

Report of a review of section 19 of the Intoxicating Liquor Act 2003 carried out pursuant to section 30 of the Irish Human Rights and Equality Commission Act 2014

Irish Human Rights and Equality Commission

February 2022



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

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

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Functions and powers of the Irish Human Rights and Equality Commission

The Irish Human Rights and Equality Commission ('the Commission') is Ireland's national human rights and equality institution.

The Commission is an independent public body that accounts to the Oireachtas, with a mandate established under the Irish Human Rights and Equality Commission Act 2014 ('the IHREC Act 2014')

The purpose of the Commission is to protect and promote human rights and equality in Ireland and to build a culture of respect for human rights, equality and intercultural understanding in the State. In order to realise these objectives, the Commission has been conferred with the power to review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights and equality.

Functions of the Commission

"10 (1) the functions of the Commission shall be –

- (a) to protect and promote human rights and equality,
- (b) to encourage the development of a culture of respect for human rights, equality, and intercultural understanding in the State,
- (c) to promote understanding and awareness of the importance of human rights and equality in the State,
- (d) to encourage good practice in intercultural relations, to promote tolerance and acceptance of diversity in the State and respect for the freedom and dignity of each person, and;
- (e) to work towards the elimination of human rights abuses, discrimination and prohibited conduct.

(2) The Commission shall, in furtherance of the functions referred to in subsection (1), have, in addition to the functions assigned to it by any other provision of this Act, or of any other enactment, the following functions:

- (a) to provide information to the public in relation to human rights and equality generally including information in respect of enactments to which section 30 refers;
- (b) to keep under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights and equality;
- (c) either of its own volition or on being so requested by a Minister of the Government, to examine any legislative proposal and report its views on any implications for human rights or equality;
- (d) either of its own volition or on being so requested by the Government, to make such recommendations to the Government as it deems appropriate in relation to the measures which the Commission considers should be taken to strengthen, protect and uphold human rights and equality in the State..."

Section 30 of the IHREC Act 2014 (as amended) bestows specific discretionary powers and/or obligations upon the Commission to review the working and effect of any legislation which relates to the protection and promotion of human rights and equality, including but not limited to:

- the Employment Equality Acts 1998-2015 (as amended);
- the Equal Status Acts 2000-2018 (as amended);
- section 19 of the Intoxicating Liquor Act ('section 19' and/or 'ILA 2003').¹

For the purpose of carrying out such reviews and making recommendations to the Minister for Children, Equality, Disability, Integration and Youth ('the Minister'), the Commission may liaise with persons, groups and organisations as it deems appropriate.

¹ Section 30(1)(b) IHREC Act 2014

Section 30(2), IHREC Act 2014 provides:

“The Commission may, if it thinks fit, and shall, if requested by the Minister, carry out a review of the working or effect of any enactment referred to in subsection (1) and may make such recommendations as it sees fit following such review.”

Section 30(5), IHREC Act 2014 provides:

“For the purposes of assisting it in carrying out a review under this section, the Commission shall consult such persons, groups and organisations (including organisations of trade unions and of employers) as it considers appropriate.”

Strategy Statement 2019-2021

The Commission has a legal obligation, pursuant to section 25 of the IHREC Act 2014, to formulate a strategy statement, the purpose of which is, inter alia, to set out the Commission's key objectives for each three-year period.

The objectives set out in the Commission's Strategy Statement ("the Strategy Statement") for the period between 2019 and 2021, during which this review took place, include:

- to protect the rights of individual persons who face the greatest barriers to justice;
- to influence legislation, policy and practice;
- to engage with key organisations to address discrimination and human rights abuses; and
- to raise the quality and broaden the extent of the dialogue on human rights and equality issues.²

² IHREC Strategy Statement 2019-2021, January 2019, available at:
<https://www.ihrec.ie/app/uploads/2019/02/Final-Strategy-Statement-ENG-VERSION.pdf>

Consultation undertaken by the commission

In line with its statutory functions, pursuant to sections 10 and 30 of the IHREC Act 2014 and in pursuance of its objectives, as set out in the Strategy Statement, the Commission has carried out a review of section 19 of the ILA 2003 ('the Review').

In exercising its statutory power under section 30(5) of the IHREC Act 2014, the Commission carried out a wide-ranging consultation with a large number of organisations and representative groups.

The Commission sought to engage widely with organisations and/or groups which represent individuals associated with each of the grounds outlined in the Equal Status Acts 2000-2018 ('ESA 2000-2018') (as outlined above), as well as business organisations and organs of the State. The following individuals and/or bodies responded to the Commission's invitation to submit information and/or views in respect of the Review undertaken:

Irish Traveller Movement: A national membership-based Traveller organisation, representing forty local and national Traveller groups across Ireland working collectively at a local, regional, national, and international level to represent the views of Travellers and challenge inequalities faced by Travellers.

Judy Walsh BL, Assistant Professor: The Head of Subject for Social Justice at University College Dublin School of Social Policy, Social Work and Social Justice who is specialised in the fields of equality and human rights law, and who has acted as the national expert on discrimination for the European Equality Law Network and as Vice-Chairperson of the Participation and Practice of Rights Project.

Traveller Equality & Justice Project ('TJEP'): A collaborative project between the School of Law at University College Cork and the Free Legal Advice Centre, which is based within the Centre for Criminal Justice and Human Rights at the School of Law at University College Cork. The TJEP established Munster's first Traveller-specific legal clinic. It carries out legal research, and provides access to justice for Travellers who have experienced discrimination and who have been refused access to goods and services.

Department of Business, Enterprise and Innovation: The objectives of the Department of Enterprise, Trade and Employment are to lead in advising and implementing the Government's policies of stimulating the productive capacity of the economy and creating an environment which enables the creation of employment and sustainability. The Department is also charged with promoting fair competition in the marketplace, protecting consumers and safeguarding workers.

Pavee Point: A national non-governmental organisation comprised of Travellers, Roma and members of the settled population working in partnership at national, regional, local and international levels with the objective of ensuring that Travellers and Roma are fully recognised and respected as minority ethnic groups who are proud and confident in their cultural identity and in exercising their human rights. The mission of this organisation is to contribute to the improvement of the quality of life, living circumstances, status and participation of Travellers and Roma through working innovatively for social justice, greater solidarity, development, equality and human rights.

BeLonG To: A national organisation that supports lesbian, gay, bisexual, transgender and intersex (LGBTI+) young people in Ireland. The organisation advocates and campaigns on behalf of young LGBTI+ people, and offers a specialised LGBTI+ youth service which focuses on mental and sexual health, as well as drug and alcohol support.

Legal Aid Board: An independent statutory body established by the Civil Legal Aid Act 1995 with responsibility for the provision of civil legal aid and advice, family mediation, vulnerable witness services and the administration of a number of *ad hoc* legal aid schemes.

Licensed Vintners Association ('LVA'): A trade association and representative body established in 1817 for the publicans of Dublin. The LVA is a membership-based organisation with approximately 600 members.

Vintners' Federation of Ireland ('VFI'): A national trade organisation with approximately 4000 members, tasked with representing the views and interests of public houses

outside the greater Dublin area, and with giving advice to members on topics which include licensing laws, employment legislation and planning matters.

Irish Hotels Federation ('IHF'): Founded in 1937, the IHF is the national organisation of the hotel and guesthouse industry in Ireland, comprised of almost 1000 hotels and guesthouses nationwide, whose primary task is to promote the interests of its members.

Inclusion Ireland: Inclusion Ireland is a national voluntary organisation which works towards promoting the rights of people with an intellectual disability in Ireland, to ensure their full and equal participation in society. The organisation's predecessor was founded in 1961, and since 2005 has been known as Inclusion Ireland, with the objective of campaigning and working towards inclusive education, creating community-based services and housing supports for families, and promoting full participation and equality for people with an intellectual disability.

Citizens Information Board: The Citizens Information Board is a statutory body, established by the Comhairle Act 2000, which supports the provision of information, advice and advocacy on a broad range of public and social services.

Immigrant Council of Ireland: A national, independent non-governmental organisation that promotes the rights of migrants within the State.

Free Legal Advice Centres ('FLAC'): A human rights organisation which exists to promote equal access to justice for all. The vision of the organisation is to create a society where everyone can access fair and accountable mechanisms to vindicate their rights. The work of FLAC is further informed by its function of operating a dedicated Traveller Legal Service.³

The Commission is grateful to all of those individuals and bodies that provided it with information and/or views in respect of the Review, all of which were taken into account when compiling this Review and formulating the Commission's recommendations.

³ Submission by FLAC to the Commission, July 2021.

Scope and effect of section 19, Intoxicating Liquor Act 2003

Prior to September 2003, complaints of discrimination that occurred on or at the point of entry to licensed premises could be made under the Equal Status Acts 2000, and were dealt with by the specialist Equality Tribunal.⁴

Section 19, ILA 2003 transferred jurisdiction from the Equality Tribunal to the District Court in cases of prohibited conduct⁵ on licensed premises,⁶ except in relation to discrimination in the provision of accommodation or any services or amenities related to accommodation, or ceasing to provide accommodation or any such services or amenities, which remained within the remit of the Equality Tribunal. An example of same may be where a hotel, although a licensed premises, refuses to allow an individual to stay overnight as a guest on the basis of discriminatory grounds – such a situation would fall within the remit of the ESA 2000-2018 as opposed to the ILA 2003. However, a refusal to allow an individual to remain in the bar area and/or to purchase an alcoholic beverage at the premises would fall within the remit of the ILA 2003.

Section 19, ILA 2003 states:

“19.-(1) In this section –

“Act of 2000” means the Equal Status Act 2000;

“Authority” means the Equality Authority;

“Court means the District Court;

4 Claims under the Equal Status Acts 2000-2018 are now heard and decided by the Workplace Relations Commission as opposed to the Equality Tribunal.

5 Section 19(1) provides that: “‘prohibited conduct’ means discrimination against, or sexual harassment or harassment of, or permitting the sexual harassment or harassment of a person in contravention of Part II (Discrimination and Related Activities) of the Act of 2000 on, or at the point of entry to, licensed premises.” The “Act of 2000” means the Equal Status Acts 2000-2018.

6 Under section 2 of the ILA 2003, “‘licensed premises’ means premises in respect of which a licence is in force and, in relation to a licensee, means the licensed premises of the licensee”; ‘licence’ means a licence for the sale of intoxicating liquor, whether granted on production or without production of a certificate of the Circuit Court or District Court; and ‘licensee’ means the holder of a licence’.

'discrimination' means discrimination within the meaning of the Act of 2000, but does not include discrimination in relation to –

- (a) the provision of accommodation or any services or amenities related to accommodation, or
- (b) ceasing to provide accommodation or any such services or amenities;

"prohibited conduct" means discrimination against, or sexual harassment or harassment of, or permitting sexual harassment or harassment of a person in contravention of Part II (Discrimination and Related Activities) Act of 2000 on, or at the point of entry to, licensed premises.

(2) A person who claims that prohibited conduct has been directed against him or her on, or at the point of entry to, licensed premises may apply to the District Court for redress.

(3) On such an application the Court may, if satisfied that the applicant is entitled to redress, make such order as it considers appropriate in the circumstances, including one or more of the following orders:

- (a) an order for compensation for the effects of the prohibited conduct to be paid to the applicant by the licensee,
- (b) an order that the licensee of the licensed premises concerned take a course of action specified in the order,
- (c) an order for temporary closure of the premises in accordance with section 9, which section shall have effect, with the necessary modifications, in relation to the order.

(4) The maximum amount which may be ordered under subsection (3) (a) by way of compensation is the maximum amount that can be awarded by the District Court in civil cases in contract.

(5) An order under this section may, if the Court thinks fit, include a statement of the reasons for its decision and shall, if any of the parties so requests, include such a statement.

(6) (a) Where it appears to the Authority that prohibited conduct –

- (i) is being generally directed against persons, or
- (ii) has been directed against a person who has not applied to the District Court for redress and who could not reasonably be expected to do so,

the Authority may apply to the Court for redress in respect of the prohibited conduct concerned.

(b) The Court shall deal with any such application in the same manner and to the same extent as if –

- (i) it has been made under subsection (2), and
- (ii) the Authority were the applicant and the person alleged to have engaged in the prohibited conduct were the respondent.

(c) Any order for compensation made by the Court on the application shall not be made in favour of the Authority.

(7) (a) A person who considers that prohibited conduct has been directed against him or her on, or at the point of entry to, licensed premises may request the Authority for assistance in applying to the Court for redress.

(b) Where –

- (i) the Authority is satisfied that the case to which the request relates raises an important matter of principle, or
- (ii) it appears to it that it is not reasonable to expect the person making the request adequate to present the case before the Court without assistance,

the Authority may, and at any stage, provide such assistance to the person in such forms as it thinks fit.

(c) “Any function of the Authority under this section may be exercised by an officer of the Authority to whom the function is delegated and any such delegation may specify criteria or other guidelines by reference to which the Authority considers that the delegated function should be exercised.

(8) An appeal to the High Court shall lie from an order of the Circuit Court on an appeal against the District Court's decision on an application for redress, but only on a point of law.

(9) (a) Anything done in the course of a person's employment shall, in any proceedings under this section, be treated for the purposes of this section as done also by the person's employer, whether or not it was done with the employer's knowledge or approval.

(b) Anything done by a person as agent for another person, with the authority (whether express or implied and whether precedent or subsequent) of that other person shall, in any such proceedings, be treated for the purposes of this section as done also by that other person.

(c) In any such proceedings against an employer in respect of an act alleged to have been done by an employee of the employer it shall be a defence for the employer to prove that the employer took such steps as were reasonably practicable to prevent the employee –

- (i) from doing the act, or
- (ii) from doing in the course of the employment acts of that description.

(10) Where an order has been made under subsection (3), any person may make an objection related to the prohibited conduct concerned, to the renewal of the licence of the licensed premises and section 4 of the Courts (No. 2) Act 1986 is to be construed accordingly.

(11) (a) The Act of 2000 shall cease to apply in relation to prohibited conduct occurring on, or at the point of entry to, licensed premises on or after the commencement of this section.

(b) Claims relating to prohibited conduct so occurring before such commencement shall be dealt with as if this Act had not been passed.

Discrimination is defined by section 3(1)(a) of the ESA 2000-2018, and the same definition applies for the purpose of section 19, ILA 2003. According to these provisions, discrimination can be taken to have occurred 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)...”

For treatment to constitute discrimination under the ILA 2003, it must involve a difference of treatment of two persons based on one of the protected grounds under the ESA 2000-2018,⁷ which include:

- **the gender ground:** that one person is male and the other female;
- **the civil status ground:** that the individuals are of different civil status;
- **the family status ground:** that one has family status and the other does not;
- **the sexual orientation ground:** that the individuals are of different sexual orientation;
- **the religion ground:** that one person has a different religious belief from the other;
- **the age ground:** that the individuals are of different ages;
- **the disability ground:** that one person has a disability and the other does not, or one person has a different disability as compared to another;
- **the race ground:** that two persons are of different race, colour, nationality, or ethnic or national background;
- **the Traveller Community ground:** that one is a member of the Traveller Community and the other is not;
- **the victimisation ground:** that one has sought redress under the legislation, has attended as a witness in respect of an application for such redress, that one has opposed prohibited action under the legislation and/or intends to take any of the said actions;

⁷ The grounds are defined at sections 2 and 3 ESA 2000-2018.

- **the housing assistance ground:** that one is in receipt of rent supplement (under the Social Welfare Consolidation Act 2005 or housing assistance payment under the Housing (Miscellaneous Provisions) Act 2014) or any payment under the Social Welfare Acts.

If the District Court is satisfied that the Applicant is entitled to redress, it may make such order as it considers appropriate in the circumstances under section 19(3), ILA 2003, including one or more of the following orders:

- an order for compensation for the effects of the prohibited conduct to be paid by the applicant by the licensee;
- an order that the licensee of the licensed premises concerned take a course of action specified in the order;
- an order for temporary closure of the premises in accordance with section 9, ILA 2003.

The upper limit of compensation that may be ordered is the maximum amount that can be ordered by the District Court in civil cases in contract, which is currently €15,000.⁸

⁸ Section 15, Courts and Civil Law (Miscellaneous Provisions) Act 2013.

Complaints mechanisms under section 19 of the Intoxicating Liquor Act 2003 and the Equal Status Acts 2000-2018

As detailed above, section 19 of the ILA 2003 provides for a complaints mechanism whereby proceedings must be instituted in the District Court area in which the prohibited conduct is alleged to have occurred.

Complaints falling under the ESA 2000-2018 are advanced in the Workplace Relations Commission ('WRC').

There are a number of differences between the procedures underpinning both mechanisms, the most pertinent of which are set out in the table that follows and then outlined in more substantive detail below.

District Court	WRC
An adversarial process in which the burden of proof is solely on the complainant.	A mechanism with some adversarial characteristics but which is inherently an inquisitorial process. Section 38A of the ESA 2000-2018 switches the burden of proof to the respondent once facts are established by or on behalf of a person from which it may be presumed that prohibited conduct has occurred in relation to him or her.
Procedural steps include legal technicalities such as identifying the correct licensee and court district in which to sue. If any errors are made in respect of either, this can be fatal for a claim. No formal information gathering and/or method of pre-litigation	Procedural steps include identifying the correct respondent, but erroneous errors may not prove fatal in claims instituted in quasi-judicial bodies. A complainant must notify a proposed respondent within 2 months of the alleged discrimination having taken place

District Court	WRC
resolution is provided for. There is a lack of clarity around the limitation time periods under the ILA 2003.	that they intend to institute a claim at the WRC.
No procedure exists to facilitate a complainant in obtaining information from a potential respondent prior to instituting proceedings, or which would allow inferences to be drawn from a respondent's engagement with a complainant following an incident of alleged discrimination but prior to proceedings being instituted or indeed, their failure to engage.	A complainant may question a respondent in writing in order to obtain material information and the respondent has a right to reply. ⁹ The WRC may draw inferences from the respondent's failure to reply or from the contents of any replies, which greatly benefits the applicant. ¹⁰
Cases are adjudicated upon by judges of the District Court.	Cases are heard and decided upon by adjudicators with specialist training in discrimination and equality law issues, and whose sole remit is dealing with cases pertaining to this area of law. ¹¹
The Mediation Act 2017 mandates that mediation be considered in every circumstance and, if availed of, the costs are generally borne by the parties. If mediation is not availed of, or if the parties do not fully participate in the mediation process recommended by a	The WRC offers a free and voluntary mediation process in line with the provisions of the ESA 2000-2018.

9 Section 21(2) (b), ESA 2000-2018.

10 Section 26, ESA 2000-2018.

11 See: Zalewski v The Workplace Relations Commission and Ors [2021] IESC 24

District Court	WRC
court, this may result in adverse consequences in respect of costs.	
In District Court proceedings there is a risk of an adverse costs order being made against either party.	There are no provisions for the making of costs orders at the WRC, meaning that there is no risk of an adverse costs order being made against either party.
Legal aid may technically be obtained where the financial eligibility and merits test are satisfied, however, there are a very limited number of examples of legal aid having actually been obtained between January 2014 and the present day.	There is no provision for legal aid in cases instituted under the ESA 2000-2018 before the WRC.
Written decisions are infrequently provided for and decisions are generally not published. However, reasons for decisions can be sought pursuant to section 19(5), ILA 2003.	Decisions are published on the WRC website pursuant to section 30, ESA 2000-2018.

Procedure under section 19, ILA 2003

Identification of the correct jurisdictional area

Claimants who wish to institute a claim under the ILA 2003 must do so in the correct District Court area. The process of identifying the correct area in which to institute a claim can be complex and can involve some level of technical, and arguably legal, analysis. A claimant cannot arbitrarily choose the venue of an action.

For the purpose of section 19, ILA 2003, it is notable that Order 40, Rule 4(2) of the District Court Rules stipulates that proceedings should be instituted in the district either in which the respondent or one of the respondents ordinarily resides or carried

on any profession, business or occupation or, in proceedings founded on contract, in which the contract is alleged to have been made.¹²

A failure to institute a claim in the correct district may result in a complainant being unable to advance their claim.¹³

Identification of the correct respondent(s)

While, as outlined below, an applicant at the WRC must ensure they have served the correct respondent, in the District Court there is a further essential evidential proof, which places a significant burden on any complainant – i.e. formal identification of the licensee. This involves visiting the relevant District Court Office in order to inspect the Register of Licenses, which requires the payment of a fee.

It is reported that in the case of *Maughan v Michael Warde's Public House*, the District Court acceded to a defendant's submission that the complainant's case should be dismissed because they had not tendered formal proof that the defendant's premises was in fact a licensed premises at the time of the incident, thus falling under the jurisdiction of the Court pursuant to section 19, ILA 2003. The Court refused however to allow the defendant to recover its costs as against the complainant.¹⁴

In its submission to the Commission, FLAC stated:

“[F]LAC has provided advice and assistance on accessing relevant information to assess a potential claim. This has included assistance in contacting District Court offices to arrange to inspect licences. FLAC has noted that the absence of a centralised system, as pertains to the WRC, increases the complexity of this necessary preliminary research. Its clients and partners have at times struggled to access accurate information on the opening procedures of District Court offices, which vary from district to district. There is a dearth of accessible

¹² Order 40, Rule 4(2) of the District Court Rules provide further stipulations as to where certain types of claims should be instituted which are not of relevance for the purpose of the Review.

¹³ See: *O'Brien v District Judge Mary O'Halloran and Ors* [2001] 1 IR 556.

¹⁴ *Maughan v Michael Warde's Public House* (Claremorris District Court, Judge Geoffrey Brown), ex tempore decision, 14 February 2008), referred to in the Case Work Activity 2008 (Equality Authority, 2008), 31 and cited in D Fennelly, *Selected Issues in Irish Equality Case Law 2008-2011* (Equality Authority, 2012), page 18.

information available...meaning that clients must rely on calling the relevant office and hoping that assistance will be forthcoming.”¹⁵

Identification of the area in which the alleged discrimination took place

As outlined above, in some circumstances, for example in hotels, the question of whether the alleged discrimination will fall to be determined under section 19, ILA 2003 or under the ESA 2000-2018 will depend on where it is alleged to have taken place and/or what it concerned.

If proceedings are instituted in the District Court in error, when the claim should have in fact been pursued through the WRC, the strict timelines associated with complaints instituted under the ESA 2000-2018 could have elapsed, thus making it impossible to advance the claim in the correct forum thereafter.

Institution of a claim

A complainant is required to complete a notice of application in the form set out in the District Court Rules,¹⁶ which must then be lodged in the District Court Office. A stamping fee of €150.00 must also be paid. The said notice must then be served on the Respondent and proof of service in accordance with the District Court Rules must be demonstrated at the hearing of the action. There is no cost associated with instituting a claim in the WRC.

Nature of the hearing

Given that Ireland is a common law jurisdiction, court proceedings, including those instituted under section 19 of the ILA 2003 are adversarial in nature and are heard in public. There are very limited circumstances in which the District Court can hold hearings in private and/or direct that reporting restrictions be put in place. The District Court has no jurisdiction to direct that proceedings under section 19 be heard in private and there is no provision for same under that particular statutory framework. As is the case at all levels of the court system, on application to it under section 27 of the *Civil Law (Miscellaneous Provisions) Act 2008*, the District Court may prohibit the

¹⁵ Submission by FLAC to the Commission, July 2021.

¹⁶ See: Schedule C, Form 80.5 of the District Court Rules.

publication or broadcast of any matter relating to the proceedings which would, or would be likely to identify a person as having a medical condition, but this obviously only applies in very particular and limited circumstances.

Insights provided by BeLonG To are particularly relevant with regard to the experiences of members of the LGBTI+ community, particularly young people who may have been subjected to discrimination. The organisation said in relation to their experience of advancing a claim in the District Court:

"It is our professional experience that particularly for trans, non-binary, and gender non-conforming young adults who have faced this form of discrimination and subsequently abandoned taking the case was as a direct result of the case being heard in open court. The case being heard in open court would mean that they must out themselves in public in order to have their rights vindicated. This can represent a significant risk for Trans, non-binary, and gender non-conforming young adults to their right to privacy and potentially safety."

The aforementioned submission was received by the Commission prior to the judgment of the Supreme Court in *Zalewski v The Workplace Relations Commission and Ors* [2021] IESC 24 and the commencement of the *Workplace Relations (Miscellaneous Provisions) Act 2021*. Following those developments, the legal presumption is now that all claims instituted under the ESA 2000-2018 at the WRC will be heard in public and can be reported upon by the media. These elements of the WRC procedures have therefore been brought broadly in line with those which exist in District Court proceedings under section 19, ILA 2003.

However, importantly, the WRC retains a discretion to hear proceedings in private where special circumstances so require.¹⁷ The legislation appears to provide WRC adjudication officers with significant discretion on account of the fact that no specific guidance is given in respect of what exactly constitutes special circumstances.

¹⁷ Section 25(2), ESA 2000-2018 (as amended by section 12(a), Workplace Relations (Miscellaneous Provisions) Act 2021.

However, the WRC has provided a non-exhaustive list of factors which may be taken into account in assessing whether hearings should be held in private. These include:

- cases involving a minor;
- circumstances where a party has a disability or a medical condition which they do not wish to be revealed;
- cases involving issues of a sensitive nature such as sexual harassment;
- cases involving a protected disclosure where there is an issue of the disclosure being made in confidence; or
- cases which could result in a real risk of harm to a party if the hearing is held in public, or if the parties are named in the decision.¹⁸

Provisions in respect of costs

Order 53, Rule 1 of the District Court Rules provides that the granting or withholding of costs against any party to civil proceedings is at the discretion of the Court. However, it has been common practice, in what the Supreme Court described as the '[t]he normal rule', that costs follow the event.¹⁹ In other words, the losing party is, in most cases, directed to pay the legal costs of the winning party or parties to the proceedings. This principle has now been enshrined in statute through the introduction of section 169(1) of the *Legal Services Regulation Authority Act 2015* ('LSRA 2015') which provides that the successful party is entitled to an award of legal costs against an unsuccessful party, unless the court directs otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the parties therein, to include the following factors:

- the conduct of the parties before and during the proceedings;

¹⁸ Workplace Relations Commission, WRC Guidance on Workplace Relations (Miscellaneous Provisions) Act 2021, available at:

https://www.workplacerelations.ie/en/complaints_disputes/adjudication/workplace-relations-miscellaneous-provisions-act-2021/

¹⁹ *Grimes v Punchestown Developments Co Ltd* [2002] 4 IR 515, p. 522.

- whether it was reasonable for a party to raise, pursue or contest one or more of the issues in the proceedings;
- the manner in which the parties conducted all or part of their cases;
- whether a successful party exaggerated his/ her claim;
- whether a party made a payment into court and the date of that payment;
- whether a party made an offer to settle the matter and, if so, the date, terms, and circumstances of that offer;
- where the parties were invited by the court to settle the claim, whether by mediation or otherwise, and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions, or in mediation.

For groups who may have lower incomes or whose income is solely made up of social welfare payments, including those who have disabilities,²⁰ members of the Traveller Community and other groups,²¹ the risk of a costs order may act as a barrier to instituting a claim.

Time periods

Section 19, ILA 2003 does not provide for any limitation period within which a claim must be instituted. There is a lack of clarity in respect of the time periods associated with instituting a claim under the legislation which may be a cause of confusion for potential litigants.

In its submission to the Commission, FLAC observed in respect of the lack of clarity in relation to the applicable limitation period that:

²⁰ Submission by Inclusion Ireland to the Commission, 17 October 2019.

²¹ See: Central Statistics Office, Census of Population 2016 – Profile 8 Irish Travellers, Ethnicity and Religion, available at: <https://www.cso.ie/en/csolatestnews/presspages/2017/census2016profile8-irishtravellersethnicityandreligion/> - 82% of the Traveller population in Ireland were unemployed as of 2016.

“[i]t also creates uncertainty and complicates the provision of legal advice and representation.”²²

Mediation

In addition to the consideration which a court may give to the issue of a party’s refusal to engage in mediation, in respect of adjudicating on a costs application under section 169, LSRA 2015, there are also obligations placed on solicitors under the Mediation Act 2017 which are of relevance.

Solicitors acting for claimants in the District Court must, prior to instituting proceedings, advise their clients in respect of mediation. A statutory declaration must then be sworn by that solicitor to confirm they have provided such advice. There are costs associated with this procedure of preparing and swearing the declaration and then arranging to file it in court.²³

Unless a court otherwise directs or unless there is an alternative agreement between the parties, the costs of mediation must be borne by both parties equally.²⁴ This is of particular relevance given the Court’s discretion to take account of a party’s engagement in mediation when adjudicating upon an application for costs.

Procedure under ESA 2000-2018

Identification of the correct jurisdictional area

It is unnecessary for a complainant to identify the jurisdictional area in which a claim should be brought. The WRC is a central body with jurisdiction over all complaints throughout the country which are submitted to it under the ESA 2000-2018.

Identification of the correct respondent(s)

Complainants under the ESA 2000-2018 must also ensure that they have identified the correct respondent, whether that be an individual or a legal entity such as a company.

Identification of the area in which the discrimination took place

²² Submission by FLAC to the Commission, July 2021.

²³ Section 14, Mediation Act 2017.

²⁴ Section 20, Mediation Act 2017.

The jurisdiction of the WRC extends to all claims of discrimination in respect of access to goods and services, regardless of the location in which said discrimination occurs, unless it occurs in or at the point of entry to a licensed premises. For the reasons outlined above, wrongly instituting a claim in the District Court instead of the WRC, on the mistaken belief that the prohibited conduct took place on or at the point of entry to a licensed premises and did not relate to the provision of accommodation or any services or amenities related to accommodation, may have significant and negative consequences for a complainant's ability to advance a claim for discrimination.

FLAC has observed that:

"Section 2 of the 2003 Act defines 'licensed premises' as a 'premises in respect of which a licence is in force'. 'Premises' is undefined in the 2003 Act. It is therefore difficult for a complainant to determine, in the case of mixed-use premises such as hotels or restaurants, whether an act of discrimination occurred 'on or at the point of entry to' a licensed premises. For example, if an act of discrimination occurred in the lobby of a hotel which also contained a bar, it is not immediately clear whether or not the licence in force for the bar would extend to the hotel lobby. A complainant may be able to inspect the map pertaining to a licensed premises to determine the sections of a premises to which a licence extends, however, such maps are not always available and, where they are, can only be accessed by paying a fee...

A further ambiguity in the 2003 Act is the limitation of the District Court's jurisdiction to cases of discrimination which occur 'on or at the point of entry to' licensed premises. In practice this has created interpretative difficulties in cases where discrimination occurred over the phone or through email. While such cases would not appear to have occurred 'on or at the point of entry to' a licensed premises in a physical sense, it renders the choice of appropriate forum, as between the District Court and the WRC, a more complex exercise. This is

particularly so where a complainant may have multiple interactions with a venue, some in person and some via telephone or email.”²⁵

Furthermore, it appears from the published decisions of the WRC that many adjudication officers refuse jurisdiction on the basis that the alleged conduct occurred on a licensed premises and redress should therefore have been sought in the District Court pursuant to section 19, ILA 2003.²⁶ For example, in *Ann Pratt v The Half Door Bar and Restaurant Limited*,²⁷ the complainant contended that she was refused service by the respondent, on the grounds that she is a member of the Traveller Community. Jurisdiction was declined by the WRC on the basis that the alleged prohibited conduct was directed against the Complainant on the licensed premises.

In *A Customer v A Licensed Premises*,²⁸ the complainant had a disability and claimed that he was discriminated against on the disability ground contrary to the ESA 2000-2018 having been refused a service on the respondent's premises. The complainant highlighted that he had an acquired brain injury causing him difficulties with his speech, actions and memory and he attended the bar seeking a drink. It was claimed that an employee of the respondent, a barman, refused to provide a drink on the basis that the complainant had consumed an excessive amount of alcohol, and he was requested to leave. The respondent's submission that the WRC had no jurisdiction in the matter as the bar was a licensed premises was accepted and jurisdiction was refused.

In *Rosemarie Mongan v Donal and Martha Duffy Limited T/A Supervalu Edgeworthstown*,²⁹ the complainant claimed that she was refused service in the supermarket of the respondent on the grounds of her being a member of the Traveller Community. It was noted that the complainant gave evidence that the prohibited conduct took place in the off-licence area of the supermarket and therefore jurisdiction

25 Submission by FLAC to the Commission, July 2021.

26 See: *Nicole Supple v The Good Luck Restaurant Limited T/A Bombay Palace*, ADJ-00013169; *A Customer v A Public House* ADJ-00002246; *Roisin Courtney and Deirdre Lennon v Zenith Café Ltd T/A Copán Café and Bar* DEC-S2016-073; *A Member of the Traveller Community v A Public House* ADJ-00001389; *A Customer v An Off Licence* ADJ-00005652.

27 *Ann Pratt v The Half Door Bar and Restaurant Limited*, ADJ-0002636.

28 *A Customer v A Licensed Premises*, ADJ-00015106.

29 *Rosemarie Mongan v Donal and Martha Duffy Limited T/A Supervalu Edgeworthstown*, DEC-S2017-044.

was refused by the WRC on the basis that the alleged discrimination took place on a licensed premises.

These cases illustrate some of the very real and practical difficulties which are faced by victims of discrimination by virtue of the fact that the District Court has jurisdiction in respect of claims of discrimination which are alleged to have occurred “[o]n or at the point of entry to a licensed premises” – a phrase that is characterised by a significant level of ambiguity in itself.

There are also a number of cases in which the matter of whether section 19 was applicable or not has been considered. There appears to have been a favourable outcome for each of the complainants in the cases that follow, in that the adjudicators found that the WRC did have jurisdiction on the basis that the refusal of services occurred on the telephone and therefore was not on, or at the point of entry to, the licensed premises. However, these cases also reflect the significant confusion and negative consequences that could arise if such cases had been instituted in the District Court in error, as could have reasonably occurred, or indeed if the line of decisions detailed below are not followed in subsequent cases.

In a decision of the WRC on 15th September 2020 - *A Member of the Traveller Community v A Limited Company*,³⁰ two related cases were brought by a husband and wife against a pub where the husband had tried to book a party over the telephone and when they attended to pay the deposit the staff member refused to take the booking when he realised that the complainant, her husband and two children were members of the Traveller Community. It was also alleged that the staff members subsequently refused to take or return any of their calls. The adjudicator was satisfied that the complainant and her husband were treated less favourably than someone who was not a member of the Traveller Community when the respondent attempted to avoid taking their booking. It was held that the discrimination took place over the phone and therefore was not of the type envisaged by Section 19, ILA 2003. The complainant was awarded €5,000.00 in compensation. Similarly in *Donna McGauley v Roy Bracken*

30 *A Member of the Traveller Community v A Limited Company* ADJ-00023718 and ADJ-00023714

Trading As 'Jackie Murphy's Bar & Restaurant',³¹ the Complainant was a member of the Traveller Community and had telephoned the Respondent's establishment to make a booking for her son's Christening party and had paid a deposit. The booking was subsequently cancelled by the respondent. The adjudicator was satisfied that although the establishment in question was a licensed premises, the complaint had been properly brought under the ESA 2000-2018 as the prohibited conduct complained of therein did not take *place* "on or at the point of entry to, licensed premises" but rather over the telephone. The Respondent was ordered to pay the Complainant €7,500 in compensation.

In the case of *Teresa Donovan v Treacys Oakwood Hotel*,³² the complainant said that she was a member of the Traveller Community and that when she had contacted the respondent to book it as a wedding venue, she had been told that her date was free. Following a viewing in person she was subsequently told that her date was no longer free as construction works were to be carried out and the respondent refused to provide alternative dates on which the venue would be free. The respondent argued that it was a licenced premises within the meaning of section 19, ILA 2003. The adjudicator was satisfied that the WRC did have jurisdiction as there are multiple services that a hotel service provides in such situations, including accommodation, food and restaurant services, that are ancillary to that intended to be covered under the ILA 2003. After hearing the evidence the adjudicator was satisfied, on the balance of probabilities, that it was most likely that the Complainant was denied the opportunity to use the respondent's facilities on the basis of her membership of the Traveller Community, and awarded the complainant the sum of €3,500 in compensation.

Institution of a claim

Within 2 months of the date of the alleged discrimination, a complainant must notify the respondent of their complaint and intention to seek redress under the ESA 2000-2018. They may do so by way of a document referred to as an ES1 form.³³ The ES1 form

31 Donna McGauley v Roy Bracken Trading as 'Jackie Murphy's Bar & Restaurant,' DEC-S2016-068.

32 Teresa Donovan v Tracy's Oakwood Hotel ADJ-00017801.

33 Section 21(2)(a), ESA 2000-2018.

is available on the website of the WRC, together with explanatory notes in respect of time limits and procedural matters.³⁴

In the event that no response is received from a respondent or the response is unsatisfactory, an applicant must then complete an online complaint form on the WRC website within 6 months of the date of the alleged discrimination. There is no fee associated with submitting a complaint form and it is a straightforward process.

In its submission to the Commission, Inclusion Ireland cited the procedure at the WRC as being: “[m]ore straightforward and more accessible”, for persons with intellectual disabilities, as compared to that which exists at the District Court.

Nature of the hearing

One of the functions of an adjudication officer dealing with a dispute under the ESA 2000-2018 is to “[i]nquire into a dispute”.³⁵ Speaking of the process by which matters are heard and adjudicated upon at the Equality Tribunal (effectively the predecessor to the Workplace Relations Commission) Clarke J (as he then was) said:

The Minister for Justice, Equality and Law Reform and the Commissioner of An Garda Síochána v The Workplace Relations Commission [2020] 2 IR 244, paragraph 60:

“[i]t is also said, correctly as far as it goes, that the procedure before the Tribunal is inquisitorial whereas the procedure before the High Court is adversarial...”

The same comparison can be made between the District Court and the WRC.³⁶ The inquisitorial nature of the process provided for in the WRC Act 2015 eases the burden on a complainant by making the process more accessible – a matter of some significance given the difficulties associated with legal aid which are detailed later in this report.

³⁴ Workplace Relations Commission, Complaint Forms, available at:

https://www.workplacerelations.ie/en/publications_forms/forms/complaint-forms/

³⁵ Section 45(5)(a)(i), WRC Act 2015.

³⁶ See also: Section 25, ESA 2000-2018; M Bolger, The Workplace Relations Bill: World-class or Legally Flawed? Irish Employment Law Journal 2015, 12(1), 21-27.

Provisions in respect of costs

There is no provision for awarding costs to any party under the WRC Act 2015, the effect of which is that each side bears their own legal costs (should they incur any), thus removing the element of risk which exists in relation to instituting a claim in the District Court under the ILA 2003.

Time periods

The time periods for instituting and advancing claims are onerous as an initial step must be taken within 2 months of the date of the alleged discrimination occurring (as set out above) and arguably reform is required in respect of same, to eradicate a further barrier to claims of discrimination being advanced.

However, the time periods associated with instituting a claim under the ESA 2000-2018 are characterised by significantly more clarity than the ILA 2003, and information in respect of same is made freely available by the WRC.

In certain circumstances, the time limits may also be extended. In order to seek an extension of time, an application must be submitted to the WRC, which can extend the time for furnishing an ES1 form to four months from the last act of discrimination,³⁷ or to twelve months for the making of a complaint to the WRC.³⁸

Mediation

Within the confines of a dispute being dealt with by the WRC, mediation is also possible under section 24 of the ESA 2000-2018.

There are a number of key differences between the process of mediation that parties may be obliged to engage in under the ILA 2003 (to be read in conjunction with the LSRA 2015 and the Mediation Act 2017) and that provided for under the ESA 2000-2018. Mediation under the ESA 2000-2018 is characterised by the following important characteristics, which are not provided for under the ILA 2003, the LSRA 2015 and/or the Mediation Act 2017:

³⁷ Section 21(3) (a) (i), Equal Status Acts 2000-2018.

³⁸ Section 21(6) (b), Equal Status Acts 2000-2018.

- There are no adverse consequences for refusing to engage with mediation proposed by the WRC and/or for such mediation breaking down. Significantly, in these circumstances, there is no risk of an adverse costs order being made against either party;³⁹
- Mediation is only put forward as an option in cases which are deemed suitable, as opposed to the obligations placed on solicitors to provide advice in respect of the possibility of mediation in every case;⁴⁰
- The cost of facilitating the mediation, which may include the cost of a mediator and a suitable venue, is borne by the WRC as opposed to the parties bearing the cost, in contrast to the situation under the ILA 2003 and Mediation Act 2017.

It is important to acknowledge that well-founded complaints of discrimination frequently involve an individual having been subjected to negative treatment based on their personal characteristics and/or circumstances. The process of advancing a complaint in any forum may involve revisiting traumatic experience(s) and/or engaging with a person or persons who are responsible for the alleged discrimination at the centre of their claim. In such circumstances, mediation may not be appropriate and may not lead to a favourable outcome.

The consequences which may flow from a failure to engage in mediation when pursuing a claim under the ILA 2003 may create a barrier to instituting proceedings to seek redress.

Workplace Relations (Miscellaneous Provisions) Act 2021

The seminal judgment of the Supreme Court in *Zalewski v The Workplace Relations Commission and Ors* [2021] IESC 24 ('Zalewski') identified the WRC Act 2015, which governs the procedures underpinning the processes in place in that forum, as being

³⁹ Section 24(2) and (5), ESA 2000-2018.

⁴⁰ Section 24(1), ESA 2000-2018.

repugnant to the Constitution. In particular, the judgment identified that the following procedures were incompatible with the requirements of the Constitution:

- a blanket prohibition on hearings being heard in public;⁴¹
- the absence of any power for an adjudication officer to administer an oath or affirmation;⁴² and
- the absence of any possibility of punishment for giving false evidence.⁴³

The Government has sought to rectify these issues through the enactment of the Workplace Relations (Miscellaneous Provisions) Act 2021. The following changes have been introduced:

- All hearings under the ESA 2000-2018 are now held in public unless there *are* “*special circumstances*” which would warrant the proceedings being held in private;⁴⁴
- An adjudication officer may require a person giving evidence to do so on oath or affirmation;⁴⁵ and
- Any person who gives evidence which is false and which he or she knows to be false will now be guilty of an offence and will be liable on summary conviction to a fine or to imprisonment not exceeding 12 months, and on conviction on indictment, to a fine not exceeding €100,000 or imprisonment for a term not exceeding 10 years, or both.⁴⁶

As detailed later in this Report, a number of submissions received by the Commission as part of the Review highlighted that the less adversarial nature of the complaints

41 [2021] IESC 24, paragraph 142.

42 [2021] IESC 24, paragraph 144.

43 [2021] IESC 24, paragraph 144.

44 Section 25(2), ESA 2000-2018 (as amended by section 12(a), Workplace Relations (Miscellaneous Provisions) Act 2021).

45 Section 25(2B) (a), ESA 2000-2018 (as amended by section 12(b), Workplace Relations (Miscellaneous Provisions) Act 2021).

46 Section 25(2B) (b), ESA 2000-2018 (as amended by section 12(b), Workplace Relations (Miscellaneous Provisions) Act 2021).

process at the WRC made them more accessible and more attractive to complainants than the process involved in advancing proceedings in the District Court under the ILA 2003.

While the changes introduced by the Workplace Relations (Miscellaneous Provisions) Act 2021 have resulted in more legal formalities, these need not necessarily be viewed as negative developments.

The provision of legal aid

Legal aid is available to those intending to institute a claim under section 19, ILA 2003, by virtue of section 27(2) of the Civil Legal Aid Act 1995, which stipulates that legal aid can be provided in respect of proceedings conducted at all levels of the courts system, including the District Court.

In the period between January 2014 and November 2019, the Legal Aid Board was unable to identify any cases in respect of which legal aid had been granted to individuals who intended to and/or who did in fact institute proceedings under section 19, ILA 2003.⁴⁷

Since November 2019 to date, legal aid provision has been made for as little as four individuals who were provided with representation in proceedings in which they sought redress under section 19, ILA 2003.⁴⁸ According to the Legal Aid Board, those cases may be summarised as follows:

- Two linked applications for legal aid were submitted to the Legal Aid Board and legal aid certificates were granted in respect of both matters. Proceedings were instituted, and the complainants were unsuccessful in the proceedings which they instituted in the District Court. The complainants wished to appeal the decisions of the District Court to the Circuit Court, and subsequent applications for legal aid certificates in respect of their proposed appeals were sought but refused; and
- Two linked applications for legal aid were submitted to the Legal Aid Board and legal aid certificates were granted in respect of both matters. Proceedings were instituted, and settlement was reached, thus negating the need for court adjudication. The complainants received monetary

⁴⁷ Submission by the Legal Aid Board to the Commission, 11 November 2019. See also: Department of Justice, Parliamentary Questions – 99, 29 November 2018, available at: <https://www.justice.ie/en/JELR/Pages/PQ-29-11-2018-99>, in which then Minister for Justice, Charlie Flanagan TD stated: “[T]he Board has not, in the time available to it to do so, been able to identify any case in the past three years where legal aid has been granted for an application pursuant to section 19(2) of the 2003 Act.”

⁴⁸ Submission by the Legal Aid Board to the Commission, 8 October 2021.

compensation on foot of the settlement one year after said agreement had been reached.⁴⁹

At present, it is not possible to obtain legal aid in respect of claims instituted in the WRC under the ESA 2000-2018.⁵⁰ The Legal Aid Board interprets section 26 of the Civil Legal Aid Act 1995 as providing it with the power to provide legal advice in respect of issues that may fall under the ESA 2000-2018, but this does not extend to providing representation before the WRC.⁵¹

FLAC described the provision of civil legal aid as being one potential advantage of the District Court process as compared to the WRC, but highlighted that all applicants must still satisfy the financial eligibility criteria under the Civil Legal Aid Act 1995 and its accompanying regulations.⁵²

In its submissions to the Commission, the Legal Aid Board correctly observed that a transfer of jurisdiction in respect of cases of alleged discrimination which occur on or at the point of entry to a licensed premises, from the District Court to the WRC, would result in the removal of such cases from the scope of section 27(2) of the Civil Legal Aid Act 1995. The consequence of this is that while a person may be able to obtain legal advice in respect of alleged discrimination on or at the point of entry to a licensed premises, they could no longer obtain legal aid and thus, legal representation.

The Commission acknowledges and regrets this reality. However, it is important to highlight that section 27(2) bestows a power on the Minister for Justice (with the consent of the Minister for Finance) to prescribe proceedings conducted before any court or tribunal in the State as falling within the scope of section 27, the result being that parties who meet the financial and eligibility criteria could obtain legal aid in respect of their proceedings in such a forum, as is already the case with the International Protection Appeals Tribunal.

49 Submission by the Legal Aid Board to the Commission, 8 October 2021.

50 Section 27(2), Civil Legal Aid Act 1995.

51 Submission by the Legal Aid Board to the Commission, 11 November 2019; Submission by the Legal Aid Board to the Commission, 8 October 2021.

52 Submission by FLAC to the Commission, July 2019.

Section 27, Civil Legal Aid Act 1995 states:

“27. – (1) In this Act ‘legal aid’ means representation by a solicitor of the Board, or a solicitor or barrister engaged by the Board under section 11, in any civil proceedings to which this section applies and includes all such assistance as is usually given by a solicitor and, where appropriate, barrister in contemplation of, ancillary to, or in connection with, such proceedings, whether for the purposes of arriving at or giving effect to any settlement in the proceedings or otherwise.

(2) This section applies to all civil proceedings other than those relating to designated matters in respect of which there is not for the time being an order for force under subsection (10) of section 28 –

(a) conducted in the District Court, the Circuit Court, the High Court or the Supreme Court, or

(b) conducted in any court or before any tribunal for the time being prescribed by the Minister, with the consent of the Minister for Finance, by order under this section...

The effective enjoyment of the rights to equality and non-discrimination as protected by international human rights law necessitates the provision of legal aid, for example, the United Nations Committee on the Rights of Persons with Disabilities that, “[s]ufficient and accessible provision of legal aid to ensure access to justice for the claimant in discrimination litigation” is a requirement of the United Nations on the Convention on the Rights of Persons with Disabilities,⁵³ subject to statutory tests of means and merits.⁵⁴

Article 6 of the European Convention on Human Rights (‘ECHR’) provides for the right to a fair trial. Whether Article 6 implies a requirement to provide legal aid depends on a number of factors, as set out below. The obligation on the State in this regard does not extend to ensuring a total equality of arms between an assisted person and an opposing

53 United Nations Committee on the Rights of Persons with Disabilities, General comment No. 6 (2018) on equality and non-discrimination, 26 April 2018, UNCRPD/C/GC/6, paragraph 31(g).

54 United Nations Committee on the Rights of Persons with Disabilities, General comment No. 6 (2018) on equality and non-discrimination, 26 April 2018, UNCRPD/C/GC/6, paragraph 52(d).

party, so long as each side is afforded a reasonable opportunity to present his/ her case under conditions that do not place him/ her at a substantial disadvantage vis-à-vis the opposing party.⁵⁵

Some supports, other than legal aid, are available to those who institute claims at the WRC, which are unavailable to those who are required to institute proceedings in the District Court. For example, the Citizens Information Board does not view its remit as extending to the assisting individuals who are instituting or advancing a claim in the District Court, but it does frequently provide support to members of the public who institute claims in the WRC.⁵⁶

The importance of what is at stake for the applicant

The case of *Steel and Morris v The United Kingdom*,⁵⁷ concerned two individuals who were associated with London Greenpeace and had handed out leaflets which made various damaging allegations against the corporation, McDonald's. McDonald's instituted defamation proceedings against the Applicants, Steel and Morris, and a monetary award of £4,000GBP was made against them. The Applicants had been refused legal aid in order to defend themselves at trial. The European Court of Human Rights ('ECtHR') found that the Applicants' right to a fair trial had been violated by virtue of the vast inequality between the Applicants on the one hand and McDonald's on the other, and the fact that they were not provided with legal aid had denied them the right to present their case effectively:

"59. The Court recalls that the Convention is intended to guarantee practical and effective rights. This is particularly so of the right of access to court in view of the prominent place held in a democratic society by the right to a fair trial (see the *Airey v. Ireland* judgment of 9 October 1979, Series A no. 32, § 24). It is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court (*ibid.*) and that he or she is able to enjoy equality of arms with

55 *Steel and Morris v The United Kingdom*, application no. 68416/01, ECtHR, 15 February 2005, §62.

56 Submission by the Citizens Information Board to the Commission, 20 August 2019.

57 Application no. 68416/01, ECtHR, 15 February 2005.

the opposing side (see, among many other examples, De Haes and Gijssels v. Belgium, judgment of 24 February 1997, Reports 1997-I, § 53).

60. Article 6 § 1 leaves to the State a free choice of the means to be used in guaranteeing litigants the above rights. The institution of legal aid scheme constitutes one of those means but there are others, such as for example simplifying the applicable procedure (see Airey, § 26 and McVicar, § 50).

61. The question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend, inter alia, upon the importance of what is at stake for the applicant in the proceedings...⁵⁸

The cases which the WRC, under the ESA 2000-2018 and the District Court under the ILA 2003, adjudicate upon are matters of significant consequence for those who allege discrimination since the introduction of the Workplace Relations (Miscellaneous Provisions) Act 2021, as now a public finding can be made against them i.e. that they are guilty of discrimination.

It is also important to observe, given the reference made to courts as opposed to tribunals in Steel and Morris v The United Kingdom, under Article 6 § 1, a tribunal need not necessarily be a court of law integrated within the standard judicial machinery. It may be set up to deal with a specific subject matter which can be appropriately administered outside the ordinary court system.⁵⁹

The vulnerability of the applicant and their capacity to represent themselves

The ECtHR has also emphasised that the vulnerability of the applicant is a factor which is to be taken into account when considering whether or not they have a right to access legal aid.⁶⁰

58 Steel and Morris v The United Kingdom, application no. 68416/01, ECtHR, 15 February 2005, §§59-60.

59 Hoxha v Albania, application no. 15227/19, ECtHR, 31 May 2021, §284.

60 Nenov v. Bulgaria, application no.33738/02, ECtHR, 16 July 2009, §52.

Many of the groups protected by the grounds of discrimination provided for in the ESA 2000-2018 are characterised by a particular level of vulnerability and/or constitute socially disadvantaged groups within society. Notwithstanding this fact, they have no opportunity to access legal aid to advance claims of alleged discrimination in the WRC.

In addition, the statistics provided by the Legal Aid Board (as set out above) demonstrate that of the four applications for legal aid that were accepted since November 2019, two of the applicants were unsuccessful in advancing their claims, while the remaining two applicants settled their claims. Those who were unsuccessful were denied legal aid in order to realise their right to appeal, despite the fact that they had satisfied the merits test to obtain legal aid on first instance and the appeal would have resulted in a full de novo hearing.

It is also relevant that in any assessment as to whether the provision of legal aid is required, and a factor which may be linked to an applicant's vulnerability is the capacity of an individual to represent him or herself.⁶¹

The emotional involvement of the applicant which impedes the degree of objectivity required by advocacy

In the seminal judgment of *Airey v Ireland*, which concerned the provision of legal aid in proceedings involving marital disputes, the ECtHR highlighted that such cases:

“[e]ntail an emotional involvement that is scarcely compatible with the degree of objectivity required by advocacy in court.”⁶²

While proceedings involving marital disputes and claims for alleged discrimination are not directly comparable, it is the case that the latter category of cases may involve a significant amount of emotional involvement, even distress for an applicant who has suffered or believes they have suffered discrimination on the basis of their personal characteristics and/or circumstances. Proceeding with a claim under the ILA 2003 or the ESA 2000-2018 may involve coming face to face or even having to question an individual or individuals who have subjected that applicant to discriminatory abuse, thus

61 *McVicar v. The United Kingdom*, no.46311/99, 7 May 2002, §§48-62.

62 *Airey v. Ireland*, application no.6289/73, ECtHR, 9 October 1979, §24.

calling into question the level of objectivity which it is reasonable to expect of an applicant in order to successfully advance their claim under either of the legal frameworks.

The complexity of the relevant law or procedure

As detailed above, the technicalities which must be adhered to in order to institute a claim in the District Court under the ILA 2003 are arguably more onerous than those procedures which underpin the process of instituting and advancing a claim at the WRC under the ESA 2000-2018.

However, the process which underpins the complaints mechanism available through the WRC is also technical and in many instances, may require a level of legal knowledge and/or experience that a layperson may not possess. Examples include but are not necessarily limited to understanding and analysing concepts such as direct and indirect discrimination, or establishing facts through examination and/or cross-examination.

The changes ushered in by the judgment of the Supreme Court in *Zalewski*, and subsequently the enactment of the Workplace Relations (Miscellaneous Provisions) Act 2021, have added further complexities in respect of the process required to advance a claim under the ESA 2000-2018, and the legal consequences of falling short of the requirements provided for in that legislation are now more significant.

These are factors that should also be considered when assessing whether or not an individual should be provided with legal aid in respect of proceedings which they are involved in, or which they intend to institute.⁶³

The need to establish facts through expert evidence and the examination of witnesses

The questioning of witnesses is an inherent part of the adversarial process that characterises District Court proceedings instituted pursuant to section 19, ILA 2003.

⁶³ *Airey v. Ireland*, application no.6289/73, ECtHR, 9 October 1979, §26; *Steel and Morris v The United Kingdom*, application no. 68416/01, ECtHR, 15 February 2005, §62.

Examination of witnesses and cross-examination of witnesses has also long been a feature of most cases at the WRC. The majority judgment in *Zalewski* has made clear that it is a legal requirement in most if not all cases that cross-examination is facilitated for the purpose of guaranteeing each party's right to fair procedures and for the purpose of establishing facts upon which an adjudicator can rely.⁶⁴

Further, this should also be a relevant factor in determining whether or not a person should gain access to legal aid, and should be assessed in conjunction with an analysis of the complexity of proceedings.⁶⁵

Observations of the Commission in respect of legal aid

It is important to acknowledge that, as outlined in the seminal judgment of *Airey v Ireland* referenced above, whether the provision of legal aid is necessary in order to comply with the requirements of Article 6 of the ECHR will depend upon the specific circumstances of each individual case.

However, as the Legal Aid Board has highlighted in its submission to the Commission, the present reality is that legal aid cannot be made available in any circumstances whatsoever in respect of claims brought under the ESA 2000-2018. This situation raises questions in respect of the compatibility of the current regime provided for by the Civil Legal Aid Act 1995 with Article 6 of the ECHR, at least insofar as claims under the ESA 2000-2018 are concerned.

The Legal Aid Board has observed that transferring jurisdiction to deal with claims of alleged discrimination on or at the point of entry to licensed premises to the WRC rather than the District Court would remove the availability of legal aid in such cases,⁶⁶ and it has also observed that:

“At a time when the broader area of access to justice has achieved much public attention and the Government is planning a broader review of the legal aid system, to remove a particular legal remedy from the scope of civil legal aid,

64 *Zalewski v The Workplace Relations Commission and Ors* [2021] IESC 24, O'Donnell J, paragraph 146.

65 *Airey v. Ireland*, application no.6289/73, ECtHR, 9 October 1979, §24.

66 Submission by the Legal Aid Board to the Commission, 8 October 2021.

particularly one which directly affects a minority group (members of the Traveller community) who are the subject of systematic discrimination, might be seen as a retrograde step. This is so notwithstanding that the Board has acted in few such cases in recent times..."⁶⁷

However, it is notable that the Department of Justice intends to carry out a review of the provision of legal aid in the State during the course of 2021,⁶⁸ and as outlined above, it is open to the Minister for Justice (with the consent of the Minister for Finance) to extend the provision of legal aid to cases instituted at the WRC.⁶⁹ It is the view of the Commission that there may in fact be a legal requirement that the blanket impediment to providing legal aid in respect of claims under the ESA 2000-2018 be lifted.

This would also have the effect of remedying the potential problem identified by the Legal Aid Board should jurisdiction in respect of claims relating to discrimination on or at the point of entry to licensed premises transfer from the District Court to the WRC. It is important to take note of observations made in Judge O'Leary's judgment in *Keaney v Ireland* where she said that it is:

"[u]p to the State to erect the appropriate 'scaffolding to support the efficient administration of justice."⁷⁰

This obligation extends to making provision for legal aid where circumstances require it, as established by the case law of the ECtHR addressed below, and the Commission is of the view that there are strong arguments to be made in respect of not only retaining the provision of legal aid in relation to claims for discrimination on or at the point of entry to licensed premises (should jurisdiction in respect of same transfer to the WRC), but to also extend such provision to all discrimination claims.

67 Submission by the Legal Aid Board to the Commission, 8 October 2021.

68 Department of Justice Action Plan (2021), page 23, available at: https://www.justice.ie/en/JELR/Department_of_Justice_Action_Plan_2021.pdf/Files/Department_of_Justice_Action_Plan_2021.pdf

69 Section 27(2), Civil Legal Aid Act 1995.

70 *Keaney v Ireland*, application no.72060/17, ECtHR, 30 July 2020, concurring judgment of Judge O'Leary, §17.

Submissions made on behalf of affected business groups

Submissions made on behalf of affected business groups

In carrying out the Review, the Commission received a number of submissions from business representative groups and trade bodies tasked with representing the views and interests of various forms of licensed premises based in the State (collectively, “the trade bodies”).⁷¹

All of the trade bodies submitted that the District Court is an appropriate and/or best placed forum for hearing and adjudicating upon claims of discrimination which are alleged to have taken place on or at the point of entry to licensed premises. None of the trade bodies recommended any amendments to section 19, ILA 2003 and all concluded that the procedures provided for in that provision are working well.

The grounds underpinning these submissions may be summarised as follows:

- the seriousness of the consequences of an adverse finding for a licensee warrant such claims being dealt with in the District Court;⁷²
- it is necessary to ensure that both parties are treated fairly that complaints are heard and adjudicated upon in the District Court;⁷³
- the District Court is responsible for adjudicating upon licensing applications and renewals and in order to ensure a coherent framework, it is necessary that matters which may impact upon that licence are dealt with in the same forum;⁷⁴
- the procedures underpinning the complaints mechanism in the District Court provided for under section 19, ILA 2003, are appropriate and not onerous or burdensome,⁷⁵ and it was submitted by the LVA that court fees

71 Irish Hotels Federation; Licensed Vintners Association; and Vintners Federation of Ireland.

72 Submission by VFA to the Commission, 3 October 2019; and Submission by LVA to the Commission, 7 October 2019; and Submission by IHF to the Commission, 8 October 2019.

73 Submission by the LVA to the Commission, 7 October 2019.

74 Submission by VFA to the Commission, 3 October 2019; and Submission by LVA to the Commission, 7 October 2019; and Submission by IHF to the Commission, 8 October 2019.

75 Submission by IHF to the Commission, 8 October 2019.

and the risks of costs orders are essential in order to ensuring both parties receive a fair hearing;⁷⁶

- the District Court retains a degree of flexibility in exercising its discretion to make varied orders to provide redress for discrimination,⁷⁷ and a licensee who does not cooperate may be found in contempt of court, which the IHF submits is an added advantage given the seriousness of any adverse findings made;⁷⁸
- it is appropriate that a claim of discrimination be dealt with in an adversarial manner, and that evidence in support of serious allegations that underpin such claims be explored through cross-examination;⁷⁹
- cases involving allegations of discrimination and adjudication of same should be heard in public.⁸⁰

76 Submission by LVA to the Commission, 7 October 2019.

77 N.B. Section 27, ESA 2000-2018 provides the WRC with the power to make an order for the same amount of compensation as is available in the District Court under section 19, ILA 2003, and a wide-ranging discretion to make, "[a]n order that a person or persons specified in the order take a course of action which is so specified".

78 Submission by the IHF to the Commission, 8 October 2019. N.B. Decisions of the WRC can be enforced by way of an application to the District Court after a period of fifty-six days has passed since the parties were given notice in writing of the decision.

79 Submission by IHF to the Commission, 8 October 2019. N.B. Cross-examination has routinely been a feature of proceedings before the WRC, and the Supreme Court in *Zalewski* stipulated that it is a legal requirement in most, if not all cases, see: *Zalewski v The Workplace Relations Commission and Ors* [2021] IESC 24, O'Donnell J, paragraph 146.

80 Submission by IHF to the Commission, 8 October 2019. N.B. Following the judgment of the Supreme Court in *Zalewski* and the enactment of section 12, Workplace Relations (Miscellaneous Provisions) Act 2021, all cases before the WRC are now heard in public unless special circumstances are determined to exist. The WRC and the Commission also have powers to institute an application for enforcement in the District Court on a complainant's behalf and with their consent, pursuant to section 43(1), WRC Act 2015 and section 31, ESA 2000-2018.

Relevant quantitative data

In carrying out the Review, the Commission engaged with the Courts Service and also submitted a request pursuant to the Freedom of Information Act 2014 in order to obtain quantitative data in respect of the operation of section 19, ILA 2003 during the period between 2017 and 2019. The available data and information in respect of same are set out below.

Information in respect of the period between 2009-2010

Ireland's Report to the Council of Europe Advisory Committee on the Framework Convention for the Protection of National Minorities, which was submitted in 2011,⁸¹ set out data in respect of the number of applications which were instituted in the District Court under the ILA 2003 during the course of 2009 and 2010. In 2009 there were 55 applications to the District Court and in all of those cases, the discriminatory ground cited was membership of the Traveller Community. Of the 55 cases instituted, orders for compensation were made in 8 cases and 44 were struck out or withdrawn, with 3 cases on hand at year's end. In 2010 there were 54 applications lodged. 50 applications alleged discrimination against members of the Traveller Community, 3 against disabled persons and 1 against a female alleging gender discrimination. Of these cases 49 were struck out, withdrawn or adjourned, meaning that 5 cases were fully advanced. In those 5 cases, compensation was paid in 4 of the cases and the licensed establishment was required to make a contribution to the court poor box in one case.

Statistics pertaining to the year 2016

The Council of Europe Advisory Committee on the Framework Convention for the Protection of National Minorities has observed that the data provided by the Courts Service in respect of 2016, demonstrates that of the 28 applications instituted under

⁸¹ Council of Europe Secretariat of the Framework Convention for the Protection of National Minorities, Third Report submitted by Ireland pursuant to Article 25, Paragraph 2 of the Framework Convention for the Protection of National Minorities, 2011, paragraphs 138-149, available: <https://www.coe.int/en/web/minorities/ireland>

the ILA 2003, 26 were lodged by members of the Traveller Community. 27 of the 28 applications were struck out, withdrawn or adjourned.⁸²

8.3 Statistics pertaining to the year 2017

In 2017, a total of 52 applications under the ILA 2003 were submitted in the District Court, in the following areas (as opposed to court districts):

- Carlow: 3;
- Cork: 1;
- Dublin Metropolitan District: 7;
- Ennis: 2;
- Galway: 3;
- Limerick: 10;
- Naas: 4;
- Portlaoise: 1;
- Tralee: 5
- Waterford: 14; and
- Wexford: 2.

With regard to the grounds for each of the 52 applications in 2017 - 1 of the applications was based on an allegation of discrimination on the ground of sexual orientation and the remaining 51 applications were based on discrimination on the Traveller Community ground. This ground amounted to 98% of the applications; only 2 of the applications resulted in an Order for compensation and the other 50 applications were either

⁸² Council of Europe Advisory Committee on the Framework Convention for the Protection of National Minorities, Fourth Opinion on Ireland, 10 October 2018, ACFC/OP/IV(2018)005, paragraph 23.

withdrawn, struck out or adjourned generally. There were no orders made for closure of the premises.

Statistics pertaining to the year 2018

In 2018, there were a total of 50 applications made to the District Court under the ILA 2013, and this data can be broken down in respect of each of the following geographical areas:

- Clonakilty: 8;
- Cork: 5;
- Dublin Metropolitan District: 20;
- Donegal: 2;
- Ennis: 5;
- Galway: 1;
- Limerick: 8; and
- Naas: 1.

Of the 50 applications during this period, one was instituted on the basis of an allegation of discrimination based on the sexual orientation ground, and the remaining 49 applications were based on the Traveller Community ground. The latter ground therefore formed the basis of 98% of the applications instituted during this period.

49 applications were either withdrawn, struck out or adjourned generally, and at the time of the data being provided, one of the cases was ongoing.

There were no orders for compensation, or orders directing the closure of any premises, made by the District Court.

Statistics pertaining to the year 2019

In 2019, there were a total of 45 sets of proceedings instituted under section 19, ILA 2003, in the following geographical areas:

- Ballina: 1;
- Bray: 1;
- Clonmel: 5;
- Cork: 1;
- Dublin Metropolitan District: 12;
- Ennis: 3;
- Galway: 13;
- Limerick: 5;
- Naas: 2;
- Nenagh: 1; and
- Portlaoise: 1.

Of the 45 proceedings instituted in 2019, 2 were based on the race ground, and the remaining 43 were based on alleged discrimination on the Traveller Community ground. Proceedings on the basis of the latter ground therefore amounted to 95% of those instituted. 36 applications were either withdrawn, struck out or adjourned generally. There were nine orders made for compensation, and no orders made for closure of the premises.

Cases instituted at the WRC under the Equal Status Acts 2000-2018

It is important to acknowledge that the District Court only has jurisdiction to adjudicate upon claims of discrimination which take place on or at the point of entry to a licensed

premises, while the WRC has jurisdiction in respect of all other discrimination claims arising from attempts to access goods and services in other forums.

However, the statistics set out in the table below⁸³ demonstrate that in the period between 2016 and 2019, there were significantly more claims for discrimination instituted under the ESA 2000-2018 at the WRC, as compared to the number of proceedings instituted in the District Court under the ILA 2003.

It is not possible for the Commission to draw definitive conclusions in comparing the figures relating to claims in the District Court and the WRC. However, it would appear that the complaints mechanism made available under section 19 of the ILA 2003 is significantly underutilised. This is an observation that is broadly in keeping with the submissions received by the Commission from civil society organisations, who put this phenomenon down to the negative experiences and/or perceptions of the system that is in place under section 19 of the ILA 2003.

Number of Complaints/Referrals	2016	2017	2018	2019
	658	668	595	439
Equal Status Grounds	2016	2017	2018	2019
Age	13	46	62	62
Civil Status	12	18	22	5
Disability	75	57	90	73
Family Status	15	28	33	24
Gender	20	101	116	89
Member of Traveller Community	416	408	124	97
Race	462	363	292	159
Religion	25	20	19	36
Sexual Orientation	7	9	6	12
Housing Assistance (HAP)	43	63	104	91
Total Grounds	1088	1113	868	648

⁸³ The data detailed in the table below is extracted from the respective Annual Reports for the Workplace Relations Commission for the years 2016, 2017, 2018, and 2019.

Observations of the Commission in respect of the data obtained

The data provided by the Courts Service demonstrates clearly that a very significant portion and almost all of the cases instituted under section 19, ILA 2003 during the period between 2017 and 2019 were brought by members of the Traveller Community because they alleged they had been discriminated against on the basis of their Traveller identity and/or ethnicity. This reflects the concerning reality that Travellers are 38 times more likely than white-Irish to experience discrimination in accessing goods and services, particularly in shops, pubs and restaurants (with the latter two generally coming within the scope of the ILA 2003 as opposed to the ESA 2000-2018).⁸⁴

However, it seems clear that a relatively low number of cases have been instituted, even as a result of alleged discrimination on the Traveller Community ground and particularly in light of observations made by the Council of Europe Advisory Committee on the Framework Convention for the Protection of National Minorities, that it received a significant number of reports of discrimination on the basis of this ground in places of entertainment, especially amongst the Traveller youth population.⁸⁵

The data provided by the Courts Service also reflects that a vast majority of the proceedings instituted in the District Court under the ILA 2003 were either struck out or withdrawn. An extremely small number of cases resulted in an Order for compensation – 11 in total during the period of 2017-2019, with no closure orders being made, thus demonstrating that the District Court rarely, if ever, uses this power. It is not possible to draw conclusions from the data as to whether the cases which were struck out or adjourned generally actually came on for hearing before a judge of the District Court. Thus, it is unclear whether these cases were struck out or adjourned following a hearing by a judge, as a result of settlement agreements having been reached between the parties prior to a hearing (therefore negating the need for a court order) or for some other reason.

84 Irish Human Rights and Equality Commission and Economic and Social Research Institute, Who experiences discrimination in Ireland? Evidence from QNHS Equality Modules (F. McGinnity, R. Grotti, O. Kenny and H. Russell), November 2017, page 36.

85 Council of Europe Advisory Committee on the Framework Convention for the Protection of National Minorities, Fourth Opinion on Ireland, 10 October 2018, ACFC/OP/IV(2018)005, paragraph 23.

Notwithstanding this observation, the Commission is concerned by the very small number of cases which were instituted during this period, and the even smaller number which actually resulted in complainants obtaining relief from the District Court. The aforementioned figures are in stark contrast to those identified by Judy Walsh BL who, in her submission to the Commission, highlighted that under the old regime (whereby discrimination claims in respect of licensed premises were dealt with by the Equality Tribunal) the Tribunal issued 20 decisions concerning licensed premises in 2001, 45 decisions in 2002, and 64 decisions in 2003.⁸⁶

⁸⁶ Submission by Judy Walsh BL to the Commission, 8 October 2019.

Requirements of the law of the European Union

The burden of proof in certain equality claims

As highlighted in the observations made by numerous international human rights bodies detailed below, and as reflected in the statistics (including those provided by the Courts Service) many of the cases brought under section 19, ILA 2003 are instituted by members of the Traveller Community. In March 2017, State recognition of Traveller ethnicity was instituted, as reflected in a statement made by then An Taoiseach Enda Kenny TD in Dáil Éireann.⁸⁷

Members of the Traveller Community therefore enjoy protections under Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('Race Equality Directive'), the scope of which encompasses the supply of goods and services, such as those which are available within a licensed premises.

Article 3(1) (h), Race Equality Directive states:

"3.1. Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to...

(h) Access to and supply of goods and services which are available to the public, including housing."

In light of Article 3(1) (h), Race Equality Directive, where discrimination occurs on or at the point of entry to a licensed premises, or indeed in the supply of any goods or services, on the Traveller Community ground, the Race Equality Directive will be engaged.

Under Article 8 of the Race Equality Directive, Member States of the European Union (including Ireland), are required to put in place measures to ensure that when a complainant establishes facts before a court or other competent authority, from which

⁸⁷ Dáil Éireann, Traveller Ethnicity: Statements, 1 March 2017, available at: <https://www.oireachtas.ie/en/debates/debate/dail/2017-03-01/37/>

it may be presumed that there has been direct or indirect discrimination, the burden of proof shifts to the respondent to prove that there has been no breach of the principle of equal treatment. The European Commission has succinctly summarised the effect of this procedural rule:

"The reversal of the burden of proof does not mean that plaintiffs are exempt from convincing the court that they have a case; a set of facts that call for an explanation. In order to reverse the burden of proof they must first establish a prima facie case, in other words convince the court of the likeliness or probability that they suffered discrimination. Thus, the burden of proof shifts before a court can make a clear finding on causation. The burden of proof then moves to the respondent to prove that discrimination played no part in the treatment or effect complained of. If the respondent is unable to explain the treatment using objective reasons unrelated to discrimination, he will be liable for a breach of non-discrimination law. The reversal of the burden of proof applies to the various forms of discrimination...

The reversal of the burden of proof is a procedural rule that must be read in conjunction with the definition of the type of discrimination invoked. It connects evidence to the showing of bias and derails the course of proceedings at two distinct junctions: (i) it lowers the onus of proof (presumption) resting on the plaintiff in relation to the causal link between the protected ground and the conduct (prima facie case), while (ii) placing and limiting the remaining onus of proof in relation to bias on the respondent (justification defence). "⁸⁸

The purpose of the provision is to seek to minimise the significant challenges those subjected to racial discrimination face in presenting explicit evidence of discrimination, particularly when the case depends on factors which lie entirely within the knowledge of the individual or individuals responsible for the discrimination and/or where there is indirect discrimination.

⁸⁸ European Commission, Reversing the burden of proof: Practical dilemmas at the European and national level, 2014, pages 6-7.

However despite the fact that it would appear, particularly in light of the data outlined above, that a significant majority of the claims instituted under section 19 of the ILA 2003 are brought by members of the Traveller Community, the provision itself does not provide for a shifting of the burden of proof in the manner in which Article 8 of the Race Equality Directive requires.

This procedural rule is not limited to the Race Equality Directive. In fact, Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services ('the Gender Goods and Services Directive') also requires the burden of proof to shift in those circumstances.⁸⁹ Section 19, ILA 2003 does not provide for a shifting of the burden of proof in respect of discrimination based on the gender ground in the supply and access to goods and services on or at the point of licensed premises.

This is in stark contrast to section 38A, ESA 2000-2018 which explicitly provides for this procedural rule, mandated by the Race Equality Directive and the Gender Goods and Services Directive.

Section 38A, ESA 2000-2018 states:

"38A. – (1) Where in any proceedings facts are established by or on behalf of a person from which it may be presumed that prohibited conduct has occurred in relation to him or her, it is for the respondent to prove the contrary.

The absence of any mechanism provided for in section 19, ILA 2003, whereby the burden of proof can shift in cases which engage those Directives, also calls into question the compatibility of the statutory provision with the requirements of the law of the European Union.

Other principles of the law of the European Union

The Charter of Fundamental Rights of the European Union only applies when the Member States, such as Ireland, are implementing the law of the European Union.⁹⁰

⁸⁹ Article 9, Gender Goods and Services Directive.

⁹⁰ Article 51, Charter of Fundamental Rights of the European Union.

When national courts and authorities, such as the WRC, are confronted with issues of purely national law, they are not obliged to apply the Charter. However when, for example, the Race Equality Directive and/or the Gender Goods and Services Directives (referenced above) are engaged, the Charter of Fundamental Rights of the European Union may also apply, even when it may appear that the District Court is dealing exclusively with national law through its application of section 19, ILA 2003.

In such circumstances, the operation of section 19 of the ILA 2003 must be viewed through the prism of the Charter of Fundamental Rights of the European Union. The Charter provides for a large number of relevant rights, including the right to an effective remedy as protected by Article 47, a corollary of which is legal aid, which “[s]hall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”

Furthermore, as outlined in the seminal judgment of the Court of Justice of the European Union in *Levez v TH Jennings (Harlow Pools) Ltd* C-326-96, the principle of effectiveness under EU law requires that procedural conditions do not render the exercise of rights conferred by Community law as virtually impossible or excessively difficult.⁹¹ The accounts provided to the Commission through the submissions furnished by civil society organisations indicate that the operation of section 19, ILA 2003 may be contrary to that legal principle, particularly compared with the complaints mechanism which is available under the ESA 2000-2018 and the lack of objective reasoning which exists for these differentiations.

91 *Levez v TH Jennings (Harlow Pools) Ltd* C-326-96, paragraph 18.

Requirements of international human rights law

The International Convention on the Elimination of All Forms of Racial Discrimination

Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination ('ICERD') places an obligations on Ireland as a State party to prohibit and eliminate discrimination in all of its forms. It is also obliged under that provision to guarantee the right of everyone without distinction as to race, colour or ethnic origin, to equality before the law, notably in the enjoyment of, inter alia, the right to equal treatment before the tribunals and all other organs administering justice in Ireland.

The data outlined above demonstrates that members of the Traveller Community, an ethnic minority and socially disadvantaged group, institute applications under section 19 ILA 2003 in disproportionately higher numbers than other groups. As outlined above, the procedures in place in that tribunal are significantly more onerous and, according to submissions received by the Commission from civil society groups, in respect of the operation of the provision, these procedures create significantly more hurdles to accessing justice for such litigants than their counterparts who institute claims in the WRC under the ESA 2000-2018. There appears to be no objective rational for the difference in treatment of these category of cases, particularly given the detrimental impact caused to this particularly vulnerable group by it.

Furthermore, Article 6 of the ICERD stipulates that:

“State Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.”

The small number of claims instituted under section 19, ILA 2003 which actually proceeded to trial calls into question whether the mechanism provides the effective

protection and remedy necessary to comply with the requirements of Article 6 of the ICERD.

In light of same, the Commission called upon the State to transfer jurisdiction for claims of discrimination on or at the point of entry to licensed premises to the WRC. It stated as follows:⁹²

“The Commission notes that access to a remedy for discriminatory refusal of entry to a licensed premises (including bars, pubs, houses, hotels, or clubs) is governed by section 19 of the Intoxicating Liquor Act 2003, rather than the Equal Status Act 2000 to 2015...Bringing a case under the 2003 Act is procedurally complex, may involve unwanted publicity, and carries a higher risk of costs and court fees. Furthermore, criticisms have been raised that the District Court is less efficient and takes place in an adversarial and public context, as opposed to the more victim-centric set up of the WRC. The Commission previously highlighted these issues to the Review Group of the Administration of Civil Justice in 2018, noting that the transfer of jurisdiction to the District Court has created a much more onerous process...

The Commission recommends that the State return complaints of discrimination in licensed premises to the purview of the Equal Status Acts and the jurisdiction of the Workplace Relations Commission.”⁹³

In considering Ireland’s compliance with the ICERD, the United Nations Committee on the Elimination of Racial Discrimination criticised the fact that jurisdiction lies with the District Court in respect of claims of discrimination arising on or at the point of entry to licensed premises and recommended that Ireland take steps to transfer jurisdiction to the WRC.

92 N.B. The Report was submitted prior to the delivery of the judgment of the Supreme Court in *Zalewski v The Workplace Relations Commission and Ors* [2021] IESC 24 and/or the enactment and commencement of the Workplace Relations (Miscellaneous Provisions) Act 2021.

93 The Irish Human Rights and Equality Commission, Ireland and the Convention on the Elimination of Racial Discrimination: Submission to the United Nations Committee on the Elimination of Racial Discrimination on Ireland’s Combined 5th to 9th Report (October 2019), pages 18-19.

Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined fifth to ninth reports of Ireland*, UN Doc. CERD/C/IRL/CO/5-9, 12 December 2019, paragraphs 45-46 state:

"45. The Committee is concerned about the discriminatory refusal of entry to licensed premises such as bars, public houses and hotels experienced mainly by Travellers and Roma. While noting that discrimination in licensed premises are not under the purview of the Equality Status Acts 2000 to 2018 but that of the Intoxicating Liquor Act 2003 and therefore complaints of racial discrimination in the licensed premises cannot be brought before the Workplace Relations Commission but before district courts, the Committee is concerned that the complex court proceedings may effectively hinder Travellers and Roma from accessing justice and remedies for the racial discrimination they have experienced (arts. 5 and 6).

46. The Committee recommends that the State party take necessary steps to ensure that the discrimination in licensed premises is covered by the Equality Status Acts 2000 to 2018 and complaints thereon are dealt by the Workplace Relations Commission with a view to enhancing the accessibility of minority groups to effective remedies."

United Nations Convention on the Elimination of All Forms of Discrimination Against Women

The United Nations Convention on the Elimination of All Forms of Discrimination Against Women includes provisions which place obligations on the State and which are of particular relevance in respect of this analysis. In particular Article 2 thereof condemns discrimination against women in all its forms and places an obligation on State Parties to:

"[e]mbody the principle of equality of men and women in their national constitutions and other appropriate legislation if not yet incorporated therein

and to ensure, through law and other appropriate means, their practical realization of this principle..."⁹⁴

The United Nations Convention on the Rights of Persons with Disabilities

The United Nations Convention on the Rights of Persons with Disabilities ('UNCRPD') also has provisions which are applicable.

Article 5 places an obligation on the State to provide effective legal protection against discrimination on all grounds, and to ensure that all persons are equal before and under the law.

The United Nations Committee on the Rights of Persons with Disabilities has outlined that to ensure full enjoyment of the rights conferred by the UNCRPD, the State is obliged to ensure effective enforcement measures are in place, including specific rules relating to evidence and proof to ensure that stereotyped attitudes about the capacity of persons with disabilities do not result in victims of alleged discrimination being inhibited in obtaining redress.⁹⁵ This serves as further justification for bringing the evidential rules in respect of the burden of proof in discrimination claims arising from situations on or at the point of entry to licensed premises in line with the other categories of claims for discrimination.

Article 13 of the UNCRPD places a further obligation on State Parties to ensure effective access to justice for persons with disabilities on an equal basis with others.

Article 13, UNCRPD states:

"13.1. State Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all proceedings, including at investigative and other preliminary stages.

⁹⁴ Article 2(a), United Nations Convention on the Elimination of All Forms of Discrimination Against Women.

⁹⁵ United Nations Committee on the Rights of Persons with Disabilities, General comment No. 6 (2018) on equality and non-discrimination, 26 April 2018, UNCRPD/C/GC/6, paragraph 31(f).

2. In order to help ensure effective access to justice for persons with disabilities, State Parties shall promote appropriate training for those working in the field of administration of justice..."

In light of this provision, there are a number of pertinent observations which should be made in respect of the differences between procedures adopted in the District Court and WRC respectively under both of the applicable legal regimes.

Firstly, as detailed above, there are absolutely no pre-litigation investigative measures available to a potential litigant under section 19, ILA 2003 in contrast to the procedure which pertains to the WRC which allows for possible exploration through questions posed to the potential respondent, and inferences which may be drawn from said responses.

Secondly, in order to provide transparency, Article 13(1) of the UNCRPD, has been said to require that a State Party ensure:

"[a]ll relevant information is accessible and available and that there is adequate recording and reporting of all relevant claims, cases and court orders."⁹⁶

As outlined above, while the WRC issues written decisions in respect of claims adjudicated upon by it, the District Court does not usually do so. In fact, in carrying out the Review, the Commission was unable to identify any written decisions in respect of claims brought pursuant to section 19, ILA 2003. This incredible dearth of information is not in keeping with the observations of the UN Committee on the Rights of Persons with Disabilities and arguably falls short of the requirements of Article 13(1).

Thirdly, the UN Committee on the Rights of Persons with Disabilities has interpreted Article 13(2) as requiring those applying equality law to be effectively trained in the rights of persons with disabilities and the various issues which may arise for this group of persons including, for example, complexities surrounding intersectionality.⁹⁷

96 United Nations Committee on the Rights of Persons with Disabilities, General comment No. 6 (2018) on equality and non-discrimination, 26 April 2018, UNCRPD/C/GC/6, paragraph 54.

97 United Nations Committee on the Rights of Persons with Disabilities, General comment No. 6 (2018) on equality and non-discrimination, 26 April 2018, UNCRPD/C/GC/6, paragraph 55.

Observations made by the European Commission Against Racism and Intolerance

The European Commission Against Racism and Intolerance ('ECRI'), established by the Council of Europe, has repeatedly called upon the State to amend the manner in which claims of discrimination arising on or at the point of entry to licensed premises are dealt with. In its fourth monitoring cycle of Ireland in 2012, the ECRI recommended that an independent authority (other than the courts) be established with the competency to deal with cases of discrimination in the provision of good and services, leading to the establishment of the WRC, as was acknowledged by the ECRI.⁹⁸

However, upon the establishment of the WRC, the ECRI noted that the WRC Act 2015 did not result in any changes with regard to cases of discrimination on or at the point of entry to licensed premises and observed that a consequence of that would be that, "[a] substantial number of pertinent cases will remain excluded from the mandate of this new independent authority."⁹⁹

Given that, as the ECRI highlighted, members of the Traveller Community are often affected by discrimination in the provision of goods and services in licensed premises, it considered that the establishment of the WRC could not be considered as "[a]ddressing the problem in full", and thus the ECRI considered that its aforementioned recommendation had only been "[p]artially implemented" as a result of the commencement of the WRC Act 2015.

In 2019, the ECRI further observed that the fact claims for discrimination arising on or at the point of entry to licensed premises are adjudicated upon by the District Court may be causing disproportionate and negative consequences for members of the Traveller Community and Roma population.

⁹⁸ European Commission against Racism and Intolerance, ECRI Conclusions on the Implementation of the Recommendations in respect of Ireland Subject to Interim Follow-Up, 1 March 2016, CRI(2016)4, page 5.

⁹⁹ European Commission against Racism and Intolerance, ECRI Conclusions on the Implementation of the Recommendations in respect of Ireland Subject to Interim Follow-Up, 1 March 2016, CRI(2016)4, page 5.

The European Commission against Racism and Intolerance, *ECRI Report on Ireland (fifth monitoring cycle)*, 4 June 2019, CRI (2019)18 states:

“Discrimination cases involving licensed premises can still only be heard by District Courts, which may be a barrier to access to justice for members of the Traveller community. Civil legal aid is not available for proceedings before the Workplace Relations Commission and the name of this body could be misleading.”

The Council of Europe Advisory Committee on the Framework Convention for the Protection of National Minorities

The Council of Europe Advisory Committee on the Framework Convention for the Protection of National Minorities has highlighted the additional barriers to accessing justice which the procedures underpinning the District Court process have created in respect of this category of discrimination claims, particularly with regard to the Traveller Community. The Council has called upon the State to change the existing procedure before the District Court, as provided for under section 19, ILA 2003 or to provide an alternative mechanism, “[s]o the remedy provided ensures any potential victim of discrimination the same procedural guarantees as those of an anti-discrimination body.”¹⁰⁰

Council of Europe Advisory Committee on the Framework Convention for the Protection of National Minorities, *Fourth Opinion on Ireland*, 10 October 2018, ACFC/OP/IV (2018)005

“22. As in previous opinion on Ireland, the Advisory Committee notes that certain discrimination issues do not fall under the jurisdiction of the WRC. Matters related to access to ‘places of entertainment’, designated by the law as ‘licensed premises’ – such as bars, public houses, hotels or clubs, where alcohol is offered for sale – fall under the jurisdiction of district courts, according to Section 19 of the Intoxicating Liquor Act 2003. The rationale behind this decision

100 Council of Europe Advisory Committee on the Framework Convention for the Protection of National Minorities, *Fourth Opinion on Ireland*, 10 October 2018, ACFC/OP/IV(2018)005, paragraph 26.

was that all licensing matters should be adjudicated upon in a transparent and cost effective way, and that the district courts were the most suitable courts for these purposes.

23. The Advisory Committee notes that the Irish authorities are in this regard 'satisfied that the provisions of the Intoxicating Liquor Act remain appropriate and proportionate.' Interlocutors of the Advisory Committee, including human rights organisations, but also representatives of Traveller organisations, as well as young Travellers interviewed by the Advisory Committee, reported on a significant number of discrimination cases in 'places of entertainment' ... Traveller organisations have continuously advocated for those cases to be under the jurisdiction of the WRC, arguing that district courts were not as efficient and relevant as an equality body in this particular context... The procedure before a district court, i.e. a judicial body without inspection capacity, diverges considerably from the victim-centred approach of the WRC, which is an anti-discrimination body. The question is whether procedure before the district courts provides the same level of procedural guarantees as those of an anti-discrimination body... For instance, the Advisory Committee notes the lack of privacy of the hearings, the fee charged, the costs incurred by complainants, the formal procedural approach, and that the burden of proof does not shift where prima facie evidence of discrimination is established.

Council of Europe Advisory Committee on the Framework Convention for the Protection of National Minorities, Fourth Opinion on Ireland, 10 October 2018, ACFC/OP/IV(2018)005, continued:

The Advisory Committee underlines also that such a judicial procedure requires specific knowledge and documentation, and is disconnected from the reality that there is a high level of illiteracy among persons belonging to Traveller communities (see Article 12), which makes it hard for persons belonging to Irish Traveller communities to access justice. In light of the above, the Advisory Committee questions whether the current legal framework provides sufficient procedural guarantees vis-à-vis the requirements of Article 4 of the Framework Convention.

24. Given the importance of public houses in Irish society, a particular effort should be made by the authorities to ensure that they do not constitute a space where discrimination is allowed to go on.... The Advisory Committee considers that, if those discrimination cases are to remain within the jurisdiction of district courts, the procedure before those courts should be adapted to the needs of discrimination victims."

Recommendations of the Commission

As detailed above, this Report provides details of a review of the adequacy and effectiveness of section 19, ILA 2003, by the Commission pursuant to its powers under section 30 of the IHREC Act 2014.

The Commission fully acknowledges the positions communicated by the trade bodies in their submissions to the Commission. However, it is notable that all of the submissions received by civil society organisations that engage with individuals and groups with direct experience of the operation of section 19, ILA 2003, as complainants, expressed the view that section 19, ILA 2003 is not fit for purpose and in fact hinders vulnerable groups in obtaining effective access to justice. The stated wish of every single civil society organisation consulted was that jurisdiction for claims of discrimination arising from incidents on or at the point of entry to licensed premises should be transferred from the District Court to the WRC.

The statistics outlined above demonstrate the small number of claims that have been instituted in the District Court in recent years, as compared to the WRC. The claims which were instituted rarely resulted in a court order being made in the complainant's favour.

Furthermore, the procedures which underpin the complaints mechanism available under section 19, ILA 2003 are unduly and unnecessarily onerous, particularly as compared to those which exist at the WRC, and in the view of the Commission make the enforcement of important rights excessively difficult and, in some cases, virtually impossible. For the reasons outlined above, the current system of redress operative under section 19, ILA 2003 serves to undermine principles of international human rights law and the law of the European Union including, but not limited to, rules in respect of the reversal of the burden of proof once facts have been established from which it may be presumed that racial or gender discrimination has occurred.

The principal recommendation which the Commission makes on foot of the Review is that urgent steps need to be taken by the Government to bring the complaints mechanism available for claims in respect of discrimination which occurs on or at the

point of entry to a licensed premises in line with the redress mechanism that is available in respect of such claims in all other forums. In particular, it is the view of the Commission that urgent steps need to be taken to bring such claims within the jurisdiction of the WRC as opposed to the District Court. This has not only been the long held view of the Commission,¹⁰¹ but multiple international human rights monitoring bodies, including the Committee on the Elimination of Racial Discrimination, have criticised the State for failing to take actions to effect this change.

While the Commission is of the view that there should be no delay in so doing, if immediate steps are not taken to implement a transfer of jurisdiction from the District Court to the WRC in respect of claims of discrimination which are alleged to have occurred on or at the point of entry to licensed premises, two matters should be given immediate attention.

In the first instance, the Government should seek to introduce an explicit statutory mechanism in a similar guise as provided for in section 38, ESA 2000-2018. Such provision should make it clear that in claims for discrimination arising on or at the point of entry to a licensed premises, a reversal of the burden of proof is necessary where facts are established by a complainant from which it may be presumed that prohibited conduct has occurred, as required by, *inter alia*, the Race Equality Directive and the Gender Goods and Services Directive.

Secondly, while the commencement of the Workplace Relations (Miscellaneous Provisions) Act 2021 has resulted in the starting position being that claims of discrimination under the ESA 2000-2018 are heard in public, adjudication officers retain a significant discretion to direct that proceedings be conducted in private where special circumstances require it. In the event that the Commission's principal recommendation is not immediately acted upon, steps should be taken to introduce a similar provision in respect of District Court proceedings under the ILA 2003, which would permit only the

101 The Irish Human Rights and Equality Commission, Ireland and the Convention on the Elimination of Racial Discrimination: Submission to the United Nations Committee on the Elimination of Racial Discrimination on Ireland's Combined 5th to 9th Report (October 2019), pages 18-19.

complainant to apply for proceedings to be heard in private and which would provide discretion for the District Court to so direct in certain circumstances.

It is of significant concern to the Commission that legal aid is not made available to those who institute and seek to advance claims of alleged discrimination under the ESA 2000-2018 at the WRC. The Commission is of the view that immediate steps should be taken to remedy this situation, subject to the financial and merits eligibility requirements. In the event that the Government does act on foot of the principal recommendation which has been made by the Commission, i.e. to transfer jurisdiction in respect of claims of alleged discrimination arising from events which take place on licensed premises from the District Court to the WRC, it is the strongly held view of the Commission that the provision of legal aid should extend to that category of cases as well.





Coimisiún na hÉireann um Chearta
an Duine agus Comhionannas
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