



## **Executive Summary**

### **Country Report Ireland 2009 on measures to combat discrimination**

**by Orlagh O'Farrell**

#### **1. Introduction**

The make up of Irish society is quite homogeneous. The latest official census in 2006 showed that 4,172,013 people were present in Ireland on census night; this reflects a population growth of 8.2% from 2002. 3,644,965 of those present on census night described themselves as Roman Catholic, which is about 87% of the population. Those describing themselves as having no religion made up 175,252 about 4% of the population; with Church of Ireland accounting for 118,948, or 2.85% of the population; and Muslims with 31,779 accounting for slightly less than 1% of the population; the remaining population described themselves as belonging to a variety of religions, or not stating their religion.

A new question was placed on the 2006 census relating to ethnic or cultural background. The results show that 94.8% of the population described themselves as white Irish, Irish Traveller or any other white background. 1.1% of the population described themselves as Black, or Black Irish, 1.3% of the population described themselves as Asian or Asian Irish, 1.1% described themselves as other including mixed background, and 1.7% did not state their ethnic or cultural identity. The census of population also revealed that some 22,435 (0.53% of the population) people considered they belonged to the Irish Traveller Community. This reflected a decline in population from the census in 2002.

The census of population also revealed that the Irish population had aged by half a year since 2002 and the average age is now 35.6 years of age. The figures for those describing themselves as disabled are not yet available, but in 2002 people with disabilities made up 8.3% of the population. No census figures are available on the issue of sexual orientation. Questions were asked as to nationality, with 3,706,683 describing themselves as Irish, with 419,733 of the population being non-nationals (just over 10%); this reflects a significant change in the make up of the population. In 2002, non-nationals made up 5.8% of the population. Of those describing themselves as non-nationals 65% came from another EU Member State, with the United Kingdom accounting for 26.8% of the total number of non-nationals.

The major impetus for the development of the equality regime in Ireland was its accession to the European Union in 1972. The 1990s witnessed all-party agreement on the necessity for a significant expansion of Ireland's equality laws, governing more than gender discrimination. This resulted in the Employment Equality Act 1998-2004 and the Equal Status Act 2000-2004. These Acts also established the Equality Authority and the Equality Tribunal.

At the outset of this equality regime there was significant support for the bodies and their actions, it would appear that in recent years there has been something of a backlash. This is evidenced most keenly by the introduction of the Intoxicating Liquor Act 2003.

This Act governs the enforcement of discrimination in licensed premises, requiring complainants to use the ordinary court system rather than the specialised Equality Tribunal. The introduction of this Act was the direct result of political pressure by the vintners of Ireland. The reason for such pressure would appear to be a direct result of the significant body of case law which established wide spread discrimination by licensed premises against members of the Traveller Community. The 2008/9 budget resulted in a decrease of 8% in funding for the Equality Tribunal, whose workload meanwhile continues to increase.

## **2. Main legislation**

The Irish Constitution enshrines a guarantee of equality before the law. However, the history of the constitutional provision, Art 40.1, has not been a happy one, with inconsistent decisions and unclear reasoning being hallmarks of its interpretation by the courts. The Supreme Court retains a broad discretion in respect of justifying discrimination. Many early advances in equality law have tended to come through cases brought before the European Court of Human Rights, and more significantly through the impetus for change which came by virtue of Ireland's membership of the European Union. There was a broad welcome for the range of equality laws which have been introduced over the last few decades in parliamentary debates and public reaction.

Today, Irish anti-discrimination legislation consists of the Employment Equality Acts 1998 2004 and 2007, and the Equal Status Acts 2000 and 2004. Four other acts also contain provisions prohibiting discrimination, namely the Pensions Act 1990 – 2004, Unfair Dismissals Act 1977 – 1993, the Prohibition on the Incitement to Hatred Act 1989, which criminalizes hate speech, and the Intoxicating Liquor Act 2003, which provides for enforcement of discrimination law in the context of premises licensed for the sale of alcohol. The Employment Equality Act is now referred to as the Employment Equality Act 1998 – 2007, by virtue of the Protection of Employment (Exceptional Collective Redundancies and Related Matters) Act 2007, which removed the upper age limit of 66 for statutory redundancy payments. Existing discrimination legislation preceded and already satisfied many of the requirements of the latest EU directives. The transposition of both directives and the necessary changes were provided for in the Equality Act 2004. The directives were transposed in good time, but the European Commission has started infringement actions against Ireland (amongst other Member States) for failure to correctly implement some requirements of both directives.

The Employment Equality Act 1998-2007 established two permanent national institutions with enforcement functions under the equality legislation, namely the Equality Authority and the Equality Tribunal, and these are the specialised bodies required by the Racial Equality directive. Both are involved in the promotion of equal treatment with regard to gender, disability, age, sexual orientation, religion, marital status and family status, and racial or ethnic origin (including membership of the Traveller Community). 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. 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 Tribunal Director is charged with the enforcement of the Employment Equality Acts and the Equal Status Acts, and may delegate her quasi-judicial functions to Equality Officers and Equality Mediation Officers. 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. These bodies fulfil the roles envisaged by the EU directives. There are two other relevant bodies in the context of equality, namely the Irish Human Rights Commission and the National Disability Authority.

The Irish Human Rights Commission is charged with the protection and promotion of human rights. The Commission works to ensure the protection of civil, political, economic, social and cultural rights in recognition of the universal, indivisible, interdependent and inter-relation of all human rights. The National Disability Authority, on behalf of the State, promotes and helps secure the rights of people with disabilities. Its responsibilities include policy development, research and advice on standards.

There are a number of concerns in respect of the compliance of Irish legislation with the EU directives, for instance the exclusion from protection under the equality legislation of persons employed in another person's home. This is one of the points covered in the infringement actions which have been initiated by the European Commission.

Irish anti-discrimination legislation goes beyond EU equality directives in some respects, chiefly in that the scope of the Equal Status Acts 2000 to 2004 prohibit discrimination in access to goods and services not just on grounds of race and gender but also disability, age, religion, sexual orientation, Traveller community, family and marital status grounds. Nationality is also a named ground under Irish employment equality and equal status legislation. The definition of disability is broader than in EU law.

As far as international norms are concerned, Ireland has ratified almost all of the major international instruments combating discrimination including: Charter of the United Nations; Universal Declaration of Human Rights; International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; Convention on the Rights of the Child; International Convention on the Elimination of All Forms of Discrimination Against Women; Convention on the Nationality of Married Women; International Convention on the Elimination of All Forms of Racial Discrimination; Convention relating to the Status of Refugees; European Convention for the Protection of Human Rights and Fundamental Freedoms; European Social Charter; European Social Charter (revised); Framework Convention for the Protection of National Minorities and European Convention on the Exercise of Children's Rights. However, it has not ratified Protocol 12 of the European Convention on Human Rights. It should be noted that Ireland is a dualist state. This means that for international law to have an impact in the Irish legal system, it must be transposed by means of legislation into the national legal order. The only international convention that has been transposed into Irish law is the European Convention on Human Rights, which was incorporated by means of the European Convention on Human Rights Act 2003.

The International Convention against All Forms of Racial Discrimination (CERD) monitoring committee considered Ireland's first set of national reports in 2005 (it had also received shadow reports from the NGO Alliance).

It expressed concern that Irish equality institutions should be properly funded and that there should be coordinated action to combat discrimination against Travellers. A Follow-up process was instituted by CERD to monitor progress. The next Irish report is due to be submitted in 2009. The committee monitoring compliance with the Convention on the Elimination of Discrimination Against Women (CEDAW) (2005) expressed concern inter alia about the lack of legislative protection of migrant domestic workers from discrimination. NGOs such as the National Women's Council of Ireland (NWC) have called on the Government, currently drawing up its 6th national report, to address this and also focus on the position of marginalised women (travellers, disabled, migrant, carers, trafficked women).

As regards aspects of discrimination which are not currently covered by the directives, the Equality Coalition, an alliance of groups and organisations concerned with equality issues, considers that EU directives should be developed to cover third country nationals, former prisoners, and trade union membership; there should be a separate directive to address disability discrimination; and debate should be stimulated at EU level as regards discrimination in social origin and language including Sign Language.



### 3. Main principles and definitions

The Equality Acts prohibit discrimination across nine grounds, but govern different aspects of discrimination. The Employment Equality Act 1998-2007 prohibits discrimination in the sphere of employment; the Equal Status Act 1998-2004 prohibits discrimination in the provision of goods and services; the Social Welfare (Miscellaneous Provisions) Act 2004 prohibits discrimination in the provision of occupational pensions. These acts prohibit: direct discrimination, indirect discrimination, victimisation, harassment, instructions to discriminate, the procurement of discrimination on the grounds of race, religion, gender, age, disability, sexual orientation, marital status, family status and membership of the Traveller community. The Equality Acts also require reasonable accommodation. Since the instigation of these Acts the Equality Tribunal has accepted cases of multiple discrimination. There are no rules that deal with such cases but the figures from the Tribunal suggest that more than one in four cases claim more than one discriminatory ground.

Direct discrimination is defined in the Equality Acts as treating one person less favourably than another person is, treated, has been treated or would be treated on any of the nine discriminatory grounds. This prohibition includes discrimination by association, and discrimination on a discriminatory ground that exists, existed but no longer exists, may exist in the future, or is imputed to the person concerned. Indirect discrimination is defined, within the Equality Acts as occurring where an apparently neutral provision puts a person within one of the protected classes at a particular disadvantage when compared with others not within that protected class. This difference of treatment as a result of the apparently neutral provision may be permitted where it can be objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary. There is some concern that this definition is not fully in compliance with the Directives as no provision is made for the use of hypothetical comparators.

There is no necessity for a complainant to show that there was an intention to discriminate, either directly or indirectly, it is sufficient if the actions do in fact discriminate. The Equality Acts define harassment 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. This conduct can include acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material. Victimisation covers any person who claims discrimination, instigates proceedings, supports a complainant, acts as a comparator or a witness to a complaint, opposes discrimination by lawful means, or gives notice of an intention to do any of the above, and as a result they suffer dismissal or adverse treatment.

It is the issue of reasonable accommodation that sees the most divergence between the Equality Acts. The Employment Equality Act 1998-2007 provides 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 on the employer. To determine what amounts to a disproportionate burden 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. The Equal Status Act 2000-2004 provides that where a provider of goods or services fails to do all that is reasonable to accommodate the needs of a person with a disability by providing special treatment or facilities, without which it would be impossible or unduly difficult for the person to avail of the good or service in question. A failure to provide the requisite special treatment or facility in question will not amount to a failure to provide reasonable accommodation where the provision of the treatment or facility would give rise to more than a nominal cost to the provider of the goods or services in question.

The Equality Acts contain a number of exceptions to the principle of non-discrimination. In the Employment context, the provisions do not apply to persons employed in another person's home for the provision of personal services. There are exceptions to the non-discrimination principle where the characteristic in question is a genuine and determining occupational requirement for the post and the objective is legitimate and the requirement proportionate. There are a number of exceptions relating to the grounds of age, disability, and religion, these relate to occupational pensions, remuneration in respect of someone with a restricted capacity and working in bodies with a religious ethos. Equally there are exceptions in respect of certain forms of employment such as the Defence Forces, the Garda Síochána and the emergency services. With regard to the Equal Status Act there are a number of exceptions and exemptions to the non-discrimination rule. Differences of treatment are permissible in respect of annuities, pensions and insurance policies where there is actuarial evidence to show that the difference is reasonable. There are exceptions to the non-discrimination norm for the purposes of organizing sporting events, for authenticity purposes for a dramatic performance, or other entertainment, or for the provision of services for religious purposes. The exception that has proved most problematic relates to the provision of goods or services that would lead a reasonable person to believe there is a substantial risk of criminal or disorderly conduct, then, discrimination is not actionable. The Equal Status Act also contains a number of exceptions in respect of education on the grounds of age, gender, religion and disability.



#### 4. Material scope

The Employment Equality Act 1998 – 2007 applies to the field of employment and vocational training; this does not distinguish between public and private sector employees. This relates 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 Act also covers vocational training, employment advertisements and agencies and agency workers.

The Equal Status Act 2000-2004 prohibits discrimination in relation to goods and services, including: education, accommodation. State services such are not explicitly mentioned in the Act, in the case of *Donovan v. Donnellan*, DEC-S2001-011 the Equality Officer interpreted the term service and held: “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 and health services, etc.” There is no express prohibition on discrimination in respect of social protection; therefore compliance with the Race Directive is dependent on future judicial interpretation. This situation is further impacted by section 14 of the Equal Status Act. This provides a statutory exemption to the Equal Status Act, where an act or action is required by virtue of another piece of legislation then the Equal Status Act 2000-2004 does not apply.

#### 5. Enforcing the law

The Employment Equality Act 1998-2007 introduced the enforcement mechanisms for the Equality Acts. The enforcement mechanisms apply equally to public and private employees with the exception of certain public sector employees. Complaints under either the Employment Equality Act 1998-2007 or the Equal Status Act 2000-2004 may be brought before the Equality Tribunal. The Equality Tribunal assumes an investigative role in the hearing of complaints; complainants may represent themselves, costs may not be awarded against either party, and the procedure is informal. 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 Court. The decisions of the Tribunal may be appealed; the Labour Court hears the employment appeals, whereas the Circuit Court hears the equal status appeals. Where the Labour court is acting as an appellate body, its determinations can be appealed on a point of law to the High Court. In addition complaints of unfair dismissal may also be brought under the Unfair Dismissals Acts 1977 and 1993. Unfair dismissal cases 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. Once litigation has been instigated the respondent (alleged discriminator will be notified).

Hearings are in private before the Equality Tribunal and Labour Court; before the Employment Appeals Tribunal the hearings are normally in public. 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.

A recent amendment to the Equal Status Act 2000-2004 now requires complaints under that Act involving licensed premises (i.e. pubs etc) to be brought to the District Court rather than as previously to the Equality Tribunal. The major impact of this amendment is the cost implications for complainants.

Organisations may represent an individual complainant, at the Equality Tribunal or the Labour Court where they are authorised to do so by the complainant. The legislation does not provide that such organisations may represent the individual before the Circuit Court or the High Court. Organisations are not permitted to instigate a complaint, with the exception of the Equality Authority. The Equality Authority enjoys legal standing to bring complaints to the Equality Tribunal relating to patterns of discrimination, discriminatory advertising or the contents of a collective agreement. The Authority can also provide legal assistance and representation to an individual complainant.

The Equality legislation provides for a shift in the burden of proof in non-discrimination cases. The burden of proof will shift where in equality proceedings the facts established by the complainant suggest there is a prima facie case of discrimination in that case 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, victimization and harassment. The section is silent as to its applicability in the context of reasonable accommodation.

The use of statistics is permitted, and may assist an applicant, but it is not necessary to raise a prima facie case of discrimination. Situation testing has not been used to any great extent in this jurisdiction. 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. 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. That being stated there are some cases where it may be inferred from the facts that a form of situational testing is taking place see *Delaney v. The Harp Bar*, DEC-S2002-53/56.

The Employment Equality Act 1998-2007 provides for a broad range of remedies: compensation, 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. 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. There are maximum limits on financial awards, those limits in the context of employment are a maximum of two years pay, and where the complainant was not in employment then the maximum award is €12,697.



The Employment Equality Act 1998-2007 also provides for non-financial sanctions, it is possible for the Equality Tribunal or the Labour Court to make an order that a person should take a course of action including orders for re-instatement or re-engagement.

The Equal Status Act 2000-2004 also provides for a variety of remedies including: compensation, orders for service providers to take specific course of action. This Act also imposes maximum award limits; the current maximum is €6,348.69. That being the case it is clear that the majority of awards granted do not come anywhere near the maximum.

This coupled with an extraordinary delay in cases coming before the Tribunal suggests that the sanctions under this Act are not effective, proportionate or dissuasive.

## **6. Equality bodies**

The Employment Equality Act 1998-2007 established two national institutions with enforcement functions under the Equality legislation. These bodies cover all nine of the protected grounds, and all the non-discrimination provisions of the Equality Acts. The first of these two bodies is the Equality Authority, an independent body. This body is required under the legislation to work towards the elimination of discrimination, to promote equality of opportunity, to provide information to the public on a number of matters and to review various legislative enactments. The Equality Authority may fulfil these functions by means of research and awareness raising, review of the legislation and the drafting of statutory Codes of Practice. The Equality Authority also has the power to instigate litigation on its own behalf or to assist a litigant. Additionally the Equality Authority is authorized to conduct inquiries, and to carry out equality reviews. These are in effect an audit of the level of equality that exists in a particular business or industry. The Department of Justice, Equality and Law Reform, under the direction of the Minister fund the Equality Authority. The Equality Authority works closely with the social partners, non-governmental organizations, trade unions and government departments promoting the effectiveness of the equality legislation. The budget of the Equality Authority was reduced by 43% for 2009, causing the then Chief Executive Officer and half of the Board members to resign in December 2008, on the basis that the budget cut was so severe as to render the Equality Authority unable to carry out its functions adequately under the EU directives. A formal complaint on this point and also maintaining that the body's independence has been compromised was submitted to the European Commission in September 2009 by Equality Rights Alliance (ERA), an alliance of 130 equality and social inclusion NGOs. However the Commission was not prepared to open infringement proceedings at this time. The Department of Justice appointed a new CEO from the ranks of officials within the Department.



The second body established under the Employment Equality Act 1998-2007 is the Equality Tribunal. 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. The Equality Officers investigate complaints and issue a legally reasoned and public decision, this decision 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. A mediated settlement agreed by the parties is binding and is enforceable by the Circuit Court. The Equality Tribunal is a statutory body, and an independent and impartial forum to hear or to mediate alleged discrimination. The Department of Justice, Equality and Law Reform, under the direction of the Minister fund the Equality Tribunal. The Equality Tribunal publishes annual reports, annual legal reviews, annual mediation reviews and statistics on their work.

There are two other relevant bodies in the context of equality: the Irish Human Rights Commission and the National Disability Authority. The Irish Human Rights Commission is charged with the protection and promotion of human rights. The Commission work to ensure the protection of civil, political, economic, social and cultural rights in recognition of the universal, indivisible, interdependent and inter-relation of all human rights. The National Disability Authority, on behalf of the State, promotes and helps secure the rights of people with disabilities. Their responsibilities include policy development, research and advice on standards.