies within common institutional structures.[9]

4 Bell and Waddington, 'Reflecting On Inequalities in European Equality Law' (2003) 28(3) *European Law Review* 349-364.

5 The scope of these legal concepts remains uncertain, in particular the extent to which state social welfare and social security systems are covered.

6 See Bell, *Anti-discrimination Law and the European Union* (Oxford University Press, 2002). Notably, only the Racial Equality Directive 2000/43/EC (Council Directive 2000/43/EC [2000] implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L180/22) requires States to establish an independent enforcement and monitoring body to assist victims of discrimination. However, the majority of EU States have now established equality bodies whose remit extends across the different equality grounds: see O'Cinneide, *Single Equality Bodies: Lessons from Abroad* (Equal Opportunities Commission Research Paper Series, 2002).

7 See the information available on the European Commission's website page, 'Tackling Discrimination', at http://ec.europa.eu/social/main.jsp?catId=423&langId=en (last accessed 14 July 2010).

8 See European Commission, *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, COM (2008) 426.

9 For an analysis of the debate that accompanied this step in the UK, see O'Cinneide, 'The Commission For Equality And Human Rights: A New Institution For New And Uncertain Times' (2007) 36(2) *Industrial Law Journal* 141-162.

Therefore, it is possible to detect a move towards the adoption of a common, standardised cross-ground equality approach across the EU, which echoes the approach already embedded in the Irish legislative framework. This is being driven to some extent by the internal logic of the development of legal regulation in this area. Once the decision has been taken to prohibit discrimination on a particular ground, maintaining substantial differences between how different grounds are protected in law and policy will inevitably generate avoidable complexity and confusion and therefore drive attempts to standardise existing law. This can be seen in the evolution of UK anti-discrimination law, which in recent times reached Byzantine levels of detail and sophistry due to the distinctions which had opened up over time as to how different equality grounds were protected in law The new Equality Act 2010 is intended to remove many of the unnecessary distinctions between the different grounds.

In addition, campaigning groups often press for protection of 'their' ground to be levelled up to meet the protection available to other grounds, as do businesses, regulators, public authorities and other bodies who seek simpler regulation in this area.[10] Also, the increasingly complex and diverse nature of contemporary European societies has generated pressure for different discriminatory factors to be addressed in an equivalent and parallel manner.[11] This has been combined with growing recognition that the complex and multi-faceted nature of the problem of discrimination, and the way it can impact negatively upon individuals and groups in different ways, requires a comprehensive, cross-ground unified approach, to maintain the strength and consistency of the law. Such an approach also appears on its face to reject the concept of 'hierarchy of [equality] grounds', i.e. the idea that certain forms of discrimination are intrinsically more serious and damaging than other, less serious, forms.

All these factors have combined to provide impetus for the emergence of a common, cross-ground legislative framework. However, notwithstanding the strength and obvious cogency of the arguments in favour of such a framework, it is slowly becoming apparent that framing and giving effect to a comprehensive and unified discrimination law is not a problem-free activity.

Emerging Problems

Some of the emerging problems associated with the unified framework are largely technical in nature, and relate to questions of design. It is often necessary to frame exceptions to the general principle of non-discrimination which apply to one or more grounds and not to others, or to make technical provision for specific areas such as housing or transport. This ensures that even unified anti-discrimination statutes remain highly complex and often inaccessible pieces of legislation: for example, the UK Equality Act 2010 contains some 218 principal clauses and 28 schedules.

Trying to deal with the different equality grounds can also pose organisational challenges for equality commissions and policy-makers trying to operate within a common unified

10 See O'Cinneide, 'Fumbling Towards Coherence: The Slow Evolution of Equality Law in England and Wales' (2006) *Northern Ireland Legal Quarterly* 57-102.

11 Timo Makkonen has argued that evidence suggests that those likely to be prejudiced on one ground will also be likely to be prejudiced on other grounds: see Makkonen, *Multiple, Compound and Intersectional Discrimination: Bringing the Experiences of the most Marginalised to the Fore* (Institute for Human Rights, Bo Akademi University, April 2002).

framework. The Equality Commission for Northern Ireland and the new UK Equality and Human Rights Commission, formed from the merger of strand-specific bodies, have struggled at times to ensure that their activities address sufficiently the varying issues which arise for each of the different equality grounds.[12]

However, the emergence of unified anti-discrimination legal and policy frameworks appears also to be giving rise to more fundamental issues, which go beyond organisational and technical complexities. Some of these issues touch upon divisive questions as to the place of religious belief in secular societies, the interrelationship between freedom of religion and non-discrimination norms, and the extent to which the reach of anti-discrimination law can stretch into the activities of private organisations. Other issues relate to less politically explosive questions, which are nevertheless of considerable importance to the evolving nature of European social democracies, such as the question of how to balance a concern with age equality with policies which attempt to ensure equity of treatment across the different age groups.

The emerging issues therefore involve both questions of inter-ground tension, such as the question of how to strike the appropriate balance between guaranteeing equality on the basis of sexual orientation and protecting religious freedom, and intra-ground difficulties, such as the need to determine the point at which limiting the rights of older workers is justified in the name of opening up employment opportunities for younger workers. These tensions are manifested also through various routes, being generated in particular through (i) the evolving case-law that is emerging from courts and tribunals applying the multi-ground unified anti-discrimination legislation to concrete cases, and (ii) the political and institutional policy choices being adopted by governments and equality bodies as to which forms of differential treatment to combat and which to accept. These tensions also manifest themselves at both European and national level.

Tensions within EU Anti-Discrimination Law

At European level, the existence of potential tension between religious beliefs and other forms of anti-discrimination norms was recognised in the text of the Framework Directive.[13] Article 4(2) of the Directive enables institutions with a particular 'religious ethos' to impose job-related requirements relating to the maintenance of that ethos that in other circumstances would constitute direct or indirect discrimination on the grounds of religion or belief. This constitutes an exception to the standard norm in anti-discrimination law that employers can only directly discriminate on a protected ground where it is necessary and proportionate to do so to ensure that a 'genuine occupational requirement' in respect of a particular post is fulfilled. This inclusion of the 'religious ethos' exception in the Directive is therefore an attempt to strike a balance between the needs of organisations linked to a particular religion or belief by adjusting the 'standard' template of anti-discrimination law. It constitutes a recognition that the unified framework applied across all the different equality grounds by the Directive needs to accommodate the special situation of religion.

12 See O'Cinneide, *Single Equality Bodies: Lessons from Abroad* (Equal Opportunities Commission Research Paper Series, November 2002).

13 Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ L303/16.

However, the text of Art 4(2) proceeds to try and have its cake and eat it by specifying that no differential treatment on any other ground apart from religion or belief can be permitted under this exception, thereby apparently precluding discrimination on the grounds of sexual orientation even where an organisation wants to exclude gay people from its staff to maintain its 'religious ethos'.

This creates an ambiguous situation. It will not always be clear when discrimination may be based on a person's religion or belief, or on their sexual orientation. For example, it remains unclear if a Catholic school could dismiss a teacher on the grounds that he or she were gay and living with a same-sex partner. Would this constitute discrimination based on sexual orientation, or discrimination based on his or her failure to adhere to Catholic moral teaching? The exception that Art 4(2) represents from the standard template of discrimination law therefore generates considerable uncertainty, and when the European Court of Justice (the ECJ) comes to interpret its scope, it will be faced with a difficult task in deciding whether to adopt a narrow or wider reading of this exception. How it interprets Art 4(2) may be of considerable importance, not least because many religious schools across Europe retain the power to dismiss teachers on the grounds of non-adherence to their religious values. However, the standard, unified cross-ground approach adopted in the Directive nevertheless struggles to provide a clear normative 'steer' in this area.

The same could be said when it comes to the age discrimination provisions of the Directive in Art 6(1), which again make a deviation form the standard unified template adopted for all the non-discrimination grounds in the Directive by providing that acts which would otherwise constitute direct age discrimination may be shown to be objectively justified and therefore to be legitimate, unlike the case for all the other grounds. This is necessary because of the particular nature of age discrimination and the fact that the use of age distinctions may at times be both necessary and legitimate. However, this means that uncertainty again exists as to how this exception should be interpreted. Should the standard approach to objective justification adopted for the other grounds in respect of indirect discrimination be applied to the use of age-based distinctions, i.e. will employers wishing to treat someone differently because of their age have to show that this was necessary and proportionate? Or should a watered-down test be applied? In general, should age be treated as a less serious form of discrimination, or should it be treated as being on all fours with the other discrimination grounds when it comes to applying the legislation?[14]

Perhaps contrary to expectations, the European Court of Justice in *Mangold*[15] in 2005 held that the prohibition of age discrimination contained in the Directive constituted an aspect of a general principle of equality and non-discrimination, which it stated to be a fundamental norm of the EU legal order. It proceeded to analyse age discrimination as being similar in nature to the other forms of discrimination, and applied the objective justification test with rigour in finding German legislation, which reduced the employment rights of older workers (as part of a programme to encourage greater recruitment of older workers by employers), to be contrary to EU law.

14 See Bamforth, Malik and O'Cinneide, *Discrimination Law: Theory and Context* (Sweet & Maxwell, 2008), Ch 15.

15 Case C-144/04 *Mangold v Helm* [2005] ECR I-9981.

The Court came under some fire in Germany and other states for aspects of its *Mangold* decision, in particular for how it appeared to give horizontal effect to the Directive's prohibition on age discrimination, even though the Directive had not entered into force in respect of Germany.[16] In subsequent cases, the Court has reaffirmed its allegiance to the core elements of the approach that it adopted in *Mangold*, treating age in general terms as essentially on all fours with the other forms of discrimination and part of a wider principle of non-discrimination.[17]

However, in recent cases such as *Petersen*[18] and *Wolf*,[19] the Court has begun to show signs of developing a more nuanced approach, whereby employers appear to be granted more leeway in making use of age-based distinctions as part of workforce management strategies, or when health and safety considerations may come into play. In *Petersen*, the Court took the view that differential treatment of older dentists could be objectively justified if necessary to maintain an equitable balance between older and younger dentists, and to keep open paths of career progression for newly qualified dentists within the German public health system. In *Wolf*, which concerned a law that prevented individuals over the age of 30 applying to the fire service on the alleged basis that few fire service employees over the age of 45 years of age would have sufficient physical capacity to fight fires effectively and rescue persons in danger, the Court accepted that the application of such an age limit in the particular context of the fire service could be objectively justified under Art 6(1), but crucially also accepted that it could constitute a genuine occupational requirement under Art 4(1) of the Directive.

In both *Petersen* and *Wolf*, the Court therefore appeared to take a reasonably flexible approach to the objective justification test, as it also does in the *Palacios de la Villa*[20] and *Age Concern*[21] cases, where the Court indicated that Member States could maintain a mandatory retirement age in place where it served legitimate national employment policy goals. These decisions are explicable by the particular nature of age discrimination as an equality ground, and the way in which the use of age distinctions may be unavoidable in certain contexts.[22] However, they also indicate that a tension is emerging between the Court's formal commitment to recognising age as equivalent to the other non-discrimination grounds, and the reality of its emerging jurisprudence in this area. The relatively strict manner in which the Court applies the objective justification test in its gender equality case-law appears to be diluted when it comes to age cases.

This may be unavoidable. However, it does give rise to a larger question, which is whether the Court will adopt a similar differentiated approach when it comes to the

16 See, for example, the discussion in Kuitenbrouwer, '*Onbescheiden Rechters'*, NRC Handelsblad, 7 February 2006, summarised in Jans, 'The Effect in National Legal Systems of the Prohibition of Discrimination on Grounds of Age as a General Principle of Community Law' (2007) 34(1) *Legal Issues of Economic Integration* 53–66, 58-60.

17 See for example, Case C-555/07 *Kücükdeveci v Swedex GmbH & Co KG* (19 January 2010).

18 Case C-341/08 *Petersen v Berufungsausschuss für Zähn für den Bezirk Westfalen-Lippe (*12 January 2010).

19 Case *C-229/08 Wolf v Stadt Frankfurt am Main* (12 January 2010).

20 Case C-411/05 *Félix Palacios de la Villa v Cortefiel Servicios SA* [2007] ECR I-8531.

21 Case C-388/07 *R (the Incorporated Trustees of the National Council for Ageing (Age Concern England)) v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] ECR I-1569.

22 Bamforth, Malik and O'Cinneide, *Discrimination Law: Theory and Context* (Sweet & Maxwell, 2008), Ch 15.

other equality grounds. Will the court treat differences of treatment based on religion or belief in a similar manner as it treats differences of treatment based on gender? Will it adopt a similar approach to the use of positive action measures designed to assist particular ethnic or even religious groups as it does to measures designed to address the under-representation of women? How will the Court apply the objective justification test when it comes to disability discrimination cases involving claims of failure to make reasonable accommodation?

As yet, it is unclear how the Court will develop its jurisprudence across all these different equality grounds: the Court's case-law has thus far largely been confined to age discrimination cases, with only one case on each of the grounds of race, disability and sexual orientation having been determined by the Court, and none yet when it comes to the vexed and difficult area of religious discrimination. However, the age cases seem to show that the Court will place great emphasis on the formal equivalence of all the different equality grounds, while in practice developing a ground-specific approach when it comes to the application of the law in respect of each specific ground. This will inevitably generate some tensions, even if the Court continues to apply EU anti-discrimination law with rigour across all the grounds, as it has so far both in the field of gender equality and also when it comes to the 'new' equality grounds of race, disability, age, sexual orientation and religion or belief. The Court will inevitably be presented with complex challenges in deciding when it should deviate from its standard approach, or when to adjust the application of its existing jurisprudence to reflect the specific nature and concerns generated by each of the different grounds.

Analysing the different non-discrimination grounds as formally equivalent and expressions of a common principle of non-discrimination, as the Court did in *Mangold*,[23] is all very well and good. However, it may gloss over the reality that the Court may need to adjust its approach across each of the different grounds to reflect the different contexts against which they apply. It may also gloss over the reality that the different grounds may cut across each other and come into tension, as the ambiguous wording of Art 4(2) of the Directive indicates.

Tensions within the Anti-Discrimination Laws of EU Member States

The same issues confront national courts applying national unified anti-discrimination legislation. In the UK, it is already apparent that cross-ground tensions are being played out through the emerging case-law. In *Ladele v London Borough of Islington*,[24] a registrar was disciplined for refusing to register civil partnerships on the grounds that this would be incompatible with her religious beliefs. Her claim that she had been subject to direct and/or indirect religious discrimination by her employers failed, with the Court of Appeal finding that no direct discrimination had taken place and any differential treatment that might constitute indirect discrimination could be objectively justified on the basis that public servants could be obliged not to discriminate against gay people in how they performed their job. In other words, the claimant's claim for her religious views to be accommodated by her employer was deemed to be outweighed by the employer's general non-discrimination requirements. This is a significant judgment, because

23 Case C-144/04 *Mangold v Helm* [2005] ECR I-9981.

24 *Ladele v London Borough of Islington* [2010] IRLR 211.

it highlights the reality that the unified anti-discrimination legislative framework still contains within it the seeds of inter-ground tension, and how anti-discrimination claims may be made using this common framework which may cut across the equality rights of others.

Ladele also illustrates the manner in which varying approaches may emerge in the case-law as between different grounds. The English Court of Appeal in *Ladele* rejected the claim of direct discrimination brought by the claimant, on the basis that the discrimination in question was based not on her religion *per se*, but rather on how she chose to interpret and give effect to her beliefs. Similarly, in *Eweida v British Airways plc*[25] the Court of Appeal held that a woman who had been subject to disciplinary action by the employer on the grounds that she wished to wear a visible Christian cross with her uniform had not been subject to direct discrimination, as she had not been discriminated against on the grounds of her religion. In addition, in *Eweida*, the Court of Appeal also held that she had not been subject to indirect discrimination, on the basis that as few if any Christian denominations emphasised visible cross-wearing as an important expression of religious adherence, a ban on wearing visible crosses could not be held to disadvantage any particular group defined by religion or belief, and therefore no indirect discrimination could be said to exist.

What is significant about how the issues of direct discrimination were addressed in these two cases is that, as Aileen McColgan has noted, a narrower approach to defining the causal factors of the difference in treatment was applied by the Court of Appeal in adjudicating the direct discrimination element of both these claims than is done in the context of anti-discrimination claims made under other grounds, in particular gender.[26] In addition, *Eweida* saw a very group-focused approach adopted by the Court in addressing claims of indirect discrimination, which again could be said to depart from the approach adopted for other grounds.

Therefore, as with the ECJ, we see in the jurisprudence of the English courts the beginnings of the development of a different approach for religion than is applied across the other non-discrimination grounds. A similar development can be detected in the age and disability case-law of the English courts. However, the application of these varying approaches is not always consistent. For example, the Court of Appeal in cases such as *Clark v Novacold*[27] initially emphasised that the specific nature of disability discrimination required the courts to depart from their standard comparator analysis in favour of an approach better designed to protect the non-discrimination rights of persons with disabilities. However, in *Malcolm v London Borough of Lewisham*[28] the House of Lords reversed this approach and emphasised that disability discrimination should be treated in a similar manner as the other non-discrimination grounds when it came to the restrictive comparator requirement.

Therefore, there exists in UK law a fluctuating position when it comes to the question of whether a standard approach should be applied across the different grounds, or whether varying approaches should be applied which take into account the different

25 *Eweida v British Airways plc* [2010] IRLR 322.

26 McColgan, 'Class Wars?: Religion and (In)equality in the Workplace' (2009) 38 *Industrial Law Journal* 1-29.

27 *Clark v Novacold* [1999] 2 AllER 977.

28 *Malcolm v London Borough of Lewisham* [2008] 4 AllER 525.

nature of each ground, including the complex and difficult issues that can be associated with controversial grounds such as religion or belief. This illustrates not alone how the unified framework cannot eliminate the existence of cross-ground tensions, but also how deep uncertainty exists as to how and whether to apply a common approach across the different grounds.

Similar issues arise when it comes to framing unified legislation, as illustrated by the complex and charged debate in the UK (including Northern Ireland) as to whether the 'standard' prohibition on harassment linked to a non-discrimination ground in the field of goods and services should be applied to religion or belief.[29] Concerns about the potential impact on freedom of expression and association of a prohibition of such harassment, which it was feared could affect evangelising activities, resulted in this form of harassment being partially excluded from the scope of the Equality Act 2010.

Difficult issues also arise when it comes to positive action, where uncontroversial measures to promote access by disadvantaged ethnic groups to public services become more controversial when they are applied to promote access by certain religious groups to services, such as when London swimming pools make provision for women-only hours to encourage greater use of their facilities by Muslim women.[30] Uncertainties can also arise when policy-makers are faced with the choice of providing special services for distinct groups, or instead of avoiding separate provision and aiming instead for cross-group or universal provision, which may be superficially attractive, but which may result in specific forms of disadvantage being neglected.

In general, across Europe, there exists profound uncertainty and deep disagreement as to how to apply the common anti-discrimination framework across the different grounds when it comes to law and policy, and whether discrimination on grounds such as religion or belief or age can be considered to be as 'serious' as other forms of discrimination such as race or gender. This can be seen in debates surrounding the wearing of religious symbols such as the face-veil, or the building of mosques in Germany and elsewhere. It can be seen in the tensions that surround the question of retirement age, or issues of secularism in education. In all these areas of policy dispute, cross-ground tensions are coming to the fore, or else issues are arising as to whether the non-discrimination grounds are to be treated as analogous or as very distinct. The more or less unified anti-discrimination framework set out in EU and (increasingly) in national law offers the illusion of a comprehensive and combined harmonious cross-ground approach which however is proving very difficult to implement in law and policy.

Another issue faced by the unified framework is how to deal with a problem in the field of equality law and policy which looms increasingly large in the concerns of academics, activists and policy-makers: the question of 'multiple discrimination'. In essence, multiple discrimination is a term used to denote the various ways in which individuals and groups may suffer discrimination which is not just based on their association with a single particular characteristic or quality ground, but which stems from the fact that they possess or are associated with a combination of characteristics

29 See *Re The Christian Institute* [2007] NIQB 66.

30 Certain swimming pools have introduced 'Muslim-only' hours, which are of dubious legality: see 'Row over ethnic minority only swimming sessions for women and children', *London Evening Standard,* 28/12/2006, available at http://www.thisislondon.co.uk/news/article-23379749-row-over-ethnic-minority-only-swimming-sessions-for-women-and-children.do (last accessed 16 July 2010).

that makes them more vulnerable to disadvantage and prejudice. This is a problem that a unified anti-discrimination framework should be capable of dealing with, but the reality is very different.

In a series of very influential academic papers in the late 1980s and early 1990s, the Afro-American scholar Kimberlé Crenshaw analysed how Afro-American women were affected by the problem of 'intersectionality', where the particular forms of disadvantage to which they were subject fell between and were neglected by measures designed to address the specific and distinct issues of race and gender discrimination:

> *…in race discrimination cases, discrimination tends to be viewed in terms of sex or class-privileged Blacks; in sex discrimination cases, the focus is on race- or class-privileged women…This focus on the most privileged group members marginalises those who are multiply burdened and obscures claims that cannot be understood as resulting from discrete sources of discrimination. I suggest further that this focus on otherwise-privileged group members creates a distorted analysis of racism and sexism because the operative conceptions of race and sex become grounded in experiences that actually represent only a subset of a much more complex phenomenon…Because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated.*[31]

Sandra Fredman has made a similar point, arguing that '[t]*he more a person differs from the norm, the more likely she is to experience multiple discrimination, the less likely she is to gain protection*'.[32] A Muslim woman, for example, or a Traveller woman, or a male black African may suffer distinct forms of prejudice, or fail to benefit from anti-discrimination initiatives, because of this problem of intersectionality. The particular forms of subordination and discrimination to which they are subject, both within their particular communities and by outsiders, may be substantially different in kind from the 'standard' single ground-linked forms of discrimination with which anti-discrimination law and policy is primarily concerned. As such, they may fall between the cracks: their particular claims for justice may be edited out of the anti-discrimination picture, as they do not fit within the dominant single-ground narratives.

The extent of the problem, and the difficulties that the unified framework faces in addressing it, is best illustrated by a close examination of the different forms multiple discrimination can take. As Gay Moon notes, there are distinct types of multiple discrimination.[33] *Additive discrimination* may occur when someone suffers from an accumulation of various prejudicial factors, as when a black Muslim male migrant is stereotyped on the basis of all three characteristics and the accumulated pile up of prejudices tips his treatment over into actual discriminatory treatment. Alternatively,

31 Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) *University of Chicago Legal Forum* 139-167, at 150.

32 Fredman, 'Double Trouble: Multiple Discrimination and EU law' (2005) 2 *European Anti-Discrimination Law Review*, 13-18, at 14.

33 Moon, 'Multiple Discrimination – Problems compounded or solutions found?' (2006) 3(2) *Justice Journal* 86-102, available at http://www.justice.org.uk/images/pdfs/multiplediscrimination.pdf (last accessed 16 July 2010).

a person may be disadvantaged in different ways at different times because of their association with different and distinct characteristics. Moon gives the example of a female wheelchair user, who may be passed over for promotion because her employers want a man to take the lead on one occasion, while on another occasion she might be unable to go to the work party because it is being held in an inaccessible place. This could be described as *accumulative* discrimination.

As Moon argues, existing ground-specific anti-discrimination law may be able to deal with both types of cases when a clear link exists between a distinct act of discrimination and a single equality ground, and distinct discrimination claims can be made out in respect of particular discriminatory acts, each based on a single ground. However, where no such clear link can be established, or where the accumulation of different forms of discrimination is the problem - not distinct and separate instances of discriminatory behaviour - then there is a problem.

Crenshaw has likened these two forms of discrimination to a person trying to cross a crowded traffic junction and being repeatedly blocked by each separate stream of oncoming traffic. It may be difficult to identify any one stream as being 'at fault', but the accumulation of obstacles results in the junction effectively becoming impassable.[34] In such cases, as Moon notes, the different forms of discriminatory behaviour in question may be interacting with each other in such a way that their effect may be effectively inseparable and indistinguishable, and it will not be possible or appropriate to analyse the impact of each single-ground discriminatory factor separately and independently, as usually required under existing national and EU law in this area.[35]

In addition, anti-discrimination law really struggles to deal with a third type of multiple discrimination, which can be regarded as intersectional discrimination in its purest form. This is where an individual or group suffers a distinct form of disadvantage that arises from their specific combination of characteristics, and which does not affect others possessing each of the relevant characteristics singly. For example, a female Muslim might be subject to particular forms of disadvantage which would not affect other females and/or Muslim men.

In such cases, there exists a problem which is distinct to that particular group, as distinct from cases of additive discrimination where wider discriminatory currents intersect to produce particular problems for individuals and groups caught in the intersection. At times, such cases may come within the flexible scope of the definition of indirect discrimination, as can be the case with cases involving female Muslims and religious dress. However, in other situations, as Moon argues, there may be grave difficulties in identifying an appropriate comparator for the affected individuals and groups, while the absence of a specific and distinct form of single-ground discrimination may make it impossible to claim a remedy.

34 See Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) *University of Chicago Legal Forum* 139-167.

35 See Moon, 'Multiple Discrimination – Problems Compounded or Solutions Found?' (2006) 3(2) *Justice Journal* 86-102, available at http://www.justice.org.uk/images/pdfs/multiplediscrimination.pdf (last accessed 16 July 2010).

The well-known US case of *DeGraffenreid v General Motors*[36] exemplifies the problem. Here, a group of black women sued General Motors (GM) following their dismissal, arguing that the selection of candidates for dismissal had been based upon seniority, and as black women had only recently begun to be hired by GM, the use of this criterion discriminated against them. However, as the claimants could not show that they had been discriminated against either as black people or as women, this aspect of their claim failed. Another example is the English case of *Bahl v Law Society*,[37] where a Vice-President of the English Law Society alleged that she had faced prejudice on the grounds that she was an assertive Asian woman. The Court of Appeal held that she was obliged to attempt to establish that she was discriminated against either because of her gender or her ethnicity, but could not bring a claim based on a combination of those grounds alone.

In Recital 14 of the Racial Equality Directive[38] the possibility of combined gender and race discrimination is acknowledged. However, the EU equality Directives fail to make concrete and substantive provision to cover the gaps within existing anti-discrimination legislative frameworks when it comes to multiple discrimination. The situation at national level is similar: multiple discrimination is often recognised to be a problem by policy-makers, but unified anti-discrimination frameworks rarely if ever make express provision to give a tangible legal remedy to those affected.

US, German, Austrian, Spanish, Rumanian and now UK law recognise the possibility of multiple discrimination claims, but usually in a tangential or limited manner.[39] For example, the recent UK Equality Act 2010 prohibits multiple discrimination which takes the form of direct discrimination based on the intersection of two grounds.[40] However, this is a limited measure, which could be seen as mainly rhetorical in substance and effect. It is possible to circumvent the problems associated with intersectional discrimination through the imaginative use of comparators and a flexible approach on the part of the adjudicatory body, as the Equality Tribunal demonstrated in the case of *Nyamhovsa v Boss Worldwide Promotions*,[41] where a 'white Irish male' was used as the relevant comparator. However, experience from across Europe as evidenced by cases such as *Bahl* show that courts struggle to maintain a focus approach in this area, and are often reluctant to abandon their 'standard' approach of requiring a discrimination claim to be clearly founded on one of the existing grounds.

Unified anti-discrimination legislative frameworks are thus best seen not as a comprehensive equality law in the broad sense, but rather as an accumulation of specific anti-discrimination norms yoked together into a common framework, where tensions remain between different grounds, uncertainties exist as how and whether

36 *DeGraffenreid v General Motors* 413 F. Supp. 142, 145 (ED Mo 1976), affirmed in part, revised in part on other grounds, 558 F.2d 480 (8th Cir 1977).

37 *Bahl v Law Society* [2004] IRLR 799.

38 Council Directive 2000/43/EC [2000] implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L180/22.

39 See Moon, 'Multiple Discrimination – Problems Compounded or Solutions Found?' (2006) 3(2) *Justice Journal* 86-102, available at http://www.justice.org.uk/images/pdfs/multiplediscrimination.pdf (last accessed 16 July 2010).

40 Equality Act 2010, s 14.

41 *Nyamhovsa v Boss Worldwide Promotions* DEC-E2007-072 (Equality Tribunal).

to treat different forms of discrimination as similar or equivalent, and the problem of multiple discrimination remains at best incompletely addressed. Therefore, the unified framework holds out the promise of a coherent, complete response to discrimination, but only partially delivers on this promise.

At present, heavy reliance is being placed on the courts and other judicialised forms of dispute resolution to deal with these problems: for example, the EU Directives leave multiple issues to be ultimately determined by the ECJ. This however is a less than ideal solution. Not alone does it leave decision-making to the judges instead of encouraging a wider democratic debate, it also contributes to the complexity and technocratisation of anti-discrimination law, as it results in an accumulation of case-law piled on top of already dense and detailed legislative provision.

At both EU and national level, there is also an attempt to use 'soft' policy mechanisms to address these underlying problems. Governments, equality bodies and the EU institutions increasingly try to smooth over the tensions and gaps by emphasising in public statements, policy initiatives and official publications the inter-connectedness of the equality grounds, the potential vulnerability of everyone to some form or other of discrimination, and the necessity of recognising the importance of multiple discrimination.[42] Academic research and NGO involvement that reflects these themes are encouraged.[43]

However, this process is taking place against a background of *de facto* 'ground priorisation', where governments (and to an extent courts) treat certain forms of discrimination such as race and gender as inherently more serious than others. There are solid reasons to justify this approach, not least because it may avoid the danger identified by Aileen McColgan that the emergence of 'diluted' protection against discrimination in the context of religious and age discrimination, as exemplified by decisions such as *Eweida v British Airways plc*,[44] may over time seep into the foundations of anti-discrimination law and dilute protection across all the equality grounds.[45] However, it is also a concern that the emergence of a hierarchy of discrimination grounds may lead to some of the grounds, and in particular the difficult and complex ones of disability, age and religion or belief, being neglected.

In addition, the 'soft' emphasis in policy on seeking common ground across the different non-discrimination grounds may also serve to gloss over the reality that there is a lack of a meaningful overlapping consensus across Europe on what 'equality' means, or what constitutes 'discrimination'. There exists substantial disagreement both within Member States and across the EU at large as to how far anti-discrimination law should be stretched to change existing law and practice. This becomes particularly apparent when

42 See, for example, the policy initiatives listed on the European Commission's website page, 'Tackling Discrimination', at http://ec.europa.eu/social/main.jsp?catId=423&langId=en (last accessed 14 July 2010).

43 See, for example, the policy initiatives listed on the European Commission's website page, 'Tackling Discrimination', at http://ec.europa.eu/social/main.jsp?catId=423&langId=en (last accessed 14 July 2010). In particular, see the information on funding and 'raising awareness'.

44 *Eweida v British Airways plc* [2010] IRLR 322.

45 McColgan, 'Class Wars?: Religion and (In)equality in the Workplace' (2009) 38 *Industrial Law Journal* 1-29.

controversy arises as to how to apply anti-discrimination norms in controversial areas such as immigration, education and national security.

Attempts have been made by academics and activists to identify a common framework of underlying principles which could be said to underpin the unified anti-discrimination framework, by for example referring to concepts such as 'human dignity'.[46] However, these attempts often suffer from the reality that the norms suggested as potential candidates for playing this 'unifying' role tend to be either under-inclusive, in the sense that concepts such as 'human dignity' can be interpreted as only justifying action directed against certain egregious types of discrimination, or excessively vague.[47]

The focus in European and national policy and academic debate on seeking common ground across the unified anti-discrimination framework may actually discourage the type of critical and detailed analysis that is necessary to uncover how inequalities are created, framed and reinforcing within contemporary European societies. It may also serve to gloss over the inherent limits of anti-discrimination law in general, and in particular its inability to engage head-on with socio-economic issues that are often the major generators of inequality.

It may be more honest and effective to recognise and debate the underlying fault-lines of the unified framework. It is entirely possible to have a multi-ground common equality 'code' that can be made to work reasonably well in practice, as the Irish experience demonstrates. However, it is also apparent that even if a well-established comprehensive unified framework is in place, distinctions, hierarchies and tensions between equality grounds tend to emerge in various forms, albeit often in camouflaged guise. Also, such frameworks struggle to cope with multiple discrimination and the problems associated with 'intersectionality'.

Alternative approaches exist. For example, the Canadian discrimination law framework is built around the idea of reasonable accommodation being applied across all the different equality grounds. This unified approach makes it much easier to respond to individual cases of multiple and intersectional discrimination, but lacks the absolute prohibition on direct discrimination in EU law.[48] In any case, it is probably too late to attempt to tear down and rebuild the entire edifice of European and national anti-discrimination law. It makes sense to engage critically with the existing state of anti-discrimination law, and to confront some of the hard questions head-on.

Do the tensions between different equality grounds, and the lack of cross-European consensus on a uniform approach to equality, reflect fundamental divergences of view about the nature and importance of anti-discrimination norms? Do they highlight the existence of deep normative disagreement about which forms of inequality 'count' in diverse societies and whether certain forms of discrimination or exclusion are less acceptable than others? Is it inevitable that EU and national anti-discrimination law

46 See, for example, Moon and Allen, 'Dignity Discourse in Equality Law: A Better Route to Equality?' (2006) 6 *European Human Rights Law Review*, 610-649.

47 See McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) *European Journal of International Law*, 655-724.

48 See Moon, 'Multiple Discrimination – Problems Compounded or Solutions found?' (2006) 3(2) *Justice Journal* 86-102, available at http://www.justice.org.uk/images/pdfs/multiplediscrimination.pdf (last accessed 16 July 2010).

will continue to develop a 'hierarchy of grounds'? Is this necessarily a bad thing? If a hierarchy of grounds does develop, as appears likely, what impact will this have on the already limited ability of the unified framework to deal with claims relating to multiple discrimination? Can flexible approaches on the parts of courts and tribunals solve the problems generated by the underlying tensions and gaps that lurk within the unified framework, or must other policy measures be adopted by governments, activists and equality bodies?

There may be no clear answers to the above questions, but they should at least be acknowledged and addressed, rather than just glossed over. However, it may be useful to emphasise one final point. It may be necessary to accept that unified equality law will consist of a bundle of different responses to different types of discrimination and exclusion. It may be necessary to recognise differences between the grounds, and to accept that the level of protection afforded by anti-discrimination law may vary from ground to ground. However, in an era where individuals now tend to possess multiple identities and define themselves (and be defined by others) in a multiple variety of ways, it is important that something to be done about the existing very limited ability of our laws to cope with complex forms of multiple discrimination.

Discrimination in Financial Services

Geraldine Hynes
—The Equality Authority

Access to financial services such as insurance or banking services plays an important role in the economy and society as a whole, as it not only allows individuals to make use of economic opportunities but also to improve their health, education, and overall well-being.[1]

So begins the executive summary of a report recently commissioned by EC Directorate General for Employment, Social Affairs and Equal Opportunities.[2]

The report provides a very useful study and overview of current practices of financial service providers in the supply and design of their products. It also considers problems of discrimination on grounds of age, disability, sex, racial/ethnic origin, religion/belief and sexual orientation. The level of discrimination experienced is difficult to quantify and the report indicates that collection of data is uneven and incomplete throughout Member States. In addition, there is no definitive evidence of the extent to which the protected grounds are employed by financial service providers in the pricing of their products. For example, insurance companies and banks acknowledge the use of age, disability and sex in the assessment of risks. They do not always accept that race, religion or sexual orientation may be used for the same purpose, although equality bodies and civil society groups indicate that they are. Direct use of any of these criteria in risk assessment is quite easily identifiable but their indirect application through, for example, requirements concerning nationality or residence is less easy to identify or prove.

Sex, age and disability are most often used as factors in risk assessment for insurance policies and age is also commonly used in relation to banking and loan products. In most cases the factor in question is not in reality a risk factor but rather a proxy for a particular risk. So, for example, age may be a proxy for health or mortality and gender a proxy for life expectancy in life insurance.

The level of competition in any commercial activity will influence the pricing structures of service providers. So, where competition is keen, insurance premiums are more likely to be fine-tuned and accurately aligned to the level of risk. However, where risk assessment costs are high and the value of the product is low, as with travel insurance, the classification of risk will be less precise and may lead to the exclusion of certain high risk groups from access to the product. A further complicating factor is whether or not a particular type of insurance is legally necessary, e.g. basic motor insurance. Many countries, including Ireland, have specific agreements to cater for declined cases in such circumstances.

1 European Commission DG Employment, Social Affairs and Equal Opportunities, *Study on the Use of Age, Disability, Sex, Religion or Belief, Racial or Ethnic Origin and Sexual Orientation in Financial Services, in particular in the Insurance and Banking Sectors* (Final Report, 16 July 2010).

2 European Commission DG Employment, Social Affairs and Equal Opportunities, *Study on Use of Age, Disability, Sex, Religion or Belief, Racial or Ethnic Origin and Sexual Orientation in Financial Services, in particular in the Insurance and Banking Sectors* (Final Report, 16 July 2010), at 9.

Restricted access to credit, insurance and other financial products can have a profound and far-reaching effect in deepening social and economic inequalities. So, when the Equal Status Acts 2000-2008 (the Equal Status Acts) were first introduced in Ireland, they were almost revolutionary in their purpose and effect. The intrusion of the legislation into commercial relationships, which were hitherto in the hands of the powerful, created both excitement and dismay in those providing and availing of goods and services. This paper is a brief exploration of the operation of the Acts in this sphere since the year 2000. The main emphasis will be on reviewing some case law before the Equality Tribunal and some specific provisions of the Acts in the context of the proposed new Directive.

Financial services fall squarely within the definition of "service" in s 2 of the Equal Status Acts: being a service or facility which is available to the public generally or a section of the public including facilities for banking, insurance, grants, loans, credit or financing. The general prohibition on discrimination in s 5 is therefore applicable as are the provisions in s 4 relating to reasonable accommodation for people with disabilities. However, the Acts contain very specific exemptions and exceptions which both modify and restrict the general protection from discrimination and some of these have particular relevance to financial services.

The first major decision from the Equality Tribunal on the provision of insurance services was *Jim Ross v Royal and Sun Alliance Insurance Plc*.[3] Mr Ross requested a quotation for motor insurance from Royal and Sun Alliance (RSA) and the company refused to quote because he was over the age of 70. He was told that the company had a policy of not quoting for new business for people over that age. He subsequently referred the complaint to the Equality Tribunal and was represented by the Equality Authority in the proceedings. RSA defended the claim on the basis of the exemption in s 5(2)(d) of the Equal Status Acts. This subsection exempts from the general prohibition on discrimination:

> *differences in the treatment of persons in relation to annuities, pensions, insurance policies or any other matters related to the assessment of risk where the treatment -*
>
> *(i) is effected by reference to-*
>
> *(I) actuarial or statistical data obtained from a source on which it is reasonable to rely, or*
>
> *(II) other relevant underwriting or commercial factors,*
>
> *and*
>
> *(ii) is reasonable having regard to the data or other relevant factors,…*

Large volumes of actuarial and statistical data were submitted by RSA in justification of the age limit the company implemented. Before and during the hearing of the case, the actuarial and statistical data were analysed and interpreted. At the outset, both parties and the Equality Officer accepted that in order to avail of a defence under s 5(2)(d), the company was required to show that it fully satisfied either test (I) or test (II) of subsection (i). In effect this meant that the burden of proof was on the respondent to justify what

3 *Jim Ross v Royal and Sun Alliance Insurance Plc* DEC-S2003-116 (Equality Tribunal).

was accepted on its face as less favourable treatment of Mr Ross on grounds of his age. In this case the actuarial and statistical evidence adduced was found to be inadequate to satisfy either test. The Equality Officer having considered the data and the submissions on behalf of the complainant, concluded that the questions raised about the source and integrity of the statistics meant that there was insufficient evidence that the data '*was obtained from a source on which it is reasonable to rely'*.[4] He did not accept that the decision of the company was *'reasonable having regard to the data or other relevant factors'*.[5] Accordingly, the company had not satisfied the first limb of the test. Nor did the company succeed in availing of the second limb of the exemption because it had applied an "*across the board*" policy of refusing quotations to people over the age of 70 with no regard for particular circumstances such as health, driving experience, previous claims history or condition/age of the vehicle.[6] The claim therefore succeeded and the Equality Officer awarded compensation equivalent to three years' insurance premium to Mr Ross. Although he did not order the company to change its policy or practice, the Equality Officer suggested that RSA and other insurance companies would review any practice still in place to refuse quotations simply on the grounds of age.

That particular case received very wide publicity both in Ireland and elsewhere and was groundbreaking in terms of the curb it put on the right of insurance companies to decide who might or might not avail of their services. It also clarified to a large extent the meaning and effect of the exemption in s 5(2)(d) of the Acts and demonstrated the considerable burden of proof on a respondent to justify less favourable treatment on a protected ground. A full reading of the decision will give some indication of the level of input into the case from both the complainant's and respondent's legal and actuarial teams in bringing the claim before the Tribunal. This is significant in illustrating the hurdles faced by claimants without legal representation or other resources.

Another case of alleged discrimination on grounds of age in the provision of motor insurance was decided differently by an Equality Officer the following year. Geoffrey O'Donoghue was unrepresented in his case against Hibernian General Insurance[7] and did not have access to professional actuarial expertise. He had complained that the level of premium he was being charged as a 31 year old motorist was significantly higher than would be charged to a 41 year old driver. Here again, the respondent submitted expert actuarial evidence which was based on the company's own claims record and statistics. The claimant in presenting his case, relied on supporting evidence from the Motor Insurance Advisory Board (MIAB) report[8] with industry-wide statistics on relative claims costs. In its justification of the 21% difference between the two compared quotes, the company employed a particular statistical model which it claimed took account of various rating factors used by insurers. The Equality Officer held that a *prima facie* case of discrimination had not been made out by the claimant. She did not accept

4 *Jim Ross v Royal and Sun Alliance Insurance Plc* DEC-S2003-116 (Equality Tribunal), at para 7.8.

5 *Jim Ross v Royal and Sun Alliance Insurance Plc* DEC-S2003-116 (Equality Tribunal), at para 7.8.

6 *Jim Ross v Royal and Sun Alliance Insurance Plc* DEC-S2003-116 (Equality Tribunal), at para 7.9.

7 *Geoffrey O'Donoghue v Hibernian General Insurance* DEC-S2004-201 (Equality Tribunal).

8 Motor Insurance Advisory Board, *Report to the Department of Enterprise Trade and Employment* (March 2002). The Motor Insurance Advisory Board was reconstituted under the remit of the Department of Enterprise Trade and Employment in 1998 and reported to the Minister of State at that Department in March 2002. The report contains an analysis of motor insurance data drawn from across the insurance industry in Ireland.

that he had shown less favourable treatment on grounds of age and furthermore she considered that even if he had done so, the respondent had established a defence under s 5(2)(d). This latter conclusion was based on the actuarial evidence of the respondent which, the Equality Officer stated, was *'not countered by expert testimony on behalf of the complainant'*. The basis for her preference of the statistical pool employed by the respondent - i.e. the company's own statistics over the industry-wide statistics tendered by the complainant - is unclear from the decision. What can be deduced from the decision however, is that a litigant without the benefit of an actuarial expert to support his case will have great difficulty succeeding in a complaint of discrimination in this type of case. In the *O'Donoghue* case, the onus appears to have been put on the complainant to discredit the actuarial evidence of the respondent rather than, as in the *Ross*[9] case, on the respondent to justify that evidence.

In the case of *Jordan v Marsh Ireland*[10] the complainant alleged discrimination on grounds of disability when he was disqualified from a payment protection scheme two years after he joined it on the grounds that he had not been in good health when he joined the scheme. In effect, Mr Jordan was advised retrospectively when he attempted to claim under the scheme that he was not in fact eligible for inclusion in the scheme in the first place. The respondent accepted that the policy may have been mis-sold to Mr Jordan by his bank and they returned his premiums because he had not met the eligibility criteria. One of the criteria had been that anyone joining the scheme must be *'in good health and not receiving any medical treatment or advice or aware of any impending hospitalisation or redundancy'*.[11] When the claim was lodged, the respondents obtained a letter from Mr Jordan's orthopaedic surgeon confirming that Mr Jordan had longstanding back problems which caused *'ongoing disablement'*.[12] The Equality Officer considered the term *'good health'* as set out in the insurer's brochure and in the policy form. She accepted that a person who lives with a chronic back condition can subjectively define himself as being in *'good health'* as he manages his condition and goes about his everyday life. His condition did constitute a disability within the meaning of s 2(1) of the Equal Status Acts and he was therefore entitled to the protection from discrimination, both direct and indirect, and subject to the exemptions and exceptions contained in the Acts.

The Equality Officer accepted that the exemptions in s 5(2)(d) would be applicable in the case of certain disabilities. However, in this particular case, the insurer was not entitled to avail of the exemption by imposing a condition which excluded any person with a pre-existing medical condition from claiming on the insurance in question. In this case it would appear that no evidence was adduced to bring the defence within the terms of s 5(2)(d). The Equality Officer found that a *prima facie* case of indirect discrimination on the disability ground had been made out and that the discrimination had not been justified. She awarded €1,000 compensation to the complainant.

In another case on the disability ground, a complainant alleged discrimination when she was refused life insurance cover in the context of a mortgage application.[13] The

9 *Jim Ross v Royal and Sun Alliance Insurance Plc* DEC-S2003-116 (Equality Tribunal).

10 *Jordan v Marsh Ireland Ltd* DEC-S2008-054 (Equality Tribunal).

11 *Jordan v Marsh Ireland Ltd* DEC-S2008-054 (Equality Tribunal), at para 4.3.

12 *Jordan v Marsh Ireland Ltd* DEC-S2008-054 (Equality Tribunal), at para 4.8.

13 *A Complainaint v A Life Insurance Provider* DEC-S2009-033 (Equality Tribunal).

application for life cover was declined on the basis of a history of depression, binge drinking and drug misuse together with incidents of overdosing. The decision to decline cover was not communicated directly to the applicant but was notified by the broker to her doctor. In their defence, the respondents relied on s 5(2)(d), claiming that there was a statistically increased risk of an insured event occurring because of the applicant's past medical history. They stated that the risk was assessed at the time of the application to be above a level for which they could get reinsurance.

The Equality Officer found that although the complainant had established a *prima facie* case of less favourable treatment, this had been successfully rebutted by the respondent on the basis of the procedures followed and the evidence on which the case relied. This was particularly so in circumstances where the respondent had a *'considered approach in determining whether an individual is given cover and … this approach is applied in a transparent and concise manner'*.[14] An ancillary claim of failure to provide reasonable accommodation was also unsuccessful in this case. The complainant maintained that the respondent should have commissioned and funded an independent medical assessment but the Equality Officer found that the report obtained from the complainant's general practitioner was adequate in the circumstances.

The question of reasonable accommodation in the provision of financial services was addressed in a number of other cases before the Tribunal. In *Patrick Murray v Irish Life and Permanent TSB*[15] the complainant was suffering from terminal cancer and needed temporary funding to buy a car so that he could travel back and forth from Sligo to Galway for treatment. He had been approved for a grant from the HSE for the purchase of the car but needed to borrow €5,000 for a few weeks until the loan came through. His loan application was refused without reason being given. In the course of the complaint investigation by the Tribunal, the bank submitted its confidential lending policy according to which, the applicant fell outside the *'normal lending criteria'*.[16] The bank denied that the refusal had any connection with Mr Murray's disability but maintained that it was based on lending criteria which included his employment status, his income level and the fact that he was a tenant rather than a property owner. The Equality Officer accepted the respondents' assertion that they had applied their lending criteria without reference to Mr Murray's disability. She also accepted, without further comment, the respondents' assertion that *'there is no evidence that disabled people are more or less likely to be tenants, to be in receipt of an income below the threshold, or to be in continuous employment for less than three years'*.[17] Finally, the Equality Officer described as *'somewhat offhand'*[18] the bank's treatment of the complainant in giving him a wrong quote, failing to respond to his application until he followed up, giving no reasons for refusal and not providing a personal contact.

The decision in this case raises issues about the level of scrutiny applied to the *'confidential lending policy'* of a financial institution by the Tribunal in the course of an investigation. Lack of transparency about lending policies and about the reasons for decisions can create difficulties for unsuccessful applicants in proving allegations

14 *A Complainaint v A Life Insurance Provider* DEC-S2009-033 (Equality Tribunal), at para 5.4.

15 *Patrick Murray v Irish Life and Permanent TSB* DEC-S2010-004 (Equality Tribunal).

16 *Patrick Murray v Irish Life and Permanent TSB* DEC-S2010-004 (Equality Tribunal), at para 2.3.

17 *Patrick Murray v Irish Life and Permanent TSB* DEC-S2010-004 (Equality Tribunal), at para 3.5.

18 *Patrick Murray v Irish Life and Permanent TSB* DEC-S2010-004 (Equality Tribunal), at para 3.7.

of discrimination. As seen in the above cases, lenders generally do not give reasons for declining applications and frequently do not even communicate their decisions to the applicants. This will generally mean that when it comes to the investigation of a complaint by the Tribunal, the Equality Officer makes a decision on the basis of the relative credibility of the witnesses or the relative experience of the parties in presenting evidence to the Tribunal. In the case of *Phyllis Fahey v Ulster Bank*[19] the applicant was refused a car loan by her bank. Her communication with the bank was by telephone and there was a conflict of evidence in the course of the investigation regarding the reason for refusal of the loan. Ms Fahey maintained that she was told specifically that she was being refused because she was over the age of 65. However, the bank staff involved submitted that there was a *'misunderstanding'* between the parties.[20] They maintained that the criteria taken into consideration by the bank included the employment situation, repayment capacity, track record and credit rating of the applicant. The Equality Officer found Ms Fahey's evidence to be more compelling and on the balance of probabilities, the more accurate account of the discussions that had taken place. Her uncontested evidence in relation to subsequent events was also found to be particularly clear and persuasive. Accordingly, the Equality Officer held that the bank had discriminated against Ms Fahey on grounds of her age and he awarded her €2,000 in compensation.

Agents

Financial services and in particular insurance services are often delivered through an intermediary. In many cases, brokers or agents will seek to avoid legal liability on the basis that they are bound by the policies, procedures and restrictions dictated by their principals. In the case of *Colm O'Donoghue v An Post Ltd. t/a One Direct*[21], the respondents acted as insurance intermediaries. The claimant who was under the age of 25 requested a quotation for motor insurance and was refused. One Direct contended that it had *'no authorisation to deviate from the limitations of the contract'* with Hibernian Insurance in relation to motor insurance for persons under the age of 25. They further submitted that there were no services suitable to the complainant which One Direct was entitled to lawfully provide under their contract with Hibernian and that the refusal was therefore not discrimination. Both agent and underwriter also relied on the provisions in s 5(2)(d) of the Equal Status Acts in defence of their refusal. In a preliminary decision, the Equality Officer considered the provisions in s 42(2) of the Acts dealing with liability of agents. She concluded unequivocally that both principal and agent were liable for any discrimination in this case. Similar conclusions were drawn when the issue of agents' liability was raised again in other cases such as *Jordan v Marsh*[22] (see above) and *Nicholas Burke v Lynskey Ryan Insurance Ltd., Galway.*[23]

19 *Phyllis Fahey v Ulster Bank* DEC-S2008-049 (Equality Tribunal).

20 *Phyllis Fahey v Ulster Bank* DEC-S2008-049 (Equality Tribunal), at para 3.1.

21 *Colm O'Donoghue v An Post Ltd. t/a One Direct* DEC-S2005-053 (Equality Tribunal).

22 *Jordan v Marsh Ireland Ltd* DEC-S2008-054 (Equality Tribunal).

23 *Nicholas Burke v Lynskey Ryan Insurance Ltd., Galway* DEC-S2006-071 (Equality Tribunal).

Travel insurance and car hire

Over the years, the Equality Authority has received many complaints about age limits and restrictive conditions for certain age groups in the provision of travel insurance and car hire. Complaints have been referred to the Equality Tribunal both by individuals under s 21 and by the Equality Authority under s 23 of the Equal Status Acts. In most of these cases, negotiated settlements were reached and the companies agreed to change their policies so that decisions would be made not just on the basis of age but on other criteria such as health, claims experience and other relevant matters.

Brother Anthony White came to Ireland on holidays and attempted to hire a car. The car hire company had an upper age limit of 75 for car hire as well as an 'age surcharge' of €25 per day for drivers over age 70. Brother White had held a heavy vehicle licence in Australia for over 50 years and was driving 40,000 to 50,000 kilometres a year at the time. The company was unwilling to change its policy and a complaint was referred to the Tribunal.[24] Negotiations followed between the Equality Authority and the company, as a result of which the company agreed to review and amend its policies. They replaced the absolute age limits with a safety assessment to take due and proper account of individual drivers' health, driving experience and existing motor insurance policy and they removed the automatic surcharge for drivers over 70.

There was a similar satisfactory resolution of complaints from groups of older people about travel insurance which discriminated against people over the age of 75. Initial correspondence failed to resolve the issues so the Equality Authority referred a complaint to the Tribunal under s 23 of the Acts. Negotiations then took place and a settlement was agreed whereby the age limits were removed.

This area of business continues to be problematic in the context of anti-discrimination legislation. Companies which continue to impose age limits or discriminatory restrictions have a competitive advantage over other providers in the market. The legislation must be enforced evenly. It is also important that a balance be struck between the need and the right to run a business effectively on the one hand and the right to have access to services without unlawful discrimination on the other. This is the balance which the legislation both in Ireland and in Europe needs to strike in exemptions such as that contained in s 5(2)(d). However, it is a very difficult exercise. In the Irish legislation the same exception applies to all nine grounds and it can be given a wide application. The phrase *'relevant underwriting or commercial factors'* in s 5(2)(d) is not defined or limited in the text. In some cases it appears to be interpreted to equate to maximisation of profits. This type of economic objective has been struck down as inadequate justification by the European Court of Justice in other discrimination contexts. The Racial Equality Directive[25] prohibits discrimination in the provision of goods and services but it provides for no exemption equivalent to s 5(2)(d) of the Equal Status Acts. By contrast, the Gender Goods and Services Directive[26] does include an equivalent exception in Art 5. The Equal Status Acts were amended in 2008 to transpose Art 5, including the additional

24 See Equality Authority Press Release 'Brother Anthony White v Irish Car Rentals', 7 November 2008 (available at www.equality.ie).

25 Council Directive 2000/43/EC [2000] implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L180/22.

26 Directive 2004/113/EC implementing the principle of equal treatment between women and men in the access to and supply of goods and services, OJ L373/37.

requirements for publication and updating of relevant data and periodic review of the provisions.[27] Article 2(7) of the proposed Directive[28] provides for similar exceptions in relation to age and disability in financial services but omits any requirement for publication, review and reporting as included in the Gender Goods and Services Directive. None of the Directives provide any exception on the basis of *'other relevant underwriting or commercial factors'* as contained in the Irish legislation.[29]

The Statutory Exception

Another group of cases referred to the Tribunal were at least partially unsuccessful as a consequence of s 14(1)(a) of the Equal Status Acts. This is a very broadly drawn exception from the general principle of non-discrimination and it basically removes from scrutiny any action required by enactment, court order or European or international instrument. The section has been applied in several cases on virtually all grounds and in many areas of goods and service provision. This discussion is confined to the application of the section to financial services.[30]

In the case of *Mohamed Haji Hassan v Western Union Financial Services (Ireland) Ltd,*[31] the complainant, a Somali national and naturalised Irish citizen, attempted to collect money transferred to him by a relative in the UK. Western Union refused to release the money, providing a number of different explanations for the refusal over a period of time. The chief defence advanced by the company in the course of the Tribunal investigation was a requirement to comply with an EC Regulation[32] and the Irish legislation enacted under that Regulation.[33] The incident of alleged discrimination occurred in October 2002 and the EC Regulation relied on by the respondent required the freezing of the funds of a specified list of individuals, which did not include the complainant. The Equality Officer found that the freezing of the complainant's funds was in compliance with the Regulation and therefore s 14 of the Equal Status Act applied. However, the Equality Officer went on to find that the procedural requirements imposed by the company on the complainant before he could access his money were indirectly discriminatory on grounds of his Muslim religion because they were arbitrarily imposed and not reasonable in all the circumstances. The respondents were ordered to pay compensation to the complainant although they were not ordered to review or amend their policies and procedures.

In the case of *A Nigerian National v A Financial Institution*[34] the complainant alleged discrimination on grounds of race when he was refused access to standard banking

27 Civil Law (Miscellaneous Provisions) Act 2008, s 76.

28 European Commission, *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, COM (2008) 426.

29 Equal Status Acts, 1998-2008, s 5(2)(d).

30 For a more general discussion, see chapter in this collection by Prof Mark Bell.

31 *Mohamed Haji Hassan v Western Union Financial Services (Ireland) Ltd* DEC-S2006-004 (Equality Tribunal).

32 Council Regulation No 881/2002 imposing certain restrictive measures directed against certain persons and entities associated with Usama Bin Laden, the Al-Quaida network and the Taliban (29 May 2002).

33 Criminal Justice (Terrorist Offences) Act 2005.

34 *A Nigerian National v A Financial Institution* DEC-S2005-114 (Equality Tribunal).

services. Here again the bank had refused services to the complainant without giving any reason. In the course of the Tribunal investigation, the respondents relied to a large extent on s 14 and in particular, on their obligations under the Criminal Justice Act 1994 in relation to money laundering. The Equality Officer considered six different incidents of refusal of service and found that only one of these was *'guided by discriminatory reasons'*.[35] Four of the other five refusals were held to be justified by the requirements of the Criminal Justice Act 1994. That Act requires restrictions not only on the transfer of money but also on communication of any suspicions or investigations related to money laundering. This was accepted as a justification for refusing the service without giving reasons.

A similar defence succeeded in the case of *Mr F v A Financial Institution*.[36] Here, a Nigerian national seeking to open a loyalty current account was presented with a succession of different requirements for opening an account. Some of these were additional to the list contained in the respondent's promotional literature and were communicated to the complainant at later stages in the process. Again, the bank relied on s 14 of the Equal Status Acts and its obligations under the Criminal Justice Act 1994. As most of the communications between the parties in the course of the application had been verbal, there was no independent evidence of the precise chain of events. The bank maintained that it had introduced additional requirements for new account holders because of an increase in fraudulent activity at that time. The Equality Officer accepted the evidence of the respondent in relation to additional security requirements and accepted its assertion that the additional requirements were applied uniformly to all customers in similar circumstances. He found that no *prima facie* case of discrimination had been established.

It is clear from a number of the cases discussed above that the issue of indirectly discriminatory criteria applied by financial institutions present significant difficulty. In the course of transactions and applications for services, the criteria rarely appear to be fixed and clearly communicated. They vary between institutions and even from branch to branch and from time to time. Different requirements are imposed on each applicant and it seems rare for clear and transparent reasons for refusal to be given promptly and clearly. While this approach may sometimes be necessary in the interests of security and compliance with statutory obligations as well as commercial imperatives, it makes the application of anti-discrimination law extremely difficult and its usefulness very limited for unsuccessful applicants.

A final case which again illustrates this point is that of *Margaret O'Keeffe v Irish Life and Permanent Plc t/a TSB*.[37] This was an allegation of discrimination on grounds of gender where the complainant was refused a visa card because she was not working in permanent employment. Ms O'Keeffe claimed that the requirement of permanent employment was indirectly discriminatory against her, because, as a woman, she was more likely to work on a temporary basis rather than on a permanent basis in order to balance work and family commitments. She contended that applications should be assessed on the basis of ability to pay and credit rating rather than employment pattern. The Equality Officer considered the test in s 3(1)(c) of the Acts to establish a case of indirect discrimination: i.e. that the apparently neutral provision puts a person at a

35 *A Nigerian National v A Financial Institution* DEC-S2005-114 (Equality Tribunal) at para 7.13.

36 *Mr F v A Financial Institution* DEC-S2008-003 (Equality Tribunal).

37 *Margaret O'Keeffe v Irish Life and Permanent Plc t/a TSB* DEC-S2010-001 (Equality Tribunal).

particular disadvantage in effect compared to other persons. Ms O'Keeffe relied on her own experience in an office administration environment in the UK to support her position in relation to female-dominated temporary work patterns. In the absence of any other evidence from the complainant, the Equality Officer held that she had failed to establish a *prima facie* case of discrimination.

The European Commission has already proscribed discrimination on grounds of race and gender in the provision of financial services. In the proposed Directive,[38] it is about to apply similar prohibitions on discrimination on grounds of age, religion, disability and sexual orientation. The EC permits certain exceptions in relation to gender, age and disability and these exceptions must be circumscribed in accordance with the Directives. In order to comply with the Racial Equality Directive[39] and the proposed Directive, the Equal Status Acts will need to be amended to exclude from the exceptions in s 5(2)(d) discrimination on grounds of religion and belief, sexual orientation, family status, race and membership of the Traveller community. In addition, s 14 requires amendment to bring it into compliance with the Directives and limit the statutory exception to those explicitly permitted. It would also be helpful if both European and national legislation were to provide some more detailed guidance on the interpretation of the concepts and terms used in the legislation, particularly in the exceptions. This would lead to greater consistency and fairness for all parties concerned in balancing the often competing rights of financial service providers and their customers. It would also assist decision makers adjudicating on complaints to achieve a fair balance and protect both the commercial and the human rights of the respective parties.

38 European Commission, *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, COM (2008) 426.

39 Council Directive 2000/43/EC [2000] implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L180/22.

A Synopsis of Discrimination in Respect of Public Housing Accommodation Services

Garrett O'Neill

—The Equality Authority

Equality Tribunal Record of Cases under The Equal Status Acts in respect of Accommodation

My paper deals with the provision of public housing and services by county councils and town councils which have been the subject of several equal status cases. In all, there have been approximately eighty-two cases since 2004. The majority of these cases are on the Traveller community ground and many of these cases include the grounds of disability, family status, age and race. Several of the complaints are not only alleging discrimination but also ongoing harassment by the service provider in the provisions of its accommodation services to the complainant/tenant.

The primary reasons for these complaints are:

- Inadequate assessment of the housing needs;
- Delay in processing the application;
- Failure to report on progress of application;
- No information on the priority of the applicant's housing need; and
- Complainant sees other parties gain preference to his/her application.

As a result the complainant feels discriminated against and harassed by the lack of progress which in turn leads to a breakdown in relations with the local authority which in most cases, means that the only form of redress or rectification is to make a complaint against the service provider under the Equal Status Acts 2000-2008 (the Equal Status Acts). However there are many difficulties for the complainant in attempting to prove a *prima facie* case of discrimination and I will examine these difficulties later.

In the cases that have been taken to the Equality Tribunal, only two[1] have been successful under the Traveller community ground with a further two[2] cases being successful under the disability ground.

Sixty-six of the cases lodged in the Equality Tribunal were part of a type of class action by Traveller families alleging discrimination and harassment by Clare County Council. The principal case was *John & Angela Mongans and Children v Clare County Council*[3] which outlined the problems faced by the Equality Officer with the complainants' legal

1 *Michael McCann v Dun Laoghaire-Rathdown County Council* DEC-S2008-004 (Equality Tribunal) and *A Complainant v A County Council* DEC-S2009-009 (Equality Tribunal).

2 *Mark Gallagher and Frances Wilson v Donegal County Council* DEC-S2006-060 (Equality Tribunal) and *Ms D (a tenant) v A Local Authority* DEC-S2007-057 (Equality Tribunal).

3 *John & Angela Mongans and Children v Clare County Council* DEC-S2008-039 (Equality Tribunal).

representative over procedural matters and the failure by the complainants to attend a Tribunal hearing. Because of this, the Equality Officer had no option but to dismiss all of the complaints.

To understand why these cases are failing

To review why cases taken under the Equal Status Acts in respect of the provision of accommodation are failing, it is useful to consider the following:

(i) The relevant provisions of the Equal Status Acts; and

(ii) How these provisions are being applied by the Equality Tribunal by reference to recent Tribunal decisions.

Section 6(1) of theEqual Status Acts provides:

A person shall not discriminate in;

(a) disposing of any estate or interest in premises,

(b) terminating any tenancy or other interest in premises, or

(c) providing accommodation or any services or amenities related to accommodation or ceasing to provide accommodation or any such services or amenities.

The meaning of the term 'discriminate' for the purposes of s 6(1) can be gleaned from s 3(1). Section 3(1) provides:

For the purposes of this Act discrimination shall be taken to occur—

(a) where a person is treated less favourably than another person is, has been or would be treated in a comparable situation on any of the grounds specified in subsection (2) (in this Act referred to as the 'discriminatory grounds') which—

(i) exists,

(ii) existed but no longer exists,

(iii) may exist in the future, or

(iv) is imputed to the person concerned,…

Section 6(6) contains an exemption in respect of the provision of accommodation:

Nothing in subsection (1) shall be construed as prohibiting -

(a) a housing authority, pursuant to its functions under the Housing Acts, 1966 to 1998, or

(b) body approved under Section 6 of the Housing (Miscellaneous Provisions) Act, 1992,

from providing in relation to housing accommodation, different treatment to persons based on family size, family status, marital status, disability, age or membership of the Traveller community.

This section was interpreted by the Circuit court in *Dublin City Council v Grace Deans*.[4] This is the leading case on disability and accommodation. Judge Hunt said:

> *I cannot construe subsection 6, as exempting the housing authority in its entirety from all application of the equality legislation. It appears to me simply to provide that the housing authority is entitled to base its priorities and its housing plan on different treatment to persons on family size, family status and the other considerations set out in the subsection.….*

Subsection (6) actually provides that the housing authority may specifically provide differential treatment within its scheme of priorities for the provision of accommodation based on disability and cannot be challenged by other persons for acting on that basis and that the subsection must appear to be enabling rather than prohibitory.

This interpretation has been accepted by Equality Officers in a number of cases.

Section 2(3) of the Equal Status Acts provides:

> *In any proceedings a respondent is presumed, unless the contrary is shown, to fail to do something when-*
>
> *(a) the respondent does an act inconsistent with doing it, or*
>
> *(b) the period expires during which the respondent might reasonably have been expected to do it.*

Case examples

As a review of how these provisions are being applied, I consider here a number of recent cases.

In *Christina Boland v Killarney Town Council,*[5] the complainant, who was a member of the Traveller community, claimed that she was discriminated against by Killarney Town Council through its (i) failure to provide her with housing; (ii) failure to carry out a proper assessment of her housing needs; and (iii) delay in processing her housing application. The complainant made three separate applications for housing, in 1999, 2002 and 2005, for both herself and her two children. While her application was being processed by the Town Council, she lived with a relative in overcrowded conditions which resulted in her suffering from poor health and depression and in her children suffering from chest infections. The complainant alleged that the Council had had four houses available, albeit that they needed renovation. When she requested one of these houses in 2003, she was informed that, in order to be entitled to housing accommodation, it was the Town Council's policy to create a reasonable social mix in allocating housing accommodation and that only a house vacated by a Traveller could be allocated to a Traveller.

4 *Dublin City Council v Grace Deans* (15 April 2008, unreported) CC, Hunt J.The case came before the Circuit Court on appeal from the decision of the Equality Tribunal in *Ms D (a tenant) v A Local Authority* DEC-S2007-057.

5 *Christina Boland v Killarney Town Council* DEC-S2008-069 (Equality Tribunal).

How the Town Council allocated its town housing was based on the Council's 'Scheme of Letting Priorities' which contained a list of criteria to be applied when making decisions on the allocation of houses to applicants and provided for a number of factors which included the applicant's circumstances in relation to overcrowding, unsuitable living conditions, financial means, health problems etc.

Under the Housing Acts 1966-1998, a housing authority is required to make a scheme determining the order of priority to be accorded in the letting of dwellings, and in doing so, it may specify certain categories of persons to which priority is to be accorded, such as applicants living in dwellings deemed to be unfit or dangerous, applicants living in overcrowded conditions and applicants who lack suitable or adequate accommodation. Killarney Town Council was empowered under the Housing Acts to act as a housing authority and had adopted the 'Scheme of Letting Priorities' in accordance with its obligations under these Acts. This scheme is also used by other local authorities.

The problem with the 'Scheme of Letting Priorities' is that people on the waiting list for housing have no idea as to where their application stands in respect of the next available house. In other words, there is no transparency. Applicants do not know how long they will have to wait for housing.

Further difficulties are caused by the application of the s 20 of the Housing Act 1988 which provides:

> *In providing dwellings under section 56 of the Principal Act, a housing authority shall have regard to the latest assessment made under section 9 and to the need for housing of any person accepted, after the making of such assessment, for inclusion in the next assessment, and shall seek to maintain a reasonable balance between the respective needs of the classes of persons specified in section 9(2).*

The effect of this section is that any applicant may be under constant review for social housing but may not effectively gain any priority in their application by reference to the length of time that they have been waiting for a house or any other criterion. The applicant may be demoted on the housing list in favour of some other applicant who may demand more urgent attention. This, in my opinion, affects the proofs in relation to proving the alleged act of discrimination. It is impossible for the complainant to prove a *prima facie* case that he or she is being treated less favourably than another person in a comparable situation. In all of these cases, persons applying for housing are entitled to have their applications treated in strict confidence. Therefore the subject matter of their application is only known to the county or town councils which prioritise their application based on the circumstances presented to them.

In *Boland*[6] it was impossible to produce evidence that other people were treated more favourably by the Council than the complainant. Due to the confidentiality of the applications, we could make no comparison between the successful applicants' circumstances and those of the complainant. It is this lack of transparency as to how people are assessed under the Scheme of Letting Priorities which is, in my view, detrimental to establishing a *prima facie* case.

6 *Christina Boland v Killarney Town Council* DEC-S2008-069 (Equality Tribunal).

In *Thomas O'Donnell v Roscommon County Council*[7], the complainant who was also a member of the Traveller community had applied for social housing from the Council in 1999 for himself, his wife and their ten children. Again in this case there were problems with where the applicant stood in respect of his application under the Scheme of Letting Priorities as operated by the County Council. Similar to the *Boland* case[8], the Council stated in its defence that it had a huge demand for public housing with only limited stock of housing to provide for such applicants. This in turn led to long waiting lists as the Council could not, on demand, house people with suitable accommodation to suit their needs. The Equality Officer was satisfied that budgetary constraints were significant factors in the Council being unable to offer suitable accommodation to the complainant for a long period of time. He considered that the respondent was genuine and had acted with *bona fides* in trying to house the complainant but had faced considerable obstacles in trying to do so. The Equality Officer found that the complainant had failed to establish a *prima facie* case. He stated:

> *I am satisfied that a person in the complainant's circumstances who was not a member of the Traveller community would not have been treated more favourably by the respondent than the complainant was.*

Again this case highlights the difficulties for a complainant in providing sufficient evidence of a comparator who is treated more favourably by the relevant council in respect of their application for social housing. The same problem occurred in this case in that the complainant had no idea where he stood on the Scheme of Letting Priorities. As a result, the complainant did not know whether the Council was treating other families more favourably than him even though their circumstances may have been less severe than his.

In *McDonagh & Others v The County Council of the County of Clare and Ennis Town Council*[9], Smyth J said:

> *One of the complaints of the Applicants is that they were not informed as to where they were in the scheme of priorities of the housing list. Altogether from being under no legal obligation to furnish such information, I am satisfied and find as a fact that because the decided case law imposes an obligation on a housing authority to consider all persons in need of housing if and when any form of accommodation becomes available and because of the dynamic nature of the demand, it would be inappropriate and unwise to make any such disclosure, which as a matter of probability would lead to more needless litigation based on grounds of legitimate expectation, estoppel or a representation which, no doubt, would be said to be acted upon to detriment. In matters of policy - so long as operating within a statutory legal framework, but subject only to necessary judicial review, the Courts ought not to enter into the function of the housing authority. In my judgment, the type of disclosure envisaged by the Applicants - modified in counsels' submissions, would move the Court in the direction of evaluation of competing needs, rather than judicial review of administrative action.*

7 *Thomas O'Donnell v Roscommon County Council* DEC-S2008-113 (Equality Tribunal).

8 *Christina Boland v Killarney Town Council* DEC-S2008-069 (Equality Tribunal).

9 *McDonagh & Others v The County Council of the County of Clare and Ennis Town Council* [2004] IEHC 184

It would be my view that the last thing on the Judge's mind when he made these comments was the possibility of discrimination contrary to the Equal Status Acts. Every applicant on the housing lists has an expectation to be housed at some point in time. To be kept in the dark and not informed of the progress of your application even though many other people are in a similar situation, is in my view, a form of harassment, as it has the effect of violating a person's dignity and of creating an intimidating, hostile, degrading, humiliating and offensive environment in their dealings with the service provider. A secondary consequence arises also in that many housing officers can be placed in a hostile work situation where the housing applicants vent their anger at them because of the lack of information about the progress of their applications.

Successful decisions

In contrast to these unsuccessful claims, the Circuit Court in *Dublin City Council v Grace Deans*[10] upheld Ms Deans' complaint regarding her treatment by Dublin City Council in the provision of accommodation to her. Ms Deans suffered from claustrophobia and agoraphobia, which could manifest themselves in the form of anxiety and panic attacks and which restricted her ability to engage fully with society outside the confines of her home. She also suffered from a chronic back problem which required physiotherapy through the use of exercise equipment at home.

Ms Deans had unsuccessfully sought from the Council a dwelling of the size that would normally be assigned to a family. Ms Deans alleged that she was entitled to such a larger home as it constituted reasonable accommodation of her needs as a person with a disability, in accordance with the Council's obligations under s 4 of the Equal Status Acts.

The complainant provided medical evidence to support her claim for a larger dwelling and it is noteworthy that the Council did not get its medical advisors to evaluate personally the complainant's medical condition when assessing her application. Instead the medical evaluation was only based on the medical reports supplied by the complainant and her application was refused on that basis.

Hunt J expressed his own reservations:

> *I was initially sceptical at the outset of this case, believing that this was in fact a ruse to get around a housing allocation made in good faith. Having heard Ms. Deans, I accept her evidence as totally genuine. I accept the significance and broad effect that this condition has on her. Accommodation is more important to her than it is for the average person, because the nature of her condition is such that she is forced to spend a larger period of time within that accommodation and therefore there are particular circumstances that apply to her case which should be taken into account and which in my view were not taken into account.*

It was also noteworthy that Ms Deans had had a long-standing relationship with the Council for 15 years or more regarding her medical condition and housing difficulties.

10 *Dublin City Council v Grace Deans* (15 April 2008, unreported) CC, Hunt J.

Of the two successful Traveller cases, one is currently under appeal to the Circuit Court and, as a result, I do not wish to discuss that case.

The second case involved a Traveller halting site which had its entrance obstructed by a height restriction bar which the Council had put in place and had locked.[11] The Council refused to give the complainant a key so that he could exit the halting site with his caravan should he wish to do so. The Equality Officer found this to be discriminatory treatment, awarded compensation and ordered the Council to give the complainant a key for the gate.

Statistics – is the problem going to continue?

The Department of the Environment, Heritage & Local Government directs each of the housing authorities to carry out an assessment of their housing needs every three years in accordance with s 9 of the Housing Act 1988. Details of the last assessment were published on 31 December 2008.[12]

Some of the interesting statistics noted report were:

(i) On 31 December 2008 there were 118,396 dwellings that were rented and under the control of county councils, city councils and town councils.

(ii) The net need figure of the number of households in need of housing support who were not currently receiving social housing support for 2008 was 56,249 households. This was an increase of 31% on the levels of need recorded in 2005.

(iii) People classified as having a net-housing need were: homeless people, members of the Traveller community, those in unfit or overcrowded accommodation, those sharing accommodation involuntarily, young people leaving institutional care, those with a housing need for medical or compassionate reasons, older people, people with a disability and people not able to meet the cost of accommodation. Of the 56,000 in net-housing need, 5,000 are those to whom the discriminatory grounds provided in the Equal Status Act would apply, i.e. members of the Traveller community, older people and people with a disability. This is approximately 9% of the overall total. In 2005, local authorities and county councils were requested by the Department to pay particular attention to the needs of older people and those with a disability, to be especially vigilant in ensuring that their applications be placed in the most appropriate category of need and that voluntary groups be contacted at an early stage to provide assistance in the matter.

(iv) There was a substantial increase in the number of non-Irish nationals in need of social housing. EU nationals account for some 12% of the total of 56,249. Non-EU nationals account for some 11% of it, making up, in total, approximately one quarter of the total household need for housing in this country.

11 *Michael McCann v Dun Laoghaire-Rathdown County Council* DEC-S2008-004 (Equality Tribunal).

12 Department of the Environment, Heritage & Local Government, 'Local Authority Assessment of Housing Needs' (last updated 24 August 2009). Available at: www.environ.ie/en/Publications/StatisticsandRegularPublications/HousingStatistics.

(v) The length of time waiting on support to be allocated by the local authorities to persons is also notable in that 10,307 households or nearly 18% of the total waited more than four years for their application to be addressed.

One striking feature of all these figures and statistics is that there appears to be no independent analysis or research to ascertain which category of persons on the waiting list for social housing, has, in some cases to wait more than seven years before the persons can be housed. This brings us back again to the issue of the Scheme of Letting Priorities that local authorities utilise in assessing applicants' claims. The question that must be asked is what makes one applicant's circumstances so special that they can be housed in one year, whereas other applicants may have to wait anything up to seven years or more to be housed. Furthermore, are the county councils utilising in any way s 6(6) of the Equal Status Acts to prioritise applications for people based on family size, family status, marital status, disability, age or membership of the Traveller community, in comparison to other applicants that may not come under any of these grounds but are applying for social housing due to their being unable to afford the cost of accommodation?

A further question must be asked in light of the High Court decision in *Pullen & Ors v Dublin City Council*,[13] which is considered below. The case is of relevance to those who, having waited for years for social housing, are then evicted due to anti-social behaviour. Under s 14 of the Housing (Miscellaneous Provisions) Act 1997, a person so evicted then goes into a kind of purgatory and will not be accommodated again until they can redeem themselves in the eyes of the relevant council.

Comparison with human right cases

Section 6 of the Equal Status Acts not only deals with the provision of accommodation, services or amenities, it also relates to ceasing such services or determination of any tenancy or interest in the premises. There have been no Equal Status cases before the Equality Tribunal, to my knowledge, in respect of any situation where local authorities have ceased to provide or sought to terminate a tenancy. However, the High Court in *Pullen*[14] considered the eviction of a family from social housing due to anti-social behaviour.The High Court found that the eviction interfered with the family's rights under the European Convention on Human Rights, which was given effect in Irish law by the European Convention on Human Rights Act 2003.

The plaintiffs had been living in a house rented from Dublin City Council. The Council had received complaints about the conduct of the family. As a result of these complaints and the Council's investigation into the complaints, the Council served a notice to quit on the plaintiffs. The plaintiffs did not deliver up possession of the house and, accordingly, the Council issued a summons under s 62 of the Housing Act 1966, as amended by s. 13 of the Housing Act 1970. The Council sought from the District Court a warrant for possession of the house. On 30 November 2006, the District Court, having been satisfied with the formal proofs required by s 62 of the Act of 1966, granted the warrant for possession. The plaintiffs' subsequent appeal to the Circuit Court was unsuccessful.

13 *Pullen & Ors v Dublin City Council* [2008] IEHC 379.

14 *Pullen & Ors v Dublin City Council* [2008] IEHC 379.

The District Court, when hearing an application under s 62 of the Act of 1966, has no jurisdiction to enter into the merits of the claim for possession and must make the warrant for possession once the formal proofs are complied with. The plaintiffs claimed that they had been entitled to an independent judicial or quasi-judicial hearing before the order for possession could be enforced. At such a hearing, the plaintiffs should have been, they argued, entitled to challenge the finding of anti-social behaviour made by the Council as this was the justification for the termination of their tenancy. The plaintiffs argued that the absence of such a procedure in the eviction process contravened Art 6 of the European Convention on Human Rights (the right to a fair trial). They also claimed that the decision to terminate their tenancy and to seek to recover possession of their home, in the absence of adequate procedural safeguards, infringed their right to respect for their private and family life and to their home, in breach of the guarantee of those rights under Art 8 of the Convention.

Irvine J noted that under s 3 of the European Convention of Human Rights Act 2003, as the Council was an organ of the State, it must perform its functions in accordance with the State's obligations under the Convention. The Council had failed to act in conformity with Arts 6(1) and 8(1) of the Convention. Irvine J said:

> *I conclude that, in performing its functions in the manner in which it did, the defendant brought about the determination of the plaintiffs' civil rights by a procedure that offended the provisions of Article 6(1) of the Convention….*
>
> *The defendant, in its decision to evict the plaintiffs based upon a finding of anti-social behaviour, was destined to interfere with the plaintiffs' rights under Article 8 of the Convention. In this regard the Act of 2003 placed new obligations on the defendant as to the circumstances in which it might, in a Convention compliant manner, avail of the procedure for eviction provided for in s. 62 of the Act of 1966.*
>
> *…Having regard to the magnitude of the right with which the defendant intended to interfere and the consequences of such interference, the defendant was obliged to justify such interference as being not only in pursuit of the legitimate aims identified in Article 8(2) but also as being necessary in a democratic society.*
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> *…The use of s. 62 of the Act of 1966 to interfere with the plaintiffs' right to respect for their home following an in-house investigation, in circumstances where such a procedure did not afford the plaintiffs any opportunity to dispute the lawfulness or the proportionality of the defendant's decision to evict them, was not justified as being necessary in a democratic society and was disproportionate to the defendant's stated aims having regard to the significance of the rights interfered with.*
>
> *…The interference was disproportionate, particularly in circumstances where the defendant had available to it, within its legal framework, an alternative procedure namely, that provided for in s. 14 of the Conveyancing Act 1881, which, if implemented, would have provided the requisite safeguards for the plaintiffs' rights whilst meeting the defendant's legitimate aims.*

This is a very important case in that many people who are evicted for anti-social behaviour from their social housing ultimately become homeless as they may not be re-housed for a number of years. Re-housing would not occur until those families could establish that their behaviour had reformed during which period they would likely spend a significant time either in bed and breakfast accommodation or private rented accommodation. What was not clear was how tenants, even using their best endeavours or being pro-active, would establish such facts to the local authority's satisfaction that they had reformed from their anti-social behaviour. Anti-social behaviour could mean anything from drug abuse to complaints of noise from neighbours. An untidy garden could even be considered anti-social behaviour. Eviction proceedings that come before the District Court and later on appeal to the Circuit Court have standard statutory proofs that do not require any explanation as to why tenants are being evicted from the premises. Therefore once statutory proofs are in place, the District Court Judge has no discretion to enquire as to the reasons behind the eviction. He must accept the statutory proofs and order an eviction. As the plaintiffs would be evicted from the home by reason of anti-social behaviour, they are deemed to have rendered themselves homeless for the purposes of s 2 of the Housing Act 1988. Their position is decisively and fundamentally altered to their detriment because of the finding of the Council and the decision of the Council to evict them.

The *Pullen* decision was affirmed by the High Court in *Byrne v Dublin City Council*.[15] The facts of this case were very similar to that in *Pullen* and an interlocutory injunction was granted by the Court preventing the Council from evicting the applicant from her home.

Neither of these cases referred to the Equal Status Acts, but I believe the possible impact of these decisions will some day come to the fore in the Equality Tribunal in a harassment/discrimination case under s 6 of the Acts.

Conclusion

It is self evident that service providers do not have the financial or housing resources to accommodate every application for social housing on demand. This inevitably leads to delays in persons being accommodated and would be unfair of me to criticise any county council, local authority or housing officer, in what evidently is a very difficult and demanding job.

That said, where you have a system in which assessments are being made and there is no transparency in that system to show how these decisions are being taken or how accommodation is being provided then that system can be open to abuse. That in turn can lead to unfavourable treatment and harassment for those relying on such services. The fact that nobody can ascertain where they stand in the list, in respect of their application for social housing, has led to several complaints being made to the Equality Tribunal. These cases have failed because complainants were unable to produce comparisons to their own situation and to show that other categories of persons were being treated more favourably than they were.[16] It leaves the entire system open

15 *Byrne v Dublin City Council* [2009] IEHC 122.

16 See further, Dáil Debates, 10 February 2010; Sunday Tribune, 'Dublin Housing Applications rotten to the core', 6 December 2009

to abuse and there have been accusations and allegations in Dublin City Council that the housing allocation process has been tainted with political interference whereby representatives are directly intervening on behalf of their constituents to gain them priority in the housing application process over other applicants. An investigation is ongoing to determine whether or not these practices have occurred in the past.

The conclusion that can be made from the progress to date is that there has been little advancement of the accommodation provision in the Equal Status Acts and this will continue to be the case. This is because the standard of evidence required is prohibitive, caused by the lack of clarity of the assessment procedures under the Scheme of Letting Priorities used by county councils and town councils. It could be the case that if everybody on the housing list were treated the same way then there could be no discrimination or unfavourable treatment to anybody.

In the coming years it would appear that most local authorities will be delegating their responsibilities or producing or procuring social housing to charitable organisations.[17]

It is hoped that the 'pathway to home' strategy being currently implemented will enable the Government to meet its target of eliminating long term homelessness by the end of the year, especially in Dublin where 1,000 emergency beds in hostels and bed and breakfasts will be phased out in the greater Dublin area and will be replaced with 1,200 long-term tenancies by the end of this year. While it is great to see these private charitable organisations take away some of the burden from local authorities to provide badly needed social housing for persons who are the most vulnerable in society, it also raises new questions to be addressed by the Irish Government in that none of these charitable organisations are under any statutory control or regulation. Therefore, should a dispute occur in respect of access to housing or any condition of the tenancy agreements, the respective tenants do not have any opportunity to resolve their complaints with the Private Residential Tenancy Board, the Ombudsman or the courts. In fact, the only place where there would appear to be any sort of remedy would be the Equality Tribunal under the Equal Status Acts which would bring us right back to square one.

How do you prove that you are being treated less favourably when there are approximately 56,000 others in a similar situation?

17 Examples of these charities are Homeless Agency, Focus Ireland, Sonas Housing Association, Respond! and Cluid Housing Association.

Disability Discrimination in Education - an Irish Perspective

Carol Ann Woulfe

—The Equality Authority

In this paper I will consider the development of disability case-law in the area of education under the Equal Status Acts 2000-2008 (the Equal Status Acts). In doing so it is useful firstly to look at the legal framework as the backdrop to the case-law. Education cases under the Equal Status Acts come within the provisions dealing with educational establishments and service providers. There are a number of defences available and these have been considered in a number of cases. Many of the cases have focused on the issue of reasonable accommodation and, in a smaller number, examined the exemption where special facilities and treatment need not be provided. While this paper is focussing on the Equal Status Acts and the provision of goods and services including educational establishments, it is important to make reference to the protections available under the Employment Equality Acts 1998–2008 (the Employment Equality Acts) in the area of vocational training. I will also look briefly at the impact of the proposed Equal Treatment Directive[1] and whether the protections available for people with disabilities would be expanded as a result.

Section 7 of the Equal Status Acts provides protection for students and potential students of educational establishments. An educational establishment is defined to include pre-schools right through primary, secondary and tertiary educational establishments. Section 7(2) of the Acts provides:

> *An educational establishment shall not discriminate in relation to—*
>
> *(a) the admission or the terms or conditions of admission of a person as a student to the establishment,*
>
> *(b) the access of a student to any course, facility or benefit provided by the establishment,*
>
> *(c) any other term or condition of participation in the establishment by a student, or*
>
> *(d) the expulsion of a student from the establishment or any other sanction against the student.*

A number of exemptions are set out in the legislation of which two relate specifically to disability. Difference in treatment of students on the gender, age or disability ground in relation to the provision and organisation of sporting facilities and events is allowed. The second exemption allows discrimination on the disability ground in circumstances which would otherwise make impossible or have a seriously detrimental effect on the provision of services to other students.

1 European Commission, *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, COM (2008) 426.

7(4)(b) provides that subsection (2) does not apply:

> *to the extent that compliance with any of its provisions in relation to a student with a disability would, by virtue of the disability, make impossible, or have a seriously detrimental effect on, the provision by an educational establishment of its services to other students.*

This exemption has been considered in a number of decisions with varying outcomes which I will highlight later in this paper.

While s 7 deals specifically with educational establishments, the goods and services provisions in s 5 of the Equal Status Acts are also relevant where the relevant organisation provides or provides for education as a service provider. The issue of whether the Department of Education and Skills is a service provider has been the subject of significant legal debate and argument as can be seen from the case-law in this area. It has been accepted by the Equality Tribunal that the Department is a service provider. As such the provisions in s 5 apply.

Section 5(1) provides:

> *A person shall not discriminate in disposing of goods to the public generally or a section of the public or in providing a service, whether the disposal or provision is for consideration or otherwise and whether the service provided can be availed of only by a section of the public.*

Prohibition of discrimination on the disability ground covers not only direct and indirect discrimination, discrimination by association and imputation but also extends to the obligation to provide reasonable accommodation.

Section 4 of the Equal Status Acts provides:

> *(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.*
>
> *(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.*

Reference to service providers in this section includes educational establishments. The Act provides a defence for different treatment under s 4(4):

> *Where a person has a disability that, in the circumstances, could cause harm to the person or to others, treating the person differently to the extent reasonably necessary to prevent such harm does not constitute discrimination.*

This exemption has also been considered in cases taken before the Equality Tribunal.

In order to consider the protections available under Irish equality legislation it is necessary to look beyond the Equal Status Acts to the vocational training provisions under the Employment Equality Acts.

Section 12 of the Employment Equality Acts provides:

> *(1) Subject to subsection (7) any person, including an educational or training body, who offers a course of vocational training shall not, in respect of any such course offered to persons over the maximum age at which those persons are statutorily obliged to attend school, discriminate against a person (whether at the request of an employer, a trade union or a group of employers or trade unions or otherwise)—*
>
> *(a) in the terms on which any such course or related facility is offered,*
>
> *(b) by refusing or omitting to afford access to any such course or facility, or*
>
> *(c) in the manner in which any such course or facility is provided*

Vocational training is defined in s 12(2):

> In this section "*vocational training*" means any system of instruction which enables a person being instructed to acquire, maintain, bring up to date or perfect the knowledge or technical capacity required for the carrying on of an occupational activity and which may be considered as exclusively concerned with training for such an activity.

A small number of cases have been taken on the disability ground under this provision. Interestingly a number of cases taken under the Equal Status Acts involving third level institutions could also have been taken under the Employment Equality Acts. Indeed, a claim taken under the Employment Equality Acts and two claims under the Equal Status Acts were issued against the same respondent.

On the basis of the current legislation in Ireland and in light of the changes on foot of the Employment Equality Directive,[2] transposed by the Equality Act 2004, complainants have better protection under the Employment Equality Acts rather than the Equal Status Acts. Of significance is the provision that reasonable accommodation (referred to as 'appropriate measures') must be provided under the Employment Equality Acts unless the measures would impose a disproportionate burden.[3] This obligation goes well beyond the present obligation under the Equal Status Acts to provide reasonable accommodation unless it gives rise to no more than a nominal cost.[4] The proposed Equal Treatment Directive[5] levels up the obligation to provide reasonable accommodation except under circumstances which would impose a disproportionate

2 Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ L303/16.

3 Employment Equality Acts 1998-2008, s 16(3).

4 Equal Status Acts 2000-2008, s 4(2).

5 European Commission, *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, COM (2008) 426.

burden.[6] The significance of the change from nominal cost to disproportionate burden in Employment Equality Act cases has not yet been properly teased out in case-law.

It is also notable that the Employment Equality Acts provide fewer exemptions which can be relied upon as a defence by vocational training bodies. In terms of statutory time limits, complainants under the Employment Equality Acts are not required to comply with the two-month time limit for notifying the educational establishment or service provider in writing of the complaint and of their intention to seek redress under the legislation. While many complainants might lodge claims in the Equality Tribunal within the statutory six-month time limit, the excessively short statutory notification period of two months makes it difficult for complainants to pursue redress under the Equal Status Acts.[7]

It would therefore be advisable when individuals are considering taking claims that they assess whether their claim relates to vocational training and could be taken under the Employment Equality Acts. On the downside for pursuing a claim under the Employment Equality Acts rather than the Equal Status Acts are the lengthy delays of approximately three years for the hearing and investigating of such claims by the Equality Tribunal. Equal status claims are being heard in approximately one year.

Looking now at the cases taken under the Equal Status Acts, less than half of the claims taken before the Equality Tribunal up to May 2010 have succeeded. The largest number of claims involved third level colleges and, of these, a number could also have been taken under the Employment Equality Acts. While the majority of these claims failed, the complainant in *A Post-Leaving Certificate Student v An Educational Institution*[8] succeeded in his claim. In this case the complainant who had Asperger Syndrome was accepted on a performing arts course with the educational institution. As a result of his condition, the complainant had certain difficulties with his social skills. He informed the respondent of his disability and explained that, while not having any special needs, he might require a little help and he suggested contacting the co-ordinator of a local autism society if they had any questions. The respondent disputed they were aware of his disability from the outset but became aware of it following a phone call from the autism society. The respondent claimed that the student was disruptive on the course and that the course organiser used a sympathetic approach as far as possible. The Equality Officer accepted that the complainant had not made sufficient headway in some of the courses to progress in these areas but he also found that he was denied access to certain courses by being placed on an individualised programme.

The Equality Officer found that he was treated less favourably as he was put at a disadvantage *vis à vis* all other students on the course, particularly given that the tuition he was to receive on the individualised programme was only two hours per week in duration.

The Equality Officer then went on to consider whether the educational institution had a defence under s 7(4)(b) that the complainant's disability had such a detrimental impact on the ability of the institution to provide educational services to the students

6 European Commission, *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, COM (2008) 426, Art 4.

7 Equal Status Acts 2000-2008, s 21(2) provides this notification obligation.

8 *A Post-Leaving Certificate Student v An Educational Institution* DEC-S2009-043 (Equality Tribunal).

affected that they were left with no choice but to treat the complainant less favourably by removing him at least temporarily from the mainstream class. The Equality Officer considered the evidence from witnesses provided at the Tribunal investigation and documentary evidence provided by the institution regarding the complainant's alleged behaviour.

The Equality Officer took into account the fact that the Equal Status Acts as instruments of social legislation must be interpreted in a purposive way and that any exemptions must be construed narrowly in the light of the purpose of the Acts which is primarily to prevent discrimination. Having considered the evidence, the Equality Officer found that the respondent was unable to provide any convincing evidence that the complainant's behaviour was so serious or was having such a detrimental impact on the education of those other students that it was obliged to take the discriminatory action that it did in the context of this complaint. He also noted that no students had made a formal complaint against the complainant and that any informal comments that were made to the respondent had been taken no further. He found that the respondent failed to show that it had no choice but to avail of the provisions of s 7(4)(b).

Interestingly in *A Post-Leaving Certificate Student v An Educational Institution*[9] the Equality Officer also noted that the students in that particular case were post Leaving Certificate students who could no doubt have taken appropriate action if they considered their education to be so seriously affected by the complainant as the respondent made out.

The Equality Officer also considered the exemption contained in s 4(4), set out above, regarding the need to treat a person with a disability differently in order to prevent harm to that person or others. No convincing evidence was provided by the respondent and the Equality Officer was not convinced that there was a sufficient risk of harm to justify the difference in treatment allowed by this exemption. The Equality Officer did not consider reasonable accommodation under s 4(1). Victimisation was also successfully argued by the complainant in this case and viewed very seriously by the Equality Officer.

In addition to compensation, the Equality Officer ordered that the respondent carry out a review of its grievance and disciplinary procedures to ensure that students with disabilities are provided with suitable and appropriate access to those procedures. He ordered that this be done in consultation with an appropriate person or organisational expert in the area of protection of rights and that the review be published. The order in this case highlights the wide-ranging redress that can be ordered by the Equality Tribunal, the orders of which can be of major significance in bringing about procedural and policy changes. It is useful to note that the Equality Officer gave a twelve-month time limit for the publication of the review document. Imposing a time limit is very important in terms of implementation as open-ended orders in terms of carrying out reviews and changing policy and procedure can lead to long delays and at times failure by respondents to implement such orders.

In the unsuccessful claim in *Mrs A (on behalf of her son B) v A Boy's National School,*[10] the Equality Officer investigated whether the suspension of a child with autism as a result of disruptive behaviour amounted to discrimination under the Equal Status Acts. The Equality Officer considered whether the school could rely on the s 7(4)(b)

9 *A Post-Leaving Certificate Student v An Educational Institution* DEC-S2009-043 (Equality Tribunal).

10 *Mrs A (on behalf of her son B) v A Boy's National School* DEC-S2009-031 (Equality Tribunal).

defence that not applying the sanction would have a seriously detrimental effect on the services to other students. Based on the evidence provided, the Equality Officer was satisfied that the extreme nature of the difficulties presented by the complainant's behaviour, especially in terms of the incidences of striking his teacher/Special Needs Assistant/peers and the disproportionate amount of time that was necessary for his class teacher to dedicate towards the management of this behaviour were having a seriously detrimental effect on the capacity of the respondent to provide educational services to both the complainant and other students in his class. He found that the school could rely on the defence provided in s 7(4)(b) and that suspension did not amount to discrimination. As the Equality Officer did not find a failure to provide reasonable accommodation within the meaning of s 4 of the Equal Status Acts, he found it unnecessary to consider the exemption provided for under s 4(4) of the Acts.

Reasonable accommodation is central to many of the education claims taken on the disability ground and the types of facilities and treatment which would be required to enable a child to obtain a proper education are considered by the Equality Officers in their decisions. In *Mrs X on behalf of her son Mr Y v A Post-Primary School,*[11] the Equality Officer awarded €3,000 as redress for the effects of the discrimination because of the failure by the secondary school to provide him with reasonable accommodation. In this case the complainant had been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) which resulted in behavioural difficulties and absenteeism in the course of his attendance at the school. The Equality Officer found that Mr Y had not been treated less favourably on grounds of his disability and went on to find that it was not necessary for him to consider the exemption contained in s 7(4)(b) as a result.

In considering the issue of reasonable accommodation, the Equality Officer had regard to relevant legislation providing for the education of persons with disabilities. In particular he took cognisance of s 21 of the Education (Welfare) Act 2000 regarding absenteeism and also had regard to the school's obligations under s 9 of the Education Act 1998 to 'ensure that the education needs of all students, including those with a disability or other special educational needs, are identified and provided for'. While the respondent offered to provide Mr Y with five hours of resource teaching per week, the Equality Officer found that this accommodation, without being allowed any access to the full-time education provided to other students, did not comply with its obligations under the Education Act and amounted to a failure to provide reasonable accommodation within the meaning of s 4 of the Equal Status Acts.

The Equality Officer considered whether the exemption at s 4(4) of the Acts was reasonably necessary to prevent harm to Mr Y or to other students. The Equality Officer did not find that there was sufficient evidence presented to allow the respondent to rely on this defence in order to discharge his obligations to provide reasonable accommodation to Mr Y. The complainant's claim did not succeed on the race or Traveller community ground.

Reasonable accommodation was also central to a similar case involving a complainant who had ADHD and a general learning disability in the claim of *Two Complainants (a mother and her son) v A Primary School.*[12] Interestingly, unlike the previous decision,[13]

11 *Mrs X on behalf of her son Mr Y v A Post-Primary School* DEC-S2010-009 (Equality Tribunal).

12 *Two Complainants (a mother and her son) v A Primary School* DEC-S2006-0028 (Equality Tribunal).

13 *Mrs X on behalf of her son Mr Y v A Post-Primary School* DEC-S2010-009 (Equality Tribunal).

the Equality Officer did not consider whether M was treated less favourably on the grounds of his disability, although she did find that he was not treated less favourably as a Traveller while his mother Mrs A was treated less favourably on that ground. The Equality Officer considered only whether there was a failure to provide M with reasonable accommodation to enable him to avail of an education in the school. As in the previous case, the Equality Officer accepted that M had certain behavioural difficulties as a result of his disability. The Equality Officer was satisfied that the respondent recognised that M had a disability and that his behaviour was connected to that disability. She stated that it was therefore incumbent upon them to seek out facilities for him as, in her view, without special educational facilities it was unduly difficult for him to avail of an education in the school.

The Equality Officer went on to highlight certain facilities which would have assisted the complainant and this included the school prioritising M for assessment with the Educational Psychologist and requesting educational supports from the Department of Education and Science to meet his needs. While M did not succeed on the Traveller community ground it is significant that the Equality Officer established the link between his needs as a child with a disability and also as a member of the Traveller community. The Equality Officer found that it was fundamental to consult with the Home School Liaison Teacher for Travellers whose job it was to liaise between the school and the parents to obtain through this channel the necessary consents for the actions proposed to be taken by the school. While the concept of multiple discrimination has not been developed in Irish case-law, the importance of the inter-linking of grounds is highlighted by the Equality Officer's approach in this case. Having found that the respondent failed to provide M with special treatments or facilities to enable him to avail of a proper education, she also found that such a provision would give rise to no more than a nominal cost for the school. The Equality Officer went on to find that M was victimised on the Traveller community ground and awarded him €2,000 in respect of the victimisation and €3,000 as redress for the disability discrimination.

While most claims have been taken against educational establishments, a number of high profile claims have also been taken against the Department of Education and Science as service providers. These claims centred on policy issues for students with disabilities and were complex both in terms of factual evidence and law.

Two of the cases taken against the Department of Education and Science were successful before the Equality Tribunal. The Equality Authority provided representation in both cases. In the case of *Mrs Kn (on behalf of her son Mr Kn) and others v the Minister for Education and Science*[14] the Department argued strenuously that it was not a 'service provider' as defined by the Equal Status Acts. It claimed that it was not a provider *of* education but rather that its role was to provide *for* education and therefore did not come within s 5 of the Acts. The Department claimed that as it was not an educational establishment as defined in s 7 or a service provider that it therefore fell outside the remit of the Equal Status Acts. However, the Equality Officer found that the types of services provided by the Department of Education and Science in the educational sphere are covered by the broad definition of service within the meaning of the Equal Status Acts.

14 *Mrs Kn (on behalf of her son Mr Kn) and others v the Minister for Education and Science* DEC-S2009-050 (Equality Tribunal).

In this case the complainants claimed that they had been discriminated against by the Department of Education and Science on the grounds of their disability in terms of the respondent's policy which required students attending special schools to leave the school that they were attending at the end of the school year in which they reached their eighteenth birthday. The complainants, who suffered from learning disabilities, attended a special school which catered for children with mild learning disorders and provided the full curriculum to Leaving Certificate and offered the Leaving Certificate Applied to students. As a result of the policy, a number of the complainants were required to skip a year in the secondary school cycle in order to complete their Leaving Certificate Applied by the year they reached their eighteenth birthday. In contrast, children attending mainstream schools are not required to leave school the year of their eighteenth birthday.

The Equality Officer found that the policy which requires students, who are pursuing or intend to pursue an accredited course, to leave the special school the year of their eighteenth birthday in circumstances where no such requirement is enforced upon students in mainstream secondary schools clearly amounts to discrimination on the grounds of their disability.

As part of the redress, the Equality Officer directed the respondent to review the policy that requires students who are attending special schools to leave the school at the end of the year in which they reach their eighteenth birthday with a view to ensuring that students in special schools who are pursuing courses leading to accreditation (such as the Junior Certificate/Leaving Certificate Applied) be afforded the same duration of time to complete these courses as their counterparts in mainstream education. Clearly such a review leading to a change in policy has a very profound impact on children attending special schools who are pursuing accredited courses.

Five complainants took a case against the Department of Education and Science in respect of this policy. While the four complainants pursuing or intending to pursue accredited courses were found to have been discriminated against, the complainant in *Mrs Cr (on behalf of her daughter Ms Cr) v Minister for Education and Science*[15] did not succeed in her claim. In this case the complainant was following a holistic life skills educational programme. Ms Cr's full educational potential had not been assessed and it remained an open question as to whether she had the ability to complete the Junior Certificate and/or Leaving Certificate Applied programmes. However, in light of the implementation of the Department's policy it was decided to fast-track the complainant into the first year of the senior cycle programme. The Equality Officer was satisfied that the requirement for the complainant to leave the special school at eighteen would not necessarily result in the termination of her education as she could then avail of the adult services.

In his decision the Equality Officer found an important distinction between the students who were pursuing a programme of education leading to accreditation such as the Junior and Leaving Certificate Applied/FETAC courses and those who were not. He took into account the fact that participants in non-accredited course of education are not subject to the same requirements in terms of having to complete an accredited curriculum or course of education within a defined period of time. The Equality Officer

15 *Mrs Cr (on behalf of her daughter Ms Cr) v Minister for Education and Science* DEC-S2009-051 (Equality Tribunal).

also took into account that he had not been presented with expert professional evidence from which he could reasonably conclude that it would not be in the best interest of the complainant to transfer to adult services. He found that while a *prima facie* case had been made out by the complainant that the Department had successfully rebutted the inference of discrimination.

There are clearly difficulties in this case as the holistic life skills approach in the complainant's school was more difficult to define and compare to the system of education leading to exams such as the Leaving Certificate in mainstream schools. In contrast, there was a clear comparator in terms of the children pursuing accredited courses such as the Leaving Certificate Applied. Furthermore, the lack of expert evidence made it easier for the Department to rebut the inference of discrimination. However, it is I think a matter for concern that children who have more profound disabilities and who arguably have greater need to spend longer in schools specifically catering for their needs do not appear to be as well protected by our equality legislation.

In the earlier case of *Two Named Complainants v The Department of Education and Science,*[16] Ms A and Ms B who both had dyslexia sought to have reasonable accommodation in their Leaving Certificate examinations in 2001. They were both granted accommodations in the form of marking adjustments in certain elements of language subjects. When the Leaving Certificates issued there were explanatory notes on them stating that certain parts of the examinations had not been assessed in English, Irish and French. The Department of Education and Science argued that the annotation was necessary and balanced to protect the integrity of the examination certification process which did not record that the complainants suffered from a disability but arose only because they applied for and had been granted reasonable accommodation. The annotation arose because the complainants had already been treated more favourably than others in the first place.

The Equality Officer however accepted that employers who routinely used Leaving Certificates as part of the recruitment process would quickly come to know that people with annotated certificates were people with a disability at the time of the examination. In the Equality Officer's view the annotation revealed details about the Leaving Certificate holder which they may not have been otherwise obliged to reveal whether or not it was relevant. The Equality Officer accepted that the integrity of the system was vital but that the Department's position was undermined in regard to annotation when the marks that were given to those who sit their exams through Irish were considered in circumstances where extra marks are given but not annotated in any way.

The Equality Officer found that the complainants had been discriminated against on the grounds of disability and made a number of orders including the issuing of new Leaving Certificates to the claimants without the relevant notations and also to investigate the feasibility of creating and implementing a system of accommodation which could meet the needs of each student applying for accommodation while maintaining the existing accommodations in place.

The decision was appealed by the Department of Education and Science to the Circuit Court where it succeeded before Judge Hunt.The appeal was heard over eight days and judgment was delivered on 19 October 2007. Judge Hunt found that there had been

16 *Two Named Complainants v The Department of Education and Science* DEC-S2006-077 (Equality Tribunal).

no breaches of the Equal Status Acts and specifically that there was no less favourable treatment within the meaning of s 3 and no failure to provide reasonable accommodation within the meaning of s 4 of the Acts.

He did not accept that forced disclosures of a disability were unlawful discrimination against the claimants and stated that the fact that both claimants had succeeded in obtaining employment indicated that no disadvantage had been suffered in this regard. He found that it was in fact important and necessary in many cases that employers should be on notice of a job applicant's disability so that they could put supports and accommodations in place.

In relation to reasonable accommodation, the judge interpreted the term 'reasonable accommodation' (which is not defined in the Equal Status Acts) as *'an accommodation which is not at variance with reason and common sense and not based on irrelevant considerations or directed to an improper purpose'*. He did not consider that the system which the Department of Education implemented in relation to examinations fell short of this requirement and therefore saw no basis for a complaint that there was a failure to provide reasonable accommodation as required by s 4 of the Acts.

Judge Hunt expressed doubts as to whether the claim was admissible under the reasonable accommodation provisions under s 4 of the Equal Status Acts. He suggested that the Minister may have no obligation to make reasonable accommodation because s 4(5) of the Acts provide:

> *This section is without prejudice to the provisions of sections 7(2)(a), 9(a) and 15(2)(g) of the Education Act 1998, in so far as they relate to the functions of the Minister for Education and Science, recognised schools and the boards of management in regard to students with a disability.*

Section 7(2)(a) of the Education Act 1998 sets out the functions of the Minister as including the provision of support services including those with disabilities *'as the Minister considers appropriate'*. He also found that even if there had been discrimination, s 5(2)(h) of the Equal Status Acts which exempts difference in treatment provided for the principal process of promoting for a *bona fide* purpose and in a *bona fide* manner, the special interests of persons, would have exempted the Department's system from the general prohibition on discrimination.

Judge Hunt's decision was appealed on a point of law to the High Court.[17] The appeal was heard by Judge De Valera in March 2009 and judgment was delivered on 11 June 2010. The appeal was dismissed and the decision of the Circuit Court was upheld in all respects. It is worrying that that this is the only judicial interpretation of reasonable accommodation from the superior courts.

Interestingly in an almost contemporaneous decision dated 26 May 2010 in *A Complainant v An Irish Language College*[18] the Equality Officer found the annotation on the complainant's Junior Certificate clearly resulted in less favourable treatment. The complainant who had dyslexia was given reasonable accommodation in certain subjects. Her Junior Certificate subsequently had annotations attached to the subjects for which

17 *Cahill v The Minister for Education and Science* [2010] IEHC 227.

18 *A Complainant v An Irish Language College* DEC-S2010-027.

she had received accommodation including Irish in which she achieved a grade A at Higher Level. In Fifth Year the complainant applied for a place on an Irish study college and included a copy of her Junior Certificate as required. As a result of the annotation, the complainant was refused a place on the course. She subsequently received a note from the college returning her application and course fee and stating that she *'would suffer a sense of failure, humiliation and lack of self esteem'* if she attended the course. The Equality Officer found that the college had directly discriminated against the complainant on the grounds of her dyslexia and that its requirement for a 'standard grade C or higher' was discriminatory in excluding students with disabilities who had annotations on their examination certificates.

The Equality Officer awarded compensation of €3,500 and ordered the college to review its procedures and policies to ensure that they would fully comply with the Equal Status Acts. The real negative impact of the annotation system in State examinations was clearly highlighted in this case. A modest financial reward three years later could hardly be said to redress the wrong suffered by the young student.

In addition to claims decided by the Equality Tribunal and the courts it is important to highlight that many education cases are settled. The Equality Authority has been involved in several such settlements. In particular, I would like to refer to the settlement in the case *A Mother on behalf of her Son v A Special School and the Department of Education and Science.*[19] This case highlights issues which are of concern in the provision of education for deaf children. In this case the complainant, who was profoundly deaf and attending a special school, claimed that the respondent was failing in its responsibility to provide him with a proper education through Irish Sign Language (ISL). At the time of the hearing, only one of his exam subjects was taught through ISL, a language in which he functioned most effectively and through which he could obtain an education. His remaining subjects were taught through Total Communication, a system in which he experienced great difficulty. When the complainant began school initially he was put into an oral class where the focus was mainly on speech and listening using minimal signs. As a result his language and communication skills were not developing and he experienced serious difficulties communicating in any language. The provision of education to deaf students is a highly complex area and the Equality Authority relied on a number of international and Irish experts in pursuing this claim.

The case came before the Equality Tribunal in June 2008 and was settled on the second day of hearing. A number of the settlement terms relating to the student remain confidential to the parties. The respondents also agreed to two important policy terms which were not confidential. Firstly, the Department of Education and Science agreed to invite tenders for the provision of a post-graduate pathway in ISL. This tender invited all interested third level institutions to submit a tender for the delivery of a programme of continuing professional development designed to provide teachers with the skills necessary for the design, implementation and evaluation of learning and teaching programmes for students learning through the medium of Irish Sign Language.

Pending the commencement of this course, the Department of Education and Science and the school agreed to take such reasonable steps as were required to ensure that teachers of deaf children have access to university level training in ISL for deaf children.

19 Noted in The Equality Authority *Annual Report* (2008) at 30.

The school offered to support and use its best endeavours to ensure that at least three teachers from the school participated in such training each year.

It was considered that such terms would pave the way for providing a better education for deaf children in Ireland. Unfortunately the delivery of the programme of continuing professional development in this area has not been rolled out to date.

Implementation of decisions and indeed of settlements is a significant hurdle for complainants in pursuing claims. In the case of Equality Tribunal decisions it is necessary to issue proceedings in the Circuit Court for enforcement where the respondent has failed to implement decisions. This makes it difficult for complainants who may have been in a position to pursue claims to the Equality Tribunal but experience problems in implementing the decisions. I noted earlier in the paper that a twelve-month time-frame was given for the implementation of a policy review in *A Post Leaving Certificate Student v An Educational Establishment.*[20] However, where orders are made to review or change policy, time limits for the implementation of such reviews or policy changes are frequently not included. Lack of a definite time-frame can pose difficulty for complainants in seeking enforcement of such orders. It is therefore advisable when seeking redress in terms of policy type changes from either the Equality Tribunal or the Circuit Court that the complainant seeks to have a time-frame for such policies to be implemented.

A further hurdle is the fact that Equal Status claims are appealed to the Circuit Court where complainants may face significant legal expenses and the risk of costs. They are also exposed to publicity and cannot retain their anonymity. In contrast, employment equality claims are appealed to the Labour Court.

In conclusion, it is clear that despite the limitations of the legislation there is a growing body of case-law from the Equality Tribunal being developed in this area. The provisions of the Equal Status Acts are only beginning to be examined by the Superior Courts. The case-law has considered what is entailed by less favourable treatment on grounds of disability and whether educational establishments can defend their actions by relying on the exemption contained in s 7(4) of the Acts. The issue of reasonable accommodation has been the focus in a number of disability education cases including what can be entailed by the obligation to provide reasonable accommodation and whether the exemption provided in s 4(4) may apply. The case-law has shown the wide scope of the Equal Status Acts in terms of education cases taken against educational establishments as service providers. In terms of redress the Equality Tribunal has utilised the provisions available under s 27 of the Acts to order specified courses of action including reviews and changes of policy, procedures and practices. As such, these orders can have far-reaching implications for students with disabilities in our education system. There is significant potential for growth in this area as the provisions of the legislation are more fully considered by the Equality Tribunal and the Superior Courts and also in light of the proposed Directive.[21]

20 *A Post Leaving Certificate Student v An Educational Establishment* DEC-S-2009-043 (Equality Tribunal).

21 European Commission, *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, COM (2008) 426.

The proposed Directive would provide additional protections for people taking claims under the Equal Status Acts, particularly in the area of reasonable accommodation. The onus on service providers and educational establishments would be extended to providing reasonable accommodation unless it imposes a disproportionate burden. As such the obligation to provide reasonable accommodation would be a stand alone form of discrimination. It would also appear that the exemptions in our legislation go beyond the proposed Directive and that the Equal Status Acts would need to be amended in this regard. It is concerning however to note that the proposed Directive is without prejudice to the content of teaching and the organisation of the educational system, including the provision of special needs education. It is unfortunate that the proposal coming from the EU seeks to limit the protections available in the area of special needs education.

Tackling Discrimination of Roma/Traveller Children in Public Education: A Case Study of Procedural Novelties: *Actio Popularis* Action in Hungary

Lilla Farkas

—Migration Policy Group

The extent of data available at the European level differs among discrimination grounds and fields. Structural and systemic discrimination against Roma and Traveller children in public education is one of the issues best documented. Arguably, extensive research data are not a result of mere coincidence but the gravity of discrimination and the paramount importance that access to good quality public education has on access to and equal treatment in other fields, and above all, on integration.

The right to education is an empowerment right: it does not only provide citizens with the skills necessary to partake in democratic societies (one needs to read and write to vote), but it also enables them to find a suitable job and make a living. As the UN Economic and Social Council phrased it, education '*is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities*'.[1] The right to education is also a special right in that it is coupled with children's obligation to attend school and, to complement this, by Member States' duty to ensure that racial and ethnic minority children enjoy full respect of their rights to, and in, education, free of discrimination. It is in this context that adequate and preventive remedies are called for against potential violations of the right to education.

Discrimination often surfaces not at the individual level. It is a reflection of long-standing, structural and institutional processes, reflecting deficiencies in the political, social and economic processes. Thus, it may not be prevented or remedied by legal means alone, and it may not be possible to remedy such discrimination at the individual level. Given, however, the dissuasive effect of legal remedies and their ability to redress the wrong done to victims, and given the imperative inherent in societies governed by the rule of law to express individual or group needs through the language of law, efforts are made to improve sanctions as well as enforcement mechanisms.

This article looks at the impact of individual litigation as well as the procedural and substantive legal implications of *actio popularis* claims in the context of public education

1 United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights (CESCR) , General Comment No. 13, *The right to education (Art.13)*, 08/12/99, E/C.12/1999/10.

Enforcement models

McCrudden argues that the enforcement of the Racial Equality Directive[2] is based fundamentally on individual litigation, regardless of several elements which are meant to overcome its limitations, including (i) the prohibition of indirect discrimination; (ii) the provision that organisations with a legitimate interest in ensuring that the provisions under the Directive are complied with may take an action on behalf or in support of a complainant to enforce the obligations; (iii) a reversed burden of proof; and (iv) protection from victimisation.[3] Under Arts 11 and 12 pertaining to social dialogue and dialogue with non-governmental organisations, equality as participation is only faintly present.

Under Art 8 the right to standing is available to non-governmental organisations and trade unions only as long as they act on behalf or in support of actual victims of discrimination. This can be and is usually ensured by giving NGOs the right to represent victims in court and in some countries to act as friends of the court (*amicus curiae*). In some Member States, trades unions have for some time had the right to act on behalf of their members. It is a positive step that, resulting from the transposition of Art 8, in some countries any NGO or trade union employee can now represent victims in court. However, Art 8 does not impose an obligation on Member States to provide for representative, collective or group standing. On the other hand, the Racial Equality Directive does not preclude that *actio popularis* action can be provided under national law. Moreover, bearing in mind the systemic and structural nature of discrimination, it could certainly be argued that providing some form of group standing is necessary.

Group justice at procedural level: *actio popularis* claims

Actio popularis action available to NGOs and specialised bodies has been introduced by national legislation transposing the community anti-discrimination directives in Bulgaria, Hungary and Romania. For instance, Hungarian anti-discrimination law allows *actio popularis* claims to be instituted by NGOs representing the public interest, provided that discrimination is based on a protected ground, that is an essential characteristic of the individual, and that the discrimination affects a larger group of potential victims who cannot be accurately identified.[4]

The following characteristics make *actio popularis* a unique and most attractive tool: there is no need for an individual victim as the case is brought by NGOs demonstrating an interest in rights protection and, instead of injustices suffered by individual victims, it focuses on patterns, trends and scenarios of discrimination. Thus, *actio popularis* is ideal in tackling institutional, structural, or *de facto* discrimination. *In lieu* of an individual client, there is minimal risk of victimisation – in fact no client needs to be identified for the case. The case not only does not revolve around the previous conduct and personal qualities of the victim of discrimination, requiring her to establish or defend her good character

2 Council Directive 2000/43/EC [2000] OJ L180/22 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

3 For more on this see McCrudden, 'National Legal Remedies for Racial Inequality' in Fredman. *Discrimination and Human Rights: The Case of Racism* (Oxford University Press, 2001), 253-259 and 294-297.

4 Act CXXV on equal treatment and the promotion of equal opportunities (Act No. 125 of 2003), Art 20.

but it is virtually impossible to make arguments that remain at the individual/micro level, instead of at a group/macro level.

Perennial costs, such as maintaining contact with the client or indeed maintaining a client service for case selection can be saved. Moreover, considering the number of potential clients and the extensive fact-finding that a case relying on individual victims entails, huge savings can be made first during the preparatory phase, and later on during trial (bearing in mind the costs of travel, communications, victim support and legal representation). Along with these financial savings, an *actio popularis* case is capable of showing the gravity and extent of discrimination that is usually at issue in such claims. Given that the evidence used in *actio popularis* cases is based primarily on documents obtained from the defendants and pertaining to their internal decision-making processes, or on statistics collected prior to or during the trial phase, virtually no witnesses need to be heard, with the exception of forensic experts, unless evidence is based on situation testing.

Actio popularis claims can be orchestrated or designed in any fashion that NGOs choose: they can be limited or broadened, or in fact focused so as to steer public discourse away from clichéd and stereotypical arguments. Furthermore, *actio popularis* claims provide excellent opportunities for advocacy, awareness raising and lobbying. No energy and funding needs to be allocated to find and support a victim who is ready and willing to risk her emotional well-being by appearing in the media and reliving discrimination during every public testimony she makes – be that before MPs or local decision makers. Lastly, such claims minimise the risk of miscommunication: instead of an emotionally involved victim who is not used to dealing with the media, the case can be outlined by the most suitable NGO activist.

There are several EU Member States that allow collective actions under the Revised European Social Charter (ESC)[5] – including Ireland. Arguments based on the Racial Equality Directive can be raised in proceedings under the ESC as well.[6]

Individual remedies for segregation in public education: European Court of Human Rights case law

A*ctio popularis* action is not allowed in Strasbourg, whose enforcement mechanism is based on the individual justice model. The limitations of this model will be discussed below.

During the last three years, three major final judgments have been rendered by the European Court of Human Rights (the EctHR) in relation to the segregation of Roma children in public education. *DH and others v Czech Republic*[7] dealt with segregation in remedial special schools resulting from the misdiagnosis of Roma children as mentally disabled. *Sampanis and others v Greece*[8] focused on segregation in a separate, lower

5 European Social Charter (Revised), Strasbourg, 3.V.1996.

6 For details of proceedings and pending collective complaints see *http://www.coe.int/T/DGHL/Monitoring/SocialCharter/*.

7 *DH and others v The Czech Republic* [2007] ECHR 922.

8 *Sampanis and others v Greece* (ECtHR, 5 June 2008).

quality school building, whereas *Orsus and Others v Croatia*[9] examined segregation in separate classes (allegedly in order to address language deficiencies and minority language needs). In all three final judgments the Court has found ethnicity-based (indirect) discrimination against Roma children in their enjoyment of the right to public education. Instead of dwelling on the theoretical mess and the de facto incompatibility with the Racial Equality Directive of these judgments, let us focus on the shortcomings of the individual justice model that these rulings demonstrate.

In all three cases the Court limited itself to making orders for the payment of just satisfaction. It did not examine what measures ought to have been taken in order to cease or alleviate discrimination in these cases, but more importantly it failed to identify the manifold failures of respondent governments that were obvious from the facts. Certainly, Member States enjoy a certain margin of freedom in designing and maintaining their public education systems. However, inasmuch as the Court noted the reports pertaining to the structural limitations and shortcomings of these systems in relation to Roma, it ought also to have indicated desirable steps to be taken – if for no other reason than in order to avoid repeat cases.

In cases of structural discrimination, such as that revealed in *DH*, pursuant to Art 15 of the Racial Equality Directive (proportionate, effective and dissuasive remedies for race and ethnic discrimination) domestic courts and/or the ECJ ought to impose positive action as the only effective, proportionate and dissuasive remedy. This is the only way to end segregation. Otherwise there is a danger that, as in *DH*, culturally biased tests and diagnostic protocols remain the same and misdiagnosis continues unabashed. More importantly, if segregation ought to end for intellectually sound Roma children who have been misdiagnosed, that will entail their referral to normal classes/schools. Surely, this cannot take place without providing extra education to bridge the gap between remedial special education and mainstream education. If positive action measures are not taken, how is segregation terminated? In failing to make the connection between the finding of discrimination, the need to end it and therefore the need to use all possible means (positive action measures) to end it, the ECtHR failed to provide to the applicants and tens of thousands of Romani children across Europe effective judicial protection. And let us not forget these deficiencies if and when respondent governments introduce certain measures to alleviate some of the wrong done to Roma children, not as a result of the judgments but rather as a result of public pressure generated during the course of lengthy domestic and regional litigation by the European Roma Rights Centre representing the victims. There is certainly room for the Court to stretch its muscles and follow the example of the European Court of Justice (the ECJ). In indirect sex discrimination cases the ECJ reversed the burden of proof to ensure effective judicial protection. A similarly bold step needs to be advocated in relation to Roma and mandatory positive action in the ECtHR context.[10]

The ECtHR's perception of *de facto* discrimination resulting from indirectly discriminatory legislation and the tacit understanding supported by relevant Council of Europe treaties and mechanisms that minority rights are collective rights virtually transformed *DH,* from an application brought by 18 individual applicants, and *Sampanis*, from an application brought by 11 individual applicants, into *actio popularis* or collective complaints; hence the finding

9 *Orsus and others v Croatia* [2010] ECHR 337.

10 See, for example, Case C-127/92, *Enderby v Frenchay Health Authority and the Secretary of State for Health* [1993] ECR I-5535.

that there was no need to examine the applicants' individual cases.[11] It is a shame therefore that the ECtHR did not accord a remedy suitable for structural discrimination or a collective complaint. Notably, however in *Orsus*[12] the ECtHR did not follow this type of reasoning and spelled out in meticulous detail the individual circumstances of the applicants, what the facts were and how they amounted to discrimination.[13]

It is also noteworthy, that similar to the Czech Republic's approach in *DH*[14], in *Orsus* the respondent Croatia had during the proceedings in Strasbourg introduced special – if somewhat token – measures to remedy the harm done to the applicant Roma children.[15] Whether the regional 'naming and shaming' did the trick can only be speculated. However, that has been proven to be the case in the Hungarian context.

Actio popularis based strategic litigation in Hungary

What works in this field in Hungary? Is it court-ordered structural remedies for structural discrimination, the threat of naming and shaming or the need for additional/EU funds for local governments to maintain their schools? These issues are explored through judgments and decisions rendered pursuant to claims initiated by the Budapest based Chance for Children Foundation (CFCF).[16]

Integration plans: extra finances or eligibility criteria for EU and international funds?

Segregation under Hungarian anti-discrimination law is illegal, but there is no public authority enforcing this prohibition in public education – especially in respect of local governments that maintain 90% of primary schools in the country. This is partly on account of a potential misinterpretation of the local government autonomy enshrined in the Constitution. A more realistic reason behind the lack of enforcement may easily be the lack of public funds available for these purposes.

11 In *DH and others v The Czech Republic* [2007] ECHR 922, the Court said (at para 209): '…*since it has been established that the relevant legislation as applied in practice at the material time had a disproportionately prejudicial effect on the Roma community, the Court considers that the applicants as members of that community necessarily suffered the same discriminatory treatment. Accordingly, it does not need to examine their individual cases.*' In *Sampanis and others v Greece* (ECtHR, 5 June 2008), the reported facts do not disclose details in relation to individual children but to the Roma class. Roma children are referred to as members of a disadvantaged group.

12 *Orsus and others v Croatia* [2010] ECHR 337.

13 *Orsus and others v Croatia* [2010] ECHR 337, at, paras 20-51.

14 *DH and others v The Czech Republic* [2007] ECHR 922.

15 As a result of the claim in *DH and others v The Czech Republic* [2007] ECHR 922, the Czech Government reformed its public education law to shut down the special schools against which complaints had been made. These efforts were referred to by the ECtHR in its decision, at para 208. However, the European Roma Rights Centre reported that the use of the impugned 'special schools' continued, though a different name was used for the schools and the system. Discrimination had continued unabashed. See the ERRC submissions to the Committee of Ministers on the lack of proper implementation, http://www.errc.org/cms/upload/file/third-communication-to-the-committee-of-ministers-on-judgment-implementation.pdf. The Croatian Government, on the other hand, provided the possibility of further education for Roma children who failed to complete primary education by the age of fifteen. The ECtHR referrred to this scheme in its decision in *Orsus and others v Croatia* [2010] ECHR 337 at para 183.

16 For details see www.cfcf.hu.

Against this backdrop the Ministry of Education has introduced innovative financial incentives to facilitate integration in education. The significance of financial incentives cannot be underestimated, as bigger cities that can afford to do so are reported to basically co-fund primary schools, adding as much as 40% to central budgetary funding. Smaller towns and villages in general cannot provide co-funding, which adversely impacts on Roma and socially underprivileged (poor) children, but that is a topic for another discussion.

Between 2002 and 2010, financial incentives, provided for voluntary integration as part of a set of Ministerial recommendations and timetables, have worked in many towns and villages where the proportion of Roma children in schools has been below 40%. However, the implementation of integration has not been centrally monitored.

A further financial incentive was introduced in 2006. According to Art 105 of the Public Education Act, towns and villages are under the duty to review their schools and make reforms ensuring that the distribution of socially underprivileged children – the majority being Roma (NB: ethnicity is sensitive data) should be as equal as possible among different catchment areas/schools.[17] The exercise does not require consultation with local Roma representatives or with any other NGOs, including those representing those in extreme poverty. Moreover, even equal opportunities action plans that miss a startlingly high level of data on the number of socially underprivileged children qualify to fit the criteria under the Public Education Act.

Enforcing anti-discrimination law: an NGO or State obligation?

Notwithstanding the fact that domestic law expressly prohibits segregation and allows for a very narrow justification defence[18] the Hungarian State has been as reluctant to enforce this prohibition as it has been to create positive action measures to end it. This inspired CFCF to launch its social experiment to demonstrate the ways in which the prohibition of segregation could be enforced in practice and through advocacy, coupled with litigation to 'impose an obligation' on the State to enforce it.

1. The Miskolc desegregation cases I and II

In 2005, CFCF initiated its first *actio popularis* action against Miskolc, a town in the North-East of Hungary, where Roma represent approximately 17% of the population and live in four distinct settlements. The town reorganised its primary schools, for financial and administrative purposes, reducing the number of school directors. This process also led to the merger of so called Gypsy schools (i.e. schools educating a majority Roma student body since the mid-1990s) with elite schools without however providing Roma students with the opportunity to enroll in the better quality schools. CFCF lost in the court of first instance, where the Court established that Miskolc could not be held liable for violating the right to equal treatment as it had not acted intentionally.

The case attracted considerable public attention and the Parliamentary Commissioner for national and ethnic minority rights submitted an *amicus curiae* brief to the appeal court detailing, inter alia, that intention was not a constitutive element of discrimination under European law, and that under international law segregation could only be justified by informed parental consent - in order for instance to provide education in a minority language.[19] One cannot underestimate the leverage this amicus brief may have had on CFCF's success

17 The Public Education Act 1993 (Act No. 79 of 1993) as amended.

18 Act CXXV on equal treatment and the promotion of equal opportunities (Act No. 125 of 2003) Art 10(2).

19 Available at http://www.kisebbsegiombudsman.hu/hir-278-nemzeti-es-etnikai-kisebbsegi-jogok.html.

on appeal in establishing that the local government's *failure to end spatial segregation* in the course of its action directed at reorganising local public education amounted to segregation.[20] Regrettably, however, the appeals court refused to order Miskolc to end segregation as it agreed with the town that it had already done so.

Notably, this ruling is in compliance with the relevant general recommendation of the Committee on the Elimination of All Forms of Racial Discrimination[21] which stresses that although '*racial segregation can also arise without any initiative or direct involvement by the public authorities*', States ought to *work for the eradication of any negative consequences that ensue*'.

Given that despite the 2006 appeal judgment Miskolc in fact continued maintaining its only remaining Gypsy school, and that negotiations and further administrative action before the Equal Treatment Authority was unsuccessful, in 2007 CFCF took the local government to court again. It sought a judgment establishing that the town was maintaining segregation despite the 2006 judgment and an order to terminate this illegal practice. In spring 2010 the local councilors finally passed a resolution ordering the closure of the Gypsy school. The case was discontinued at trial phase.

The *Nyíregyháza* and *Györ* desegregation cases

Action against Nyíregyháza in 2007 resulted in negotiations and the local government's decision to close down the Gypsy school and to bus children to six other schools in town. CFCF subsequently dropped its claim in trial phase.[22]

Györ decided not to close down its school but to transform it instead. Thus, although the case is still in the trial phase, the local government prohibited the Gypsy school from enrolling children into grade 1 for the academic year 2010/2011. The case is pending in first instance.[23]

The *Hajdúhadház* desegregation case

Until the early 1990s education in the town was integrated. Following its own initiative in 1994 the local government maintained two schools, both of which operated in three school buildings. The main buildings taught an overwhelmingly majority Hungarian student body, whereas Roma were educated in the more run down smaller school buildings. Hajdúhadház was regarded among the domestic human rights organisations for over a decade as a showcase of local government racism, unyielding to the many initiatives and financial incentives offered to it.

This case centred on the evidence produced by a court-appointed forensic education expert who collected school-level data in collaboration with members of the local Roma Minority Self-Government. Data was based on membership of the local Roma minority community as known to the Roma Minority Self-Government, with perception of

20 Borsod-Abaúj-Zemplén County Court judgment No, 13. P.21. 660/2005/16. and Debrecen Appeals Court judgment No, 13.P.21.660/2005.

21 Committee on the Elimination of All Forms of Racial Discrimination (CERD), General Recommendation No. 19: *Racial segregation and apartheid (Art. 3),* 18/08/95, point 4. CERD also condemns discrimination against Roma children in public education in its General Recommendation No. 27: *Discrimination against Roma,* 16/08/2000.

22 Szabolcs-Szatmár-Bereg County Court judgment No. 9.P.22.020/2006.

23 Györ-Moson-Sopron County Court, No.P.20.950/2008.

membership, and place of residence as proxies for the ethnic origin of Romani children. The trial court found that the two schools and the local government segregated Romani children in buildings other than the main school buildings, and directly discriminated them by providing inferior physical conditions. The court ordered the local government to publish an apology through the Hungarian Press Agency and ordered the schools to end segregation by 1 September 2007. It ordered the local government, which maintained the two schools, to refrain from interference with desegregation.[24]

CFCF hailed this judgment for its clarity and for bravely embracing procedural novelties, despite fierce attacks by the defendants. The defendants collected signatures from Roma parents to support the school and to show that CFCF could have no institutional standing as the number of victims could not be identified. However, the trial court agreed with CFCF that (i) it had fulfilled the initial procedural criteria of standing; (ii) victims of potential future violations could not under any circumstances be identified, and (iii) it was impracticable to establish the ethnic identity of each parent involved in the petition necessary to refuse standing. Moreover, the trial court found a way in which reliable ethnic data could be generated without violating data protection rules. The indisputable significance of this judgment is that since 2007, when it was handed down, it has served as a model for other trial courts as well as for the Equal Treatment Authority when dealing with segregation and lower level education (direct discrimination).

On appeal, the Debrecen Appeals Court upheld the finding of direct discrimination and ordered an end to it, but quashed the remaining part of the first instance judgment.[25] The plaintiff Chance for Children Foundation, was granted judicial review before the Supreme Court (SC). CFCF sought the first instance judgment to be upheld in its entirety and requested a referral to the ECJ asking the following questions:

1. Does spatial segregation in the instant case amount to direct discrimination contrary to Art 2.2(a) of the Racial Equality Directive (direct discrimination)?

2. If the answer to question 1 is yes, can the respondents justify such direct discrimination under provisions other than Art 5 of the Racial Equality Directive (positive action)?

3. If the answer to question 2 is no, then can the respondents justify their conduct on the basis of Romani ethnic minority education or small classes, or special education as provided in the respondent schools?

Given that facts in the case were based on ethnic statistics compiled during litigation but otherwise not expressly permitted to be collected under domestic data protection legislation, it was also hoped that, through guidance to domestic courts, the ECJ would facilitate the use of such statistics and flesh out the procedural framework for requiring such evidence from respondents and assessing it.

The SC avoided the referral, but more importantly for our topic, it did not uphold the first instance judgment in its entirety. Significantly, the SC held that a date by which segregation should be ended could not be specified.[26] Clearly, this poses serious challenges to enforcement.

24 Hajdú-Bihar County Court judgment No. 6.P.20.341/2006/50.

25 Debrecen Appeals Court judgment No. Pf.I.20.361/2007.

26 Supreme Court judgment No. Pfv.IV.20/936/2008/4.

However, the local government maintaining the schools had by that time closed down one of the three buildings and integrated Roma children into mainstream classes from this and another building. CFCF has raised private funds to implement an integration program in the remaining school buildings in collaboration with the local Roma Minority Self-Government.

The *Kaposvár* desegregation case

CFCF took the town of Kaposvár to court because, out of its 12 schools with an average student body of 400, it maintained a Gypsy school of 160 children, teaching two out of the three major groups of Roma (Lovari, Beash and Romungro) living in the nearby settlement. The trial court established that the Roma children in this Gypsy school were segregated and that they received education of an inferior quality. It ordered the town to refrain from the violation but rejected CFCF's claim seeking an order to eliminate segregation by shutting the Gypsy school down. The court argued that segregation could be eliminated in many different ways, but that all these solutions would require the local councillors' decision – therefore an order to put an end to segregation could not be enforced by the courts.[27]

In its appeal to the Pécs Appeals Court CFCF primarily argued that, in practice, an order to end segregation could be enforced by imposing fines on the town as long as it failed to act in accordance with such a court order and by requesting the competent Office of Public Administration to take action against the councillors for failing to act. Secondly, it pointed out that local government autonomy (including decision making by councillors in relation to local education and property) safeguarded by the Constitution was a right enjoyed by the town vis à vis the state and not vis à vis the citizens. Thus, local government autonomy could be curtailed by the competing constitutional right of such citizens to equal treatment stemming from the right to human dignity. Thirdly, CFCF stressed that the town was acting in a segregationist manner through its omissions and inaction failing to integrate Roma children from the Gypsy school. Thus, if an order to refrain from segregation under these conditions was imposed on the town, in essence it could not be enforced in any other way than requiring it to take action to integrate the children. Whichever way one looks at it, refraining from segregation is tantamount to taking action in order to eliminate segregation.

Notably, this is exactly the kind of argument that was used in the US desegregation litigation from the early days on. Needless to say, US courts up until the 1990s had been far more active and forthcoming with ordering desegregation – going as far as ordering school districts to install bussing, remedial reading classes and to ban legislators from intervening with allocation of private funds to further desegregation.

The Pécs Appeals Court amended the trial court's judgment in relation to segregation but quashed as unsubstantiated its part pertaining to the direct discrimination claim (physical conditions and quality of education). In ordering the town to end segregation in its Gypsy school the Appeals Court admitted CFCF's arguments in part, but in refraining from making a detailed order in relation to the course of action that the local government needed to take to end segregation, it stressed the finding that given the public law nature of this case, such a claim could not be satisfied by a civil court.[28]

27 Somogy County Court judgment No. 24.P.21.443/2008/35.

28 Pécs Appeals Court judgment No. Pf.I.20.061/2010/7.

This finding, if upheld by the Supreme Court, sets the limits of *actio popularis* action in civil courts and significantly, supports CFCF's case against the Ministry of Education – given that, in public law, only the Ministry is entitled to initiate or take action against local governments.

State obligation to end segregation in the framework of school inspection: lawsuit against the Ministry of Education

Given the lack of enforcement of anti-discrimination provisions – and more notably the prohibition of segregation - by the Ministry, CFCF instituted a civil action, seeking (i) a finding that the Ministry's failure to enforce the law contributes in a great part to segregation; and (ii) an order requiring the Ministry to act. The lawsuit has been allowed, which is a victory in itself as public authorities and bodies other than local governments have never before been held liable by civil courts for their inactions in public law.

CFCF is using this claim to lobby for the re-establishment of school inspection in general and the strengthening of oversight in relation to ethnic discrimination in particular. The case has already attracted huge media coverage and with the recent change in government more prone to centralisation in public education it remains to be seen whether it ought to be fought through all judicial stages. The case is pending before the Metropolitan City Court.[29]

Individual actions for compensation

Following the judgment in *Miskolc desegregation case No I (Miskolc I)*, CFCF sought to 'put a price' on segregation. It identified five Roma children previously educated in the schools found to be segregated in 2006 and brave enough to take on the municipality in a civil action for damages arising from their segregated education. Morley Allen and Overy represented the children *pro bono* throughout the proceedings that, following defeat at trial and appeal phase, ended with a victory in the Supreme Court (SC) in June 2010.[30] Referring back to the final judgment handed down in *Miskolc I* the SC found that regardless of the children's individual fate after they had left primary school, their segregation in and of itself amounted to less favourable treatment, which translated into damages in civil law.

The SC therefore ordered Miskolc to pay €350 plus default interest to each child. This is the first ever ruling handed down by a national court in Europe in which Roma children are provided compensation for being ethnically segregated during their primary school education. Although the ECtHR has recently ruled in favour of Roma applicants in *DH*,[31] *Sampanis*[32] and *Orsus*[33], it has so far failed to clearly spell out that compensation was due to these children because of ethnic segregation.

CFCF also took over representation in misdiagnosis cases initiated in Hungary in the wake of the *DH*[34] litigation. Courts in all cases recognised the procedural shortcomings of diagnosis procedures (failure to ensure parents' informed consent and participation in the process, failure

29 Fővárosi Bíróság case No. 19.P.24.588/2009.

30 Borsod-Abaúj-Zamplén County Court judgment No. 13.P.20.580/2008, Debrecen Appeals Court judgment No. Pf.I.20.125/2009/4, Supreme Court judgment No. Pfv.IV.20.510/2010/3.

31 *DH and others v The Czech Republic* [2007] ECHR 922.

32 *Sampanis and others v Greece,* ECtHR, 5 June 2008.

33 *Orsus and others v Croatia* [2010] ECHR 337.

34 *DH and others v The Czech Republic* [2007] ECHR 922.

to ensure their right to appeal), but only in the case tried in Nyíregyháza was it found that such failures caused actual damages and that the two plaintiffs were not provided adequate education as a result.[35] The trial court ordered defendants to pay €3,500 to each of the two Roma children. This judgment was quashed on appeal, whereby the Debrecen Appeals Court described, but failed to identify, indirect ethnicity-based discrimination.[36] Curiously, the questions asked during the appeal hearing and the arguments advanced in the written judgment show great similarities with the DH I judgment[37] and the questions asked by the dissenting judges during the hearing before the Grand Chamber.

On review the Supreme Court found that the procedural shortcomings amounted to damages caused by the public authorities, but that the substantive questions, i.e. (i) whether the tests had been culturally biased; and (ii) whether the definition of special educational needs (including mild intellectual disability) at the time had been too broad fell either to the Constitutional Court or to the ECtHR to answer.[38] The Supreme Court terminated the proceedings against the remedial school – arguing that in lieu of a finding of a violation of law relating to the substantive issues it could not be held liable. It ordered the county government that maintains the third defendant to pay €1,050 to each plaintiff. Given that the third defendant - the remedial school that houses the Expert Panel diagnosing the children - missed the deadline for appeal, the plaintiffs received the full amount of compensation that had been ordered by the lower court. The plaintiffs are taking their case to the ECtHR to secure just compensation through a finding that they had been discriminated against through being misdiagnosed as intellectually disabled. They were both re-diagnosed at trial phase and the older child was found to possess normal intellectual abilities despite eight years spent in a remedial school.

The central role that courts have played in Hungary in providing protection to Roma children from discrimination cannot but be praised. The attitude of the Supreme Court bench that has so far reviewed all cases initiated by CFCF has been a decisive factor. One wonders whether the same jurisprudence could have been built at the national level, had this bench had a different view on the need for desegregation. Clearly, if victories could not have been secured at the domestic level, not only would litigation have taken two to five years longer (depending on the regional forum), but generating an attitudinal change could have also proved far more challenging.

35 Szabolcs-Szatmár-Bereg County Court judgment No.3.P.20.035/2008/20.

36 Debrecen Appeals Court judgment No. Pf.II.20.509/2009/10.

37 *DH and others v The Czech Republic* [2007] ECHR 922.

38 Supreme Court judgment not yet available in writing.

Conclusion

The EctHR's recent Roma education judgments[39] aptly demonstrate the shortcomings of individual litigation – given especially that the implementation of judgments by the Committee of Ministers is the 'weakest link' in the Convention mechanism, being predominantly political in nature. Thus, a considerable amount of time and money needs to be invested into this system to generate case-law and to distill certain basic principles regarding state obligations. The Court's relevant case-law has so far been somewhat confused. It has failed to find ethnicity based segregation in clear cut cases, but established the following principles:

(i) Romani parents must be informed adequately about the education of their children (informed consent);

(ii) no consent can be given to ethnic discrimination;

(iii) the special needs of Roma children in public education (including minority language) must be reasonably accommodated; and

(iv) indirect discrimination in this field is also prohibited and can be established via ethnic statistics.

The ECtHR has so far been unwilling to provide remedies against structural discrimination even when complaints in the Roma education cases have been brought before it by sizeable groups of individual Roma applicants. Structural changes have been generated not by the Court or its judgments directly, but by the leverage of litigation before the EctHR as well as by the regional advocacy of the clients' representative, the European Roma Rights Centre and its NGO coalition partners.

In contrast, in Hungary *actio popularis* claims have been capable of more adequately addressing structural discrimination in civil law, and securing structural remedies. Significantly, *actio popularis* standing also has implications for sanctions: if a case is not about the violation of the rights of an individual victim, then remedies ought also to tackle 'system failures'. And this is exactly the issue that Hungarian desegregation litigation has revolved around. As the final judgment brought in the *Kaposvár* desegregation case indicates, domestic civil courts have the power to impose an order to end segregation, but can a deadline and the way in which integration ought to take place be prescribed and enforced?

39 Supreme Court judgment No. Pfv.IV.20/936/2008/4 (the *Hajdúhadház* desegregation case); and Somogy County Court judgment No. 24.P.21.443/2008/35 (the *Kaposvár* desegregation case).

Faith in Equality: The Making of the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006

Tony McGleenan

—Barrister of the Inn of Court Northern Ireland

Northern Ireland has had an 'equality agenda' for longer than most jurisdictions in Europe. One consequence has been a proliferation of anti-discrimination norms. These include supra-national obligations such as those enshrined in Art 14 of the European Convention on Human Rights and the Employment Equality Directive.[1] The legislature has also enacted a suite of equality statutes to address discrimination on grounds of gender, race, religion and political belief, age and disability. In addition, political and constitutional considerations have given rise to the embedding of targeted equality duties in the Northern Ireland Act 1998 where s 75 imposes an obligation on public authorities to have 'due regard' to the need to promote equality of opportunity and s 24 prohibits any Department of Government from making sub-ordinate legislation which discriminates on grounds of religious belief or political opinion.

Against this background, the UK Government enacted legislative provisions to address the issue of discrimination on grounds of sexual orientation in 2006-7. This was a United Kingdom-wide initiative but a different legislative vehicle was used in Northern Ireland from that used in England and Wales. This had the unintended result that the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 (the Sexual Orientation Regulations) were made, and came into force, in advance of broadly equivalent provisions in England and Wales.

The promulgation of the Sexual Orientation Regulations gave rise to an almost immediate legal challenge fuelled by the apparently competing concepts of equality and freedom of religion in the *Christian Institute* case.[2]

The Sexual Orientation Regulations

Section 82 of the Equality Act 2006 made provision for the Office of the First Minister and Deputy First Minister (OFMDFM) to make secondary legislation or regulations addressing discrimination or harassment on grounds of sexual orientation. The power in the 2006 Act permitted OFMDFM to make regulations similar in form to the Race Relations (Northern Ireland) Order 1997 (itself an analogue of the Race Relations Act 1976) in relation to acts of discrimination occurring otherwise than in the field of employment.

1 Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation , OJ L303/16.

2 *Re The Christian Institute* [2007] NIQB 66.

The Sexual Orientation Regulations were duly made on 8 November 2006 and came into force on 1 January 2007. In brief compass, the core elements of the regulations are:

(i) Regulation 3 provides a definition of discrimination on grounds of sexual orientation that extends to direct discrimination, indirect discrimination and harassment;

(ii) Regulation 5 extended the prohibition of discrimination and harassment on grounds of sexual orientation to the provision of goods, facilities and services to the public or a section of the public;

(iii) Regulation 6 extended the prohibition to the disposal or management of premises;

(iv) Regulations 9, 10 and 11 prohibit such discrimination in certain areas of education. Regulation 17 did the same with respect to associations and private members clubs;

(v) Regulation 36 provides a mechanism whereby claims arising out of the foregoing provisions could be brought in the County Court which would, for these purposes, enjoy all the powers of the High Court;

Regulation 16 provides for exceptions for religious organisations such that is not unlawful for them to restrict membership, participation in activities, provision, use or disposal of premises on grounds of sexual orientation. Importantly, these exceptions did not extend to the provision of goods, facilities and services.

The Regulations were challenged by way of judicial review by a composite group of applicants composed of nominees of seven organisations.[3] These were the Christian Institute, the Reformed Presbyterian Church in Ireland, the Congregational Union in Ireland, the Evangelical Presbyterian Church of Ireland, the Association of Baptist Churches in Ireland, the Fellowship of Independent Methodist Churches and Christian Camping International (UK) Ltd.

The legal challenge contained two core elements. The first was the contention that a breach of public law principle had occurred because there had been inadequate consultation prior to the making of the Regulations. The second was that the Regulations were inconsistent with the applicants' rights under Arts 9, 10, 14 and/or 17 of the European Convention on Human Rights as patriated into domestic law by the Human Rights Act 1998.

The challenge was resisted by the OFMDFM supported, broadly, by the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland and the Coalition on Sexual Orientation.

The Consultation Challenge

The applicants' challenge on the consultation point must be viewed in the political context of the time. Although provision had been made for the devolution of powers to the Northern Ireland Assembly by the Northern Ireland Act 1998, the Assembly was in a state of suspension at the time of the promulgation of the Regulations. Accordingly, the power to enact the Regulations reverted to the Secretary of State and the Northern Ireland Office, a Westminster department. The making of the Regulations was not, therefore, subject to scrutiny by the Northern Ireland Assembly. Indeed, the timetable for consultation on the Regulations was

3 *Re The Christian Institute* [2007] NIQB 66.

compressed (said the applicants) in order to permit the making of the Regulations prior to the devolution of powers back to the Northern Ireland Assembly on 24 November 2006. Since there was no political consensus on the making of these Regulations among the political parties it was considered most unlikely that they would pass through the Assembly legislative process prior to the resumption of devolution.

A particular area of controversy related to the provisions on 'harassment' on grounds of sexual orientation. In the original proposals consulted upon, the UK Government had indicated that it was minded not to legislate on the issue of harassment because of the complexity of the arguments. Indeed, a House of Lords and House of Commons Joint Committee on Human

Rights report had recommended against the inclusion of a harassment provision. In its sixth report in 2006-7 the Committee stated at paragraph 58 that:

> *The width and vagueness of the definition of harassment in the Northern Ireland Regulations give rise to a risk of incompatibility with both freedom of speech in Article 10 ECHR and freedom of thought conscience and religion in Article 9. The potential interference with freedom of speech arises because people may feel inhibited from saying something if they fear that a person may perceive it is a violation of their dignity or creating an offensive environment. The potential interference with freedom of religion and belief arises because explanations of sincerely held doctrinal beliefs might be perceived as violating a person's dignity or creating an offensive environment…*[4]

However, notwithstanding these reservations, the consultation exercise produced a strong response in favour of the inclusion of harassment provisions (although smaller than the response in opposition) and they were duly included in the draft Regulations.

Thus, Reg 5(2) made it unlawful for a person concerned with the provision of goods, facilities and services to subject a person seeking those services to harassment. Regulation 6(4) made similar provision in relation to the disposal of premises. Regulation 9(2) addressed harassment in access to educational establishments.

The applicants posited a series of scenarios to illustrate their objections to these provisions. It was argued that:

(i) a presentation of Catholic doctrine in schools, youth clubs, universities and parishes on sexual orientation, marriage and the family could be subject to claims that it breached the prohibition on harassment;

(ii) the management of a University College who sought to uphold a religious ethos by prohibiting the promotion of an event by a gay and lesbian students' association could be in breach of the harassment prohibition;

(iii) the refusal to provide marriage counseling services to a same-sex couple by a diocesan counseling service could be deemed harassment.

4 House of Lords and House of Commons, Joint Committee on Human Rights, *Legislative Scrutiny: Sexual Orientation Regulations, Sixth Report of Session 2006-07* (The Stationery Office Limited, 2007)

The harassment provision in the Regulations was in the following terms:

> *3(3) A person ("A") subjects another person ("B") to harassment in any circumstances relevant for the purposes of any provision referred to in these Regulations where, on the ground of sexual orientation, A engages in unwanted conduct which has the purpose or effect of –*
>
> *(a) violating B's dignity; or*
>
> *(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
>
> *(4) Conduct shall be regarded as having the effect specified in sub-paragraphs (a) and (b)… only if, having regard to all the circumstances including, in particular, the perception of B, it should reasonably be considered as having that effect.*

The harassment provision in the Regulations is framed in identical terms in the Sex Discrimination (Northern Ireland) Order 1976 (Art 6A), the Fair Employment and Treatment (Northern Ireland) Order 1998 (Art 3A) and the Race Relations (Northern Ireland) Order 1997 (Art 4A).

Importantly, the harassment provisions in all of these statutes is virtually identical to the harassment provision contained in the Employment Equality Directive.[5] That arises because these statutes were all amended in 2003 on foot of the Directive. It established a general framework for equal treatment. Article 2.3 of the Directive provided that:

> *Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.*

It is notable that the scope of the harassment provision in the domestic statutes is *wider* that that in the Directive. The use of the conjunctive 'and' along with the reference to the perception of the alleged victim are additional components which do not feature in the Directive.

In analysing this distinction, Weatherup J noted that the more expansive harassment provision in the other discrimination statutes, in force since 2003, did not appear to have given rise to particular difficulties notwithstanding the necessary interference with the freedom of speech enshrined in Art 10 of the European Convention on Human Rights. The learned judge was concerned that different considerations might apply in the context of harassment in the Sexual Orientation Regulations. He stated:

> *…in outlawing harassment on the ground of sexual orientation the competing right may not only be the right to freedom of speech but may in addition be the right to manifest a religious belief. Where the exercise of the right to freedom of speech also involves the manifestation of a religious belief there will be an added basis on which to seek to justify the action. The provides an added consideration in the case of sexual orientation that may not apply in relation to harassment on the grounds of gender, race or religious belief. This*

5 Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation , OJ L303/16.

> *was a difference accepted by the respondent. It is not clear that any consideration was given to this difference when deciding to introduce the harassment provisions into the Regulations.*[6]

In light of this finding the Court ruled that the harassment provisions in the Regulations be quashed.

The Convention Challenge

The Applicant also sought to condemn the Regulations for breach of a number of rights enshrined in the European Convention on Human Rights. Article 9(1) of the Convention provides:

> *Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.*

Article 10 provides:

> *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and receive and impart information and ideas without interference by public authority and regardless of frontiers…*

Weatherup J held that the orthodox Christian belief that the practice of homosexuality is sinful was a long established part of the belief system of one of the world's major religions. He therefore found that Art 9 of the Convention was engaged. He also found that the right to freedom of expression in Art 10 was engaged. The Court considered that the right to freedom of expression extended not only to ideas with which an audience would agree but also to ideas that would shock, offend or disturb the audience.

Within this paradigm of Convention rights the applicants argued that the Regulations privileged the protection afforded to sexual orientation over the protection afforded to the expression of religious belief. However, the Court dealt with this issue by reflecting upon the fact that any proper analysis of the balance to be struck between an alleged interference with the applicants rights and the justification for such interference was necessarily a fact specific question that would require examination against the back-drop of a specific case. The Judge noted that there was potential in the Regulations for some provisions to operate in a manner that was not compatible with Convention rights. Weatherup J stated:

> *I am satisfied that the introduction of the Regulations will result in instances of material interference, that is interference to an extent which is significant in practice, with the applicant's freedom to manifest the religious belief in question. However, as indicated above, it is not practicable and it is not proposed to attempt to set out all the circumstances in which this will arise.*[7]

6 *Re The Christian Institute* [2007] NIQB 66, at para 42.

7 *Re The Christian Institute* [2007] NIQB 66, at para 69.

The Court also rejected the applicants' ancillary arguments that the Regulations would require persons of orthodox religious belief to promote ideas to which they had religious objection. The example relied upon by the applicants was that of the Christian printer asked to print material on behalf of a gay and lesbian group. Weatherup J addressed this issue by reference to the Canadian decision in *Ontario Human Rights Commission v Brockie*.[8] The Ontario Superior Court of Justice had ruled that there was a legitimate, pressing and substantial aim in prohibiting discrimination on grounds of sexual orientation. The Court further found that there was a rational connection between the prohibition on discrimination and the objective of removing demeaning discrimination. The Court considered that the provision of commercial services to the public was at the very periphery of that which was protected by the concept of freedom of religion. The issue of the proportionality of any restriction required consideration of the content of the speech in question. The Court considered that asking a printer with orthodox Christian beliefs to produce material proselytizing and promoting a gay and lesbian lifestyle was likely to be in direct conflict with his religious beliefs.

Weatherup J adopted this formulation and held that a viable approach to the resolution of the various practical scenarios which exercised the applicants was to consider whether the believer was being required to undertake action that promotes a concept which the essence of their belief teaches to be wrong.[9]

The ruling in *Re the Christian Institute* resulted in the quashing of a key feature of the Regulations, namely, the prohibition on harassment on grounds of sexual orientation. Remarkably, however, the judgment was regarded as a victory by virtually all sides. The applicants had secured a litigation victory, an element of the Regulations had been struck down and they secured an order for costs. The State managed to uphold the Regulations in *toto* bar a single provision which had not been included in the original draft and which had been added at a late stage in response to lobbying pressure. Perhaps, most fundamentally, however, little was lost with respect to the real protections afforded to lesbian, gay, bi-sexual and transgender persons because the Employment Equality Directive[10] maintained a high level prohibition on harassment which remains enforceable in the domestic courts notwithstanding the ruling of the learned judge.

Kirk Session of Sandown Free Presbyterian Church[11]

The ideological tension between expressions of Christian beliefs and the right to be protected from harassing speech demeaning to those of a homosexual sexual orientation tension has continued to feature in litigation in Northern Ireland. Judgment was given in *Re The Christian Institute*[12] in September 2007 and the harassment provisions were duly struck down.

On 3 April 2008 a full page advertisement appeared in the Belfast News Letter. It was headed 'The Word of God Against Sodomy'. It was taken out in direct response to the holding of a Gay Pride parade in Belfast in July 2008. The advertisement invited members of the public to gather in a gospel witness against the act of sodomy. The text included the following phrases:

8 *Ontario Human Rights Commission v Brockie* [2002] DLR(4th) 174.

9 *Re The Christian Institute* [2007] NIQB 66, at para 88.

10 Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ L303/16.

11 *Kirk Session of Sandown Free Presbyterian Church* [2009] NIQB WEA 7616.

12 *Re The Christian Institute* [2007] NIQB 66.

> *The act of sodomy is a grave offence to every bible believer who, in accepting the pure message of God's precious Word, express the mind of God by declaring it to be an abomination. (Leviticus, ch 18 v22 "Thou shalt not lie down with mankind as with womankind; it is an abomination") This unequivocal statement in the Bible clearly articulates God's judgment upon a sin that had been only made controversial by those who were attempting to either neutralize or remove the guilt of their wrongdoing.*

The advertisement generated a number of complaints to the Advertising Standards Authority (the self-regulatory body for advertising in the United Kingdom). After a period of deliberation the Advertising Standards Authority (the ASA) ruled that the advertisement was in breach of the 'decency' requirement which appeared in the ASA Code of Practice at para 5.1 in these terms:

> *Marketing communications should contain nothing that is likely to cause serious or widespread offence. Particular care should be taken to avoid causing offence on the grounds of race, religion, sex, sexual orientation or disability. Compliance with the Code will be judged in the context, medium, audience, product and prevailing standards of decency.*

The ASA upheld the complaints and ruled that the advertisement had breached the requirement of avoiding serious or widespread offence. The ASA ruled that the advertisement should not appear again in its current form and that the Kirk Session should take '*more care in future to avoid serious offence when advertising their opposition to the Gay Pride parade*'.

This relatively modest rebuke by the regulator provoked an extensive judicial review challenge brought by the Kirk Session of Sandown Free Presbyterian Church.[13] The Applicant argued *inter alia* that the ASA had broken its own code by adjudicating between competing ideologies. The Applicant further argued that the ruling of the ASA was an infringement of the right to manifest religious belief and the right to freedom of expression pursuant to Arts 9 and 10 of the European Convention on Human Rights.

On the first argument, Weatherup J, ruling on the leave application, held that there was a serious query as to whether there were, in fact, two competing ideologies involved. He further found that the ASA was not attempting to arbitrate between two competing ideologies but was simply attempting to impose a Code of Self Regulation in light of *bona fide* complaints from members of the public.

On the second argument, ASA sought to rely upon the ruling of the European Court of Human Rights in *Murphy v Ireland*[14] where a ban on religious advertising was upheld as not being in breach of Art 10 of the Convention. Weatherup J did not consider that the Art 10 ruling in *Murphy* afforded a complete answer to the Applicant's challenge in this case. The Court found that there was an arguable case that there was interference with the Art 9 and 10 rights of the Applicant and that the real issue was that of justification. Leave was granted to apply for judicial review.

13 *Kirk Session of Sandown Free Presbyterian Church* [2009] NIQB WEA 7616.

14 *Murphy v Ireland* [2003] ECHR 352.

Notwithstanding that partial success, the Applicant appealed against the decision of the learned judge with respect to the grounds on which leave had been refused. The Court of Appeal heard the appeal in March 2010 and granted leave on one further ground. The matter will now be heard at a substantive hearing in October 2010.

Conclusion

The history, to date, of attempts to legislate in order to introduce equality laws to provide enhanced protection against discrimination on grounds of sexual orientation has exposed the tensions that arises from the implementation of the overarching supra-national norms of equality and human rights. The fact that the ruling of the Court in *Re The Christian Institute*[15] was not subject to any appeal is an indication to legislators and lawyers that the judgment in that case struck an appropriate balance. The resurrection of the ideological argument in *Kirk Session*[16] indicates that the jurisprudence will continue to develop.

15 *Re The Christian Institute* [2007] NIQB 66.

16 *Kirk Session of Sandown Free Presbyterian Church* [2009] NIQB WEA 7616.

The Equality Authority

Birchgrove House
Roscrea
Co. Tipperary
Phone: (0505) 24126
Fax: (0505) 22388

2 Clonmel Street
Dublin 2
Phone: (01) 417 3336
Fax: (01) 417 3331

Public Information Centre
Lo Call: 1890 245 545
Email: info@equality.ie

www.equality.ie

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