

# Submission on the Review of the Equality Acts

Irish Human Rights and Equality Commission  
December 2021



Coimisiún na hÉireann um Chearta  
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# 1. Introduction

The Irish Human Rights and Equality Commission ('the Commission') is both the national equality body and national human rights institution for Ireland, established under the *Irish Human Rights and Equality Commission Act 2014*. In accordance with its founding legislation, the Commission is mandated to keep under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights and equality<sup>1</sup> and is specifically mandated to keep under review the effectiveness of the working of equality legislation.<sup>2</sup>

In June 2021, the Minister for Children, Equality, Disability, Integration and Youth announced a review of the Equality Acts,<sup>3</sup> including the *Equal Status Acts 2000-2018* ('ESA')<sup>4</sup> and the *Employment Equality Acts 1998-2015* ('EEA')<sup>5</sup>. The enactment of the Equality Acts at the turn of the century represented a significant milestone in the development of Irish law and the Acts have considerably advanced equality in Ireland by underpinning positive change at individual, organisational and societal levels.

More than two decades on, Ireland is a more diverse multi-ethnic and multi-national society and the experiences of inequality and discrimination have changed significantly, for example through the development of the digital sphere. The pandemic has exposed and increased structural inequalities in Ireland, including by disproportionately affecting certain groups at a heightened risk of discrimination.<sup>6</sup>

The next generation of equality legislation needs to combat all emerging and cumulative forms of discrimination, comply with European and international legal frameworks, ensure awareness of rights, mandate disaggregated data, and address the existing procedural and accessibility issues impacting on access to justice. It also needs to adopt a proactive model of promoting equality and ensuring compliance, including by

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<sup>1</sup> See Section 10(2) of the *Irish Human Rights and Equality Commission Act 2014*.

<sup>2</sup> See Section 930(1) b of the *Irish Human Rights and Equality Commission Act 2014*.

<sup>3</sup> Department of Children, Equality, Disability, Integration and Youth, [Minister O'Gorman announces review of the Equality Acts](#) (press release, 22 June 2021).

<sup>4</sup> For more information, see IHREC's [Guide on the Equal Status Acts 2000-2018](#) (2020).

<sup>5</sup> For more information, see IHREC's [Guide on the Employment Equality Acts 1998-2015](#) (2020).

<sup>6</sup> C. Casey, O. Doyle, D. Kenny and D. Lyons [Ireland's Emergency Powers During the COVID-19 Pandemic](#) (February 2021).

further shifting the burden onto the State to identify, mitigate and respond to equality issues that may arise.

Progress in the areas of equality and discrimination is often driven by pressure from human rights bodies, international and national court decisions, or infringement proceedings by the European Commission.<sup>7</sup> This review of the Equality Acts provides an important opportunity to proactively assess the extent to which the Irish legislative framework is in compliance with European Union ('EU') law and adopt positive measures, not only to realise the full potential of the EU Equality Directives ('the Directives'), but to go beyond their provisions to ensure the systematic protection of victims of discrimination.

This review of the Equality Acts takes place in a wider policy context, including the evaluation and development of national strategies adopted by the State to address inequality across Irish society.<sup>8</sup> The EU' has also been a critical driver for the equality architecture in Ireland, with the Directives setting the minimum requirements for Member States.<sup>9</sup> The review should ensure continued connection with reforms at a European level, including the European Commission's commitment to strengthen equality bodies and set binding standards on how they operate in all grounds of discrimination and areas covered by EU equality law.<sup>10</sup> Overall, the strong and renewed

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<sup>7</sup> European Commission, [Roma and the enforcement of anti-discrimination law](#) (2017) 26.

<sup>8</sup> For example, the timeframe for the implementation of *Better Outcomes, Brighter Futures: the National Policy Framework for Children and Young People 2014–2020* has concluded and a new policy framework will be developed in 2022. The *National Strategy for Women and Girls 2017–2020* has been extended to end 2021. In the Programme for Government, the Government has committed to developing and implementing a new Strategy. A review of the *National Traveller and Roma Inclusion Strategy 2017–2021* has been carried out and will inform the development of a successor strategy. The National Anti-Racism Committee, established by Government, is engaged in the preparation of the *National Action Plan Against Racism*. The *Migrant Integration Strategy* has been extended to the end of 2021 and an independent evaluation is due to be carried out to inform the new strategic policy in this area. The *National Disability Inclusion Strategy (2017–2021)* has been extended until the end of 2022. The *National LGBTI+ Inclusion Strategy 2019–2021* is also nearing its conclusion. The Department of Children, Equality, Disability, Integration and Youth and the Department of Public Expenditure and Reform are currently working on the development of an *Equality Data Strategy*.

<sup>9</sup> Council Directive (EC) 42/2000 on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('the Racial Equality Directive'); Council Directive (EC) 78/2000 on establishing a general framework for equal treatment in employment and occupation ('the Framework Employment Directive'; Council Directive (EC) 113/2004 on implementing the principle of equal treatment between men and women in the access to and supply of goods and services ('the Gender Goods and Services Directive'); and Council Directive (EC) 54/2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) ('the Gender Recast Directive').

<sup>10</sup> EQUINET, [Standards for Equality Bodies](#) (2021).

focus within the current European Commission on combatting discrimination in all its forms and achieving a just transition and recovery from the pandemic presents a moment of opportunity for Ireland to further protect and advance equality.<sup>11</sup>

The Irish Human Rights and Equality Commission welcomes the opportunity to make this initial submission to the Department of Children, Equality, Disability, Integration and Youth's Consultation on the Review of the Equality Acts. The Commission, as the national Equality Body, looks forward to engaging with the Department on all aspects of the Review and on the much needed reform of equality legislation.

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<sup>11</sup> The European Commission President's '[Political guidelines for the next European Commission 2019-2024 - A Union that Strives for More](#)' sets out six headline ambitions for Europe including 'An economy that works for people'. This includes a commitment to 'A Union of equality' and the introduction of new anti-discrimination legislation. See also, the [Recovery plan for Europe](#).

## 2. Access to Justice under the Equality Acts

The State is required to put in place structural and proactive interventions to enable access to justice, as a fundamental right in itself and an essential prerequisite for the protection and promotion of all other human rights.<sup>12</sup> Access to justice is reflected in the constitutional right of access to the courts, which can be considered to include an entitlement that the right be effective, not just as a matter of law and form, but also in practice.<sup>13</sup> As established by the *International Covenant on Civil and Political Rights* and the Human Rights Committee, the right to equality before courts and tribunals, including both equal access and equality of arms, and to a fair trial are essential elements of the proper administration of justice. Enabling access to justice requires accessible and effective remedies for individuals to vindicate their rights, including through administrative mechanisms.<sup>14</sup> The right of access to justice is also protected in articles 6 and 13 of the *European Convention on Human Rights* and article 47 of the *European Union Charter of Fundamental Rights*. The Directives recognise that the provision of adequate judicial or administrative procedures for the enforcement of the obligations imposed on states is essential to the effective implementation of the principle of equal treatment.<sup>15</sup>

Noting the State's obligations under international law, the Commission is concerned about systemic shortcomings in accessing justice in equality cases in Ireland. Central Statistics Office data from 2019 demonstrates that just 3% of people who experienced discrimination made an official complaint or took legal action.<sup>16</sup> Full vindication of the right to access justice would have a significant impact on the extent to which individuals

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<sup>12</sup> Human Rights Council, [Access to justice for children: Report of the United Nations High Commissioner for Human Rights](#) (2013) UN Doc. A/HRC/25/35, paras 3, 8.

<sup>13</sup> *Persona Digital Telephony Limited & Sigma Wireless Networks Limited and The Minister for Public Enterprise, Ireland and the Attorney General, and, by order, Denis O'Brien and Michael Lowry* [2017] IESC 27 [2.9] (Clarke J).

<sup>14</sup> Article 2(3), ICCPR and Human Rights Committee, [General Comment No. 31: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant](#) (2004) UN Doc. CCPR/C/21/Rev.1/Add.13, para 15.

<sup>15</sup> Racial Equality Directive, art 7(1); Framework Employment Directive, art. 9(1); Gender Goods and Services Directive, art. 8(1); and the Gender Recast Directive, art. 17(1).

<sup>16</sup> Central Statistics Office, [Equality and Discrimination: Quarter 1 2019](#) (2019). See also, F. McGinnity, R. Grotti, O. Kenny and H. Russell, [Who experiences discrimination in Ireland? Evidence from the QNHS Equality Modules](#) (IHREC and ESRI) (2017) 10.



and groups are able to claim their rights, challenge inequalities and discrimination, hold decision-makers to account and combat social and economic exclusion.<sup>17</sup>

## Access to legal aid

The civil legal aid scheme provided for under the *Civil Legal Aid Act 1995* precludes the Legal Aid Board from providing representation before many quasi-judicial tribunals and bodies, including the Workplace Relations Commission ('the WRC'), in the absence of a Ministerial Order.<sup>18</sup> The restrictive nature of the civil legal aid scheme has been strongly and repeatedly criticised by the Commission,<sup>19</sup> as well as international experts such as the Committee on the Elimination of Racial Discrimination ('CERD Committee') in 2019,<sup>20</sup> the Committee on Economic, Social and Cultural Rights in 2015,<sup>21</sup> and the former independent expert on the question of human rights and extreme poverty in 2011.<sup>22</sup>

The Commission recognises that the intention in establishing the WRC was to promote a non-adversarial process,<sup>23</sup> and is of the view that any reforms should continue to prioritise the accessibility and inquisitorial nature of this mechanism to the greatest extent possible, including by addressing the complex and technical procedures. However, the availability or absence of legal assistance and representation can determine whether or not a person can access court and tribunal proceedings or

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<sup>17</sup> FLAC, [Submission to the Independent Anti-Racism Committee's Public Consultation: Towards a National Action Plan against Racism in Ireland](#) (2021) 1.

<sup>18</sup> Under section 27(2)(b) of the Civil Legal Aid Act 1995 the Minister for Justice, with the consent of the Minister for Finance, may by order extend the civil legal aid scheme to prescribed tribunals.

<sup>19</sup> IHREC, [Developing a National Action Plan Against Racism: Submission to the Anti-Racism Committee](#) (2021) 62; IHREC, [Submission to the United Nations Human Rights Committee on the List of Issues for the Fifth Periodic Examination of Ireland](#) (August 2020) 13; IHREC, [Ireland and the International Covenant on Economic, Social and Cultural Rights](#) (2015) 34; and IHREC, [Submission to the United Nations Committee on the Elimination of Racial Discrimination on Ireland's Combined 5<sup>th</sup> to 9<sup>th</sup> Report](#) (2019) 142-143.

<sup>20</sup> Committee on the Elimination of Racial Discrimination, [Concluding observations on the combined fifth to ninth reports of Ireland](#) (2020), UN Doc. CERD/C/IRL/CO/5-9, paras 43-44.

<sup>21</sup> Committee on Economic, Social and Cultural Rights, [Concluding observations on the third periodic report of Ireland](#) (2015), UN Doc. E/C.12/IRL/CO/3, para 8.

<sup>22</sup> Human Rights Council, [Report of the independent expert on the question of human rights and extreme poverty, Magdalena Sepúlveda Carmona: Mission to Ireland](#) (2011) UN Doc. A/HRC/17/34/Add.2, para 10.

<sup>23</sup> Department of Jobs, Enterprise and Innovation, [Legislating for a World-Class Workplace Relations Service: Submission to Oireachtas Committee on Jobs, Enterprise and Innovation](#) (July 2012).

participate in them in a meaningful way.<sup>24</sup> In practice, many respondents are represented by legal counsel before the WRC, which gives rise to an inequality of arms.<sup>25</sup> The absence of civil legal aid in all employment and equality cases is also particularly pressing given the recent judgment in the *Zalewski v Adjudication Officer & Ors* case<sup>26</sup> that the standard of justice administered in bodies such as the WRC cannot be lower or less demanding than the justice administered by the courts, and must comply with fundamental human rights principles such as fairness.<sup>27</sup>

Legal aid must be made available to those who lack sufficient resources, in so far as such aid is necessary to ensure effective access to justice.<sup>28</sup> The blanket exclusion in employment and equality cases fails to account for the complexity of an individual case, or the additional barriers to accessing justice faced by specific groups, including those on low incomes, minority ethnic communities, lone parents, disabled people and older people.<sup>29</sup> The prevalence of low paid, precarious employment and the lack of recognition of care-giving can also have an adverse impact on the ability of women to

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<sup>24</sup> Human Rights Committee, [\*General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial\*](#) (2007) UN Doc. CCPR/C/GC/32, para 10. See also, M. O'Sullivan and J. McMahon, 'Employment equality legislation in Ireland: claimants, representation, and outcomes' (2010) 39(4) *Industrial Law Journal* 332.

<sup>25</sup> Committee on the Elimination of Racial Discrimination, [\*Concluding observations on the combined fifth to ninth reports of Ireland\*](#) (2020), UN Doc. CERD/C/IRL/CO/5-9, paras 43-44; FLAC, [\*Submission to the Independent Anti-Racism Committee's Public Consultation: Towards a National Action Plan against Racism in Ireland\*](#) (2021) 4; and Community Law and Mediation, [\*A submission by Community Law & Mediation to the Citizens' Assembly on Gender Equality\*](#) (2020) 2.

<sup>26</sup> *Zalewski v Adjudication Officer & Ors* [2021] IESC 24.

<sup>27</sup> FLAC, [\*Submission to the Independent Anti-Racism Committee's Public Consultation: Towards a National Action Plan against Racism in Ireland\*](#) (2021) 4 and H. Gallagher, '[Legal Aid and Quasi-Judicial Bodies Post-Zalewski](#)' (2021) *Trinity College Law Review*.

<sup>28</sup> Article 47 of the EU Charter of Fundamental Rights. According to the European Court of Human Rights, the obligation on the State does not extend to ensuring a total equality of arms between an assisted person and an opposing party, so long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis the opposing party. See *Steel and Morris v The United Kingdom* Application no 68416/01 (ECtHR, 15 February 2005), para 62.

<sup>29</sup> IHREC, [\*Submission to the United Nations Committee on the Elimination of Racial Discrimination on Ireland's Combined 5<sup>th</sup> to 9<sup>th</sup> Report\*](#) (2019) 142-143; Community Law and Mediation, [\*Annual Report 2019\*](#) (2019) 32 and FLAC, [\*FLAC Submission to The Workplace Relations Commission on the "Consultation Paper on Remote Hearing and Written Submissions Dealing with Adjudication Complaints During the Period of Covid-19 related Restrictions"\*](#) (2020) 9. The European Court of Human Rights has also emphasised that the vulnerability of the applicant is a factor which is to be taken into account when considering whether they may have a right to access legal aid: *Nenov v Bulgaria* Application no 33738/02 (ECtHR, 16 July 2009), para 52.

challenge discrimination in the workplace, which is further exacerbated by the absence of civil legal aid.<sup>30</sup>

Research by the EU Agency for Fundamental Rights on access to justice in cases of discrimination found that complainants can be at a disadvantage to their alleged discriminators, largely due to a resource imbalance. Large or multi-national companies often deploy significant resources and legal advisors, while individual complainants are limited to the minimum legal advice and support. Complainants reported that any legal support they did receive was necessary to navigate the intricacies of access to justice and the relevant procedures. Overall, the research identified improving the legal aid system across Europe and increasing funding for legal advice and representation as key factors to guarantee equality of arms.<sup>31</sup>

The CERD Committee specifically requested that the State provide information in a one year follow-up report regarding the efforts taken to implement its recommendation to extend the civil legal aid scheme.<sup>32</sup> This follow-up report has been overdue since December 2020. The Commission also notes the State's commitment in the *Justice Plan 2021* to review the civil legal aid scheme and bring forward proposals for reform.<sup>33</sup> However, the details and scope of this review have yet to be publicly released. The Commission has previously highlighted that the minimum financial contribution for legal representation represents a barrier to access and should be reviewed, particularly in light of the Legal Aid Board's Public Sector Equality and Human Rights Duty obligations. The Legal Aid Board must be adequately resourced in order to ensure that waiting times are reduced.<sup>34</sup>

**The Commission recommends that the State extend the scope of the Legal Aid Board to equality cases by designating the WRC as a prescribed tribunal under Section 27(2) (b) of the *Civil Legal Aid Act 1995*. A commitment to implementing this**

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<sup>30</sup> Community Law and Mediation, [A submission by Community Law & Mediation to the Citizens' Assembly on Gender Equality](#) (2020) 1-2.

<sup>31</sup> European Union Agency for Fundamental Rights, [Access to justice in cases of discrimination in the EU: Steps to further equality](#) (2012) 43, 50, 58.

<sup>32</sup> Committee on the Elimination of Racial Discrimination, [Concluding observations on the combined fifth to ninth reports of Ireland](#) (2020), UN Doc. CERD/C/IRL/CO/5-9, para 56.

<sup>33</sup> Department of Justice, [Justice Plan 2021](#) (2021) 23 (Objective 89).

<sup>34</sup> IHREC, [Developing a National Action Plan Against Racism: Submission to the Anti-Racism Committee](#) (2021) 62 and IHREC, [Submission to the United Nations Human Rights Committee on the List of Issues for the Fifth Periodic Examination of Ireland](#) (August 2020) 13.

**recommendation should be included in the State's one year follow-up report under the Convention on the Elimination of All Forms of Racial Discrimination, due since December 2020.**

**The Commission recommends that the planned review of the civil legal aid scheme is underpinned by international human rights and equality standards; has the scope to address all of the barriers to accessing legal aid in a timely manner; is structured with clear timeframes for reform and dedicated resources; and ensures the participation of rights holders, civil society organisations and other key stakeholders.**

### **Access to legal and other advocacy services**

The Directives require States to provide adequate means of legal protection by empowering associations, organisations or other legal entities, with a legitimate interest in ensuring compliance with equality law, to engage in judicial and administrative proceedings on behalf of, or in support of, a complainant with his or her approval.<sup>35</sup> It is recognised that EU Member States may go beyond the minimum requirements established in the Directives and allow claims to be brought where no identifiable victim exists.<sup>36</sup> The involvement of trade unions and non-governmental organisations ('NGOs') in discrimination cases, either through such bodies initiating proceedings in their own name or by assisting individuals in bringing actions would be a significant tool in helping people to achieve their rights under the Directives.<sup>37</sup> and the State should address this gap, particularly as many other EU Member States adopt more generous rules of legal standing.<sup>38</sup>

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<sup>35</sup> Racial Equality Directive, recital 19 and art. 7(2) ; Framework Employment Directive, recital 29 and art 9(2); Gender Goods and Services Directive, art 8(3); and Gender Recast Directive, recital 31 and art. 17(2).

<sup>36</sup> See for example, Racial Equality Directive, art. 6 and Framework Employment Directive, art. 8. See also, European Agency for Fundamental Rights, [The Racial Equality Directive: application and challenges](#) (2012) 14.

<sup>37</sup> As previously highlighted by the Irish Human Rights Commission. See IHRC, [Observations on the Equality Bill](#) (2004) 3.

<sup>38</sup> For a list of measures practice in other states: European network of legal experts in gender equality and non-discrimination, [A comparative analysis of gender equality law in Europe](#) (2020) 81: France: Trade unions and NGOs which have existed for over 5 years can act on behalf of or support victims of discrimination before any jurisdiction. Germany: anti-discrimination associations which fulfil certain criteria can support claimants in court proceedings. Bulgaria: Public interest NGOs and trade unions may either join proceedings or represent the claimant directly. Croatia: organisations and bodies engaged in

Broadening legal standing can support a stronger fundamental rights culture in which more people report and claim violations of their rights to equality and non-discrimination. Trade unions and NGOs can be in a position to bring strategic cases raising important points of law under the equality legislation, which contributes to developing Irish jurisprudence in the area of anti-discrimination law.<sup>39</sup> This is particularly the case when claims can be brought in the absence of an identifiable victim, as practices resulting in discrimination against a large number of individuals can be challenged. The participation of trade unions and NGOs can also help to reduce the financial and personal burden on individual victims, giving them greater access to justice.<sup>40</sup>

The Commission notes Free Legal Advice Centres ('FLAC') recommendation that representative NGOs must be given unambiguous legal standing in appropriate cases to initiate proceedings on behalf of those affected by racism.<sup>41</sup> The Seanad Public Consultation Committee also recently recommended that the State empower Traveller organisations to have legal standing to provide representation in claims of discrimination and access to justice.<sup>42</sup>

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

The experience of anti-discrimination litigation in Ireland and elsewhere has demonstrated that people who have experienced discrimination also require specialised and independent advocacy and support from civil society organisations to access enforcement mechanisms and remedies.<sup>43</sup> The State is required to create an

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the protection of the right to equal treatment possess a right to intervene when their activities are related to the rights at issue in proceedings.

<sup>39</sup> IHRC, [Observations on the Equality Bill](#) (2004) 3.

<sup>40</sup> European Agency for Fundamental Rights, [The Racial Equality Directive: application and challenges](#) (2012) 14.

<sup>41</sup> FLAC, [Submission to the Independent Anti-Racism Committee's Public Consultation: Towards a National Action Plan against Racism in Ireland](#) (2021) 10.

<sup>42</sup> Seanad Public Consultation Committee, [Report on Travellers Towards a More Equitable Ireland Post-Recognition](#) (2020) 34.

<sup>43</sup> As an example, research with legal practitioners in the area of disability and education has highlighted the challenges faced by parents pursuing the legal route and the need for supportive structures to be put

enabling environment that fosters and promotes the capacity of such organisations to empower individuals to claim their rights, particularly people living in poverty,<sup>44</sup> disabled people,<sup>45</sup> and those who face intersectional discrimination.<sup>46</sup>

Civil society organisations, including community-based and voluntary groups, are uniquely placed to provide an accessible range of independent advocacy and support services to individuals wishing to bring discrimination actions.<sup>47</sup> Such services include measures to raise awareness about the meaning of discrimination and existing remedies, build capacity for self-advocacy, as well as assistance in reporting discrimination, initiating legal action and finding appropriate legal support.<sup>48</sup> The provision of adequate support can enable discrimination complainants to better navigate the process of lodging a complaint and the lengthy subsequent procedures, including the stress and feelings of isolation that can be involved,<sup>49</sup> and reduce the overreliance on families or carers.<sup>50</sup>

**The Commission recommends that the State develop policy and training measures to promote the capacity of civil society organisations to provide independent**

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in place prior to the litigation process: S. Perry and M. Clarke, 'The law and special educational needs in Ireland: perspectives from the legal profession' (2015) *European Journal of Special Needs Education* 491.

<sup>44</sup> United Nations Office of the High Commissioner for Human Rights, [Guiding Principles on Extreme Poverty and Human Rights](#) (2012) 3-4, 10.

<sup>45</sup> United Nations Special Procedures, [International Principles and Guidelines on Access to Justice for Persons with Disabilities](#) (2020) 6, 12, 19-20.

<sup>46</sup> Committee on the Rights of Persons with Disabilities, [General comment No. 6 on equality and non-discrimination](#) (2018) UN Doc. CRPD/C/GC/6, para 32.

<sup>47</sup> As previously recognised by the Irish Human Rights Commission. See IHRC, [Observations on the Equality Bill](#) (2004) 3.

<sup>48</sup> European Union Agency for Fundamental Rights, [Access to justice in cases of discrimination in the EU: Steps to further equality](#) (2012) 49; Committee on the Rights of Persons with Disabilities, [General comment No. 6 on equality and non-discrimination](#) (2018) UN Doc. CRPD/C/GC/6, para 31; and United Nations Special Procedures, [International Principles and Guidelines on Access to Justice for Persons with Disabilities](#) (2020) 21.

<sup>49</sup> European Union Agency for Fundamental Rights, [Access to justice in cases of discrimination in the EU: Steps to further equality](#) (2012) 51.

<sup>50</sup> In the recent public and stakeholder consultations on Ireland's Draft State Report under the United Nations Convention on the Rights of Persons with Disabilities, participants cited difficulties engaging with the justice system, including due to the lack of independent advocacy services. While existing advocacy services such as FLAC, Citizens Information and the National Advocacy Service were found to provide some support, participants commented that this did not go far enough and lead to an overreliance on families or carers. There was a recommendation for more advocacy services to support making complaints or taking legal cases against employers/the State, particularly appropriate services for disabled women. See Centre for Effective Services, [Ireland's Draft State Report under the United Nations Convention on the Rights of Persons with Disabilities Report from Public and Stakeholder Consultations](#) (2021) 10, 13, 18.

## **advocacy and support services to people experiencing discrimination across the equality grounds.**

The ability of civil society organisations to provide independent advocacy and support services or engage in litigation in equality cases is dependent on available resources.

The Commission has previously expressed concerns about the damaging impact of the funding cuts during the economic recession on Irish civil society and community development organisations, including in the areas of women's rights, poverty and social exclusion.<sup>51</sup> However, despite a number of policy commitments from Government, funding has not been restored to pre-austerity levels for civil society organisations to ensure their ongoing sustainability.<sup>52</sup> This has cumulatively undermined the capacity, effectiveness and expertise within civil society.

In the *National Traveller and Roma Inclusion Strategy 2017-2021*, the Department of Justice committed to supporting a legal advice and advocacy service for Travellers and Roma.<sup>53</sup> While the Department does provide funding for the Free Legal Advice Centre for Roma, this support is tied to the lifetime of the Strategy and there is no clear timeframe or criteria for decision-making in respect of core funding. FLAC has responded to the ongoing gap in services by establishing a Traveller Legal Service,<sup>54</sup> but it has extremely limited financial and staff resources and cannot fully meet the significant legal needs.<sup>55</sup> The reliance on pilot programmes and project funding undermines sustainable funding for community organisations and can result in the

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<sup>51</sup> IHREC, [Submission to the Committee on the Elimination of Discrimination Against Women on the follow-up procedure to Ireland's combined sixth and seventh periodic report](#) (August 2020), 10-11 and IHREC, [Ireland and the International Covenant on Economic, Social and Cultural Rights](#) (2015) 30. See also F. McGinnity, R. Grotti, O. Kenny and H. Russell, [Who experiences discrimination in Ireland? Evidence from the QNHS Equality Modules](#) (IHREC and ESRI) (2017) 8-9.

<sup>52</sup> For example, the current funding for the Social Inclusion and Community Activation Programme is at less than 50% of what it was in 2008 (84 million in 2008 compared to 39 million in 2021). See Dáil Debates, [Priority Questions – Departmental Programmes](#) (25 May 2021). See also, IHREC, [Submission to the Committee on the Elimination of Discrimination Against Women on the follow-up procedure to Ireland's combined sixth and seventh periodic report](#) (August 2020) 10-11.

<sup>53</sup> Department of Justice and Equality, [National Traveller and Roma Inclusion Strategy 2017-2021](#) (2017) 40 (Action 119).

<sup>54</sup> Supported by The Community Foundation of Ireland. See FLAC, [Flac to launch only dedicated Traveller Legal Service in the State](#) (2020).

<sup>55</sup> FLAC, [Submission to the Independent Anti-Racism Committee's Public Consultation: Towards a National Action Plan against Racism in Ireland](#) (2021) 8-9.



disruption and discontinuation of services if there is no route to mainstream evidence-based interventions.<sup>56</sup>

**The Commission recommends that the State increase the allocation of sustainable core funding to organisations providing legal, independent advocacy and support services to people experiencing discrimination across the equality grounds.**

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<sup>56</sup> See also, IHREC, [\*Developing a National Action Plan Against Racism: Submission to the Anti-Racism Committee\*](#) (2021) 37 and FLAC, [\*Submission to the Independent Anti-Racism Committee's Public Consultation: Towards a National Action Plan against Racism in Ireland\*](#) (2021) 8-9.



### 3. Discriminatory Grounds

The Commission has previously argued that the list of discriminatory grounds in the equality acts should be broadened to reflect the grounds identified in international and regional human rights treaties and should be non-exhaustive.<sup>57</sup> In particular, the Commission has recommended that the grounds of discrimination be expanded to prohibit discrimination on the ground of socio-economic status,<sup>58</sup> that the Equality Acts should explicitly prohibit discrimination against transgender, non-binary and intersex people,<sup>59</sup> and that the equality legislation be amended to include a broad prohibition on discrimination on the ground of criminal conviction.<sup>60</sup>

#### Gender identity

The Commission recognises that the areas of gender, gender identity and gender expression are evolving. Therefore, further consideration is required before it settles its position on gender identity within the context of the Equality Acts review.

The Commission is seeking to identify the best approach to take to the reform of the gender ground in equality legislation, from a legislative point of view, to achieve the protection of transgender people from discrimination, and to ensure all those who are excluded from the current framework are adequately protected from discrimination.

The Programme for Government, published in October 2020, includes a commitment to amend the gender ground in equality legislation to ensure that someone discriminated against on the basis of their gender identity is able to avail of this legislation. As well as gender identity, the scope of the review of the Equality Acts engages 'gender expression' and the sex category of women/men. The Commission

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<sup>57</sup> IHREC, [\*Submission to the United Nations Human Rights Committee on the List of Issues for the Fifth Periodic Examination of Ireland\*](#) (2020) 9.

<sup>58</sup> IHREC (2017) Observations on the Equality (Miscellaneous Provisions) Bill 2017.

<sup>59</sup> IHREC, Submission to the Citizens' Assembly on Gender Equality (March 2020) pp. 27-28; IHREC, Ireland and the Convention on the Elimination of Racial Discrimination (October 2019) pp. 17-18; IHREC, Observations on Equality (Miscellaneous Provisions) Bill 2017 (December 2017); IHREC, Ireland and the Convention on the Elimination of All Forms of Discrimination Against Women (January 2017) p. 34; IHREC, Observations on the General Scheme Equality/Disability (Miscellaneous Provisions) Bill (November 2016) pp. 47-49; IHREC, Ireland and the International Covenant on Economic, Social and Cultural Rights (May 2015) pp. 22-23.

<sup>60</sup> IHREC (2020) Response to the Public Consultation on the Review of the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016

considers that it is important that the review is informed by an understanding of the range of identities that are included within the scope of 'gender'.

Currently the Equality Acts include a gender ground as follows:

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

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

While transgender people are not specifically referenced in the Equality Acts, the Acts must be - and indeed have been - interpreted in accordance with the Directives. Under EU law a transgender person who experiences discrimination arising from their 'gender reassignment', or transition, is also protected under the gender ground. Recital 3 of the Gender Recast Directive 2006/54/EC sets out that

"The Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person".

In *P v S and Cornwall County Council*<sup>61</sup> the Court of Justice of the European Union ('CJEU') ruled that the applicant, who had been employed as a man and was dismissed after giving her employers notice that she proposed to undergo gender reassignment and was intending to take the preliminary step of living as a woman for a year, had been discriminated against because of sex, contrary to the Equal Treatment Directive. According to the Court, where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment.<sup>62</sup>

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<sup>61</sup> Case C-13/94, [1996] ECR I-2143.

<sup>62</sup> Case C-13/94, [1996] ECR I-2143, para 21.

In *KB v National Health Service Pensions Agency & Anor*,<sup>63</sup> the CJEU ruled that the principle of equal pay for men and women applied in a situation in which the then-inability of a person who had undergone gender reassignment surgery to obtain legal recognition and marry in their acquired gender (same-sex marriage being unavailable at the time) impacted on an employee's pension entitlement. In *Richards v Secretary of State for Work and Pensions*,<sup>64</sup> the CJEU ruled that the failure to recognise a post-operative transwoman's acquired gender for the purposes of pension entitlement breached Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security ('Directive 79/7'), with the Directive's prohibition on sex discrimination applying to discrimination arising from the gender reassignment of the person concerned.

In *MB v Secretary of State for Work and Pensions*,<sup>65</sup> the CJEU ruled that the denial of recognition to a post-operative transwoman for the purposes of pensionable age (then lower for women than for men) because she was unable, by reason of remaining married to a woman, to obtain legal recognition in her acquired gender<sup>66</sup> breached Directive 79/7. According to the CJEU:

"persons who had lived for a significant period as persons of a gender other than their birth gender, and who had undergone a gender reassignment operation, had to be considered to have changed gender for the purposes of the Directive."

Although the protection provided in this area by EU law is of limited nature, many European Member States have legislation which is considerably more protective than the EU requirement. The European network of legal experts in gender equality's 2020 *Comparative Analysis of Gender Equality Law in Europe* reported that:

"Many countries have a broad prohibition of discrimination on the ground of gender identity (and often also gender expression) in their legislation (e.g. Albania, Belgium, Croatia, Czechia ... Denmark (where the term gender is used in the legislation, but where the preparatory works state that gender includes

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<sup>63</sup> Case C-117/01, [2004] ECR I-541.

<sup>64</sup> Case C-423/04 [2006] ECR I-3585.

<sup>65</sup> Case C-451/16 (2018) 46 BHRC 202.

<sup>66</sup> This was at a time before same-sex marriages were lawful in the UK and married persons had to have their marriages dissolved as a precondition of recognition post gender reassignment.

gender identity), Finland, France, Greece ... Hungary, Luxembourg, Malta, Montenegro, Netherlands, Norway, Portugal, Serbia, Slovenia, Sweden)."<sup>67</sup>

The Commission recommends amendment of the Equality Acts to explicitly prohibit discrimination against transgender, non-binary and intersex people. This could be achieved by expanding the current definition of the gender ground to include gender identity, or by the addition of a separate gender identity ground. There may be advantages and disadvantages to either approach, and the Commission is aware that there are differences of approach with regard to this issue in other Member States. The Commission has previously made a number of closely related recommendations in the area of gender: 'Intersex' should be defined by way of reference to a non-exhaustive list of 'sex characteristics'.<sup>68</sup> 'Gender Identity' should explicitly include persons who do not identify within the traditional gender binary;<sup>69</sup> and 'Gender Expression' should be included to ensure discrimination based on the perception of gender is prohibited explicitly.<sup>70</sup>

**The Commission recommends that further research and analysis of the effectiveness of these different legislative approaches is undertaken before an approach in the Irish context is settled on.**

## Socio-economic discrimination

The Commission has repeatedly stated its position that the list discriminatory grounds should be extended to include a ground which addresses socio-economic discrimination.<sup>71</sup> Research commissioned by the Commission found that a person's

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<sup>67</sup> European network of legal experts in gender equality and non-discrimination, [A comparative analysis of gender equality law in Europe](#) (2020) 13.

<sup>68</sup> IHREC, [Observations on the General Scheme of the Equality/Disability \(Miscellaneous Provisions\) Bill 2016](#) (2016) 48-49

<sup>69</sup> IHREC, [Observations on the General Scheme of the Equality/Disability \(Miscellaneous Provisions\) Bill 2016](#) (2016) 49.

<sup>70</sup> IHREC, [Observations on the General Scheme of the Equality/Disability \(Miscellaneous Provisions\) Bill 2016](#) (2016) 49.

<sup>71</sup> Equality Authority, *Overview of the Employment Equality Act 1998 and the Equal Status Act 2000* (2003) 66-71; Irish Human Rights Commission, [Submission on Extending the Scope of Employment Equality Legislation](#) (2005) 4-6; IHREC, [Ireland and the International Covenant on Economic, Social and Cultural Rights](#) (2015) 22-23; IHREC, [Submission to the UN Committee on the Elimination of Discrimination Against Women on Ireland's combined sixth and seventh periodic reports](#) (2017) 33-34; IHREC, [Challenging Employment Discrimination Directly Can Boost Disadvantaged Areas Such as Dublin Inner City](#) (press release, 17 February 2017); IHREC, [Submission to the United Nations Committee on the](#)

socio-economic status has a significant impact on both their exposure to discrimination and their responses to it.<sup>72</sup> The Commission's Your Rights helpline has received complaints of socio-economic discrimination in the areas of education, employment, and advertising, and in service provision areas such as insurance, banking and recreation – although none of these complaints were actionable as socio-economic status is not a protected ground.

While the inclusion of this ground is not required by EU law, references to grounds which address socio-economic discrimination can be found in a number of international instruments to which the State is a party.<sup>73</sup> It has been recommended that the State take steps to integrate these grounds, among others, into its anti-discrimination legislation.<sup>74</sup> References to socio-economic discrimination can be found in the jurisprudence of a number of international and regional courts and quasi-judicial bodies,<sup>75</sup> and the State has been subject to criticism in this area.<sup>76</sup> Furthermore, there is evidence from the jurisprudence of the Irish courts that a person's socio-economic background cannot be the basis for less favourable treatment as a result of the guarantee of equal treatment in article 40.1 of the Constitution.<sup>77</sup> Finally, despite the

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[Elimination of Racial Discrimination on Ireland's Combined 5<sup>th</sup> to 9<sup>th</sup> Report](#) (2019) 17-18; IHREC, [Observations on the Equality \(Miscellaneous Provisions\) Bill 2017](#) (2017); IHREC, [Submission to the Citizens' Assembly on Gender Equality](#) (2020) 27-28; and IHREC, [Comments on Ireland's 15<sup>th</sup> National Report on the Implementation of the European Social Charter](#) (2018) 4-6.

<sup>72</sup> F. McGinnity, R. Grotti, O. Kenny and H. Russell, [Who experiences discrimination in Ireland? Evidence from the QNHS Equality Modules](#) (IHREC and ESRI) (2017) 14.

<sup>73</sup> European Convention on Human Rights, art. 14: 'social origin' 'property' 'other status'; European Social Charter, art. E: 'social origin' and art. 30: right to protection against poverty and social exclusion; European Charter of Fundamental Rights, art. 21: 'social origin' 'property'; ICESCR, art. 2.2: 'social origin' 'property' 'other status'; and ICCPR, art. 26: 'social origin' 'property' 'other statuses'.

<sup>74</sup> UN Human Rights Council, [Report of the Working Group on the Universal Periodic Review: Ireland](#) (2016) UN doc. A/HRC/33/17, paras 136.30, 136.31 and 136.32: 'Adopt comprehensive anti-discrimination legislation that includes all the grounds for discrimination.'

<sup>75</sup> *Garib v Netherlands* App no 43494/09 (ECtHR, 23 February 2016), dissent of J Pinto De Albuquerque; *Horvath and Kiss v Hungary* App no 11146/11 (ECtHR, 29 April 2013); *Yordonova v Bulgaria* App no 25446/06 (ECtHR, 24 April 2012); Committee on the Elimination of Discrimination against Women, *Pimentel v Brazil* [2011] Communication No. 17/2008; Inter-American Court of Human Rights, *Murillo et al v Costa Rica* [2012] Series C, No. 257; Inter-American Court of Human Rights, *Lluy et al v Ecuador* [2015] Series C, No. 298; and European Committee on Social Rights, *IPPF v Italy* [2012] No. 87/2012.

<sup>76</sup> Human Rights Committee, *Mellet v Ireland* [2013] Communication No. 2324/2013: Regarding a woman who was required to travel to the UK to procure a termination of pregnancy prior to the repeal of the 8<sup>th</sup> amendment, '[t]he Committee considers that the differential treatment to which the author is subjected in relation other similarly situated women failed to adequately take into account her medical needs and socioeconomic circumstances.'

<sup>77</sup> *Quinn's Supermarket Ltd v Attorney General* [1972] IR 1; *Redmond v Minister for the Environment* [2001] 4 I.R. 61; *K v W (No.2)* [1990] ILRM 791; *Health Service Executive v OA* [2013] IEHC 172; and *NHV v Minister for Justice, Equality and ors* [2017] IESC 35.

absence of a requirement in the Directives, a significant number of European states and Member States have included grounds relating to socio-economic discrimination in their non-discrimination legislation.<sup>78</sup> Therefore, while there is no direct obligation to incorporate this ground in the Equality Acts, there is a comprehensive body of international, regional and domestic jurisprudence which provides a strong legal basis supporting the prohibition of discrimination based on a person's socio-economic background.

In the Commission's previous recommendations on this matter, it has asserted that purported difficulties surrounding the introduction of this ground, such as ambiguity or complexity, could be overcome through the provision of key indicators of social class. Therefore, the Commission acknowledges with approval that this approach has been taken in the Private Member's Bill relating to this topic which is currently before the Oireachtas.<sup>79</sup>

The Commission is of the view that the introduction of this ground would constitute a crucial shift in the equality landscape in Ireland. Prohibiting socio-economic discrimination would be a fulfilment of the objectives underpinning the Equality Acts and furthermore, would be a significant step towards greater recognition of intersectional discrimination.

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

**The Commission is of the view that sufficient clarity and precision in defining the ground can be achieved to secure foreseeability and transparency, which is required in the law.**

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<sup>78</sup> Albania: social situation, residence; Belgium: property, social origin; Bulgaria: social status, property status; Croatia: social origin, property, education, social status; Denmark: social origin; France: place of residence, economic vulnerability, banking residence; Greece: social status; Hungary: social origin, financial status; Lithuania: social status; Montenegro: social origin, material status; North Macedonia: social origin, education, property status, social status; Romania: social status; Serbia: financial position; Slovakia: social origin, property; Slovenia: social standing, economic situation, education. See European network of legal experts in gender equality and non-discrimination, [A comparative analysis of gender equality law in Europe](#) (2020).

<sup>79</sup> *Equality (Miscellaneous Provisions) Bill 2021*, section 2: (a) poverty, (b) source of income, (c) illiteracy, (d) level of education, (e) address, type of housing or homelessness, (f) employment status, (g) social or regional accent, or from any other similar circumstance.

## Disability definition

The Covid-19 pandemic has highlighted the long-standing limited realisation of disabled people's rights and given rise to significant risks of discrimination.<sup>80</sup> The Commission welcomes that the review of the Equality Acts will include the definition of disability,<sup>81</sup> particularly as this legislation pre-dates Ireland's ratification of the United Nations Convention on the Rights of Persons with Disabilities ('UNCRPD').<sup>82</sup>

While the Framework Employment Directive does not define disability, the European Union has approved the human rights model of disability set out in the UNCRPD.<sup>83</sup>

Article 1 defines disabled persons as:

"those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."

Under article 5(2), there is a positive duty on Member States to enact disability-inclusive anti-discrimination laws that have a broad scope and provide effective legal remedies by eradicating and combatting all discrimination linked to disability. According to the UNCRPD Committee, such laws can only be effective if they are based on a definition of disability that includes those who have long-term physical, psychosocial, intellectual or sensory impairments, as well as past, present, future and presumed disabilities, and the associates of disabled people.<sup>84</sup> The Committee has repeatedly criticised Member States for national laws that reflect a medical, narrow concept of disability by overemphasising impairments and the limitation of abilities, while

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<sup>80</sup> IHREC, [The Impact of COVID-19 on People with Disabilities: Submission by the Irish Human Rights and Equality Commission to the Oireachtas Special Committee on COVID-19 Response](#) (2020) 4 and IHREC, [Consultation on Terms of Reference and Work Programme for the Joint Oireachtas Committee on Disability Matters: Submission by the Irish Human Rights and Equality Commission](#) (2020) 3-4.

<sup>81</sup> Department of Children, Equality, Disability, Integration and Youth, [Consultation on the Review of the Equality Acts](#) (July 2021).

<sup>82</sup> Reviewing pre-existing legislation to ensure compliance with the UNCRPD is particularly important in dualist States such as Ireland as international instruments do not have domestic legal effect upon ratification but require additional implementation. See art. 29.6 of the Constitution.

<sup>83</sup> The European Union ratified the UNCRPD on 23<sup>rd</sup> December 2010. The approval by the European Union of the definition of disability set out in the UNCRPD was referenced by the WRC in Workplace Relations Commission, *A Hair Stylist v A Hairdressing Salon*, ADJ-00015823, 10 July 2020.

<sup>84</sup> Committee on the Rights of Persons with Disabilities, [General Comment No. 6 on equality and non-discrimination](#) (2016) UN Doc. CRPD/C/GC/6, paras 17, 20, 73.

disregarding the social dimensions of disability. Such definitions have repeatedly been found to be incompatible with the UNCRPD.<sup>85</sup>

The Commission notes that the current definition of disability in the Equality Acts<sup>86</sup> is broad, and has been interpreted expansively by the WRC and the Labour Court.<sup>87</sup> For example, case law has established that the definition includes depression, epilepsy, claustrophobia and agoraphobia, alcoholism, facial scarring, HIV infection, diabetes and dyslexia.<sup>88</sup> Anxiety and stress can also fall within the definition of disability under certain circumstances.<sup>89</sup> The broad scope of the definition is welcome and should be retained, including its applicability to transient and fluctuating conditions and the absence of a requirement for an impairment to be of a certain severity.<sup>90</sup> However, the conceptual approach is currently based on the medical model of disability and fails to recognise the existence of barriers that hinder the full participation of disabled people in society on an equal basis with others. By focusing on medical deficit, it has also resulted in the development of diagnosis-led systems.<sup>91</sup> This medicalised definition was strongly criticised during the passage of the Equality Acts through the Oireachtas,<sup>92</sup> and needs to be revisited in light of the UNCRPD.<sup>93</sup> Furthermore, the Commission has previously

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<sup>85</sup> International Disability Alliance, [IDA's Compilation of the CRPD Committee's Concluding Observations](#) (2019) 6-63.

<sup>86</sup> See section 2 EEA and section 2 ESA.

<sup>87</sup> See for example, Workplace Relations Commission, *Quigley v Health Service Executive*, DEC-S2009-012, 9 February 2009 and Workplace Relations Commission, *A Hair Stylist v A Hairdressing Salon*, ADJ-00015823, 10 July 2020. In the latter case, the Adjudication Officer stated that as the EEA is a remedial social statute, it ought to be construed as widely and as liberally as possible consistent with fairness.

<sup>88</sup> Note, many of the successful cases to date on this ground involve discrimination as between persons with different disabilities: J. Walsh, *Equal Status Acts 2000-2011: Discrimination in the Provision of Goods and Services* (Dublin: Irish Council for Civil Liberties and Blackhall Publishing, 2012) 23, 104.

<sup>89</sup> Workplace Relations Commission, *A Hair Stylist v A Hairdressing Salon*, ADJ-00015823, 10 July 2020.

<sup>90</sup> J. Walsh, *Equal Status Acts 2000-2011: Discrimination in the Provision of Goods and Services* (Dublin: Irish Council for Civil Liberties and Blackhall Publishing, 2012) 23. Walsh does note that in some employment discrimination cases, the Tribunal and Labour Court have found that the disability ground protection does not apply where the symptoms or effects associated with a condition or impairment are present to an insignificant degree.

<sup>91</sup> Centre for Disability Law and Policy and the Ombudsman for Children's Office, [Mind the Gap: Barriers to the realisation of the rights of children with disabilities in Ireland](#) (2021) 22.

<sup>92</sup> G. Quinn and S. Quinlivan, 'Disability Discrimination: The Need to Amend the Employment Equality Act 1998 in light of the EU Framework Directive on Employment' in C. Costello and E. Barry (eds), *Equality in Diversity: The New Equality Directives* Vol. 29 (Dublin: Irish Centre for European Law, 2003) 218.

<sup>93</sup> As recommended in the submissions received on the draft initial State Report under the UNCRPD: ACE Communication Ireland, [A Summary of the Submissions Received by the DCEDIY on the Draft Initial State Report UNCRPD](#) (2021) 7-8.



recommended that the limited definition of disability in the *Disability Act 2005* is also reviewed to ensure coherence across the statutory frameworks.<sup>94</sup>

**The Commission recommends that the definition of disability in the Equality Acts should be brought into compliance with the human rights model enshrined in the UNCRPD, based on close consultations with, and the active involvement of, disabled people and their representative organisations.<sup>95</sup>**

**The Commission recommends that the definition should support a continued broad and inclusive interpretation to enable all discrimination linked to disability to be challenged, and avoid placing a burden on claimants to prove that they come within the definition.**

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

## Family status and care

The Commission has previously made recommendations to overhaul State policy to ensure that care work is adequately supported, publically valued and equally shared.<sup>96</sup> The Commission is of the view that the current definition of the 'family status' ground does not go far enough to capture and protect the full range of caring responsibilities present in modern Irish society.<sup>97</sup> Many people may now care for older relatives or individuals who do not live under the same roof as them. The intention behind the family ground was to reconcile work and family life and ensure people did not have to forsake family responsibilities in the course of their employment.<sup>98</sup> It is still the case, however,

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<sup>94</sup> IHREC, [Ireland and the International Covenant on Economic, Social and Cultural Rights](#) (2015) 44.

<sup>95</sup> See art. 4(3) of the UNCRPD.

<sup>96</sup> IHREC, [Submission to the Citizens' Assembly on Gender Equality](#) (2020); IHREC, [Policy Statement on Article 41.2 of the Constitution of Ireland](#) (2018); IHREC, [Submission to UN Committee on the Elimination of Discrimination Against Women](#) (2017) 94-95; and IHREC, [Ireland and the International Covenant on Economic, Social and Cultural Rights](#) (2015) 32.

<sup>97</sup> See section 2(1) ESA and EEA: Family status is defined as having responsibility for a child and/or being the parent or primary carer of an adult with a disability that gives rise to the need for care on an ongoing basis. For the purposes of this section, the carer must be residing with them in order to be considered the primary carer.

<sup>98</sup> Dáil Éireann Debate, [Employment Equality Bill, 1997 \[Seanad\]: Second Stage](#), 26 March 1998.

that care remains a highly gendered aspect of Irish society and this may have been exacerbated by the Covid-19 pandemic.<sup>99</sup> Women are far more likely than men to be engaged in care work and those that do provide care work provide substantially more than their male counterparts.<sup>100</sup> Care work often must be juggled with employment responsibilities and women are overrepresented amongst employees availing of reduced hours.<sup>101</sup> Ireland has the third highest rate of unpaid work for both men and women, and the gap between the genders is among the greatest of the Member States.<sup>102</sup> Therefore, deficiencies in the protection offered by the Acts have a particular impact on women and serve to perpetuate gender inequality in the labour market. As the employment sphere and the nature of care work have evolved since the introduction of the Equality Acts, the protection given to this area must be made more robust.

Care work is recognised in article 41.2 of the Constitution as constituting the 'common good'. Extending the ground found in the Acts can be seen as furthering the fulfilment of constitutional principles. Debate around article 41.2 has already highlighted widespread acknowledgement that this area has evolved significantly over the last twenty years. The recognition by the Supreme Court of childless married couples as constituting a 'family' for the purposes of article 41.2 shows that the care work envisaged by the Constitution goes beyond childcare and could therefore take place outside the context of the home.<sup>103</sup> Furthermore, recommendations stemming from the Convention on the Constitution made explicit reference to the importance of care

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<sup>99</sup> National Women's Council of Ireland, [Women's Experiences of Caring during COVID-19](#) (2020). This survey found that 85% of women said their caring responsibilities had increased since the outbreak of COVID-19 with 52% responding that they believe this increase had been significant. Many respondents also reported that caring responsibilities were not shared equally in their household, with the lion's share falling to them.

<sup>100</sup> H. Russell, R. Grotti, F. McGinnity and I. Privalko, [Caring and Unpaid Work in Ireland](#) (IHREC and ESRI) (2019). Key findings included the following: 40% of women are involved in childcare compared to 26% of men. Of persons aged 35-49, 70% of women were involved in childcare compared to 48% of men. Average weekly hours spent caring for women were 42.6 hours compared to men with 25.2 hours. Women in Ireland are estimated to undertake 38.2 hours of unpaid work per week which is among the highest levels in the EU28. Men in Ireland are estimated to undertake 19.8 hours of unpaid work and this is also among the highest in the EU28.

<sup>101</sup> H. Russell, R. Grotti, F. McGinnity and I. Privalko, [Caring and Unpaid Work in Ireland](#) (IHREC and ESRI) (2019) 68, 74, 76.

<sup>102</sup> H. Russell, R. Grotti, F. McGinnity and I. Privalko, [Caring and Unpaid Work in Ireland](#) (IHREC and ESRI) (2019) xi, xii.

<sup>103</sup> *Murray v Ireland* [1985] IR 532, para 537.

in the 'wider community'.<sup>104</sup> The State also has obligations under the International Covenant on Economic, Social and Cultural Rights to:

"reduce the constraints faced by men and women in reconciling professional and family responsibilities."<sup>105</sup>

There is clear support for a broader, more progressive understanding of what constitutes a 'family' in Irish law. This will logically require extending the prohibition on discrimination beyond what was envisaged by the Equality Acts to protect the variety of care relationships found in modern Irish society.

**The Commission recommends that the family status ground should be amended to capture and protect the full range of caring responsibilities present in modern Irish society.**

**The Commission recommends that consideration should be given to renaming the Family Status ground as the Care ground.**

## Religion or belief

Section 6(2) of the EEA provides, amongst other things, for the grounds covered by the Framework Employment Directive. However, the religion ground in section 6(2) (e) refers to 'religious belief' as opposed to 'religion or belief' as provided for in the Directive.<sup>106</sup> Religious belief is defined at section 2(1) of the EEA as including 'religious background or outlook'. It would appear that the ground of 'religion or belief' has not been adequately transposed to include beliefs not based on a recognised religion.

**The Commission recommends that the religion ground be amended to the 'religion or belief' ground to comply with EU law.**

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<sup>104</sup> Department of Justice, [\*Report of the Task Force on Implementation of the Recommendations of the Second Report of the Convention on the Constitution\*](#) (2016) 23-24.

<sup>105</sup> UN Committee on Economic, Social and Cultural Rights, [\*General Comment No. 16: The equal rights of men and women to the enjoyment of all economic, social and cultural rights \(art. 3 of the International Covenant on Economic Social and Cultural Rights\)\*](#) (2005) UN Doc. E/C.12/2005/4, para 24.

<sup>106</sup> Framework Employment Directive, art. 1.

## Intersectionality

The Commission has repeatedly called for the Equality Acts to be amended to provide for intersectional discrimination.<sup>107</sup> Intersectional discrimination in this context is not intended to be synonymous with 'multiple' or 'compound' discrimination, which describe discrimination on multiple grounds which are then examined independently.<sup>108</sup> Intersectional discrimination describes the unique disadvantage experienced by a person as a result of a combination of grounds which can only be understood by examining them together, rather than apart.<sup>109</sup> A minority ethnic woman's experience of discrimination will often be different from that of a white woman or minority ethnic man and intersectional analysis allows this distinctive form of discrimination to be identified and adequately addressed.

At present, there is no clear legal basis in the Directives for intersectional discrimination. The CJEU has acknowledged that discrimination may stem from a multitude of grounds but this cannot create a new ground not found in the Directives,<sup>110</sup> although intersectionality can still be found in its jurisprudence.<sup>111</sup> Importantly however, there have been calls for such provision to be made,<sup>112</sup> several

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<sup>107</sup> IHREC, [Submission to the United Nations Committee on the Elimination of Racial Discrimination on Ireland's Combined 5<sup>th</sup> to 9<sup>th</sup> Report](#) (2019) 17-18; IHREC, [Submission to UN Committee on the Elimination of Discrimination Against Women](#) (2017) 34-35; and IHREC, [Submission to the Citizens' Assembly on Gender Equality](#) (2020) 28.

<sup>108</sup> The three forms of multiple discrimination are 'sequential multiple discrimination' which is discrimination on multiple grounds stemming from different events; 'additive multiple discrimination' which is discrimination on multiple grounds, stemming from the same event but that can be proven independently; and intersectional discrimination which is discrimination on multiple grounds that produces a qualitatively different outcome than separate grounds applying separately. For more see: S. Fredman, [Intersectional discrimination in EU gender equality and non-discrimination law](#) (European Commission and European network of legal experts in gender equality and non-discrimination) (2016) 27-28.

<sup>109</sup> See generally: K. Crenshaw, 'Demarginalising the intersection of race and sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1 University of Chicago Legal Forum 139.

<sup>110</sup> Case C-443/15 *David L. Parris v Trinity College Dublin and Others* [2016] ECLI:EU:C:2016:897, para 80.

<sup>111</sup> Case C-123/10 *Waltraud Brachner v Pensionsversicherungsanstalt* [2011] ECLI:EU:C:2011:675 where complainants alleging discrimination on grounds of age and gender were found to have been discriminated against on grounds of gender, as older women.

<sup>112</sup> European Union Agency for Fundamental Rights, [Equality in the EU 20 Years on from the Initial Implementation of the Equality Directives](#) (2021) 10: 'The EU legislator should consider broadening the concept of discrimination to include intersectional discrimination in existing and new legislation in the area of equality and non-discrimination.'

European States have enacted laws which relate to this area,<sup>113</sup> and a number of equality bodies report engaging in work on this matter.<sup>114</sup> However, case law remains scarce and best practice is difficult to discern. Although it has no formal or binding legal status, intersectionality is prevalent across a wide range of EU equality policy documents.<sup>115</sup> Furthermore, research on this area has uncovered numerous examples of intersectional discrimination both across Europe and on the island of Ireland, including but not limited to: age-gender, ethnicity-disability, gender-ethnicity and sexual orientation-gender identity discrimination, spanning across education, health, employment and socio-economic status.<sup>116</sup>

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<sup>113</sup> European network of legal experts in gender equality and non-discrimination, [A comparative analysis of gender equality law in Europe](#) (2020) 18: Multiple discrimination and/or intersectional discrimination is explicitly covered in the national legislation of Austria, Bulgaria, Croatia, Germany, Greece, Iceland, Italy, Malta, Montenegro, North Macedonia, Norway, Poland, Romania, Serbia, Slovenia and Turkey.

<sup>114</sup> N. Crowley, [Equality bodies making a difference](#) (2018) 79: '18 equality bodies in 17 countries identified that they had worked on issues of intersectionality.'

<sup>115</sup> European Commission, [A Union of equality: EU anti-racism action plan 2020-2025](#) (2020); European Commission, [EU Roma strategic framework for equality, inclusion and participation for 2020-2030](#) (2020); European Commission, [Union of Equality: LGBTIQ Equality Strategy 2020-2025](#) (2020); European Commission, [Action Plan on Integration and Inclusion 2021-2027](#) (2020); European Commission, [A Union of Equality: Gender Equality Strategy 2020-2025](#) (2020); and European Commission, [Union of Equality: Strategy for the Rights of Persons with Disabilities 2021-2030](#) (2021).

<sup>116</sup> S. Fredman, [Intersectional discrimination in EU gender equality and non-discrimination law](#) (European Commission and European network of legal experts in gender equality and non-discrimination) (2016) 39-51; EIGE, [Intersecting inequalities: Gender Equality Index](#) (2019); and K. Zappone, (ed.) [Re-thinking Identity: The Challenge of Diversity](#) (Joint Equality and Human Rights Forum) (2003).

Beyond the EU, intersectional discrimination has also found support in the jurisprudence of the UN Treaty Bodies,<sup>117</sup> the European Court of Human Rights,<sup>118</sup> the Inter-American Court of Human Rights,<sup>119</sup> and the jurisdictions of several other common law countries.<sup>120</sup>

Therefore, it is clear that there is widespread support for the introduction of intersectional analysis to anti-discrimination laws. References to intersectionality can already be found in Government policy,<sup>121</sup> and there also appears to be examples of its implementation in the jurisprudence of the WRC.<sup>122</sup> Two of these cases demonstrate

<sup>117</sup> Human Rights Committee, [Concluding Observations on the sixth periodic report of Australia](#) (2017) UN Doc. CCPR/C/AUS/CO/6 18; Human Rights Committee, [Concluding Observations on the sixth periodic report of Italy](#) (2017) UN Doc. CCPR/C/ITA/CO/6 9; Human Rights Committee, *Turkan v Turkey* [2018] CCPR/C/123/D/2274/2013; Human Rights Committee, *Yaker v France* [2016] CCPR/C/123/D/2747/2016; Human Rights Committee, *Hebbadj v France* [2016] CCPR/C/123/D/2807/2016; CEDAW, [General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures](#) (2004) 12; CEDAW, [General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women](#) (2020) UN Doc. CEDAW/C/GC/28 18; CEDAW, [Concluding Observations on the ninth periodic report of Austria](#) (2019) UN Doc. CEDAW/C/AUT/CO/9 40; CEDAW, *Texeira v Brazil* [2008] CEDAW/C/49/D/17/2008; CERD, [General Recommendation 25 on gender-related dimensions of racial discrimination](#) (2000); CERD, [General Recommendation 27 on Discrimination Against Roma](#) (2000) 34; CERD, [Concluding Observations on the combined 5th to 9th reports of Ireland](#) (2020) UN Doc. CERD/C/IRL/CO/5-9, 11-12, 14 and 30; CESCR, [General Comment No. 20: Non-discrimination in economic, social and cultural rights](#) (2009) UN Doc. E/C.12/GC/20; CESCR, [General Comment No. 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights](#) (2005) UN Doc. E/C.12/2005/4; CESCR, [Concluding Observations on the fifth periodic report of Belgium](#) (2020) UN Doc. E/C.12/BEL/CO/5 26-27; CRC, [Concluding Observations on the combined 5th and 6th periodic reports of Costa Rica](#) (2020) UN Doc. CRC/C/CRI/CO/5-6; CRPD, [General Comment No. 3: Women and girls with disabilities](#) (2016) UN Doc. CRPD/C/GC/3; CRPD, [General Comment No. 6: Equality and non-discrimination](#) (2018) UN Doc. CRPD/C/GC/6; and CRPD, [Concluding Observations on the initial report of Estonia](#) (2021) UN Doc. CRPD/C/EST/CO/1.

<sup>118</sup> *BS v Spain* App no 47159/08 (ECtHR, 24 October 2012); *Markin v Russia* App no 30078/06 (ECtHR, 22 March 2012) (dissent); *Garib v Netherlands* App no 43494/09 (ECtHR, 6 November 2017) (dissent); *VC v Slovakia* App no 18968/07 (ECtHR, 16 June 2009); and *NB v Slovakia* App no 29518/10 (ECtHR, 12 June 2012).

<sup>119</sup> Inter-American Court of Human Rights, *Murillo et al v Costa Rica* [2012] Series C, No. 257 and Inter-American Court of Human Rights, *Lluy et al v Ecuador* [2015] Series C, No. 298.

<sup>120</sup> Canada: *Law v Canada* [1999] 1 SCR 497; *Frank v AJR Enterprises Ltd* [1993] 23 CHRR; *Egan v Canada* [1995] 2 SCR 513 (dissent); *Corbière v Canada* [1999] 2 SCR 203; *Kearney v Bramalea Ltd* [1998] Decision No: 98-021 (Ont. BOLI); *Sparks v Dartmouth/Halifax County Regional Housing Authority* [1993] NSCA 13; and *Canada v Mossop* [1993] 1 SCR 554 (dissent). UK: *Ministry of Defence v DeBique* [2009] Appeal No. UKEAT/0048/09/MAA. South Africa: *National Coalition for Gay and Lesbian Equality* [1998] Case CCT 11/98; *Hassam v Jacobs* [2009] Case CCT83/08 ZACC 19; and *Mahlangu v Minister for Labour* [2020] Case CCT 306/19 ZACC 24.

<sup>121</sup> Department of Justice and Equality, [National Strategy for Women and Girls 2017-2020](#) (2017) 7; Department of Justice and Equality, [Mid-Term Review of the National Disability Inclusion Strategy 2017-2021](#) (2020) 13; and Anti-Racism Committee, [Interim Report to the Minister for Children, Equality, Disability, Integration and Youth](#) (2020) 5, 21 and 23.

<sup>122</sup> Workplace Relations Commission, *Freeman v Superquinn*, DEC-E/2002/13, 5 March 2002; Workplace Relations Commission, *Lindberg v Press Photographer's Association of Ireland*, DEC-s2011-041, 5

the utility of intersectional discrimination as a tool for improving access to justice and addressing discrimination.

In *Enners v McCarthy*, the respondent was alleged to have discriminated against a Latvian tenant on the grounds of race and housing assistance when he refused to sign her Housing Assistance Payment ('HAP') forms.<sup>123</sup> The comparators available to the complainant were an Irish national HAP tenant of the respondent and a number of non-Irish national tenants who were not in receipt of HAP. As a result of the available comparators, it is questionable whether the complainant could have succeeded if each ground had been examined in isolation. However, the successful outcome of the case for the complainant indicates that intersectional analysis was applied to the facts in order to return that decision. This highlights the access to justice issue that intersectional discrimination addresses by providing recourse to redress for individuals whose experience of discrimination may not accord perfectly with the single-ground analysis, which typically occurs in hearings before the WRC.

The complainant in *Lindberg v Press Photographer's Association of Ireland* alleged that the respondent's refusal to permit her entry to their organisation constituted discrimination on the grounds of race and gender.<sup>124</sup> In upholding the complaint, the Adjudication Officer said:

"I find that the totality of circumstances, which includes her race and gender, again put her into the category of 'outsider' and this had an impact..."<sup>125</sup>

While a single-ground analysis would have likely borne the same result, the decision instead examined the unique impact that being a non-national and a woman had on the experience of discrimination. Having established that the complainant had suffered discrimination, the Officer then considered the traits possessed by the complainant which may have motivated the treatment she had suffered, and concluded that it was an amalgamation of these grounds acting together. This demonstrates the purposive potential of intersectional analysis to allow a better understanding of the lived

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October 2011; and Workplace Relations Commission, *Enners v McCarthy*, ADJ-00020413, 23 September 2019.

<sup>123</sup> Workplace Relations Commission, *Enners v McCarthy*, ADJ-00020413, 23 September 2019.

<sup>124</sup> Workplace Relations Commission, *Lindberg v Press Photographer's Association of Ireland*, DEC-s2011-041.

<sup>125</sup> Workplace Relations Commission, *Lindberg v Press Photographer's Association of Ireland*, DEC-s2011-041.

experience of discrimination rather than distilling it into separate unconnected grounds as is currently procedure.

**The Commission recommends that the Equality Acts be amended to provide for intersectional discrimination.**



## 4. Exemptions to the Prohibition of Discrimination

### Equal Status Acts

#### Section 14(1) (a) (i) enactment exemption

The Commission is particularly concerned with the blanket exemption in section 14(1) (a) (i) of the ESA which prevents any challenge to discriminatory laws. This exemption has had far-reaching consequences in terms of equality protections, primarily with regard to the provision of services in the public sector. The effect of section 14(1) (a) (i) is to remove from the ambit of the ESA any measure required by law that gives rise to discriminatory treatment.

This exemption is problematic for a number of reasons. Firstly, the limited definition of 'service' under section 2 of the ESA, combined with the blanket exemption provided in section 14, serve to exempt a broad range of crucial State services from the remit of the ESA due to the uncertainty created by these provisions and the lack of accompanying detail. The Commission notes that the WRC and former Equality Tribunal developed a body of jurisprudence setting out the distinction between actions taken which are required by law and actions taken pursuant to discretion provided by an enactment. In certain cases, private actors have not been allowed to rely on this provision where their actions were not obliged by law.<sup>126</sup> However, decisions on this matter can often be technical and inaccessible to complainants; therefore, this is still an area that generates great uncertainty insofar as the functioning and effectiveness of the Acts are concerned. The enactment exemption also creates the situation whereby the outcome of a successful ESA challenge can be reversed by introducing new Statutory Instruments, which may be overtly discriminatory but regardless are immune from challenge due to the blanket nature of section 14.<sup>127</sup>

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<sup>126</sup> For example, Workplace Relations Commission, *Flanagan Talbot v Casino Cinemas Ltd t/a Killarney Cineplex Cinemas*, DEC-S2008-053, 11 September 2008: The health and safety laws relied upon by the respondent did not require the creation of a blanket ban for children under the age of two when accompanied by a guardian.

<sup>127</sup> See Workplace Relations Commission, *Martin King v The Voluntary Health Insurance Board*, DEC-S2008-116, 11 December 2006: The Equality Tribunal upheld a complaint of discrimination on the sexual orientation ground by a man who was denied access to the Free Travel Scheme. It was held that as this was an administrative scheme, the Department of Social and Family Affairs was not entitled to rely on

Such an exemption is not provided for in the Racial Equality Directive or the Gender Goods and Services Directive and, therefore, it is very questionable if section 14 is in compliance with these Directives. Insofar as the grounds of gender, race and membership of the Traveller community are concerned, the blanket nature of the exemption and the lack of any requirement of objective justification make it highly unlikely that such a provision could be regarded as compliant with the Directives.<sup>128</sup>

The Commission reiterates that section 14(1) (a) should be amended to allow the ESA to be used to challenge other discriminatory legislation. However, the Commission acknowledges that the WRC does not have a general jurisdiction to disapply national law as this power only arises in respect to a national provision that is in breach of an enforceable entitlement arising from EU law.<sup>129</sup> Further consideration should be given as to how the WRC would be equipped to deal with such cases, including whether it would be appropriate to provide for a case stated mechanism to the High Court. An obligation on the State to equality proof all legislation prior to implementation may also provide some assistance here.

**The Commission recommends that section 14(1)(a) should be amended to allow the Equal Status Acts to be used to challenge other discriminatory legislation and that further consideration is given as to how the WRC would be equipped to deal with such cases.**

### Section 9 on discriminating clubs

Section 9 exempts certain clubs from the remit of the ESA by allowing clubs to refuse membership where the principal purpose of the club is to cater only for the needs of certain protected categories of people. In *Equality Authority v Portmarnock Golf Club*,<sup>130</sup> the Supreme Court upheld the High Court decision to the effect that section 9 permitted male-only membership in golf clubs, holding that the principal purpose of

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section 14(1) (a) (i). The Oireachtas subsequently amended the social welfare statute in order to prevent same-sex cohabiting couples from accessing administrative social welfare schemes.

<sup>128</sup> J. Walsh, *Equal Status Acts 2000-2011: Discrimination in the Provision of Goods and Services* (Dublin: Irish Council for Civil Liberties and Blackhall Publishing, 2012) 54.

<sup>129</sup> Case C-378/17 *Minister for Justice, Equality and Law Reform v The Workplace Relations Commission and ors* [2018] ECLI:EU:C:2018:979.

<sup>130</sup> [2009] IESC 73.

such clubs was to cater to the needs of men. However, this interpretation of section 9(1) appears to permit discrimination against protected groups.

From an EU law perspective, the minority view (as expressed by Justice Denham) that in order to come within section 9(1), there should be a logical connection between the objects of the club and the category of people to whom membership is limited, would seem to be more compatible. In so far as 'gender' and 'racial or ethnic origin' are included within the exclusion under section 9(1) (a) (i), issues regarding compliance with the Gender Goods and Services Directive and the Racial Equality Directive arise. In this regard, article 4(5) of the Gender Goods and Services Directive provides for an exemption where the provision of services to one gender is justified by a legitimate aim and the means of achieving that aim are appropriate and proportionate. Recital 16 lists examples here, including freedom of association in cases of membership of single-sex private clubs.

Contrary to article 4(5), no objective justification requirement exists in the Supreme Court's interpretation of section 9(1) and, furthermore, Portmarnock golf club was not a single sex club covered by recital 16 as it permitted women to play golf at the club but restricted their membership. Recital 17 of the Racial Equality Directive refers to organisations of persons of a particular racial or ethnic origin where the main object is the promotion of the special needs of those persons through positive action measures, which clearly does not provide for the application of the exemption as interpreted by the Supreme Court.

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

### [Section 7 on non-State funded primary and secondary schools](#)

Section 7(2) of the ESA prohibits discrimination by an educational establishment in relation to:

- admissions;
- the terms or conditions of admission;
- access to a course, facility or benefit;
- any other term or condition of participation; or
- the expulsion or imposition of any other sanction.

Section 7(3) then qualifies what amounts to discrimination and sections 7(3) (c) and 7(3) (ca) provide for an exemption based on the promotion of certain religious values in schools as follows:

'7(3) An educational establishment does not discriminate under subsection (2) by reason that –

...

(c) where the establishment is a school (other than a recognised primary school) providing primary or post-primary education to student and the objective of the school is to provide education in an environment which promotes certain religious values, it admits persons of a particular religious denomination in preference to others,

(ca) where the establishment is a school providing primary or post-primary education to students and the objective of the school is to provide education in an environment which promotes certain religious values, it refuses to admit as a student a person who is not of a particular religious denomination and it is proved that the refusal is essential to maintain the ethos of the school.'

The above amendments to the ESA, as introduced by section 11 of the *Education (Admission to Schools) Act 2018*, mean that primary schools that are 'recognised' (which covers publicly funded schools) cannot discriminate on the basis of religion by way of affording preferential treatment to students of a particular religion. However, this does not apply to privately funded primary schools or to secondary schools. Further, under section 7(3) (ca), where the objective of a school (including a recognised primary school) is to provide education in an environment which promotes certain religious values, it can refuse to admit a student on the basis of religion where:

"it is proved that the refusal is essential to maintain the ethos of the school."

While these provisions continue to permit discrimination on the religion ground, the Commission acknowledges that this was no doubt intended, to a certain extent, not to infringe on the constitutionally protected right to free practice of religion. However, the Commission believes that the paramount concern in balancing the rights of individual children with the rights of institutions, such as religious patrons, must be the right of children to an education under reasonable conditions and without discrimination.<sup>131</sup>

**The Commission recommends that section 7(3) of the Equal Status Acts be reviewed to ensure there is appropriate balancing between the right to equal treatment and the right to free practice of religion. In the immediate term, section 7(3)(ca) should be amended to provide a definition of 'ethos' and to define precisely what would be required in order to establish that a refusal was 'essential' to maintain the ethos of the school.**

### Section 7(5) on discrimination on the grounds of nationality in relation to educational grants

Section 7(5)(b) of the ESA permits the Minister for Education to require that third level and higher education grants be restricted to persons who are citizens of Ireland or EU/EEA/Swiss nationals, or to require such citizens or nationals and other persons to be treated differently in relation to the making of grants. The Commission is concerned that this provision potentially impacts on the economic, social and cultural rights of non-EU/EEA/Swiss nationals by restricting their eligibility for educational grants.<sup>132</sup> Whilst this provision appears to be compliant with EU law,<sup>133</sup> it is very broadly drafted with regards to the powers of the Minister and should be amended to provide for an objective justification requirement.

**The Commission recommends that section 7(5)(b) of the Equal Status Acts be amended to require the Minister to objectively justify any restrictions on third level**

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<sup>131</sup> IHREC, *Observations on the Education (Admissions to School) Bill 2016* (2016) 11-14.

<sup>132</sup> Irish Human Rights Commission, *Observations on the Equality Bill* (2004) 6-7.

<sup>133</sup> A difference in treatment based on nationality is expressly excluded by article 3(2) of the Racial Equality Directive.

**and higher education grants for non-EU/EEA/Swiss citizens or any other difference of treatment.**

### Section 14(1) (aa) on permitting nationality discrimination in immigration matters

Section 14(1)(aa) provides an exemption to public authorities for any action taken in relation to a non-national provided they were either unlawfully present in the State or the action was conducted in accordance with enactments concerning their entry to or residence in the State. Also, all actions taken by the Minister in relation to non-nationals are also exempt from a claim of discrimination on the nationality ground. While this provision was clearly intended to prevent the ESA from being used to challenge decisions issued by the State's immigration apparatus, the Commission considers that this provision is overly broad as it would appear to permit migrants to be treated differently, based on their migration status, with respect to the provision of goods and services, unrelated to their immigration or residence status.

**The Commission recommends that this provision should be more narrowly applied by restricting the exemption only to matters relating to a migrant's entry or residence in the State. A requirement of objective justification would further narrow the scope of this provision.**

### Section 15(1) and (2) exemptions

Section 15 (1) and (2) provide general exemptions to goods and service providers and licence holders where they refuse service to a person on grounds other than the discriminatory grounds. Section 15(1) exempts service providers from claims of discrimination where they refuse service based on a reasonably held belief that the individual may engage in criminal or disorderly conduct. Section 15(2) only requires that the licence holder in refusing service was acting in good faith.

The subjective defence provided by these provisions carries clear potential for misuse and, although they are of general application, they have been primarily applied to defeat complaints of discrimination issued by members of the Traveller community. The broad

scope of defences provided may also run contrary to the Racial Equality Directive.<sup>134</sup> Moreover, arguably, licence holders already have the necessary entitlements and obligations under the licencing Acts and, therefore, the provisions are unnecessary.

**The Commission recommends that section 15(1) and (2) of the Equal Status Acts be removed.**

## Employment Equality Acts

### Exclusion of domestic workers from the definition of employee

The Commission considers the express exclusion of domestic workers from the definition of employee in the EEA to constitute a de facto exemption for employers of domestic workers with regards to their recruitment practices, and has repeatedly recommended their inclusion in the definition.<sup>135</sup> This exclusion is not in compliance with the Framework Employment Directive, Racial Equality Directive or Gender Recast Directive. The exclusion is express and absolute, and does not require the establishment of a genuine occupational requirement. The lack of protection against discrimination in this regard has a disproportionate effect on women, particularly migrant women who make up the majority of domestic workers.<sup>136</sup>

**The Commission recommends that the law be amended to include domestic workers in the definition of employee and bring them under the protection of the Employment Equality Acts.**

### Section 35(1) on different rates of remuneration for disabled people

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<sup>134</sup> Equality Authority, *Overview of the Employment Equality Act 1998 and the Equal Status Act 2000* (2003) 28–29.

<sup>135</sup> Section 2(1) EEA defines “employee” as: “subject to subsection (3)...a person who has entered into or works under (or, where the employment has ceased, entered into or worked under) a contract of employment and, where the context admits, includes a member or former member of a regulatory body, but, so far as regards access to employment, does not include a person employed in another person’s home for the provision of personal services for persons residing in that home where the services affect the private or family life of those persons.”

<sup>136</sup> IHREC, [\*Submission to the UN Committee on the Elimination of Discrimination Against Women on Ireland’s combined sixth and seventh periodic reports\*](#) (2017) 91.

It may have been intended that section 35(1) of the EEA, allowing employers to provide different rates of remuneration for disabled persons, was to provide an element of support for sheltered or supported employment. However, the Commission is of the view that this is a major qualification on the principle of equal pay for disabled persons and, in fact, perpetuates inequality.<sup>137</sup> Such an exemption is not provided for in the Framework Employment Directive and a strong argument can be made that this provision is not in compliance with the positive action provision under article 7 or the reasonable accommodation measures provided for under article 5. The provision also appears to run contrary to the UNCRPD.

**The Commission recommends the removal of section 35(1) from the Employment Equality Acts.**

#### Section 36(4) requirement of educational attainment

Under section 36(4) of the EEA, it is not unlawful for an employer to require that an employee holds:

- (a) a specified educational, technical or professional qualification which is a generally accepted qualification in the State in respect of the particular position; or
- (b) the production and evaluation of information about any qualification other than such a specified qualification.

This provision gives rise to potential indirect discrimination on a number of grounds, particularly in light of the approach by the Labour Court to viewing the provision as a complete defence.<sup>138</sup> In the absence of any obligation for the qualification requirement to be objectively justified, it is difficult to see how the measure is justifiable, legitimate and proportionate to its intention.

**The Commission recommends that section 36(4) of the Employment Equality Acts is amended in order to include a test of objective justification in respect to the specified qualification.**

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<sup>137</sup> Equality Authority, *Overview of the Employment Equality Act 1998 and the Equal Status Act 2000* (2003) 38-39.

<sup>138</sup> *Health Services Directive v Fitzgerald* EDA1915.



## Section 37 on actions taken against employees to uphold 'ethos'

The Commission acknowledges that the discriminatory potential of section 37 of the EEA was restricted by the *Equality (Miscellaneous Provisions) Act 2015*. However, the Commission remains concerned that this provision may still not be sufficiently narrow to ensure it does not permit unlawful discrimination.<sup>139</sup> The exclusion of religious institutions from the application of section 37(1A), (1B) and (1C) does not appear to be in conformity with Article 4(2) of the Framework Employment Directive. Similarly, the exclusion of institutions which do not receive any public funding does not appear to be in conformity with the Framework Employment Directive as the CJEU has upheld that Article 4(2) applies to public and private organisations.<sup>140</sup> Furthermore, the provision could be narrowed further by the inclusion of a definition of 'religious ethos' and the provision of a precise list of relevant institutions that may rely on this section. A further requirement that any 'undermining' by an employee within the meaning of this provision must be 'active and significant' would limit reliance on this exemption to only where it is absolutely necessary.

**The Commission recommends that section 37 of the Employment Equality Acts is amended to ensure it complies with the Framework Employment Directive.**

**The Commission recommends that section 37 should include a definition of 'religious ethos' and provide a precise list of relevant institutions that may rely on its provisions.**

**The Commission recommends the amendment of section 37(1) (b) so that, for the purposes of taking action under that section, an employer must demonstrate that the employee has engaged in 'active and significant undermining' of the institution's ethos or religious belief.**

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<sup>139</sup> The Commission has previously expressed concern over a provision based on undefined terms such as 'ethos': IHREC, [Recommendation Paper to IHREC re Section 37 of the Employment Equality Act 1998-2011](#) (2015) 13-16; IHREC, [Ireland and the International Covenant on Economic, Social and Cultural Rights](#) (2015) 23-24; and Irish Human Rights Commission, [Religion and Education: A Human Rights Perspective](#) (2011) 103.

<sup>140</sup> C-68/17 *IR v JQ* [2018] ECLI:EU:C:2018:696.

## 5. Procedural and Other Issues in the Equality Acts

### Compensation limits under the Acts

The Commission has repeatedly recommended<sup>141</sup> the removal of the limits on the amount of compensation that can be awarded under the EEA and the ESA.<sup>142</sup> Under the EEA, compensation is limited to the greater of two years' salary or €40,000, or €13,000 where the complainant was not an employee at the time of the discriminatory act, and interest is only payable in respect of complaints on the gender ground.<sup>143</sup>

Compensation up to a ceiling of €15,000 is provided for under the ESA, and this has been criticised as particularly inadequate for egregious violations of the law such as the discriminatory denial of access to education.<sup>144</sup> Similar concerns can be found expressed in the WRC's jurisprudence.<sup>145</sup> Complaints on the gender ground may be referred to the Circuit Court where there is no limit on the amount of compensation that may be awarded, but claimants may face other barriers such as increased costs.<sup>146</sup> This distinct treatment is due to judgments by the CJEU in employment cases on the gender ground that compensation ceilings are not compatible with the right to an effective judicial process under the Equal Treatment Directive.<sup>147</sup>

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<sup>141</sup> Equality Authority, *Overview of the Employment Equality Act 1998 and the Equal Status Act 2000* (2003) 20; Equality Authority, [Embedding Equality in Immigration Policy: Submission on the discussion document of the Department of Justice, Equality and Law Reform on the Immigration and Residence Bill](#) (2006) 12; IHRC, [Observations on the Equality Bill](#) (2004) 3-4; IHREC, [Submission to UN Committee on the Elimination of Discrimination Against Women](#) (2017) 35-36; IHREC, [Comments on Ireland's 16<sup>th</sup> National Report on the European Social Charter](#) (2019) 46; and IHREC, [Submission to the Citizens' Assembly on Gender Equality](#) (2020) 28-29.

<sup>142</sup> The maximum award payable under the ESA is linked to the monetary limits on the jurisdiction of the District Court and is currently set at €15 000 - section 27(2) ESA.

<sup>143</sup> Section 82(4-5) EEA.

<sup>144</sup> European Commission, [European Network of legal experts in gender equality and non-discrimination: Country report on non-discrimination – Ireland](#) (2020) 9, 84.

<sup>145</sup> Workplace Relations Commission, *Tenant C v A Landlord*, ADJ-00004705, 9 August 2017. The Adjudication Officer in their decision stated: 'I am constrained by the maximum award of €15,000 which by virtue of Section 27(2) is fixed at the maximum District Court civil jurisdiction, and in my view does not reflect the seriousness of the discrimination.'

<sup>146</sup> The issues with the Circuit Court in this area have been recognised by the State. See Government of Ireland, [16<sup>th</sup> National Report on the implementation of the European Social Charter](#) (2018) 157-158.

<sup>147</sup> Council Directive (EEC) 76/207 of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. See Case-14/83 *Von Colson v Land Nordrhein-Westfalen* EU:C:1984:153, [1984] ECR 01891; Case C-271/91 *Marshall v Southampton & SW Hants AHA* EU:C:1986:84, [1986] ECR 00723 and Case C-177/88 *Dekker v VJV Centrum* ECLI:EU:C:1990:383, [1990] ECR I-03941. See also, J. Walsh, *Equal Status Acts 2000-2011: Discrimination in the Provision of Goods and Services* (Dublin: Irish Council for Civil Liberties and Blackhall Publishing, 2012) 329, 349.

The disparities in the remedies available for gender discrimination and other claims, as well as the capping of compensation in cases involving multiple grounds of discrimination, raises concerns about Ireland's compliance with EU law.<sup>148</sup> As recently highlighted in a European Commission report on Ireland,<sup>149</sup> the compensation limits arguably undermine the clear requirement across the Directives that remedies for discrimination must be 'effective, proportionate and dissuasive.'<sup>150</sup> In particular, the CJEU has confirmed that national rules on sanctions implementing the Racial Equality Directive must meet this requirement for real and effective compensation, even where there is no identifiable victim.<sup>151</sup> There is symbolic value to the limit at which compensation is set, which demonstrates the seriousness with which discrimination is taken by the legislature. There is also an obvious link between the maximum amount of compensation that can be awarded and the dissuasive and deterrent effect of the law. Compensation limits in both EEA and ESA cases should be removed. The Commission is cognisant that their removal may have further implications in light of the *Zalewski* decision. The Commission further recognises that in removing these limitations, consideration should be given to the consequent powers of the WRC and providing guidance to ensure that awards are proportionate, effective and dissuasive in compliance with the relevant EU Directives. This could be done by way of published WRC guidance, statutory instrument or a code of practice. Of principal importance will be the requirement that the size of award is relative to the respondent.

**The Commission recommends the immediate removal of statutory compensation limits on complaints of discrimination under the EEA and ESA.**

**The Commission further recommends that they are replaced with a coherent, accessible compensation system that calculates awards relative to the size of the**

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<sup>148</sup> European Commission, [European Network of legal experts in gender equality and non-discrimination: Country report on gender equality – Ireland](#) (2021) 87 and IHREC, [Comments on Ireland's 16th National Report on the European Social Charter](#) (2019) 46.

<sup>149</sup> European Commission, [European Network of legal experts in gender equality and non-discrimination: Country report on non-discrimination – Ireland](#) (2020) 10, 84-85.

<sup>150</sup> Framework Equality Directive, art. 17; Racial Equality Directive, art. 15; Gender Goods and Services Directive, art. 14; and the Gender Recast Directive, art. 25.

<sup>151</sup> European Commission, [European Network of legal experts in gender equality and non-discrimination: Country report on non-discrimination – Ireland](#) (2020) 10, 84-85.

**enterprise involved and ensures compliance with the requirements of the EU Directives.**

## Non-disclosure agreements

Through its casework, the Commission has grown concerned by the prevalence of confidentiality clauses in agreements to settle equality cases. It is acknowledged that in certain circumstances, such clauses may be appropriate; however, the almost automatic assumption that they are a necessary aspect of any settlement agreement, coupled with the often broad nature of their content, raises significant concerns. The elimination of discrimination and promotion of equality, as well as the ability of complainants to pursue redress, must be primary considerations in all equality proceedings and the normalisation of non-disclosure agreements ('NDAs') potentially impedes this. A dearth of information or research on this subject outside of the Commission's own casework has made it difficult to identify the true extent of such agreements.

This matter has been the subject of substantial media and political attention in the United Kingdom and has borne legislation, regulatory measures and State authored guidance documents.<sup>152</sup> In the United Kingdom, concern relating to NDAs and the silencing of complaints related to discrimination is relatively longstanding, with guidance being issued to NHS employers on the issue as far back as 2013.<sup>153</sup> In 2019, Irish solicitors remarked on the potential for NDAs to 'cover up' abusive behaviour.<sup>154</sup> In April 2020, the National Women's Law Centre said employers continue to use non-disclosure and non-disparagement agreements to prevent individuals from disclosing harassment.<sup>155</sup> More recently, the Dublin Rape Crisis Centre has highlighted that rather than finding that NDAs protect victims, research has asserted that their elimination (in

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<sup>152</sup> House of Commons Women and Equalities Committee, [The use of non-disclosure agreements in discrimination cases](#) (2019); Solicitors Regulation Authority, [Warning notice: Use of non-disclosure agreements \(NDAs\)](#) (2020); United Kingdom Department for Business, Energy and Industrial Strategy, *Confidentiality clauses: measures to prevent misuse in situations of workplace harassment or discrimination* (2019); and Equality and Human Rights Commission, [Guidance: The use of confidentiality agreements in discrimination cases](#) (2019).

<sup>153</sup> NHS Employers, [The use of settlement agreements and confidentiality clauses](#) (2019).

<sup>154</sup> Hayes Solicitors, [Has the Whistle Been Blown on Confidentiality Clauses/Non-Disclosure Agreements?](#) (2019).

<sup>155</sup> National Women's Law Centre, [Limiting Nondisclosure And Nondisparagement Agreements That Silence Workers: Policy Recommendations](#) (2020) 1.

relation to workplace allegations of harassment or abuse) may actually enhance access to justice.<sup>156</sup>

A guiding principle of any efforts to reform the law in this area is that respondents may not impose these agreements and complainants may only enter them freely, having been fully informed of their rights. The Commission acknowledges and welcomes the current Private Member's Bill on this issue but notes that the reforms contained within its provisions are exclusive to employment equality complaints relating to sexual harassment and discrimination, and there is no proposal to extend its provisions to similar complaints relating to the provision of goods and services.<sup>157</sup>

The Commission also notes that mediation facilitated by the WRC is confidential under the *Workplace Relations Act 2015*. The Commission recognises the benefits of mediation in appropriate cases but has concerns that some claimants who have not had the benefit of legal advice and/or representation may agree to participate in this process where they might otherwise have elected for an adjudication hearing. As a result, there may be less visibility with regard to the nature and extent of discrimination in the State.

**The Commission recommends that greater regulation of confidentiality agreements in all equality cases be introduced, and that reforms are guided by the principles of eliminating discrimination and promoting equality, and facilitating access to an effective remedy.**

**The Commission recommends that the WRC publish anonymised accounts of cases resolved through mediation, including whether the parties had representation, as well as anonymised data on mediation and non-disclosure agreements.**

### Burden of proof in indirect discrimination claims

The burden of proof provisions under EU Law<sup>158</sup> are implemented by way of section 85A of the EEA. With regard to cases of indirect discrimination, there is a concern that the

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<sup>156</sup> Dublin Rape Crisis Centre, [Discussion Paper: Workplace Sexual Harassment and Abuse](#) (2021) 14.

<sup>157</sup> *Employment Equality (Amendment) (Non-disclosure Agreements) Bill 2021*.

<sup>158</sup> See Article 10 Framework Employment Directive, Article 8 Racial Equality Directive and Article 19 Gender Recast Directive.

Supreme Court in *Stokes v Christian Brothers High School*<sup>159</sup> (a claim under the ESA) set the bar too high for a complainant by requiring statistical analysis in order to establish that a person belonging to a protected group is at a particular disadvantage compared with others. The case made no reference to EU law on the burden of proof. This decision was made in advance of the amendment to the definition of indirect discrimination brought about by the *Equality (Miscellaneous Provisions) Act 2015 Act* whereby instead of challenging a measure that 'puts' a person at a particular disadvantage, the definition now refers to measures that 'would put' a person at a particular disadvantage. The issue here, however, does not appear to be one with transposition but rather a matter of interpretation by the superior courts. This is particularly so given the absence of accessible equality data, especially disaggregated data, in both the public and private sectors, and the absence of data on equality and discrimination at a national level.<sup>160</sup>

Indeed, the use of statistical evidence in cases of indirect discrimination is provided for in recital 15 of the Framework Employment Directive and article 15 of the Racial Equality Directive. Interestingly, in *Dobson v East Cumbria NHS* the UK Employment Appeals Tribunal held that the Employment Tribunal should have taken judicial notice of the fact that childcare responsibilities were still in general likely to bear more heavily on women, notwithstanding that there was no positive evidence of group disadvantage.<sup>161</sup>

**The Commission recommends that clarity should be provided with regard to the use of statistical evidence in discrimination claims under the Equality Acts. This could be achieved by inserting into the law a clarification that the use of statistical evidence in proving indirect discrimination cases is 'admissible but *not* required.'**

**The Commission further recommends that equality training for the courts would also assist in this regard.**

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<sup>159</sup> [2015] IESC 13.

<sup>160</sup> The gaps and shortcomings in equality data in Ireland are outlined in: CSO, [Equality Data Audit](#) (2020). The audit found particular gaps or weakness in ethnicity, disability, sex and gender identity, and sexual orientation data. It also found that much of the data that is already available is only high level information and does not always allow for analysis of minority groups. There was also a reported lack of intersectional data.

<sup>161</sup> UKEAT/0220/19/LA (22 June 2021).

## WRC Complaints Procedure

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

### Online complaints form

The WRC uses a single online complaints form for all employment, equality employment and equal status cases. This means that persons making a claim of discrimination in relation to the provision of goods and services must complete a form designed for employment claims. This is confusing and of particular concern where the person is unrepresented. As the form is accessed and completed online, connectivity, material access (including ICT equipment) and a level of digital competency are required in order to pursue a complaint.<sup>162</sup> The Commission has previously raised its concerns about the extent to which the digital divide is exacerbating existing social inequalities and further isolating already marginalised communities in the State.<sup>163</sup> Older Irish people have much lower levels of digital skills than their counterparts in other EU countries.<sup>164</sup> Furthermore, unemployed people, lone-parent households, people living in rural areas, non-native English speakers and people with lower levels of education and lower incomes are less likely to use online public services.<sup>165</sup>

FRA recommends that equality mechanisms must accommodate diversity, and that the needs of complainants must be assessed before a complaint is lodged with a view to meeting those needs and better facilitating the initiation of discrimination claims.<sup>166</sup>

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<sup>162</sup> The WRC acknowledges that the form cannot be accessed on the majority of mobile or tablet devices and, users of certain browsers must follow instructions in a supplementary document provided in order to use the form: WRC, [How to Make a Complaint/Refer a Dispute](#).

<sup>163</sup> IHREC, [Developing a National Action Plan Against Racism: Submission to the Anti-Racism Committee](#) (2021) 28 and IHREC, [Annual Report 2020](#) (2020) 5.

<sup>164</sup> For example, 33 per cent of Irish people aged 65–74 had never used the internet in 2019, compared to 11 per cent in Britain. See National Economic & Social Council, [Digital Inclusion in Ireland: Connectivity, Devices and Skills](#) (2021) 2.

<sup>165</sup> National Economic & Social Council, [Digital Inclusion in Ireland: Connectivity, Devices and Skills](#) (2021) 2–3.

<sup>166</sup> European Union Agency for Fundamental Rights, [Access to justice in cases of discrimination in the EU: Steps to further equality](#) (2012) 56–58.

**The Commission recommends that the WRC commissions an independent review into its complaints procedures, with the purpose of meeting the needs of complainants and removing access barriers.**

**The Commission recommends that a dedicated complaint form for Equal Status Act complaints be made available, both online and offline.**

### **Listing times and timely resolution**

The Commission notes the considerable inconsistency in the notice given regarding hearing dates in the WRC, with times recorded in the Commission's casework ranging from several weeks to several months. The Commission also notes from its casework that delays in listing a case following a postponement, and significant delays in issuing decisions in certain cases, contribute to a lack of timely resolution of certain disputes that can exacerbate what may already be a stressful process for the parties involved. The lack of consistency currently present places a strain on the Commission's ability to exercise its functions relating to legal advice and representation and creates further issues for complainants not in receipt of the same.

There is no clear system for how cases are listed nor for how cases may be expedited. Given the nature of some cases that appear before the WRC, there should be clearly identifiable procedures in place to apply for expedited proceedings. Examples include recipients of HAP' who are incurring the full cost of their rent while they wait for the resolution of their complaint and complaints involving a significantly consequential pre-existing relationship such as a child and their school. Furthermore, there should be an appeals process available where a request for expedition has been rejected.

The Commission reiterates that provision should be made in the Equality Acts for interlocutory relief in urgent cases<sup>167</sup> and where there is a risk that the duration of proceedings could render any redress effectively moot. Such relief would be of particular importance, for example, to prevent evictions which are taking place due to rent arrears which have arisen from a landlord refusing to sign the complainant's HAP

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<sup>167</sup> Equality Authority, [\*Embedding Equality in Immigration Policy: Submission on the discussion document of the Department of Justice, Equality and Law Reform on the Immigration and Residence Bill\*](#) (2006) 43. Equality Authority, *Overview of the Employment Equality Act 1998 and the Equal Status Act 2000* (2003) 60-61.



forms, or to prevent the dismissal of an employee who is being discriminated against. Applications for interlocutory relief could be made by way of preliminary hearings. The Commission notes, however, that any powers given to the WRC in this regard must be considered in light of the *Zalewski* judgment.

**The Commission recommends that the WRC puts in place a transparent and consistent system for listing, hearing and expediting cases.**

**The Commission recommends that the WRC reviews its procedures to avoid unreasonable delays following a postponement and in the issuing of decisions.**

**The Commission recommends that the Equality Acts be amended to provide for interlocutory relief in urgent cases.**

### Provision of interpreters and reasonable accommodation

The Commission considers that the WRC's should facilitate complaints of discrimination to the greatest degree reasonably possible. This includes but is not limited to the provision of interpreters for people who have suffered discrimination who are not fluent in English and reasonable accommodation for disabled people, including the provision of sign language interpreters where necessary. The functioning and effectiveness of the Acts requires these measures to be of sufficient quality and readily available. In recent public and stakeholder consultations on Ireland's draft State report under the UNCRPD, participants referenced difficulties in making complaints of workplace issues or discrimination, and their sense that the WRC does not properly accommodate those with additional needs.<sup>168</sup>

**The Commission recommends that measures are taken to professionalise the interpretation and reasonable accommodation service provision in the WRC.**

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<sup>168</sup> Centre for Effective Services, [Ireland's Draft State Report under the United Nations Convention on the Rights of Persons with Disabilities Report from Public and Stakeholder Consultations](#) (2021) 14.

## Applications for hearings in private and anonymity

Following the Supreme Court decision in *Zalewski*,<sup>169</sup> all hearings before the WRC must be held in public, and party names will no longer be anonymised, unless 'special circumstances' are present.<sup>170</sup> The Commission notes the guidance published by the WRC in this regard which includes a non-exhaustive list of factors which may amount to such special circumstances.<sup>171</sup> However, the list is vague, with none of the terms contained within defined and the scope for interpretation is extremely broad. The Commission considers this may be an area in which the Minister's powers to set regulations for the procedures of the WRC could be of use.<sup>172</sup> The Commission respects the decision of the Supreme Court but has concerns that public hearings and the publication of the names of parties as standard could deter certain classes of complaint, such as those involving claims of sexual harassment.<sup>173</sup> Therefore, complainants, particularly those who are unrepresented, should be informed at an early stage that they may make an application to the WRC on these matters. The rationale for granting private hearings/anonymity should also be addressed in WRC determinations to provide greater understanding as time progresses as to how the discretion is exercised.

It is not clear from the guidance at what stage in proceedings a decision regarding anonymity will be made. It is suggested that provision should be made for decisions relating to hearings in public and the naming of the parties to be dealt with by way of preliminary hearing where appropriate.

The Commission notes that one of the special circumstances which may be considered is where a real risk of harm to a party could result if the hearing is held in public, or if the

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<sup>169</sup> *Zalewski v Adjudication Officer and WRC, Ireland and the Attorney General* [2021] IESC 24.

<sup>170</sup> Sections 11 and 12 of the *Workplace Relations (Miscellaneous Provisions) Act 2021* amending the EEA and the ESA respectively to provide that investigations shall be held in public unless the Director General of the Workplace Relations Commission, of his or her own motion or upon the application by or on behalf of any party, determines that, due to the existence of special circumstances, the investigation (or part thereof) should be held otherwise than in public.

<sup>171</sup> Workplace Relations Commission, [WRC Guidance on Workplace Relations \(Miscellaneous Provisions\) Act 2021](#); Special circumstances may include but are not limited to cases involving minors, a disability or medical condition that the complainant does not want disclosed publicly; protected disclosures; disclosures made in confidence; sexual harassment; and other issues of a sensitive nature and where a real salient risk of harm to either party is present were the case to proceed without anonymity.

<sup>172</sup> Section 79(4) EEA & Section 25(3) ESA.

<sup>173</sup> As noted above, the special circumstances noted in the WRC Guidance include 'cases involving issues of a sensitive nature such as sexual harassment.'

parties are named in the decision. However, there is no further clarity as to the precise meaning of 'a real risk of harm' and whether, for example, this could include victimisation.

**The Commission recommends that complainants be informed at an early stage that they may make an application to the WRC on private hearings and anonymity, and that the rationale for granting or refusing such applications be addressed in WRC determinations.**

**The Commission recommends that provision should be made to allow for applications on privacy and anonymity to be dealt with by way of preliminary hearing where appropriate.**

**The Commission recommends that further clarity be provided as to the meaning of 'a real risk of harm' in the guidance on the special circumstances that apply.**

## Equal Status Acts

### Two-month period for written notification

Under the ESA, complainants are required, within two months of the most recent occurrence of the discriminatory act, to notify the respondent in writing of the nature of their complaint and their intention to bring a complaint before the WRC if not satisfied with the respondent's response.<sup>174</sup> This amounts to, in effect, a two months statute of limitation.<sup>175</sup> No such requirement is in either the EEA or section 19 of the *Intoxicating Liquor Act 2003*. Representatives of certain protected groups have regarded this requirement as either being particularly onerous, or constituting a genuinely impossible barrier to overcome.<sup>176</sup> The notification period requirement also

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<sup>174</sup> Section 21(2) ESA.

<sup>175</sup> IHRC, [Observations on the Equality Bill](#) (2004) 3-4.

<sup>176</sup> See J. Walsh, C. Conlon, B. Fitzpatrick and U. Hansson, [Enabling Lesbian, Gay and Bisexual Individuals to Access Their Rights under Equality Law](#) (Equality Authority and Equality Commission for Northern Ireland) (2007) 68-70 where members of the LGB community claimed that the process of identifying discrimination, recovering from it and mobilising resources to take legal action was often not compatible with a two-month threshold. See also: Equality Authority, *Overview of the Employment Equality Act 1998 and the Equal Status Act 2000* (2003) 19-20 where representatives of disabled groups submitted that section 21 posed an insurmountable barrier to many of their members.

raises compliance issues with EU law. This two month time limit would appear to undermine the availability of a remedy as required under both the Racial Equality Directive<sup>177</sup> and the Gender Goods and Services Directive<sup>178</sup> and is, therefore, potentially in breach of their provisions. Making the two month notification period optional would bridge the gap between the intention of the time period for notification and the requirements of EU law. In some cases, there may be benefits to bringing a complaint within an optional time period such as the provision of information and expedited resolution, however, it is imperative that persons who have suffered discrimination who do not opt to notify the respondent within a set period do not experience any disadvantage.

**The Commission recommends that written notification of a complaint within a two month period should be optional.**

### The definition of services

The lack of express reference to public functions in the definition of services,<sup>179</sup> coupled with the blanket exemption in section 14(1) (a) (i) which prevents any challenge to discriminatory laws, excludes a significant amount of State activity from the remit of the ESA. This raises compliance issues with the Racial Equality Directive, which clearly proscribes discrimination in the provision of social security, healthcare and social advantages.<sup>180</sup> Jurisprudence on the matter has developed the distinction between a service and a public function.<sup>181</sup> Furthermore, areas such as policing, immigration and civil and criminal justice were likely deliberately excluded from the remit of the

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<sup>177</sup> Racial Equality Directive, art. 7.

<sup>178</sup> Gender Goods and Services Directive, art. 8.

<sup>179</sup> Section 2(1) ESA: 'Service' means a service or facility of any nature which is available to the public generally or a section of the public, and without prejudice to the generality of the foregoing includes – (a) access to and the use of any place, (b) facilities for – (i) banking, insurance, grants, loans, credit or financing, (ii) entertainment, recreation or refreshment, (iii) cultural activities, or (iv) transport or travel, (c) a service or facility provided by a club.....(d) a professional or trade service.

<sup>180</sup> Racial Equality Directive, art. 3(1)(e)&(f).

<sup>181</sup> *Buckley v An Garda Síochána*, DEC-S2008-006: 'customer service' aspects of the force including activities such as liaising with and providing information to victims are subject to the legislation. *Donovan v Garda Donnellan* DEC-S2001-011: the investigation of a crime does not constitute a service. *A Patient v Health Service Provider and A Hospital* DEC-S2010-053: A hospital was still considered to be providing a service to the complainant despite the fact they were detained under statute. *Fogarty v Employment Appeals Tribunal* DEC-S2009-087: The administrative aspects of the Tribunal's work constituted a service whereas the issuing of decisions did not.

Directive.<sup>182</sup> Notwithstanding these developments, further clarity is still needed about which public functions do, and do not, fall within the current definition of services. It is arguably the public functions which most routinely come into contact with members of the protected groups that should be subjected to the most scrutiny, such as social protection, policing and immigration.<sup>183</sup> Furthermore, this aspect of the law essentially constitutes an exemption which was not envisaged or prescribed by the Directives and which, in practice, serves to deny access to a remedy to a person alleging a breach of the Directives' equality provisions through the ESA. A broad purposive review of the Equality Acts requires consideration of the extent to which acts of the State are precluded from the prohibition on discrimination and the symbolic significance this has for the State's efforts to promote equality and eliminate discrimination.

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

## Harassment

The Commission notes that whilst harassment and sexual harassment are included in the definition of prohibited conduct under the ESA, the ESA does not expressly state that harassment is a form of discrimination, as is provided for in the EEA. This is not in compliance with Article 2 of the Racial Equality Directive or Article 2 of the Framework Employment Directive. A simple amendment to clarify this matter would increase the compliance of the ESA with the Directives.

**The Commission recommends that the Equal Status Acts be amended to include harassment as a specific form of discrimination in compliance with EU law.**

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<sup>182</sup> *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others* (2011) C-391/09 para 45, 47 & 48: The Court noted that in the preparatory work on the Directive an amendment to extend its scope to 'the exercise by any public body, including policy, immigration, criminal and civil justice authorities, of its functions' was not accepted by the Council.

<sup>183</sup> FLAC, [Submission on the 5th programme for law reform](#) (2008) 12.

## Provision of accommodation in one's home

Section 6(2) (d) of the ESA exempts 'the provision of accommodation by a person in a part (other than a separate and self-contained part) of the person's home,' even where the property is available for rent by members of the public. The Commission notes that this exemption is not provided for in the Racial Equality Directive. Without a requirement of objective justification this provision essentially acts as permission to discriminate when it is a person's own residence that is being provided as accommodation.

**The Commission recommends that the exemption in section 6(2) (d) of the Equal Status Acts be amended to incorporate an objective justification requirement.**

## Strengthen provisions regarding reasonable accommodation

Article 5(3) of the UNCRPD requires States Parties to take all appropriate steps to ensure that reasonable accommodation is provided to disabled people. The provision of reasonable accommodation seeks to promote equality and to eliminate discrimination, and is defined in article 2 UNCRPD as follows:

""Reasonable accommodation' means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms."

While Ireland ratified the UNCRPD in 2018, the Commission is concerned that the requirement of reasonable accommodation under article 5 of the UNCRPD is not incorporated into Irish law to the fullest extent possible.<sup>184</sup> Limiting accessibility to goods and services by imposing the lesser burden of 'nominal cost' on providers of

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<sup>184</sup> See also L. Buckley and S. Quinlivan, 'Reasonable accommodation in Irish equality law: An incomplete transformation' (2021) 41(1) Legal Studies 37: '[...] Irish legislation could still be considerably improved by remodelling current legislation to comply as far as constitutionally possible with the CRPD duty.'

goods and services<sup>185</sup> has the potential to significantly impact the day-to-day lives of disabled persons.<sup>186</sup>

The Commission recognises the constraints imposed by the Supreme Court decision *In re Article 26 of the Constitution and in the matter of the Employment Equality Bill 1996*,<sup>187</sup> which continues to represent the position of Irish law on this matter. It is important to note, however, that the exercise of property rights under the Irish Constitution is regulated by the principles of social justice.<sup>188</sup> The decision of the Supreme Court arguably left it open to the legislature to distinguish between categories of providers of goods and services, based for example on size or turnover.<sup>189</sup> While the Supreme Court did raise privacy concerns in this regard (in relation to the disclosure of financial information), reliance on publicly available audited accounts or on employee thresholds may mitigate against this risk. It is open to the legislature to differentiate between groups of businesses for various purposes, for example in imposing varying degrees of obligations on smaller undertakings under company law.<sup>190</sup> There is also scope for the legislature to consider the position of employers who owe obligations to a specific group of individuals, in contrast to providers of goods and services whose obligations are arguably of a more general nature. It is worth considering that the transfer of the cost of positive discrimination arises in a different context to that which came before the Supreme Court in 1997.

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<sup>185</sup> The higher standard of 'disproportionate burden' is applied to employers under section 16(3) (b) EEA. See also IHREC, [Observations on the General Scheme of the Equality / Disability \(Miscellaneous Provisions\) Bill](#) (2016).

<sup>186</sup> Disability Legislation Consultation Group, [Equal Citizens: Proposals for Core Elements of Disability Legislation](#) (2003): "A key issue for the DLG is that 'reasonable accommodation' should not be limited by the concept of 'nominal cost' when applied to public bodies."

<sup>187</sup> The Supreme Court struck down employment equality draft legislation which was considered to have the potential to transfer the cost of positive discrimination on to private entities in the employment context, without distinction as to the size of the entity involved. See: *In re Article 26 of the Constitution and in the matter of the Employment Equality Bill 1996* [1997] 2 Irish Reports 321 [367].

<sup>188</sup> Article 43.2.1° of the Irish Constitution states that: 'The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.'

<sup>189</sup> The Commission notes however the views of the Committee on the Rights of Persons with Disabilities in relation to Sweden and its exemption for small businesses in relation to reasonable accommodation: 'The Committee is concerned that the new bill on discrimination, which classifies the denial of reasonable accommodation as discrimination, exempts organizations employing fewer than 10 employees.' UN Committee on the Rights of Persons with Disabilities, [Concluding observations on the initial report of Sweden](#) (2014) UN Doc. CRPD/C/SWE/CO/1, para 10.

<sup>190</sup> See section 350 of the *Companies Act 2014*, which differentiates between companies based on turnover, balance sheet and number of employees.

The Commission emphasises that the State's obligations towards disabled persons are strengthened by Ireland's ratification of the UNCRPD. This ratification confirms that Irish courts will be bound to interpret Irish law, in so far as is possible, in a manner that is consistent with its international obligations.<sup>191</sup>

**The Commission recommends that the need and desirability of coherence in reasonable accommodation standards across all fields of equality legislation merit a reassessment of the balance being struck between the right to private property and the principles of social justice, in light of evolving international and EU law developments.**

**The Commission recommends that the State consider how reasonable accommodation obligations might be extended to further secure the rights of disabled people, for example through the provision of grants to small businesses and training on reasonable accommodation in various service sectors where barriers are identified.**

**The Commission recommends that the Equal Status Acts be amended to incorporate a relatively increased burden for larger providers of goods and services, which might, for example, be based on a turnover threshold.**

The ESA provide that a service provider is only required to provide reasonable accommodation to a disabled person where it would otherwise be 'impossible or unduly difficult' for them to access the service. This is in conflict with the UNCRPD, which requires that disabled persons should be able to exercise their rights on an equal basis with others.<sup>192</sup>

**The Commission recommends that that the current legislative provision on the right to reasonable accommodation is made fully compliant with the UNCRPD.**

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<sup>191</sup> *Cunningham v Irish Prison Service* [2020] IEHC 282 is an example of the High Court interpreting the provisions on reasonable accommodation in the EEA in light of the UNCRPD.

<sup>192</sup> L. Buckley and S. Quinlivan, 'Reasonable accommodation in Irish equality law: An incomplete transformation' (2021) 41(1) *Legal Studies* 17.



**The Commission recommends that the Equal Status Acts be amended to remove the ‘impossible or unduly difficult’ test in respect of the provision of reasonable accommodation.**

### Victimisation as a distinct form of discrimination

The Commission notes the inconsistency in the framing of victimisation under the Equality Acts.<sup>193</sup> Under the ESA, victimisation is constructed as an additional ground of discrimination requiring a comparator, whereas no such comparator is necessary under the EEA. Article 9 of the Racial Equality Directive sets out that Member States shall take all necessary measures to protect victims of discrimination from adverse treatment in response to their seeking of enforcement of the principle of equal treatment.<sup>194</sup> The construction of victimisation under the ESA requires a complainant to show that compared to another person in a similar situation they were treated less favourably. Such a requirement is not prescribed by the Racial Equality Directive, or the Gender Goods and Services Directive, and this has been argued to potentially raise issues regarding the ESA’s compliance with EU law.<sup>195</sup>

**The Commission recommends the Equal Status Acts be amended to include a standalone provision for victimisation, which requires only the establishment that a detriment has been suffered and does not have any comparator requirement.**

### Express provision for harassment on the HAP ground

The Commission notes that there is no express provision for harassment on the ‘receipt of housing assistance’ ground.<sup>196</sup> While there have been findings of harassment on this ground in the WRC’s jurisprudence, the absence of an explicit provision still has

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<sup>193</sup> See section 74(2) EEA and section 4 ESA.

<sup>194</sup> Racial Equality Directive.

<sup>195</sup> J. Walsh, *Equal Status Acts 2000-2011: Discrimination in the Provision of Goods and Services* (Dublin: Irish Council for Civil Liberties and Blackhall Publishing, 2012) 149. The victimisation provisions under the *Equality Act 2010* in Great Britain do not require a comparator and are concerned only with whether the respondent subjected the complainant to a detriment as a response to a protected act: *Equality Act 2010*, section 27.

<sup>196</sup> While the provisions regarding harassment do not specifically exclude complaints on the HAP ground, the construction of the provisions do not make it sufficiently clear that the protection extends.

the potential to generate uncertainty and incoherency in the application of the law.<sup>197</sup>

Under a narrow interpretation of the law, this generates a lacuna whereby unwanted conduct that is related to a person's HAP status is actionable once they have initiated proceedings, as a claim of victimisation, but not beforehand.

**The Commission recommends that the Equal Status Acts be amended to expressly provide for harassment on the 'receipt of housing assistance' ground.**

### Landlord addresses in HAP cases

The Commission notes with concern the difficulty some persons alleging HAP discrimination under the ESA have encountered in accessing the address of the landlord or prospective landlord. As landlords may often be private individuals or represented by estate agents, their address may not be publicly available or disclosed. The requirement under the ESA for a complainant to notify a respondent of their intention to refer a complaint to the WRC makes knowledge of the address of the respondent a fundamental core element of initiating proceedings. This is further exacerbated by the two-month period within which this notice must be issued or else the complaint will be effectively statutorily barred. It is clear intervention is needed to ensure that elements of the ESA's procedures are not abused to defeat complaints before they begin. Potential solutions may involve granting the Commission status as a privileged litigator which is entitled to request disclosure from the Residential Tenancies Board ('RTB') or giving the Commission power to report unregistered tenancies to the RTB. Furthermore, while there are clear privacy concerns regarding the disclosure of personal information, it is not unreasonable that some trade-offs are required when engaging in a commercial enterprise, which can have such a profound effect on another person's circumstances such as the provision of housing.

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<sup>197</sup> See: Workplace Relations Commission, *A Tenant v A Landlord*, ADJ-00013893, 5 March 2019 and Workplace Relations Commission, *A Tenant v A Landlord*, ADJ-00029231, 31 March 2019 where the Adjudication Officers issued findings of harassment on the HAP ground. See also: Workplace Relations Commission, *A Tenant v A Landlord*, ADJ-00012156, 19 September 2018 where a finding of harassment was issued despite the facts indicating a prima facie case of victimisation, demonstrating the uncertainty present in the current law.

**The Commission recommends that legislative action be taken to ensure that the landlord or prospective landlord address information is made accessible to complainants in a manner which balances the privacy rights of respondents.**

## Employment Equality Acts

### Standalone reasonable accommodation claims

The Commission is concerned that under the EEA the denial or refusal of reasonable accommodation by an employer or a prospective employer does not currently constitute an act of discrimination.<sup>198</sup> Therefore, the law can be interpreted as not providing a remedy to people denied reasonable accommodation.<sup>199</sup> This is an inconsistency in the equality law framework as such denial is expressly contained within the definition of discrimination found in the ESA.<sup>200</sup> This raises further compliance issues with EU law as it may constitute a denial of effective remedy as required under the Framework Employment Directive,<sup>201</sup> and cannot be reconciled with the purpose of reasonable accommodation to ensure compliance with the principle of equal treatment for disabled persons.<sup>202</sup> The UNCRPD also expressly describes the denial of reasonable accommodation as a form of discrimination.<sup>203</sup>

In practice, this duty has been recognised by the WRC and the Labour Court as a freestanding duty and is included as a ground of discrimination in the WRC claim form. However, the Supreme Court in *Nano Nagle v. Daly*<sup>204</sup> noted that it was not a free standing duty and that failure of compliance would not in itself give rise to compensation, but that the effect of the failure in that obligation must be considered within the framework of section 16 of the EEA as a whole. Therefore, the failure to

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<sup>198</sup> Section 16(3) EEA setting out the duties of employers in the provision of reasonable accommodation.

<sup>199</sup> L. Buckley and S. Quinlivan, 'Reasonable accommodation in Irish equality law: An incomplete transformation' (2021) 41(1) Legal Studies 12.

<sup>200</sup> Section 4(1) ESA: 'For the purposes of this Act discrimination includes a refusal or failure by the provider of a service to do all that is reasonable to accommodate the needs of a person with a disability by providing special treatment or facilities.'

<sup>201</sup> Framework Employment Directive 78/2000, art. 17.

<sup>202</sup> Framework Employment Directive 78/2000, art. 5.

<sup>203</sup> Article 2, UNCRPD.

<sup>204</sup> [2019] 3 IR 369 [82] (MacMenamin J).

provide reasonable accommodation should be specified to be a form of discrimination in and of itself.

**The Commission recommends that the Employment Equality Acts be amended to provide that denial of reasonable accommodation is discriminatory, to ensure consistency in equality protections and to bring the law into compliance with the State's international legal obligations.**

### Vocational training courses

In respect of vocational training, section 12 of the EEA contains a limited definition relating only to courses that are 'exclusively concerned with training' for an occupational activity. Training courses not covered by section 12 of the EEA are therefore covered by section 7 of the ESA. The limited definition of vocational training under the EEA may indicate an inadequate transposition of EU law on the basis that the duty to provide reasonable accommodation under the ESA is less extensive than that required under Article 5 of the Framework Employment Directive. In this regard, the obligation to provide reasonable accommodation under Article 5 requires employers to:

'take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer.'

The obligation under section 4 of the ESA is to:

"do all that is reasonable to accommodate the needs of the person with a disability by providing special treatment or facilities' without which 'it would be impossible or unduly difficult for the person to avail...of the service."

This obligation to provide special treatment or facilities is subject to a 'nominal cost' threshold. The nominal cost threshold, and the fact that the duty only occurs where it would otherwise be impossible or unduly difficult for the disabled person to avail of the service, narrows the duty under the ESA to provide vocational training for disabled

persons compared with the corresponding duty under the EEA giving rise to an issue of transposition of the Framework Employment Directive in this respect.

**The Commission recommends that the definition of vocational training in the Employment Equality Acts be amended to ensure compliance with the Framework Employment Directive.**

### State bodies' duty to provide reasonable accommodation

Section 37(3) of the EEA provides that it is an occupational requirement that those employed in the police, prison or any emergency services are fully competent, available and capable of undertaking the range of functions concerned so that the occupational capacity of the service may be preserved. This reflects the wording of recital 18 of the Framework Employment Directive. Regarding the application of this provision in *Irish Prison Service v Irish Prison Officer*<sup>205</sup> the Labour Court held, without hearing evidence, that this section exempted the listed occupations from the duty to provide reasonable accommodation. On appeal to the High Court in *Cunningham v Irish Prison Service*<sup>206</sup> it was held that the Labour Court had erred in law in not hearing evidence and thus not making any findings of fact. The High Court further found that, if not unduly burdensome, reasonable accommodation should be afforded to the employee and it was noted that this interpretation was in accordance with the terms of the Framework Employment Directive and the UNCRPD.

**The Commission recommends that section 37(3) of the Employment Equality Acts should be amended to confirm the approach of the High Court and ensure compliance with the Framework Employment Directive.**

### Levelling up of reasonable accommodation

The Equality Authority has previously recommended that the provisions on reasonable accommodation be extended to all grounds across both the ESA and the EEA.<sup>207</sup> There

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<sup>205</sup> [2019] EDA1837.

<sup>206</sup> [2020] IEHC 282.

<sup>207</sup> Equality Authority, *Overview of the Employment Equality Act 1998 and the Equal Status Act 2000* (2003).

is already some recognition of this in the form of protections provided for pregnant women, which essentially amount to reasonable accommodation.<sup>208</sup> Whilst the Labour Court has also recognised the net good of employers providing effectively reasonable accommodation on grounds of race.<sup>209</sup> Other examples would include accommodation for employees on religious grounds whose practice of their religion requires them to fast, or measures intended to help employees with children in their childcare arrangements. Reasonable accommodation requires a focus on the tangible and less obvious barriers that effectively inhibit equal opportunities. It acknowledges that every person has abilities. It acknowledges difference and the need to take steps to accommodate this difference if equality of opportunity is to be realised. Arguably, a fundamental task of a just society is to organise in a manner that allows all to participate and to make their contribution.

**The Commission recommends that the provisions on reasonable accommodation be extended to all grounds across both the Equal Status Acts and the Employment Equality Acts.**

### Unfair dismissal claims

The Commission notes with concern that section 101(4A) of the EEA provides that where an employee brings a claim in respect of a dismissal under both the *Unfair Dismissals Acts 1977-2015* and the EEA, the claim under the EEA is deemed to have been withdrawn unless the unfair dismissal claim is withdrawn within a prescribed timeframe. It is unclear what justification exists for preventing an employee from pursuing both claims where they are heard by the WRC and where there is no question of double enrichment under two pieces of legislation. The Commission also notes with

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<sup>208</sup> Maternity Protection Act 1994 & Maternity Protection (Amendment) Act 2004, provisions relating to maternity leave or ante and post-natal care while not using the language of reasonable accommodation are measures aimed towards improving access to employment of a protected group whose access for reasons relating to this status may otherwise have been inhibited without such protection, which is the spirit of reasonable accommodation.

<sup>209</sup> *A Company v A Worker*, ED/01/27: 'The Court strongly recommends the companies employing non-nationals recognise the difficulties that may arise, provide proper induction courses and that they make resources available to them to deal with any social or cultural differences which might arise in these situations.'

concern that the presumption falls in favour of the unfair dismissal claim as opposed to the discriminatory dismissal claim.

**The Commission recommends that the Employment Equality Acts be amended to allow employment equality and unfair dismissal claims to be pursued in parallel before the WRC.**

## 6. Jurisdictional Issues

### Intoxicating Liquor Act 2003

Access to a remedy for discriminatory refusal of entry to a licenced premises (including public houses, registered clubs, hotels, and many restaurants) is governed by section 19 of the *Intoxicating Liquor Act 2003*, rather than by the ESA. The State's rationale for this decision is that licensees should be answerable in a single jurisdiction for all their decisions due to the complex nature of the obligations imposed on them under various statutes, and to provide for enhanced sanctions.<sup>210</sup> The Advisory Committee on the Framework Convention for the Protection of National Minorities ('Advisory Committee') assessed whether this rationale was appropriate and proportionate in 2018, and concluded that an alternative redress mechanism is required to ensure sufficient procedural guarantees in all discrimination cases.<sup>211</sup>

As repeatedly highlighted by the Commission, the transfer of jurisdiction to the District Court imposes a fundamentally more onerous process for people wishing to bring complaints.<sup>212</sup> Bringing a case under the 2003 Act is procedurally complex due to strict formal rules, burden of proof requirements and technical documentation, and it carries a higher risk of costs and court fees.<sup>213</sup> This raises particular concerns about a deterrent effect and inequality of arms, particularly as it is the complainant who is more likely to have no access to legal representation.<sup>214</sup> 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 approach of the WRC.<sup>215</sup> While

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<sup>210</sup> Council of Europe, [Third report submitted by Ireland pursuant to Article 25, Paragraph 2 of the Framework Convention for the Protection of National Minorities](#) (2011) 44.

<sup>211</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities, [Fourth Opinion on Ireland](#) (2018) 10-11.

<sup>212</sup> See for example, IHREC, [Submission to the United Nations Committee on the Elimination of Racial Discrimination on Ireland's Combined 5<sup>th</sup> to 9<sup>th</sup> Report](#) (2019) 18-19 and IHREC, [Developing a National Action Plan Against Racism: Submission to the Anti-Racism Committee](#) (2021) 61.

<sup>213</sup> For groups who may have lower incomes or rely on social welfare payments, including those who have disabilities, members of the Traveller Community and other groups, the risk of a costs order may act as a barrier to instituting a claim.

<sup>214</sup> 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 from January 2014 to date.

<sup>215</sup> D. Fennelly, *Selected Issues in Irish Equality Case Law 2008-2011* (2012) 83 and IHREC, [Submission to the United Nations Committee on the Elimination of Racial Discrimination on Ireland's Combined 5<sup>th</sup> to 9<sup>th</sup> Report](#) (2019) 18-19.



enhanced remedies are available in principle, they do not appear to have been applied in practice with the available data referencing compensation orders in a very limited number of cases.<sup>216</sup>

The Advisory Committee, the Committee on the Elimination of Racial Discrimination and the European Commission against Racism and Intolerance have raised their concerns that the current system has a disproportionate impact on Travellers and Roma as they are frequently refused admission to licenced premises.<sup>217</sup> The complex court proceedings and lack of procedural guarantees have acted as a particularly significant barrier for members of the Traveller community seeking to access justice and remedies for the racial discrimination they have experienced.<sup>218</sup>

Despite the original rationale by the State to limit the complexity of adjudication on licencing matters, a number of ongoing jurisdictional issues have created considerable uncertainty and may have significant and negative consequences for a complainant's ability to advance a discrimination claim.<sup>219</sup> Not all incidents concerning licenced premises are dealt with by the District Court as the alleged discrimination must have occurred on or at the point of entry of the premises, resulting in dealings that occur over the phone or through email not being covered by section 19.<sup>220</sup> Incidents that take place in a part of the premises not covered by the licence also remain under the

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<sup>216</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities, [Third Opinion on Ireland](#) (2013) 14.

<sup>217</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities, [Fourth Opinion on Ireland](#) (2018) 10-11, Committee on the Elimination of Racial Discrimination, [Concluding observations on the combined fifth to ninth reports of Ireland](#) (2020) UN Doc. CERD/C/IRL/CO/5-9, paras 45-46 and ECRI, [Report on Ireland: 5<sup>th</sup> monitoring cycle](#) (2019) 10-12.

<sup>218</sup> According to data provided by the Courts Service, in 2018 49 of 50 applications made under the Act were lodged by members of the Traveller community and 49 of the total applications were withdrawn, struck out or adjourned. There were no orders for compensation, or orders directing the closure of any premises, made by the District Court. In 2019, 43 of 45 applications were lodged by members of the Traveller community and 36 of the total applications were withdrawn, struck out or adjourned. There were 9 orders made for compensation, and no orders made for closure of the premises. As well as the clearly disproportionate impact on Travellers, the Commission is concerned by the very small number of cases instituted during this period and the even smaller number which actually resulted in complainants obtaining relief.

<sup>219</sup> If proceedings are instituted in the District Court in error, when the claim should have in fact been pursued through the WRC, it may be that the strict timelines associated with complaints instituted under the ESA could have since passed, thus leading to it not being possible to advance the claim in the correct forum thereafter.

<sup>220</sup> See Workplace Relations Commission, *Arundel McCarthy v Planet Health Club*, DEC-S2016-005, 5 February 2016 and Workplace Relations Commission, *Donna McGauley v Roy Bracken Trading As 'Jackie Murphy's Bar & Restaurant'*, DEC-S2016-068, 2 November 2016.

jurisdiction of the WRC, which can create confusion in the case of mixed-use premises such as hotels or restaurants.<sup>221</sup>

The Commission is of the view that, in the absence of a legitimate and proportionate aim, the differential treatment of discrimination complaints relating to licenced premises raises particular concerns regarding compliance with the Racial Equality Directive, including the principle of non-regression, article 2 on indirect discrimination, and article 8 on the burden of proof. Article 9 of the Gender Goods and Services Directive also requires the shifting of the burden of proof in respect of discrimination based on the gender ground in the supply and access to goods and services.

**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 WRC.**

### Discriminating clubs

The Commission is fundamentally opposed to any divestment of jurisdiction for equality complaints from the WRC. There is no justification for depriving the body, which was established for the express purpose of hearing equality cases, of the power to do so. The increased difficulty of bringing a case before the District Court has been explained elsewhere in this submission.<sup>222</sup> This arbitrary erection of barriers to justice in equality cases is an unacceptable limitation on the functioning and effectiveness of the ESA and stands in tension with the purposive nature of a remedial social statute.

**The Commission recommends that jurisdiction for hearing all equality cases be immediately divested from the District Court and be consolidated in the WRC.**

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<sup>221</sup> J. Walsh, *Equal Status Acts 2000-2011: Discrimination in the Provision of Goods and Services* (Dublin: Irish Council for Civil Liberties and Blackhall Publishing, 2012) 329. For example, in Workplace Relations Commission, *Dunne & Anor v. Planet Health Club*, DEC-S2011-018, 27 April 2011 the respondent argued that the gym in which the alleged discrimination had taken place was part of a larger entertainment centre with a licence and that the complaint fell within the jurisdiction of the District Court. In Workplace Relations Commission, *Rosemarie Mongan v Donal and Martha Duffy Limited T/A Supervalu Edgeworthstown*, DEC-S2017-044, 23 November 2017 jurisdiction was removed by the WRC on the basis that the prohibited conduct took place in the off-licence area of the supermarket.

<sup>222</sup> See section on the *Intoxicating Liquor Act 2003* above.

## 7. Measuring Effectiveness

Available research highlights the prevalence of persistent discrimination across equality groups in Ireland, in spite of the presence of equality and non-discrimination legislation.<sup>223</sup> For example, disabled persons,<sup>224</sup> migrants,<sup>225</sup> lone parents,<sup>226</sup> women, ethnic minorities including Travellers, and others, have all been found to face persistent disadvantages across domains including housing,<sup>227</sup> employment,<sup>228</sup> education, social welfare, access to public services, etc. There are also studies that consider the impact of discrimination on the lived experience of those who are affected.<sup>229</sup>

Despite the significant body of evidence revealing trends of persistent discrimination against protected groups, the Commission notes the dearth of disaggregated data that specifically interrogates the effectiveness of equality and non-discrimination legislation.<sup>230</sup> A limited number of studies have commented on the need for the realisation of rights beyond legislation,<sup>231</sup> the need to monitor equality in Ireland,<sup>232</sup> and the effects of allowing opt-out clauses in the legislation.<sup>233</sup> However, the State does

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<sup>223</sup> From 2017–2021, the Commission commissioned a research programme on human rights and equality with researchers from the Economic Social and Research Institute (ESRI). This led to the publication of ten separate reports on equality and discrimination across the grounds covered by equality legislation and across domains such as housing, employment, etc. See <https://www.ihrec.ie/our-work/research-reports/> to download reports.

<sup>224</sup> For example, see J. Banks, R. Grotti, É. Fahey and D. Watson, *Disability and Discrimination in Ireland: Evidence from the QNHS Equality Modules 2004, 2010, 2014* (IHREC and ESRI) (2018).

<sup>225</sup> Non-EU nationals are found to be a greater risk of overcrowding, housing deprivation, and housing discrimination. See R. Grotti, H. Russell, É. Fahey and B. Maître, *Discrimination and Inequality in Housing in Ireland* (IHREC and ESRI) (2018).

<sup>226</sup> Lone parents were found to be most disadvantaged in Ireland's housing system: IHREC, *Lone Parents Among Most Disadvantaged in Ireland's Housing System* (14 September 2021).

<sup>227</sup> For example, see: R. Grotti, H. Russell, É. Fahey and B. Maître, *Discrimination and Inequality in Housing in Ireland* (IHREC and ESRI) (2018); and H. Russell, I. Privalko, F. McGinnity and S. Enright, *Monitoring Adequate Housing in Ireland* (IHREC and ESRI) (2021).

<sup>228</sup> For example, see: F. McGinnity, H. Russell, I. Privalko and S. Enright, *Monitoring Decent Work in Ireland* (IHREC and ESRI) (2021).

<sup>229</sup> See IHREC, Human Rights and Equality Grants [2020](#) and [2021](#).

<sup>230</sup> Furthermore, the Commission has noted a need for more baseline research on equality and poverty, including on the impact of Covid-19. See IHREC, *Submission to the Third Universal Periodic Review Cycle for Ireland* (2021).

<sup>231</sup> S. Perry and M. Clarke, 'The law and special educational needs in Ireland: perspectives from the legal profession' (2015) 30(4) *European Journal of Special Needs Education* 491.

<sup>232</sup> E. Kelly, G. Kingston, H. Russell, F. McGinnity, 'The equality impact of the unemployment crisis' (2014) 44 *Journal of the Statistical and Social Inquiry Statistical Society of Ireland* 81.

<sup>233</sup> D. Fahie, 'Spectacularly exposed and vulnerable' – how Irish equality legislation subverted the personal and professional security of lesbian, gay and bisexual teachers' (2016) 19(4) *Sexualities* 403–404.

not collect sufficient disaggregated data<sup>234</sup> to allow a timely and regular assessment of the efficacy and impact of the legislation or the extent to which the State is meeting its international obligations.<sup>235</sup> The Commission also notes that, while WRC decision data is available on its website,<sup>236</sup> the detail and accessibility of data is limited from an equality data perspective. A tool to synthesise decisions according to disaggregated equality groups would offer significant insights into overall trends and interactions with equality legislation.

The Commission notes key national and EU level developments, which offer clear direction to the State and public bodies to collect and process equality data, including the *National Statistics Board Strategic Priorities 2021-2016*<sup>237</sup> and the recently-published *EU Guidance Note on the Collection and Use of Equality Data based on Racial or Ethnic Origin*.<sup>238</sup> The Commission also notes the implicit data requirements of Section 42 of the *Irish Human Rights and Equality Commission Act 2014* (or the 'Public Sector Duty'), which imposes a statutory obligation on public bodies to assess, address and report on the equality and human rights issues of relevance to their functions.

**The Commission recommends urgent action by the State to develop and roll out disaggregated data collection, processing and communication systems across relevant public bodies in order to monitor the effectiveness and impact of equality**

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<sup>234</sup> The gaps and shortcomings in equality data in Ireland are outlined in: CSO, [Equality Data Audit](#) (2020). The audit found particular gaps or weakness in ethnicity, disability, sex and gender identity, and sexual orientation data. It also found that much of the data that is already available is only high level information and does not always allow for analysis of minority groups. There was also a reported lack of intersectional data.

<sup>235</sup> While the CSO conducted a survey into Equality and Discrimination in 2019, this is not a regularly conducted exercise. The next most recent similar exercise was in 2014, conducted via data from the Quarterly National Household Survey, and used too small a sample size to be meaningful with regard to minority groups. Similarly, the Survey of Income and Living Conditions (SILC) does not provide data disaggregated across equality grounds, and information on the impact of Covid-19 case numbers and deaths among ethnic minorities is poor.

<sup>236</sup> See WRC, [Decisions and Determinations](#).

<sup>237</sup> See NSB, [Strategic Priorities for Official Statistics 2021-26](#) (2021) 27 for references to: the Public Sector Equality and Human Rights Duty (and the responsibilities of public bodies); the EU Equality Data Guidelines, including a comment that the CSO is 'well-placed to host' an Equality Data Hub; disaggregated data and data linkages as measurement and monitoring resources across a range of policy areas; incorporation of the Census 2022 disability definition in all survey data collection and analyses to be made readily available for UNCRPD implementation activities, and; a study on best-practice regarding asking about sexual orientation and gender identity in surveys and censuses.

<sup>238</sup> EU Equality Data Subgroup, [Guidance Note on the Collection and Use of Equality Data based on Racial or Ethnic Origin](#) (2021) and EU Equality Data Subgroup, [Guidelines on Improving the Collection and Use of Equality Data](#) (2018).

**legislation in Ireland, and that the relevant complaints mechanisms publish statistics and analysis on an annual basis.**

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



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