



**REPORT ON MEASURES TO COMBAT DISCRIMINATION
Directives 2000/43/EC and 2000/78/EC**

COUNTRY REPORT 2008

IRELAND

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State of affairs up to 31 December 2008

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INTRODUCTION

0.1 The national legal system

Explain briefly the key aspects of the national legal system that are essential to understanding the legal framework on discrimination. For example, in federal systems, it would be necessary to outline how legal competence for anti-discrimination law is distributed between different levels of government.

The basic law of Ireland is the Constitution, Bunreacht na hÉireann, 1937. The Constitution takes precedence over all other sources of law, with the exception of European Law. European supremacy relates to its sphere of competency. Within that sphere Europe enjoys unquestioned supremacy. Bunreacht na hÉireann, 1937, the Constitution, establishes the State and its institutions and sets out the fundamental principles guiding the governance of the State. The Constitution is the basis by which the Irish legal system is run, and as such it is amenable to interpretation by the courts.

Inferior sources of law depend on the Constitution for their validity. A common law or a legislative rule that conflicts with a provision of the Constitution is invalid. The Constitution states that the sole law making body in the State is the Oireachtas.¹ Legislation must be passed by both houses of the Oireachtas and is then signed into law by the President. The common law consists of decisions that have been delivered by judges in the courts over the centuries. The common law adopts the doctrine of precedent, ensuring that court decisions have the binding force of law. The sheer quantity of decisions throughout the centuries has allowed the common law to develop into a substantial body of law. Employment law is an amalgamation of both common law and legislation. Legislation is of increasing importance, for instance in the context of non-discrimination measures.²

Ireland is a dualist state; ratification of a Treaty does not automatically result in its provisions becoming part of the internal legal system. This has the effect of externalising our international human rights obligations. Only after incorporation into domestic law can an international Treaty be relied upon directly in the Irish Courts, for example the European Convention on Human Rights Act, 2003.³ No other Convention has been incorporated into the national legal order; it is contended that we comply with our international legal obligations by means of national legislation.

0.2 Overview/State of implementation

List below the points where national law is in breach of the Directives. This paragraph should provide a concise summary, which may take the form of a bullet point list. Further explanation of the reasons supporting your analysis can be provided later in the report.

¹ The Oireachtas is the National Parliament. Ireland has a bicameral system, which means that there are two houses of the Oireachtas. The first chamber is Dáil Éireann and the second chamber consists of Seanad Éireann (Senate). Legislative powers are granted to the two houses by virtue of Article 15.2 of the Constitution.

² Byrne, Kennedy, Ni Longain and Shannon, *Employment Law*, Dublin 2003, at 1.

³ www.irlgov.ie



Please clearly and briefly indicate whether the Member State had taken advantage of the option to defer implementation of Directive 2000/78 EC to 2 December 2006 in relation to age and disability?

This section is also an opportunity to raise any important considerations regarding the implementation and enforcement of the Directives that have not been mentioned elsewhere in the report.

This could also be used to give an overview on the way (and if at all) national law has given rise to complaints or changes, including, eventually a reference to the number of complaints, whether instances of indirect discrimination have been found by judges, and if so, for which grounds, etc.

Please ensure that you review the existing text and remove items where national law has changed and is no longer in breach.

The Equality Act 2004⁴ amended the Equal Status Act 2000⁵ and the Employment Equality Act 1998⁶ in order to give effect to the following EU Council Directives: Council Directive 2000/43 EC – The Racial Equality Directive; Council Directive 2000/78/EC – The General Framework Directive; Council Directive 2002/73/EC – The Equal Treatment Directive. The Employment Equality Act 1998 has been amended again in 2007 to remove the upper age limit for receiving statutory redundancy payments.⁷ The amended Acts are entitled the Equal Status Acts 2000-2004 and the Employment Equality Acts 1998 to 2007. The Social Welfare (Miscellaneous Provisions Act 2004⁸ was enacted to amend the Pensions Act 1990, now entitled The Pensions Act 1990-2004. Ireland did not take advantage of the option to defer implementation of Directive 2000/78 EC to 2 December 2006 in relation to age and disability.

The legislation may be in breach of the directives in the following points:

Both Acts:

The budget cut of 43% administered to the Equality Authority in October 2008 (compared to average budget cuts of 4% for other State Agencies) together with the continued decentralisation of the staff of the Equality Authority (in the context of a general decentralisation programme which has been halted) seems to constitute a breach of Ireland's duty of ongoing and effective implementation of Art 13 of the Racial Equality Directive. The Chief Executive Officer and six board members of the Authority, including both social partner representatives, resigned their posts in the wake of the cuts, which they maintained have rendered the Authority unable to carry out its duties under national legislation and as a designated specialised body.

⁴ <http://www.oireachtas.ie/documents/bills28/acts/2004/A2404.pdf>

⁵ <http://www.oireachtas.ie/documents/bills28/acts/2000/a800.pdf>

⁶ <http://www.gov.ie/bills28/acts/1998/a2198.pdf>

⁷ Protection of Employment (Exceptional Collective Redundancies and Related Matters) Act 2007 <http://www.entemp.ie/publications/employment/2007/excollredact.pdf>

⁸ <http://www.oireachtas.ie/documents/bills28/acts/2004/A0904.pdf> Section 22 and 23 of the Social Welfare (Miscellaneous Provisions) Act 2004 give effect to the following EU Council Directives: Council Directive 2000/43 EC – The Racial Equality Directive; Council Directive 2000/78/EC – The General Framework Directive, as they relate to occupational pensions.



Employment Equality Acts 1998 to 2007

- The exclusion of ‘persons employed in another person’s home for the provision of personal services’⁹ from protection against discrimination in regard to access is arguably too broad an exemption to be in compliance with both the Framework Employment Directive and the Racial Equality Directive.
- Section 37(1) of the Employment Equality Act 1998-2007 permits discrimination in employment for the purposes of maintaining, or the reasonable prevention of any undermining of, the religious ethos of an institution. The Act does not refer to the terms ‘legitimate’ or ‘proportionate’, as required by the Framework Employment Directive.
- The use of a hypothetical comparator is not permitted when claiming equal pay discrimination, whereas Article 2 of the Framework Employment Directive and Article 2 of the Racial Equality Directive do permit the use of a hypothetical comparator¹⁰.
- Section 82, Employment Equality Acts 1998 to 2007 imposes maximum levels of compensation. Based on the European Court of Justice decision in *Marshall No. 2* the imposition of a maximum limit is arguably not in compliance with Articles 17 and Article 15 of the Framework Employment Directive and the Racial Equality Directive.¹¹
- Although there is no State retirement age in Ireland, Section 34 (4) of the Employment Equality Acts 1998 to 2007 allows any employer to set compulsory retirement ages, including different retirement ages, and this is not discriminatory under the legislation. The Framework Employment directive provides for Member States, not employers, to set retirement ages if they so choose. They may only do so “..if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.”¹² There is no limitation in Section 34 (4), where compulsory retirement ages are set differentially by employers, for objective and reasonable justification by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, nor that the means of achieving that aim must be appropriate and necessary. This view is supported by the ECJ decision in *Palacios*.¹³
- Under Section 6 (3) (c) of the Employment Equality Acts 1998 to 2007 it is not discrimination to offer a fixed term contract to a person over the compulsory retirement age for that employment. This may be a breach of the Framework Employment Directive in view of the decision of the ECJ in *Mangold*.¹⁴

⁹ Section 3 Equality Act 2004.

¹⁰ DEC-E2008-072 *Power v Blackrock College* - The Equality Officer found that the facts did not support a finding of discrimination in pay on grounds of age, but even if the facts had been otherwise, the complainant could not rely on a hypothetical comparator under the Irish legislation.

¹¹ Case C-271/91

¹² Article 6 of Directive 2000/78

¹³ Case C-411/05, OJ C 297 of 8.12.07 p 6

¹⁴ C-144/04 *Mangold v Rüdiger Helm*, Judgment of 22 November 2005, OJ C 36, 11.02.2006, p. 10

- Under Section 35(1) of the Employment Equality Acts 1998 to 2007, it is not discriminatory to pay a disabled person a lesser rate of remuneration if that person's output during a particular period is less than a non-disabled person. This seems to negate the principle of equal pay where disabled employees are concerned.
- Not all provisions containing discriminatory measures have been abolished; see for example the Organisation of Working Time Act, 1997.¹⁵ This is a potential problem for compliance with Article 16 of the Framework Employment Directive.¹⁶

Equal Status Acts 2000 and 2004

- Section 21(1) of the Equal Status Act provides that a complainant must instigate proceedings within two months of the discriminatory act, and send a written notification to the alleged discriminator. This system has proved problematic for a number of protected groups.¹⁷ This is a serious bar to litigation and may therefore not be in compliance with 7 of the Racial Equality Directive.
- The scope of the Equal Status Acts 2000-2004 is arguably too narrow to cover all the elements of Article 3 (1)(e), (f) and (g) of the Racial Equality Directive (social security, health care); this is further impacted upon by the inclusion of section 14 of the Equal Status Act 2000-2004, whereby anything which is required to be done under another statute is not in breach of the Equal Status Act.
- Harassment is not defined as discrimination in Equal Status Act 2000-2004.
- Section 19 of the Intoxicating Liquor Act 2003 now governs the prohibition of discrimination in licensed premises which was formerly covered by the Equal Status Act. No body has been charged with disseminating information about the prohibition against discrimination in this Act, with the result that many members of groups experiencing discriminatory exclusion believe that the law has been repealed. This does not appear to comply with Article 10 of Directive 2000/43.
- The Intoxicating Liquor Act 2003, as stated, transferred jurisdiction to hear cases regarding discrimination in access to premises licensed for the sale of alcohol from the Equality Tribunal to the District Court, resulting in fewer complaints being made against licensed premises which refused access to Travellers. Procedures in the District Court are more complicated, hearings are adversarial and public and there is the risk of costs being incurred.

¹⁵ The Organisation of Working Time Act, 1997 'contains an entitlement to leave in respect of public holidays. The Second Schedule to the Act provides that an employer may, "for the purpose of fulfilling any relevant obligation imposed on him or her by this Act, treat as a public holiday, in lieu of a public holiday aforesaid, either (a) the Church holiday falling in the same year immediately before the public holiday, or (b) the Church holiday falling in the same year immediately after the public holiday....." The Schedule goes on to list the applicable Church holidays, which are all Christian, and in the main Roman Catholic. The question is whether the entitlement of an employer to substitute a public holiday for a church holiday is contrary to the principle of equal treatment.' Religion report of May 2003 by Dave Ellis.

¹⁶ Religion report of May 2003 by Dave Ellis.

¹⁷ Equality Authority, 'Overview of the Employment Equality Act 1998 and the Equal Status Act 2000 in light of the Transposition of the European Union 'Race' Directive (Racial Equality Directive), Framework Employment Directive (FED) and the Gender Equal Treatment Directive (GETD)' at 20.

The Equality Authority is aware of a growing number of claims which did not proceed because the claimant did not want to run the risk of having to pay the other party's costs. This was foreseeable as a consequence of the change made by the Government to the Equality Tribunal's jurisdiction and had been pointed out as representing an erosion of the Equal Status Act 2000¹⁸. It seems to be a breach of the non-regression provisions of Article 15 of the Racial Equality Directive.

Compliance with article 3(1)(e) of the Racial Equality Directive is dependent on future judicial interpretation. The Equal Status Act 2000-2004 prohibits discrimination in relation to goods and services, on all nine grounds. In *Donovan v. Donnellan*¹⁹ it was suggested that this could cover State services such as health care, but the matter has to be finally determined. The impact of section 14 of the Equal Status Act may prove difficult in this regard, as it provides a broad statutory exemption to the Equal Status Act 2000-2004 where an act or action is required by virtue of another piece of legislation.²⁰

- The Equal Status Act prohibits clubs from discriminating, on all nine grounds, at section 8, and permits certain exceptions to this rule in section 9. Those exceptions are where a club is set up to cater for the needs of a particular ground, such as gender, race or religion.

In *Equality Authority v Portmarnock Golf Club*²¹ the High Court in assessing whether a male only golf club was a discriminatory club, held that section 9 of the Act permitted male only clubs, as the principal purpose of Portmarnock Golf Club is to cater only for the needs of men. The interpretation in the context of gender can apply across all nine grounds and is potentially not in compliance with the Racial Equality Directive. Judgment is expected in 2009 in the Supreme Court's hearing of an appeal in this case.

0.3 Case-law

Provide a list of any important case-law within the national legal system relating to the application and interpretation of the Directives. This should take the following format:

Name of the court

Date of decision

Name of the parties

Reference number (or place where the case is reported).

Address of the webpage (if the decision is available electronically)

Brief summary of the key points of law and of the actual facts (no more than several sentences)

¹⁸ <http://www.paveepoint.ie/pdf/NewsletterJuly03.pdf>

Also see Submission to Government of the Equality Coalition on the report of the Commission on Liquor Licensing 2002 http://iccl.ie/DB_Data/publications/ResponseofEqualityandHumanRightsOrganisationstotheReportoftheCommissiononLiquorLicensingonAdmissionandServiceinLicensedPremises.pdf

¹⁹ DEC-S2001-011

²⁰ Section 14 (1) Equal Status Act states "Nothing in this Act shall be construed as prohibiting (a) the taking of any action that is required by or under (i) any enactment."

http://www.justice.ie/en/JELR/EqualStatusActsConsldtd_00_04.pdf/Files/EqualStatusActsConsldtd_00_04.pdf

²¹ [2005] IEHC 235, this case is on appeal to the Supreme Court.



➔ Please use this section not only to update, complete or develop last year's report, but also to include information on important and relevant case law concerning the equality grounds of the two Directives, even if it does not relate to the legislation transposing them (e.g. if it concerns previous legislation unrelated to the transposition of the Directives)

Please describe trends and patterns in cases brought by Roma and Travellers, and provide figures – if available.

Name of the court: Labour Court

Date of decision: 16 May 2008

Name of the parties: Ice Group Business Services Limited (represented by Doyles Solicitors) and Borzena Czerski (represented by the Equality Authority)

Reference number: EDA0812

Address of the webpage:

<http://www.labourcourt.ie/labour/labour.nsf/LookupPageLink/Recommendations>

Brief summary: The Labour Court determined that a requirement that had been laid down by an employment agency for a Polish job seeker to provide two references, one being a character reference, did not equate to discrimination either direct or indirect in terms of race or gender. In doing so the Labour Court effectively overturned the controversial findings of the Irish Equality Tribunal decision of Czerski-v-Ice Group.

In Czerski-V-Ice Group the Equality Tribunal had awarded the Polish job seeker €7,000 following a finding that a requirement of two references amounted to indirect discrimination on the grounds of race. The Complainant, Ms Czerski had replied to an advertisement placed by the Respondent, an employment agency in the Western People newspaper, for a position as a production operative. All applicants were required to furnish details of two referees which she failed to do and was consequently unsuccessful in seeking employment from the agency. She contended that the Respondent's insistence on two references constituted less favourable treatment of her on grounds of gender and race contrary to the Employment Equality Act, 1998. Whilst the Respondent in these proceedings claimed that it had informed the Complainant that a character reference would be acceptable as one of the references, this was disputed by the Claimant who was "adamant" that she was never informed of this. The Equality Officer in accepting the Complainant's version of events in this regard held that the respondent's actions had amounted to indirect discrimination, thus awarding €7,000 by way of compensation. This decision was much criticised by employers and commentators.

The Labour Court however accepted the evidence put forward by the Respondent that it had informed the Complainant that a character reference would be acceptable as one of the references. The Court in turn considered whether the requirement to provide two referees, one being a character reference, could be more easily complied with by Irish nationals over non-national and concluded that a non-national would not be placed "at any greater disadvantage than a National" under such conditions. The Court thus concluded that the requirement of two references, one being a character reference, did not amount to any form of racial or gender discrimination.

Name of the court: Equality Tribunal

Date of decision: 18 February 2008

Name of the parties: A student v City of Dublin Vocational Education Committee

Reference number: DEC-S2007-089

**Address of the webpage:**

<http://www.equalitytribunal.ie/index.asp?locID=121&docID=1686>

Brief summary: A student, a Somali national, complained that he was discriminated against on grounds of race and age contrary to the Equal Status Act, 2000. The college had organised a separate graduation ceremony for participants in a class exclusively designed for and targeted at asylum-seekers who were defined as unaccompanied minors under 18 years of age. The main graduation ceremony involved bar facilities at which alcohol would be served, and the college argued that the purpose of excluding the student's class and organising a separate ceremony for them was only in order to protect children who were under 18 from exposure to alcohol provision. However the student contended that some of the participants on his course had turned 18 during the year, and conversely, not all of the students on courses eligible to take part in the main ceremony were in fact aged 18 or over.

The Equality Tribunal held that the failure to invite the student to the main graduation ceremony constituted indirect discrimination on grounds of race contrary to Section (3) (c) (iii) of the Equal Status Act, 2000. It found that the main criterion for admittance to the main ceremony was not in fact the requirement to be aged 18 or over (since some of the Somali student's class were over 18, and some of the students on the other courses were under 18). The condition of age that the college imposed was one that the student's class, being perceived to be minors, was unable to comply with, but that a substantially larger number of people enrolled in other classes (Irish) were able to comply with. The complainant had established a prima facie case of discrimination on the race ground and the college had not rebutted it.

Name of the court: Equality Tribunal

Date of decision: 11 September 2008

Name of the parties: A Construction Worker v A Construction Company

Reference number: DEC – E2008 – 048

Address of the webpage: <http://www.equalitytribunal.ie/index.asp?locID=139&docID=1828>

Brief summary: Large compensation to victim of harassment due to sexual orientation

The complainant, Mr X., worked with the respondent from June 1996 to April 2006 as a general operative and banksman (i.e. person who directs the operation of a crane) on various building sites. He alleged that he was sexually harassed, and claimed that the respondent treated him in a discriminatory manner and victimised him when the respondent changed his conditions of employment, placed him on sick leave and ultimately made him redundant. The complainant had informed his employer he was sexually harassed but this was not properly investigated. The complainant mentioned that he had once had suicidal thoughts as a result of the harassment on site; following this the employer asked him to go on sick leave and receive counselling. Finally he was made redundant, although there was no evidence of clinical depression. The Equality Officer ruled on 11 September 2008 that the complainant was discriminated against, sexually harassed and victimised on grounds of his sexual orientation and awarded the sum of 14,700 Euro as compensation for lost earnings, 10,000 Euro as compensation for the distress and effects of the harassment and 25,000 Euro as compensation for the distress and effects of the victimisation.²²

²² The powers of the Equality Tribunal are delegated to the Equality Officer who has the power to make the ruling.



The Equality Officer also ordered the construction company to ensure that its current policies relating to harassment and sexual harassment are in accordance with the Code of Practice on Sexual Harassment and Harassment issued by the Equality Authority, that all existing and new staff are fully acquainted with the policy and that a specified contact person be appointed as the first point of contact for employees making initial enquiries or complaints, in line with best practice as included in the Health and Safety Authority's Code of practice for Employers and Employees on the Prevention and Resolution of Bullying at Work.

Name of the court: Equality Tribunal

Date of decision: 16 December 2008

Name of the parties: Power v Blackrock College

Reference number: DEC-E2008-072

Address of the webpage: <http://www.equalitytribunal.ie/index.asp?locID=139&docID=1933>

Brief summary: Hypothetical comparator not allowed in age discrimination case.

The complainant was employed by the respondent as a security guard between January 1993 and August 2005, with a break of a number of months in 2002. Prior to this break he worked on a full-time basis and after that break he worked mostly on a part-time basis. He stated that his employment was terminated by the respondent in August 2005 in circumstances amounting to redundancy and that the failure of the respondent to make a lump sum redundancy payment to him in those circumstances constituted discrimination of him on grounds of age contrary to the Employment Equality Acts, 1998 and 2004.

The Equality Officer ruled that the complainant is required to identify an actual comparator for the purposes of his complainant with whom he performs "like work" in terms of section 7 of the Employment Equality Acts, 1998 and 2004. He cannot rely on a hypothetical comparator. As the complainant had failed to identify an actual comparator with whom he performed "like work" his complaint must fail. Furthermore, the employer had made an ex-gratia payment to two other employees who were made redundant at the same time as the complainant. It states that (i) these employees were both in the same age bracket as the complainant and therefore age discrimination cannot be inferred from this and (ii) there were personal circumstances pertaining to these two employees which prompted the respondent to make those payments. The Equality Officer was satisfied that the employer's decision not to make a similar ex-gratia payment to the complainant on termination of his employment with it was because he was not in the same personal circumstances as the other two employees. The failure to grant him an ex-gratia payment was not connected with his age and it did not therefore constitute discrimination of him contrary to the Acts.

The Equality Officer found that the facts did not support a finding of discrimination, but even if the facts had been otherwise, the complainant could not rely on a hypothetical comparator under the Irish legislation.

Name of the court: Equality Tribunal

Date of decision: December 2008

Name of the parties: A Complainant v An Employer

Reference number: DEC-E2008-068

Address of the webpage: <http://www.equalitytribunal.ie/index.asp?locID=139&docID=1929>

Brief summary: Failure to provide reasonable accommodation during job interview.

The complainant, Mr Z, applied to an advertisement for the position of Graphic Designer in February 2006. After a week he received an incoming call on his mobile phone from the company and as he is deaf he texted the caller asking to be texted the content of the message. This was done and the message indicated that he was invited for an interview the next morning. The complainant accepted the invitation and contacted the Cork Deaf Society in an attempt to organise an interpreter. This did not prove possible, and Mr. P, the representative of the Cork Deaf Society, called the respondent on the complainant's behalf, so as to arrange for a solution. It became apparent that the company intended to hold the interviews on the following day only. As an interpreter was not available, Mr. P indicated that this would mean that the complainant would not be able to attend the interview and suggested that the interview could eventually be held with the aid of a computer. The company replied that it would not be possible as the interviewer was not computer literate. The interview slot originally assigned to the complainant was reassigned to another applicant.

The Equality Officer found that the complainant was indirectly discriminated on the disability ground when a deferral of his interview was refused. She considered that the respondent failed to provide reasonable accommodation to the complainant, as the requirement to facilitate the complainant by means of deferring the interview to allow for an interpreter or alternatively to provide a computer at interview was not held to be disproportionate, and awarded the complainant the sum of 8,000 Euro as compensation.²³

Name of the court: Labour Court

Date of decision: 29 July 2004

Name of the parties: Department of Health and Children v Gillen

Reference number: EDA0412

Address of the webpage:

<http://www.labourcourt.ie/labour/labcourtweb.nsf/185190278967d05380256a01005bb35e/80256a770034a2ab80256ed60052a16f?OpenDocument>

Brief summary: The Court found that the complainant was discriminated against on the grounds of age when applying for promotion in the interview and promotion process.

- It set out the tests which are considered by the Labour Court and the Equality Tribunal when considering age discrimination. The factors which figured most strongly to date are: A marked statistical difference in success rates for different age groups in apparently similar circumstances²⁴
- Evidence of a policy to prefer a particular age group²⁵
- Lack of transparency, or unexplained procedural unfairness, may create an inference of discrimination²⁶
- A mismatch between formal selection criteria and those apparently applied in practice may also create an inference of discrimination²⁷
- A pattern of significant inconsistency with older candidates previous assessments²⁸

²⁴ *O'Mahony v Revenue Commissioners*, DEC-E2002-018.

²⁵ *O'Byrne v. Department of Public Enterprise*, DEC-E2002-040.

²⁶ *O'Byrne v. Department of Public Enterprise*, DEC-E2002-040, *Madden v Aer Lingus* DEC-E2002-006.

²⁷ *O'Mahony v Revenue Commissioners*, DEC-E2002-018.

²⁸ *O'Mahony v Revenue Commissioners*, DEC-E2002-018.



Other factors, which can be persuasive, are:

- (a) Discriminatory questions asked at interview.
- (b) The presence of a single successful appointee who was in the same age group as the complainants does not disprove age discrimination, notwithstanding that the appointee is of exceptional ability compared to other successful appointees.

Conversely, the following elements have weighed against an inference or a conclusion of age discrimination:

- The selection criteria appear objective and seen to have been honestly applied in practice²⁹
- Statistics suggested that success rates are broadly similar for different age groups, in apparently similar circumstances³⁰
- The employer tried to ensure that the Interview Board included a mix of gender and ages³¹

Finally, the fact that the respondent's overall policy is not discriminatory has been given limited weight in several decisions^{32,33}

Name of the court: Equality Tribunal

Date of decision: 28 May 2003

Name of the parties: Two Complainants v. The Department of Education and Science

Reference number: DEC-S2003-042-043

Address of the webpage: <http://www.equalitytribunal.ie/index.asp?locID=94&docID=380>

Brief summary: This was a race discrimination case taken to the Equality Tribunal. The Tribunal had to assess what is a service within the meaning of the Equal Status Act. The Department of Education provide maintenance grants which are payable to adults on further education courses. The two complainants were refused such grants. Section 2 of the Act defines 'service' as "*a service or facility of any nature which is available to the public generally or a section of the public.*" The Equality Officer firstly relied on the decision in *Donovan v. Garda Donnellan*,³³ to establish that the Act covered services provided by the State. The second element of this decision was to establish what was meant by the term 'facility'. The Equality Officer found that the provision of a maintenance grant is a 'facility' covered by the provisions of the Equal Status Act.

Name of the court: Equality Tribunal

Date of decision: 1 August 2006

Name of the parties: O'Brien v. ComputerScope

Reference number: DEC-E2006-030

Address of the webpage: <http://www.equalitytribunal.ie/index.asp?locID=109&docID=1310>

Brief summary: The complainant alleged both direct and indirect discrimination on the age and gender ground, as well as alleging victimisation.

²⁹ *Employee v. Department of Foreign Affairs*, DEC-E2002-038.

³⁰ *Byrne v. FÁS* DEC-E2002-045.

³¹ *O'Mahony v Revenue Commissioners*, DEC-E2002-018.

³² *Sheehan v. D.P.P.* DEC-E2002-047.

³³ DEC-S2001-011.



The complainant was appointed to the position of Assistant Editor, she was 23 years of age: her comparators were both male and over 30 year's of age. One comparator, her predecessor, as Assistant Editor was paid more than the complainant when working in that role; this was deemed *prima facie* evidence of discrimination on the gender and age ground. The Equality Officer in assessing whether indirect discrimination occurred did not address the issue of age and gender discrimination separately. The respondent did not dispute that the complainant was paid less than her comparator, but stated that there were grounds other than gender and age for the difference in pay. The respondent in this case submitted a market forces argument stating: “severely deteriorating market conditions dictated that the remuneration for the role of Assistant Editor had changed, primarily due to the difficult trading conditions within the technology media sector, and the resulting financial constraints on ComputerScope Ltd.” The Tribunal relied on a Labour Court decision³⁴ that stated:

“An employer, seeking to rely on this defence, must prove that the difference in pay is genuinely attributable to a ‘ground other than sex’ (see *Irish Crown Cork Co. v. Desmond and Ors.* [1983] ELR 1780). This requires that the respondent must establish to the Court’s satisfaction that the reasons for paying the comparator the particular rate of pay are genuine, and that they do not apply in the case of the claimants. The Court must also be satisfied that there is objective justification for the difference in pay, and that the justification is not just historical but is also relevant at the date of the determination (see *Flynn v. Primark* [1977] ELR 218.”³⁵

The Tribunal had to determine whether this reason was objective, and unrelated to the complainant’s gender and/or age. The Tribunal established that the complainants’ salary was frozen due to the difficult market conditions, but at the same time the comparator’s salary on promotion was not frozen. This was attributed to “*his different level of skill and ability*” and in respect of the promotional post he was doing “*a completely different job with a different salary attached.*”³⁶ Relying on the European Court of Justice decision in *Jamstalldhetsombudsmannen v. Orebro lars landsting*,³⁷ the Equality Tribunal stated of the level of skill required that:

“It follows that genuine transparency, permitting an effective review is assured only if the principle of equal pay applies to each of the elements of remuneration granted to men or women.”³⁸

Further the Tribunal relied on *Brunnhofner v. Bank der Osterreichischen Postsparkasse AG*,³⁹ which addressed the issue of effectiveness of an employee’s work relative to that of another worker, and on the question of objective justification in a pay related case it stated:

³⁴ *Roches Stores v. Mandate*, DEP013

³⁵ *Roches Stores v. Mandate*, DEP013

³⁶ DEC-E2006-030 at paragraph 7.

³⁷ Case C-236/98.

³⁸ Case C-236/98 paragraph 54.

³⁹ Case C-381/99.

“... it follows from the foregoing that circumstances linked to the person of the employee which cannot be determined objectively at the time of the person’s appointment but come to light only during the actual performance of the employee’s activities, such as personal capacity or the effectiveness or quality of the work actually done by the employee, cannot be relied upon by the employer to justify the fixing, right from the start of the employment relationship, of pay different from that paid to a colleague of the other sex performing identical or comparable work.”⁴⁰

This ensured that the complainant could only be assessed after commencement of work, and difference in skill or capacity cannot be determined as a basis for a starting salary. It was further noted that in this instance the complainant’s capacity was not in issue. The respondent did not succeed in establishing that the difference in pay was objectively justified. No reference was made in the Tribunal to the issue of whether the action was appropriate and necessary. The complainant was awarded compensation for discrimination as well as the correct rate of remuneration for the period complained of.

Name of the court: Equality Tribunal

Date of decision: 30 June 2003

Name of the parties: Noonan v. Accountancy Connections

Reference number: DEC-E2004-042

Address of the webpage: <http://www.equalitytribunal.ie/index.asp?locID=90&docID=681>

Brief summary: an age discrimination case taken to the Equality Tribunal, addressed the issue of rejecting the ‘overqualified’ candidate, and whether this amounts to indirect discrimination.⁴¹ The respondent, an employment agency, advertised two posts requiring at least 2-3 years post-qualification experience. The complainant, in his 50’s, had 20 years experience as a qualified accountant. The complainant did not succeed in getting either position, and the respondent stated that 2-3 years was in fact the maximum experience sought, and that the complainant was too senior for the post. The complainant contended that the imposition of a maximum limit would in this instance exclude most candidates over the age of 30; no statistics were introduced to support this argument. The Equality Officer in addressing this lack of proof referred to the Labour Court decision of *NBK Designs Ltd. v. Marie Inoue*,⁴² and quoted:

‘On the one hand, the burden is on the complainant to prove his case and, viewed in isolation, the statistics produced do not prove it. On the other hand it is most undesirable that, **in all cases of indirect discrimination, elaborate statistical evidence should be required before the case can be found proved** (*emphasis added*). The time and expense involved in [p]reparing [sic] and proving statistical evidence can be enormous, as experience in the United States had demonstrated.

⁴⁰ Case C-381/99 paragraph 76.

⁴¹ This case was taken under the Employment Equality Act 1998 prior to amendment, the provision on indirect discrimination is now broader, and arguably easier to prove.

⁴² ED-02-34, the Labour Court in reaching its decision relied on a number of UK and Northern Ireland decisions, namely: *Price v Civil Service Commission*, [1977] IRLR 291, *Perera v. Civil Service Commission*, [1982] IRLR 147, *Clymo v. Wainsford London Borough Council*, [1989] IRLR 241 and *Briggs v. North Eastern Education Library Board*, [1990] IRLR 181.

It is not good policy to require such evidence to be put forward unless it is clear that there is an issue as to whether the requirements of Section 1(1)(b) are satisfied.’⁴³

The Equality Officer accepting that statistical proof is not always necessary, accepted that the maximum limit of 2-3 years would in practice ensure that the provision could be complied with by a “*substantially smaller proportion of prospective employees*”⁴⁴ who are in the over 30 age group. There was a *prima facie* case of indirect discrimination; the question that remained for the Equality Tribunal was whether the respondent’s action was capable of objective justification. The respondent referred to candidates with too much post qualification being potentially poor performers as they are more than qualified for the job, or that the job satisfaction of the employee will be reduced. The respondent also referenced the fact that a person with 2-3 years experience would be at the right level of experience for the job, and would have a career path in the organisation. The Equality Tribunal relied on a European Court of Justice decision that stated:

“Mere generalisations concerning the capacity of a specific measure to encourage recruitment are not enough to show that the aim of the disputed provisions is unrelated to any discrimination on grounds of sex or to provide evidence on the basis of which it could reasonably be considered that the means chosen are or could be suitable for achieving that aim.”⁴⁵

The respondent was held not to have shown that the imposition of the maximum requirement of 2-3 years post qualification experience was unrelated to any discrimination based on age, neither had the respondent established that the requirement could be considered as a suitable means of achieving the aim of providing the appropriate skill base. Therefore the respondent failed to rebut the complainant’s claim of age indirect discrimination.

For an employer to avoid liability for harassment and sexual harassment it is necessary to have in place procedures which would enable the appellant to avail of working conditions free from harassment⁴⁶, under the statutory Code of Practice on Sexual Harassment and Harassment at Work, S I /78 of 2002. A number of cases have referred to the Code of Practice in relation to the steps which should be taken by employers.⁴⁷

The Equality Tribunal held that ‘the victimisation of a person for in good faith having taken a claim under the equality legislation is very serious, as it could have the impact of undermining the effectiveness of the legislation’ in *McCarthy v. Dublin Corporation*.⁴⁸

⁴³ DEC-E2004-042 at paragraph 5.10, This quote is taken from *Perera v. Civil Service Commission*, [1982] IRLR 147 which was repeated verbatim in the Labour Court decision of *NBK Designs Ltd. v. Marie Inoue*, ED-02-34.

⁴⁴ Section 28 of the Employment Equality Act 1998, this was the wording used in the pre-amended Act.

⁴⁵ DEC-E2004-042 at paragraph 5.15 quoting from *Erica Steinicke v Bundesanstalt für Arbeit* Case C77/02 11 at paragraph 64.

⁴⁶ *A Hospital v. an Appellant* DEE029 – sexual harassment case in the Labour Court. See also Equality Tribunal’s Annual Legal Review 2003.

⁴⁷ *A Complainant v. A Financial Institution* DEC-E2003/053 and *A Complainant v. A Health Board*, DEC-E2003-055.

⁴⁸ DEC-E2001-015.



Name of the court: Equality Tribunal

Date of decision: 15 November 2007

Name of the parties: Maphoso v Chubb

Reference number: DEC2007-067

Brief summary: The complainant claimed that he was not allowed on racist grounds to use the toilet or canteen facilities at the site where he was working as a security officer. The complainant also claims that he had been victimised since filing his complaint with the Tribunal. The Tribunal awarded him €8000 compensation for the effects of the acts of discrimination and victimisation.

Name of the court: Labour Court

Date of decision: 23 July 2004

Name of the parties: Campbell Catering Ltd., v. Rasaq

Reference number: EED 048

Address of the webpage:

<http://www.labourcourt.ie/labour/labour.nsf/LookupPageLink/HomeSearch>

Brief summary: The Labour Court highlighted the difficulties faced by migrant workers, and stated:

It is clear that many non-national workers encounter special difficulties in employment arising from a lack of knowledge concerning statutory and contractual employment rights together with difficulties of language and culture. In the case of disciplinary proceedings, employers have a positive duty to ensure that all workers fully understand what is alleged against them, the gravity of the alleged misconduct and their right to mount a full defence including the right to representation ... Special measures may be necessary in the case of non-national workers to ensure that this obligation is fulfilled and that the accused worker fully appreciates the gravity of the situation and is given appropriate facilities and guidance in making a defence.

Here the Labour Court clearly suggest a positive duty in respect of non-national workers.

Name of the court: Employment Appeals Tribunal

Date of decision: -

Name of the parties: 17 Complainants v. Eamonn Murphy t/a Kilnaleck Mushrooms

Reference number: UD155/2006

Brief summary: This case was taken under the Unfair Dismissals Act 1977-1993, to the. The employees were employed as mushroom pickers. In January 2006 the employees left their employment due to a dispute and contacted their local SIPTU office.⁴⁹ The Union official contacted the employer who stated: *“they’re not with me now, they’re with SIPTU.”* He later denied this, and denied that they were dismissed, or that they were dismissed because they had joined a trade union. The Employment Appeals Tribunal determined that the employees were unfairly dismissed because they had joined a trade union. The dismissals were held to be blatantly unfair due to the employees being non-nationals with limited English and having been brought to Ireland specifically to pick mushrooms.

⁴⁹ SIPTU; The Services, Industrial, Professional and Technical Union is one of the largest trade unions in Ireland.



The Tribunal awarded the maximum award of 2 years salary, €26,000, in addition to varying amounts of compensation for lack of notice and annual leave/holiday pay to the 13 employees that proceeded with their claims. The total award was €355,850. This is one of the highest awards made by the Employment Appeals Tribunal, and suggests that the Employment Appeals Tribunal will not tolerate exploitation of non-national workers.

Name of the court: Equality Tribunal

Date of decision: 10 April 2006

Name of the parties: A Health Service Employee v. The Health Service Executive

Reference number: DEC-E2006-013

Address of the webpage:

<http://www.equalitytribunal.ie/index.asp?locID=109&docID=1228>

Brief summary: held that in this instance obesity could be considered an imputed disability. The employee had been offered the post of Staff Nurse, subject to a medical examination; medical clearance was not provided because of the complainant's weight, which it was alleged would not permit her to do the job. She was informed that her appointment was deferred subject to her satisfying the standards necessary for health clearance, and she would be reviewed in six months. Throughout the period where the respondent refused to make her permanent the complainant was deployed as a Staff Nurse when the respondent needed her. The complainant claimed that the employer in their actions imputed a disability to her, and whether obesity amounted to a disability was not in itself an issue. The respondents argued that obesity was not a disability. The Equality Officer referring to a letter from the respondent which stated about her weight that: "Nonetheless this condition does pose significant risk to [Ms. A's] health and is an independent predictor of work related disability." A different letter stated: "you have a serious weight problem which has been raised with you in order that you might address the significant risk to your own health and also the fact that this problem is predictive of work related impairment." The Equality Officer ultimately held that she was not going to determine whether obesity was a disability but found that the respondent had imputed a disability to the complainant as a result of her weight.

Name of the court: Equality Tribunal

Date of decision: 11 September 2003

Name of the parties: Leahy v. Limerick City Council

Reference number: DEC-E2003-038

Address of the webpage: <http://www.equalitytribunal.ie/index.asp?locID=93&docID=1056>

Brief summary: The employer sought to rely on section 34(4) relating to mandatory retirement ages. The complainant in this action was a fire-fighter who was obliged to retire from his position at the age of 55. He claimed age discrimination, as different retirement ages were applied to fire officers. Equally the complainant was able to show that extensions of service beyond the age of 55 had been granted to fire-fighters in his district, and other local authorities had fire-fighters in service who were over 55 years of age. The respondent relied on section 34(4) and contended that as employers they were permitted to set different retirement ages for employees of different categories, and that fire-fighters formed a distinct category of employee from fire officers. Fire officers were required to have appropriate third level qualification for the post, there was a managerial function to the post, and they attended fires only in a supervisory role.

The respondent also contended that the terms and conditions of the complainant's employment stated that there was a mandatory retirement age of 55. There had been extensions to this in the past but these were exceptional cases and only sanctioned for operational reasons when the respondent was experiencing staff shortages.

The respondent set out the rationale underpinning the introduction and operation of the mandatory retirement age. The Equality Officer held that the respondent had consistently applied the retirement age of 55 for fire-fighters since 1974; those that stayed in service beyond that age did so as a result of a Labour Court Recommendation, or because exceptional circumstances existed, and further these extensions occurred at a time when age discrimination was not unlawful. The Equality Officer also accepted that fire-fighters and fire officers were different categories of employee and consequently, she held that it was not unlawful for the respondent to set different mandatory retirement ages for the two groups.

Regarding Roma and Travellers, no separate statistics are kept on these by the Equality Tribunal. There is no evidence of any cases having been brought as yet by Roma people. Regarding travellers, employment discrimination cases brought by Travellers are very rare, and only 3 cases were referred in 2007. Regarding access to goods and services under the Equal Status Acts, 16 cases were taken on the Traveller community ground, a decrease of 6% over 2006).⁵⁰ Many of the cases taken by Travellers continue to concern problems in accessing hotels and licensed premises. The Intoxicating Liquor Act 2003 transferred jurisdiction to hear cases regarding access to premises licensed for the sale of alcohol from the Equality Tribunal to the District Court, resulting in fewer complaints being made against licensed premises which refused access to Travellers; procedures in the District Court are more complicated, hearings are adversarial and public and there is the risk of costs being incurred. The Equality Authority is aware of a growing number of claims which did not proceed because the claimant did not want to run the risk of having to pay the other party's costs. No body has been charged with disseminating information about the legal protection against discrimination contained in the Intoxicating Liquor Act 2003, an apparent non-compliance with Article 10 of Directive 2000/43 and Article 12 of Directive 2000/78. The Equality Authority says that a national voluntary group that works with and represents Travellers has informed the Equality Authority that Travellers wrongly believe that the law prohibiting discrimination by licensed premises has been repealed.⁵¹

In the Equality Authority files, no complaints by Roma have been recorded. While only 2% of the Authority's investigations of complaints under the employment equality acts relate to the Traveller ground, anecdotal evidence suggests that the figure may be significantly higher, and it is of the view that discrimination is a significant factor for Travellers in the workplace⁵². Cases on access to goods and services under the Equal Status Acts predominantly concern hotels, restaurants, bars and shops, but there are now some cases regarding educational provision and discrimination in schools. In the case of *Faulkner*,⁵³ a mother was awarded compensation of €4000 for discrimination on the Traveller ground when her son was unable to gain admission to a special needs school to which he had been referred by the psychological services.

⁵⁰ Equality Tribunal Annual Report 2007.

⁵¹ Equality Authority Annual Report 2007, p 15

⁵² Evidence of Equality Authority to the High-Level Group on Travellers 2006
<http://www.justice.ie/en/JELR/HLGReport.pdf/Files/HLGReport.pdf> p36

⁵³ Equality Tribunal, DEC-S2006-037 *Nora Faulkner (represented by the Kerry Traveller Development Project) v St Ita's & St Joseph's School, Tralee*

In *Mrs A v a Primary School* ⁵⁴, a mother claiming on behalf of her son was awarded €6,350 for victimisation when the school refused to enrol her son, although her claims of discrimination on the Traveller and disability grounds were not upheld.

- With regard to Traveller accommodation important recent cases have included *Doherty v South Dublin County Council* in which the High Court established that section 6(6) of the Equal Status Acts 2000 to 2004 cannot be relied on to allow local authorities to afford less favourable treatment in the provision of housing ⁵⁵, and the Supreme Court subsequently established that the Equality Authority has the statutory authority to apply to act, and if permitted by the court, to act as an amicus curiae in court proceedings ⁵⁶. Another important case was *Lawrence and Others v Mayo County Council*, a case currently underway in the High Court concerning the alleged failure of the relevant housing authorities to meet the accommodation needs of a Traveller family, and challenging the Criminal Justice (Public Order) Act, which criminalises in effect the entry into and occupation of lands by Travellers, even where the local authority has failed to meet its statutory accommodation obligations. This case has since been settled without coming to judgment.

Other important recent cases have included:

- A landmark decision of the Equality Tribunal that the Department of Education and Science had discriminated against two Leaving Certificate students with dyslexia by annotating their Leaving Certificates ⁵⁷ (this is under appeal)
- A finding of the Equality Tribunal that a primary school had discriminated against and harassed a Traveller mother and victimised her son and failed to provide reasonable accommodation for her son in that he was not prioritised to see an educational psychologist so that educational supports could be put in place ⁵⁸
- An order in the District Court under the Intoxicating Liquor Act 2003 to install wheelchair accessible toilets in a pub and a hotel, to which the owners of the licensed premises consented ⁵⁹
- An expression of concern by the Equality Officer in a claim under the Employment Equality Acts 1998 to 2007 that the employer engaged a large number of foreign workers without having translated contracts available and then proceeded to make unlawful deductions from their wages and to permit some of them to work hours in breach of the Organisation of Working Time Act. The Equality Officer found that the employer made no adequate provision for the employment of foreign workers and had failed in its duty of care to them as employees on the ground of race. ⁶⁰
- A government decision (in settlement of a claim under the Equal Status Acts on the sexual orientation ground) to pay adult dependent allowance in respect of the same sex partner of a terminally ill gay man ⁶¹

⁵⁴ Equality Tribunal, DEC-S2007-003 *Mrs A (on behalf of her son B) -v- A Primary School*

⁵⁵ High Court *Doherty & Anor -v- Sth Dublin County Council & Ors* [2007] IEHC 4

⁵⁶ Supreme Court [2006] IESC 57

⁵⁷ Equality Tribunal, DEC-S2006-077 *Two Complainants v The Department of Education and Science*

⁵⁸ Equality Tribunal DEC – S2006-028 *Two complainants (Mrs A and her son M) v a Primary School*

⁵⁹ *Hayes v Russell Court Hotel and McGowan v Searson's Public House*

⁶⁰ Equality Tribunal DEC – E2006 – 050 *Five Complainants v Hannon's Poultry Export Ltd, Roscommon*

⁶¹ *A claimant v The Department of Social and Family Affairs, settlement with Equality Authority 2006*



- The first District Court finding of discrimination on the sexual orientation ground under the Intoxicating Liquor Act 2003 ⁶²
- The first case of indirect discrimination on the religion ground where the Equality Tribunal found that Western Union had indirectly discriminated against Mohamed Haji Hassan on the grounds of his Muslim religion when they refused to release money sent through their service ⁶³
- The acknowledgement in open Court by a pub that it had discriminated against a number of Travellers, the apology for the discrimination and an undertaking to implement a non-discriminatory policy in their premises ⁶⁴
- A number of orders of significant compensation for the victimisation of people who have sought to enforce their rights. ⁶⁵

⁶² *McGuirk and Twomey v Malone's Public House*, District Court 2006
<http://www.equality.ie/index.asp?locID=136&docID=684>

⁶³ Equality Authority, DEC-S2006-004 *Hassan v Western Union*

⁶⁴ *Power and 4 Others v Bennigans*, settlement in District Court <http://www.equality.ie/index.asp?locID=136&docID=684>

⁶⁵ E.g. Labour Court 2005 EED 054 *Icon Clinical Research Limited and Djemma Tsourova*



1. GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

- a) *Briefly specify the grounds covered (explicitly and implicitly) and the material scope of the relevant provisions. Do they apply to all areas covered by the Directives? Are they broader than the material scope of the Directives?*

The Constitution, Bunreacht na hEireann, 1937 contains an equality clause, which states:

40.1 All citizens shall, as human persons, be held equal before the law.

This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.

To date the Irish Supreme Court have been disinclined to rigorously enforce the equality provision⁶⁶. Its history has not been a happy one, with inconsistent decisions and unclear reasoning being hallmarks of its interpretation by the courts.⁶⁷ This provision has been interpreted by the Irish Supreme Court as not requiring identical treatment of all persons without recognition of differences in relevant circumstances.⁶⁸ The provision forbids arbitrary discrimination. The difficulty with the provision is reflected in the broad discretion the Irish Supreme Court has in respect of justifying discrimination. In *Draper v. Attorney General* [1984] IR 277 the Supreme Court held that the failure of the legislature to make it possible for disabled people physically to vote in general elections did not infringe Article 40.1. In *Norris v. Attorney General* [1984] IR 36 the Supreme Court rejected a challenge to legislation which criminalized consensual homosexual conduct between adult males, but did not criminalise similar conduct between females. The Supreme Court upheld the legislation and in respect of the distinction between male and female conduct the court held that the legislature was 'perfectly entitled to have regard to the difference between the sexes and to treat sexual conduct or gross indecency between males as requiring prohibition because of the social problem which it creates, while at the same time looking at sexual conduct between females as not only different but as posing no such social problems.'⁶⁹ In *Murphy v. Attorney General*, [1982] IR 241 the Supreme Court reviewed a taxation law which ensured that married couples were worse off than if they were an unmarried couple living together. This law was deemed unconstitutional but not because of the equality ground, in that regard the Court stated that the inequality was 'justified by the particular social function under the Constitution of married couples living together.'⁷⁰ The Constitution Review Group have stated, the provision 'has too frequently been used by the courts as a means of upholding legislation by reference to questionable stereotypes, thereby justifying discrimination.'⁷¹

⁶⁶ Casey, *Constitutional Law in Ireland*, 3rd Ed Dublin 2000.

⁶⁷ Kilkelly, *ECHR and Irish Law*, Jordan Publishing Ltd 2004.

⁶⁸ *de Búrca and Anderson v. A.G.* [1976] IR 38 and *O'Brien v. Keogh* [1972] IR 144.

⁶⁹ *Norris v. Attorney General*, [1984] IR 36 at 59

⁷⁰ *Murphy v. Attorney General*, [1982] IR 241 at 284.

⁷¹ Government of Ireland, (1996) *Report of the Constitution Review Group*, at 228

In *Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321 the Supreme Court stated ‘the forms of discrimination which are, presumptively at least, prescribed by Article 40.1 are not particularised: manifestly, they would extend to classifications based on sex, race, language, religious or political opinions.’⁷² It should be noted that it was this case that determined that a requirement on employers to provide reasonable accommodation to disabled workers, providing that accommodation did not give rise to an undue burden was in fact unconstitutional. It seems therefore that the equality provision is far from satisfactory. Although the grounds in that case were taken to extend (beyond the requirements of the Directives) to language and political opinions, it is not clear how the courts would see its application to age, disability and sexual orientation.

The Preamble of the Constitution reflects a religious theme to the Constitution:

In the name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred,
We, the people of Eire,
Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial, ...
Do hereby adopt, enact, and give to ourselves this Constitution.

The preamble has been referred to in several important Constitutional cases,⁷³ It has been referred to in an interpretative context. The preamble has never formed the sole basis for any Constitutional case. Article 44 of the Irish Constitution specifically addresses religion and the free practice of religion. This provision states:

- 44.1 The State acknowledges that the homage of public worship is due to Almighty God. It shall hold his name in reverence, and shall respect and honour religion.
- 44.2.1 Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.
- 44.2.2 The State guarantees not to endow any religion.
- 44.2.3 The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status.
- 44.2.4 Legislation providing State aid for schools shall not discriminate between schools under the management of different religious denominations, nor be such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school.
- 44.2.5 Every religious denomination shall have the right to manage its own affairs, own, acquire and administer property, movable and immovable, and maintain institutions for religious or charitable purposes.
- 44.2.6 The property of any religious denomination or any educational institution shall not be diverted save for necessary works of public utility and on payment of compensation.

Article 44 is focused on the free practice of religion.

⁷² *Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321 at 347.

⁷³ *Attorney General v. Southern Industrial Trust*, (1960) 94 ILTR 161; *McGee v. A.G.*, [1974] IR 284



Prior to the fifth amendment the Irish Constitution did grant special privilege to particular religious denominations.⁷⁴ The Constitution Review Group stated of this provision that:

Broadly speaking, the existing provisions of Article 44 are satisfactory and have worked well. The key aspects of Article 44 – the guarantees of free practice of religion and the twin prohibitions of non-endowment and non-discrimination – are far-reaching and comprehensive. The Review Group is of course, aware that it has been frequently suggested that the State has a confessional ethos which tends to favour the majority religion at the expense of religious minorities. If this is so the fault lies elsewhere than with these provisions.⁷⁵

b) *Are constitutional anti-discrimination provisions directly applicable?*

Yes.

c) *In particular, where a constitutional equality clause exists, can it (also) be enforced against private actors (as opposed to the State)?*

It is not clear whether the equality guarantee may be enforced in actions between private parties.⁷⁶

⁷⁴ Government of Ireland, (1996) *Report of the Constitution Review Group* at 368

⁷⁵ Government of Ireland, (1996) *Report of the Constitution Review Group* at 369

⁷⁶ Casey, *Constitutional Law in Ireland*, 3rd Ed Dublin 2000.



2. THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination

Which grounds of discrimination are explicitly prohibited in national law? All grounds covered by national law should be listed, including those not covered by the Directives.

The Employment Equality Act 1998-2007 and Equal Status Act 2000-2004 both prohibit discrimination on nine grounds: Marital Status, Family Status, Sexual Orientation, Religious Belief, Age, Disability, Gender, Race (including nationality and ethnic origin) and Membership of the Traveller Community.⁷⁷ It is possible to take cases on the basis of multiple/double discrimination, under both of the anti-discrimination statutes: In *Nyamphosa v. Boss Worldwide Promotions*,⁷⁸ it was held that the complainant was discriminated against on the grounds of both gender and race; in *Golovan -v-Porturlin Shellfish Ltd*,⁷⁹ where the complainant claimed discrimination on the grounds of gender and race, the Equality Officer found discrimination on the basis of race only.

Protection from discriminatory dismissal is also guaranteed by the Unfair Dismissals Acts 1977 to 2007. This protection is governed by section 6(2) and prohibits discrimination in respect of union membership, religious or political opinions, for taking an action against the employer, race, colour sexual orientation, age or membership of the Traveller community. These terms are not defined within the legislation.⁸⁰ The Prohibition of Incitement to Hatred Act of 1989 prohibits incitement to hatred on account of a person's race, colour, nationality, religion, ethnic or national origins, membership of the Traveller community or sexual orientation. These terms are not defined within the legislation.

2.1.1 Definition of the grounds of unlawful discrimination within the Directives

- a) *How does national law on discrimination define the following terms: racial or ethnic origin, religion or belief, disability, age, sexual orientation?*
Is there a definition of disability on national level and how does it compare with the concept adopted by the European Court of Justice in case C-13/05, Chacón Navas, Paragraph 43, according to which "the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life"?

The Employment Equality Act 1998-2007 and the Equal Status Act 2000-2004 contain broadly similar definitions:

Racial or ethnic origin - The ground of race relates to people who are of a different race, colour, nationality or ethnic or national origin.⁸¹

⁷⁷ Section 3(2)(a-j) Equal Status Act 2000-2004 and section 6(2)(a-i) Employment Equality Act 1998-2007.

⁷⁸ DEC-E2007-072

⁷⁹ DEC-E2008-032

⁸⁰ The Unfair Dismissal Act does not apply to most civil servants and to some members of the public sector: Gardai and the Defence Forces.

⁸¹ Section 6(2)(h) Employment Equality Act 1998-2007



Also relevant here is the definition of the Membership of the Traveller Community which is defined as a separate ground in Section 2(1) of the Employment Equality Act, 1998 as amended by the Equal Status Act “ ‘Traveller community’ means the community of people commonly known and identified (both by themselves and others) as people with a shared history, culture and traditions including, historically a nomadic way of life on the island of Ireland.” Neither the legislation nor case law has determined whether members of the Traveller community are a racial or ethnic minority.⁸² This would be important in respect of applicability to the Traveller community of the protections guaranteed by international conventions, but with regard to EU directives, the Traveller community is defined as a separate protected ground under Irish equality legislation. However, while the Government has not recognised Travellers as a separate ethnic group, Ireland does report on developments concerning the Traveller community within the framework of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the Framework Convention for National Minorities (FCNM).

Religion - Section 2(1) defines religion as “‘religious belief,’ includes religious background or outlook.” This is further defined at section 6(2)(e) as prohibiting discrimination with respect to people of different religious beliefs and includes discrimination where someone has no religious belief.

Disability - Section 2(1) defines disability as:

- a) the total or partial absence of a person’s bodily or mental functions, including the absence of a part of a person’s body,
- b) the presence in the body of organisms causing, or likely to cause, chronic disease or illness,
- c) the malfunction, malformation or disfigurement of a part of a person’s body,
- d) a condition or malfunction which results in a person learning differently from a person without the condition or malfunction, or
- e) a condition, illness or disease which affects a person’s thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour, and shall be taken to include a disability which exists at present, or which previously existed but no longer exists, or which may exist in the future or which is imputed to a person.

The Irish definition of disability is broader than that set out by the European Court of Justice in the *Chacón Navas*⁸³ case. The Irish definition does cover those who in the words of that case could have a “limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life.”⁸⁴

⁸² It has been contended by a number of groups, e.g. the Equality Authority and the National Consultative Committee on Racism and Interculturalism) that Ireland should recognise Travellers as members of a distinct ethnic group. See e.g. Traveller Ethnicity- An Equality Authority Report (<http://www.equality.ie/index.asp?docID=556>), and The Importance of Recognising Travellers as an Ethnic Group - Submission to the Joint Oireachtas Committee on Human Rights March 2004 (<http://www.nccri.ie/submissions/04MarTravellerEthnicity.pdf>). The Equality Tribunal has accepted a person’s self identification as a Member of the Traveller Community as evidence of such membership. Membership of the Traveller community is both individual and communal in nature, and membership does not cease on a person ceasing to have a nomadic way of life. However, the Government’s position remains negative on this issue, for reasons that are not clear.

⁸³ Case C-13/05

⁸⁴ Case C-13/05 paragraph 43

The *Chacón Navas* case also holds that for a limitation to be regarded as a disability it must be probable that it will last for a long time,⁸⁵ in addition a disability is deemed to be different from a sickness.⁸⁶ The Irish definition of disability does not contain such distinctions, requiring neither the necessity for a condition lasting a long time, or making the distinction between disability and sickness/illness. The Irish definition includes those that come within the *Chacón Navas*, and also covers those that have a disability at present, a history of a disability, a future disability or an imputed disability.⁸⁷

Age - The age ground as set out in section 6(f) refers to people of different ages.

Sexual Orientation - Section 2(1) states that 'sexual orientation' means heterosexual, homosexual or bisexual orientation.

Neither the Unfair Dismissals Act 1977 to 2007, nor the Prohibition on the Incitement to Hatred Act 1989 defines the terms set out within the parameters of those Acts.

b) *Where national law on discrimination does not define these grounds, how far have equivalent terms been used and interpreted elsewhere in national law (e.g. the interpretation of what is a 'religion'; or a "disability", sometimes defined only in social security legislation)? Is recital 17 of Directive 2000/78/EC reflected in the national legislation against discrimination?*

As stated above, Irish legislation defines disability. The courts have provided further interpretation of these terms. The Labour Court in *Customer Perception Ltd. v. Leydon*,⁸⁸ held that a temporary injury constituted a disability within the meaning of the Employment Equality Act 1998. The injury in question resulted from a road traffic accident and the complainant sustained injuries that resulted in pain and reduced movement in her shoulder, back and neck. The Labour Court held that this came under subsection (c) above, stating: 'Taking the ordinary and natural meaning of the term malfunction (connoting a failure to function in a normal manner), the condition from which the complainant suffered in consequences of her accident amounted to a malfunction of parts of her body. It thus constituted a disability within the meaning of the Act. Moreover, in providing that the term comprehends a disability which existed but no longer exists, it is clear that a temporary malfunction comes within the statutory definition.' In

A Civil Servant v. The Office of the Civil Service and Local Appointments Commissioners,⁸⁹ the Equality Tribunal accepted that illness could amount to a disability within the terms of the Employment Equality Act 1998-2007. The Tribunal was required to determine whether the complainant's illnesses amounted to a disability. The complainant suffered from asthma and irritable bowel syndrome.

⁸⁵ Case C-13/05 paragraph 45

⁸⁶ Case C-13/05 paragraph 44

⁸⁷ See *Health Service Employee v The Health Service Executive*, DEC-E2006-013 discussed at 0.3 above.

⁸⁸ ED/02/1

⁸⁹ DEC-E2004-029

The Tribunal held that having regard to paragraph (c) of the definition of disability, “both asthma and irritable bowel syndrome are malfunctions of the airways of the lungs and the intestinal tract respectively ... I therefore accept that both conditions amount to disabilities within the meaning of the Act.”⁹⁰

The Irish courts have interpreted the definition of disability in an inclusive manner, with most people who claim to have a disability being found to be within the protected group. Disability as defined and interpreted in Irish law has ensured that the purpose of the equality legislation has not been undermined by using the ground of disability as a gate-keeper preventing access to the Equality Tribunal. Alcoholism⁹¹, obesity,⁹² depression, stress and anxiety⁹³ have all been found to constitute disability under the equality acts.

To date there have been few cases concerning religion. *An Employee (Mr M) v A State Author* was the first case of indirect discrimination on the religion ground, where the Equality Tribunal found that Western Union had indirectly discriminated against Mohamed Haji Hassan on the grounds of his Muslim religion when they refused to release money sent through their money transfer service.⁹⁴ In *Mr A v a State Authority*⁹⁵, the Equality Officer held that section 6(2) (e) of the Acts must be read in conjunction with the definition of “religious belief” at section 2 of those Acts. He held that discrimination on grounds of religion can only occur where a person is treated less favourably than another because he has a different belief from that person or none at all. A prison chaplain brought proceedings under the Employment Equality Acts alleging less favourable treatment than other prison officers in relation to access to promotion and the terms of termination of his appointment. He submitted that this less favourable treatment related to the religious belief ground in the legislation, namely his religious background as a priest. The Court rejected this interesting argument, pointing out that the difference in treatment was grounded on the office or position which the complainant held rather than the religion he professed or practised⁹⁶.

Recital 17 of Directive 2000/78 is reflected in Section 16(1)(b) and 16(3)⁹⁷.

c) *Are there any restrictions related to the scope of ‘age’ as a protected ground (e.g. a minimum age below which the anti-discrimination law does not apply)?*

⁹⁰ DEC-E2004-029 at para 5.10: See also *Roche v. Alabastor*, DEC-S2002-086 and *A Complainant v. Café Kylemore*, DEC-S2003-024 where the Tribunal accepted that chronic conditions could amount to a disability within the terms of the Equality legislation.

⁹¹ DEC-S2003-024 *A Complainant -v- Cafe Kylemore*

⁹² At least in one case where obesity was considered an imputed disability: Equality Tribunal DEC-E2006-013, *Health Service Employee v. The Health Service Executive*, see above 0.3 Case-law p 10.

⁹³ DEC-E2007-025 *A Prison Officer -v- The Minister for Justice, Equality and Law Reform*

⁹⁴ Equality Authority, DEC-S2006-004 *Hassan v Western Union*

⁹⁵ DEC-E2006-015

⁹⁶ *Irish Prison Service and Morris* (ADE/06/10, Determination No 074, 28th February, 2007) and *Irish Prison Service and Morris* (FTC/06/10 Determination No 073, March 2nd 2007).

⁹⁷ See para 2.6 below on reasonable accommodation

The Employment Equality Acts 1998 to 2007 apply to all ages above the maximum age at which a person is statutorily obliged to attend school, which is 16, and persons under the age of 16 are excluded from protection against discriminatory dismissal under the Unfair Dismissals Act; an employer may set a minimum age for recruitment not exceeding 18; it is not discrimination to offer a fixed term contract to a person over the compulsory retirement age for that employment or to a particular class or description of employees in that employment.⁹⁸ The Equal Status Acts 2000 to 2004 apply to people over the age of 18 except for car insurance to licensed drivers under that age⁹⁹.

The Equality Authority has referred to the need to remove the lower age limit to the age ground in the Equal Status Act to allow the Authority to challenge harassment of or discrimination against young people in the provision of goods and services, accommodation and education.¹⁰⁰

- d) *Please describe any legal rules (or plans for the adoption of rules) or case-law (and its outcome) in the field of anti-discrimination which deal with situations of multiple discrimination. This includes the way equality body (or bodies) are tackling cross-grounds or multiple grounds discrimination.*
- *Would national or European legislation dealing with multiple discrimination be necessary in order to facilitate the adjudication of such cases?*

There are no legal rules that deal with the situation of multiple-discrimination, but there are many cases taken on multiple grounds. The figures produced by the Equality Tribunal for 2008¹⁰¹ show that almost one in four claimants allege multiple discrimination. The Equality Authority commissioned a background paper in 2007 on women and multiple discrimination (transsexual women, single parents, women carers, women travellers, lesbian and bisexual women, those from different religious backgrounds, Black and minority ethnic women, young women and older women.¹⁰² The National Disability Authority has focused on women with disability and older people with disabilities¹⁰³. Legislation at EU level would be useful in order to highlight the fact that multiple discrimination places people in a complex condition needing better recognition and vindication under the law. Too often cases are treated on a ground-by-ground basis rather than holistically as a particular and complex phenomenon.

- f) *How have multiple discrimination cases involving one of Art. 13 grounds and gender been adjudicated by the courts (regarding the burden of proof and the award of potential higher damages)? Have these cases been treated under one single ground or as multiple discrimination cases?*

⁹⁸ Employment Equality Acts 1998 to 2007, section 6 (3) (a) – (d).

⁹⁹ Equal Status Acts 2000 to 2004 section 3 (3).

¹⁰⁰ Equality Authority press release 12 March 2008 <http://www.equality.ie/index.asp?locID=135&docID=716>

¹⁰¹ Annual Report 2008 <http://www.equalitytribunal.ie/index.asp?locID=80&docID=1959>

¹⁰² Equality Authority Annual Report 2007 P 87 <http://www.equality.ie/index.asp?locID=136&docID=732>

¹⁰³ Equality Authority Annual Report 2007 P87 <http://www.equality.ie/index.asp?locID=136&docID=732>



In *O'Brien v. ComputerScope Limited*,¹⁰⁴ the complainant alleged age and gender discrimination and the Equality Tribunal dealt with the grounds of discrimination as a collective issue. However, the usual practice is to examine each ground separately¹⁰⁵, and there is no evidence of higher awards in such cases.

2.1.2 Assumed and associated discrimination

- a) *Does national law (including case law) prohibit discrimination based on perception or assumption of what a person is? (e.g. where a person is discriminated against because another person assumes that he/she is a Muslim or has a certain sexual orientation, even though that turns out to be an incorrect perception or assumption).*

Both the Employment Equality Act and the Equal Status Act prohibit discrimination on the basis of a discriminatory ground that is imputed to an individual.¹⁰⁶ In *Ms X v An Electronic Component Company*¹⁰⁷, the Equality Officer found that the respondent imputed a disability to the complainant, and that the complainant's imputed disability was a significant factor in the respondent's decision to dismiss her. The issue of imputation is a significant one, for instance in the area of racial discrimination, given the malleability of concepts like ethnicity. The Equality Tribunal has accepted that a person may make a complaint of discrimination based on race even if he no longer pursues a nomadic way of life and does not regard himself as a Traveller, where other people do regard him as a Traveller¹⁰⁸.

- b) *Does national law (including case law) prohibit discrimination based on association with persons with particular characteristics (e.g. association with persons of a particular ethnic group or the primary carer of a disabled person)? If so, how? Is national law in line with the judgment in Case C-303/06 Coleman v Attridge Law and Steve Law?*

Both Acts prohibit discrimination by association¹⁰⁹. The Equal Status Act has covered discrimination by association since the inception of the Act in 2000. In the case of *Six Complainants v. a Public House*,¹¹⁰ a group of six were refused admittance to a premises because of one individual's disability. The premises failed to give reasons for their refusal of admittance and this amounted to a failure to reasonably accommodate that individual, and by association all six complainants, who were also refused admittance. A similar outcome was found in *Kiernan v. The Newbury Hotel*,¹¹¹ where the hotel refused to serve a group on a work night out as some of the members of the group were members of the Traveller Community, the tribunal found discrimination by association. In *McDonnell v. Dolan's Bar*,¹¹² a doorman refused a member of the settled community, who was married to a member of the Traveller Community, access to a public house.

¹⁰⁴ DEC-E2006-030; see section 2.3 below for a further discussion of this case.

¹⁰⁵ E.g. Equality Tribunal DEC-S2007-089-A student v City of Dublin Vocational Education Committee –race and age-race discrimination only upheld -€3000

¹⁰⁶ Section 6(1) Employment Equality Act 1998-2007 and section 3(1) of the Equal Status Act 2000-2004.

¹⁰⁷ DEC-E2006-042

¹⁰⁸ *O'Brien v. Killarney Ryan Hotel* (DEC-S2001-008) (2001/08/20). The complaint was dismissed on other grounds.

¹⁰⁹ Section 3(1)(b) Equal Status Act 2000-2004, section 6(1)(b) Employment Equality Act 1998-2007.

¹¹⁰ DEC-S2004-009-014

¹¹¹ DEC-S2006-080

¹¹² DEC-S2006-058



When questioned about the reasons for refusal, the doorman pointed to his wife and stated that the problem was his ‘excess baggage.’ The husband succeeded in proving discrimination by association; the association was with his wife who was a member of the Traveller community. Caselaw has so far only covered access to goods and services, but principles established in these cases will also be applicable to employment cases. While neither act defines how close the relationship must be to establish an association, some cases indicate that it need not be very close; in one case the complainant did not enter the pub with the other people with whom she was subsequently asked to leave, but only became involved with them during the evening. Harassment or sexual harassment by association, which arose in the *Attridge* case, is not referred to in the Irish legislation and has not yet arisen in caselaw.

2.2 Direct discrimination (Article 2(2)(a))

a) *How is direct discrimination defined in national law?*

Section 6 of the Employment Equality Act 1998-2007 prohibits direct discrimination in employment. This section prohibits treating a person ‘less favourably than another is, has been or would be treated’ on any of the nine grounds, in a comparable situation which exists, existed or may exist in the future. The legislation does not specify how a comparison is to be made in the context of any of the nine grounds. Direct Discrimination under section 3 of the Equal Status Act 2000-2004 is defined in the same way. There is no necessity for a complainant to show that there was an intention to discriminate, it is sufficient if the actions do in fact discriminate against a person on any of the discriminatory grounds.¹¹³

b) *Are discriminatory statements or discriminatory job vacancies announcements capable of constituting direct discrimination in national law? (as in Case C-54/07 Firma Feryn)*

Yes. Section 10 of the Employment Equality Acts 1998 to 2007 and Section 12 of the Equal Status Acts 2000 to 2004 prohibit discriminatory advertisements or statements. However, complaints about discriminatory advertisements or statements can only be brought before the Equality Tribunal by the Equality Authority.¹¹⁴ This seems to unduly curtail an individual’s right to access an effective remedy for a directly or indirectly discriminatory act.

c) *Does the law permit justification of direct discrimination generally, or in relation to particular grounds? If so, what test must be satisfied to justify direct discrimination? (See also 4.7.1 below).*

The provision has been interpreted as incorporating the ECJ decision of *Finanzamt Koeln-Alstadt v. Roland Schumacker*,¹¹⁵ and *Gillespie & ors v. Northern Health and Social Services Board*.¹¹⁶ These decisions initially related to discrimination based on nationality, and gender respectively, the Equality Courts have extended them to cover all nine protected grounds covered by the Irish Acts.

¹¹³ *St. James Hospital v. Eng* EDA023, July 2002.

¹¹⁴ Equality Tribunal, DEC 2003-024 *GTS Reprographics*, and DEC E2004 – 016 *Burke v FÁS*

¹¹⁵ Case C-279/93 [1995] ECR-I-225

¹¹⁶ [1996] ECJ C342/93 See section 0.3 above.



Although the legislation does not provide for any general justification of direct discrimination, there are some broad general exemptions. The Employment Equality Act does not require an employer to employ someone who is not fully competent or capable of doing the job, although if this is because of disability, there is a requirement to provide reasonable accommodation¹¹⁷ (this requirement does not apply to any of the other grounds). The Equal Status Act contains broad general exemptions which apply to all grounds. Art 14(1) for example provides a sweeping general exception stipulating that no act is discriminatory where it is mandated by any other legislation. Others are section 14(2) positive action, and section 15 where a bona fide belief exists of the likelihood of criminal conduct ensuing or breach of licensing laws.

In Section 16(2), treating a person differently does not constitute discrimination where the person “is so treated solely in the exercise of a clinical judgment in connection with the diagnosis of illness or his or her medical treatment...” A case on this last point, *Mr Pat Hallinan v Dr Luke O’ Donnell*¹¹⁸, concerned the treatment received by a patient while in hospital. The complainant was quadriplegic. During a stay in hospital the complainant stated that he knew his breathing was becoming difficult so he asked for physiotherapy to relieve this. He also asked for x-rays to be undertaken. There was a delay in both of these services being provided to the complainant. The Equality Officer looked at whether or not treatment and x-rays were withheld because the complainant was disabled and whether or not the doctor’s response was delayed because the complainant was disabled. She found that based on section 16 of the Equal Status Act 2000, treating a person differently while exercising clinical judgment in connection with that person’s diagnosis or treatment cannot amount to discrimination. The Equality Officer was also satisfied that the doctor would have treated correspondence from non-disabled persons in similar fashion therefore the complainant failed to establish a prima facie case of discrimination on the disability ground. She stated that had the doctor been found to have discriminated against the complainant in matters other than his clinical decisions the Western Health Board may have been vicariously liable. She also stated that the argument that such doctors operate independently is relevant only to clinical issues and where the issue arises in relation to correspondence or other administrative matters the Board or, as it is now, the Health Service Executive, may be found liable. This was not an issue here however as the complainant failed to establish a prima facie case of discrimination.

d) *In relation to age discrimination, if the definition is based on ‘less favourable treatment’ does the law specify how a comparison is to be made?*

The legislation is silent on how a comparison is made in respect of age discrimination. In *Perry v. Garda Commissioner*¹¹⁹ the case was whether the voluntary retirement scheme benefited those under 60 and therefore discriminated on the basis of age. The complainant in this case was 64 and her comparator was 59. The respondent contended that the differences were designed to compensate the comparator for missing more years’ paid employment. With the use of a hypothetical comparator, one being 60 and a day, and the other being 59 years old and three hundred and sixty four days old, in effect a difference of two days, the difference financially was that the person who was two days younger would gain almost IR£6,000 more.

¹¹⁷ EEASections 16 (1) and 16 (3).

¹¹⁸ Equality Authority, DEC-S2006-069

¹¹⁹ *Perry v. Garda Commissioner*, DEC-E2001-029

Therefore in this instance two days of a difference in age was sufficient difference for a comparator, and discrimination on the ground of age was found. In a second case that of *Superquinn v. Freeman*¹²⁰ the Labour Court held that a difference in age between a 28 year old and a 31 year old was not enough to suggest age discrimination had occurred. In *Reynolds v. Limerick Country Council*,¹²¹ it was held that a difference of 8 years between the complainant and the comparator was sufficient to maintain a claim of age discrimination. See also the Labour Court decision *Department of Health and Children v. Gillen*, discussed in section 0.3 above.

In *Johnston v Co Louth VEC*,¹²² an important aspect of the case was the respondent's attempts to rely on an age bracket defence. The complainant was 56 and the successful candidate was 50. The respondent's contention that since both candidates were in the same age bracket, the provisions of age discrimination could not apply, was not accepted by the Director. Conversely she considered age brackets as an "*entirely arbitrary construct adopted usually for convenience*" and stressed the importance of deciding the exact significance of any difference in age on the merits of the case.

In *McNamee v Donegal County Council*¹²³, the complainant failed to prove discrimination on grounds of gender and age because they related to events that took place at a time when they were not illegal, namely the situation of women who were obliged to retire from the public service upon their marriage, until this rule was abolished only in 1973. The Irish courts have never accepted the concept of continuing effects of past discrimination which can still impact on older workers, in this case women, in the workplace.

The employer must furnish any information the employee needs in order for a comparison of less favourable treatment to be made¹²⁴

2.2.1 Situation Testing

- a) *Does national law permit the use of 'situational testing'? If so, how is this defined and what are the procedural conditions for admissibility of such evidence in court?. For what discrimination grounds is situation testing permitted? If not all grounds are included, what are the reasons given for this limitation?*

National law is silent as to situational testing.

- b) *Is there any reluctance to use situational testing as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law (European strategic litigation issue)?*

There are no procedural or other rules prohibiting the use of 'situational testing.' Situational testing does not occur with any regularity in the Irish context.

¹²⁰ *Superquinn v. Freeman*, DEE0211, November 2002.

¹²¹ *Reynolds v. Limerick County Council*, DEC-E2003-032

¹²² DEC-E2006-052

¹²³ DEC-E2007-074

¹²⁴ *Da Silva*, DEC – 2008-043 (race ground, concerning comparators in an equal pay case).



Anecdotal evidence suggests that Judges from the Irish superior courts would be hostile to this form of evidence, seeing it as a form of entrapment.¹²⁵ There is therefore a reluctance to use situational testing. Thus it would appear that for the present developments in other jurisdictions are not impacting on the position at present.

c) *Outline important case-law within the national legal system on this issue.*

There have been some cases where it may be inferred from the facts that a form of situational testing is taking place. In *Delaney v. The Harp Bar*,¹²⁶ the complainants were members of the Traveller community and were refused entry to the respondent's premises. During the case the Equality Officer referred to the events of the night in question where the complainants actually visited eight different pubs only one of which was willing to serve them. The complainants litigated against all of the other seven pubs, including the pub subject to the case at hand.¹²⁷

d) *Outline how situation-testing is used in practice and by whom (e.g. NGOs, equality body, etc)*

The study "Discrimination in Recruitment: Evidence from a Field Experiment", commissioned by the Equality Authority and conducted by the Economic and Social Research Institute (ESRI), used situational testing to investigate discrimination on grounds of race or ethnic origin¹²⁸. The experiment directly compared the behaviour of employers faced with applications from candidates who were identical on all relevant characteristics other than their ethnic or national origin. The research team sent pairs of matched CVs in response to 240 separate job adverts. The two fictitious applicants had equivalent qualifications, skills and experience, all gained in Ireland. The only difference was the name at the top of the CVs. Candidates with Irish names were more than twice as likely to be called to interview as those with minority names. This level of discrimination was found to be consistent across the three minorities tested (African, Asian, German), three occupations (lower administration, lower accountancy, retail sales) and different business sectors. The experiment was carried out between March and October 2008. Compared with similar experiments carried out in other countries, the level of discrimination recorded for Ireland was found to be high.

2.3 Indirect discrimination (Article 2(2)(b))

a) *How is indirect discrimination defined in national law?*

The Equality Tribunal reviewed this section of the legislation in *O'Brien v. ComputerScope*,¹²⁹ see section 0.3 above where it is discussed in detail. Indirect discrimination is deemed to occur where an apparently neutral provision "puts" a person belonging to a "protected group" at a 'particular disadvantage' in respect of remuneration compared with other employees of their employer.

¹²⁵ This issue has yet to be addressed in a court action.

¹²⁶ DEC-S2002-53/56

¹²⁷ *Delaney v. Kilford arms*, DEC-S2002-033/36, *Delaney v. Shems Bar*, DEC-S2002-037/40, *Delaney v. Biddy Earlys*, DEC-S2002-041/044, *Delaney v. Quays Bar (River Court Hotel)*, DEC-S2002-045/048, *Delaney v. Matt the Millars*, DEC-S2002-049/052, *Delaney v. The Harp*, DEC-S2002-053/056, *Delaney v. Paris Texax*, DEC-S2002-057/060.

¹²⁸ <http://www.equality.ie/index.asp?locID=105&docID=794>

¹²⁹ DEC-E2006-030 – See also section 0.2 above.

This is not the same as the wording in the directives which says “puts or would put”. The European Commission has initiated infringement proceedings against Ireland on grounds which include an incorrect definition of indirect discrimination. It sent Ireland a Reasoned Opinion on 27 June 2007 for failure to fully implement the provisions of the Racial Equality Directive 2000/43/EC¹³⁰, and a further Reasoned Opinion on 31 January 2008 for failure to fully implement the provisions of the Framework Employment Directive 2000/78/EC¹³¹.

Statistical evidence may be used to prove indirect discrimination. The provision also ensures that where it can be shown that there has been unequal treatment with regard to remuneration, compliance requires that the complainant should be given the higher remuneration.

Section 22 of the Employment Equality Act 1998-2007 prohibits indirect discrimination in the non-pay context. Indirect discrimination is deemed to occur where an apparently neutral provision puts a person belonging to a particular protected group at a ‘particular disadvantage’ in respect of an employment matter as compared with other employees of their employer.¹³² The test to justify indirect discrimination is that the discriminatory provision must be objectively ‘justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.’¹³³ It is possible to use statistics in determining whether or not indirect discrimination has occurred.¹³⁴

The Equality Act of 2004 also amended the definition of indirect discrimination in the provision of goods and services. Indirect discrimination in the Equal Status Act 2000-2004 is now defined in an identical manner to the Employment Equality Act. Indirect discrimination is deemed to occur where an apparently neutral provision puts a person belonging to one of the protected grounds at a “particular disadvantage compared with other persons, unless the provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.”¹³⁵ In relation to age discrimination, the legislation does not specify how a comparison is to be made. The cases of *Perry v. Garda Commissioner*,¹³⁶ *Superquinn v. Freeman*¹³⁷ and *Reynolds v. Limerick Country Council*,¹³⁸ discussed in section 2.2 above would be instructive as to how comparisons on the age ground will be determined.

b) What test must be satisfied to justify indirect discrimination? What are the legitimate aims that can be accepted by courts? Do the legitimate aims as accepted by courts have the same value as the general principle of equality, from a human rights perspective as prescribed in domestic law? What is considered as an appropriate and necessary measure to pursue a legitimate aim?

The test to justify indirect discrimination is that the discriminatory provision must be objectively ‘justified by a legitimate aim and the means of achieving the aim are appropriate and necessary.’¹³⁹

¹³⁰ http://ec.europa.eu/employment_social/fundamental_rights/pdf/legisln/2000_43_en.pdf

¹³¹ http://ec.europa.eu/employment_social/fundamental_rights/pdf/legisln/2000_43_en.pdf

¹³² Section 22 refers to gender but section 31 extends its provisions to other protected grounds

¹³³ Section 22 (1)(b) Employment Equality Act 1998-2007.

¹³⁴ Section 22(1A) Employment Equality Act 1998-2007

¹³⁵ Section 3(1)(c) Equal Status Act 2000-2004

¹³⁶ *Perry v. Garda Commissioner*, DEC-E2001-029

¹³⁷ *Superquinn v. Freeman*, DEE0211, November 2002.

¹³⁸ *Reynolds v. Limerick County Council*, DEC-E2003-032

¹³⁹ Section 19 (4) b) Employment Equality Act 1998-2007



c) *Is this compatible with the Directives?*

The test is compatible with the Directives. It has not been litigated as yet. The only cases on indirect discrimination to date have been decided under the pre-directives employment equality and equal status legislation, which applied different tests.¹⁴⁰

d) *In relation to age discrimination, does the law specify how a comparison is to be made?*

The legislation does not specify how a comparison is to be made, but guidance can be gleaned from two cases decided under the pre-amended provisions. In *Martin v. Concern*,¹⁴¹ the claimant alleged both gender and age discrimination. There were 148 applications for the job, 13 of whom were interviewed. To determine the comparator group the Equality Officer referred to those that were short-listed for the position and those that were not. The group of 148 people were considered by the reference to age groups, that is how many were aged between 20-29, how many between 30-39, how many between 40-49 and how many were over 50. In *O'Connor v. Lidl Ireland*,¹⁴² the claimant alleged indirect age discrimination. The claimant had responded to an advertisement for the position of District Manager. The advertisement stated that the ideal candidate should be a graduate with 2 – 3 years experience. The complainant had 31 years experience but was not called for interview. The Equality Officer in this case sought to rely on the applications for the job in question and make the relevant comparisons and rely on the relevant statistics from the case in question. That information had been destroyed. As a result the Equality Officer sought the same information for a different time period with a view to reviewing the general if not the specific practice of the company. The Equality Officer when reviewing the statistics that were available referred to the comparison between those called for interview that were under 40 and those that were over 40 and over 50.

e) *Have differences in treatment based on language been perceived as indirect discrimination on the grounds of racial or ethnic origin?*

Differences in treatment based on language have not been perceived as indirect discrimination as such, but cases have shown that in order to avoid a finding of discrimination, employers must take into account the fact that many non-national workers encounter special difficulties in employment arising inter alia from differences of language and culture, and have a positive duty to ensure that all workers fully understand their situation at work. Special measures may be necessary and non-national workers may need to be given appropriate facilitates and guidance in certain circumstances.¹⁴³

¹⁴⁰ A recent gender case was *Health Service Executive and 27 named complainants*, Labour Court No.EDA0720 in 2007 – this case was eventually decided on the basis of whether the work was of equal value, but the employer admitted that different collective bargaining processes leading to a difference in pay would not be a valid justification in indirect discrimination in a gender case.

¹⁴¹ DEC-E2005/029, this decision was overturned in the Labour Court, EDA0518 but not on this point.

¹⁴² DEC-E2005/012, also see *Gillen* Labour Court EDA 041, above para 0.3

¹⁴³ Labour Court, EDA0812/2008 *Ice Group Business Services Ltd -and - Borzena Czerski* (the case was successfully appealed but the point stands). Also DEC-E2008-020 *58 Named Complainants -v- A Company*.where compensation was awarded for discriminatory dismissal and better information for non-national workers was ordered.



There are very low numbers of foreign employees in the Irish public service, suggesting the possibility of indirect discrimination against candidates on grounds of different language and culture. There is a further complication in that the two official languages of the Irish State are English and Irish. The Employment Equality Act 1998-2007 provides at section 36 that it is permissible to impose requirements in relation to proficiency in the Irish language for public service jobs. The positions that can impose those requirements are officer holders in the service of the State, including the Garda Síochána, the Defence Forces, civil servants, teachers, officers of local authorities, harbour authorities, health boards or vocational education committees.

In relation to access to goods and services, Irish Sign Language (ISL) is the first language of the Deaf community and used in everyday life with their families.

However, the Irish Government has rejected all efforts to have it recognised formally. As a result ISL is not included in the Irish education curriculum and official government documentation is rarely distributed in ISL.

2.3.1 Statistical Evidence

- a) *Does national law permit the use of statistical evidence to establish indirect discrimination? If so, what are the conditions for it to be admissible in court.*

Statistics may be used to establish indirect discrimination¹⁴⁴ and are admissible in court.

- b) *Is the use of such evidence widespread? Is there any reluctance to use statistical data as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law?*

It is not widespread but there is no reluctance to use statistical data.

- c) *Please illustrate the most important case law in this area.*

In *Toner v Department of Communications, Marine and Natural Resources*¹⁴⁵ the complainant alleged that she had been discriminated against on the ground of age when she was unsuccessful in a promotional competition. Her claim was unsuccessful. Age profiles of successful and unsuccessful candidates were carefully studied. At para 4.12 the Equality Officer stated "It will be seen that, statistically, the changes of promotion decline as the candidate ages, until the age group 51 to 55 years is reached, when it improves dramatically. Given the exceedingly small numbers of candidates in the older age groups, I am unable to attach statistical significance to the data. In all of the circumstances of this case, I find that the complainant has failed to establish a prima facie case of discrimination." An earlier paragraph (para 4.10) is instructive: "It appears to me that finding the simple failure of any particular age group to be successful in any particular competition to automatically demonstrate discrimination would have the effect of imposing unnecessary difficulties on interview boards.

¹⁴⁴ Employment Equality Acts 1998 and 2007, Sections 19(4)(c) and 22(1A),

¹⁴⁵ DEC-E2007-056 <http://www.equalitytribunal.ie/index.asp?locID=120&docID=1641>



The result may be that boards would feel constrained to match the percentage of successful candidates of any particular age group with the percentage of applicants in that age group. While the Acts provide at section 33 that positive action may be permitted in certain circumstances, this is clearly not what was intended."

d) *Are there national rules which permit data collection? Please answer in respect to all 5 grounds. The aim of this question is whether or not data collection is allowed for the purposes of litigation and positive action measures. Specifically, are statistical data used to design positive action measures? How are these data collected/ generated?*

National law does permit the use of statistical evidence to establish indirect discrimination in respect of all five grounds.¹⁴⁶ Where statistical evidence is available its use is common, both in equality litigation and designing positive action measures. There are no clear rules on how statistics should be collected. In litigation, the Equality Officers tend to rely on statistics put forward by the litigant; in a specific case.¹⁴⁷ Where none were available in a particular case, reliance was placed on an employer's statistics.¹⁴⁸ In *Sweeney v. Saehan Media*¹⁴⁹, concerning discrimination on the basis of membership of the Traveller Community, the complainant sought to rely on Government statistics, from the Census and the Central Statistics Office to highlight the fact that members of the Traveller Community were seven times less likely to achieve the Leaving Certificate when compared with the settled community. The Equality Officer stated that it is for the complainant to show, in the first instance that the requirement (in this instance the Leaving Certificate) operated to the disadvantage of one person over another and that in practice can be complied with by a substantially smaller number of people who are members of the Traveller community than those who are not.

The Equality Officer noted that the complainant had submitted data from a number of sources,¹⁵⁰ and stated 'I note that there is a serious lack of data on Travellers and their lifestyle in general and that the complainant has sought to use a range of research from a number of sources which, when combined, yields the aforementioned results. In light of the absence of any clearer data I am inclined to accept the scenario set out by the complainant represents as accurate a picture of the situation as is possible in the circumstances.'¹⁵¹ The Equality Officer did not find for the complainant because she could show that the employer had in fact interviewed a number of people, including the complainant, who did not have the Leaving Certificate, and in fact hired people who had not attained that educational standard, therefore the complainant could not show that the requirement operated to their disadvantage.

¹⁴⁶ Section 19(4)(c) and 22(1A) Employment Equality Act 1998-2007. See particularly *Department of Health and Children v Gillen*, EDA041.

¹⁴⁷ *Martin v. Concern*, DEC-E2005/029,

¹⁴⁸ *O'Connor v. Lidl Ireland* DEC-E2005/012, the Equality Officer did express her concern in relation to the value of such statistics.

¹⁴⁹ DEC-E2003/017.

¹⁵⁰ The complainant relied on information from a variety of sources to establish a statistical difference in treatment, they included: Traveller Health and National Strategy 2002-2005, CSO, Department of Education.

¹⁵¹ Para 6.15, DEC-E2003/017.

The Equality Officer did suggest that the company review their job specifications for each post, and stated: ‘it might also take steps to ensure that newspaper advertisements do not contain references to educational requirements that a category of individuals covered by the Act is substantially less likely to have attained, unless that level of education can be objectively justified or reasonable in the circumstances, as the case requires.’¹⁵² The Equality Tribunal reviewed this section of the legislation in *Noonan v. Accountancy Connections*,¹⁵³ see section 0.3 above where it is discussed in detail.

The Data Protection Act 1988-2003 permits employers, education providers, health authorities and other public bodies to keep records of their workforce in respect of their ethnic or racial origin, disability, religion or belief or sexual orientation of their workers. Data relating to these grounds would be classified as sensitive data, and certain criteria apply in the processing of this form of personal data.¹⁵⁴ The primary purpose of amending the Data Protection Act of 1988 by means of the Data Protection (amendment) Act 2003 was to give effect to the Provisions of Directive 95/46/EC of the European Parliament and of the Council. Therefore European provisions clearly influence the content of the Data Protection Laws. On a national level, there is a periodic census of population whereby data is gathered every five years. The last census took place in 2006.¹⁵⁵ It collected data in respect of nationality, religion, age, marital status and ethnic origin, including membership of the Irish Traveller Community. A question on disability was included with a new wording,¹⁵⁶ There were no questions on the issue of sexual orientation.¹⁵⁷ These questions require the individual to self-identify their characteristics.¹⁵⁸

2.4 Harassment (Article 2(3))

- a) *How is harassment defined in national law? Include reference to criminal offences of harassment insofar as these could be used to tackle discrimination falling within the scope of the Directives.*

The Employment Equality Act 1998-2007 prohibits harassment by means of section 14A. The legislative provision states that harassment can occur at the place of employment or otherwise in the course of employment. The provision prohibits harassment by an employer, a colleague, a client, customer or other business contact of the employer.¹⁵⁹ The employer may be held vicariously liable for the harassment of the victim, if the harassment is by a person other than the employer.¹⁶⁰ There is a statutory defence for the employer and that is that he or she took such steps as are reasonably practicable to prevent the harassment in question, or the person being treated differently as a result of harassment.

¹⁵² Para 6.17, DEC-E2003/017.

¹⁵³ DEC-E2004-042

¹⁵⁴ Section 2(b) Data Protection Act 1988-2003.

¹⁵⁵ The 2002 census was held a year later than scheduled due to the Foot and Mouth Crisis.

¹⁵⁶ The new wording contains an expands definition of disability, although it is not the same as that contained within the Equality Acts.

¹⁵⁷ This reflects the case law under the Irish Equality Acts to date, sexual orientation is one of the least litigated grounds under the Acts, whereas membership of the Traveller community, Disability, Age and the other grounds are freely litigated.

¹⁵⁸ The legislation currently governing the work of the Central Statistics Office is the Statistics Act of 1993; there is nothing in this Act to suggest that it is or is not guided by developments in other jurisdictions.

¹⁵⁹ Section 14A(1)(a) Employment Equality Act 1998-2007.

¹⁶⁰ Section 15 Employment Equality Act 1998-2007

In a recent case the Equality Officer awarded an employee a total of nearly €50,000 for harassment, victimisation and discriminatory dismissal on grounds of sexual orientation¹⁶¹. Harassment is defined as ‘any unwanted conduct’ relating to a discriminatory ground, ‘being conduct which has the purpose or effect of violating a person’s dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person.’¹⁶² This conduct can include acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material.’¹⁶³

The Equal Status Act 2000-2004 also prohibits harassment by means of section 11. The legislative provision relates to the provision of goods and services, including the provision of accommodation and education.¹⁶⁴ The person responsible for the provision of education, goods, services or accommodation may be vicariously responsible for the harassment by another person in the provision of such service.¹⁶⁵ There is a statutory defence available for such a person, which is that he or she took such steps as are reasonably practicable to prevent harassment.¹⁶⁶ Harassment is defined as ‘unwanted conduct’ relating to any discriminatory grounds and that conduct has the purpose or effect of violating a person’s dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person.’¹⁶⁷ This conduct can include acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material.’¹⁶⁸

The Prohibition on the Incitement to Hatred Act, 1989 was introduced to prohibit hate speech on the basis of a persons’ race, religion, nationality or sexual orientation. Hatred is defined in the Act as hatred against a group on account of their race, colour, nationality, religion, ethnic or national origins, membership of the Traveller community or sexual orientation. This legislation creates a criminal offence incitement to hatred, that involves publishing, distributing, displaying material or behaviour that is threatening, abusive or insulting and is intended or is likely to stir up hatred. The difficulty with this provision relates to the fact that it requires an intention to stir hatred. This has proven to be an exceptionally difficult evidential barrier to overcome.

b) Is harassment prohibited as a form of discrimination?

Harassment constitutes discrimination within the terms of the Employment Equality Act¹⁶⁹. In two recent cases, claims of discriminatory dismissal on grounds of race were not upheld but sums were awarded for racial harassment (*Paskauskas*¹⁷⁰ and *Odion*¹⁷¹), €7000 and €7500 respectively).

Harassment is not defined as discrimination within the terms of the Equal Status Act 2000-2004.

¹⁶¹ Equality Tribunal, DEC-E2008-048, *A Construction Worker v A Construction company*

¹⁶² Section 14A(7)(a) Employment Equality Act 1998-2007

¹⁶³ Section 14A(7)(b) Employment Equality Act 1998-2007

¹⁶⁴ Section 11(1)(a)-(c) Equal Status Act 2000-2004

¹⁶⁵ Section 42 Equal Status Act 2000-2004

¹⁶⁶ Section 11 (3) Equal Status Act 2000-2004

¹⁶⁷ Section 11 (5)(a) Equal Status Act 2000-2004

¹⁶⁸ Section 11 (5)(b) Equal Status Act 2000-2004

¹⁶⁹ Section 14A Employment Equality Act 1998-2007

¹⁷⁰ DEC 2007-062

¹⁷¹ DEC2000-018



- c) *Are there any additional sources on the concept of harassment (e.g. an official Code of Practice)?*

A Code of Practice was also developed; this is the Employment Equality Act, 1998 (Code of Practice) (Harassment) Order, 2002 (S.I. no. 78 of 2002).

2.5 Instructions to discriminate (Article 2(4))

Does national law (including case-law) prohibit instructions to discriminate?

If yes, does it contain any specific provisions regarding the liability of legal persons for such actions?

Section 14 of the Employment Equality Act, 1998-2007 prohibits what is termed the procuring of discrimination or victimisation. The provision criminalises the conduct of anyone who ‘procures or attempts to procure’ another person to discriminate or victimise within the terms of the provision. Section 2(a) of the Employment Equality Act, 1998-2007 states that “‘discrimination’ includes the issue of an instruction to discriminate and, in Parts V and VI, includes prohibited conduct within the meaning of the Equal Status Act 2000, and cognate words shall be construed accordingly.’ This implies that an instruction to discriminate is also prohibited under the terms of the Equal Status Act, i.e., beyond the employment field, although the Act itself contains no specific provision on this point. The Equal Status Act, 2000-2004 prohibits the procurement of another person to engage in prohibited discriminatory conduct under the Act. This is a criminal offence.¹⁷²

2.6 Reasonable accommodation duties (Article 2(2)(b)(ii) and Article 5 Directive 2000/78)

- a) *How does national law implement the duty to provide reasonable accommodation for people with disabilities? In particular, specify when the duty applies, the criteria for assessing the extent of the duty and any definition of ‘reasonable’. e.g. does national law define what would be a "disproportionate burden" for employers or is the availability of financial assistance from the State taken into account in assessing whether there is a disproportionate burden? Please also specify if the definition of a disability for the purposes of claiming a reasonable accommodation is the same as for claiming protection from non-discrimination in general, i.e. is the personal scope of the national law different (more limited) in the context of reasonable accommodation than it is with regard to other elements of disability non-discrimination law.*

Both the Employment Equality Act 1998-2007 and the Equal Status Act 2000-2004 impose the obligation to provide reasonable accommodation.

¹⁷² Section 13 Equal Status Act 2000-2004

In 1996 the Irish Supreme Court held that the requirement to provide reasonable accommodation as set out in the Employment Equality Bill 1996 and the Equal Status Bill 1996 was unconstitutional.¹⁷³

As a consequence, when the original Employment Equality Act 1998 and the Equal Status Act 2000 were finally introduced the legislature had little choice but to introduce a more restrictive provision on reasonable accommodation (accommodation only required if it would not amount to more than a nominal cost).¹⁷⁴ The introduction of the Framework Employment Directive allowed the Irish legislature to overcome the restrictive Supreme Court decision and amend section 16 of the Employment Equality Act 1998 by means of the Equality Act 2004, to introduce the test of disproportionate burden. The definition of reasonable accommodation provided within the Equal Status Act 2000 (must not amount to more than a nominal cost) remains unchanged, as the Framework Employment Directive does not relate to the provision of goods and services.

The position now with regard to reasonable accommodation in employment equality legislation is that where a person who has a disability can perform the duties of the post with or without the assistance of ‘appropriate measures’ they will be deemed competent under the Act. The employer has an obligation to take ‘appropriate measures’ to enable a person with a disability to have access to employment, to participate or advance in employment, to undergo training unless such measures would impose a ‘disproportionate burden’¹⁷⁵ on the employer. To determine what amounts to a disproportionate burden, the legislation specifies that, account must be taken of the costs of the measure in question, the scale and financial resources of the employer in question, the possibility of obtaining public funding or other assistance.¹⁷⁶

*A Hotel and A Worker*¹⁷⁷ involved an appeal by the respondent hotel against an Equality Officer finding that it had discriminated against and dismissed the complainant on grounds of disability. The Equality Officer awarded €15,000 for the effects of this discrimination. The complainant, who suffered from mild osteoarthritis of the left knee, worked as a Sales Executive for only three days for the respondent before her employment ended.

¹⁷³ The core definition of reasonable accommodation provision under the 1996 Bills was contained in Section 16(3) which stated: “subject to Section 35(4) an employer shall do all that is reasonable to accommodate the person’s needs, in particular, by allowing or, as the case may require, making provision for, such treatment or facilities, or by providing such treatment or facilities.” This obligation was bounded by section 35(4) which stated: “Section 35(4) Nothing in this Part or Part II applies to discrimination against a person on the disability ground if; (a) that person needs treatment or facilities in order satisfactorily to take part in a selection process or to undertake that employment, and (b) the employer does all that is reasonable to accommodate the needs of that person.” The defence contained in the act was that the obligation should not give rise to an ‘undue hardship.’

¹⁷⁴ Section 16 Employment Equality Act, 1998 and Section 4 Equal Status Act 2000. The core section of the Employment Equality Act 1998, was contained in section 16(3) which stated: “(a) For the purposes of this Act, a person who has a disability shall not be regarded as other than fully competent to undertake, and fully capable of undertaking, any duties if, with the assistance of special treatment or facilities, such person would be fully competent to undertake, and fully capable of undertaking, those duties. (b) An employer shall do all that is reasonable to accommodate the needs of a person who has a disability by providing special treatment or facilities to which paragraph (a) relates. (c) A refusal or failure to provide for special treatment or facilities to which paragraph (a) relates shall not be deemed reasonable unless such provision would give rise to a cost, other than a nominal cost, to the employer.” The limiting factor in this provision was that the obligation should not give rise to more than a ‘nominal cost.’

¹⁷⁵ Section 16 (3)(b) Employment Equality Act 1998-2007.

¹⁷⁶ Section 16 (3)(c)(i),(ii) and (iii) Employment Equality Act 1998-2007.

¹⁷⁷ Labour Court 2007, Determination No.EDA072.

The hotel argued that installing a lift to her office would have imposed a disproportionate financial burden upon it. In addition, it did not have an alternative office available. The complainant said that office accommodation with lift access elsewhere in the hotel could have been made available and that the hotel did not wish to explore the options. The Court ultimately found that the complainant's disability was more than a trivial influence in the ending of her employment and that had special facilities been made available, she would have been capable of doing the job. However, there was no evidence that management made appropriate enquiries as to what measures might be taken to continue her employment. The Court reduced the award of €15,000 to €10,000 as there was evidence that the complainant at the time of the hearing was working in another first floor office with no lift access. Nonetheless, this case is a salutary reminder to employers that the obligation to provide reasonable accommodation to persons with a disability must involve a real attempt to find a viable solution with a thorough assessment of available options.

In *McCrory Scaffolding (N.I.) –and- A Worker*,¹⁷⁸ the Complainant was a scaffolder who was summarily and arbitrarily dismissed after two unexplained seizures while at work and without waiting for any explanation. The Court found that the company had discriminated against him because of his disability. It pointed out that Subsection (3) imposes a clear duty on the employer to make enquiries as to whether, with special treatment and facilities, an employee suffering from a disability can continue in his employment. The Respondent had made no attempt to make any kind of reasonable accommodation as required by Section 16(3) of the Act for the Complainant's problem or to offer him any suitable alternative work. It awarded the Complainant €13,600, to include €600 for economic loss and €10,000 compensation for the effects of the discrimination.

In *The Alzheimer Society – and – A Worker*¹⁷⁹, the Complainant had been on sick leave suffering from a depressive illness and was advised on medical grounds to return to work initially on a part-time basis. The employer refused to provide reasonable accommodation for her to return to her position as a nurse-manager on this basis. The Labour Court found that there had been discrimination on grounds of disability without provision of reasonable accommodation and ordered that the complainant be re-employed as a nurse manager on the terms and conditions of her contract without loss of service from such date as she was medically certified to return to work. The Court awarded compensation of €35,000.

Both the Equality Tribunal and the Labour Court interpreted the provision contained in the Employment Equality Act 1998. Some of those cases, although based on the older law, are instructive. The Labour Court in *A Worker v. An Employer*¹⁸⁰ in 2005 said of reasonable accommodation that the 'proscription of discrimination on the grounds of disability is not absolute. If a person is, by reason of a disability, unable to fully undertake the duties of a position they may, in accordance with section 16(1) of the Act, be lawfully refused employment or promotion into that position. The applicability of that qualification is itself restricted by the provision of Section 16(3) of the Act.' The Labour Court went on to state that Section 16 of the Act imposes a duty on employers to accommodate the needs of an employee with a disability. This provision means that special treatment or facilities are not an end in itself, but a means to an end.

¹⁷⁸ Labour Court, 2005, DETERMINATION NO. EED055

¹⁷⁹ Labour Court, 2007 Determination No. EDA075

¹⁸⁰ 16 [2005] ELR 159



The end is achieved when the person with a disability is placed in a position where they can have access to, or as the case may be, participate in or advance in employment.

The effect of an employer's failure to fulfil the duty imposed by Section 16(3)(b) of the Act is to negate any defence they might otherwise have under Section 16(1) in a claim of discrimination on the disability ground.

The Labour Court and Tribunal clearly provided that the duty to provide special treatment or facilities is proactive in nature. It includes an obligation to carry out a full assessment of the needs of the person with a disability and of the measures necessary to accommodate that person's disability. The fullest explanation of the duty to provide reasonable accommodation under the 1998 Act was set out by the Labour Court in *A Health and Fitness Club v. A Worker*.¹⁸¹ The Labour Court held that the burden was on the employer to ensure that an employee is not fully capable of performing the duties for which they are employed by making 'adequate enquiries so as to establish fully the factual position in relation to the employee's capacity.' The Labour Court held that 'in practical terms this will normally require a two-stage enquiry, which looks firstly at the factual position concerning the employee's capability including the degree of impairment arising from the disability and its likely duration. This would involve looking at the medical evidence available to the employer either from the employee's doctors or obtained independently. Secondly, if it is apparent that the employee is not fully capable, Section 16(3) of the Act requires the employer to consider what if any special treatment or facilities may be available by which the employee can become fully capable. ... Finally, such an enquiry could only be regarded as adequate if the employee concerned is allowed a full opportunity to participate at each level and is allowed to present relevant medical evidence and submissions.'

The Employment Equality Act 1998 held that there was a requirement to provide reasonable accommodation as long as it did not give rise to more than a nominal cost. In *An Employee v. A Local Authority*,¹⁸² the Equality Officer had to determine the meaning of 'nominal cost' and gave an expansive interpretation of the term. The decision reached by the Equality Officer held that the reasonable accommodation did not give rise to more than a 'nominal cost.' In reaching that decision he considered the size and resources of the employer, whether it was public or private sector employment and also noted the availability of state financial aid available under the Employment Support Scheme. Based on these criteria the Equality Officer held that the 'nominal cost' threshold had not been reached.

The Employment Equality Act 1998-2007 defines an appropriate measure as an effective and practical measure that is needed in a specific case to adapt a place of business, provide equipment, alter patterns of working, training, distribution of tasks or the integration of resources. An appropriate measure does not include 'any treatment, facility or thing that the person might ordinarily or reasonably provide for himself or herself.'¹⁸³ The Employment Equality Act 1998-2007 does not distinguish between the major or essential functions and the marginal or ancillary functions of a job.

¹⁸¹ Labour Court 2003, EED037

¹⁸² DEC-E2002-004, this case was not referring to the concept of 'disproportionate burden' but the limiting concept of 'nominal cost' contained in the Employment Equality Act 1998, prior to amendment in 2004.

¹⁸³ Section 16 (4)(c) Employment Equality Act 1998-2007.

A person is qualified for a position where they are in a position to undertake ‘any duties’ of the job. It is questionable whether this element of the definition of reasonable accommodation is in compliance with the Directive.¹⁸⁴ While neither the amended version of reasonable accommodation, nor the older version of reasonable accommodation distinguished between ‘essential functions’ and ancillary functions the Labour Court have made that distinction. In *A Computer Component Company v. A Worker*,¹⁸⁵ the Labour Court held that the operation of some machinery was a minor part of the production system and as such it appeared to the court that arrangements could have been put in place to ensure that she would not be required to operate it. This effectively endorses the view of it being the essential functions of the job as opposed to the ancillary functions that are relevant. The new section 16 does not refer to the term essential functions, which is a phrase used in paragraph 17 of the preamble of the Framework Directive. Compliance with the Directive is dependent on future interpretation by the courts. However, the interpretation here suggests that the courts will incorporate the concept of ‘essential functions’ into the obligation to reasonably accommodate.

The definition of disability for purposes of reasonable accommodation has the same scope as under the general prohibition of discrimination on grounds of disability.

- b) *Does national law provide for a duty to provide a reasonable accommodation for people with disabilities in areas outside employment? Does the definition of “disproportionate burden” in this context, as contained in legislation and developed in case law, differ in any way from the definition used with regard to employment?*

The Equal Status Act 2000-2004 specifies that the failure to provide reasonable accommodation is a form of discrimination, in contrast to the Employment Equality Act 1998-2004. In the Equal Status Act reasonable accommodation is defined as the provision of a special treatment or facility, where without such special treatment or facility it would be impossible or unduly difficult for the person to avail of the service. A refusal to provide such a treatment or facility will not amount to discrimination where it gives rise to more than a nominal cost. In *Roche v. Alabaster Associates Limited t/a Madigans*,¹⁸⁶ it was held that refusing access to a premises to a person accompanied by a guide dog amounted to discrimination for a failure to provide reasonable accommodation. In *Forrestal v. Hearn's Hotel, Clonmel*,¹⁸⁷ it was held to be discrimination not to allow a wheelchair user access to a nightclub. In *Six Complainants v. a Public House*,¹⁸⁸ only one of the six complainants was disabled, the other five complainants claimed discrimination by association. The six complainants were successful in raising a case of *prima facie* discrimination arguing and that the respondent failed to reasonably accommodate all six complainants. Another noteworthy case is that of *Hennessy v. Dublin Bus*,¹⁸⁹ here the complainant alleged direct discrimination, victimisation and a failure to provide reasonable accommodation.¹⁹⁰

¹⁸⁴ www.ihrc.ie Irish Human Rights Commission, ‘Observations on the Equality Bill 2004’

¹⁸⁵ ED/00/8

¹⁸⁶ DEC-S2002-086

¹⁸⁷ DEC-S2001-018

¹⁸⁸ DEC-S2004-009-014

¹⁸⁹ DEC-S2003 – 046.

¹⁹⁰ The complainant successfully raised a *prima facie* case of direct discrimination: the Equality Officer held that there were specific statutory considerations under section 17(1) of the Equal Status Act which established that there was no general requirement that public buses should be accessible. He therefore failed to establish direct discrimination.

On the reasonable accommodation element, he claimed that the bus service failed to reasonably accommodate him by ensuring that a functioning accessible bus was provided on the route.¹⁹¹ The limiting factor within the reasonable accommodation provisions are that the accommodation in question does not give rise to more than a 'nominal cost;' or that the refusal of such treatment does not constitute discrimination, if that failure is by virtue of another requirement of the Equal Status Act.

The Equality Officer held that the failure to provide reasonable accommodation did not amount to discrimination in this context, as there was 'no statutory/legal requirement that the buses be wheelchair accessible.'¹⁹² The Equality Officer went on to hold that the issue of road passenger services is regarded as something that requires separate and specific treatment under the Act. The Equality Officer also reviewed the 'nominal cost' threshold, and held that the making of public buses accessible gave rise to more than a nominal cost. It was shown in the case in question that each wheelchair accessible bus cost in the region of €150,000 and that this could not be regarded as nominal.

In *McMahon and five others v. McGowan's Pub*¹⁹³ the complainant alleged that he was directly discriminated against and that there had been a failure to reasonably accommodate him. The complainant has an intellectual disability which can affect his balance, speech and communication. He went with five members of his family to the respondent's premises to celebrate his mother's 50th birthday. The doorman refused the complainant having determined that he was under the influence of alcohol and refused the entire group access because of this. The complainant was upset and distressed as he believed he spoiled a family night out, equally the family were upset at the embarrassment caused to him and the effect this even had on his self-confidence. The Tribunal accepted that he raised a prima facie case of direct discrimination and found that the complainant had been discriminated against on the grounds of his disability and the remainder of the family had been discriminated against based on their association with the complainant. The Tribunal further found that the service provider had failed to provide a reasonable accommodation. The accommodation required by the Tribunal was that a licensed premises should be aware of the possibility for reasons other than drunkenness that may affect a person's demeanour. The Tribunal held that the complainant group were refused admission to the premises without the provision of the normal accommodation afforded to patrons, which was for the doorman to engage in conversation with the patrons to ascertain whether they were intoxicated, he did not do so with the complainant. Had the doorman engaged the complainant in such a conversation it would have been apparent that he was not in fact intoxicated. This decision was appealed to the Circuit Court, the respondent sought to have this case heard in private but was not successful. Judge Delahunt of the Circuit Court¹⁹⁴ held that the appellant had acted in good faith and was not guilty of discrimination.

¹⁹¹ Evidence produced showed that the bus did have a ramp, but the ramp was not working that day, and when the bus driver manually opened the ramp the complainant refused to get on the bus. Evidence was also produced about the abuse the bus driver was subjected to in the context of this case.

¹⁹² See also Equality Tribunal, Annual Review, 2003.

¹⁹³ DEC-S2004-009/014, appealed to the Circuit Court a discussion of the Circuit Court decision is available in the Equality Authorities, Annual Review 2005.

¹⁹⁴ June 23, 2005 report available in the Equality Authority's Annual Review, 2005.



The Judge held that where a person seeks reasonable accommodation under the Equal Status Act 2000 he must first prove that the ‘service provider had actual or implied knowledge of the disability and disregarded such knowledge either intentionally or unintentionally in order to succeed in a claim.’¹⁹⁵

c) *Does failure to meet the duty of reasonable accommodation count as discrimination? Is there a justification defence? How does this relate to the prohibition of direct and indirect discrimination?*

The Employment Equality Act 1998 to 2007 does not state that a failure to meet the duty to reasonably accommodate amounts to discrimination; however, case law holds that a failure to provide reasonable accommodation amounted to discrimination.¹⁹⁶ The case law does not state whether it is a form of direct or indirect discrimination.

As regards justification, Section 16 (1) offers employers a defence in relation to disabilities when it states: “Nothing in this Act shall be construed as requiring any person to recruit or promote an individual to a position, to retain an individual in a position, or to provide training or experience to an individual in relation to a position, if the individual –

(a) will not undertake (or, as the case may be, continue to undertake) the duties attached to that position or will not accept (or, as the case may be, continue to accept) the conditions under which those duties are, or may be required to be performed, or

(b) is not (or, as the case may be, is no longer) fully competent and available to undertake, and fully capable of undertaking, the duties attached to that position, having regard to the conditions under which those duties are, or may be required to be, performed.”

However, section 16 (3) (a) of the Employment Equality Acts 1998 – 2007 tempers that defence: “For the purposes of this Act a person who has a disability is fully competent to undertake, and fully capable of undertaking, any duties if the person would be so fully competent and capable on reasonable accommodation (in this subsection referred to as “appropriate measures”) being provided by the person’s employer.” The Labour Court in *A Health and Fitness Club v A Worker* (EED037) set out an approach that should be taken in order that a respondent can rely on this defence “if it can be shown that the employer formed the bona fide belief that the complainant is not fully capable, within the meaning of the section, of performing the duties for which they are employed. However, before coming to that view the employer would normally be required to make adequate enquiries so as to establish fully the factual position in relation to the employee’s capacity.”

The nature and extent of the enquiries which an employer should make will depend on the circumstances of each case. At a minimum, however, an employer, should ensure that he or she is in full possession of all the material facts concerning the employee’s condition and that the employee is given fair notice that the question of his or her dismissal for incapacity is being considered. The employee must also be allowed an opportunity to influence the employer’s decision.

¹⁹⁵ Equality Authority, Annual Review, 2005.

¹⁹⁶ *A Complainant v. Bus Éireann* DEC E2003-04



In practical terms this will normally require a two-stage enquiry, which looks firstly at the factual position concerning the employee's capability including the degree of impairment arising from the disability and its likely duration. This would involve looking at the medical evidence available to the employer either from the employee's doctors or obtained independently.

Secondly, if it is apparent that the employee is not fully capable, Section 16(3) of the Act requires the employer to consider what if any special treatment or facilities may be available by which the employee can become fully capable. The Section requires that the cost of such special treatment or facilities must also be considered. Here, what constitutes nominal cost will depend on the size of the organisation and its financial resources.

Finally, such an enquiry could only be regarded as adequate if the employee concerned is allowed a full opportunity to participate at each level and is allowed to present relevant medical evidence and submissions.¹⁹⁷

There has been a notably high level of awards issued by both the Equality Tribunal and the Labour Court under the Employment Equality Acts in cases where a dismissal can be linked to discrimination on grounds of disability and failure to provide reasonable accommodation. An example of this is the case of *Vincent Kavanagh –v- Aviance*, Equality Authority E2007- where the employee was awarded €125,000

In a recent case the Labour Court found that the respondent had failed to provide reasonable accommodation in a job interview to compensate for the complainant's inability to work from paper in the interview process because of a visual impairment, and hence his disability was a factor in the respondent's decision not to appoint him to the position and allowed the complainant's appeal. The Court awarded the complainant €12,000 for the effects of the failure to provide reasonable accommodation at interview, to include the €4,000 already awarded by the Equality Officer¹⁹⁸.

In *A Government Department- And -A Worker*¹⁹⁹, the Labour Court held that requiring the Complainant to attend for interview at a time when he was physically incapable of so doing because of his disability constituted an act of discrimination contrary to section 8 of the Act and a failure to reasonably accommodate him by deferring the interview. It awarded him compensation of €20,000

In *A Worker -v- A Government Department*²⁰⁰, the complainant worked for a government department in a senior technical/professional role. In May 2006 he suffered an accident in which he fractured his spine. This resulted in a disablement which prevented the complainant from sitting uninterruptedly for more than an hour, and from undertaking long journeys by car.

¹⁹⁷ DEC-E2008-026 *An Employee -v- A Co-operative*.

¹⁹⁸ Labour Court 2007, EDA0714, *A Technology Company –and-A Worker*. See also *O'Keeffe -v- Walsh t/a By Pass Stores*, (DEC-E2007-033)

¹⁹⁹ Labour Court 2006, EDA0612

²⁰⁰ DEC-E2008-023



The Equality Tribunal found that the respondent did provide reasonable accommodation to the complainant with regard to his return to full-time work, but nevertheless failed in its statutory duty to assess the complainant's situation in a timely and pro-active manner, and to explore a full range of options, including teleworking, to accommodate the complainant's disability and facilitate his return to work in a timely manner. It awarded him €25,000.

The Equal Status Act 2000-2004 specifies that the failure to provide reasonable accommodation is a form of discrimination. In *A Complainant-v- A Local Authority*,²⁰¹ a mother claimed that a local authority had discriminated against her son, who suffered from a disability, by refusing her request to either (a) extend and adapt the present house or (b) move the family to more spacious accommodation. The *Complainant*, Ms. C., stated that the respondent discriminated against her son by:

- comparing his disability less favourably with other disabilities.
- failing to provide reasonable accommodation to her son in accordance with the terms of Section 4 of the Equal Status Acts 2000-2004.
- lack of transparency in the decision making process.
- the application of a general policy which does not allow the specific needs of applicants to be properly considered
- delay in the process, accompanied by lack of consultation, lack of knowledge of her son's disability, failure to properly investigate the needs of her son and his family and failure to provide alternative accommodation at an early stage.

The respondent indicated at the hearing that it had fundamentally misinterpreted the reasonable accommodation requirements of Section 4 of the Equal Status Acts to mean the provision of physical accommodation. The Equality Officer held while some confusion is entirely understandable in the context of the instant case, the requirement to provide reasonable accommodation has been clearly interpreted in numerous decisions of the Tribunal to mean the provision, by any service provider, of any/all reasonable treatment or facilities without which it would be unduly difficult or impossible for a disabled person to avail of the service in question. The Local Authority was liable for having had no system in place for assessing disability and reasonable accommodation. The Tribunal ordered the respondent to pay to the complainant the sum of €6,350 for the distress and hardship caused to her by the discrimination, the maximum amount which can be awarded under the Equal Status Acts 2000-2004. It said that if it were not constrained by this, and taking all of the evidence in this matter into consideration, it would have awarded a higher amount to the complainant.

In *Elizabeth Golden v Just Beds*, compensation was awarded to a customer in a furniture shop as there was no reasonable accommodation for a wheelchair-using customer in shopping in the store.²⁰²

d) *Has national law (including case law) implemented the duty to provide reasonable accommodation in respect of any of the other grounds (e.g. religion)?*

²⁰¹ Equality Authority DEC2007-049

²⁰² Equality Tribunal DEC 2007-064

Reasonable accommodation only applies explicitly in the context of people with disabilities, although caselaw has established in relation to some other grounds that the employer may be obliged to make special arrangements for employees, such as providing translated contracts for foreign nationals²⁰³. Legislation does not provide for reasonable accommodation in any other areas, and there have been no cases concerning religion on this point.

- e) *Does the national law clearly provide for the shift of the burden of proof, when claiming the right to reasonable accommodation?*

Yes. In *O'Keeffe -v- Walsh t/a By Pass Stores*,²⁰⁴ the complainant was found to have been dismissed by the respondent in circumstances amounting to discrimination on grounds of disability in February, 2005. The respondent had stated that her dismissal was lawful because of her poor performance, in particular her failure to carry out instructions when requested. The Equality Officer noted that the respondent was aware of the complainant's hearing impairment before she commenced employment with it and was satisfied that it did not adversely impact on her ability to perform her duties, as she wore hearing aids. He further noted that the complainant's hearing aids were away for repair for several days preceding her dismissal and she did not have a substitute set. He was satisfied therefore that any alleged failure on the complainant's part to carry out the respondent's instructions - the sole reason advanced by the respondent for her dismissal - could be attributed to the fact that she was unable to understand the person communicating with her unless they were positioned so that she could lip read. He was therefore satisfied, on balance, that the respondent was disposed to attributing any alleged rudeness by the complainant to customers to her hearing impairment and therefore her disability. He noted the Labour Court decision in *A Government Department v An Employee* which required that the respondent's decision to terminate the complainant's employment could not be influenced in any way whatsoever by her disability and that the respondent must produce cogent evidence to support its assertion that the dismissal was lawful. He held that the respondent had failed to discharge that burden and the complainant was entitled to succeed in her claim. He commented that the respondent had given no consideration whatsoever to providing the complainant with appropriate measures which might overcome the perceived difficulties it felt impeded her performing her job and it would not therefore, have been entitled to avail of the protection provided at section 16(3) of the Acts in that regard. He ordered the respondent to pay her €17,000 - €7,000 of which related of loss of earnings and the balance for the effects of the discrimination.

- f) *Does national law require services available to the public, buildings and infrastructure to be designed and built in a disability-accessible way? If so, could and has a failure to comply with such legislation be relied upon in a discrimination case based on the legislation transposing Directive 2000/78?*

The Equality legislation does not require buildings and infrastructure to be designed and built in a disability-accessible way. There are two relevant provisions dealing with access. First, Part M of the Building Regulations 1997 – 2005²⁰⁵ requires that as regards public buildings adequate provision shall be made to enable people with disabilities to safely and independently access and use a building.

²⁰³ Equality Tribunal DEC – E2006 – 050 *Five Complainants v Hannon's Poultry Export Ltd, Roscommon*, see above p 12

²⁰⁴ Equality Tribunal DEC-E2007-033

²⁰⁵ Available at Department of the Environment website www.environ.ie

If sanitary conveniences are provided in a building, adequate provision shall be made for people with disabilities. If a building contains fixed seating for audience or spectators, adequate provision shall be made for people with disabilities. As regards dwellings, or residential buildings, new dwellings come within Part M of the building regulations. The regulations address issue relating to the approach to new dwellings, circulations within new dwellings and sanitary provision within new dwellings. ‘People with disabilities’ are defined as people who have an impairment of hearing or sight or an impairment which limits their ability to walk, or which restricts them to a wheelchair. Part M applies to new buildings only it does not apply to works in connection with extensions to and the material alteration of existing dwellings.²⁰⁶ The primary responsibility for compliance rests with the designers, builders and owners. Building control authorities have powers to inspect design documents and buildings, and powers of enforcement and prosecution where breaches of the regulations occur.²⁰⁷ A public consultation was initiated in March 2006 on revising Part M of the Building Code.

The second provision that is applicable in this context is the Disability Act 2005,²⁰⁸ which at Part 3 requires access to buildings and services. The Act refers only to public buildings and public services. The Disability Act 2005 introduces a requirement to ensure that public buildings are made compliant with the relevant building regulations: Part M 1997-2005, by 2015. The commitments contained within the Act are enforced via a complaints mechanism set out in the Act and enforced by the Ombudsman. The Ombudsman charged with the enforcement of the Act has stated that the wording of the Act may not be robust enough to ensure public bodies take sufficient steps to improve access for disabled people to buildings and services.²⁰⁹

g) *Does national law contain a general duty to provide accessibility for people with disabilities by anticipation? If so, how is accessibility defined, in what fields (employment, social protection, goods and services, transport, housing, education, etc.) and who is covered by this obligation? On what grounds can a failure to provide accessibility be justified?*

Sections 26, 27 and 28 of the Disability Act 2005 place obligations on **public bodies** to make their services and information accessible to people with disabilities. A Code of Practice gives guidance to public bodies to meet those obligations. An individual with a disability can make a complaint about any failure by a public body to provide access as required by sections 26, 27 and 28 to an inquiry officer appointed by the body under section 39. If the complainant is not satisfied with the outcome of their complaint they can appeal to the Ombudsman as provided under section 40. The Act is designed to improve access to public services for persons with disabilities.

²⁰⁶ The Minister for the Environment, Heritage and Local Government has announced the commencement of a comprehensive review of Part M of the Building Regulations. A Public consultation period has commenced – <http://www.nda.ie/CntMgmtNew.nsf/0/A18D4DF727F1F8F5802570DF00438C45?OpenDocument>

²⁰⁷ Prosecutions are rare for more information, see [http://www.envirom.ie/DOEI/doeipub.nsf/0/17407b65c95d10d280256f0f003db979/\\$FILE/PL11%20Guide%20to%20Building%20Control%20SystemCOPY.pdf](http://www.envirom.ie/DOEI/doeipub.nsf/0/17407b65c95d10d280256f0f003db979/$FILE/PL11%20Guide%20to%20Building%20Control%20SystemCOPY.pdf)

²⁰⁸ <http://www.oireachtas.ie/ViewDoc.asp?DocId=-1&CatID=87&m=1>

²⁰⁹ ‘O’Reilly warns of Flaws in Disability Legislation’ *Irish Times*, 30 November 2005.



The term “disability” for the purposes of the Act means a substantial restriction in the capacity of the person to carry on a profession, business or occupation in the State or to participate in social or cultural life in the State by reason of an enduring physical, sensory, mental health or intellectual impairment.

The Code covers a wide range of services and facilities provided by public bodies that are available to the public generally or a particular section of the public. This includes: the use of any place or amenity owned, managed or controlled by a public body; the provision of information or an information resource or a scheme or an allowance or other benefit administered by a public body; any cultural or heritage services provided by such a body; and any service provided by a court or other tribunal. The Code applies to a wide range of public bodies, including Departments of State; the Office of the President; the Office of the Attorney General; the Office of the Comptroller and Auditor General; the Office of the Houses of the Oireachtas; a local authority; the Health Service Executive; bodies, other than the Defence Forces, such as the Broadcasting Commission of Ireland; the Central Statistics Office; the National Disability Authority; the Courts Service; the Legal Aid Board; the bus companies and the railways.

The Code gives guidance as to the kind of action “that is appropriate and can be delivered where practicable”., as well as examples of obstacles to accessibility for people with disabilities including, for example: communication, where presented in inaccessible formats; lack of awareness of the needs of people with disabilities; the physical environment e.g. design, layout, signage, lighting etc.; service design e.g. where systems, procedures and practices can present obstacles.

Information and services can be made accessible when they are provided in a manner that is consistent with the needs of those individuals for whom they are intended. The Code says that in general, this can be facilitated by adopting a proactive and consultative approach to information and service design and delivery.

In summary, it seems that the duty in Ireland is individualised and can not be said to be anticipatory in practice. It is only envisaged that action will be taken “that is appropriate and can be delivered where practicable”, which must be activated by the individual, and is so vague as to be unenforceable.

Building regulations require all new buildings including houses to be accessible, but all public buildings, public spaces and state services to be accessible only by year 2015 and only “where possible/ practicable”. The interaction between the disability and equality legislation here is not clear.

h) Please explain briefly the existing national legislation concerning people with disabilities (beyond the simple prohibition of discrimination). Does national law provide for special rights for people with disabilities?

The principal statute is the Disability Act 2005 which is part of a framework of Government legislative measures addressing disability and social inclusion.



Other essential elements in the Government legislative framework are:

- the Employment Equality Act 1998 to 2007
- the Equal Status Act 2000 and 2004
- the Education for Persons with Special Educational Needs Act 2004
- the Comhairle (Amendment) Bill 2004.

Main provisions in the Act

The Act establishes a basis for:

- an independent assessment of individual needs, a related service statement and
- independent redress and enforcement for persons with disabilities;
- access to public buildings, services and information;
- Sectoral Plans for six key Departments which will ensure that access for
- people with disabilities will become an integral part of service planning and
- provision
- an obligation on public bodies to be pro-active in employing people with
- disabilities
- restricting the use of information from genetic testing for employment,
- mortgage and insurance purposes
- a Centre for Excellence in Universal Design.

The Act is couched in the language of rights, but although it establishes the right to an individual assessment of needs and a statement of the services proposed for the disabled person, the service statement takes into account:

- the practicability of providing the service
- the financial resources available.

In practice the services provided will vary from individual to individual and between different areas of the country where financial resources have not been provided and facilities have not been put in place.

These are much weaker rights than those guaranteed under equality legislation.

2.7 Sheltered or semi-sheltered accommodation/employment

- a) *To what extent does national law make provision for sheltered or semi-sheltered accommodation/employment for workers with disabilities?*

Traditionally, sheltered or semi-sheltered services were part of general health provision, funded via the Department of Health, rather than part of the employment or welfare function of government. The Department of Health acted directly with voluntary agencies (direct funded) or through the Health Board. Generally the Health Board used voluntary organisations as service providers and all services were seen as part of the general health service delivery.



The Government began to rectify this anomaly when it transferred responsibility for vocational training and sheltered employment to the Department of Enterprise Trade and Employment (DETE). There are widespread calls for all sheltered work/employment to be transferred to the DETE but the decision taken was to transfer responsibility for vocational training and employment of people with disabilities to that department, with responsibility for rehabilitative training and sheltered work remaining with the Department of Health and Children.

b) Would such activities be considered to constitute employment under national law?

The definition of employment, employee, employer and vocational training all lend themselves to the contention that sheltered and semi-sheltered employment is regarded as employment under the Employment Equality Act 1998-2007. To that end a draft Code of Practice in respect of sheltered and semi-sheltered employment was drafted by the Equality Authority, which clearly sees such employment as coming within its ambit.

This draft Code of Practice requires the assent of the Minister for Justice, Equality and Law Reform to sign confirm it as a legal code, an action the Minister has chosen not to take. There has been no litigation in this area to date, but there have been a number of out of court settlements under the Equality legislation. The Irish Congress of Trade Unions (ICTU) has asked for an investigation under section 58 of the Equality Act into the current situation where people with an intellectual disability are doing real work, which is productive and profit-making, but are not being paid the minimum wage and do not have employment rights.²¹⁰ However, in view of very significant cuts to the Equality Authority's budget in 2008, it is dubious whether such an investigation will now take place.

²¹⁰<http://www.inclusionireland.ie/InclusionIrelandwelcomesICTUcallforInvestigationintoShelteredWorkshops.asp>



3. PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

3.1.1 EU and non-EU nationals (Recital 13 and Article 3(2) Directive 2000/43 and Recital 12 and Article 3(2) Directive 2000/78)

Are there residence or citizenship/nationality requirements for protection under the relevant national laws transposing the Directives?

There are two distinctions made on the basis of nationality in the Equal Status Act 2000-2004. The first relates to educational establishments in section 7 of that Act and a new subsection has been added by virtue of the Equality Act 2004. That subsection permits the Minister for Education and Science to differentiate between nationals, and members of the European Union and others in relation to the provision of educational grants.²¹¹ A further distinction is made in section 14 of the amended Equal Status Act 2000-2004 permitting distinctions based on nationality in relation to the enforcement of the Immigration Act, or in respect of other residency requirements. In these sections a non-national has the same meaning as that used in the Immigration Act of 1999. This exception comes within the provisions contained in the Racial Equality Directive.

The Employment Equality Act 1998-2007 provides at section 36 that it is permissible to impose requirements in relation to residence, citizenship and proficiency in the Irish language, for public service jobs. The positions that can impose those requirements are officer holders in the service of the State, including the Garda Síochána (police service), the Defence Forces, Civil Servants, Officers of local authorities, harbour authorities, health boards or vocational education committees. While it is permitted under Irish law to impose requirements in respect of residency, citizenship and proficiency in the Irish language, not all of the above mentioned positions impose such restrictions. An Garda Síochána recently removed the requirement for proficiency in the Irish language, instead requiring proficiency in two languages at least one of which is Irish or English. Equally An Garda Síochána allow applications from a number of nationalities: EU nationals; EEA nationals; Swiss confederation; refugees under the Refugee Act, 1996; or those with a period of one year's continuous legal residence in the State prior to an appointed date, and in the preceding eight years have a total legal residence that amount to four years (the asylum process does not count towards the qualifying five year period). The Public Service Management (Recruitment and Appointments) Act 2004²¹² is also relevant; it governs how appointments are made to the civil and public service. Section 24 of that Act refers to the requirements for appointment. Section 24(12) states that 'nothing in this section shall be read as affecting the application of the Employment Equality Act 1998 in circumstances where the Act applies.'

3.1.2 Natural persons and legal persons (Recital 16 Directive 2000/43)

Does national law distinguish between natural persons and legal persons, either for purposes of protection against discrimination or liability for discrimination?

²¹¹ Section 7(5)(b) Equal Status Act 2000-2004

²¹² <http://www.oireachtas.ie/documents/bills28/acts/2004/a3304.pdf> This Act governs how appointments are made to the civil and public service.

Section 8(1) of the Employment Equality Act 1998-2007 prohibits discrimination by employers and employment agencies. Most of the prohibitions contained within the legislation are aimed at the employer and no clear provision is made to enable actions against the person(s) who actually discriminated. There are a few exceptions to this provision; section 14 of the Act refers to liability being imposed on the person responsible for procuring or attempting to procure discrimination. Equally section 10 refers to liability being imposed on the person who displays discriminatory advertising.

The Equal Status Act 2000-2004 is much clearer on this point; it defines the term person at section 2(1) of that Act as including ‘an organisation, public body or other entity.’ The terms of this Act clearly prohibit discrimination by both natural persons and legal persons.

3.1.3 Scope of liability

What is the scope of liability for discrimination (including harassment and instruction to discriminate)? Specifically, can employers or (in the case of racial or ethnic origin) service-providers (e.g. landlords, schools, hospitals) be held liable for the actions of employees? Can they be held liable for actions of third parties (e.g. tenants, clients or customers)? Can the individual harasser or discriminator (e.g. co-worker or client) be held liable? Can trade unions or other trade/professional associations be held liable for actions of their members?

Both the Employment Equality Act 1998-2007²¹³ and the Equal Status Act 2000-2004²¹⁴ contain identical provisions on vicarious liability. These provisions set out that the employer/service provider is the addressee of the prohibition of discrimination. No distinctions are made on the basis of the size of the employer/service provider. Effectively these provisions ensure that the employer/service provider is liable for the actions of the employee and that the person with authority is liable for the actions of their agents for anything done in the course of employment. A statutory defence is available and that is that the employer/authority took such steps as were reasonably practicable to prevent the employee from doing that act. In practice this defence can be availed of where an employer has a work place policy on harassment/equality within the work place.

As well as the provisions on vicarious liability consideration must be given to the provisions on harassment.²¹⁵ Section 14A of the Employment Equality Act 1998-2004 prohibits harassment by the employer, it also provides that the employer may be responsible for harassment by fellow workers, clients, customers and others that a person may reasonably be expected to come into contact with. Again there is a statutory defence available to the employer and that is that they took such steps as were necessary to prevent the harassment in question. The Employment Equality Act 1998-2007 is silent on the issue of whether a trade union or other professional association may be held liable for the actions of their members. The provision does state that the reference to ‘other business contact’ in the provision refers to any person with whom the employer might reasonably expect the victim to come into contact in the workplace or otherwise in the course of his or her employment. Based on this provision it seems possible to infer a potential liability for the employer in respect of members of the trade union or professional associations.

²¹³ Section 15, Employment Equality Act 1998-2007

²¹⁴ Section 42, Equal Status Act 2000-2004

²¹⁵ See section 2.4 above.



The provisions in relation to harassment do make it clear that the term ‘employee’ does cover agency workers, and anyone seeking a service from an agency, as well as anyone in vocational training.

Equally it is clear that where the employer is a trade union or professional association then that union, or association may be liable for the actions of their employees.

Section 11 of the Equal Status Act 2000-2004 also prohibits harassment. The responsibility for harassment remains with what is deemed to be the ‘responsible person.’ This person may avoid liability if they can come within the statutory defence, which is that they took such steps as were necessary to prevent the harassment in question. As regards the individual harasser being held liable this position is not entirely clear under the Employment Equality Act 1998-2007.²¹⁶ The Equal Status Act 2000-2004 clearly provides that an individual may be liable for acts of discrimination or harassment.²¹⁷

3.2 Material Scope

3.2.1 Employment, self-employment and occupation

Does national legislation apply to all sectors of public and private employment and occupation, including contract work, self-employment, military service, holding statutory office?

The Employment Equality Act 1998-2007 does not distinguish between public and private sector employees, equally full-time, part-time and temporary employees are covered. Section 2(1) of that Act defines a ‘contract of employment’ and includes within its remit contract of service or apprenticeship, agency workers, and self-employed workers.²¹⁸ Section 13A of the Employment Equality Act 1998-2007 ensures that business partnerships come within the terms of the legislation. A second relevant definition is that of ‘employee’ which covers persons who have ‘entered into or works under ... a contract of employment’ and includes members of a regulatory body, but does not include the provision of personal services in a private home.²¹⁹ The term ‘personal service’ is further defined and means services ‘provided in a person’s home, includes but is not limited to services that are in the nature of services in *loco parentis* or involve caring for those residing in the home.’²²⁰ There is no equivalent exception within the terms of the Framework Directive or the Racial Equality Directive, and it is questionable whether this provision is in compliance.

The legislation specifies different rules in respect of some forms of employment and also includes a category of employees that are excluded from the ambit of the provisions.²²¹

²¹⁶ See section 3.1.2 above.

²¹⁷ Section 2(1) Equal Status Act 2000-2004

²¹⁸ The term self-employed is not used in the Act, and there is no case law on this issue. The Employment Equality Act 1998 was amended by the Equality Act 2004 to include the self-employed and it does so by means of the definition of a contract of employment, contained in section 2(1) which includes ‘any ... contract whereby – an individual agrees with another person personally to execute any work or service for that person.’

²¹⁹ Section 2(1) Employment Equality Act 1998-2007

²²⁰ Section 2(1) Employment Equality Act 1998-2007

²²¹ There are different rules in respect of religious organisations, organisations of certain religious values, emergency services, the Garda Síochána and the Defence Forces.

Section 37 of the Employment Equality Act 1998-2007 sets out rules in relation to organisations that promote certain religious values, and permission is given for more favourable treatment on the religion ground in certain circumstances and also to prevent the undermining of that religious ethos.²²² The legislation does apply to the Garda Síochána (police service), the prison services, and the emergency services, however, the employee must be fully competent and fully capable of undertaking ‘the range of functions that they may be called upon to perform so that the operational capacity of the Garda Síochána or the service concerned may be preserved.’ As Irish legislation does not mention the term ‘essential functions’ this provision implies that unless a person with a disability is fully competent (with or without a reasonable accommodation) to perform all the duties of the post, then the Garda Síochána are not obliged to hire that individual. There are also specific derogations from the prohibition on age discrimination within the Garda Síochána or other emergency service where the Minister is of the opinion that the age profile of that service is likely to adversely affect the service in question. The Minister may declare that the age ground shall not apply in relation to recruitment competitions for such services. The obligation not to discriminate on the grounds of age or disability does not apply to the Defence Forces.

In May 2008 an Assistant Commissioner of the Garda Síochána began a legal action in the High Court challenging the legality of Regulations issued by the Minister for Justice Equality and Law Reform requiring police officers to retire at age 60. He was assisted in the case by the Equality Authority. Judgment was pending at the cut-off date for this report.

In paragraphs 3.2.2 - 3.2.5, you should specify if each of the following areas is fully and expressly covered by national law for each of the grounds covered by the Directives.

3.2.2 Conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy (Article 3(1)(a)) Is the public sector dealt with differently to the private sector?

Section 8(1) Employment Equality Act 1998-2007 prohibits discrimination in relation to access to employment, conditions of employment, training or experience for or in relation to employment, promotion or re-grading or classification of posts. In short the Act applies to full-time, part-time and temporary employees, public and private sector employment, vocational training bodies, employment agencies, trade unions, professional and trade bodies, the self employed, partnerships and people employed in another person’s home.

Employee has been redefined to ensure that it is a broader definition, the new definition of employee contains one specific exception in respect of access to employment and that relates to a person employed in another person’s home to provide personal services.²²³ This limitation applies to access to employment, which impacts on those seeking employment as childcare workers, or other forms of domestic work. The exception has been widely criticised²²⁴ and is currently the subject of an infringement action.²²⁵

²²² Section 37(1) Employment Equality Act 1998-2007

²²³ Section 2(1) Employment Equality Act 1998-2007

²²⁴ E.g. by National Women’s Council of Ireland, <http://www.nwci.ie/content/download/417/1793/file/Concluding...>

²²⁵ This is one of the subjects of an infringement action against Ireland in which the Commission sent a Reasoned Opinion on 27 June 2007. Reasoned Opinions are the second stage in the infringement procedure leading, if not addressed in a satisfactory way, to a finding by the Court of Justice that a Member State has breached EU law.

A contract of employment includes a contract of service, or apprenticeship, or any other contract where an individual agrees with another person personally to execute any work or service for that person.²²⁶ This should under Irish law cover many forms of work that would otherwise be classified as self-employment.²²⁷

Discrimination in access to employment includes ‘any arrangements the employer makes for the purpose of deciding to whom employment should be offered,’²²⁸ or by ‘specifying, in respect of one person or class of persons, entry requirements for employment which are not specified in respect of other persons or classes of persons, where the circumstances in which both such persons or classes would be employed are not materially different.’²²⁹ Section 8(8) prohibits discrimination in respect of opportunities of access for promotion. Section 13(c) prohibits discrimination in relation to a body that controls entry to or the carrying on of, ‘a profession, vocation or occupation.’ Section 16(5) Employment Equality Acts 1998 to 2007 contains an exception in respect of access to employment. The section states that ‘nothing in this Act shall be construed as requiring an employer to recruit, retain in employment or promote an individual if the employer is aware, on the basis of a criminal conviction of the individual or other reliable information, that the individual engages, or has a propensity to engage, in any form of sexual behaviour which is unlawful.’ This provision has yet to be litigated, but was referred to by the Supreme Court in *Re Article 26, Employment Equality Bill 1996*.²³⁰ The Supreme Court held that it reflected a concern on the part of Parliament relating to ‘the addictive character of certain sexual offences involving minors’.²³¹

3.2.3 Employment and working conditions, including pay and dismissals (Article 3(1)(c))

In respect of occupational pensions, how does national law ensure the prohibition of discrimination on all the grounds covered by Directive 2000/78 EC? NB Case C-267/06 Maruko confirmed that occupational pensions constitute part of an employee’s pay under Directive 2000/78 EC.

Note that this can include contractual conditions of employment as well as the conditions in which work is, or is expected to be, carried out.

Section 8(1) Employment Equality Act 1998-2007 prohibits discrimination in relation to access to employment, conditions of employment, training or experience for or in relation to employment, promotion or re-grading or classification of posts. This section relates to employers and employees as well as to agencies and agency workers. Section 8(6) states that the employer is prohibited from discriminating against employees or prospective employees in relation to conditions of employment. This relates to terms of employment, working conditions, treatment in relation to overtime, shift work, transfers, lay-offs, short time, redundancies, dismissals and disciplinary measures.

²²⁶ Section 2(1) Employment Equality Act 1998-2007

²²⁷ Sexual orientation Summary of 29 September 2004 by Mark Bell

²²⁸ Section 8(5)(a) Employment Equality Act 1998-2007

²²⁹ Section 8(5)(b) Employment Equality Act 1998-2007

²³⁰ [1997] 2 IR 321

²³¹ *Re Article 26, Employment Equality Bill 1996* [1997] 2 IR 321 at 376, see also Sexual orientation report of 29 September 2004 by Mark Bell

Equal remuneration must be paid for equal work or work of equal value.²³² Section 29 contains an entitlement to equal pay, for equal work. Like work is defined as work that is the same, similar or of equal value.²³³ Where two people are doing like work then they are entitled to equal remuneration. Remuneration is defined as including ‘any consideration, whether in cash or in kind, which the employee receives, directly or indirectly from the employer.’²³⁴ This definition specifically excludes pensions from its ambit.

The Pensions Act 1990-2007 prohibits discrimination in respect of occupational pensions schemes and other occupational benefits.

Section 22 of the Social Welfare (Miscellaneous Provisions) Act 2004 amended the Pensions Act 1990. This amendment prohibits discrimination on the grounds of race, religious belief, gender, age, sexual orientation, marital status, family status, disability and membership of the Traveller community. The Act prohibits direct, indirect, instruction and procurement to discriminate, as well as harassment and victimisation, and requires reasonable accommodation in respect of occupational benefit schemes, occupational benefits and occupational pensions.²³⁵ The only reported cases to date concern the gender and marital status grounds²³⁶.

Section 35 of the Employment Equality Act 1998-2007 is a cause of concern as it permits employers to pay employees with disabilities different rates of pay if they are restricted in their capacity to do the same amount of work, or the same hours as a person who does not have a disability. This section contains only one limitation and that is that the employee should not be remunerated at a rate below the level required by the National Minimum Wage Act 2000. The difficulty with this section relates to the fact that there is nothing to suggest that the work should be remunerated at a proportionate level to that of the employee without the disability. The Equality Act 2004 which transposed the directive did not alter this provision, and so less favourable rates of pay may be paid to the disabled worker. See comments of the Irish Human Rights Commission on this point.²³⁷

The Unfair Dismissals Act 1977-2007 prohibits discrimination on a wide number of grounds, namely trade union membership, religious or political opinions, for taking an action against the employer, race, colour, sexual orientation, age or membership of the Traveller community. The protection also extends to cover a number of statutory protections, interestingly however, disability is not among the protected groups under this statute.²³⁸ A person claiming an unfair dismissal on the basis of their disability may take a case under the Employment Equality Act 1998-2007.²³⁹

²³² Section 7 Employment Equality Act 1998-2007 defines the concept of like work.

²³³ Section 7 Employment Equality Act 1998-2007.

²³⁴ Section 2(1) Employment Equality Act 1998-2007

²³⁵ Pensions Act 1990-2004 as amended by the Social Welfare (Miscellaneous Provisions) Act 2004 available at: www.irlgov.ie

²³⁶ e.g. DEC –P2008 – 001 Ms Nora Shanahan (Represented by SIPTU union) v HSE West (St Joseph’s Hospital) (Represented by HSE – Employers Agency), DEC-E2002-044 An Employee -v- Midland Health Board. These cases did not succeed in establishing prima facie evidence of discrimination.

²³⁷ www.ihrc.ie Irish Human Rights Commission, ‘Observations on the Equality Bill 2004’

²³⁸ The Unfair Dismissal Act does not apply to most civil servants and to some members of the public sector: Gardai and the Defence Forces.

²³⁹ See section 4.7.4 below.



3.2.4 Access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience (Article 3(1)(b))

Note that there is an overlap between ‘vocational training’ and ‘education’. For example, university courses have been treated as vocational training in the past by the Court of Justice. Other courses, especially those taken after leaving school, may fall into this category. Does the national anti-discrimination law apply to vocational training outside the employment relationship, such as that provided by technical schools or universities, or such as adult life long learning course?

There is a prohibition on discrimination in relation to access to employment, by virtue of section 8(1). Section 8(7) prohibits discrimination in relation to training or experience for employment. The employer is not permitted to refuse or not to afford the employee the same opportunities on any of the discriminatory grounds when it comes to ‘employment counselling, training (whether on or off the job) and work experience.’

This provision is further reinforced by section 12, which prohibits discrimination in vocational training. Vocational is broadly defined and includes any system of instruction defined as:

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

This definition ensures that where a course is one that is exclusively concerned with training for a particular activity then it is covered by the provisions of the Act. It is accepted that the provisions of the Act cover many University and third level courses; the Act also reiterates this point by stressing that a vocational training body is one who offers a course of vocational training and can include an educational or training body.

There are certain exceptions contained within this provision. The first relates to the age ground, this provision only relates to vocational training courses offered to persons over the maximum age at which those persons are statutorily obliged to attend school. A second exception relates to the religion ground. The Act provides an exception for hospitals and primary schools ‘which are under the direction or control of a body established for religious purposes or whose objectives include the provision of services in an environment which promotes certain religious values.’ It says that “in order to maintain the religious ethos of the hospitals or primary schools, the prohibition of discrimination in *subsection (1)*, in so far as it relates to discrimination on the religion ground, shall not apply.”²⁴⁰ Certain hospitals or places of vocational training may protect their religious ethos, in that where the relevant Government Minister certifies that it is necessary, the provisions in respect of religious discrimination will not apply. This provision is not limited by the necessity for this exception to be related to a genuine occupational requirement, nor is there a requirement for legitimacy or proportionality.

²⁴⁰ Section 12(4) Employment Equality Act 1998-2007

It is not permissible to discriminate in the provision of vocational training in relation to the terms on which the course or facility is offered, by refusing or omitting to afford access to any such course or facility, or in the manner in which any such course or facility is provided.²⁴¹

The Equal Status Act 2000-2007 also prohibits discrimination on all nine grounds within educational services, in respect of access to courses or facilities as well as the terms and conditions of how that course is provided. This provision is broadly defined and should cover vocational training.²⁴²

3.2.5 Membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations (Article 3(1)(d))

Section 13(c) Employment Equality Act 1998-2007 prohibits discrimination in relation to a body that controls entry to or the carrying on of, 'a profession, vocation or occupation.'

This provision relates both to membership of the body in question as well as to any benefits provided by that body, with the exception of pension rights. Section 13A introduces a prohibition on discrimination in respect of business partnerships.

The Unfair Dismissals Act 1977-2007 prohibits discrimination in respect of union membership, religious or political opinions, for taking an action against the employer, the race, colour, sexual orientation, age or membership of the Traveller community.

In relation to paragraphs 3.2.6 – 3.2.10 you should focus on how discrimination based on racial or ethnic origin is covered by national law, but you should also mention if the law extends to other grounds.

3.2.6 Social protection, including social security and healthcare (Article 3(1)(e) Directive 2000/43)

In relation to religion or belief, age, disability and sexual orientation, does national law seek to rely on the exception in Article 3(3), Directive 2000/78?

There is no express prohibition on discrimination in relation to religion or belief, age, disability or sexual orientation in respect of social protection. The Equal Status Act 2000-2004 does prohibit discrimination in relation to goods and services, on all nine grounds. It is not entirely clear whether that prohibition would apply to all State services including social security and healthcare. The interpretation of the Equal Status Act 2000-2004 will be crucial in determining whether Ireland is in compliance with this element of Directive 2000/43.²⁴³ In *Donovan v. Donnellan*²⁴⁴ the Equality Officer interpreted the term service and concluded that 'while State services are not specifically mentioned as being covered they are not specifically excluded either and I believe that certain services provided by the State are available to the public and are covered by the Act, e.g. social welfare services, health services, etc.'

²⁴¹ Section 12(1) Employment Equality Act 1998-2007

²⁴² See section 3.2.8 below for more on this provision.

²⁴³ Racial Equality Report of November 2002 by Dave Ellis

²⁴⁴ DEC-S2001-011



Compliance with the Racial Equality Directive is dependent on future judicial interpretation.²⁴⁵ This situation is further impacted by section 14 of the Equal Status Act. This section provides a statutory exemption to the Equal Status Act 2000-2004, where an act or action is required by virtue of another piece of legislation then the Equal Status Act 2000-2004 does not apply. This is an extremely broad exemption to the terms of the Equal Status Act 2000-2004. Pending further judicial interpretation of the various provisions, it is not possible to say definitively whether Ireland is or is not in compliance with the Racial Equality Directive. According to Dave Ellis, in the Racial Equality Report of November 2002, Ireland may comply if the Equal Status Act 2000-2004, the Ombudsman Act 1980²⁴⁶ and the Constitutional guarantee²⁴⁷ are read together.

3.2.7 Social advantages (Article 3(1)(f) Directive 2000/43)

This covers a broad category of benefits that may be provided by either public or private actors granted to people because of their employment or residence status, for example, e.g. reduced rate train travel for large families, child birth grants, funeral grants and discounts on access to municipal leisure facilities. It may be difficult to give an exhaustive analysis of whether this category is fully covered in national law, but you should indicate whether national law explicitly addresses the category of ‘social advantages’ or if discrimination in this area is likely to be unlawful.

The term ‘social advantage’ is not expressly referred to in any of the Equality legislation. Commentators have contended that the prohibitions on discrimination in relation to ‘social protection’ would apply to ‘social advantages.’²⁴⁸

3.2.8 Education (Article 3(1)(g) Directive 2000/43)

This covers all aspects of education, including all types of schools. Please also consider cases and/ or patterns of segregation and discrimination in schools, affecting notably the Roma community and people with disabilities. If these cases and/ or patterns exist, please refer also to relevant legal/political discussions that may exist in your country on the issue. Please briefly describe the general approach to education for children with disabilities in your country, and the extent to which mainstream education and segregated “special” education is favoured and supported.

The Equal Status Act, 2000 refers to educational establishments at section 7. ‘Educational establishment’ is broadly defined covering pre-school services through to higher-level institutions, whether or not they are supported by public funds. Public and private establishments providing educational services are therefore covered. Discrimination on all nine grounds is prohibited in respect of: admission to the terms or conditions of admission of a person as a student to the establishment; the access of a student to any course, facility or benefit provided by the establishment; any other term or condition of participation in the establishment by a student, or the expulsion of a student from the establishment or any other sanction against the student.

²⁴⁵ See section 0.3

²⁴⁶ Section 4(2), Ombudsman Act 1980

²⁴⁷ Article 40.1 Irish Constitution

²⁴⁸ Racial Equality Report of November 2002 by Dave Ellis

The Traveller community has and still experiences social exclusion and discrimination throughout society: the field of education is no exception. The Education system provides a complaints procedure by virtue of the Education Act 1998. This system is administered by school boards with an appeal to the Department of Education. It addresses issues such as enrolment, suspension or removal of children from a school. Therefore the use of anti-discrimination legislation is not a first option for those who find discrimination in the education system. However, there are a number of cases that are of relevance. In *Two Complainants v. A Primary School*,²⁴⁹ the complainants were a mother and son who alleged discrimination on two grounds, namely disability and membership of the Traveller community by the Primary School.²⁵⁰ The complaint was founded on the Equal Status Act, claiming both discrimination and harassment contrary to the Act. The mother claimed her son was bullied and called names and that the management of the school failed to deal with the issue, that he was constantly blamed for anything that happened in the school and ultimately suspended.

She was regularly called to the school to discuss her son's behavioural problems and on one occasion a member of the Garda (police) entered the room with the intention of attending the meeting without her prior knowledge or consent. She requested the Resource Teacher for Travellers teach her son but he was transferred back to his mainstream class where he was unhappy and the problems continued. The complainants also alleged victimisation, claiming her son was denied his Confirmation because he had instigated proceedings under the Equal Status Act. The respondent denied discrimination, harassment or victimisation. They accepted they knew the complainants were Travellers but that the school welcomed Travellers and had appointed a Resource Teacher for Travellers. They claimed the complainant was subject to the normal disciplinary procedures and they had consulted his parents to that effect, the involvement of the Garda was to offer friendly advice in relation to the complainant's behaviour. He was denied Confirmation because of his absenteeism. The Equality Officer concluded that the mother had been directly discriminated against on the Traveller community ground, as a non-Traveller would have been treated more favourably in similar circumstances. It was not school practice to invite members of the Garda to parent teacher meetings. The Equality Officer also held that the mother was harassed on the Traveller community ground in respect of this incident as it was an unwelcome act and it was reasonable for her to have found the situation intimidating and for her to feel humiliated. As regards the son's action, the Equality Officer held he failed to establish a prima facie case on the Traveller community ground, but he did succeed on the disability ground as he established a failure to provide him with reasonable accommodation, and proved victimisation. The son had Attention Deficit Disorder. The equality officer felt that if the school had so much difficulty with him he should have been prioritised, and this amounted to a failure to reasonably accommodate his disability.

In a recent case²⁵¹ a mother was found to have been discriminated against on the Traveller ground when her son was unable to gain admission to a special needs school to which he had been referred by the psychological services.

²⁴⁹ DEC-S2006-028

²⁵⁰ Only the issue surrounding membership of the Traveller Community will be addressed here.

²⁵¹ Equality Tribunal, DEC-S2006-037 *Nora Faulkner (represented by the Kerry Traveller Development Project) v St Ita's & St Joseph's School, Tralee*



The Tribunal took a grave view of the injustice done to the mother and her son through the school's discrimination against them and awarded compensation of €4000. (This sum while significant hardly seems to remedy four year's schooling lost through injustice to a 16-year old boy.)

In the *Faulkener* case,²⁵² a mother on behalf of her son claimed that a school had discriminated against and victimised her son contrary to the Equal Status Act, 2000, on the grounds of a disability from which he suffered and membership of the Traveller community, when it refused to enrol her son in the school. Although she lost on the Traveller and disability grounds she succeeded on the victimisation ground and was awarded €6,350.

One concern in respect of education is the lack of recognition of diverse cultures within the curriculum.²⁵³ As mentioned in the case of *Sweeney v. Saehan Media*,²⁵⁴ members of the traveller community are significantly less likely to complete secondary education than members of the dominant population in Ireland.

The Census of Population 2002 shows that the issue of concern is retention within the education system, with significant numbers of students either leaving or not completing the junior cycle of the education system. Since the 1970's in Ireland there has been a growing awareness of the need to encourage greater participation and inclusion of Travellers in education. As a result a number of resources were provided to increase participation and support Traveller's children's learning. These include:

- Pre-school provision for Travellers.
- Resource Teachers for Travellers (RTT). The role of the RTT is to support and optimise teaching and learning opportunities for Traveller students and to provide learning support for those identified with low achievement or learning difficulties.²⁵⁵
- Visiting teacher for Travellers. These teachers aim to promote education among the Traveller community.²⁵⁶
- National Education Officer for Traveller Education. The National Education Officer works in conjunction with the Visiting teachers and the national Inspectorate and advise the Department of Education and Science on particular needs in this area.
- Enhanced capitation for Traveller students. Schools receive a capitation sum for all children enrolled.
- Senior Traveller training centres (33, plus 3 Outreach centres). This service provides education, work experience, guidance and counselling for members of the Traveller community.
- Youth reach. Youth reach provides an alternative to the formal school structure, and is aimed at early school leavers, it is estimated that over 300 members of the Traveller community participate in youth reach programmes annually.

²⁵² Equality Tribunal, DEC-S2007-003 *Mrs A (on behalf of her son B) -v- A Primary School*

²⁵³ Summary of June 2004 by Dave Ellis and Sue Gogan, see also section 41(3)(b) of the Education Act and the Guidelines on Traveller Education in Primary Schools, Department of Education and Science (2002) at 34.

²⁵⁴ DEC-E2003/017. see above p23.

²⁵⁵ Traveller organisations have expressed some concerns with how the RTT works, including: not requesting parental consent prior to sending children to the RTT; children being removed from class for what should be intensive tuition but being assigned 'low level tasks,' such as drawing; due to removal from class, missing out on portions of the curriculum; children who do not require additional learning supports being sent to the RTT because of their ethnic identity.

²⁵⁶ There are only 40 such teachers in the school.

- Access programmes to third level education.
- In-service education for primary teachers on Traveller education. The delivery of any reform aimed at social inclusion depends on the capacity of the teacher to promote such principles.

The Department of Education has published a Report and Recommendations for a 'Traveller Education Strategy',²⁵⁷ to be financed under the National Development Plan 2007 -2013 with provision for funding of €511million over the period. The main objective of the Strategy is to ensure equality of outcomes for Travellers from education.²⁵⁸ Among the topics prioritised for the development of this strategy are: teacher training; curricular change and interculturalism in curriculum; ethnic identifier, data collection re access (at all levels of education), outcomes; traveller parental role and involvement; school enrolment policies and traveller proofing system for the Department of Education and Science and school policies generally; school retention issues;²⁵⁹ nomadism and education.²⁶⁰ The Employment Equality Act 1998-2004 also has relevance by virtue of section 12 in relation to vocational training.²⁶¹

There are a number of exceptions to the general prohibition of discrimination, permitting the existence of single sex schools,²⁶² the provision of training for religious purposes to one gender only or to those of a particular belief,²⁶³ different fee arrangements for EU members and nationals,²⁶⁴ different access arrangements to third level institutions for mature students,²⁶⁵ and also distinctions made in relation to the organisation of sporting events.²⁶⁶ A specific exception in relation to students with disabilities exists. It is permissible to discriminate where the provision of education to a student with a disability would make it impossible or have a seriously detrimental effect on the provision of education to other students.²⁶⁷

There is an exception in the Equal Status Acts 2000 and 2004 regarding the promotion of a religious ethos, allowing a primary or post-primary school with a religious ethos to accept pupils of a particular religious denomination in preference to others, or refuse to admit a pupil who is not of that denomination, where it is proved that the refusal is essential to maintain the ethos of the school.²⁶⁸

²⁵⁷ <http://www.itmtrav.com/education01.html> .See also the Irish Government's Joint Education Committee on Education and Science produced *The Provision of Educational Services in a Multi-Ethnic/Multi-Cultural Society* and the National Council for Curriculum Assessment in May 2005 published guidelines on *Intercultural Education in Primary School*.

²⁵⁸ see also <http://www.paveepoint.ie/EducationStrategy.html>

²⁵⁹ There is a low retention rate in the education system for members of the Traveller Community. See http://www.education.ie/servlet/blobServlet/pp_traveller_education.pdf

²⁶⁰ The NCCRI have estimated that there are approximately 1,700 members of the Roma Community in Ireland, an accurate figure is not possible as the census asks questions in relation to nationality and membership of the Roma community is not referenced. See <http://www.nccri.ie/cdsu-travellers.html>

²⁶¹ See section 3.2.4 above.

²⁶² Section 7(3)(a) Equal Status Act 2000-2004

²⁶³ Section 7(3)(b) Equal Status Act 2000-2004

²⁶⁴ Section 7(3)(d) Equal Status Act 2000-2004

²⁶⁵ Section 7(3)(e) Equal Status Act 2000-2004

²⁶⁶ Section 7(4)(a) Equal Status Act 2000-2004

²⁶⁷ Section 7(4)(b) Equal Status Act 2000-2004

²⁶⁸ Section 7(3)(c) Equal Status Act 2000-2004



This position is reinforced by the Education Act 1998 which requires the school management board to uphold the ‘characteristic spirit’ of the school as established by its ‘cultural educational, moral, religious, social, linguistic and spiritual values and traditions.’²⁶⁹

All children resident in Ireland have a constitutional entitlement to free primary education, with due regard to parental rights.²⁷⁰ The state also provides free post-primary and third level education. All children are required to remain in school until they are 16 years of age. The Constitution of Ireland provides that a child has the right to attend a school receiving public money without attending religious instruction at that school.²⁷¹ The vast majority of Irish schools are denominational in nature, the bulk of those being Roman Catholic.²⁷² Children of different faiths from the majority faith in Ireland will not be required to attend religion class, but will in many cases have to attend a school of a different religious ethos from that which they profess themselves.²⁷³ However, there is a growing number of non-denominational schools as well as minority faith schools.

The Education for Persons with Special Educational Needs Act 2004 relates to education needs for children with disabilities.

The purpose of this Act is to provide for the education of people with disabilities and to provide that people with disabilities shall have the same right to avail of, and benefit from, appropriate education. This principle reflects the Constitutional reality; the Constitutional Courts have already stated that children with disabilities are entitled to benefit from the same education as all other children of the state.²⁷⁴ The legislative approach favours inclusive education, that is, education within an inclusive environment with children who do not have special educational needs. However, this will not be required if it would not be in the best interests of the child with special needs or if it would impair the effective provision of education for the children with whom the child is to be educated. According to the Statistical Report of the Department of Education and Science, there were 9,486 students with special needs within mainstream provision in 2007. As well as mainstream provision, students with special needs are also accommodated in a variety of special schools and in special classes attached to mainstream primary and post-primary schools. The special schools cater for students with mild general learning disability, moderate general learning disability and sever/profound general learning disability; for emotionally disturbed students; for students with autistic spectrum disorders; for students with physical and multiple disabilities; for students with visual and hearing impairment; and students with specific learning disability. Special classes for students in most of these categories are attached to mainstream schools, mainly at primary level. There were 6,578 pupils enrolled in a total of 124 special schools for students with disabilities in 2007.

²⁶⁹ Summary of June 2004 by Dave Ellis and Sue Gogan

²⁷⁰ Article 42.4 Bunreacht na hÉireann.

²⁷¹ Article 44.2.4 Bunreacht na hÉireann.

²⁷² The schools are owned by the churches whose ethos they profess.

²⁷³ The evidence available is that schools do accept pupils from a wide variety of religions into schools with a particular ethos. It is not clear whether it could be deemed to amount to discrimination not to be able to attend a school reflecting a particular religious faith, or a non-denominational school.

²⁷⁴ *O'Donoghue v. Minister for Health* [1996] 2 IR 20. This position was reiterated in the Supreme Court case *Sinnott v. Minister for Education*, [2001] 2 IR 505, which held that the Constitutional right to education for children with profound disabilities continued until they were eighteen years of age. The *O'Donoghue* case stated that all children of the state were entitled to benefit from education, this would include children belonging to the various protected grounds.



3.2.9 Access to and supply of goods and services which are available to the public (Article 3(1)(h) Directive 2000/43)

- a) *Does the law distinguish between goods and services available to the public (e.g. in shops, restaurants, banks) and those only available privately (e.g. limited to members of a private association)? If so, explain the content of this distinction.*

The Equal Status Act 2000-2004 provides that a person shall not discriminate in disposing of goods, or in the provision of services, whether that disposal or provision 'is for consideration or otherwise and whether the service provided can be availed of only by a section of the public.'²⁷⁵ In *Two Complainants v. Department of Education and Science*²⁷⁶ the Equality Officer considered what was covered by the definition of service provision. This related to the provision of maintenance grants payable to adults on further education courses. The then non-statutory rules provided that these grants were only available to EU nationals or persons with official refugee status. The Department had refused the complainants' applications for the grants. The question before the Tribunal was whether a maintenance grant was covered by the Act. Section 2 of the Act defines a service as 'a service or facility of any nature which is available to the public generally or a section of the public. To determine what was meant by 'facility' the Equality officer referred to comparable provisions in the United Kingdom equality legislation and referred to a definition of 'facility' as 'a manner, method opportunity for the easy or easier performance of anything ... The term should cover most instances where a person is not actually providing goods or a service himself, but is providing a means to obtain access to those goods or that service.' The Equality Officer held that a maintenance grant was a 'facility' covered by the Act.²⁷⁷

Section 15(1) of the Equal Status Act 2000-2004 provides that the Act will not require a person who provides goods or services to deal with a customer where it may be reasonably believed that 'the customer would produce a substantial risk of criminal or disorderly conduct or behaviour or damage to property at or in the vicinity of the place in which the goods or services are sought or the premises or accommodation are located.'²⁷⁸ Section 15(2) also provides another broad exception to the non-discrimination provisions. This exception is for owners of licensed premises, which permits actions taken in 'good faith' for the purpose of complying with the Licensing Acts, those actions will not constitute discrimination.²⁷⁹

The Equal Status Act prohibits clubs from discriminating at section 8, and permits certain exceptions to this rule in section 9, where a club is set up to cater for the needs of a particular gender, marital status, family status, sexual orientation, religious belief, age, disability, nationality or ethnic or national origin or membership of the Traveller Community. The Equality Authority challenged the actions of Portmarnock Golf Club, which is a male-only club.²⁸⁰

²⁷⁵ Section 5(1) Equal Status Act 2000-2004

²⁷⁶ DEC-S2003-042/043

²⁷⁷ This provision was amended in 2004, now section 12 Employment Equality Act 1998-2007, see also *Donovan v. Garda Donnellan* DEC-S2001-011 which supports the contention that the Equal Status Act covers services and now facilities provided by public authorities.

²⁷⁸ Section 15(1) Equal Status Act 2000-2004

²⁷⁹ See further under paragraph 4.9

²⁸⁰ *The Equality Authority v. Portmarnock Golf Club and Ors*, unreported, High Court, 10th June, 2005, this decision is being appealed by the Equality Authority to the Supreme Court.

The case went at first instance to the District Court who made a declaration, that Portmarnock was a discriminating club, and ordered the suspension of the certificate of registration and alcohol license of the club. This finding was suspended pending an appeal to the High Court. The High Court interpreted section 9 of the Equal Status Act as permitting male-only golf clubs, and holding that the principal purpose of Portmarnock Golf Club is to cater only for the needs of men. This is a very broad interpretation of the section. The implications of this decision are most obvious in the context of the Racial Equality Directive. Should the Supreme Court uphold the High Court interpretation of section 9, to the effect that a male-only golf club is not discriminatory, it seems conceivable that a white-only tennis club is equally not discriminatory under the Act, thereby ensuring that by virtue of judicial interpretation the Equal Status Act is not in compliance with the Racial Equality Directive. Further, pending the Supreme Court decision (still pending at the cut-off date for this report), the High Court decision is the correct legal interpretation and so it is arguable that we are currently not in compliance with the Racial Equality Directive.

- b) *Does the law allow for differences in treatment on the grounds of age and disability in the provision of financial services? If so, does the law impose any limitations on how age or disability should be used in this context, e.g. does the assessment of risk have to be based on relevant and accurate actuarial or statistical data?*

Section 5 (2) of the Equal Status Act 2000 to 2004 states that the prohibition on difference in treatment does not apply in the case of differences in the treatment of persons in relation to annuities, pensions, insurance policies or any other matters related to the assessment of risk. The assessment of risk must be effected by reference to actuarial or statistical data obtained from a source on which it is reasonable to rely, or “other relevant underwriting or commercial Factors”, and must be reasonable having regard to the data or other relevant factors.²⁸¹ In 2007, following negotiations with the Equality Authority, the underwriters AIG Insurance undertook to no longer underwrite travel insurance which contains an absolute age limit, and to comply with the Equal Status Act 2000 to 2004 in its underwriting business in this jurisdiction²⁸².

3.2.10 Housing (Article 3(1)(h) Directive 2000/43)

To which aspects of housing does the law apply? Are there any exceptions? Please also consider cases and patterns of housing segregation and discrimination of the Roma and other minorities or groups and the extent to which the law requires or promotes the availability of housing which is accessible to people with disabilities and older people.

The Equal Status Act 2000-2004 prohibits discrimination in the disposing of any estate or interest in premises, in respect of terminating any tenancy or other interest in the property, or in the provision of accommodation, or amenities related to such accommodation.²⁸³

²⁸¹ Section 5 (2)(d) Equal Status Act 2000-2004

²⁸² Equality Authority Annual Report 2007, p 45.

²⁸³ Section 6(1) Equal Status Act 2000-2004



The provision does contain a number of exceptions, the first is that the prohibition on discrimination does not apply to accommodation that is being provided in a person's home, "or where that the provision of accommodation affects the person's private or family life or that of any other person residing in the home."²⁸⁴ Another such exception relates to accommodation that is reserved for a particular category of people, and this may relate to one of the discriminatory grounds, such as a residential centre for people with disabilities, or a nursing home for the elderly.²⁸⁵

Local authorities in Ireland are obliged to provide housing for older people and people with a disability on broadly the same basis as the rest of the population.

Regarding older people, some local authorities provide specific housing for older people or take their specific circumstances into account when assessing need. There are some grants for housing which are particularly relevant to older people or people with disabilities. Some local authorities provide special accommodation for older people. This is usually communal accommodation with special security features, for example, wardens, security cameras etc. Persons aged 60 or over and spouses aged 55 or over, or single persons aged 55 or over, are eligible for special housing if otherwise entitled to priority on medical or compassionate grounds. Voluntary housing organisations also provide housing on a somewhat similar basis to local authority housing and are financed to a significant extent by government. Most of these organisations are community-based organisations and have developed in order to meet a recognised special housing need within the community. A large proportion of these approved bodies have been set up to provide housing for older people. To qualify for the various grants and loans they must be approved by the Department of the Environment and Local Government.

Voluntary housing organisations provide two types of housing for older people - group schemes and sheltered housing. Voluntary housing associations have some discretion as to whom they house in accordance with their own policy but the majority of their houses are let in consultation with the local authority. Tenants in sheltered housing pay rent and may qualify for rent supplements.

The Housing Aid for Older People Scheme is for improving living conditions of older people by carrying out minor repairs to the main areas of an older person's home. The type of work which will be grant aided includes structural repairs or improvements, re-wiring, repair or replacement of windows and doors, the provision of water, sanitary services, heating, cleaning and painting. On 1 November 2007, the Housing Aid for Older People Scheme replaced the Essential Repair Grant and Special Housing Aid for the Elderly. From 1 November 2007, the Mobility Aids Grant Scheme provides grants for works designed to address mobility problems in the home, for example, the grant can be used for the purchase and installation of handrails. The grant is primarily for older people but people with disability can also access the scheme. The amount of assistance available under the Mobility Aids Grant Scheme is less than under the Housing Aid for Older People Scheme and the Housing Adaptation Grant for People with a Disability, but is useful if minor adaptations or improvement are needed quickly.

²⁸⁴ Section 6(2)(d) Equal Status Act 2000-2004

²⁸⁵ Section 6(5) Equal Status Act 2000-2004



Regarding disability, from 1 November 2007 the Housing Adaption Grant for People with a Disability (which is means-tested) has replaced the Disabled Persons Grant (which was not). Housing Adaptation Grants for People with a Disability are available from local authorities. The housing adaptation grant is available where changes need to be made to a home to make it suitable for a person with a physical, sensory or intellectual disability or mental health difficulty to live in. The grant is for making changes and adaptations to a home, for example, making it wheelchair-accessible, extensions to create more space, adding a ground floor bathroom or toilet and stair-lifts. In some cases, the provision of heating can be included but only under certain conditions. For more minor work the Mobility Aids Grant Scheme is available but this is subject to a means test.

The Equal Status Act 2000-2004 at section 6(6) provides that nothing in the Act can be construed as prohibiting housing authorities, pursuant to their functions under both the Housing Acts, 1966-1998 or the Housing (Miscellaneous Provisions) Act, 1992 from providing in respect of housing accommodation, different treatment to persons based on family size, family status, marital status, disability, age or membership of the Traveller community.

While permitting the difference in treatment, there is no clarification as to how they may be treated differently.²⁸⁶ In *Doherty and Anor v. South Dublin County Council, the Minister for the Environment, Heritage and Local Government, Ireland and the Attorney General*, the High Court clarified that section 6(6) of the Equal Status Acts 2000 to 2004 cannot be relied on to allow local authorities to afford less favourable treatment in the provision of housing.²⁸⁷ The Equal Status Act 2000-2004 at section 6(7) provides that nothing in the Act shall be construed as prohibiting, in relation to housing accommodation provided by or on behalf of the Minister, different treatment to persons on the basis of their nationality, gender, family size, family status, marital status, disability, age or membership of the Traveller community.²⁸⁸ This exception is tempered by virtue of the fact that any difference in treatment is not permitted to amount to a derogation from any of the obligations of the State under the treaties governing the European Communities or any Act adopted by an institution of those Communities. This ensures that the differences of treatment permitted under section 6(7) should be in compliance with the Racial Equality Directive, although no such statement is made in respect of section 6(6).

The Housing (Traveller Accommodation) Act 1998 provides that each major housing authority is to prepare and adopt a five-year programme for the provision of Traveller accommodation in its area. The Act permits those housing authorities to provide loans to members of the Traveller community to support them in obtaining caravans or sites for same.²⁸⁹ A further provision relevant in this context is the Housing (Miscellaneous Provisions) Act, 2002. Section 24 of the 2002 Act, amends the Criminal Justice (Public Order) Act 1994 and criminalizes trespass on public and private land.

²⁸⁶ Flash report Racial Equality and religion 02-02-2004

²⁸⁷ [2007] IEHC 4. see below p 49 for further details of this case.

²⁸⁸ No reference is made in this section to the ground of race or sexual orientation.

²⁸⁹ Racial Equality Report of November 2002 by Dave Ellis

While this provision applies equally to all persons it has a disproportionate impact on members of the Traveller community.²⁹⁰ The Act permits the Gardaí to move Travellers with no notice on the basis of a complaint by the local authority. Equally it means that ‘Travellers will be unable to move from place to place to exercise their right to be nomadic due to the fear of committing a criminal offence.’²⁹¹ The Equality Authority annual report stated in 2005:

The impact of the Racial Equality Directive is beginning to become evident in the case files of the Equality Authority particularly for those claims in relation to accommodation under the Equal Status Acts 2000 to 2004. The involvement of the Equality Authority led to three significant settlements being reached involving the provision of accommodation. In addition after correspondence with Wicklow County Council from the Equality Authority, a proposed resolution was withdrawn which would have barred any accommodation within a 3 kilometer radius of any area zoned or designated a national park or an area of outstanding beauty within the county and blocked a compulsory purchase order in respect of a dwelling. Media reports stated that this resolution was in effect a ban to apply only in respect of Travellers.²⁹²

During 2005 the Equality Authority applied to be appointed as an amicus curiae in relation to High Court proceedings brought by a Traveller family concerning the provision of accommodation and the criminal trespass legislation. The Equality Authority was granted the right to appear as amicus curiae²⁹³ in two cases relating to Traveller accommodation.²⁹⁴ The Court retains discretion and may or may not take on board the arguments raised.²⁹⁵ The Irish courts require a body seeking to enter an amicus curiae brief to establish proof of a legitimate interest in the case. In the *Lawrence* case the Equality Authority sought to do this by highlighting that they were a specialised body within the meaning of Article 13 of the Racial Equality Directive, and as such they were charged with promoting equality in Ireland. The arguments also referred to Article 7(2), that as a specialised body within the meaning of the Directive they should be in a position to provide assistance or go in and support the case in question, and that the Equality Authority does have a ‘legitimate interest in ensuring that the provisions of the Directive are complied with.’ The Equality Authority also referred to the powers and functions conferred on them by national law, including their right to take actions, assist litigants, and promote equality. The Equality Authority in their role as amicus curiae to this case have been “given leave to appear as amicus curiae in relation to the application and interpretation of the Racial Equality Directive should it arise as part of the case.” As the case has to come to hearing it has yet to be determined.

²⁹⁰ The Irish Traveller Movement Traveller Legal Unit, Strategic Plan of 2003-2006 suggests that some 1,000 families are currently susceptible to criminal prosecution. Also where a family do not move immediately their caravans may be seized; this may have the effect of making them homeless.

²⁹¹ The Irish Traveller Movement Traveller Legal Unit, Strategic Plan of 2003-2006.

²⁹² Settlements are not reported, information available in the Equality Authorities Annual Report 2005 available at www.equality.ie

²⁹³ An amicus curiae brief (friend of the court) is an intervention by a disinterested third party, that is not a party to the action, and this third party seeks to use the court as a platform to amplify a point of law that might not otherwise be considered within the factual confines of the court. The procedure adopted is that the third party provide a written brief for the information of the court, in the context of this particular case the Equality Authority are seeking to raise arguments that the provisions of the Racial Equality Directive should be considered when determining the outcome of this case.

²⁹⁴ *Doherty and Anor v. South Dublin County Council, the Minister for the Environment, Heritage and Local Government, Ireland and the Attorney General* and *Lawrence v. Mayo County Council and Ors*.

²⁹⁵ The use of amicus curiae briefs are relatively new in the Irish context, in this particular case both the Irish Human Rights Commission and the Equality Authority are providing such briefs. Prior to this there have been two other occasions where such briefs have been entered, one by the UNHCR and again by the Irish Human Rights Commission. It should be noted that unlike the Irish Human Rights Commission the Equality Authority do not have a statutory right to intervene, but relied on the inherent discretion of the court and sought and received permission to intervene in this case.

This combination of arguments ensured that the court was willing to exercise its discretion and permit them to act as an *amicus curiae* to the court in this case.²⁹⁶ In the *Lawrence* case the family are challenging the constitutionality of The Housing (Traveller Accommodation) Act 1998 on the grounds that it has a discriminatory impact on Traveller families.²⁹⁷ Should the Act be deemed unconstitutional it ceases to have legal effect.

In a second case, that of *Doherty v. South Dublin County Council and Ors*, the High Court had granted the Equality Authority the right to act as an *amicus curiae* to the court, but a number of the respondents to the action challenged this and appealed this point to the Supreme Court. That Court held that the Equality Authority had the right to appear as an *amicus curiae* to the Court.²⁹⁸ Subsequently, in the substantive hearing, the High Court found that the Equal Status Acts 2000 to 2004 were not justiciable outside the framework of compliance established by the Equal Status Acts 2000 to 2004 (i.e. the Equality Tribunal) and therefore could not be relied on by the plaintiffs in their High Court proceedings. The judge went on to say that he did not believe that there had been discrimination or breach of the Racial Equality Directive. There was no analysis of the interaction between the Housing Acts, the Equal Status Act and the Racial Equality Directive, or the implications of the burden of proof provisions in the Equal Status Acts and the Racial Equality Directive. The judge held *inter alia* that providing a house (instead of a habitable caravan, as requested by the complainants in accordance with their preference, was not a breach of the complainants' rights under the European Convention of Human Rights. "A duty to take into account the sensitivities of members of the Roma communities, whether Gypsies from the neighbouring kingdom, members of the Sinti from Central Europe, or members of our own Irish Traveller Community, can arise (but is) not however, unlimited."²⁹⁹ The judgement was appealed and was settled on appeal, with the terms of the settlement being confidential. However, in another recent case, taken in the High Court under the Human Rights Act 2003 and the Housing Acts, the judge, having concluded that the case before her was very unusual if not unique, ruled that the refusal to provide the appropriate caravan constituted a violation of Article 8 of the ECHR, where a second disability-adapted caravan was required for the temporary needs of a Traveller family with three severely disabled children awaiting rehousing.³⁰⁰

²⁹⁶ This case is unreported, and as such there is no judgement available, the information provided in relation to the arguments used is provided by the Equality Authority.

²⁹⁷ *Doherty and Anor v. South Dublin County Council, the Minister for the Environment, Heritage and Local Government, Ireland and the Attorney General*, Reported in the Irish Times, January 12th 2006, the purpose of the Equality Authorities intervention is to challenge the compliance of this provision with the Racial Equality Directive.

²⁹⁸ *Doherty and ors v. South Dublin County Council*, [2006] IESC 57

²⁹⁹ *Doherty and ors v. South Dublin County Council*, [2007] IEHC 4 at paragraph 43, he relied in *Chapman v. United Kingdom* (2001) 33 EHRR 18 and *Codona v. The United Kingdom*, 7th February, 2006 in support of this proposition.

³⁰⁰ *O'Donnell and others v South County Dublin County Council*
http://www.flac.ie/download/pdf/piln_bulletin_29_june_2007.pdf



4. EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

Does national law provide an exception for genuine and determining occupational requirements? If so, does this comply with Article 4 of Directive 2000/43 and Article 4(1) of Directive 2000/78?

There is an exception to the Employment Equality Act 1998-2007 when a difference in treatment is based on a characteristic which constitutes a genuine and determining occupational requirement, where the objective is legitimate and the requirement proportionate.³⁰¹ This necessity for legitimacy and proportionality is in line with Article 4 of both the Racial Equality Directive and the Framework Employment Directive. A previous exception was removed as a result of the Equality Act 2004. That exception permitted distinctions on the grounds of gender, race and religion, where the employment duties were performed outside the State, and the relevant characteristic was an occupational qualification having regard to the laws and or customs of that State.

4.2 Employers with an ethos based on religion or belief (Art. 4(2) Directive 2000/78)

a) Does national law provide an exception for employers with an ethos based on religion or belief? If so, does this comply with Article 4(2) of Directive 2000/78?

Section 37(1) of the Employment Equality Act 1998-2007 permits discrimination for the purposes of maintaining, or the reasonable prevention of any undermining of, the religious ethos of an institution. The Act does not refer to the term 'legitimate' or 'proportionate.' It could be argued that Irish case law would ensure that these notions apply, for example, in the Supreme Court decision of *Re Article 26 and the Employment Equality Bill, 1996*,³⁰² the court held that it would 'appear that it is constitutionally permissible to make distinctions or discrimination on grounds of religious profession belief or status insofar but only insofar as this may be necessary to give life and reality to the guarantee of the free profession and practice of religion contained in the Constitution...'³⁰³ Equally it can be contended that the concept of legitimacy is also contained in Irish law.³⁰⁴ It would be preferable if the language of the Act expressly required all actions to be 'legitimate' and 'proportionate.' A second point is that the terms of the exception contained in section 37(1) of the Employment Equality Act 1998-2004 are phrased in broader terms than those found in the Directive. The Directive refers to employment in a religious organisation 'where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement.' This suggests that employers should show that a person's religion or belief is relevant to the individual post in question. Whilst this is implicit in the Irish Act it is not express.

³⁰¹ Section 37(2) Employment Equality Act 1998- 2007.

³⁰² [1997] 2 I.R. 321

³⁰³ Religion report of May 2003 by Dave Ellis

³⁰⁴ *Flynn v. Sr. Power and the Sisters of the Holy Faith*, [1985] ILRM 336, see Ellis Religion Report May 2003.



The Directive also explicitly limits this exception to discrimination based on the grounds of religion or belief and it cannot be used to justify discrimination on another ground. However, there is no similar restriction found within section 37(1).³⁰⁵

Section 12(4) of the Employment Equality Act 1998-2007 which relates to the provision of vocational training, reflects the exception contained in section 37(1) of that Act. It permits difference in treatment with regard to access to training or vocational courses under the direction of a body established for religious purposes, and in order to maintain the religious ethos of educational or medical institutes³⁰⁶.

- b) *Are there any specific provisions or case-law in this area relating to conflicts between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination? (e.g. organisations with an ethos based on religion v. sexual orientation or other ground.)*

The few older cases that there have been in this area have been taken under Constitutional provisions. The few precedents that there have been in this area are of increasingly dated vintage and do not reflect the greater social and cultural pluralism of Ireland today and the new legislative context of the Equality legislation.

4.3 Armed forces and other specific occupations (Art. 3(4) and Recital 18 Directive 2000/78)

- a) *Does national law provide for an exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78)?*

Section 37(5) of the Employment Equality Act 1998-2007 contains such an exception. The section states in 'relation to discrimination on the age ground or disability ground, nothing in this Part or Part II applies in relation to employment in the Defence Forces.'

- b) *Are there any provisions or exceptions relating to employment in the police, prison or emergency services (Recital 18, Directive 2000/78)?*

While there are no longer any blanket exceptions to employment in the police, prison or emergency services the Act does contain some restrictions. Section 37(3) provides that it is an occupational requirement that those employed in the Garda Síochána, prison services or emergency services are competent and capable to undertake the 'range of functions' associated with this position. A further exemption from age discrimination is included at section 37(4) which provides that if the Minister is of the opinion that the age profile of members of the Garda Síochána, prison service or other emergency services is such that the occupational capacity is likely to be adversely affected, the age ground shall not apply in relation to recruitment to those services.

³⁰⁵ Sexual orientation report of 29 September 2004 by Mark Bell

³⁰⁶ The infringement action initiated against the Irish Government for incorrect implementation of Directive 2000/78 covers this point.

- c) *Are there cases where religious institutions can select people (on the basis of their religion) to hire or to dismiss from a job - when that job is in a state entity, or in an entity financed by the State (e.g. the Catholic church in Italy or Spain can select religious teachers in state schools)? In what conditions is that selection done ? Is this possibility provided for by national law only, or international agreements with the Holy See, or a combination of both ?*

The only exceptions for religious institutions are those related to protection of ethos discussed above at 4.2.

4.4 Nationality discrimination (Art. 3(2))

Both the Racial Equality Directive and the Framework Employment Directive include exceptions relating to difference of treatment based on nationality (Article 3(2) in both Directives).

- a) *How does national law treat nationality discrimination? Does this include stateless status?*
What is the relationship between 'nationality' and 'race or ethnic origin', in particular in the context of indirect discrimination?
Is there overlap in case law between discrimination on grounds of nationality and ethnicity (ie where nationality discrimination may constitute ethnic discrimination as well?)

The Equality legislation (both the Employment Equality Act, 1998-2007 and the Equal Status Act 2000-2004) defines race as including nationality, or ethnic or national origin.³⁰⁷ Equally the Constitutional Courts have held that some of the protections of the Constitution can be extended to non-citizens.³⁰⁸ The Unfair Dismissals Acts 1973-2007 provides that dismissal of an employee on the ground of race shall be deemed to be an unfair dismissal; the term is not defined so it is unclear whether this would include nationality. The Prohibition of Incitement to Hatred Act 1989 prohibits incitement to hatred on various grounds including race, colour, religion, nationality or ethnic or national origins / membership of the Traveller community. There is no definition of nationality, nor is there case-law, which would shed light on any overlap with ethnicity, nor whether or not statelessness is covered.

- b) *Are there exceptions in anti-discrimination law that seek to rely on Article 3(2)?*

Section 12(7) of the Employment Equality Act 1998-2007 provides for different treatment on the basis of nationality. The exception relates to difference in treatment in relation to fees for admission, or attendance at any vocational or training course, different treatment is permitted for citizens of Ireland or nationals of another Member States of the European Union. It also provides that it is not discrimination to offer assistance to particular categories of persons by way of sponsorships, scholarships, bursaries or other awards, which assistance is reasonably justifiable, having regard to traditional or historical considerations.

³⁰⁷ Section 6(2)(h) Employment Equality Act 1998-2007

³⁰⁸ *The State (Nicolaou) v. An Bord Uchtála*, [1966] IR 567, Hogan and Whyte, *JM Kelly The Irish Constitution*, 4th Edition, at 1260 contend that there are situations where non-citizens may not be in a position to invoke a particular Constitutional right. See section 3 above.

This exception would appear to comply with the provisions of Article 3(2) of the Racial Equality Directive. Section 17(2) of the Employment Equality Act 1998-2007 provides that in relation to discrimination on the basis of nationality, nothing in the Act shall render unlawful any action taken in accordance with the Employment Permits Act 2003.

The Equal Status Act 2000-2004 also contains some exceptions in relation to nationality, by excluding from the provisions of the legislation differential treatment of persons, on the ground of nationality in relation to housing or accommodation provided by or on behalf of the Minister. Section 5(2)(f) continues to permit a difference in treatment of persons, on the basis of nationality in relation to the provision or organisation of a sporting facility or event to the extent that the differences are reasonably necessary having regard to the nature of the facility or event and are relevant to the purpose of the facility or event. A final distinction made in this area relates to section 9 of the Equal Status Act which provides that a club will not be a discriminating club if it excludes membership by reason only that its principal purpose is to cater for the needs of a particular nationality.

4.5 Work-related family benefits (Recital 22 Directive 2000/78)

Some employers, both public and private, provide benefits to employees in respect of their partners. For example, an employer might provide employees with free or subsidised private health insurance, covering both the employee and their partner. Certain employers limit these benefits to the married partners (e.g. Case C-267/06 Maruko) or unmarried opposite-sex partners of employees. This question aims to establish how national law treats such practices. Please note: this question is focused on benefits provided by the employer. We are not looking for information on state social security arrangements.

- a) *Does national law permit an employer to provide benefits that are limited to those employees who are married?*

The Employment Equality Act 1998-2007 does provide some specific exceptions in relation to ‘family benefits.’ The definition of “family benefits” makes clear that these benefits are limited to families based on marriage.

- b) *Does national law permit an employer to provide benefits that are limited to those employees with opposite-sex partners?*

Section 34(1) provides an exception from the ban on discrimination where an employer provides: a benefit to an employee in respect of events related to members of the employee’s family or any description of those members; a benefit to or in respect of a person as a member of an employee’s family; a benefit to an employee on or by reference to an event occasioning a change in the marital status of the employee. The term ‘member of the family’ is defined as in relation to any person means their spouse, brother, sister, uncle, aunt, nephew, niece, lineal ancestor, or lineal descendant of that person or that person’s spouse.³⁰⁹ This definition clearly excludes same-sex partnerships. There are legislative benefits which do not extend to same-sex couples. The Parental Leave Act 1998 provides a statutory entitlement to unpaid parental leave for men and women.

³⁰⁹ Section 2(1) Employment Equality Act 1998-2007

This leave is in respect of each child of which that person is the natural or adoptive parent. This leave is available separately to both parents.³¹⁰ Parental leave involves an employee who is the natural or adoptive parent of a child being entitled to 'leave from his or her employment' for a period of 14 weeks to enable him or her to take care of the child.³¹¹ This leave is confined to natural or adoptive parents, and partners in a same sex relationship would not be so entitled. Same sex couples may not jointly adopt a child, unlike married couples. Single people regardless of sexuality may adopt, and that person is entitled to leave under the legislation, but their partner will not be. A second issue in respect of the Parental Leave Act relates to *force majeure* leave. This is paid leave for urgent family reasons that relates to an injury or illness of one of the persons specified in the Parental Leave Act 1998. Section 13 states that leave applies to the following categories of persons: a person of whom the employee is the parent or adoptive parent; the spouse of the employee or a person with whom the employee is living as husband or wife, a person to whom the employee is in *loco parentis*, a brother or sister of the employer, a parent or grandparent of the employee, and persons of such other class or classes as may be prescribed.

The Pensions Act 1990-2004³¹² contains an exception to the principle of non-discrimination on the grounds of sexual orientation. Section 72(3) states that it will not be a breach of the principle of equal pension treatment on the marital status or sexual orientation ground to provide more favourable occupational benefits to a deceased member's widow or widower. Equally the social welfare survivor's pensions are payable only to spouses of the deceased contributor.³¹³ Same sex couples are also be treated differently by the taxation system. Marriage as recognised by Irish law benefits from a number of tax advantages. Same-sex relationships, as well as non-marital relationships do not have legal standing as regards the tax system.³¹⁴ This position was challenged in the recent High Court case of *Zappone and Gilligan v. Revenue Commissioners & Ors.*³¹⁵ In this action a same-sex couple were married in Canada and sought among other issues to challenge the taxation system that would not permit them to file as a married couple, rather than as two single people.³¹⁶ The plaintiffs claimed a constitutional right to marry, and also sought to rely on the European Convention of Human Rights. The Court held that the plaintiffs were not married in Irish law, and were prohibited from so marrying and that this prohibition was not in contravention of the Constitution, or the European Convention on Human Rights Act.³¹⁷ This case has been appealed to the Supreme Court.

³¹⁰ Section 6 Parental Leave Act 1998.

³¹¹ Section 6(1) Parental Leave Act 1998

³¹² This Act relates to occupational pensions, personal retirement savings accounts, and other occupational benefits.

³¹³ http://www.equality.ie/stored-files/PDF/Partnership_Rights_of_Same_Sex_Couples.pdf - See this publication for more detailed information about pension rights.

³¹⁴ The advantages of belonging to the Constitutional Family are set out in the following report:

http://www.equality.ie/stored-files/PDF/Partnership_Rights_of_Same_Sex_Couples.pdf

³¹⁵ *Zappone and Gilligan v Revenue Commissioners & Ors*, Unreported High Court Decision of Mrs Justice Dunne, 14 December 2006 - http://www.kalcase.org/KAL%20Zappone_v_Rev_Commrs_Judgement.doc

³¹⁶ <http://www.irishexaminer.com/text/story.asp?j=287804893034&p=z878x4893963&n=287804894017>;

<http://www.queermarriage.com/index.php?content=showNews&nID=96>;

http://www.emergence.qc.ca/mariage_articles/20041109_1.htm for some examples of the coverage of this case.

³¹⁷ The case while instigated as a tax case, became a case about the definition of marriage, and whether the term marriage as understood in Irish law should encompass same sex marriage. The High Court did not find for the plaintiffs in this action.



In 2006 a claim under the Equal Status Acts 2000 and 2004 was settled in the Equality Tribunal when the Government decided to pay adult dependent allowance in respect of the same sex partner of a terminally ill gay man³¹⁸.

4.6 Health and safety (Art. 7(2) Directive 2000/78)

Are there exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78)?

Are there exceptions relating to health and safety law in relation to other grounds, for example, ethnic origin or religion where there may be issues of dress or personal appearance (turbans, hair, beards, jewellery etc)?

In Ireland the main legislative provision in this area is the Safety, Health and Welfare at Work Act 2005.³¹⁹ This Act imposes a duty on an employer to provide a safe place of work as far as is reasonably practicable a failure to do so may result in criminal liability.

The Safety, Health and Welfare at Work (General Application) Regulations³²⁰ impose civil and criminal liability for failure to provide a safe place of work. The standard imposed by the regulations is at issue but there is an argument that they may impose an absolute standard of care. These regulations cover nine areas of employment: general provisions; workplace regulations, work equipment; personal protective equipment; manual handling of loads; display screen equipment; electricity; first aid; notification of accidents and dangerous occurrences.

Irish legislation doesn't contain specific exemptions in relation to disability and health and safety; however, provisions in certain Acts can be interpreted by employers as exempting them from liability in some situations. The Health and Safety Welfare at Work (General Application) Regulations state that although employers should ergonomically adapt workplaces to the individual, they are entitled to give collective protective measures priority over individual protective measures. Equally there are no specific exemptions in relation to any of the other protected grounds, but issues such as dress code are currently dictated by the policy of the individual employer. For example employers who operate manufacturing processes that require a clean room environment generally impose very strict regulations in respect of attire; no case law has arisen from such practices to date.

The Employment Equality Act 1998-2007 at section 33 provides that nothing will render unlawful measures that have been adopted with a view to ensuring equality in practice between employees to protect the health and safety at work of persons with a disability, or to create or maintain facilities for safeguarding or promoting the integration of such persons into the working environment. This provision is new and has yet to be litigated, but the emphasis of the provision is towards integration as opposed towards segregation which is positive.

³¹⁸ Equality Authority, Annual Report 2006 p 30

³¹⁹ <http://www.oireachtas.ie/documents/bills28/acts/2005/a1005.pdf>

³²⁰ The Safety Health and Welfare at Work (General Application) Regulations 1993 S.I. 44/93; The Safety Health and Welfare at Work (General Application) (Amendment) Regulations 2001 S.I. 188/2001; The Safety Health and Welfare at Work (General Application) (Amendment No. 2) Regulations 2003 S.I. 53 /2003; The Safety Health and Welfare at Work (General Application) (Revocation) Regulations 2005 S.I. 392/2005 – collectively known as the Safety Health and Welfare at Work (General Application) Regulations.

There are a number of exceptions to the principle of equality on the basis of health and safety concerns. The Equal Status Act 2000-2004 provides that where a person has a disability that, in the circumstances, could cause harm to the person or to others, treating the person differently to the extent reasonably necessary to prevent such harm does not constitute discrimination.³²¹ This exception was the reason why a claimant suffering from epilepsy failed in his claim against a sailboat training company for lack of reasonable accommodation on a training voyage, where his falling ill on a previous voyage had necessitated a dangerous air-sea rescue. ³²²Section 7(4)(b) of the same Act excludes the provisions of the Act in respect of the provision of education where compliance with the non-discrimination provisions would make it impossible or have a seriously detrimental effect on the provision of education to other students. What is unclear in respect of both provisions relates to who makes the decision as to whether a person is a harm to themselves or others, whether it be made by professionals or lay people and what is the standard to be imposed in such a decision.

4.7 Exceptions related to discrimination on the ground of age (Art. 6 Directive 2000/78)

4.7.1 Direct discrimination

- a) *Is it possible, generally, or in specified circumstances, to justify direct discrimination on the ground of age? If so, is the test compliant with the test in Article 6, Directive 2000/78, account being taken of the European Court of Justice in the Case C-144/04, Mangold ?*

The Employment Equality Act 1998-2007 permits employers to set a maximum age for recruitment, as long as that considers the cost or period of time involved in training a recruit to a standard at which the recruit will be effective in that job, and the need for there to be a reasonable period of time prior to retirement age during which the recruit will be effective in that job.³²³ This complies with the test in Article 6 paragraph (c) of Directive 2000/78.

- b) *Does national law permit differences of treatment based on age for any activities within the material scope of Directive 2000/78?*

There are a number of exemptions contained in the Employment Equality Act 1998-2007 to the age ground. Besides the power to set a maximum recruitment age as mentioned, it is permissible for employers to fix different ages for the retirement of employees whether voluntary or compulsory.³²⁴ Section 34(7) also permits employers to provide for different rates of remuneration or different terms and conditions of employment, on the age ground, where that difference is based on their seniority or length of service within the post. These provisions may not be in conformity with EU law.³²⁵

³²¹ Section 4(4) Equal Status Act 2000-2004

³²² Equality Tribunal DEC S2006-034 *Connery v Coiste an Asgard*

³²³ Section 34(5) Employment Equality Act 1998-2007

³²⁴ Section 34(4) Employment Equality Act 1998-2007: “(4) Without prejudice to subsection (3), it shall not constitute discrimination on the age ground to fix different ages for the retirement (whether voluntarily or compulsorily) of employees or any class or description of employees.”

³²⁵ See below under para 4.7.4.(d)

- c) *Does national legislation allow occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits under it taking up the possibility provided for by article 6(2) ?*

Section 34 refers to an occupational benefits scheme, and provides that it does not amount to discrimination on the age ground for an employer to fix ages for admission to such a scheme or for entitlement to benefits under it; to fix different ages for all employees or a category of employees; to use, in the context of such a scheme, age criteria in actuarial calculations; to provide different rates for severance payment for different employees these rates being based on or taking into account the period between the age of an employee on leaving employment and his or her compulsory retirement age – provided that none of these measures constitute discrimination on the gender ground.³²⁶ Occupational benefit schemes are defined as schemes which provide for benefits to employees or categories of employees on their becoming ‘ill, incapacitated or redundant but does not include any occupational pension scheme providing for pensions, gratuities or other allowances payable on retirement or death.’³²⁷

4.7.2 Special conditions for young people, older workers and persons with caring responsibilities

Are there any special conditions set by law for older or younger workers in order to promote their vocational integration, or for persons with caring responsibilities to ensure their protection? If so, please describe these.

The Protection of Young Persons (Employment) Act 1996³²⁸ limits the employment of young persons, young persons are over sixteen but not yet eighteen. This Act also restricts the employment of children; children are under sixteen. The Act prohibits children under the age of 13 from working, unless they have received a licence from the Minister for State at the Department of Trade Enterprise and Employment. The Minister may not grant a licence without first considering the education and the safety and health of the child. The employer must also have written permission from the parent or guardian before the child is permitted to work. If an employer hires young workers then they must keep a register of young workers, this register should set out the hours worked, the rate of pay and the total amount in wages paid. A second provision aimed at protecting young workers is the Safety, Health and Welfare at Work (Children and Young Persons) Regulations, 1998. Under these regulations an employer must carry out a risk assessment, assessing the risks to the child or young person by the type of employment required. This assessment should consider the safety and health of the child or young person and also consideration should be given to the physical and mental growth. Where the assessment shows that the employment could cause harm to the child or young person then they may not be employed in that employment. Where the assessment shows a risk to the mental and physical growth of the child then the employer must make health surveillance available to them. Parents or guardians should be informed of the outcome of the assessments, and the precautions and preventative measures being put in place to protect the child or young person. The Employment Equality Act 1998-2007 prohibits discrimination on the grounds of age for everyone above 16, but employers are still allowed to set minimum recruitment ages of 18.

³²⁶ Section 34 Employment Equality Act 1998-2007

³²⁷ Section 34(3A) Employment Equality Act 1998-2007

³²⁸ <http://acts.oireachtas.ie/zza16y1996.1.html>



The Employment Equality Act 1998-2007 prohibits discrimination on the grounds of a person's family status. This includes a parent or a person in loco parentis to a person who has yet to attain the age of 18, it also includes a resident primary carer to a person who has a disability which is of such a nature as to give rise to the need for care or support on a continuing, regular or frequent basis. This is a somewhat narrow definition and will cover some but not all carers as many carers are not resident. All the protections granted by the Employment Equality Act are provided for those with a family status as defined by the Act.

The introduction of the Carer's Leave Act, 2001 entitles employees to unpaid leave to provide full time care for a dependant. The maximum leave entitlement is 65 weeks and the minimum is 13 weeks. The Carer's Benefit is payable for up to 65 weeks for a carer who gives up work under the Act. The national agreement Sustaining Progress established the National Framework committee for Work-Life Balance and the Special Initiative on Care. The Work Life Balance Committee is convened by the Department of Enterprise, Trade and Employment. The committee advises on work life balance practices, organises information seminars, offers financial assistance to firms to develop work-life balance initiatives.³²⁹ The Special Initiative on Care includes issues such as childcare, care for the people with disabilities and the elderly. The Equality Authority have published a number of documents in respect of carers see particularly: Implementing Equality for Carer's which highlights the difficulties for carers in Irish society and makes a number of recommendations for change.³³⁰

4.7.3 Minimum and maximum age requirements

Are there exceptions permitting minimum and/or maximum age requirements in relation to access to employment (notably in the public sector) and training?

The Employment Equality Act 1998-2007 prohibits age discrimination for everyone over the age of 16. Employers are still permitted to set a minimum recruitment age of 18 or under and to set retirement ages in employment contracts. If the age of retirement is not specified in the employment contract then it may be implied by practice, this means that if the practice in the particular employment is for people to retire at 65 then it may be assumed that employees, will in the normal course of events retire at this age. If a person is employed after their 65th birthday and no retirement age is specified then the employer cannot impose a retirement age unless they can show that the employee is no longer capable of doing the job or is a danger to either themselves or other employees.³³¹ There are maximum age requirements for access to certain types of training, particularly access to the Garda Síochána and the defence forces. Among those upper age limits are the following:

- Army and Air Corps under the age of twenty five at the time of enlistment
- Naval Service under the age of twenty seven at the time of enlistment
- Air Corp Apprenticeship under the age of nineteen at the time of apprenticeship
- An Garda Síochána under the age of thirty five to commence training

³²⁹ For more information <http://www.worklifebalance.ie/>

³³⁰ Available at www.equality.ie

³³¹ Information provided by Age Action Ireland.



4.7.4 Retirement

In this question it is important to distinguish between pensionable age (the age set by the state, or by employers or by collective agreements, at which individuals become entitled to a state pension, as distinct from the age at which individuals retire from work), and mandatory retirement ages (which can be state-imposed, employer-imposed, imposed by an employee's employment contract or imposed by a collective agreement).

For these questions, please indicate whether the ages are different for women and men.

- a) *Is there a state pension age, at which individuals must begin to collect their state pensions? Can this be deferred if an individual wishes to work for longer, or can an individual collect a pension and still work?*

The State Pension (Transition) is paid to people aged 65 who have retired from work and who have enough social insurance contributions. It is not means-tested. In general, you must have been an employee and paying full-rate social insurance contributions, but a small number of self-employed people also qualify. At age 66, you will transfer to the State Pension (Contributory). You cannot work and get a State Pension (Transition). However, when you transfer to the State Pension (Contributory), at age 66, you can work and get your pension.

Where a person is in receipt of a State Pension (Contributory) there is no limit on what may be earned. There is no potential to increase the contributory state pension after the age of 65 therefore there is no benefit to deferring that payment. Those in receipt of the non-contributory pension may only earn up to €100 per week prior to deductions being made from the actual pension. The state pension age applies equally to men and women.

- b) *Is there a normal age when individuals can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements? Can payments from such occupational pension schemes be deferred if an individual wishes to work for longer, or can an individual collect a pension and still work?*
- c) *Is there a state-imposed mandatory retirement age(s)? Please state whether this is generally applicable or only in respect of certain sectors, if so please state which. Have there been recent changes in this respect or are any planned in the near future?*

Ireland does not have a single fixed retirement age. In general the retirement age is provided for in the contract of employment. Some contracts of employment have a mandatory retirement age but make provision for earlier retirement, generally on the grounds of illness. It is permissible for employers to fix different ages for the retirement of employees whether voluntary or compulsory, within the terms of the contract of employment.³³² Most people in Ireland retire at age 65. There is no set retirement age for the self-employed. Occupational pension schemes are private agreements and they are completely dependent on the individual agreement.

³³² Section 34(4) Employment Equality Act 1998-2007, this permits employers to choose whatever age they please for the retirement of employees, whether voluntary or compulsory.



Some jobs existing under a statutory framework set a maximum age of staff. The mandatory retirement age for those in the public sector who joined before April 2004 is 65 years. Those who joined after April 2004 have a minimum retirement age of 65, this means they can continue to work subject to health requirements. There are different age periods for certain occupations such as the Gardaí, fire-fighters and the Defence Forces. The Gardaí and Fire Service have a minimum retirement age of 55 and the compulsory retirement age for Gardaí is 60. Members of the judiciary have a statutory retirement age of 70, however, some judges may remain in office until the age of 72. Medical general practitioners must retire at the age of 70. An employer may offer a fixed term contract to a person over the compulsory retirement age.³³³ This is of questionable legality now in view of the decision of the ECJ in the *Mangold* case.³³⁴

- d) *Does national law permit employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract, collective bargaining or unilaterally?*

It is permissible for employers to fix different ages for the retirement of employees whether voluntary or compulsory, within the terms of the contract of employment, under the Employment Equality Acts.³³⁵ This was challenged as discriminatory in the case of *Eileen McEvoy v Mount Temple School* in 2007.³³⁶ Ms McEvoy was forced to retire from her position with the school on her 65th birthday. She argued before the Equality Tribunal and later the Labour Court that new legislation introduced in 2004 should have allowed her to reapply for her position. That legislation provided that all public servants recruited after 2004 can go on working past the age of 65. Her claim did not succeed.

The issue of age discrimination was also addressed by the ECJ in October 2007 in the Spanish *Palacios* case, where the Court held that a mandatory retirement clause may be unlawful unless it can be objectively justified in the context of national labour policies. This case has raised the likelihood that mandatory retirement clauses fixed at the discretion of employers may be recognised as not in conformity with Directive 2000/78, notwithstanding their compliance with national employment equality legislation.

- e) *Does the law on protection against dismissal and other laws protecting employment rights apply to all workers irrespective of age, if they remain in employment or are these rights lost on attaining pensionable age or another age (please specify)?*

To be covered by the Unfair Dismissals Act 1977-2007 a number of basic requirements must be satisfied, they include: the necessity to have one year's continuous service with the employer; and employees must not have reached the normal retirement age for the employment in question.³³⁷ The legislation defines unfair dismissals as dismissals relating to:

³³³ Section 6 (3) (c) Employment Equality Acts 1998 – 2007.

³³⁴ Case C-144/04 *Mangold v Rüdiger Helm*, Judgment of 22 November 2005, OJ C 36, 11.02.2006, p. 10

³³⁵ Section 34(4) Employment Equality Act 1998-2004, this permits employers to choose whatever age they please for the retirement of employees, whether voluntary or compulsory.

³³⁶ Labour Court 2007, Determination No. EDA0716

³³⁷ Section 2(1) Unfair Dismissals Act 1977-2007



- membership of a trade union, or
- union activity,
- by reason of a persons religious or political opinions,
- by reason of race,
- colour,
- sexual orientation,
- age,
- membership of the Traveller community

Unfair dismissals also occur where a person is dismissed for seeking to enforce their rights under the:

- Unfair dismissals may also occur where there Parental leave Act,
- Maternity Protection Act,
- Adoptive Leave Act,
- instigating or proposing to take either civil or criminal proceedings against the employer,
- or acting as a witness,
- or being party to such proceedings.

Unfair dismissals may also occur where there was not a substantial ground to justify the dismissal. This scope of the Unfair Dismissals Act 1977-1993 is broader than that of the Employment Equality Act 1998-2007. The Employment Equality Act 1998-2007 has no equivalent to issues such as trade union membership, political opinion among other grounds. As stated above the Unfair Dismissals Act 1977-2007 does not apply to persons who have reached the retirement age, even if they are still in employment. This means that where there are two employees one who has not reached the retirement age and one who has, and both are unfairly dismissed for their political opinion, only the individual who has not reached the retirement age will possess a remedy for that dismissal.

In effect where a person who has passed the normal retirement age and is dismissed in an unfair manner, not amounting to a discriminatory dismissal, there is no legal remedy available. This is arguably not in conformity with the provisions of the Framework Employment Directive.

4.7.5 Redundancy

- a) *Does national law permit age or seniority to be taken into account in selecting workers for redundancy?*

No.

- b) *If national law provides compensation for redundancy, is this affected by the age of the worker?*

In Ireland redundancy occurs where you lose your job as a result of the closure of the business or a reduction in the number of staff. The Redundancy Acts 1967-2007 governs this area of law.



The law sets down minimum entitlements to redundancy payments; the employer and employee may agree redundancy payments in excess of the statutory minimum. To be eligible for a payment under the Redundancy Acts, you must satisfy a number of criteria. The employee must be over 16 years of age, they must be in insurable employment under the Social Welfare Acts, the employee must have worked continuously for the employer for at least 104 weeks. Where there is a redundancy, the employer must use fair criteria for selecting employees. A number of different approaches are taken. They can include: 'Last in First Out;' use of a selection process or process which have been used before; the custom in the particular trade or occupation; the contract of employment sets out a selection process; the employer wants another employee to do the work of the employee being made redundant, and that employee is not trained or qualified to do both types of work. As a result of the Employment Equality Act 1998-2007 the employer may not select a person for redundancy on any of the discriminatory grounds prohibited by the Act including age.³³⁸ The under - 66 limit for claiming statutory redundancy payments has now been removed³³⁹ meaning that there is now no limit.

4.8 Public security, public order, criminal offences, protection of health, protection of the rights and freedoms of others (Article 2(5), Directive 2000/78)

Does national law include any exceptions that seek to rely on Article 2(5) of the Framework Employment Directive?

Section 16 (5) of the Employment Equality Acts 1998 to 2007 does not require an employer to recruit, retain or promote a person if he is aware on the basis of a criminal conviction or other reliable information that the individual engages or has a propensity to engage in any form of unlawful sexual activity, particularly where the employment involves access to minors or other vulnerable persons (subsection (6)).

Section 15 of the Equal Status Act 2000-2007 does not require a person who provides goods or services to deal with a customer in circumstances 'which would lead a reasonable individual having the responsibility, knowledge and experience of the person to the belief, on grounds other than discriminatory grounds,' that to deal with the customer would produce 'a substantial risk of criminal or disorderly conduct or behaviour or damage to property at or in the vicinity of the place in which the goods or services or the premises or accommodation are located.'³⁴⁰ This section then provides that any action taken in 'good faith' by or on behalf of a 'publican/hotel'³⁴¹ for the purpose of complying with the Licensing Acts 'shall not constitute discrimination.'³⁴²

³³⁸ <http://www.redcalc.entemp.ie/> Online redundancy calculator

³³⁹ Protection of Employment (Exceptional Collective Redundancies and Related Matters) Act 2007 <http://www.entemp.ie/publications/employment/2007/excollredact.pdf>

³⁴⁰ Section 15(1) Equal Status Act 2000-2004

³⁴¹ The term used in the legislation is the 'holder of a licence or other authorisation which permits the sale of intoxicating liquor.'

³⁴² Section 15(2) Equal Status Act 2000-2004



4.9 Any other exceptions

Please mention any other exceptions to the prohibition of discrimination (on any ground) provided in national law.

In this section, the exceptions referred to are those not already mentioned in the report. The Employment Equality Act 1998-2007 at section 36 permits the use of certain requirements in the context of certain posts, such as holding officer under, or in the service of the State, this includes the Defence Forces, Garda Síochána, and civil servants, or officers of a local authority, a health board, or a vocational education committee. The requirements relate to residence, citizenship and proficiency in the Irish language. As regards proficiency in the Irish language it is also permissible under the Act to require such proficiency in the context of teachers in both primary and post primary schools. Finally this section permits the imposition of certain educational requirements for certain posts, professions, or vocations.

Under Section 35(1) it is not discriminatory to pay a disabled person a lesser rate of remuneration if their output is less than a non-disabled person. This seems to negate the principle of equal pay where disabled employees are concerned.

The Equal Status Act 2000-2007 also contains a number of exceptions and exemptions to the non-discrimination rule. The principal and most problematic exception is contained in section 14 of that Act which provides that nothing in the Act can be construed as prohibiting the taking of any action required by order of a court, enactments, any measure adopted by the European Union, or any international convention. In effect this ensures that the Equal Status Act 2000-2007 is subordinate to those enactments set out in this section. For, example the introduction of the Social Welfare (Miscellaneous Provisions) Act 2004 and the Residential Tenancies Act 2004 both introduced provisions that discriminated against cohabiting same sex couples by limiting the definition of cohabitation to heterosexual couples. Section 14 of the Equal Status Act 2000-2007 denies co-habiting couples in this context to challenge the provisions under that Act. These provisions may, however, be in breach of the European Convention on Human Rights Act 2003. The amendments to the Equal Status Act in 2004 added a further exclusion, that being any action taken by a public authority in relation to non-nationals, who are unlawfully within the State or outside the State when the action was taken. Equally the provisions of the Equal Status Act do not apply to any statutory or non-statutory schemes covering persons who are not nationals and their entry to and residence in the State.

The Equal Status Act 2000-2007 contains a general prohibition on discrimination in the disposing of goods to the public, there are a number of exceptions to that general rule where it will not amount to discrimination, including:

- Differences in treatment are permitted in relation to ‘annuities, pensions, insurance policies’ or other matters related to the assessment of risk. The difference in treatment should relate to actuarial or statistical data or other relevant underwriting or commercial factor and should be reasonable.³⁴³

³⁴³ Section 5(2)(d) Equal Status Act 2000-2004

- Difference in the treatment of persons on the religion ground in relation to goods or services provided for a religious purpose.³⁴⁴
- Difference in treatment of persons on the gender, age or disability ground or on the basis of nationality or national origin in the organisation of sporting events.³⁴⁵
- Difference in treatment on the gender, age, disability or race ground that is required for reasons of ‘authenticity, aesthetics, tradition or custom in connection with a dramatic performance or other entertainment.’³⁴⁶
- Having an age requirement for persons to be either an adoptive or foster parent.³⁴⁷
- Differences in the treatment not otherwise specifically provided for in the treatment, which can reasonably be regarded as goods or a service suitable only to the needs of certain persons.³⁴⁸

Section 46 provides that the provisions of this Act do apply in respect of ships and aircraft registered in the State. Actions done in respect of such a ship or aircraft while subject to the jurisdiction of a country outside of the State and that is required by the law of that State shall not constitute discrimination under the Equal Status Act 2000-2007. Section 7 refers to education and there is one further exception that is not mentioned in the section above on education and that is that it will not amount to age discrimination to allocate places at third level institutes for ‘mature students’ within the meaning of Local Authorities (Higher Education Grants) Acts, 1968 to 1992).³⁴⁹

Section 16 of the Equal Status Act 2000-2007 permits the imposition or maintenance of preferential fee charges in respect of goods or services being offered in respect of persons with their children, married couples, persons in a specific age group, or persons with a disability. The section also permits different treatment where a person is treated differently solely ‘in the exercise of a clinical judgment in connection with the diagnosis of illness or his or her medical treatment,’ or ‘is incapable of entering into an enforceable contract or of giving an informed consent and for that reason the treatment is reasonable in the particular case.’³⁵⁰

Section 15(1) of the Equal Status Act 2000-2007 provides that the Act will not require a person who provides goods or services to deal with a customer where it may be reasonably believed that ‘the customer would produce a substantial risk of criminal or disorderly conduct or behaviour or damage to property at or in the vicinity of the place in which the goods or services are sought or the premises or accommodation are located.’³⁵¹ The Equality Tribunal has extensively considered this section.³⁵² This provision was amended in 2003 by the Intoxicating Liquor Act 2003, which provided that cases involving discrimination in respect of licensed premises should be heard in the District Court as opposed to at the Equality Tribunal. This has a significant impact on the cost of such litigation for both the complainant and the respondent.

³⁴⁴ Section 5(2)(e) Equal Status Act 2000-2004

³⁴⁵ Section 5(2)(f) Equal Status Act 2000-2004

³⁴⁶ Section 5(2)(i) Equal Status Act 2000-2004

³⁴⁷ Section 5(2)(k) Equal Status Act 2000-2004

³⁴⁸ Section 5(2)(j) Equal Status Act 2000-2004

³⁴⁹ Section 7(3)(e) Equal Status Act 2000-2004 – Mature students refers to students that are over the age of 23.

³⁵⁰ Section 16(2)(a) and (b) Equal Status Act 2000-2004

³⁵¹ Section 15(1) Equal Status Act 2000-2004

³⁵² See statistics for 2001, 2002 and 2003 http://www.equalitytribunal.ie/htm/about_us/statistics.htm which show that the majority of cases under the Equal Status Act related to the provision of services in Pubs/Hotels and Night Clubs. See as example *Collins v. Owner Club Sarah* DEC-S2002-014 and *Ward v. The Boathouse Pub*, DEC-S2001-01.



A second point to note is that the Equality Authority is not afforded a statutory function to provide information to the public on the operation of Section 19 of the Intoxicating Liquor Act, 2003. This means that no body has been charged with disseminating information about the legal protection against discrimination contained in this Act, such dissemination is required by both Article 10 of Directive 2000/43, and Article 12 of Directive 2000/78. The Intoxicating Liquor Act is not therefore in compliance with the Directives. The statistics for the end of year for 2003 establish that members of the Traveller community took 52% less cases post the introduction of the Intoxicating Liquor Act 2003. This provision applies to all the protected grounds, but would appear to have had a disproportionate impact on members of the Traveller community.³⁵³

Section 15(2) also provides another broad exception to the non-discrimination provisions. This exception is for owners of licensed premises, which permits actions taken in 'good faith' for the purpose of complying with the Licensing Acts, those actions will not constitute discrimination. This exception has been relied on in numerous cases.³⁵⁴ The position taken by the Equality Tribunal in respect of this provision is that the meaning of 'in good faith' means the actions must be done honestly and without prejudice.³⁵⁵ In *Conroy v. Costello* the Equality Officer stated that in 'order to take an action in good faith it has to be free from any discriminatory motivation.'³⁵⁶ Any action taken should be for the sole purpose of ensuring compliance with the provisions of the Licensing Acts.³⁵⁷ The Licensing laws require publicans to run orderly houses, avoiding drunkenness, violent or riotous behaviour, and impose various legal obligations on publicans in respect of health and safety law.

³⁵³ Please see sections 0.2 above and 6.1 and 6.5 below for a discussion on effective sanctions, and section 7 below on the functions of the equality body.

³⁵⁴ *Delaney v. The Harp Bar*, DEC-S2002-53/56, *Mongan and Ors v. The Waterside Hotel* DEC-S2003-008/014, *Moorehouse v. Ayleswood* DEC-S2001-009, *Maughan v. The Glimmer Man* DEC-S2001-020, *Conroy v. Costello* DEC-S2001-014, *McDonagh v. The Castle Inn* DEC-S2001-022 to name but some of the cases.

³⁵⁵ *Delaney v. The Harp Bar*, DEC-S2002-53/56

³⁵⁶ DEC-S2001-014

³⁵⁷ *Mongan and Ors v. The Waterside Hotel* DEC-S2003-008/014



5. POSITIVE ACTION (Article 5 Directive 2000/43, Article 7 Directive 2000/78)

- a) *What scope does national law provide for taking positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation? Please refer to any important case-law or relevant legal/political discussions on this topic*

Section 33 of the Employment Equality Act 1998-2007 states that nothing in the Act shall render unlawful measures that are maintained or adopted with a view to ensuring full equality in practice between employees. Those measures should aim to prevent or compensate for disadvantages linked to any of the discriminatory grounds; to protect the health and safety at work of a person with a disability; to create or maintain facilities for safeguarding or promoting the integration of such persons into the working environment. This provision has yet to be litigated. The pre-amended Employment Equality Act was litigated and contained the following provision: nothing in the Act prevented the taking of measures to facilitate the integration into employment, either generally or in particular areas or a particular workplace, of: persons who have attained the age of 50 years; persons with a disability or any class or description of such persons; or members of the traveller community. Any measures taken under this section must have been intended to reduce or eliminate the effects of discrimination against any of the persons protected by this section.

In *Gillen v. Department of Health*,³⁵⁸ the complainant attempted to rely on the provision which permitted positive action to facilitate the integration into employment of persons aged over 50. He contended that the failure of the respondent to take such positive action was suggestive that it discriminated on the age ground. The Equality Officer held that this was not the position, section 33 was permissive of positive action but did not oblige the respondent to take such action. Therefore a failure to do so was not discriminatory. The Equality Officer also noted that section 33 referred to measures to integrate persons into employment, while the complainant's case was about access for existing employment, and the complainant's case referred to promotion. Equally the Equality Officer stated that 'as section 33 is an exception to the 1998 Act, it must be strictly construed.'

The Equal Status Act 2000-2004 also permits positive actions. Section 14 provides that nothing within the Act shall prohibit preferential treatment or the taking of positive measures which are bona fide intended to promote equality of opportunity for persons who are, in relation to other persons, disadvantaged or who have been or are likely to be unable to avail themselves of the same opportunities as those other persons; to cater for the special needs of persons, or category of persons, who, because of their circumstances, may require facilities, arrangements, services or assistance not required by persons who do not have those special needs.

The Equal Status Act also permits different treatment by housing authorities and voluntary housing associations in the provision of accommodation on the basis of 'family size, family status, marital status, disability, age or membership of the Traveller community.'³⁵⁹

³⁵⁸ DEC-E2003/035, this was appealed to the Labour Court, decision EDA0412, this decision did not address this element of the case. See also *Glennon v. St. Clare's Comprehensive School*, DEC-E2003/30 which related to positive action in respect of gender, here the Equality Officer held that the ECJ decision of *Abrahamsson & Andersson v. Fogelqvist*, ECJ, C-407/98 applied.

³⁵⁹ Section 6(6) Equal Status Act 2000-2004, race and ethnicity are not mentioned in this section.



The Equal Status Act, 2000-2004 also provides that in respect of educational establishments differences of treatment are permitted on the grounds of religion³⁶⁰ and age.³⁶¹ Section 16 also permits preferential fee charges in respect of goods and services in respect of persons with a disability or in specific age groups.

The attainment of a 3% quota for the employment of people with disabilities has been a government policy in respect of both the civil and public service.³⁶² This policy regards it as desirable that the civil and public service aim to ensure that 3% of its work force are people with disabilities.³⁶³

b) Do measures of positive action exist in your country? Which are the most important? Please provide a list and short description of the measures adopted., classifying them into broad social policy measures, quotas, or preferential treatment narrowly tailored. Refer to measures taken in respect of all 5 grounds, in particular refer to the measures related to disability and any quotas for access of people with disabilities to the labour market, any related to Roma and regarding minority rights based measures.

The National Disability Authority by virtue of Part V of the Disability Act 2005 is now the monitoring body for ensuring that the civil and public sector comply with positive action for people with disabilities in the civil and public service..³⁶⁴ In 2006, the NDA published a 'Code of Practice on Accessibility of Public Services and Information provided by Public Bodies', to provide guidance and support for public bodies in meeting their new obligations under Sections 26, 27 and 28 of the Disability Act 2005³⁶⁵. The Partnership 2000 agreement also contained a commitment that the quota/target will be met in the Public Service during the lifetime of the Partnership.³⁶⁶ This was followed by two further agreements: the Programme for Prosperity and Fairness, and Sustaining Progress.³⁶⁷ The most recent partnership agreement 'Towards 2016 – Ten-Year Framework Social Partnership Agreement' further provides that:

'Policies and procedures will be reviewed to ensure that they support appropriate steps for improvement in the delivery of more accessible services, and that the provision of services and facilities are disability-proofed. Procedures will remain in place to monitor, record and report compliance with the 3% target for the employment of people with disabilities.

³⁶⁰ Section 7 (3)(b) and (c) Equal Status Act 2000-2004.

³⁶¹ Section 7 (3)(e) Equal Status Act 2000-2004.

³⁶² In 1973 a draft Bill on the Employment of People with Disabilities was proposed there was widespread opposition to the Bill and as a result it never proceeded. The Government at that time set up a working group to research the issue and in 1977 they reported. One of their recommendations was a 3% quota in the civil and public service and in March of that year the then Government introduced the policy, this policy is not on a statutory footing.

³⁶³ On the results of NDA's analysis of information received in 2006, the overall figure for Government Departments was 2.4%, and only 36% of public bodies had reached the 3% quota. They indicated however that these results must be treated with caution

[http://www.nda.ie/cntmgmtnew.nsf/0/60DD74656B72013F802573B5005CD6C7/\\$File/da05compliancereport2006_08.htm](http://www.nda.ie/cntmgmtnew.nsf/0/60DD74656B72013F802573B5005CD6C7/$File/da05compliancereport2006_08.htm)

³⁶⁴ This part of the Act was given force of law on the 31st of December 2005.

³⁶⁵ The Code was declared, by government order, an approved statutory Code of Practice under the Disability Act 2005, in April 2006 (as outlined in Statutory Instrument no. 163 of 2006).

³⁶⁶ See para 5.21 of 'Partnership 2000' which ended in 2000, available at:

<http://www.taoiseach.gov.ie/index.asp?locID=231&docID=217>

³⁶⁷ Available at: <http://www.taoiseach.gov.ie/index.asp?ACTIVEGROUP=2&locID=231&docID=-1>

Effective implementation of the strategy will depend upon meaningful consultation and liaison arrangements with other relevant bodies and representative organisations to facilitate access by people with disabilities.’³⁶⁸

There are few positive action measures in Ireland specifically for Roma.

One measure is the Equal Community Initiative Roma Cultural Mediation Project (RCMP) whose aims are to give Roma people greater equality of access to health, social, educational and probation services, and more benefits from their utilisation of them, as well as to develop appropriate professional skills and intercultural competence among service providers. There is also a project to establish a Roma Employment Agency. There is a wide range of positive action measures for Travellers, in addition to general programmes to target disadvantaged groups which benefit Travellers. It appears that to date no such range of specific supports have been provided for the Roma community.

POSITIVE ACTION MEASURE	TYPE
Measures for Roma	
Roma Cultural Mediation Equal Project	Preferential treatment Roma
Roma Employment Agency pilot project	Preferential treatment Roma
Structures	
High-Level Group on Travellers	Preferential treatment Travellers
Education	
Home/School Community Liaison Scheme	Broad social policy
Giving Children an Even Break	Broad social policy
School Completion Programme	Broad social policy
DEIS Learning Support Guidelines	Broad social policy
Visiting Teacher Service	Preferential treatment Travellers
Increased capitation grants to schools	Preferential treatment Travellers
Resource teachers in primary schools	Preferential treatment Travellers
Additional teaching hours per week for each Traveller student enrolled.	Preferential treatment Travellers
Third level education access programmes	Broad social policy , minority groups
Employment	
Community Employment schemes incl 5 for Travellers	Broad social policy, + preferential treatment Travellers
Social Economy Programme	Broad social policy
HSE/Pavee Point primary health care/employment project	Preferential treatment Travellers
Civil Service work/placement initiatives	Preferential treatment Travellers

³⁶⁸ See para 32.16 in ‘Towards 2016 – Ten-Year Framework Social Partnership Agreement 2006-2015’ available at: <http://www.taoiseach.gov.ie/index.asp?locID=181&docID=2755>

Integrated projects employment/accommodation etc	
Galway City pilot project	Preferential treatment Travellers
Local authority Integrated pilot projects Clare and South Dublin	Preferential treatment Travellers

A High-Level Group of officials has been set up to replace earlier structures to monitor implementation of the influential 1995 Report of the Task Force on Travellers. However the new monitoring body does not include Traveller organisations, social partner organisations or relevant statutory bodies such as the Equality Authority.

In education, general social policy programmes relevant to Travellers include the Home /School Community Liaison Scheme and the School Completion Programme targeting individual “at risk” young people of school going age, both in and out of school, and arranging supports to address inequalities in education access, participation and outcomes. The programme includes, for example, home work clubs and holiday activities.

Approximately 2,000 Traveller children are currently targeted by this initiative in schools. The National Educational Psychological Service considers issues related to the assessment and placement of Traveller students. The Learning Support Guidelines published by Developing Equal Opportunities in Schools (DEIS) provide guidelines to primary schools to ensure that all children achieve appropriate levels of literacy and numeracy during the course of their primary education.

Special measures for Travellers include the Visiting Teacher Service (40 posts) for Traveller Education in pre-schools, primary and secondary schools; Guidelines on Traveller Education and Guidelines on Intercultural Education to provide information and help schools to increase their understanding of Traveller culture, educational needs and diversity; 48 special Pre-schools for Travellers (in the process of being integrated into mainstream provision); 540 Resource Teachers for Travellers throughout the country in primary schools; enhanced capitation grants for each Traveller pupil in primary schools and secondary schools; provision to each post-primary school of an additional 1.5 ex-quota teaching hours per week for each Traveller student enrolled; National Educational Psychological Service has considered issues related to the assessment and post-primary placement of Traveller students; Junior Education Centres for Travellers (3) catering for Traveller students aged 12 – 15 years, where students are provided with door to door transport, breakfast and lunch, are not required to wear a uniform and parents are not required to provide any financial support.

In Third level education, the National Office for Equity of Access to Higher Education published its “Achieving Equity of Access to Higher Education in Ireland – Action Plan 2005 – 2007”.

The National Office develops and agrees national and institutional targets for each under-represented group; Travellers are a target of this plan. In adult and further education, Senior Traveller Training Centres (33, 3 outreach) provide a programme of general education, vocational training, work experience and guidance/ counselling/ psychological services for travellers over 15, no upper age limit.



All Adult Literacy Programmes are open to Travellers and of the 33 Vocational Education Committees, 19 have specific adult literacy programmes for Travellers.

In employment, the Youthreach training programmes include a significant number of young travellers. The Health Service Executive /Pavee Point Primary health care project trains Traveller women to work as health care workers in their own communities. Currently 40 Primary Health Care for Travellers Projects are run nationally, with 15 participants in each programme. There are also Community Employment Schemes focused exclusively on the needs of Members of the Traveller Community, and small number of Travellers are also employed under the Social Economy Programme. A pilot project in Galway City involves a number of traveller organisations, community, voluntary and statutory organisations. In recent years, the Civil Service has been involved in a number of initiatives relating to recruitment/work placement opportunities for Travellers in the Civil Service. South Dublin and Clare local authorities have developed integrated pilots for traveller employment, accommodation etc.



6. REMEDIES AND ENFORCEMENT

6.1 Judicial and/or administrative procedures (Article 7 Directive 2000/43, Article 9 Directive 2000/78)

In relation to each, of the following questions please note whether there are different procedures for employment in the private and public sectors.

In relation to the procedures described, please indicate any costs or other barriers litigants will face (e.g. necessity to instruct a lawyer?) and any other factors that may act as deterrents to seeking redress (e.g. strict time limits, complex procedures, location of court or other relevant body)?

Are there available statistics on the number of cases related to discrimination brought to justice? If so, please provide recent data.

a) *What procedures exist for enforcing the principle of equal treatment (judicial/administrative/alternative dispute resolution such as mediation)?*

The Employment Equality Act 1998-2007 provides for a range of remedies, combining compensation awards with orders for employers to take specific actions, and includes the possibility of mediation. The enforcement mechanisms apply equally to most public and private sector employees; there is an exception in respect of the Defence Forces.³⁶⁹ The Employment Equality Act 1998-2007 provides a different redress process for members of the Defence Forces, which excludes direct access to the Equality Tribunal or Labour Court.³⁷⁰ The government has indicated that it intends to amend the Act in order to allow access for the Defence Forces to the general redress procedures on all grounds (except age and disability).³⁷¹ A second exception relates to section 77(7) of the Employment Equality Act 1998-2007 which requires certain public sector employees to exhaust internal complaints procedures prior to taking a case to the Equality Tribunal.

Complaints under either the Employment Equality Act 1998-2007 or the Equal Status Act 2000-2004 may be brought before the Equality Tribunal.³⁷² The Equality Tribunal assumes an investigative role in the hearing of complaints, complainants may represent themselves, costs may not be awarded against either the complainant or the respondent, and the procedure is informal. In 2004 the jurisdiction for dismissal cases was transferred to the Equality Tribunal, which now has the power to award remedies including the specific power to order a reinstatement.³⁷³ Prior to this the Labour Court dealt with dismissal cases. The option of mediation is provided for in section 78 of the Employment Equality Act 1998-2007. A mediated settlement agreed by the parties becomes legally binding and its terms can be enforced at the Circuit Court³⁷⁴. The Equality Authority may provide assistance in the enforcement procedures.³⁷⁵

³⁶⁹ Section 77(9) and 104 of the Employment Equality Act 1998-2007

³⁷⁰ Section 104, Employment Equality Act 1998-2007

³⁷¹ Department of Justice, Equality and Law Reform, 2003.

³⁷² http://www.equalitytribunal.ie/php/database_previous_cases.php Equality Tribunal cases database.

³⁷³ Section 46 Equality Act 2004.

³⁷⁴ Section 91(2), Employment Equality Act 1998-2007

³⁷⁵ Section 67(1)(b)(iii) Employment Equality Act 1998-2007.

The Labour Court³⁷⁶ is an industrial relations tribunal operating on a tripartite basis, consisting of a panel, having a full-time chair and one representative each of employers and workers. The Labour Court is empowered to hear appeals from the Equality Tribunal.³⁷⁷ Recommendations from the Labour Court are binding on the parties. Where it is acting as an appellate body in cases from the Equality Tribunal, its determinations can be appealed on a point of law to the High Court.³⁷⁸

The District Court is a court of local and limited jurisdiction,³⁷⁹ with jurisdiction over a range of criminal and civil matters. The Intoxicating Liquor Act 2003 transferred jurisdiction for cases alleging discrimination against a licensed premises to the District Court. The Circuit Court is a court of local and limited jurisdiction,³⁸⁰ with jurisdiction over a range of criminal and civil matters.³⁸¹ Gender discrimination cases falling under the Employment Equality Act 1998-2007 may be brought directly to the Circuit Court and this forum offers superior remedies for complainants. The Circuit Court has an unlimited financial jurisdiction when dealing with gender discrimination cases under the Employment Equality Act. Appeals on a point of law lie to the High Court.³⁸² Final decisions of the Equality Tribunal and the Labour Court can be enforced through the Circuit Court.³⁸³

Complaints of dismissal due to discrimination³⁸⁴ may also be brought under the Unfair Dismissals Acts 1977 and 1993. These complaints are considered first by a Rights Commissioner, whose recommendations are not legally binding. The Employment Appeals Tribunal makes legally binding determinations, with the possibility of appeal to the Circuit Court, and subsequently the High Court.

Claims are brought before the relevant body by way of application using standard forms. Hearings are in private before the Equality Tribunal and Labour Court and are normally in public before the Employment Appeals Tribunal. The decisions of each of the bodies are available for public inspection, with both the Equality Tribunal and the Labour Court publishing their decisions on their respective websites. Both District and Circuit Court Cases are heard in public; it is rare for decisions of either court to be published.

Both the Employment Equality Act 1998 – 2007 and the Equal Status Act 2000-2004 impose time limits for bringing complaints to the appropriate body. These time limits are quite strict, the Equal Status Act 2000-2004 requires a complainant to initiate his/her complaint by notifying, in writing, the respondent within two months of the date of the occurrence (or the date of the last occurrence if relevant) of the nature of the complaint and the intention to pursue the matter to the Equality Tribunal if there is not a satisfactory response³⁸⁵. This may present difficulties for complainants, for example, a complainant who has been the victim of harassment may be extremely concerned about commencing his/her complaint with an initial notice to the alleged perpetrator of the harassment.

³⁷⁶ <http://www.labourcourt.ie/labour/labour.nsf/lookuppagelink/HomeRecommendations> Labour Court database.

³⁷⁷ Section 83(1), Employment Equality Act 1998-2007

³⁷⁸ Section 90(3), Employment Equality Act 1998-2007

³⁷⁹ Article 34.4.3, Bunreacht na hÉireann, Constitution of Ireland, 1937.

³⁸⁰ Article 34.4.3, Bunreacht na hÉireann, Constitution of Ireland, 1937.

³⁸¹ Hogan and Whyte, *JM Kelly: The Irish Constitution*, 4th Edition, 2003 at 921

³⁸² S. 90(2) Employment Equality Act, 1998-2007

³⁸³ S. 91 Employment Equality Act, 1998-2007

³⁸⁴ Not all the grounds are covered, see section 2.1 above.

³⁸⁵ Equal Status Acts 2000 to 2004, section 21 (2)

There are also very real concerns in respect of people with literacy difficulties, and individuals who may not have an adequate command of the English language. The Director of Equality Investigations may extend this period for a further two months, if satisfied that reasonable cause³⁸⁶ prevented the complainant from sending the notification within the normal time period.

An amendment to the Equal Status Act 2000-2007 requires complaints under that Act involving licensed premises to be brought to the District Court. The District Court may provide for an order for compensation, an order that the holder of the licence specified take a course of action, or an order for temporary closure of the licensed premises. The major impact of this amendment is the cost implications for complainants. Under the previous system it was possible to represent oneself at the Equality Tribunal, and costs cannot be awarded against either complainant or respondent; this is not the case at the District Court.³⁸⁷ This amendment was controversial and was strongly opposed by the Equality Authority and the Human Rights Commission.³⁸⁸ A further and significant concern relates to the fact that the Equality Authority was not granted a function to provide information to the public in relation to the operation of section 19 of the Intoxicating Liquor Act 2003. In practice this means that no body disseminates information about the legal protection against discrimination contained within this Act. This does not appear to comply with either Article 10 of Directive 2000/43, or Article 12 of Directive 2000/78.

Litigating is fraught with difficulties, and the Equality Authority through its case work and work with the public has highlighted a number of relevant concerns.³⁸⁹ These concerns include the cost of litigation, which can act as a substantial disincentive to potential claimants. While there is no potential for awards of costs against either party in the Equality Tribunal or the Labour Court, this is not the position with regard to appeals in the District Court,³⁹⁰ or the Circuit Court.³⁹¹

A second issue relates to concerns about the right to privacy, cases in the Equality Tribunal and the Labour Court are private, whereas hearings in the District and Circuit Court are in public this is of particular importance for the grounds of sexual orientation and disability.

A third issue raised relates to delay. The current backlog of cases in the Equality Tribunal means parties are experiencing considerable delay prior to cases being heard, on occasion up to as much as seven or eight years in respect of Equal Status cases³⁹². It is estimated that it can take up to one year for an Equality Officer to be appointed to a case, there are delays in scheduling, hearing and further delays in the delivery of the recommendation of the Equality Officer. This delay impacts on the potential remedies that can be granted.

Where a case takes three or more years from filing to hearing it is improbable that the remedy of reinstatement will be ordered.

³⁸⁶ Section 21 (3) , Equal Status Act 2000-2004

³⁸⁷ Intoxicating Liquor Act 2003.

³⁸⁸ Irish Times, 28th May 2003.

³⁸⁹ Equality Authority, Annual Report 2006, <http://www.equality.ie/index.asp?locID=136&docID=380>

³⁹⁰ Equal Status Cases under the Intoxicating Liquor Act, 2003 go to the District Court at first instance.

³⁹¹ Appeals from the Labour Court, Gender Cases and enforcement orders may be heard in the Circuit Court.

³⁹² Equality Authority, 2006 see "Issues of concern" <http://www.equality.ie/index.asp?locID=136&docID=380>



In 2007 there was a reduction in the number of casefiles of the Equality Authority under the Employment Equality Acts 1998 and 2007 on the ground of race. Voluntary groups working with migrant workers have informed the Equality Authority that this reduction was not due to a reduction in allegations of discrimination on the race ground but is on account of perceived delays in the Equality Tribunal.

Another issue relates to the size of awards, the financial ceilings on compensation awards impact negatively on the size of awards granted. The level of potential award is so low that this acts as a disincentive for people taking actions. There have been difficulties in getting awards enforced.

Section 21 of the Equal Status Act 2000-2004 requires potential claimants to notify the potential respondent within two months of the incident of the nature of the allegation and also the claimant's intention to seek redress under the Act. The short time frame involved means that in practice the first contact with the respondent involves a threat of litigation and is unhelpful and decreases the potential for matters to be resolved by means other than litigation. The Equality Authority say that their experience has been that agreeing to mediation is often used as a delaying tactic; they suggest a process be introduced to tackle this. Section 79(4) permits the Minister to specify procedures to be followed in carrying out investigations by Equality Officers, currently different procedures are operated by different Equality Officers and there is a necessity to harmonise practice.

A final concern relates to the Equality Authority's ability to assist in the bringing of proceedings, or to represent claimants. The Equality Authority provides assistance in a limited number of cases.

For the Equality legislation to be truly effective, employers and service providers need to believe that cases will be taken against them. There is therefore a necessity for the Equality Authority to be in a position to take more than just the exceptional case, but to have a steady run of cases and there is currently no capacity for the Authority to deal with the workload they have, let alone take on more cases. There is no provision under the legislation for a body to instigate procedures on their own behalf, there must always be an individual plaintiff; this does limit the potential of the Equality legislation.

b) Are these binding or non-binding?

Decisions of the Equality Tribunal, Employment Appeals Tribunal, Labour Court and civil courts are binding.

c) Can a person bring a case after the employment relationship has ended?

The Employment Equality Act 1998-2007 requires cases to be brought within six months of the matter complained of occurring, or as the case may be the last occurrence.

The Employment Equality Act 1998-2007 provides for an extension of time where there is 'reasonable cause'.³⁹³

³⁹³ Section 77, Employment Equality Act 1998-2007



6.2 Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78)

Please list the ways in which associations may engage in judicial or other procedures

a) in support of a complainant

The Equality Authority may engage in judicial or other procedures in support of a claimant (before the Equality Tribunal or in civil courts, or by making representations to employers or service providers). Other bodies such as trade unions or employer bodies do not have formal standing before civil courts, but in practice may support parties at the Equality Tribunal or in the Labour Court.

b) on behalf of one or more complaints (please indicate if class actions are possible)

The Equality Authority may take actions on its own behalf, in certain circumstances, and on behalf of an individual.

This is governed by section 67 of the Employment Equality Act 1998-2007, which provides that a person who considers that he or she has been discriminated against in the terms of the Equality Acts³⁹⁴ may request assistance from the Equality Authority. The Equality Authority has set out criteria to assist in determining who will receive assistance from it. Those criteria include whether the case is of strategic importance, the capacity of the complainant to represent him/herself or get representation whether it via a lawyer, trade union or professional body; the complexity of the case, the nature of the claim (here the focus is on the actual complainant and the impact of the case on that individual), finally the resources available to the Equality Authority. As regards the issue of resources, the Authority will review its workload, the backlog of cases, the resources available to it, the cost of the proceedings, the duration of the proceedings and the likely award or order.³⁹⁵

Section 77(4) of the Employment Equality Act 1998-2007 sets out who may be a complainant to an action, that is, the person who is impacted by the alleged discrimination or, where they lack capacity (by reason of an intellectual or a psychological disability), a parent or guardian or other person acting in that role may instigate the action on their behalf. Section 77(11) of that Act provides that 'A party to any proceedings under this Act before the Director or Labour Court may be represented by an individual or body authorised by the party in that behalf.' This permits associations to represent complainants where the complainants agree to this representation. There is no reference to these bodies being permitted to take a case before either the District or Circuit Court. There is no provision for class actions, nor is there provision for an association (other than the Equality Authority) to instigate actions in their own right. In practice it is common for both trade unions and employers organisations to represent parties to an action.³⁹⁶

³⁹⁴ The enforcement provisions contained in the Employment Equality Act 1998-2007 also include within their scope the Equal Status Act 2000-2004, which covers the provision of goods and services as well as education and housing.

³⁹⁵ Guidelines are available at: <http://www.equality.ie/index.asp?locID=14&docID=9>

³⁹⁶ For example see: *McGrane* (represented by PSEU (the Public Services Executive Union)) v. The Department of Finance & the Department of Foreign Affairs (represented by the Chief State Solicitor's Office) - DEC-E2005/011; *Murray* (represented by INTO (Irish National Teachers Organisation)) v. *Scoil Mhuire* (legally represented) & *The Department of Education and Science*, DEC-E2005/015; *Devereux* (represented by SIPTU (Services, Industrial, Professional and Technical Union)) v. *Bausch & Lomb* (represented by IBEC (Irish Business and Employer's Confederation), DEC-E2005/020.



6.3 Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78)

Does national law require or permit a shift of the burden of proof from the complainant to the respondent? Identify the criteria applicable in the full range of existing procedures and concerning the different types of discrimination, as defined by the Directives (including harassment).

The Employment Equality Act 1998 initially only explicitly provided for a shift in the burden of proof in respect of gender discrimination cases. The principle of the shifting of the burden of proof was confirmed with the enactment of the European Communities (Burden of Proof in Gender Discrimination Cases) Regulations, 2001, S.I. 337 of 2001, in respect of gender discrimination.

While not explicitly provided for, the Equality Tribunal and the Labour Court applied the principle of the shifting of the burden of proof in non-gender cases under both the Employment Equality Act and the Equal Status Act.³⁹⁷ As noted in *Ross v. Sun Alliance* ‘A shift in the burden of proof was applied as a matter of law in Irish discrimination cases long before European Community law developed the obligation, so this practice is not dependent on EC discrimination law applying in the context of the Equal Status Act.’ How this was applied was clarified in the decision of *Crawford v. Bootlegger Bar*, ‘the burden of proof lies with the complainants, who are required to demonstrate that a *prima facie* case of discrimination exists. If established, the burden of proof shifts to the respondent who, in order to successfully defend their case, must show that their actions were driven by factors which were non-discriminatory.’³⁹⁸ A similar approach was applied in the context of Employment Equality cases, the Labour Court in *Flexco Computer Stationary v. Coulter*, the Labour Court held that ‘it is now established in the jurisprudence of this court that in all cases of alleged discrimination a procedural rule for the shifting of the probative burden similar to that contained in the ... [Burden of Proof Regulations] should be applied.’³⁹⁹

The shift in the burden of proof is now explicitly provided for in the Employment Equality Act 1998-2004 with the insertion of a new section; section 85(A),⁴⁰⁰ which provides: ‘Where in any proceedings facts are established by or on behalf of a complainant from which it may be presumed that there has been discrimination in relation to him or her, it is for the respondent to prove the contrary.’ This also applies in cases brought by the Equality Authority, and expressly includes proceedings relating to indirect discrimination, victimisation and harassment. The section is silent as to its applicability in the context of reasonable accommodation.

The Pensions Acts 1990 and 2004 also provide for a shifting of the burden of proof : ‘Where in any proceedings facts are established by or on behalf of a complainant from which it may be reasonably inferred that there has been a breach of the principle of equal pension treatment in relation to him, it is for the respondent to prove the contrary.’

³⁹⁷ See *Flexco Computer Stationary Ltd., v. Coulter*, ED/03/10 as an example of an employment case and *O’Brien v. Scruffy’s Bar* DEC-S2001-027 as an example of an Equal Status case.

³⁹⁸ DEC-S2003-146/147

³⁹⁹ ED/03/10

⁴⁰⁰ The enforcement provisions in the Employment Equality Act 1998-2007 also govern the enforcement of the Equal Status Act 2000-2004, therefore there is now an explicit shifting of the burden of proof in these cases also.

Under the Unfair Dismissal Act 1977 section 6(1) a dismissal is deemed to be unfair unless, having regard to all the circumstances, there were substantial grounds justifying the dismissal. Section 6(2) states specifically that a dismissal arising wholly or mainly from an employee's race, colour, sexual orientation, age, religious opinions, or membership of the Traveller community shall be deemed unfair.

6.4 Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)

What protection exists against victimisation? Does the protection against victimisation extend to persons other than the complainant? (e.g. witnesses, or person that help the victim of discrimination to present a complaint)

The Employment Equality Act 1998-2007 prohibits victimisation, which is deemed to occur where a person is dismissed or any other adverse treatment occurs because they have involved themselves in any of the following activities: made a complaint of discrimination, been involved in proceedings by a complainant, been an employee having represented or otherwise supported a complainant, been a comparator in an equality action, been a witness under either Equality Acts, having opposed by lawful means a discriminatory act, or stated an intention to take any of the preceding activities⁴⁰¹. Sanctions, compensation, ordering a course of action to be taken, re-instatement and reengagement, are all available for victimisation cases.

There are two instances where victimisation may amount to a criminal offence: where a person procures another to do anything that could be considered victimisation or discrimination⁴⁰² or where the victimisation amounts to dismissal then it is an offence.⁴⁰³ There are no financial limits on compensation awards for victimisation. This signifies how seriously the legislature takes the issue of victimisation and this is also reflected in the Equality Tribunal's attitude. Successful victimisation cases have resulted in significant compensation awards.⁴⁰⁴ In *A Complainant v A Department Store*⁴⁰⁵ victimisation was found to have occurred. In this instance the complainant had contacted the Equality Authority alleging disability discrimination against the employer, these allegations were not substantiated by the Equality Officer. After failing to gain employment the employer wrote to the complainant stating: 'in view of the untrue and unfounded allegations you have made to the Employment Equality Authority [sic] we are not for the foreseeable future going to accept any application from you for employment in our store, or indeed any other branch.' It was held that the letter amounted to victimisation in this instance, and the complainant was awarded €12,700 in compensation. A reminder of the potency of the remedy for victimisation under the Equality Acts was provided in *McGinn v St Anthony's BNS*⁴⁰⁶ where the Equality Officer awarded the maximum amount of two years salary (€17,362) for victimisation and €10,000 for stress. In some cases the award of compensation for victimisation can be higher than the amount given for the initial act of discrimination. It must also be noted that a finding of victimisation can be made in situations where the claimant is no longer employed by the alleged offender. Examples of post-employment victimisation include a refusal to give a reference or an adverse reference.

⁴⁰¹ Section 74 (2)

⁴⁰² Section 14 Employment Equality Act 1998-2007

⁴⁰³ Section 98 Employment Equality Act 1998-2007

⁴⁰⁴ See *Dublin City Council v McCarthy*, EDS022

⁴⁰⁵ DEC-E2002-017

⁴⁰⁶ DEC-E2004-032



Complaints of discrimination or victimisation must be brought within six months of the most recent occurrence of the act.⁴⁰⁷ This may be extended to a maximum of twelve months in certain circumstances.⁴⁰⁸

Victimisation is also prohibited in the Equal Status Act 2000-2004, section 3(2)(j) hold that where a person has in good faith applied for redress under the Act, has been a witness, has given evidence in criminal proceedings under the Act, has opposed by lawful means discriminatory acts, or has given notice of an intention to take any of the preceding actions. This provision has been litigated and in a 2004 case on victimisation on the grounds of disability discrimination, that of *Salmon v. Para Equestrian Ireland*⁴⁰⁹ the Equality Officer set out what was necessary to show that victimisation had occurred. The Equality Officer stated:

- (a) that the complainant has in good faith taken any of the actions listed in section 3(2)(j) (i) to (v)
- (b) that the respondent has treated the complainant in a particular way as a result of that action
- (c) that the treatment is less favourable than the way the respondent treats or would treat a person who had not opposed the alleged discriminatory conduct in the manner the complainant did or the way the respondent would treat the complainant herself, had she not done so.

If and when those elements are established, the burden of proof shifts ...

This case was appealed all the way to the Circuit Court with the assistance of the Equality Authority, and the complainant succeeded in establishing victimisation. The statement of the Equality Officer provides useful guidance as to how the Equality Tribunal determines when victimisation has occurred.⁴¹⁰ See also *Collins v. Campion's Public House*,⁴¹¹ referred to in section 0.3 above.

6.5 Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)

- a) *What are the sanctions applicable where unlawful discrimination has occurred? Consider the different sanctions that may apply where the discrimination occurs in private or public employment, or in a field outside employment.*

The Employment Equality Act 1998-2007 provides for a broad range of remedies in both private or public employment.: compensation awards, orders for employers to take specific courses of action, re-instatement and re-engagement. All employment contracts are deemed to have an equality clause that transforms any provisions of the contract that would otherwise give rise to unlawful discrimination.⁴¹²

⁴⁰⁷ Section 77(5), Employment Equality Act 1998 - 2007.

⁴⁰⁸ Section 77(6)(a), Employment Equality Act 1998-2007.

⁴⁰⁹ DEC-S2004-002

⁴¹⁰ Circuit Court decisions are not published, information is available on this decision from the Equality Authority's annual report for 2004 - <http://www.equality.ie/index.asp?locID=136&docID=-1>

⁴¹¹ DEC-S2003-071.

⁴¹² Section 30 Employment Equality Act 1998-2007

All discriminatory provisions in collective agreements are deemed null and void; it is not possible to contract out of the terms of the equality legislation.⁴¹³

The Equal Status Acts 2000 to 2004 provide for orders for compensation, or for a certain course of action to be followed.

b) Is there any ceiling on the maximum amount of compensation that can be awarded?

There are maximum limits on financial awards by the Equality Tribunal and also by the Labour Court. Those limits in the context of employment are a maximum of two years' pay, this is calculated on the basis of the complainant's weekly pay at the time the case was referred.⁴¹⁴ Where the complainant was not an employee (discriminatory interview for example) then the maximum award is €12,697.⁴¹⁵ In unequal pay cases, the Equality Tribunal can award compensation in the mode of arrears of pay, where this pay loss is a result of discrimination. This can cover a period of a maximum of three years prior to the referral of the case.⁴¹⁶ There is no provision for the payment of interest in cases like this. The situation with respect of gender discrimination is interesting in comparison. Gender cases may be brought to the Circuit Court and here there is no monetary limit on the amount of compensation that can be awarded.⁴¹⁷ In the Circuit Court compensation for unequal pay may cover a period of a maximum of six years,⁴¹⁸ and interest may be paid on compensation in gender discrimination cases.⁴¹⁹ The more dissuasive sanctions that are available in the context of gender discrimination appear to reflect previous case law of the European Court of Justice.⁴²⁰ It is questionable whether the remedies available in the context of non-gender discrimination could generally be described as 'effective, proportionate and dissuasive' sanctions.⁴²¹ The Employment Equality Act 1998-2004 also provides for non-financial sanctions. Section 82(1)(e) provides for the Equality Tribunal or the Labour Court to make 'an order that a person or persons specified in the order take a course of action which is so specified.'⁴²² The potential of this remedy should not be underestimated; it has been used as a means of ensuring employers create an equal opportunities policy,⁴²³ re-training of staff,⁴²⁴ reviewing recruitment procedures.⁴²⁵

As regards dismissal cases, the Labour Court,⁴²⁶ and now the Equality Tribunal can make orders for re-instatement or re-engagement of the employee that can occur with or without compensation.⁴²⁷ Unfair dismissal legislation also provides for a maximum of two years salary or re-instatement / re-engagement.

⁴¹³ Section 9 Employment Equality Act 1998-2007

⁴¹⁴ Section 82(4) Employment Equality Act 1998-2007

⁴¹⁵ Section 82(4) Employment Equality Act 1998-2007

⁴¹⁶ Section 82(1)(a) Employment Equality Act 1998-2007

⁴¹⁷ Section 82(3) Employment Equality Act 1998-2007

⁴¹⁸ Section 82(3)(a) Employment Equality Act 1998-2007

⁴¹⁹ Section 82(5) Employment Equality Act 1998-2007

⁴²⁰ Case C-271/91 *Marshall No. 2*, ECJ.

⁴²¹ Article 17 General Framework Directive.

⁴²² Section 82(1)(e) Employment Equality Act 1998-2007

⁴²³ *Nevin v. Plaza Hotel*, DEC-E2001-033

⁴²⁴ *Mr. O v. A Named Company* DEC-E2003-052

⁴²⁵ *Equality Authority v. Ryanair*, DEC-E2000-014

⁴²⁶ Prior to the amendments of jurisdiction.

⁴²⁷ Section 82(2)(b) Employment Equality Act 1998-2007



The Employment Equality Act 1998-2007 is not a criminal statute, and does not in general provide for penal sanctions for unlawful discrimination, there are a number of situations that can give rise to criminal offences.

Where a person procures another to do anything that could be considered victimisation or discrimination,⁴²⁸ or where the victimisation amounts to dismissal, or the giving of a false statement in response to an Equality Authority inquiry,⁴²⁹ these actions can amount to a criminal offence.

The Equality Authority is the only independent body permitted to instigate litigation under the Acts,⁴³⁰ however section 82(6)(7) provides that compensation orders may not be made in favour of the Authority. The Equality Authority is dependent on the State for funding, this unwillingness to permit the Equality Authority to receive compensation would appear to stifle its ability to litigate.

The Equal Status Act 2000-2004 also has maximum award limits, which are linked to limits set on the jurisdiction of the District Court and the current limit is €6,348.69.⁴³¹ The Equality Tribunal may also order a course of action to be taken where discrimination has been found this remedy has been used extensively under this Act.

- c) *Is there any information available concerning:*
- *the average amount of compensation available to victims*
 - *the extent to which the available sanctions have been shown to be - or are likely to be effective, proportionate and dissuasive, as is required by the Directives?*

The Equality Authority in their annual report for 2004 stated that: 'It was expected that the implementation of the Racial Equality Directive and the Framework Employment Directive would bring about the removal of the financial ceilings that exist in relation to the maximum compensation that can be paid under the Employment Equality Act 1998 and the Equal Status Act 2000. This removal of ceilings was not provided for in the Equality Act 2004. Low awards can serve as a barrier to pursuing a case ... Concern has already been expressed about the low levels of award in cases involving licensed premises. This is the second year where the Equality Officers have stated that they have felt constrained by the maximum compensation that they can be awarded under the Employment Equality Act 1998. The level of potential award that may be available if a claimant is on low wages often means that it is not an effective and dissuasive remedy.'⁴³² These criticisms are reiterated in the latest Annual Report of the Equality Authority.

The average award before the Equality Tribunal in 2007 was €14,431 compared to €10,113 in 2006. The highest award was €125,000. The average award in Equal Status cases was €2,751, an increase compared to 2006 (€1,187). The level of award is low, and in the context of the Equal Status cases it is staggeringly low. These awards also suggest that in practice discrimination in the non-employment context is not regarded as serious.

⁴²⁸ Section 14 Employment Equality Act 1998-2007

⁴²⁹ Section 60(3) Employment Equality Act 1998-2007

⁴³⁰ Section 85, Employment Equality Act 1998-2007.

⁴³¹ The Courts and Courts Officers Act of 2002 suggested this limit would be raised, but has not been enacted.

⁴³² The Equality Authority Annual Report 2004, p. 54 www.equality.ie



The level of award and the fact that it can take three years for Equal Status cases to be heard⁴³³, can hardly be regarded as an effective or dissuasive remedy.

⁴³³ The Equality Tribunal's Annual Report for 2006 refers to assurances from the Department of Justice, Equality and Law Reform of additional staff to come on stream from 2007 to enable the Tribunal to eliminate delays over the next two years. http://www.equalitytribunal.ie/uploadedfiles/AboutUs/AnnualReport_EngIrish_13_07.pdf. However the budget estimate submitted for the Equality Tribunal for 2008 were €2213, a **decrease** of 8% over the previous year <http://www.finance.gov.ie/documents/REV2008/REV2008English.pdf>

7. SPECIALISED BODIES, Body for the promotion of equal treatment (Article 13 Directive 2000/43)

When answering this question if there is any data regarding the activities of the body (or bodies) for the promotion of equal treatment, include reference to this (keeping in mind the need to examine whether the Racial Equality equality body is functioning properly). For example, annual reports, statistics on the number of complaints received in each year or the number of complainants assisted in bringing legal proceedings.

- a) *Does a ‘specialised body’ or ‘bodies’ exist for the promotion of equal treatment irrespective of racial or ethnic origin?(Body/bodies that corresponds to the requirements of article 13. If the body you are mentioning is not the designated body according to the transposition process, please clearly indicate so)*

The Employment Equality Act 1998-2007 established two permanent national institutions with enforcement functions under the Equality legislation: The Equality Authority and The Equality Tribunal. Both of these bodies are involved in the promotion of equal treatment irrespective of racial or ethnic origin (including membership of the Traveller Community), as well as gender, disability, age, sexual orientation, religion, marital status and family status.

- b) *Describe briefly the status of this body (or bodies) including how its governing body is selected, its sources of funding and to whom it is accountable.*

The Equality Authority is an independent statutory body charged with working towards the elimination of discrimination, the promotion of equality, the provision of information to the public, and assisting litigants.⁴³⁴ It has a Board of Directors appointed by the Minister for Justice, Equality and Law Reform, comprising 12 members. Board members come from employer organisations, employee organisations and organisations with knowledge or, or experience in, equality issues relating to any of the nine protected grounds. Board members serve a four-year term. The Equality Authority has approximately 50 permanent staff members, headed up by the Chief Executive Officer. However, staff will be reduced from 53 to 38 posts following the reduction of the Authority’s budget by 43% announced in October 2008. As staff are a part of the civil service they may apply for any promotional post throughout the civil service. In practice this means that when the staff have been trained up and are performing well within their job they move on to another sector of the civil service. It is not within the competence of the Chief Executive Officer to promote staff within the Authority, thus retaining a corporate memory is very difficult. The Chief Executive Officer of the Equality Authority, on receipt of the agreement of the Board, submits estimates of income and expenditure to the Minister for Justice, Equality and Law Reform on an annual basis. The Budget of the Department of Justice, Equality and Law Reform is determined annually by the Finance Act of the particular year, and supplied by the national exchequer; the Minister submits the estimate for the specialised body in question. The estimated budget for 2007 was €5,600,000, an increase of 1%, and for 2008 it was €5,897, an increase of 8%. In October 2008, the budget was cut by 43%.

⁴³⁴ The introduction of the Equal Status Act in 2000 extended the Equality Authorities remit to encompass the provisions of the Equal Status Act.

The Board of the Equality Authority is accountable to the Minister for Justice, Equality and Law Reform who must lay its annual report before the Oireachtas (houses of parliament). The Chief Executive Officer is separately accountable when required by the parliamentary public finance committee for financial transactions and effective use of resources.

The Equality Tribunal is the second body established under the Employment Equality Act 1998-2007.⁴³⁵ The Equality Tribunal is a quasi-judicial body established for the purpose of investigating complaints under the Employment Equality Act 1998-2007 and the Equal Status Act 2000-2004, on all nine grounds. The Director is charged with the enforcement of the Employment Equality Act, and the Equal Status Act. The Director may delegate her quasi-judicial functions to Equality Officers and Equality Mediation Officers. As the staff are civil servants it means that they can apply for any promotional post throughout the civil service. In practice this means that Equality Officers may change jobs while dealing with cases. It is not within the competence of the Director of Equality Investigations to promote staff within the Tribunal, which makes retaining a corporate memory very difficult. The Director reports to the Minister annually.

c) Describe the competences of this body (or bodies), including a reference to whether it deals with other grounds of discrimination and/or wider human rights issues.

The Equality Authority's functions include functions by means of research, awareness-raising,⁴³⁶ review of the legislation⁴³⁷ and the drafting of statutory Codes of Practice.⁴³⁸

The Equality Authority also has the power to instigate litigation on its own behalf or to assist a litigant.⁴³⁹ The Equality Authority's in-house legal service may, at its discretion, where the case has strategic importance, provide free legal assistance to those making complaints of discrimination under the Equality Acts.⁴⁴⁰ The Equality Authority provides assistance only in a small percentage of cases based on criteria set down by the Board of the Authority. These criteria include whether the case is of strategic importance, the capacity of the complainant to represent themselves or be represented by a lawyer, trade unions or other body, the complexity of the case, the nature of the claimant (this is a focus on the actual complainant and the impact of the case on that individual), and finally the available resources . To that end the Authority will review its workload, the backlog of cases, the resources available, the cost of the proceedings, the duration of the proceedings and the likely award or order.⁴⁴¹

The Equality Tribunal's principal role is the investigation and mediation of complaints of discrimination in relation to employment and in relation to access to goods and services, disposal of property and certain aspects of education. This protection against discrimination applies to gender, race, disability, age, family status, marital status, sexual orientation, religion or belief, and member ship of the Traveller community. Where a complaint of discrimination is upheld, redress can be awarded.

⁴³⁵ Section 75 Employment Equality Act 1998-2007.

⁴³⁶ Section 57 Employment Equality Act 1998-2007.

⁴³⁷ Sections 39 and 73 Employment Equality Act 1998-2007.

⁴³⁸ Section 56 Employment Equality Act 1998-2007.

⁴³⁹ Section 67 Employment Equality Act 1998-2007.

⁴⁴⁰ Section 67 Employment Equality Act 1998-2007.

⁴⁴¹ www.equality.ie



The Tribunal may also investigate complaints of discrimination on the grounds of gender under the Pensions Act, 1990-2008, where an employer has failed to comply with the principle of equal treatment in relation to occupational benefit or pensions schemes.

The Tribunal has jurisdiction in all areas covered by the equality legislation with the exception of service in licensed premises and registered clubs which are now dealt with by the District Court.

Human rights are dealt with by a different statutory body, the Irish Human Rights Commission.

d) Does it / do they have the competence to provide independent assistance to victims, conduct independent surveys and publish independent reports, and issue recommendations on discrimination issues?

Yes. The Equality Authority provides independent assistance to victims; it also carries out independent surveys, and publishes independent reports. These are independent publications, although the Minister for Justice, Equality and Law Reform appeared to criticise the Authority in parliament recently for its expenditure on publications⁴⁴².

The Authority does not carry out systematic reviews of discrimination, but does carry out independent reports on thematic issues and makes recommendations in respect of those issues. The Equality Authority liaises with the Central Statistics Office and other relevant bodies on a range of equality data issues.

According to a new report published by the ESRI and the Equality Authority in May 2008⁴⁴³, just over 12% of Irish adults feel that they have been discriminated against in the preceding two years. Rates of reported discrimination rise to 23% among lone parents, 31% among those of Black, Asian or Other ethnicity, 24% among non-Irish nationals, 20% among people with disabilities and 29% amongst the unemployed.

Overall, men and women are equally likely to record discrimination but their experiences are concentrated in different settings. Women are more likely to report discrimination in the workplace and accessing health services, while men are more likely to report discrimination while looking for work and accessing financial services. Women were more likely to report that they had been discriminated against because of their marital status, family status or gender, while men were more likely to feel discriminated against on the grounds of their age or nationality/ethnicity.

The results are based on new analysis of the CSO's Quarterly National Household Survey: Equality Module, which asked Irish adults about their experience of discrimination in a range of different situations. The results show that the highest rates of reported discrimination occur while looking for work (5.8%) and in the workplace (4.8%). In services, reported discrimination is highest for accessing housing and using financial services such as banks, and insurance services. The lowest rates of subjective discrimination are recorded for transport services, education and 'other public services'.

⁴⁴² In the course of debate over the Government's budgetary cut to the Equality Authority, see Parliamentary debates <http://debates.oireachtas.ie/DDebate.aspx?F=DAL20081218.xml&Node=H14&Page=11>

⁴⁴³ <http://www.equality.ie/index.asp?locID=135&docID=724>



Setting by setting analysis shows that different groups are at risk of discrimination in different situations.

Key findings in relation to services were:

- Housing/Accommodation: 4% of respondents felt discriminated against in this domain. Those with higher than average risk were minority ethnic groups, the unemployed, the economically inactive, those aged 18-44, people with disabilities, lone parents and couples with children.
- Financial Institutions: 3.7% of respondents reported discrimination in this domain. Those at higher risk were young people (18-25), men, those of Black ethnicity. Respondents with higher education were more likely to report experience of discrimination.
- Shops, Restaurants and Pubs: 2.6% of respondents reported such discrimination. Those at higher risk were young people, minority ethnic groups, non-Irish nationals, people with disabilities, the unemployed and economically inactive.

Analysis of work-related discrimination showed that the most vulnerable groups were the unemployed and the disabled. Nationality strongly influenced the likelihood of experiencing discrimination while looking for work: 13% of non-Irish job seekers reported discrimination compared to 5% of Irish job seekers.

The Equality Authority may conduct formal inquiries. On completion of an inquiry where the Equality Authority is satisfied that ‘any person’ is involved in discrimination the Authority may serve a ‘non-discrimination notice.’⁴⁴⁴ This notice may set out the conduct that gave rise to the notice and what steps should be taken in order to prevent further discrimination. It will be a criminal offence not to comply with a notice for a period of 5 years after its issue.⁴⁴⁵ The Authority is also empowered to seek an injunction from the High Court or the Circuit Court during this 5 year period to restrain any further contravention or failure to comply with a notice.⁴⁴⁶

The Equality Authority may carry out equality reviews. These are in effect an audit of the level of equality that exists in a particular business or industry.⁴⁴⁷ Based on this audit, which examines practices, procedures and other relevant factors, an equality plan will be developed. The plan consists of a programme of actions to be undertaken in employment or business to further the promotion of equality of opportunity.⁴⁴⁸ Where there are more than 50 employees, the Authority may instigate the review itself and prepare an action plan. If there is a failure to implement the action plan, the Equality Authority may issue a notice detailing what steps are required for its implementation.⁴⁴⁹ Non-compliance with this notice may result in an order from either the High Court or Circuit Court requiring compliance.⁴⁵⁰

⁴⁴⁴ Section 62 Employment Equality Act 1998-2007.

⁴⁴⁵ Section 66 Employment Equality Act 1998-2007

⁴⁴⁶ Section 65 Employment Equality Act 1998-2007

⁴⁴⁷ Section 69 Employment Equality Act 1998-2007.

⁴⁴⁸ Section 69 Employment Equality Act 1998-2007.

⁴⁴⁹ Section 70 Employment Equality Act 1998-2007.

⁴⁵⁰ Section 72 Employment Equality Act 1998-2007.



The Equality Authority must prepare annual reports; these reports must be presented to the Minister for Justice Equality and Law Reform who will cause a copy of every report to be laid before each House of the Oireachtas (Parliament).⁴⁵¹ These reports are also made available to the public.

The Equality Authority responded to a high level of demand for its services during 2007. It dealt with 10,993 queries to the Public Information Centre under 5 pieces of legislation. 58% of these queries related to the parental leave, maternity leave and adoptive leave legislation. The number of these queries was a decline (7.7%) on the previous year. However the overall demand is more accurately captured when the 507,666 visits to the homepage of the Equality Authority website is also considered. This represents an increase of 7.6% on homepage visits in 2006. The information booklets on the Employment Equality Act 1998-2007 and the Equal Status Act 2000-2004 were translated into a number of languages.⁴⁵²

During the year it was decided that the Public Information Centre (PIC) would form part of the advance ~~for~~ of the Equality Authority in Roscrea under the decentralisation programme. There was a substantial movement of staff in and out of the PIC to enable this change. Enquiries under the Employment Equality Acts rose by 3.9% totalling 3,047. General enquiries, access to employment, working conditions, dismissal, harassment and bullying were the dominant areas of enquiry. The grounds of age, gender, disability and race made up the majority of the enquiries in the employment area. The numbers of enquiries under the Equal Status Acts remained consistent with 2006, totalling 1559. The main areas of enquiry covered access to educational establishments and service provision.

The Equality Authority had 737 casefiles in 2007 under three pieces of legislation. There were 360 casefiles under the Employment Equality Acts with the grounds of age, race, gender and disability most prominent. There were 328 casefiles under the Equal Status Act with the grounds of disability, Traveller community, race, gender and age most prominent. There were 83 casefiles under the Intoxicating Liquor Act with the grounds of Traveller community and disability most prominent. According to unofficial information, the number of casefiles open in 2008 was 488.

The Equality Officers investigate complaints and issue a legally reasoned and public decision, which is binding. Discrimination complaints, including dismissal cases are brought at first instance to the Equality Tribunal. Cases may only be sent to mediation where both parties agree to the process.⁴⁵³ A mediated settlement agreed by the parties is binding and is enforceable by the Circuit Court.⁴⁵⁴ The Tribunal has had its legal mandate extended and it now has jurisdiction to deal with discriminatory dismissals and the Pensions Acts as they deal with equality issues. The Equality Tribunal may in the employment context provide for the following sanctions: compensation awards, arrears of payment (not including interest awards), orders for employers to take specific courses of action, re-instatement and re-engagement.

⁴⁵¹ Section 54 Employment Equality Act 1998-2007.

⁴⁵² Arabic, Chinese, Croatian, Czech, French, Irish, Lithuanian, Polish, Portuguese, Romanian, Russian, Serbian and Spanish. Video guides are available in Irish Sign Language. For further information see Equality Authority, Annual Report 2007. <http://www.equality.ie/index.asp?locID=136&docID=684>

⁴⁵³ Section 78 Employment Equality Act 1998-2007.

⁴⁵⁴ Section 91(2) Employment Equality Act 1998-2007



In the context of the provision of goods and services, the Equality Tribunal may order a course of action to be taken where discrimination has been found, and they may order compensation. The Equality Tribunal is a statutory body, and an independent and impartial forum to hear or to mediate alleged discrimination. The Minister for Finance determines the budget of the Department of Justice Equality and Law Reform annually, which comes from the national exchequer; the Minister submits an estimate for the Equality Tribunal. The budget based on the estimates for the past number of years is as follows: the 2007 estimates were €2,140,000, the estimate for 2008 was €2,213, 000 (less than the actual expenditure in 2007 of €2,399,000). There has been a substantial increase in the number of decisions issued by the Tribunal, from 67 in 2001 to 120 in 2002, 145 in 2003, 187 in 2004, 144 in 2005 and 157 in 2006. In 2007 there were 852 referrals, an increase of 685%. The decisions are of increasing legal complexity. Race was the main ground in employment complaints and disability in access to goods and services.

The Tribunal is statutorily required to provide in writing the reasons for its decisions all of which are made available to the public. The increase in workload is significant, and has in turn resulted in a significant backlog of cases. The Equality Tribunal publish an annual report, an annual legal review, an annual mediation review and statistics on their work.⁴⁵⁵

e) Does the body (or bodies) have legal standing to bring discrimination complaints or to intervene in legal cases concerning discrimination?

The Equality Authority has legal standing to bring discrimination cases or to intervene in legal cases by supporting the claimant or by using an amicus curiae brief. This is undertaken in a limited number of cases, selected according to the criteria which it has adopted .

f) Is / are the body / bodies a quasi-judicial institution? Please briefly describe how this functions. Are the decisions binding? Does the body /bodies have the power to impose sanctions? Is an appeal possible? To the body itself? To courts?) Are the decisions well respected? (Please illustrate with examples/decisions)

The Equality Authority has the power to conduct inquiries and carry out equality reviews; these are formal powers whose findings are binding. They are rarely used. Two such inquiries/equality reviews were being considered in 2008, one into conditions of employment in sheltered workshops, but they will not now take place owing to the 2008 reduction of the Authority's budget by 43%.

g) Is the work undertaken independently?

Yes, to date. It remains to be seen what effect the 43% cut in the budget of the Equality Authority will have on the amount and prioritising of the work.

h) Does the body treat Roma and Travellers as a priority issue? If so, please summarise its approach relating to Roma and Travellers.

⁴⁵⁵ Section 75 Employment Equality Act 1998-2007 requires the Equality Tribunal to report on their activities to the Minister for Justice, Equality and Law Reform, these reports are also available to the public at: http://www.equalitytribunal.ie/html/about_us/stats_annual_report.htm



The Equality Authority does not identify Roma as a priority issue but in its work since its establishment has recognised Travellers as an ethnic group. It includes Travellers as one of its targets or strategic objectives in its 2006-2008 Strategic Plan Embedding Equality.

The Equality Authority has used its power of assisting litigants in some important Traveller cases⁴⁵⁶.

Publications include *Traveller Ethnicity 2006*, *Towards a Workplace Equality Infrastructure*, *Travellers' Experiences of Labour Market Programmes 2000*, *Good Practice in Employment Programmes for Travellers 2006*. The EA held a symposium on Traveller Ethnicity as part of Traveller Focus Week 2006 in Dublin.

⁴⁵⁶ E.g. *Doherty v South County Dublin*.



8. IMPLEMENTATION ISSUES

8.1 Dissemination of information, dialogue with NGOs and between social partners

Describe briefly the action taken by the Member State

- a) *to disseminate information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)*

The Equality Authority is required to ‘provide information to the public’ on the workings of both the Employment Equality Act 1998-2007 and the Equal Status Act 2000-2004.⁴⁵⁷ The Equality Authority does not have a statutory duty to provide information to the public on Section 19 of the Intoxicating Liquor Act, 2003. Therefore the Equality Authority does not provide a service on this Act through the medium of its Public Information Centre, leaflets, videos, website or seminars. The impact of this is that no body disseminates information about the legal protection against discrimination in licensed premises. This does not appear to be in compliance with Article 10 Directive 2000/43, or Article 12 Directive 2000/78.

As regards the Equality Authority’s statutory duty to provide information, it has published extensively in respect of all nine grounds.⁴⁵⁸ The Equality Authority may prepare codes of practice in furtherance of the elimination of discrimination and the promotion of equality of opportunity.⁴⁵⁹ Once the Minister approves a code of practice it shall be admissible in evidence for the purposes of proceedings. In drafting the codes of practice the Equality Authority may consult with such person or persons as they consider appropriate. The Equality Authority has built up partnerships and joint ventures with the Department of Education and Science, Congress of Trade Unions and IBEC⁴⁶⁰ continuing its work in the Equal Opportunities Framework Committee, the Framework Committee and the Work-Life Balance Framework Committee and Anti-Racist Workplace. The Authority is also working with the Department of Enterprise Trade and Employment in seeking to mainstream policy and practice learning from the EQUAL projects. These partnerships include anti-racist training. A number of publications have also been produced.⁴⁶¹ The Irish Congress of Trade Unions have also published a pack entitled ‘Lesbian, Gay and Bisexual Rights in the Workplace.’⁴⁶²

The Equality Authority conducts regional consultations throughout the year. Members of the Authority, including the CEO and the Chair of the Equality Authority meet with representatives from the Business Sector, Trade Unions, and Government services as well as organisations representing the nine protected grounds.

⁴⁵⁷ Section 39 Employment Equality Act 1998-2007: they also provide information on The Maternity Protection Acts 1994-2004, The Adoptive Leave Acts 1995-2005 and the Parental Leave Act 1998. They are not granted the function to provide information on the Intoxicating Liquor Act 2003.

⁴⁵⁸ <http://www.equality.ie/php/workflow.php?queryType=1>

⁴⁵⁹ Section 56 Employment Equality Act 1998-2007

⁴⁶⁰ Irish Business and Employer’s Confederation.

⁴⁶¹ http://www.coe.int/T/E/human_rights/Ecri/1-ECRI/3-General_themes/2-Examples_of_good_practices/1-Specialised_Bodies/SB_Ireland_Equality.asp

⁴⁶² <http://www.ictu.ie/html/publications/ictu/Gay%20&%20Lesbian%20Leaflet.pdf>



The proceedings of these regional meetings alongside submissions from numerous organisations assist the Authority in drafting its strategic plans.⁴⁶³ The third strategic plan, Embedding Equality, for the years 2006 to 2008⁴⁶⁴ established five strategic objectives.

1. To stimulate and support initiatives that enable the systems and practices of key organisations and institutions to promote and achieve full equality in practice.
2. To maintain and further develop a culture of compliance with the equality legislation.
3. To contribute to the further development of a strategic framework for action on equality.
4. To stimulate and support a response to core equality issues for specific groups experiencing inequality.
5. To sustain and further develop the standing, expertise and capacity of the Equality Authority at international, national and local levels.

In addition to this the government, in January 2005, launched the National Action Plan Against Racism. This aims to provide strategic direction to combat racism and to promote the development of a more inclusive, intercultural society in Ireland. This plan highlights five key points to this end, namely Protection, Inclusion, Provision, Participation, and Recognition.⁴⁶⁵ This action plan is intended to follow on from the 'Know Racism' campaign. The aim of this scheme is to enable organisations to raise awareness about racism and to highlight cultural diversity in Ireland. This grant scheme was organised in association with the National Consultative Committee on Racism and Interculturalism.⁴⁶⁶ (This body was abolished in October 2008 for budgetary reasons⁴⁶⁷). The Irish government also launched a National Disability Strategy which comprises four elements: The Disability Act 2005; the Citizens Information Act 2007;⁴⁶⁸ Six Outline Sectoral Plans published by six Government Departments as provided in the Disability Act 2005; and a multi-annual Investment Programme for high priority disability support services, the details of which were announced in Budget 2005.

⁴⁶³ Submissions were received from some 40 organisations, including: Age and Opportunity, Pavee Point, Irish Refugee Council, Catholic Youth Care, PAUL Partnership, Muscular Dystrophy Ireland, Senator Norris, St., Anne's Service, Sunbeam House Services, Dublin City Council, Citizens Information Centre, Threshold, Social and Resource Centre, Bantry Integrated Development Group, Retired Teachers Association, Summerhill Active Retirement Group, Alzheimer's Society of Ireland, Diane Richards-Huges, New Moon Project, Meitheal Mhaigheo Teo to name some of the organisations.

⁴⁶⁴ <http://www.equality.ie> A new Strategic Plan has been drafted in 2009 but is not available as yet. <http://www.equality.ie>

⁴⁶⁵ <http://www.justice.ie/80256DFD00637EE0/vWeb/pcSSTY5UBER3-en> It should also be noted that some concern has been expressed about this project. See http://www.irishrefugeecouncil.ie/press05/action_plan.html as an example.

⁴⁶⁶ This committee was established by the Department of Justice, Equality and Law Reform in 1998, the committee consists of members of government departments, agencies and non-governmental organisations.

⁴⁶⁷ <http://www.nccri.ie/>

⁴⁶⁸ The purpose of the Act is to amend the Comhairle Act 2000 so as to confer enhanced and additional functions on the Citizens Information Service, formerly Comhairle, involving, *inter alia*, the introduction of a personal advocacy service specifically aimed at people with disabilities. This advocacy service proposed is quite limited in its remit, in that it relates only to people who may come within the restrictive definition of disability given, and having regard to the resources of the service. It was intended that the Act would also provide for the introduction of a sign language interpretation service, but that did not occur, with a sign language interpretation service now being provided by way of an administrative scheme.

It should be noted that the disability sector expressed serious concern about the provisions of the Disability Act 2005,⁴⁶⁹ which establishes the right to an assessment of needs and a statement of services proposed, but does not guarantee resources to provide the needed services, thus potentially negating the rights that it grants. The Department of Justice, Equality & Law Reform also produced a discussion document on the employment issues that arose from the Directives and invited submissions from other Government Departments, the social partners, the Equality Tribunal and the Equality Authority.⁴⁷⁰

In view of the cut of 43% to the budget of the Equality Authority for 2009, it is not known how many of these activities will be carried on by the Authority in future.

b) to encourage dialogue with NGOs with a view to promoting the principle of equal treatment (Article 12 Directive 2000/43 and Article 14 Directive 2000/78) and

The Equality Authority hosts regular meetings with NGOs including regional meetings throughout the year.

c) to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice, workforce monitoring (Article 11 Directive 2000/43 and Article 13 Directive 2000/78)

The Authority also hosts regular meetings with the Trade Union movement, and quarterly meetings with the National Disability Authority and Disability Organisations, which focus on issues relating to reasonable accommodation

d) to specifically address Roma and Travellers

Besides the activities described under Section 7 (h), the Authority has produced research concerning women travellers, explored the development of a pilot programme to develop a scheme to promote intercultural approaches to education at primary level, and published studies on the integrated workplace and barriers to participation specifically focusing on Travellers and ethnic minorities.

8.2 Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

a) Are there mechanisms to ensure that contracts, collective agreements, internal rules of undertakings and the rules governing independent occupations, professions, workers' associations or employers' associations do not conflict with the principle of equal treatment? These may include general principles of the national system, such as, for example, "lex specialis derogat legi generali (special rules prevail over general rules) and lex posteriori derogat legi priori (more recent rules prevail over less recent rules).

⁴⁶⁹ The web sites following highlight some of the responses from a variety of disability organisations.
<http://www.irishhealth.com/?level=4&id=6539>

<http://www.namhi.ie/legislation/documents/ResponseofnamhitoDisabilityBill2004-Final.doc>

<http://www.ihrc.ie/home/wnarticle.asp?NID=105&T=N&Print=>

⁴⁷⁰ Racial Equality Summary of June 2004 by Dave Ellis



The Employment Equality Act 1998-2007 provides that all employment contracts are deemed to have an equality clause that transforms any provisions of the contracts that would otherwise give rise to unlawful discrimination.⁴⁷¹ All discriminatory provisions in collective agreements are deemed null and void; it is not possible to contract out of the terms of the equality legislation.⁴⁷²

b) Are any laws, regulations or rules contrary to the principle of equality still in force?

While it is the case that discriminatory clauses are not valid, the reality is that this fact may only be established through litigation. Were the Equality Tribunal to determine that the clause in question is contrary to the legislation, then that part of the collective agreement/contract cannot be enforced and must be modified. The legislation does not contain a mechanism aimed at a review of collective agreements, or other rules.

Section 13 of the Employment Equality Act 1998-2007 prohibits discrimination by professional or trade organisations. There are no specific laws or regulations in force that are contrary to the Directives there are however, a number of provisions of the Equality legislation that may not be in compliance with the Directives.⁴⁷³ The major concern remains section 14(a)(i) of the Equal Status Act 2000-2004 as this provides that nothing in that Act will prohibit any action taken under any enactment. Therefore this provision ensures that the Equal Status Act 2000-2004 remains subordinate to other legislative enactments.

Section 28 of the Disability Act 2005 is about access to information. This provides that where a public body communicates with one or more persons then as far as is practicable the contents of the communication should be made in an accessible format. This relates to oral, written and electronic communication.

The public body is also required, as far as is practicable, to ensure that information published which contains information relevant to persons with intellectual disabilities, is in clear language that is easily understood.

⁴⁷¹ Section 30 Employment Equality Act 1998-2007

⁴⁷² Section 9 Employment Equality Act 1998-2007

⁴⁷³ See section 0.2 above.



9. CO-ORDINATION AT NATIONAL LEVEL

Which government department/ other authority is/ are responsible for dealing with or co-ordinating issues regarding anti-discrimination on the grounds covered by this report?

The most pressing concern in respect of both the Equality Authority and The Equality Tribunal relates to their budgets and the issue of decentralisation. The Government has announced its intention to de-centralise much of the civil service. As members of the Equality Authority and the Equality Tribunal are civil servants they may be decentralised. Currently the Equality Authority is housed in Dublin, and while it is not ideal that the Authority is only situated in Dublin, Dublin is the most accessible venue in Ireland. It is proposed to move the Equality Authority to Roscrea. Roscrea is not serviced by a train service; the nearest Airport (Shannon) is 96km away, which is not serviced by a train link. There is a daily bus service from Dublin. This inaccessibility is a serious concern, but will have a disproportionate impact on certain groups, such as asylum seekers and people with disabilities. It is clear from conversations with staff of the Equality Authority that very few members intend to transfer to Roscrea, there is therefore likely to be a loss of corporate memory, but of more concern relates to the loss of key personnel. The board of the Equality Authority is politically appointed and while to date this has not negatively impacted on the independence of the Equality Authority, this independence may be largely dependent on certain personnel within the Equality Authority. The Equality Act 2004 also altered how the Chief Executive Officer is appointed, the Minister having a much greater involvement than had previously been the case.⁴⁷⁴ There are general concerns in respect of the Budget. There is a general increase in the number of people taking cases and in seeking assistance from the Equality Authority, which has a considerable backlog of case files. All of these increases in the Equality Authority's workload have not been accompanied by a parallel increase in budget. In fact, as mentioned, the budget of the Authority has been cut by 43% for 2009.

The Equality Authority has for a number of years raised a number of concerns that act as disincentives to claimants. These include:

- The risk of incurring costs in the Circuit Court acts as a disincentive to claimants to either pursue or defend appeals under the Equal Status Act 2000-2004.
- The risk of incurring costs in the District Court acts as a disincentive to claimants to pursue a claim in respect of licensed premises under the Intoxicating Liquor Act 2003.
- The failure of public bodies to respond to complaints reduces the chances of the matter being resolved amicably.
- Section 21 of the Equal Status Act 2000-2004 obliges potential claimants to notify a potential respondent within two months of the nature of the allegation and the claimant's intention to seek redress under the Act, this means that first contact is a threat of litigation and reduces the chances of the matter being resolved amicably.
- The imposition of a ceiling on compensation ensures that compensation awards are low. This coupled with delays, and in some instances the risk of incurring costs act, and low level awards all act as a disincentive for potential claimants.

⁴⁷⁴ Section 51 Employment Equality Act 1998-2007



- In the Equality Tribunal parties to the action may protect their anonymity. But claimants are reluctant to initiate cases or process appeals because of the potential publicity. This is particularly a concern in respect of sexual orientation discrimination and disability discrimination (particularly mental health and learning disability).

The Equality Tribunal also has specific concerns in respect of its budget, many of these issues are mentioned in section 7 above. Briefly they include a significant extension of the mandate of the Tribunal and a large increase in workload. Following a budget decrease of 8% in 2008 compared to its actual expenditure in 2007, the Tribunal's budget has been increased by 15% in 2009. However, it is not likely that this will result in effective elimination of long waiting times. The transfer of dismissal claims to the Equality Tribunal means that inevitably with the current delays, albeit reduced in 2008, the remedy of reinstatement is far less likely.

There are also concerns in respect of de-centralisation. It is proposed to move the Equality Tribunal to Portllington⁴⁷⁵ a town poorly serviced by public transport. The concerns in respect of de-centralisation relate to the backlog of cases, which is significant. As a result of decentralisation it is estimated that there will be a significant turnover in equality officers and support staff therefore the difficulty in dealing with the current backlog is increased. The Tribunal estimate that it takes 18 months at a minimum for an equality officer to be able to handle a case load therefore with a significant number of new staff this will impact negatively on both employment cases and mediation cases. This is further compounded by the fact that there is no provision for an interim hearing and interlocutory orders pending full hearing of the case.

The Tribunal state on this issue 'a substantial turnover of equality officers is virtually certain and, accordingly, this risk, in the absence of an appropriate response, is equally so.'⁴⁷⁶ A loss of significant numbers of staff signifies a serious loss of expertise, as many of the Equality Officers have been working in such a role since the introduction of the Equal Pay Act 1974.. Another issue relates to staff training: being situated in Dublin has meant that employees have been in a position to participate in relevant courses. The Tribunal state that staff have participated in Diplomas in Legal Studies, Diplomas in European Law, professional qualifications in the area of mediation and conflict resolution and 4 of the 10 Equality Officers are currently pursuing third-level legal qualifications, with one of the Mediation Officers pursuing a Masters Degree in Conflict Resolution. This becomes impossible when staff are situated so far from a city providing such education courses.

⁴⁷⁵ The Tribunal conducts hearings throughout the country, so the move itself is less concerning than that of the Equality Authorities.

⁴⁷⁶ www.equalitytribunal.ie



ANNEX

- 1. Table of key national anti-discrimination legislation**
- 2. Table of international instruments**

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Name of Country: Ireland

Date: 31 December 2008

Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrative / Criminal Law	Material Scope	Principal content
This table concerns only key national legislation; please list the main anti-discrimination laws (which may be included as parts of laws with wider scope). Where the legislation is available electronically, provide the webpage address.	Please give month / year			e.g. public employment, private employment, access to goods or services (including housing), social protection, social advantages, education	e.g. prohibition of direct and indirect discrimination, harassment, instruction to discriminate or creation of a specialised body
Employment Equality Act 1998 (http://www.justice.ie/en/JELR/EmEqActsConsltdtd.pdf/Files/EmEqActsConsltdtd.pdf)	October 1999	Gender, Age, Race, Religion, Family Status, Disability, Marital Status, Sexual Orientation, membership of the Traveller Community	Civil Law	Public and Private employment with certain exceptions	Prohibits direct and indirect discrimination the procurement of discrimination as well as harassment and victimisation. The law also requires the provision of reasonable accommodation for people with disabilities and establishes the Equality Tribunal and the equality authority.



Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrative / Criminal Law	Material Scope	Principal content
Equal Status Act 2000 (http://www.justice.ie/en/JELR/EqualStatusActsConsldtd_00_04.pdf/Files/EqualStatusActsConsldtd_00_04.pdf)	2000	Gender, Age, Race, Religion, Family Status, Disability, Marital Status, Sexual Orientation, membership of the Traveller Community	Civil Law	Access to goods and services	Prohibits direct and indirect discrimination the procurement of discrimination, discrimination by association as well as harassment and victimisation. The law also requires the provision of reasonable accommodation for people with disabilities.
Equality Act 2004 (http://www.equality.ie/index.asp?docID=206)	July 2004	Gender, Age, Race, Religion, Family Status, Disability, Marital Status, Sexual Orientation, membership of the Traveller Community	Civil Law	Amends both the Employment Equality Act 1998 and the Equal Status Act 2000 with a view to ensuring compliance with the two Directives	Amends the definition of harassment, indirect discrimination in both the Equal Status Act and the Employment Equality Act. Amends the definition of reasonable accommodation and introduces the



Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrative / Criminal Law	Material Scope	Principal content
					concept of discrimination by association into the Employment Equality Act 1998.
Pensions Act 1990-2004 (http://www.equalitytribunal.ie/uploadedfiles/AboutUs/socwelf_miscprovact_04.pdf)	2004	Gender, Age, Race, Religion, Family Status, Disability, Marital Status, Sexual Orientation, membership of the Traveller Community	Civil Law	Pensions including occupational pensions	Prohibits direct and indirect discrimination the procurement of discrimination as well as harassment and victimisation. The law also requires the provision of reasonable accommodation for people with disabilities.
Unfair Dismissals Act 1977-1993 (http://www.irishstatutebook.ie/1993/en/act/pub/0022/index.html)	1993	Gender, Age, Race, Religion, Family Status, Disability, Marital Status, Sexual Orientation, membership of the Traveller Community	Civil Law	Unfair dismissals from employment	Provides remedies for dismissals that are deemed to be unfair



Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrative / Criminal Law	Material Scope	Principal content
Intoxicating Liquor Act 2003	2003	Gender, Age, Race, Religion, Family Status, Disability, Marital Status, Sexual Orientation, membership of the Traveller Community	Civil	Discrimination complaints relating to licensed premises, the provision of a service.	Relates primarily to opening hours of premises, however, it provides a controversial jurisdictional change for the enforcement of discrimination law in the context of licensed premises
Prohibition on the Incitement to Hatred Act 1989	1989	Gender, Age, Race, Religion, Family Status, Disability, Marital Status, Sexual Orientation, membership of the Traveller Community	Criminal	Criminal legislation relating to the incitement to hatred	Prohibits hate speech
Protection of Employment (Exceptional Collective Redundancies and Related Matters) Act 2007 http://www.irishstatutebook.ie/2007/en/act/pub/0027/sec0001.html	2007	Age	Civil Law	Greater protections to employees in collective redundancy situations and amends Employment Equality Acts 1998 – 2004 as follows: “Section 1 (5) : The Employment Equality Acts 1998 and 2004 and this Act (insofar as it relates to	Previously, under the criteria to qualify for a statutory redundancy payment, an employee had to be between the ages of 16 and 66. The Act removes the upper age cap of 66 years for individual and collective



Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrative / Criminal Law	Material Scope	Principal content
				those Acts) shall be construed together as one and may be cited together as the Employment Equality Acts 1998 to 2007"	redundancies.

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Name of country: Ireland

Date: 31 December 2008

Instrument	Signed (yes/no)	Ratified (yes/no)	Derogations/ reservations relevant to equality and non- discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	Yes 4.11.50	Yes 25.2.53	No	Yes	Yes in an interpretative sense, as a result of the passage of the European Convention on Human Rights Act 2003
Protocol 12, ECHR	Yes	No	No	No	No
Revised European Social Charter	Yes	Yes	Article 8(3), Article 21, Article 31(1), (2) and (3).	Ratified collective complaints protocol? Yes	No
International Covenant on Civil and Political Rights	Yes	Yes	Article 10 paragraph 2, Article 14, Article 19 paragraph 2, Article 20 paragraph 1, Article 23 paragraph 4.	Yes	No
Framework Convention for the Protection of National Minorities	Yes	Yes			No
International Convention on Economic, Social and Cultural Rights	Yes	Yes	Article 2, paragraph 2, Article 13 paragraph 2(a)	N/A	No

Instrument	Signed (yes/no)	Ratified (yes/no)	Derogations/ reservations relevant to equality and non- discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
Convention on the Elimination of All Forms of Racial Discrimination	Yes	Yes		Yes	No
Convention on the Elimination of Discrimination Against Women	Yes	Yes			No
ILO Convention No. 111 on Discrimination	Yes	Yes		N/A	No
Convention on the Rights of the Child	Yes	Yes			No
Convention on the Rights of Persons with Disabilities	Yes	No		No	No