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# Country report

## Non-discrimination

Ireland

2016

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**EUROPEAN COMMISSION**

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Directorate D — Equality  
Unit JUST/D1

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B-1049 Brussels*

# **Country report**

# **Non-discrimination**

# **Ireland**

Orlagh O'Farrell

Reporting period 1 January 2015 – 31 December 2015

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## **List of abbreviations**

EEA - Employment Equality Act 1998 - 2015

<http://www.justice.ie/en/JELR/EmpEqActsConsldtd.pdf/Files/EmpEqActsConsldtd.pdf>

ESA - Equal Status Act 2000 - 2015

[http://www.justice.ie/en/JELR/EqualStatusActsConsldtd\\_00\\_04.pdf/Files/EqualStatusActsConsldtd\\_00\\_04.pdf](http://www.justice.ie/en/JELR/EqualStatusActsConsldtd_00_04.pdf/Files/EqualStatusActsConsldtd_00_04.pdf)

IHREC - Irish Human Rights and Equality Commission

IHRECA - Irish Human Rights and Equality Commission Act 2014,

<http://www.irishstatutebook.ie/eli/2014/act/25/enacted/en/print>

WRC - Workplace Relations Commission

WRA - Workplace Relations Act 2015, 20.5.2015

<http://www.irishstatutebook.ie/eli/2015/act/16/enacted/en/html?q=workplace+relations+act&years=2015>

E(MP)A - Equality (Miscellaneous Provisions) Act, 2015, 10.12.2015

<http://www.irishstatutebook.ie/eli/2015/act/43/enacted/en/html?q=Equality+%28Miscellaneous+Provisions%29+Act+2015&years=2015>

## EXECUTIVE SUMMARY

### 1. Introduction

The make-up of Irish society is quite homogeneous. According to the 2011 census,<sup>1</sup> of a population of 4,588,252, 84% are Roman Catholic, 2.8% Church of Ireland (Protestant), 1% Muslim, 1.8% no religion, remainder unstated or various religions. 85% describe themselves as white Irish, 0.6% as Irish Travellers.<sup>2</sup> 58 697 people describe themselves as Black or Black Irish. Between 2006 and 2011 "Other White" (non-Irish) rose by almost 43%, largely due to immigration from Eastern European countries. "Other Asian" ethnic group includes people of Indian and Filipino origin (87% rise), while there is 8% more people of Chinese ethnicity. The average age of the population is 36.1. The figures for those describing themselves as disabled are not available. No census questions were asked as to sexual orientation (there were 4,042 cohabiting same-sex couples). Non-Irish nationals consisted of 544,357 (12% of the population). The percentage of non-nationals from another EU Member State is not available, but is likely to be the majority.

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 1998-2015 and the Equal Status Act 2000-2015.<sup>3</sup> These Acts also established the Equality Authority and the Equality Tribunal.

At the outset of this equality legislation there was significant support for the bodies and their actions, but subsequently there was something of a backlash. This is evidenced most keenly by the introduction of the Intoxicating Liquor Act 2003. This Act governs the enforcement of non-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.

For six years following the economic recession in 2008 national budgets severely curtailed funding for the Equality Authority and Tribunal, whose workloads meanwhile continued to increase. With the establishment of the new merged Irish Human Rights and Equality Commission<sup>4</sup> restored funding has been promised. Meanwhile the Equality Tribunal was subsumed into the reorganised Workplace Relations Commission.<sup>5</sup>

### 2. Main legislation

The Irish Constitution enshrines a guarantee of equality before the law. There was a broad welcome for the range of equality laws which have been introduced over the last few decades.

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<sup>1</sup> <http://www.cso.ie/en/census/census2011reports/>.

<sup>2</sup> There are no official statistics on Roma.

<sup>3</sup> Employment Equality Act 1998-2015, <http://www.justice.ie/en/JELR/EmpEqActsConsldtd.pdf/Files/EmpEqActsConsldtd.pdf> and <http://www.irishstatutebook.ie/eli/2015/act/43/enacted/en/pdf>. Equal Status Act 2000-2015, [http://www.justice.ie/en/JELR/EqualStatusActsConsldtd\\_00\\_04.pdf/Files/EqualStatusActsConsldtd\\_00\\_04.pdf](http://www.justice.ie/en/JELR/EqualStatusActsConsldtd_00_04.pdf/Files/EqualStatusActsConsldtd_00_04.pdf) and <http://www.irishstatutebook.ie/eli/2015/act/43/enacted/en/pdf>.

<sup>4</sup> Irish Human Rights and Equality Commission Act (2014) <http://www.irishstatutebook.ie/2014/en/act/pub/0025/print.html>. The new body came into effect on 1 November 2014.

<sup>5</sup> Workplace Relations Act 2015 <http://www.irishstatutebook.ie/eli/2015/act/16/enacted/en/pdf>.



Irish anti-discrimination legislation consists of the Employment Equality Act 1998-2015, and the Equal Status Act 2000-2015. They cover the grounds of gender, age, race, religion, family status, disability, marital status, sexual orientation, membership of the Traveller Community. The Equal Status Act has now been amended by the Equality (Miscellaneous Provisions) Act 2015, which added the new ground of housing assistance, by virtue of which landlords and accommodation advertisers may not discriminate in the provision of rental accommodation against a person who is in receipt of housing assistance.<sup>6</sup>

Four other acts also contain provisions prohibiting discrimination, namely the Pensions Act 1990-2008, Unfair Dismissals Act 1977-2007, the Prohibition on the Incitement to Hatred Act 1989, which criminalises 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 transposition of both directives and the necessary changes were provided for in the Equality Act 2004. The Employment Equality Act 1998-2015 established two permanent national institutions with enforcement functions under the equality legislation, namely the Equality Authority and the Equality Tribunal, and these were the specialised bodies designated under the Racial Equality Directive. The Equality Tribunal has now been subsumed into the Workplace Relations Commission.

Irish anti-discrimination legislation goes beyond EU equality directives, in that the scope of the Equal Status Act 2000-2015 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, and housing assistance 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.

Ireland has ratified almost all of the major international instruments combating discrimination: 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. It has not ratified Protocol 12 of the European Convention on Human Rights. Ireland is a dualist state, meaning 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. Ireland has not yet ratified the UN Convention on the Rights of Persons with Disabilities.

The International Convention against All Forms of Racial Discrimination (CERD) monitoring committee observed<sup>7</sup> that the economic recession that confronted the State party since 2008 threatens to reverse the achievements that have been made in the State party's efforts to combat racial discrimination. It expressed grave concern over the disproportionate budget cuts to various human rights institutions mandated to promote and monitor human rights such as the Irish Human Rights Commission, Equality Authority and National Consultative Committee on Racism and Interculturalism. It recommended that the government should recognise Travellers as an ethnic group, and produce a positive action programme for Travellers at all levels.

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<sup>6</sup> Ireland, Equality (Miscellaneous provisions) Act 2015, 10,12,2015

<http://www.irishstatutebook.ie/eli/2015/act/43/enacted/en/pdf>.

<sup>7</sup> Concluding Observations of the Committee on the Elimination of Racial Discrimination, March 2011  
[http://www2.ohchr.org/english/bodies/cerd/docs/co/Ireland\\_AUV.pdf](http://www2.ohchr.org/english/bodies/cerd/docs/co/Ireland_AUV.pdf).

### 3. Main principles and definitions

The Equality Acts prohibit discrimination across nine grounds, but govern different aspects of discrimination. The Employment Equality Act 1998-2015 prohibits discrimination in the sphere of employment; the Equal Status Act 1998-2015 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 and procuring another person to discriminate on the grounds of race, religion, gender, age, disability, sexual orientation, marital status, family status, membership of the Traveller community, and housing assistance. The Equality Acts also require reasonable accommodation on the ground of disability in employment and access to goods and services. Multiple discrimination is not explicitly prohibited. 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 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.

The Employment Equality Act 1998-2015 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 2000-2015 provides that there is a breach when 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, which does not apply to access to employment in another person's home for the provision of personal services. There are exceptions 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 exceptions relating to the grounds of age and

disability in occupational pensions and remuneration in respect of someone with a restricted capacity respectively. There is an exception relating to discrimination in employment for the purposes of maintaining the religious ethos of an institution, provided that this is "legitimate", "proportionate," and limited so that it could not be used to justify discrimination on another ground. There are also exceptions in respect of certain forms of employment such as the Defence Forces, the Garda Síochána (police) 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 organising sporting events, for authenticity purposes for a dramatic performance, or other entertainment, or for the provision of services for religious purposes. There is an exception that discrimination in relation to the provision of goods or services is not actionable in circumstances that would lead a reasonable person to believe there is a substantial risk of criminal or disorderly conduct. The Equal Status Act also contains a number of exceptions in respect of education on the grounds of age, gender, religious ethos and disability.

#### 4. Material scope

The Employment Equality Act 1998-2015 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 2000-2015 prohibits discrimination in relation to goods and services, including education and accommodation. State services are not explicitly mentioned. Section 14 of the Equal Status Act provides a statutory exemption where an act or action is required by virtue of another piece of legislation: then the Equal Status Act 2000-2015 does not apply.

There has been some new equality case law in 2015.<sup>8</sup>

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<sup>8</sup> On the Age ground:  
WRC, *Goss v Ryanair*, DEC-E2015-138, December 2015 (exact date not given)  
<https://www.workplacerelations.ie:443/en/Cases/2015/December/DEC-E2015-138.html>. No requirement on an employer to objectively justify a mandatory retirement age.

On the Disability ground:  
Labour Court, *Michal Wojcik and Sodexo Ireland Ltd*, EDA1517, 23 November 2015  
<https://www.workplacerelations.ie:443/en/Cases/2015/November/EDA1517.html>. The requirement to provide reasonable accommodation is a specific cause of action.

High Court, *Nano Nagle School v Marie Daly*, [2015] IEHC 785, 11 December 2015  
<http://www.courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/86867f31d053511280257f30005c002f?OpenDocument>. The employer had a duty to consider the possibility of a reorganisation of work and a redistribution of tasks so as to relieve the complainant of those duties that she was unable to perform.

On the Race or ethnic origin ground:  
Equality Tribunal, *Ms. A (on behalf of her daughter, B) -v- A Girls Secondary School*, DEC-S2015-001.html, 6 February 2015. <https://www.workplacerelations.ie:443/en/Cases/2015/February/DEC-S2015-001.html>. Indirect discrimination on grounds of race in provision of education. The aim of the school's admission's policy was legitimate, but it had not proved that this was objectively justified by a legitimate aim and was appropriate and necessary.

On the Traveller community ground:  
Supreme Court, *Stokes v Christian Brothers High School Clonmel*, [2015] IESC 13, 24 February 2015  
<http://www.courts.ie/Judgments.nsf/597645521f07ac9a80256ef30048ca52/a09897a48211897980257df6005a3c31?OpenDocument>. The Supreme Court notably failed to consider the provisions of the Equal Status Act in the light of the EU directives which it transposes, and failed to consider CJEU jurisprudence on indirect discrimination. The incorrect interpretation of indirect discrimination in this case is likely now to be the standard for all claims of indirect discrimination in access to goods and services, and also likely to apply to cases of indirect discrimination in employment.

## 5. Enforcing the law

The Employment Equality Act 1998-2015 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 1998-2015 or the Equal Status Act 2000-2015 may be brought before the Equality Tribunal, now the WRC. The latter 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 1998-2015. A mediated settlement agreed by the parties becomes legally binding and its terms can be enforced at the Circuit Court. The decisions may be appealed; the Labour Court (WRC) hears the employment appeals, whereas the Circuit Court hears the equal status appeals. Labour court determinations can be appealed on a point of law to the High Court. Complaints of unfair dismissal may also be brought under the Unfair Dismissals Acts 1977 and 1993. Claims are brought before the relevant body by way of application using standard forms. Once litigation has been instigated the alleged discriminator will be notified. Hearings are in private before the WRC. The decisions of the WRC are available for public inspection, and published on the WRC website. Complaints under the Equal Status Act 2000-2015 involving licensed premises (i.e. pubs etc.) must be brought to the District Court rather than the (WRC) Equality Tribunal. The major impact of this amendment is increased costs for complainants. Organisations may represent an individual complainant, at the WRC where they are authorised to do so by the complainant, but not before the Circuit Court or the High Court. Organisations are not permitted to take a complaint, with the exception of the Irish Human Rights and Equality Commission (IHREC). IHREC enjoys legal standing to bring complaints to the WRC relating to patterns of discrimination, discriminatory advertising or the contents of a collective agreement. It 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, where the facts established suggest that there is a *prima facie* case of discrimination. The use of statistics is permitted, but is not required by the equality legislation in order to raise a *prima facie* case of discrimination. Situation testing has not been used to any great extent. There are no procedural or other rules prohibiting the use of "situational testing." However, judges from the Irish superior courts may be hostile to this form of evidence, seeing it as a form of entrapment. The Employment Equality Act 1998-2015 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 1998-2015 also provides for non-financial remedies, such as an order that a person should take a course of action including orders for re-instatement or re-engagement. The Equal Status Act 2000-2015 also provides for a variety of remedies including compensation, or orders for service providers to take specific course of action. This Act also imposes maximum award limits; the current maximum is € 15,000.<sup>9</sup> The majority of awards granted do not come anywhere near the maximum. Under both Acts the financial sanctions are much lighter than those provided for in the case of gender. This suggests that the sanctions in the case of the non-gender grounds under these Acts may not be effective, proportionate or dissuasive.

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<sup>9</sup> The limit was raised with effect from 4 February 2014, [Courts and Civil Law \(Miscellaneous Provisions\) Act 2013](#).

## 6. Equality bodies

The Equality Authority was merged with the Irish Human Rights Commission to form the Irish Human Rights and Equality Commission.<sup>10</sup> The Irish Human Rights and Equality Commission (IHREC), which was established on 1 November 2014, is an independent body mandated to work towards the elimination of discrimination, promote equality of opportunity, provide information to the public on a number of matters and review various legislative enactments. It fulfils these functions by means of research and awareness raising, review of the legislation and the drafting of statutory Codes of Practice. IHREC also has the power to instigate litigation on its own behalf or to assist a litigant. It is authorised to conduct inquiries, and carry out equality reviews. The Department of Justice, Equality and Law Reform, under the direction of the Minister, funds IHREC, which reports to the Irish Parliament.

The Equality Tribunal is a quasi-judicial body established for the purpose of investigating complaints under the Employment Equality Act 1998-2015 and the Equal Status Act 2000-2015, on all nine grounds. Its decisions are binding. The Tribunal Director is charged with the enforcement of the Employment Equality Acts and the Equal Status Acts, and may delegate his/her quasi-judicial functions to Equality Officers and Equality Mediation Officers. The Tribunal also has jurisdiction to deal with discriminatory dismissals and the Pensions Acts as they deal with equality issues.

The Equality Tribunal was reorganised in 2015 into a new structure under the responsibility of the Minister for Jobs, Enterprise and Innovation, which saw the Equality Tribunal and Employment Appeals Tribunal replaced by a new Workplace Relations Commission (WRC), and the appellate functions of the EAT transferred to a new expanded Labour Court. The new body will report annually to the Minister for Jobs, Enterprise and Innovation. The legislation was adopted in 2015.<sup>11</sup>

The WRC has responsibility for:

1. promoting the improvement of workplace relations, and maintenance of good workplace relations;
2. promoting and encouraging compliance with relevant enactments;
3. providing guidance in relation to compliance with codes of practice approved under Section 20 of the Workplace Relations Act 2015;
4. conducting reviews of, and monitor developments as respects, workplace relations;
5. conducting or commissioning research into matters pertaining to workplace relations;
6. providing advice, information and the findings of research conducted by the Commission to joint labour committees and joint industrial councils;
7. advising and apprising the Minister in relation to the application of, and compliance with, relevant enactments; and
8. providing information to members of the public in relation to employment.

These functions are in addition to the quasi-judicial functions of the former Equality Tribunal, which it took over by virtue of Section 84 of the WRA.

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<sup>10</sup> Irish Human Rights and Equality Commission Act  
<http://www.irishstatutebook.ie/2014/en/act/pub/0025/print.html>.

<sup>11</sup> Workplace Relations Act 2015, <http://www.irishstatutebook.ie/eli/2015/act/16/enacted/en/pdf>.

## **7. Key issues**

The merger of the Irish equality and human rights bodies into the Irish Human Rights Commission will be keenly scrutinised for its positive or negative impact on equality issues. An interesting innovation in the Act is Section 42 of the Irish Human Rights and Equality Commission Act (2014) which introduces a positive duty on public bodies to have due regard to human rights and equality. The Irish Human Rights and Equality Commission will assist public bodies to comply with the positive duty, including by producing guidelines, and codes of practice.

The other significant change is the absorption of the Equality Tribunal into an amalgamated Workplace Relations Commission under legislation adopted in 2015. It may be a cause of concern that the two equality bodies will now be reporting to different Ministers, only one of whose remit concerns equality. In addition, cases of discrimination in regard to goods and service are now brought to a body responsible for workplace relations.

## RÉSUMÉ

### 1. Introduction

La composition de la société irlandaise est assez homogène. Selon le recensement de 2011,<sup>12</sup> la population de 4 588 252 habitants comprend 84 % de catholiques romains, 2,8 % de membres de l'Église d'Irlande (protestante), 1 % de Musulmans et 1,8 % de personnes déclarant n'appartenir à aucune confession religieuse – le solde comprenant des personnes appartenant à des religions diverses et les personnes n'ayant rien déclaré. Selon la même source, 85 % se décrivent comme des Irlandais de race blanche et 0,6 % comme des gens du voyage irlandais,<sup>13</sup> et 58 697 personnes se décrivent comme étant de race noire ou comme des Irlandais de race noire. Le pourcentage des «autres blancs» (non-Irlandais) a augmenté de près de 43 % entre 2006 et 2011 en raison principalement de l'immigration en provenance de pays d'Europe de l'Est. Le groupe ethnique des «autres asiatiques» comprend des personnes d'origine indienne et philippine (progression de 87 %) et le pays enregistre une hausse de 8 % de résidents d'origine chinoise. L'âge moyen de la population s'établit à 36,1 ans. Les chiffres concernant les personnes se déclarant handicapées ne sont pas disponibles. Le recensement ne contenait aucune question concernant l'orientation sexuelle (le pays comptait 4 042 couples de même sexe vivant en cohabitation). Les ressortissants étrangers étaient au nombre de 544 357 (12 % de la population). Le pourcentage de non-ressortissants originaires d'un autre État membre de l'UE n'est pas disponible, mais devrait représenter la majorité des étrangers vivant dans le pays.

C'est l'adhésion à l'Union européenne en 1972 qui a insufflé le principal élan au développement du régime égalitaire en Irlande. Les années 1990 ont vu tous les partis s'accorder sur la nécessité d'un élargissement sensible de la législation irlandaise en matière d'égalité afin qu'elle aille au-delà de la discrimination fondée sur le genre. C'est ainsi qu'ont été adoptées la loi sur l'égalité dans l'emploi (1998-2015) et la loi sur l'égalité des statuts (2000-2015),<sup>14</sup> lesquelles ont également institué l'*Equality Authority* (Autorité pour l'égalité) et l'*Equality Tribunal* (Tribunal pour l'égalité).

Si, lors de l'instauration de ce régime égalitaire, les organismes et leurs actions ont bénéficié d'un soutien important, une certaine volte-face a été observée ensuite – l'introduction de la loi de 2003 sur les boissons alcoolisées en étant probablement la preuve la plus frappante. Cette loi régit l'application des dispositions antidiscrimination dans les établissements titulaires d'une licence en exigeant que les plaignants recourent au système judiciaire ordinaire plutôt qu'au Tribunal pour l'égalité. L'introduction de cette loi est le résultat direct d'une pression politique des viticulteurs d'Irlande – cette pression étant elle-même le résultat direct de l'importante jurisprudence établissant une discrimination largement répandue de la part des établissements titulaires d'une licence à l'égard des membres de la communauté des gens du voyage.

Durant les six années qui ont suivi le début de la crise économique en 2008, les budgets nationaux ont considérablement réduit le financement de l'*Equality Authority* et de l'*Equality Tribunal*, dont la charge de travail a pourtant continué d'augmenter. Un rétablissement du financement est promis lors de la mise en place de la nouvelle

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<sup>12</sup> <http://www.cso.ie/en/census/census2011reports/>.

<sup>13</sup> Il n'existe aucune statistique officielle concernant les Roms.

<sup>14</sup> *Employment Equality Act 1998-2015*,  
<http://www.justice.ie/en/JELR/EmpEqActsConsldtd.pdf/Files/EmpEqActsConsldtd.pdf> et  
<http://www.irishstatutebook.ie/eli/2015/act/43/enacted/en/pdf>.  
*Equal Status Act 2000-2015*,  
[http://www.justice.ie/en/JELR/EqualStatusActsConsldtd\\_00\\_04.pdf/Files/EqualStatusActsConsldtd\\_00\\_04.pdf](http://www.justice.ie/en/JELR/EqualStatusActsConsldtd_00_04.pdf/Files/EqualStatusActsConsldtd_00_04.pdf) et  
<http://www.irishstatutebook.ie/eli/2015/act/43/enacted/en/pdf>.



Commission irlandaise fusionnée en charge des droits de l'homme et de l'égalité.<sup>15</sup> Entre-temps, l'*Equality Tribunal* a été intégré à la Commission réorganisée pour les relations sur le lieu de travail.<sup>16</sup>

## 2. Législation principale

La Constitution irlandaise consacre la garantie d'une égalité devant la loi. L'ensemble des lois relatives à l'égalité qui ont été introduites au cours des quelques dernières dizaines d'années ont bénéficié d'un accueil très favorable.

La législation irlandaise antidiscrimination comprend la loi sur l'égalité dans l'emploi (1998-2015) et la loi sur l'égalité des statuts (2000-2015), qui couvrent les motifs suivants: le genre, l'âge, la race, la religion, la situation familiale, le handicap, l'état matrimonial, l'orientation sexuelle et l'appartenance à la communauté des gens du voyage. La loi sur l'égalité des statuts a été modifiée par la loi de 2015 sur l'égalité (dispositions diverses), qui y ajoute le nouveau motif de l'aide au logement – en d'autres termes, les propriétaires et les annonceurs de biens ne peuvent pratiquer, en matière de location d'une habitation, de discrimination à l'encontre d'une personne bénéficiaire d'une aide au logement.<sup>17</sup>

Quatre autres lois contiennent également des dispositions interdisant la discrimination, à savoir, la loi sur les retraites (1990-2008), la loi sur les licenciements abusifs (1977-2007), la loi de 1989 sur l'interdiction de l'incitation à la haine, qui pénalise les discours haineux, et la loi de 2003 sur les boissons alcoolisées, qui prévoit une mise en application du droit antidiscrimination dans le cadre des établissements titulaires d'une licence de vente d'alcool. La transposition des deux directives et les modifications requises ont été assurées par la loi de 2004 sur l'égalité. La loi sur l'égalité dans l'emploi (1998-2015) a créé deux institutions nationales permanentes chargées de faire respecter la législation relative à l'égalité: il s'agit de l'*Equality Authority* (Autorité pour l'égalité) et de l'*Equality Tribunal* (Tribunal pour l'égalité), qui constituent les organismes spécialisés désignés au titre de la directive sur l'égalité raciale. L'*Equality Tribunal* est désormais intégré à la Commission pour les relations sur le lieu de travail.

La législation antidiscrimination irlandaise va au-delà des directives de l'Union européenne sur l'égalité dans la mesure où la loi sur l'égalité des statuts (2000-2015) interdit la discrimination dans l'accès aux biens et aux services non seulement pour des motifs de race et de genre, mais également de handicap, d'âge, de religion, d'orientation sexuelle, d'appartenance à la communauté des gens du voyage, d'état matrimonial et de situation familiale, et d'aide au logement. La nationalité est également désignée en tant que motif de discrimination par la législation irlandaise relative à l'égalité dans l'emploi et à l'égalité des statuts. La définition du handicap est plus large que celle figurant dans le droit de l'UE.

L'Irlande a ratifié presque tous les grands instruments internationaux de lutte contre la discrimination: la Charte des Nations unies, la Déclaration universelle des droits de l'homme, le Pacte des Nations unies relatif aux droits civils et politiques, le Pacte des Nations unies relatif aux droits économiques, sociaux et culturels, la Convention des Nations unies relative aux droits de l'enfant, la Convention des Nations unies sur l'élimination de toutes les formes de discrimination à l'égard des femmes, la Convention des Nations unies sur la nationalité de la femme mariée, la Convention internationale sur l'élimination de toutes les formes de discrimination raciale, la Convention des Nations unies relative au statut des réfugiés, la Convention européenne de sauvegarde des droits de

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<sup>15</sup> *Irish Human Rights and Equality Commission Act (2014)* (Loi de 2014 sur la Commission pour les droits de l'homme et l'égalité), <http://www.irishstatutebook.ie/2014/en/act/pub/0025/print.html>. Ce nouvel organisme est opérationnel depuis le 1<sup>er</sup> novembre 2014.

<sup>16</sup> Loi de 2015 sur les relations sur le lieu de travail  
<http://www.irishstatutebook.ie/eli/2015/act/16/enacted/en/pdf>.

<sup>17</sup> Irlande, loi de 2015 sur l'égalité (dispositions diverses) du 10 décembre 2015  
<http://www.irishstatutebook.ie/eli/2015/act/43/enacted/en/pdf>.



l'homme et des libertés fondamentales, la Charte sociale européenne, la Charte sociale européenne (révisée), la Convention-cadre européenne pour la protection des minorités nationales et la Convention européenne sur l'exercice des droits de l'enfant. Elle n'a pas ratifié le protocole n° 12 à la Convention européenne des droits de l'homme. L'Irlande est un État dualiste, ce qui signifie que pour avoir un impact au niveau du système juridique irlandais, la législation internationale doit être transposée en droit interne par voie législative. La seule convention internationale qui ait été transposée en droit irlandais est la Convention européenne de sauvegarde des droits de l'homme, laquelle y a été incorporée au moyen de l'*European Convention on Human Rights Act* (loi sur la Convention européenne de sauvegarde des droits de l'homme) de 2003. L'Irlande n'a pas encore ratifié la Convention des Nations unies relative aux droits des personnes handicapées.

Le Comité pour l'élimination de la discrimination raciale (CERD), qui surveille l'application de la Convention sur l'élimination de toutes les formes de discrimination raciale, a constaté<sup>18</sup> que la récession économique à laquelle l'État partie est confronté depuis 2008 risque de compromettre les avancées réalisées par ledit État partie dans sa lutte contre la discrimination raciale. Il s'est dit profondément préoccupé par les réductions disproportionnées des budgets de diverses institutions des droits de l'homme chargées de promouvoir et de surveiller le respect des droits de l'homme, telles que l'*Irish Human Rights Commission* (Commission irlandaise des droits de l'homme), l'*Equality Authority* (Autorité pour l'égalité) et le *National Consultative Committee on Racism and Interculturalism* (Comité consultatif national sur le racisme et l'interculturalisme). Il a recommandé que le gouvernement reconnaisse les gens du voyage en tant que groupe ethnique et élabore un programme d'action positive en leur faveur à tous les niveaux.

### 3. Principes généraux et définitions

Les lois garantissant l'égalité interdisent la discrimination pour neuf motifs, mais régissent des aspects différents de la discrimination. L'*Employment Equality Act* (loi sur l'égalité dans l'emploi) (1998-2015) interdit la discrimination dans le domaine de l'emploi; l'*Equal Status Act* (la loi sur l'égalité des statuts) (2000-2015) interdit la discrimination dans la fourniture de biens et de services; et la *Social Welfare (Miscellaneous Provisions) Act* (loi sur la sécurité sociale (dispositions diverses)) de 2004 interdit la discrimination en matière de pensions de retraite professionnelles. Ces lois interdisent la discrimination directe, la discrimination indirecte, les rétorsions, le harcèlement, l'injonction de discriminer et le fait d'obtenir d'une autre personne qu'elle pratique une discrimination fondée sur la race, la religion, le genre, l'âge, le handicap, l'orientation sexuelle, l'état matrimonial, la situation familiale, l'appartenance à la communauté des gens du voyage et l'aide au logement. Les lois sur l'égalité exigent également l'aménagement raisonnable en rapport avec le handicap dans les domaines de l'emploi et de l'accès aux biens et aux services. La discrimination multiple n'est pas explicitement interdite. La discrimination directe est définie dans les lois sur l'égalité comme le fait de traiter une personne de manière moins favorable qu'une autre ne l'est, ne l'a été ou ne le serait en raison de l'un des neuf motifs discriminatoires. Cette interdiction inclut la discrimination par association et la discrimination fondée sur un motif existant, ayant existé mais n'existant plus, pouvant exister dans le futur ou imputé à la personne concernée. Les lois sur l'égalité définissent la discrimination indirecte comme se produisant lorsqu'une disposition apparemment neutre fait qu'une personne appartenant à l'une des catégories protégées subit un désavantage particulier par rapport à d'autres personnes n'appartenant pas à cette catégorie protégée. Cette différence de traitement est autorisée lorsqu'elle peut être objectivement justifiée par un but légitime et que les moyens pour atteindre ce but sont appropriés et nécessaires. On peut craindre

<sup>18</sup> Observations finales du Comité pour l'élimination de la discrimination raciale, mars 2011  
[http://www.google.be/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CBwQFjAAahUKEwjpueMN\\_YrJAhXDshQKHQFzAxM&url=http%3A%2F%2Fdocstore.ohchr.org%2FSelfServices%2FFilesHandler.ashx%3Fenc%3D6QkG1d%252FPPRiCAqhKb7yhsi%252FyrM1B9TT0oGmEKq0FjIGMDN9GaDxXjccJrXyrYI%252F%252FCNOv7wnHib0L7jDoxEB0XhLrMV2E0%252FB7Oq%252FVKGJwstIoaPalc7j370zMKLqdNpmCu&usq=AFOjCNFoWTU1-7-OFITRvA\\_1WuCGvNR5xQ](http://www.google.be/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CBwQFjAAahUKEwjpueMN_YrJAhXDshQKHQFzAxM&url=http%3A%2F%2Fdocstore.ohchr.org%2FSelfServices%2FFilesHandler.ashx%3Fenc%3D6QkG1d%252FPPRiCAqhKb7yhsi%252FyrM1B9TT0oGmEKq0FjIGMDN9GaDxXjccJrXyrYI%252F%252FCNOv7wnHib0L7jDoxEB0XhLrMV2E0%252FB7Oq%252FVKGJwstIoaPalc7j370zMKLqdNpmCu&usq=AFOjCNFoWTU1-7-OFITRvA_1WuCGvNR5xQ).

cependant que cette définition ne soit pas pleinement conforme aux directives dans la mesure où aucune disposition n'est prévue pour ce qui concerne l'utilisation de comparateurs hypothétiques. Il n'est pas nécessaire pour un plaignant de démontrer l'existence d'une intention de discriminer, directement ou indirectement. Il suffit que les actes aient un effet discriminatoire. Les lois sur l'égalité définissent le harcèlement comme tout comportement indésirable lié à un motif discriminatoire et ayant pour objet ou pour effet de porter atteinte à la dignité d'une personne et de créer pour elle un environnement intimidant, hostile, dégradant, humiliant ou offensant. Ce comportement peut consister en actes, demandes, mots exprimés, gestes ou production, affichage ou distribution de mots écrits, de dessins ou d'autre matériel. Les rétorsions visent toute situation dans laquelle une personne se déclarant victime de discrimination engage des poursuites ou soutient un plaignant, agit en qualité de comparateur ou comme témoin dans une procédure de plainte, s'oppose à la discrimination par des moyens légaux ou fait part de son intention d'agir de l'une des manières précitées et fait l'objet pour cette raison d'un licenciement ou d'un traitement défavorable.

La loi sur l'égalité dans l'emploi (1998-2015) dispose que, lorsqu'une personne atteinte d'un handicap peut s'acquitter des fonctions du poste qu'elle occupe avec ou sans l'aide de «mesures appropriées», elle est considérée comme compétente en vertu de la loi. L'employeur est tenu de prendre des mesures appropriées afin de permettre à une personne souffrant d'un handicap d'avoir accès à l'emploi, de participer à l'emploi ou d'y être promue, et de suivre une formation, à moins que ces mesures imposent une charge disproportionnée à l'employeur. Pour déterminer ce que représente une charge disproportionnée, il convient de tenir compte du coût de la mesure en question, de la taille et des ressources financières de l'employeur concerné, et de la possibilité d'obtenir un financement public ou une autre forme d'assistance. La loi sur l'égalité des statuts (2000-2015) stipule qu'il y a infraction lorsqu'un fournisseur de biens et de services ne fait pas tout ce qui est raisonnable pour répondre aux besoins d'une personne handicapée en prévoyant un traitement ou un équipement spécial sans lequel il serait impossible ou excessivement difficile pour cette personne de pouvoir disposer des biens et services en question. Le fait de ne pas offrir le traitement ou l'équipement spécial requis ne sera pas considéré comme un non-respect de l'obligation d'aménagement raisonnable lorsque la mise à disposition de ce traitement ou de cet équipement impose au fournisseur de biens ou services des frais allant au-delà du coût nominal des biens ou services concernés.

Les lois en matière d'égalité prévoient un certain nombre d'exceptions au principe de non-discrimination, lequel ne s'applique pas aux personnes travaillant au domicile d'une autre personne dans le cadre de la prestation de services personnels. Il existe aussi des dérogations lorsque la caractéristique en question constitue une exigence professionnelle véritable et déterminante pour le poste à pourvoir et que l'objectif est légitime et l'exigence proportionnée. Il existe un certain nombre d'exceptions liées aux motifs de l'âge et du handicap qui s'appliquent respectivement aux retraites professionnelles et à la rémunération d'une personne à capacité restreinte. Une exception concerne la discrimination dans l'emploi liée au maintien de l'éthique religieuse d'une institution pour autant que la dérogation soit «légitime», «proportionnée» et limitée de façon à ne pouvoir servir de justification à une discrimination fondée sur un autre motif. On trouve également des exceptions concernant certaines formes d'emploi telles que les forces de défense, la *Garda Síochána* (police irlandaise) et les services d'urgence. La loi sur l'égalité des statuts contient pour sa part un certain nombre d'exceptions et d'exemptions à la règle de non-discrimination. Des différences de traitement sont admissibles au niveau des rentes, des pensions et des polices d'assurance lorsqu'une preuve actuarielle atteste que la différence est raisonnable. Il existe des exceptions à la règle de non-discrimination pour ce qui concerne l'organisation d'événements sportifs, de spectacles ou d'autres divertissements dans un souci d'authenticité, ou la prestation de services à des fins religieuses. Une exception prévoit que la discrimination en rapport avec la fourniture de biens et de services n'est pas passible de poursuites lorsque les circonstances peuvent conduire une personne raisonnable à croire qu'il existe un risque important de comportement criminel ou de

perturbation de l'ordre public. La loi sur l'égalité des statuts contient également un certain nombre d'exceptions dans le domaine de l'enseignement, liées aux motifs de l'âge, du genre, de l'éthique religieuse et du handicap.

#### 4. Champ d'application matériel

La loi sur l'égalité dans l'emploi (1998-2015) s'applique au domaine de l'emploi et de la formation professionnelle sans établir de distinction entre les travailleurs du secteur public et ceux du secteur privé. Elle concerne l'accès à l'emploi, les conditions de travail, la formation ou l'expérience requise pour l'emploi, la promotion ou le reclassement, et la classification professionnelle. Cette loi régit également la formation professionnelle, les offres d'emploi, les agences de placement et les travailleurs intérimaires.

La loi sur l'égalité des statuts (2000-2015) interdit la discrimination en matière de biens et services, y compris dans le domaine de l'enseignement et du logement. Elle ne mentionne pas spécifiquement les services publics. Son article 14 prévoit une exemption statutaire dans la mesure où la loi sur l'égalité des statuts (2000-2015) ne s'applique pas lorsqu'une action ou une mesure est requise en vertu d'un autre acte législatif.

Il y a eu une série de nouveaux cas de jurisprudence en matière d'égalité au cours de l'année 2015.<sup>19</sup>

#### 5. Mise en application de la loi

La loi sur l'égalité dans l'emploi (1998-2015) a institué les mécanismes de mise en application prévus pour les lois sur l'égalité, lesquels s'appliquent de la même façon aux travailleurs du secteur public et à ceux du secteur privé, à l'exception de certains agents de la fonction publique. Les recours invoquant la loi sur l'égalité dans l'emploi (1998-2015) ou la loi sur l'égalité des statuts (2000-2015) peuvent être adressés au Tribunal pour l'égalité (Equality Tribunal), désormais Commission pour les relations sur le lieu de travail (WRC). Cette instance assure un rôle d'investigation dans l'audition des plaintes. Les plaignants peuvent se représenter eux-mêmes, les frais ne peuvent être portés à la charge

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<sup>19</sup> Concernant le motif de l'âge:

WRC (Commission pour les relations sur le lieu de travail), *Goss c. Ryanair*, DEC-E2015-138, décembre 2015 (date exacte non communiquée)

<https://www.workplacerelations.ie:443/en/Cases/2015/December/DEC-E2015-138.html>. Aucune obligation pour un employeur de justifier objectivement un âge de retraite obligatoire.

Concernant le motif du handicap:

*Labour Court, Michal Wojcik & Sodexo Ireland Ltd*, EDA1517, 23 novembre 2015

<https://www.workplacerelations.ie:443/en/Cases/2015/November/EDA1517.html>. L'obligation de prévoir un aménagement raisonnable est un motif spécifique d'action.

*High Court, Nano Nagle School c. Marie Daly*, [2015] IEHC 785, 11 décembre 2015

<http://www.courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/86867f31d053511280257f30005c002f?OpenDocument>. L'employeur est tenu d'étudier la possibilité d'une réorganisation du travail et d'une redistribution des tâches de manière à libérer la partie plaignante de celles qu'elle est dans l'incapacité d'exécuter.

Concernant le motif de la race ou de l'origine ethnique:

*Equality Tribunal, Mme A (au nom de sa fille, B) -c.- A Girls Secondary School*, DEC-S2015-001.html, 6 février. <https://www.workplacerelations.ie:443/en/Cases/2015/February/DEC-S2015-001.html>.

Discrimination indirecte fondée sur la race dans l'offre éducative. La politique d'admission de l'école était légitime, mais il n'avait pas été démontré qu'elle était objectivement justifiée par un but légitime et qu'elle était appropriée et nécessaire.

Concernant le motif de la communauté des gens du voyage:

*Supreme Court, Stokes c. Christian Brothers High School Clonmel*, [2015] IESC 13, 24 février 2015

<http://www.courts.ie/Judgments.nsf/597645521f07ac9a80256ef30048ca52/a09897a48211897980257df6005a3c31?OpenDocument>.

La Cour suprême a plus particulièrement omis ici d'envisager les dispositions de la loi sur l'égalité des statuts à la lumière des dispositions des directives européennes qu'elle transpose, et de tenir compte de la jurisprudence de la CJUE relative à la discrimination indirecte. Il est probable que l'interprétation incorrecte de la discrimination indirecte en l'espèce devienne la norme pour tous les recours portant sur une discrimination indirecte en rapport avec l'accès aux biens et aux services, et qu'elle s'applique également aux cas de discrimination indirecte dans le domaine de l'emploi.

d'aucune des parties et la procédure est informelle. L'option de la médiation est prévue à l'article 78 de la loi sur l'égalité dans l'emploi (1998-2015). Un règlement intervenant au terme d'une médiation est exécutoire pour les parties et le respect de ses clauses peut être imposé par le tribunal itinérant (Circuit Court). Il peut être fait appel des décisions auprès de la juridiction du travail (Labour Court – WRC) lorsqu'il s'agit d'emploi et auprès du tribunal itinérant (Circuit Court) lorsqu'il s'agit d'égalité de statut. Il peut être fait appel des décisions de la Labour Court sur un point de droit auprès de la High Court. Les recours pour licenciement abusif peuvent également être portés devant les tribunaux en vertu des lois sur les licenciements abusifs (Unfair Dismissal Acts) de 1977 et 1993. La requête est déposée auprès de l'instance concernée au moyen d'un formulaire standard. Une fois l'action intentée, l'auteur allégué de la discrimination en est avisé. Les audiences se tiennent à huis clos devant la WRC. Les décisions de la WRC sont disponibles pour consultation publique et publiées sur son site Internet. Les recours invoquant la loi sur l'égalité des statuts (2000-2015) et impliquant des établissements titulaires d'une licence de débit de boissons (pubs, etc.) doivent être adressés à la District Court (tribunal de district) plutôt qu'à la WRC. Cette modification se traduit principalement par des frais plus importants pour les plaignants. Des organisations peuvent représenter un plaignant individuel devant la WRC pour autant que le dit plaignant les y autorise, mais pas devant la Circuit Court ou la High Court. Les organisations ne sont pas autorisées à déposer plainte, à l'exception de l'Irish Human Rights and Equality Commission ou IHREC (Commission irlandaise pour les droits de l'homme et l'égalité), laquelle est habilitée à saisir la WRC à propos de pratiques discriminatoires, de publicités à caractère discriminatoire ou du contenu de conventions collectives. L'IHREC peut également offrir une assistance juridique et une représentation à un plaignant individuel.

La législation sur l'égalité prévoit le renversement de la charge de la preuve dans les affaires de discrimination lorsque les faits établis conduisent à présumer l'existence d'une discrimination. L'utilisation de statistiques est autorisée mais n'est pas requise par la législation sur l'égalité pour établir une présomption de discrimination. Le test de situation n'a guère été utilisé. Il n'existe aucune règle procédurale ou autre qui l'interdise, mais les juges des instances supérieures irlandaises pourraient être hostiles à cette forme de preuve qu'ils considèrent comme une sorte de piège. La loi sur l'égalité dans l'emploi (1998-2015) prévoit un large éventail de recours: indemnisation, ordres aux employeurs de prendre des mesures spécifiques, réintégration dans la fonction ou réengagement. Tous les contrats de travail sont censés posséder une clause d'égalité transformant toute disposition du contrat susceptible d'entraîner autrement une discrimination illégale. Toutes les dispositions discriminatoires figurant dans les conventions collectives sont nulles et non avenues, et aucun contrat ne peut être soustrait à l'application des dispositions de la législation garantissant l'égalité. Les indemnisations financières sont plafonnées: dans le cadre de l'emploi, elles représentent deux ans de salaire; en dehors de l'emploi, l'indemnisation maximale est fixée à 12 697 euros.

La loi sur l'égalité dans l'emploi (1998-2015) prévoit également des sanctions non financières, telles que l'ordre à une personne de prendre une mesure déterminée, y compris la réintégration ou le réengagement. La loi sur l'égalité des statuts (2000-2015) prévoit également divers recours, parmi lesquels des indemnisations et des ordres aux prestataires de services de prendre des mesures spécifiques. Cette loi plafonne également l'indemnisation, laquelle est actuellement limitée à 15 000 euros.<sup>20</sup> La majorité des indemnités sont toutefois très loin d'approcher ce montant. Les sanctions financières prises en vertu des deux lois sont beaucoup plus légères que celles appliquées en cas de discrimination fondée sur le genre – ce qui conduit à penser que les sanctions imposées au titre de ces deux lois pour d'autres motifs que le genre pourraient ne pas être efficaces, proportionnées et dissuasives.

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<sup>20</sup> La limite supérieure a été relevée avec effet au 4 février 2014, [Courts and Civil Law \(Miscellaneous Provisions\) Act 2013](#).

## 6. Organismes de promotion de l'égalité de traitement

L'*Equality Authority* (Autorité pour l'égalité) et l'*Irish Human Rights Commission* (Commission irlandaise des droits de l'homme) ont fusionné et forment désormais l'*Irish Human Rights and Equality Commission* ou IHREC (Commission irlandaise pour les droits de l'homme et l'égalité).<sup>21</sup> Cette nouvelle Commission, instituée le 1<sup>er</sup> novembre 2014, est un organisme indépendant chargé d'œuvrer à l'élimination de la discrimination, à la promotion de l'égalité des chances, à la fourniture au public d'informations sur toute une série de questions, et à l'examen de divers textes législatifs. Elle remplit cette mission au moyen de travaux de recherche et d'actions de sensibilisation, de l'analyse de la législation et de l'élaboration de codes de pratique statutaires. L'IHREC est également habilitée à intenter des poursuites pour son propre compte ou pour aider l'une des parties. Elle est autorisée à mener des enquêtes et à procéder à des bilans en matière d'égalité. Le ministère de la Justice, de l'égalité et des réformes législatives, sous la direction du ministre, finance l'IHREC – laquelle rapporte au Parlement irlandais.

L'*Equality Tribunal* est un organisme quasi-judiciaire institué pour instruire les plaintes déposées en vertu de la loi sur l'égalité dans l'emploi (1998-2015) et la loi sur l'égalité des statuts (2000-2015) en rapport avec les neuf motifs. Ses décisions sont exécutoires. Le directeur/la directrice du Tribunal est chargé(e) de faire appliquer la loi sur l'égalité dans l'emploi et la loi sur l'égalité des statuts, et peut déléguer ses fonctions quasi-judiciaires à des agents responsables de l'égalité ou à des agents en charge de médiations en matière d'égalité. Le Tribunal est également compétent pour traiter de licenciements discriminatoires ainsi que des questions en rapport avec les lois relatives aux retraites dans la mesure où elles concernent l'égalité.

L'*Equality Tribunal* a été réorganisé en 2015 et la nouvelle structure, placée sous la responsabilité du ministre de l'Emploi, de l'entreprise et de l'innovation, a donné lieu au remplacement de l'*Equality Tribunal* et de l'*Employment Appeals Tribunal* par une nouvelle Commission pour les relations sur le lieu de travail (*Workplace Relations Commission* ou WRC) et le transfert des fonctions d'appel de l'*Employment Appeals Tribunal* vers une nouvelle juridiction du travail renforcée. La nouvelle instance fera rapport chaque année au ministre de l'Emploi, de l'entreprise et de l'innovation. La législation a été adoptée en 2015.<sup>22</sup>

La WRC a pour mission de:

1. promouvoir l'amélioration des relations sur le lieu de travail, et le maintien de bonnes relations sur le lieu de travail;
2. promouvoir et encourager la conformité aux dispositions législatives et réglementaires;
3. fournir des orientations concernant la mise en conformité avec les codes de pratique adoptés en vertu de l'article 20 de la loi de 2015 sur les relations sur le lieu de travail;
4. procéder à l'examen et suivre l'évolution des relations sur le lieu de travail;
5. effectuer ou commanditer des études portant sur des questions en rapport avec les relations sur le lieu de travail;
6. communiquer aux comités de travail conjoints (*joint labour committees*) et aux commissions paritaires industrielles (*joint industrial councils*) des conseils, des informations et les résultats des études réalisées par la Commission;
7. conseiller et informer le Ministre concernant l'application et le respect des dispositions législatives et réglementaires pertinentes; et
8. fournir aux citoyens des informations relatives à l'emploi.

<sup>21</sup> *Irish Human Rights and Equality Commission Act* (Loi sur la Commission pour les droits de l'homme et l'égalité), <http://www.irishstatutebook.ie/2014/en/act/pub/0025/print.html>.

<sup>22</sup> *Workplace Relations Act 2015* (Loi de 2015 sur les relations sur le lieu de travail), <http://www.oireachtas.ie/documents/bills28/bills/2014/7914/b7914d-memo.pdf>.

Ces fonctions viennent compléter les fonctions quasi-judiciaires de l'ex-*Equality Tribunal*, que la *WRC* a reprises à son compte en vertu de l'article 84 de la loi sur les relations sur le lieu de travail.

## **7. Points essentiels**

La fusion des organismes irlandais chargés de l'égalité et des droits de l'homme pour former l'*Irish Human Rights Commission* fera l'objet d'une analyse approfondie en vue d'en évaluer les effets positifs ou négatifs sur les questions d'égalité. Une innovation intéressante figure à l'article 42 de la loi de 2014 sur la Commission irlandaise pour les droits de l'homme et l'égalité, qui introduit pour les organismes publics l'obligation positive de tenir dûment compte des droits de l'homme et de l'égalité. La Commission en question aidera les organismes publics à respecter cette obligation positive, en produisant notamment des lignes directrices et des codes de pratique.

L'autre changement important réside dans l'absorption, en vertu de la législation adoptée en 2015, de l'*Equality Tribunal* par une Commission fusionnée pour les relations sur le lieu de travail. On peut craindre que les deux organismes pour la promotion de l'égalité rapporteront à l'avenir à deux ministres différents, dont un seul a un mandat couvrant l'égalité. Des cas de discrimination en rapport avec les biens et les services sont, en outre, portées désormais devant une instance en charge des relations sur le lieu de travail.

## ZUSAMMENFASSUNG

### 1. Einleitung

Die Zusammensetzung der irischen Gesellschaft ist relativ homogen. Nach der Volkszählung von 2011<sup>23</sup> sind von den 4.588.252 Einwohnern des Landes 84 % römisch-katholisch, 2,8 % Mitglied der Church of Ireland (Protestanten), 1 % Muslime, 1,8 % nicht religiös und der Rest gehört entweder einer anderen Glaubensrichtung an oder hat keine Angaben gemacht. 85 % bezeichnen sich selbst als weiße Iren, 0,6 % als irische Fahrende oder Landfahrer (Travellers).<sup>24</sup> 58.697 bezeichnen sich selbst als Schwarze oder schwarze Iren. Zwischen 2006 und 2011 ist der Anteil der „sonstigen Weißen“ (Nicht-Iren) um fast 43 % gestiegen, vor allem durch Einwanderer aus osteuropäischen Ländern. Zur ethnischen Gruppe „sonstige Asiaten“ gehören Menschen mit indischer und philippinischer Herkunft (Anstieg um 87 %), die Bevölkerungsgruppe mit chinesischer ethnischer Zugehörigkeit ist um mehr als 8 % gewachsen. Das Durchschnittsalter der Bevölkerung liegt bei 36,1 Jahren. Zur Anzahl der Menschen, die sich selbst als behindert bezeichnen, gibt es keine Angaben. In der Volkszählung wurden keine Daten zur sexuellen Ausrichtung erhoben (es gab jedoch 4042 gleichgeschlechtliche Lebenspartnerschaften). 544.357 Personen besitzen nicht die irische Staatsbürgerschaft (12 % der Bevölkerung). Es liegen keine Zahlen dazu vor, wie viele davon aus anderen EU-Mitgliedstaaten stammen, aber es ist vermutlich die Mehrheit der Nicht-Staatsbürger.

Der wichtigste Impuls für die Entwicklung der irischen Gleichbehandlungspolitik ging vom Beitritt des Landes zur Europäischen Union im Jahr 1972 aus. In den 1990er Jahren waren sich alle Parteien einig, dass Irland ein wesentlich umfassenderes Gleichbehandlungsrecht braucht, das über das Thema Diskriminierung aufgrund des Geschlechts weit hinausgeht. Ergebnisse dieser Bestrebungen waren das Gesetz zur Gleichstellung am Arbeitsplatz (*Employment Equality Act 1998-2015*) und das Gleichstellungsgesetz (*Equal Status Act 2000-2015*).<sup>25</sup> Mit diesen Gesetzen wurde außerdem die Gleichbehandlungsstelle und das Gleichstellungstribunal geschaffen.

Bei der Verabschiedung dieser Gleichstellungsgesetze gab es eine starke politische Unterstützung für diese Stellen und ihrer Tätigkeit, jedoch kam es später zu einer Art Gegenreaktion. Das deutlichste Beispiel war die Einführung des Gesetzes über alkoholische Getränke von 2003. Dieses Gesetz regelt die Durchsetzung des Diskriminierungsverbots in konzessionierten Schankstätten und zwingt Opfer von Diskriminierung, sich statt an das spezialisierte Gleichstellungstribunal an die ordentlichen Gerichte zu wenden. Die Einführung dieses Gesetzes war das direkte Ergebnis des politischen Drucks der irischen Gastronomie. Unmittelbarer Auslöser für diesen politischen Druck dürfte die umfangreiche Rechtsprechung sein, die belegt, dass bei den konzessionierten Schankbetrieben eine Diskriminierung der irischen Fahrenden weit verbreitet ist.

In den sechs Jahren nach der Wirtschaftskrise von 2008 wurden die Haushaltsmittel für die Gleichbehandlungsstelle und das Tribunal stark gekürzt, wobei deren Arbeitsbelastung eher zugenommen hat. Die Stelle wurde inzwischen mit der neu gegründeten Irischen Menschenrechts- und Gleichbehandlungskommission<sup>26</sup> zusammengelegt, in diesem Zusammenhang wurde auch eine Wiederaufstockung der Finanzmittel versprochen.

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<sup>23</sup> <http://www.cso.ie/en/census/census2011reports/>.

<sup>24</sup> Es gibt keine offiziellen Statistiken zu den Roma.

<sup>25</sup> *Employment Equality Act 1998-2015*, <http://www.justice.ie/en/JELR/EmpEqActsConsldtd.pdf/Files/EmpEqActsConsldtd.pdf> und <http://www.irishstatutebook.ie/eli/2015/act/43/enacted/en/pdf>.  
*Equal Status Act 2000-2015*, [http://www.justice.ie/en/JELR/EqualStatusActsConsldtd\\_00\\_04.pdf/Files/EqualStatusActsConsldtd\\_00\\_04.pdf](http://www.justice.ie/en/JELR/EqualStatusActsConsldtd_00_04.pdf/Files/EqualStatusActsConsldtd_00_04.pdf) und <http://www.irishstatutebook.ie/eli/2015/act/43/enacted/en/pdf>.

<sup>26</sup> Gesetz über die Irische Menschenrechts- und Gleichbehandlungskommission (2014) <http://www.irishstatutebook.ie/2014/en/act/pub/0025/print.html>. Die neue Stelle nahm am 1. November 2014 ihre Arbeit auf.



Inzwischen ist das Gleichstellungstribunal in der umorganisierten Kommission für Arbeitsbeziehungen (*Workplace Relations Commission*, kurz: WRC) aufgegangen.<sup>27</sup>

## 2. Wichtigste Gesetze

Die Irische Verfassung garantiert die Gleichheit aller Menschen vor dem Gesetz. Die zahlreichen Gleichstellungsgesetze der letzten Jahrzehnte wurden mit breiter politischer Zustimmung verabschiedet.

Das irische Antidiskriminierungsrecht besteht aus dem Gesetz zur Gleichstellung am Arbeitsplatz und dem Gleichstellungsgesetz. Es deckt die Diskriminierungsgründe Alter, Rasse, Religion, Familienstand, Behinderung, Personenstand, sexuelle Ausrichtung und Mitgliedschaft in der Gemeinschaft der Landfahrer ab. Das Gleichstellungsgesetz wurde nun im Zuge des *Equality (Miscellaneous Provisions) Act 2015* geändert. Es wurde ein neuer Diskriminierungsgrund „Wohngeldbezug“ aufgenommen: Danach dürfen Vermieter und Wohnungsinserenten bei der Bereitstellung von Mietwohnraum Personen, die Wohngeld beziehen, nicht benachteiligen.<sup>28</sup>

Vier weitere Gesetze enthalten ein Verbot von Diskriminierung, nämlich das Rentengesetz 1990-2008, das Kündigungsschutzgesetz 1977-2007, das Gesetz über das Verbot der Anstiftung zum Hass 1989, in dem der Straftatbestand der Hassrede eingeführt wird, und das Gesetz über alkoholische Getränke 2003, das die Durchsetzung des Diskriminierungsverbots gegenüber Betrieben betrifft, die eine Konzession zum Ausschank alkoholischer Getränke haben. Die Umsetzung der beiden Richtlinien und die dafür notwendigen Gesetzesänderungen wurden durch das Gleichstellungsgesetz 2004 durchgeführt. Das Gesetz zur Gleichstellung am Arbeitsplatz von 1998-2015 führte zwei dauerhafte nationale Stellen zur Durchsetzung des Gleichstellungsrechts ein, nämlich die Gleichbehandlungsstelle und das Gleichstellungstribunal. Sie sind die zuständigen Stellen im Sinne der Antirassismusrichtlinie. Das Gleichstellungstribunal ist inzwischen in der Kommission für Arbeitsbeziehungen aufgegangen.

Das irische Antidiskriminierungsrecht geht über die Gleichstellungsrichtlinien der EU hinaus, weil das Gleichstellungsgesetz 2000-2015 auch ein Diskriminierungsverbot beim Zugang zu Gütern und Dienstleistungen enthält und zwar nicht nur aufgrund von Rasse und Geschlecht, sondern auch aufgrund von Behinderung, Alter, Religion, sexueller Ausrichtung, Mitgliedschaft in der Traveller-Gemeinschaft, Familien- und Personenstand sowie Wohngeldbezug. Das Gesetz zur Gleichstellung am Arbeitsplatz und das Gleichstellungsgesetz nennt auch die Nationalität als verbotenen Diskriminierungsgrund. Die Definition von Behinderung ist weiter als die des EU-Rechts.

Irland hat fast alle wichtigen internationalen Rechtsinstrumente zur Bekämpfung von Diskriminierung ratifiziert: Die Charta der Vereinten Nationen, die Allgemeine Erklärung der Menschenrechte, den Internationalen Pakt über bürgerliche und politische Rechte, den Internationalen Pakt über wirtschaftliche, soziale und kulturelle Rechte, die UN-Kinderrechtskonvention, das Übereinkommen zur Beseitigung jeder Form von Diskriminierung der Frau, das Übereinkommen über die Staatsangehörigkeit verheirateter Frauen, das Übereinkommen zur Beseitigung jeder Form von Rassendiskriminierung, die Genfer Flüchtlingskonvention, die Konvention zum Schutz der Menschenrechte und Grundfreiheiten, die Europäische Sozialcharta, die Europäische Sozialcharta (revidiert), das Rahmenübereinkommen zum Schutz nationaler Minderheiten und das Europäische Übereinkommen über die Ausübung von Kinderrechten. Irland hat das 12. Protokoll der Europäischen Menschenrechtskonvention nicht ratifiziert. Irland ist ein dualistischer Staat, das heißt internationales Recht kann nur dann im irischen Rechtssystem angewendet werden, wenn es durch ein Gesetz in irisches Recht überführt wurde. Das einzige

<sup>27</sup> *Workplace Relations Act 2015*, <http://www.irishstatutebook.ie/eli/2015/act/16/enacted/en/pdf>.

<sup>28</sup> *Irland, Equality (Miscellaneous provisions) Act 2015*, 10,12,2015  
<http://www.irishstatutebook.ie/eli/2015/act/43/enacted/en/pdf>.



internationale Übereinkommen, das in irisches Recht überführt wurde, ist die Europäische Menschenrechtskonvention, die durch das Gesetz über die Europäische Menschenrechtskonvention 2003 ins nationale Rechtssystem aufgenommen wurde. Irland hat das Übereinkommen über die Rechte von Menschen mit Behinderungen noch nicht ratifiziert.

Der Überwachungsausschuss des Übereinkommens zur Beseitigung jeder Form von Rassendiskriminierung (CERD) hat festgestellt,<sup>29</sup> dass die wirtschaftliche Rezession, die der Vertragsstaat seit 2008 erlebt, die Erfolge des Vertragsstaats im Kampf gegen Rassendiskriminierung zunichte zu machen droht. Er drückte schwere Bedenken gegen die unverhältnismäßig starken Budgetkürzungen für mehrere Menschenrechtsinstitutionen aus, die die Aufgabe haben, die Menschenrechte zu fördern und zu überwachen. Dazu gehören die Irische Menschenrechtskommission, die Gleichbehandlungsstelle und der Nationale Beratungsausschuss über Rassismus und interkulturelle Fragen. Er empfahl der Regierung die Anerkennung der Travellers als ethnischer Gruppe und die Einführung eines positiven Maßnahmenprogramms zur Förderung der Travellers auf allen Ebenen.

### **3. Wichtigste Grundsätze und Begriffe**

Die Gleichstellungsgesetze verbieten Diskriminierung aufgrund von neun Gründen, decken jedoch unterschiedliche Aspekte von Diskriminierung ab. Das Gesetz zur Gleichstellung am Arbeitsplatz 1998-2015 verbietet Diskriminierung im Arbeitsleben, das Gleichstellungsgesetz 1998-2015 verbietet Diskriminierung bei der Bereitstellung von Gütern und Dienstleistungen, das Gesetz über soziale Sicherheit 2004 verbietet Diskriminierung bei der betrieblichen Altersversorgung. Diese Gesetze verbieten unmittelbare und mittelbare Diskriminierung, Viktimisierung, Belästigung, Anweisung zur Diskriminierung und Unterstützung Dritter bei der Diskriminierung aufgrund von Rasse, Religion, Geschlecht, Alter, Behinderung, sexueller Ausrichtung, Personen- und Familienstand, Mitgliedschaft in der Landfahrer-Gemeinschaft und Wohngeldbezug. Das Gleichstellungsgesetz verpflichtet außerdem zu angemessenen Vorkehrungen, die Menschen mit Behinderung die Teilnahme am Arbeitsleben und den Zugang zu Gütern und Dienstleistungen ermöglichen. Mehrfachdiskriminierung ist nicht ausdrücklich verboten. Unmittelbare Diskriminierung im Sinne des Gleichstellungsgesetzes liegt vor, wenn eine Person aufgrund der neun Diskriminierungsgründe eine weniger günstige Behandlung als eine andere Person erfährt, erfahren hat oder erfahren würde. Das Verbot gilt auch für Diskriminierung durch Assoziierung und Diskriminierung aufgrund eines Diskriminierungsgrundes, der besteht, früher bestanden hat, womöglich bestehen wird oder der betroffenen Person unterstellt wird. Mittelbare Diskriminierung wird im Gleichstellungsgesetz definiert als Situation, in der eine dem Anschein nach neutrale Bestimmung Personen, die einer geschützten Gruppe angehören, im Vergleich zu anderen Personen, die nicht der geschützten Gruppe angehören, in besonderer Weise benachteiligt. Die Ungleichbehandlung ist jedoch zulässig, wenn sie durch ein rechtmäßiges Ziel sachlich gerechtfertigt ist und die Mittel zur Erreichung dieses Ziels angemessen und erforderlich sind. Manche sind der Meinung, dass diese Definition nicht völlig mit den Richtlinien vereinbar ist, weil sie keine Bestimmungen über eine hypothetische Vergleichsperson enthält. Kläger müssen nicht nachweisen, dass eine mittelbare oder unmittelbare Diskriminierung beabsichtigt war, es reicht aus, wenn die Handlung den Kläger tatsächlich diskriminiert. Das Gleichstellungsgesetz definiert Belästigung als unerwünschte Verhaltensweisen, die im Zusammenhang mit einem Diskriminierungsgrund stehen und bezwecken oder bewirken, dass die Würde der betreffenden Person verletzt und ein von Einschüchterungen, Anfeindungen, Erniedrigungen, Entwürdigungen oder Beleidigungen gekennzeichnetes Umfeld geschaffen wird. Unter diese Verhaltensweisen fallen Handlungen, Aufforderungen, Aussagen, Gesten oder die Herstellung, Darstellung oder Verbreitung von Texten, Bildern oder sonstigen Materialien. Viktimisierung bezeichnet die

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<sup>29</sup> Abschließende Bemerkungen des Ausschusses zur Beseitigung von Rassendiskriminierung, März 2011  
[http://www2.ohchr.org/english/bodies/cerd/docs/co/Ireland\\_AUV.pdf](http://www2.ohchr.org/english/bodies/cerd/docs/co/Ireland_AUV.pdf).

Kündigung oder sonstige Benachteiligung von Personen, die wegen Diskriminierung klagen, ein Verfahren einleiten, einen Kläger unterstützen, eine Klage als Vergleichsperson oder Zeuge untermauern, auf gesetzlichem Wege Diskriminierung bekämpfen oder ihre Absicht zu den oben genannten Handlungen kenntlich machen.

Nach dem Gesetz zur Gleichstellung am Arbeitsplatz 1998-2015 gelten Menschen mit Behinderung als kompetent, wenn sie die mit einer Stelle verbundenen Pflichten mit oder ohne Unterstützung durch „geeignete Maßnahmen“ erfüllen können. Der Arbeitgeber ist verpflichtet, geeignete Maßnahmen zu ergreifen, um einem Menschen mit Behinderung den Zugang zur Beschäftigung, die Ausübung eines Berufes, den beruflichen Aufstieg und die Teilnahme an Aus- und Weiterbildungsmaßnahmen zu ermöglichen, es sei denn, diese Maßnahmen würden den Arbeitgeber unverhältnismäßig belasten. Bei der Entscheidung, was eine unverhältnismäßige Belastung darstellt, müssen die Kosten der fraglichen Maßnahme, die Größe und die finanziellen Mittel des betreffenden Arbeitgebers und die Möglichkeit, öffentliche oder sonstige Hilfen zu erhalten, berücksichtigt werden. Nach dem Gleichstellungsgesetz 2000-2015 gilt es als Diskriminierung, wenn ein Anbieter von Gütern oder Dienstleistungen nicht alle angemessenen Maßnahmen trifft, um die Bedürfnisse einer Person mit Behinderungen zu erfüllen. Dazu muss er besondere Verfahren oder Einrichtungen bereitstellen, ohne die es für die Person unmöglich oder unverhältnismäßig schwierig wäre, die Güter oder Dienstleistungen in Anspruch zu nehmen. Wenn die Bereitstellung des Verfahrens oder der Einrichtung jedoch für den Anbieter von Gütern und Dienstleistungen zu mehr als symbolischen Kosten führen würde, gilt die mangelnde Bereitstellung nicht als Verstoß gegen das Diskriminierungsverbot.

Das Gleichstellungsgesetz enthält mehrere Ausnahmen vom Grundsatz der Gleichbehandlung, der nicht für den Zugang zu Beschäftigung in privaten Haushalten zur Erbringung persönlicher Dienstleistungen gilt. Ausnahmen sind möglich, wenn das betreffende Merkmal eine wesentliche und entscheidende berufliche Voraussetzung für die Stelle darstellt und es sich um einen rechtmäßigen Zweck und verhältnismäßige Anforderungen handelt. Ausnahmen bei den Diskriminierungsgründen Alter und Behinderung sind im Bereich der Betriebsrenten bzw. bei der Vergütung für Menschen mit eingeschränkten Fähigkeiten möglich. Eine Ausnahme in Bezug auf Diskriminierung im Arbeitsleben verfolgt den Zweck, den religiösen Ethos einer Organisation aufrechtzuerhalten, wobei die Ungleichbehandlung „rechtmäßig“, „verhältnismäßig“ und begrenzt sein muss, sodass sie nicht zur Rechtfertigung anderer Arten von Diskriminierung benutzt werden kann. Weitere Ausnahmen im Bereich Beschäftigung betreffen die Streitkräfte, die Garda Síochána (Polizei) und die Rettungsdienste. Auch das Gleichstellungsgesetz enthält Ausnahmen und Beschränkungen des Diskriminierungsverbots. Eine Ungleichbehandlung in Bezug auf Renten, Pensionen und Versicherungspolice ist zulässig, wenn die Ungleichbehandlung aus versicherungsmathematischen Gründen angemessen ist. Weitere Ausnahmen vom Gleichbehandlungsgebot betreffen die Organisation von Sportveranstaltungen, die Authentizität dramatischer Darstellungen oder sonstiger Unterhaltungsereignisse oder die Bereitstellung von Dienstleistungen zu religiösen Zwecken. Diskriminierung bei der Bereitstellung von Gütern oder Dienstleistungen ist nicht unter Umständen verfolgbar, die eine vernünftige Person zu der Annahme veranlassen würden, dass ein wesentliches Risiko für kriminelles oder ordnungswidriges Verhalten besteht. Außerdem erlaubt das Gleichstellungsgesetz bestimmte Ausnahmen im Bildungswesen aufgrund von Alter, Geschlecht, religiösem Ethos und Behinderung.

#### **4. Sachlicher Anwendungsbereich**

Das Gesetz zur Gleichstellung am Arbeitsplatz 1998-2015 gilt für die Bereiche Beschäftigung und berufliche Bildung und unterscheidet nicht zwischen privaten und öffentlichen Arbeitgebern. Reguliert sind der Zugang zu Beschäftigung, Arbeitsbedingungen, Ausbildung oder Erfahrung für eine Beschäftigung, Beförderung oder

Neueinstufung sowie die Einstufung von Stellen. Das Gesetz deckt auch die berufliche Bildung, Stellenausschreibungen, Zeitarbeitsfirmen und Leiharbeiter ab.

Das Gleichstellungsgesetz 2000-2015 verbietet Diskriminierung in Bezug auf Güter und Dienstleistungen, einschließlich Bildung und Wohnraum. Staatliche Dienstleistungen sind nicht ausdrücklich erwähnt. Abschnitt 14 des Gleichstellungsgesetzes sieht eine gesetzliche Ausnahme für Handlungen oder Maßnahmen vor, die durch eine andere Rechtsvorschrift vorgeschrieben sind; in diesem Fall hat das Gleichstellungsgesetz 2000-2015 keine Geltung.

2015 gab es einige neue Entscheidungen in Gleichbehandlungsverfahren.<sup>30</sup>

## 5. Rechtsdurchsetzung

Das Gesetz zur Gleichstellung am Arbeitsplatz 1998-2015 hat Mechanismen zur Durchsetzung der Gleichstellungsgesetze eingeführt. Die Durchsetzungsmechanismen sind für Arbeitnehmer im öffentlichen und im privaten Sektor gleich, wobei für bestimmte Stellen des öffentlichen Dienstes Ausnahmen gelten. Klagen nach dem Gesetz zur Gleichstellung am Arbeitsplatz 1998-2015 oder dem Gleichstellungsgesetz 2000-2015 können vor das Gleichstellungstribunal – jetzt Kommission für Arbeitsbeziehungen (WRC) – gebracht werden. Letztere hat bei der Behandlung von Beschwerden eine investigative Rolle; die Kläger können sich selbst vertreten, es können keiner Partei Kosten zugewiesen werden und das Verfahren ist formlos. Abschnitt 78 des Gesetzes zur Gleichstellung am Arbeitsplatz 1998-2015 sieht die Möglichkeit eines Mediationsverfahrens vor. Eine durch Mediation erreichte Einigung zwischen den Parteien ist rechtlich bindend und kann vor einem Bezirksgericht durchgesetzt werden. Gegen die Entscheidungen kann Berufung eingelegt werden, Berufungsinstanz in Arbeitsrechtsfragen ist das Arbeitsgericht (WRC), für andere Gleichstellungsklagen das Bezirksgericht. Gegen Urteile des Arbeitsgerichts kann beim Obergericht Kassationsbeschwerde eingelegt werden. Gegen ungerechtfertigte Kündigungen kann auch nach den Kündigungsgesetzen 1977 und 1993 geklagt werden. Klagen werden vor der zuständigen Stelle durch Ausfüllen von Standardformularen eingereicht. Sobald ein Verfahren eröffnet wurde, wird der mutmaßliche Täter geladen. Verfahren vor der WRC finden unter Ausschluss der

<sup>30</sup> Zum Diskriminierungsgrund Alter:  
WRC, *Goss v Ryanair*, DEC-E2015-138, Dezember 2015 (genaues Datum nicht angegeben) <https://www.workplacerelations.ie:443/en/Cases/2015/December/DEC-E2015-138.html>. Keine Pflicht des Arbeitgebers, ein obligatorisches Rentenalter sachlich zu rechtfertigen.  
Zum Diskriminierungsgrund Behinderung:  
Labour Court, *Michal Wojcik and Sodexo Ireland Ltd*, EDA1517, 23. November 2015 <https://www.workplacerelations.ie:443/en/Cases/2015/November/EDA1517.html>. Die Pflicht, angemessene Vorkehrungen zu treffen, ist ein spezifischer Klagegrund.  
High Court, *Nano Nagle School v Marie Daly*, [2015] IEHC 785, 11. Dezember 2015 <http://www.courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/86867f31d053511280257f30005c002f?OpenDocument>. Der Arbeitgeber war verpflichtet, die Möglichkeit einer Reorganisation der Arbeit und einer Neuverteilung der Aufgaben zu prüfen, um die Beschwerdeführerin von den Aufgaben zu befreien, die sie nicht erfüllen konnte.  
Zum Diskriminierungsgrund rassische bzw. ethnische Zugehörigkeit:  
Equality Tribunal, *Ms. A (on behalf of her daughter, B) -v- A Girls Secondary School*, DEC-S2015-001.html, 6. Februar 2015, <https://www.workplacerelations.ie:443/en/Cases/2015/February/DEC-S2015-001.html>. Mittelbare Diskriminierung aufgrund der rassischen Zugehörigkeit beim Zugang zu Bildung; das Ziel der Aufnahmepolitik der Schule war rechtmäßig, sie hatte jedoch keinen Nachweis erbracht, dass dies durch ein rechtmäßiges Ziel sachlich gerechtfertigt sowie angemessen und notwendig war.  
Zum Diskriminierungsgrund Gemeinschaft der Fahrenden:  
Supreme Court, *Stokes v Christian Brothers High School Clonmel*, [2015] IESC 13, 24. Februar 2015 <http://www.courts.ie/Judgments.nsf/597645521f07ac9a80256ef30048ca52/a09897a48211897980257df6005a3c31?OpenDocument>.  
Der Supreme Court unterließ es insbesondere, die Bestimmungen des Gleichstellungsgesetzes im Licht der Unionsrichtlinien, die dieses Gesetz umsetzt, zu untersuchen, und er berücksichtigte auch die Rechtsprechung des EuGH zu mittelbarer Diskriminierung nicht. Die fehlerhafte Auslegung von mittelbarer Diskriminierung in dieser Rechtssache wird nun wahrscheinlich bei sämtlichen Klagen wegen mittelbarer Diskriminierung beim Zugang zu Gütern und Dienstleistungen der Standard sein und wahrscheinlich auch in Fällen von mittelbarer Diskriminierung im Beschäftigungsbereich zur Anwendung kommen.

Öffentlichkeit statt. Die Entscheidungen der WRC können von jedermann eingesehen werden und werden auf der Webseite der WRC veröffentlicht. Klagen nach dem Gleichstellungsgesetz 2000-2015 gegen konzessionierte Schankstätten (Pubs usw.) müssen vor das Bezirksgericht gebracht werden und nicht vor das (WRC-)Gleichstellungstribunal. Diese Gesetzesänderung führt vor allem zu höheren Kosten für die Kläger. Organisationen dürfen einzelne Kläger vor der WRC vertreten, wenn sie vom Kläger entsprechend bevollmächtigt sind, jedoch nicht vor dem Bezirksgericht oder Obergericht. Organisationen dürfen nicht im eigenen Namen klagen, mit Ausnahme der Irischen Kommission für Menschenrechte und Gleichstellung (IHREC). Die IHREC kann bei der WRC gegen diskriminierende Strukturen, diskriminierende Werbung oder den Inhalt von Tarifverträgen Klage einreichen. Sie kann einzelne Kläger außerdem rechtlich beraten und vertreten.

Das Gleichstellungsrecht sieht eine Umkehrung der Beweislast bei Diskriminierungsklagen vor, sofern die vorgebrachten Tatsachen den Anscheinsbeweis für eine Diskriminierung darstellen. Die Verwendung statistischer Daten ist zulässig, nach den Vorschriften des Gleichstellungsrechts jedoch nicht zwingend erforderlich, um das Vorliegen einer Diskriminierung glaubhaft zu machen. Situationstests wurden bisher kaum verwendet. Es gibt jedoch weder Verfahrens- noch sonstige Regeln, die die Verwendung von Situationstests verbieten. Die Richter der irischen Berufungsgerichte stehen dieser Beweisform jedoch möglicherweise ablehnend gegenüber und fassen sie als Irreführung des Beklagten auf. Das Gesetz zur Gleichstellung am Arbeitsplatz 1998-2015 sieht eine Vielzahl von Rechtsmitteln vor: Entschädigung, die Verurteilung der Arbeitgeber zu bestimmten Maßnahmen und die Wiedereinstellung des Klägers. Alle Beschäftigungsverträge enthalten eine Gleichbehandlungsklausel, die alle Bestimmungen des Vertrags aufhebt, die eine rechtswidrige Diskriminierung darstellen. Diskriminierende Bestimmungen in Tarifvereinbarungen sind null und nichtig und Abweichungen vom Diskriminierungsverbot können nicht vertraglich erlaubt werden. Es gibt eine Obergrenze für die Höhe von Entschädigungssummen, die bei arbeitsrechtlichen Fällen bei zwei Jahresgehältern oder, sofern der Kläger nicht beschäftigt war, bei 12.697 Euro liegt.

Das Gesetz zur Gleichstellung am Arbeitsplatz 1998-2015 sieht auch nicht finanzielle Rechtsmittel vor, bei der bestimmte Maßnahmen gerichtlich angeordnet werden, z. B. eine Wiedereinsetzung oder Wiedereinstellung. Das Gleichstellungsgesetz 2000-2015 sieht ebenfalls viele Rechtsmittel vor, z. B. Schadensersatz oder die Anordnung an die Anbieter von Dienstleistungen, bestimmte Maßnahmen zu treffen. Auch dieses Gesetz sieht eine Obergrenze für Entschädigungen vor, die derzeit bei 15.000 Euro liegt.<sup>31</sup> Die Mehrzahl der zugesprochenen Entschädigungen kommen nicht einmal in die Nähe dieses Höchstbetrags. Die nach diesen Gesetzen vorgesehenen finanziellen Sanktionen sind wesentlich milder als bei Diskriminierung aufgrund des Geschlechts. Das deutet darauf hin, dass die Sanktionen bei anderen Diskriminierungsgründen nach diesen Gesetzen möglicherweise nicht wirksam, verhältnismäßig und abschreckend sind.

## **6. Gleichbehandlungsstellen**

Die Gleichbehandlungsstelle wurde mit der Irischen Menschenrechtskommission zur neuen Irischen Menschenrechts- und Gleichbehandlungskommission zusammengelegt.<sup>32</sup> Die Irische Menschenrechts- und Gleichbehandlungskommission (IHREC), die am 1. November 2014 gegründet wurde, ist eine unabhängige Stelle mit der Aufgabe, Diskriminierung zu bekämpfen, die Chancengleichheit zu fördern, die Öffentlichkeit über bestimmte Themen zu informieren und die Umsetzung einschlägiger Gesetze zu überwachen. Zur Erfüllung dieser Aufgaben kann sie Forschungsprojekte und Aufklärungskampagnen durchführen, Gesetze überprüfen und Verhaltensrichtlinien erstellen. Die IHREC ist außerdem berechtigt,

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<sup>31</sup> Die Obergrenzen wurden im Zuge des [Courts and Civil Law \(Miscellaneous Provisions\) Act 2013](#) mit Wirkung vom 4. Februar 2014 heraufgesetzt.

<sup>32</sup> *Irish Human Rights and Equality Commission Act*,  
<http://www.irishstatutebook.ie/2014/en/act/pub/0025/print.html>.

in eigenem Namen Klage einzureichen oder Kläger zu unterstützen. Sie kann Untersuchungen und Gleichstellungskontrollen durchführen. Die IHREC wird vom Ministerium für Justiz, Gleichstellung und Gesetzesreform unter der Leitung des Ministers finanziert und muss dem irischen Parlament Rechenschaft ablegen.

Das Gleichstellungstribunal ist eine außergerichtliche Stelle und hat die Aufgabe, Beschwerden nach dem Gesetz zur Gleichstellung am Arbeitsplatz 1998-2015 und dem Gleichstellungsgesetz 2000-2012 wegen aller neun Diskriminierungsgründe zu untersuchen. Seine Urteile sind bindend. Der Leiter bzw. die Leiterin des Tribunals ist für die Durchsetzung des Gesetzes zur Gleichstellung am Arbeitsplatz und des Gleichstellungsgesetzes zuständig und kann seine/ihre außergerichtlichen Funktionen an Gleichstellungsbeauftragte und Gleichstellungsmediatoren delegieren. Das Tribunal ist außerdem Gerichtsstand für diskriminierende Kündigungen und die Bestimmungen der Rentengesetze, die Gleichstellungsthemen betreffen.

Das Gleichstellungstribunal wurde 2015 neu organisiert. Im Zuge dieser Neuorganisation wurden das Gleichstellungstribunal und das Arbeitsberufungsgericht durch die neue Kommission für Arbeitsbeziehungen ersetzt, die dem Ministerium für Arbeit, Unternehmen und Innovation untersteht, und wurde die Berufungsfunktion des Arbeitsberufungsgerichts auf ein erweitertes Arbeitsgericht übertragen. Die neue Stelle wird dem Ministerium für Arbeit, Unternehmen und Innovation jährlich einen Bericht vorlegen. Das entsprechende Gesetz wurde 2015 verabschiedet.<sup>33</sup>

Aufgabe der Kommission für Arbeitsbeziehungen ist es:

1. die Verbesserung der Arbeitsbeziehungen und die Aufrechterhaltung guter Arbeitsbeziehungen zu fördern;
2. die Einhaltung der einschlägigen Bestimmungen zu fördern und zu unterstützen;
3. Handlungsempfehlungen hinsichtlich der Einhaltung der in Artikel 20 des *Workplace Relations Act 2015* festgeschriebenen Verhaltenskodexe zu liefern;
4. die Entwicklung der Arbeitsbeziehungen zu überprüfen und kontrollierend zu begleiten;
5. Untersuchungen über Fragen der Arbeitsbeziehungen durchzuführen bzw. in Auftrag zu geben;
6. die *Joint Labour Committees* und *Joint Industrial Councils* (gemeinsame Ausschüsse und Beratungsgremien der Arbeitgeber/innen und Arbeitnehmer/innen) zu beraten und ihnen Informationen sowie die Ergebnisse aus den Forschungsprojekten der Kommission zur Verfügung zu stellen;
7. den Minister oder die Ministerin hinsichtlich der Anwendung und Einhaltung der einschlägigen Vorschriften zu beraten und zu informieren; und
8. den Bürgern und Bürgerinnen Informationen in Bezug auf Beschäftigung zur Verfügung zu stellen.

Neben diesen Funktionen nimmt die Kommission auch die quasi-gerichtlichen Funktionen des früheren Gleichstellungstribunals wahr, die ihr im Zuge von Artikel 84 des *Workplace Relations Act 2015* übertragen wurden.

## **7. Wichtige Punkte**

Es muss aufmerksam beobachtet werden, ob sich der Zusammenschluss der irischen Gleichstellungs- und Menschenrechtsstellen zur neuen Irischen Menschenrechts- und Gleichbehandlungskommission positiv oder negativ auf die Gleichstellung auswirkt. Eine interessante Innovation im Gesetz über die Irische Menschenrechts- und Gleichbehandlungskommission (2014) besteht in Abschnitt 42, mit dem öffentliche Stellen

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<sup>33</sup> *Workplace Relations Act 2015*, <http://www.oireachtas.ie/documents/bills28/bills/2014/7914/b7914d-memo.pdf>.

verpflichtet werden, Menschenrechte und Gleichstellung aktiv zu berücksichtigen. Die Irische Menschenrechts- und Gleichbehandlungskommission wird öffentliche Stellen bei der Erfüllung dieser Pflicht unterstützen, indem sie beispielsweise Richtlinien und Verhaltenskodizes erstellt.

Die andere wichtige Änderung ist das Aufgehen des Gleichstellungstribunals in der Kommission für Arbeitsbeziehungen, das in einem 2015 verabschiedeten Gesetz geregelt wurde. Es gibt Anlass zu Sorge, dass die beiden Gleichbehandlungsstellen nun zwei unterschiedlichen Ministerien unterstehen, deren Aufgabenbereiche nur bei einem das Thema Gleichstellung betreffen. Außerdem werden Fälle von Diskriminierung im Zusammenhang mit Gütern und Dienstleistungen nun einer Stelle vorgelegt, die für Arbeitsbeziehungen zuständig ist.

## INTRODUCTION

### The national legal system

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, which has unquestioned supremacy within its sphere of competency. The Constitution establishes the State and its institutions and sets out the fundamental principles guiding the governance of the State. It is the basis by which the Irish legal system is run, and 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 or national parliament.<sup>34</sup> 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 quantity of decisions throughout the centuries has allowed the common law to develop into a substantial body of law. Equality law is an amalgamation of both common law and legislation. Legislation is of increasing importance in the context of non-discrimination measures.<sup>35</sup>

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, an international Treaty can be relied upon directly in the Irish Courts, for example the European Convention on Human Rights Act, 2003.<sup>36</sup> No other Convention has been incorporated into the national legal order; it is contended that Ireland complies with its international legal obligations by means of national legislation.

### List of main legislation transposing and implementing the directives

Title of law: Employment Equality Act 1998-2015 (EEA)<sup>37</sup>

Date of adoption: 18.6.1998

Latest amendments: 10.12.2015

Entry into force: 18.10.1999

Grounds covered: Gender, age, race, religion, family status, disability, marital status, sexual orientation, membership of the Traveller community, housing assistance

Material scope: Public and private employment with certain exceptions

Title of the law: Equal Status Act 2000-2015 (ESA)<sup>38</sup>

Date of adoption: 26.4.2000

Latest amendments: 10.12.2015

Entry into force: 25.10.2000

Grounds covered: Gender, age, race, religion, family status, disability, marital status, sexual orientation, membership of the Traveller community, housing assistance

Material scope: Access to goods and services

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<sup>34</sup> 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 is Seanad Éireann (Senate). Legislative powers are granted to the two houses by virtue of Article 15.2 of the Constitution.

<sup>35</sup> Byrne, G., Kennedy, M., Ni Longain, M., and Shannon, G., (2003) *Employment Law*, Dublin, Blackstone Press Ltd., at p. 1.

<sup>36</sup> [www.irlgov.ie](http://www.irlgov.ie).

<sup>37</sup> [www.justice.ie/en/JELR/EmpEqActsConsldtd.pdf/Files/EmpEqActsConsldtd.pdf](http://www.justice.ie/en/JELR/EmpEqActsConsldtd.pdf/Files/EmpEqActsConsldtd.pdf).

E(MP)A added being in receipt of housing assistance as a new ground in 2015.

<sup>38</sup> [www.justice.ie/en/JELR/EqualStatusActsConsldtd\\_00\\_04.pdf/Files/EqualStatusActsConsldtd\\_00\\_04.pdf](http://www.justice.ie/en/JELR/EqualStatusActsConsldtd_00_04.pdf/Files/EqualStatusActsConsldtd_00_04.pdf).

E(MP)A added being in receipt of housing assistance as a new ground in 2015.

Title of the law: Pensions Act 1990-2015 (PA)

Date of adoption: 24.7.1990

Latest amendments: 10.12.2015

Entry into force: 21.12.1990

Grounds covered: Gender, age, race, religion, family status, disability, marital status, sexual orientation, membership of the Traveller community, housing assistance

Material scope: Pensions including occupational pensions



## **1 GENERAL LEGAL FRAMEWORK**

### **Constitutional provisions on protection against discrimination and the promotion of equality**

The Irish constitution includes the following articles dealing with non-discrimination:

General clause:

Article 40.1 Equality of all citizens before the law, with due regard to differences of capacity, physical and moral, and of social function.

These provisions are presumed to apply to all areas covered by the directives. The grounds covered are presumed to be broader given that they are presumed to apply also to language and political opinions.<sup>39</sup> Their material scope is broader than those of the directives in that they extend to access to goods and services on all grounds.

Specific clause applying only to religion:

Article 44 guarantees equality in religion.

The constitutional anti-discrimination provisions are directly applicable.

The constitutional equality clauses can be in principle enforced against private actors (as opposed to the State).

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<sup>39</sup> In *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321, the Supreme Court stated that "the forms of discrimination which are, presumptively at least, proscribed by Article 40.1 are not particularised: manifestly, they would extend to sex, race, language and religious or political opinions." However, in this case the court 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.

## 2 THE DEFINITION OF DISCRIMINATION

### 2.1 Grounds of unlawful discrimination explicitly covered

The following grounds of discrimination are explicitly prohibited in national law: gender, age, race, religion, family status, disability, civil status, sexual orientation, membership of the Traveller community.

#### 2.1.1 Definition of the grounds of unlawful discrimination within the directives

EEA and ESA 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 - the definition of ethnic origin is the same as both are included in the same article in the EEA and ESA, and there is no further definition of the concepts.<sup>40</sup> A comparison will usually be made between people of different racial or ethnic origins.

Membership of the Traveller community is defined as a separate ground.<sup>41</sup> "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 legislation nor case law has determined whether members of the Traveller community are a racial or ethnic minority.<sup>42</sup>

Religion or belief: This is defined as "religious background or outlook."<sup>43</sup> The legislation prohibits discrimination with respect to people of different religious beliefs and includes discrimination where someone has no religious belief.<sup>44</sup> It is not clear whether or not the protection extends to philosophical beliefs; in a 2004 case before the Equality Tribunal the Equality Officer maintained that it was not clear that humanism can be counted as a religion.<sup>45</sup> However, in a more recent case both the Equality Tribunal and the Labour Court (on appeal) seemed implicitly to accept that humanist beliefs may be covered, even though it was ruled in that case that the action complained of was not discriminatory.<sup>46</sup> The former Equality Authority (now the Irish Human Rights and Equality Commission) considered the protection to apply to different religious belief, background, outlook or none.<sup>47</sup>

Disability: This is defined 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;

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<sup>40</sup> Ireland, EEA, Section 6(2)(h), Ireland, ESA Section 3(2)(h).

<sup>41</sup> Section 2(1) EEA, Section 2(1) ESA.

<sup>42</sup> Bodies such as IHREC and the parliamentary (Oireachtas) Joint Committee on Justice, Defence and Equality have called for Ireland to recognise Travellers as members of a distinct ethnic group. Traveller Ethnicity- An Equality Authority Report (<http://www.equality.ie/en/Publications/Policy-Publications/Traveller-Ethnicity.html>) and The Joint Oireachtas Committee on Justice, Defence and Equality Report on Traveller Ethnicity <http://www.oireachtas.ie/parliament/media/committees/justice/Report-onTraveller-Ethnicity.pdf>. The position of successive governments has been negative on this issue, for reasons that are not clear.

<sup>43</sup> Section 2(1) EEA.

<sup>44</sup> Section 6(2)(e) EEA.

<sup>45</sup> DEC-S2004-015 Mr. Brendan Sheeran, Dublin V Office of Public Works <http://www.workplacerelations.ie/en/Cases/2004/January/DEC-S2004-015-Full-Case-Report.html>.

<sup>46</sup> Department of Defence and Barrett (ADE/09/39, Labour Court No EDA1017 30.09.2010 <http://www.workplacerelations.ie/en/Cases/2010/October/EDA1017.html>).

<sup>47</sup> "Your employment rights explained", Equality Authority <http://www.equality.ie/Files/Your-Employment-Equality-Rights-Explained-Easy-to-read-version-pdf.pdf> p. 12.

- 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 judgment or which results in disturbed behaviour.<sup>48</sup>

The definition of disability does not accord with the concept adopted by the Court of Justice in *Skouboe Werge* and *Ring*,<sup>49</sup> or Article 1 UN Convention on the Rights of Persons with Disabilities. It is more in accordance with the language and definitions adopted by the European Court of Justice in the earlier *Chacón Navas* case.<sup>50</sup> The Irish definition of disability does not require a condition to last a long time in order to qualify as a disability, nor does it make the distinction between disability and sickness/illness. It covers those that have a disability at present, a history of a disability, a future disability or an imputed disability.<sup>51</sup> However, it does not employ the concept of barriers which may hinder the full and effective societal participation of a person with disabilities.

The definition accords generally with the directives but does not employ the concept of barriers which may hinder the full and effective societal participation of a person with disabilities.

Age: The age ground is defined as referring to people of different ages,<sup>52</sup> but in employment applies only in relation to persons above the maximum age at which a person is statutorily obliged to attend school.<sup>53</sup> In access to goods and services it does not apply to persons under age 18.<sup>54</sup>

Sexual orientation: This is defined as heterosexual, homosexual or bisexual orientation.<sup>55</sup>

### **2.1.2 Multiple discrimination**

In Ireland prohibition of multiple discrimination is not included in the law.

Apart from the case cited below, there is virtually no case law on multiple discrimination in Ireland.

*O'Brien v. ComputerScope Limited*.<sup>56</sup> The issues of age and gender were treated together but this did not lead to the award of higher damages.

### **2.1.3 Assumed and associated discrimination**

- a) Discrimination by assumption

In Ireland the following national law (including case law) prohibits discrimination on grounds of gender, age, race, religion, family status, disability, marital status, sexual orientation, membership of the Traveller community, based on perception or assumption of what a person is:

Employment Equality Act (EEA) Article 6(1) (a) (iv):

6(1) For the purposes of this Act and without prejudice to its provisions relating to discrimination occurring in particular circumstances, discrimination shall be taken to occur

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<sup>48</sup> Section 2(1) EEA.

<sup>49</sup> Joined Cases C-335/11 and C-337/11.

<sup>50</sup> Case C-13/05.

<sup>51</sup> *Health Service Employee v The Health Service Executive*, DEC-E2006-013.

<sup>52</sup> EEA Section 6(1)(f), ESA 3(2)(f).

<sup>53</sup> EEA Section 6(3)(a).

<sup>54</sup> ESA Section 3(3) (a).

<sup>55</sup> Section 2(1) EEA.

<sup>56</sup> DEC-E2006-030, 01.08.2006.

<https://www.workplacerelations.ie/en/Cases/2006/August/DEC-E2006-030-Full-Case-Report.html> accessed 29.03.2016.

where (a) a person is treated less favourably than another person is, has been or would be treated in a comparable situation on any of the grounds specified in *subsection (2)* (in this Act referred to as the “discriminatory grounds”) which....(iv) is imputed to the person concerned.<sup>57</sup>

Equal Status Act (ESA) Article 3 (1) (iv):

3(1) For the purposes of this Act, discrimination shall be taken to occur— (a) where a person is treated less favourably than another person is, has been or would be treated in a comparable situation on any of the grounds specified in *subsection (2)* (in this Act referred to as the “discriminatory grounds”) which (i) ... (ii) ... (iii) ... (iv) is imputed to the person concerned.<sup>58</sup>

#### b) Discrimination by association

In Ireland the following national law (including case law) prohibits discrimination based on association with persons with particular characteristics:

EEA Article 6(1)(b):

6(1) For the purposes of this Act and without prejudice to its provisions relating to discrimination occurring in particular circumstances, discrimination shall be taken to occur where

(a)...

(b) a person who is associated with another person

(i) is treated, by virtue of that association, less favourably than a person who is not so associated is, has been or would be treated in a comparable situation.<sup>59</sup>

ESA Article 3(1)(b):

3(1) For the purposes of this Act, discrimination shall be taken to occur

(a)...

(b) where a person who is associated with another person

(i) is treated, by virtue of that association, less favourably than a person who is not so associated is, has been or would be treated in a comparable situation.<sup>60</sup>

National law is in line with the judgment in Case C-303/06 *Coleman v Attridge Law and Steve Law*.<sup>61</sup>

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

#### a) Prohibition and definition of direct discrimination

In Ireland direct discrimination is prohibited in national law. It is defined.

EEA, Article 6: Direct discrimination is defined as 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.

ESA, Article 3: Direct discrimination is defined as 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.

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<sup>57</sup> [www.justice.ie/en/JELR/EmpEqActsConsldtd.pdf/Files/EmpEqActsConsldtd.pdf](http://www.justice.ie/en/JELR/EmpEqActsConsldtd.pdf/Files/EmpEqActsConsldtd.pdf).

<sup>58</sup> [www.justice.ie/en/JELR/EqualStatusActsConsldtd\\_00\\_04.pdf/Files/EqualStatusActsConsldtd\\_00\\_04.pdf](http://www.justice.ie/en/JELR/EqualStatusActsConsldtd_00_04.pdf/Files/EqualStatusActsConsldtd_00_04.pdf).

<sup>59</sup> [www.justice.ie/en/JELR/EmpEqActsConsldtd.pdf/Files/EmpEqActsConsldtd.pdf](http://www.justice.ie/en/JELR/EmpEqActsConsldtd.pdf/Files/EmpEqActsConsldtd.pdf).

<sup>60</sup> [www.justice.ie/en/JELR/EqualStatusActsConsldtd\\_00\\_04.pdf/Files/EqualStatusActsConsldtd\\_00\\_04.pdf](http://www.justice.ie/en/JELR/EqualStatusActsConsldtd_00_04.pdf/Files/EqualStatusActsConsldtd_00_04.pdf).

<sup>61</sup> <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d51ece9cc283834052b950b96a17a73f82.e34KaxiLc3eQc40LaxqMbN4OchiOe0?text=&docid=67793&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=506134>.

b) Justification of direct discrimination

The law does not provide for any justification of direct discrimination.

### 2.2.1 Situation testing

a) Legal framework

In Ireland situation testing is not explicitly permitted in national law. The law is silent.

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.<sup>62</sup> 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 in Irish courts.

b) Practice

In Ireland situation testing is not generally used in practice.

A form of situation testing seems to have been used in one Equality Tribunal case. In *Delaney v. The Harp Bar*,<sup>63</sup> the complainants were members of the Traveller community and were refused entry to the respondent's premises. The complainants visited eight different pubs only one of which was willing to serve them. The complainants litigated against all seven of the discriminating pubs. The Equality Tribunal upheld the complaint of discrimination. However, it is not known if such evidence would be accepted in the courts.

Situation testing was used in one study commissioned by the Equality Authority in 2009 to investigate discrimination in access to employment on grounds of race or ethnic origin.<sup>64</sup>

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

a) Prohibition and definition of indirect discrimination

In Ireland indirect discrimination is prohibited in national law (EEA Sections 10 and 22, ESA Section 3). It is defined as occurring where an apparently neutral provision puts a person belonging to a protected group at a particular disadvantage compared with other employees of their employer, or where an apparently neutral provision puts a person belonging to a protected group at a particular disadvantage compared with other persons.

b) Justification test for indirect discrimination

Indirect discrimination may be justified if the provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. The justification is compatible with the directives.

c) Comparison in relation to age discrimination

The justification test is the same.

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<sup>62</sup> This issue has yet to be addressed in a court action.

<sup>63</sup> DEC-S2002-53/56.

<sup>64</sup> Equality Authority (2009), *Discrimination in Recruitment: Evidence from a Field Experiment*. Available at: [http://www.ihrec.ie/download/pdf/discrimination\\_in\\_recruitment.pdf](http://www.ihrec.ie/download/pdf/discrimination_in_recruitment.pdf) accessed 29.03.2016.

### 2.3.1 Statistical evidence

#### a) Legal framework

In Ireland there are national rules permitting data collection.

In Ireland statistical evidence is permitted by national law in order to establish indirect discrimination and design positive action measures on all five grounds. EEA 19(4)(c) and 22(1A) and ESA 3(3A). It is admissible as evidence in court.

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.<sup>65</sup> 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 2011. 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. There were no questions on the issue of sexual orientation. These questions require the individual to self-identify their characteristics.

#### b) Practice

In Ireland the use of statistical evidence in order to establish indirect discrimination is not widespread. There is no reluctance to use statistical data as evidence in court but there has been a tendency to assert that it is not always necessary to use statistical evidence.

*NBK Designs Ltd. and Marie Inoue*:<sup>66</sup> The Labour Court said that its procedures are intended to facilitate parties whether legally represented or unrepresented, and that it would be alien to the ethos of the Court to oblige parties to undertake the inconvenience and expense involved in producing elaborate statistical evidence to prove matters which are obvious to the members of the Court by drawing on their own knowledge and experience.

The Equality Tribunal has frequently followed this approach and found indirect discrimination without requiring statistical evidence, citing the *Inoue* case.<sup>67</sup>

On the other hand, cases also fail for lack of substantiation through statistical analysis.<sup>68</sup>

In a recent judgment the Supreme Court considered the interpretation of indirect discrimination for the first time, and held that statistical analysis is required in order to establish that a person belonging to a protected group is at a "particular disadvantage" compared with others.<sup>69</sup>

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<sup>65</sup> Section 2(b) Data Protection Act 1988-2003.

<sup>66</sup> Labour Court, <http://www.equalitytribunal.ie/en/Cases/2002/November/EED0212.html>, accessed 29.03.2016.

<sup>67</sup> Equality Tribunal, Noonan v. Accountancy Connections, <http://www.equalitytribunal.ie/en/Cases/2003/June/DEC-E2004-042-Full-Case-Report.html>, accessed on 29.03.2016.

<sup>68</sup> E.g. Equality Tribunal, Toner v Department of Communications, Marine and Natural Resources, <http://www.equalitytribunal.ie/en/Cases/2007/October/DEC-E2007-056-Full-Case-Report.html>, accessed on 29.03.2016, where the Equality officer undertook a statistical analysis whose results did not bear out the claim of discrimination.

<sup>69</sup> Supreme Court, *Stokes v Christian Brothers High School, Clonmel*, [2015] IESC 13, 24.2.2015 <http://www.courts.ie/Judgments.nsf/597645521f07ac9a80256ef30048ca52/a09897a48211897980257df6005a3c31?OpenDocument>.

## 2.4 Harassment (Article 2(3))

### a) Prohibition and definition of harassment

In Ireland harassment is prohibited in national law. It is defined.

Employment Equality Act (EEA) 14A:

EEA prohibits harassment in employment on grounds of gender, age, race, religion, family status, disability, marital status, sexual orientation, and membership of the Traveller community in Section 14A. It is defined as any unwanted conduct relating to a discriminatory ground 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.<sup>70</sup> This conduct can include acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material.

The Equality Officer awarded an employee in one case a total of nearly € 50,000 for harassment, victimisation and discriminatory dismissal on grounds of sexual orientation.<sup>71</sup> In another case € 25,000 was awarded by way of compensation for distress suffered as a result of discrimination and harassment on race grounds.<sup>72</sup>

Equal Status Act (ESA) 11:

ESA prohibits harassment in access to goods and services on grounds of gender, age, race, religion, family status, disability, marital status, sexual orientation, and membership of the Traveller community in Section 11. It is defined as unwanted conduct relating to any discriminatory grounds 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.<sup>73</sup> This conduct can include acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material.

In Ireland harassment explicitly constitutes a form of discrimination in employment (EEA Section 14A) but does not explicitly constitute a form of discrimination in access to goods and services (ESA Section 11).

### b) Scope of liability for harassment

Where harassment is perpetrated by an employee, in Ireland the employer is liable.

EEA Section 14A:

14A(1) For the purposes of this Act, where

(a) an employee (in this section referred to as "the victim") is harassed or sexually harassed either at a place where the employee is employed (in this section referred to as "the workplace") or otherwise in the course of his or her employment by a person who is (i) employed at that place or by the same employer, (ii) the victim's employer, or (iii) a client, customer, or other business contact of the victim's employer and the circumstances of the harassment are such that the employer ought reasonably to have taken steps to prevent it, or

(b) without prejudice to the generality of paragraph (a)

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<sup>70</sup> Section 14A(7)(a) EEA.

<sup>71</sup> Equality Tribunal, DEC-E2008-048, *A Construction Worker v A Construction company*, <http://www.equalitytribunal.ie/en/Cases/2008/September/DEC-E2008-048-Full-Case-Report.html>.

<sup>72</sup> Equality Tribunal, DEC-E2011-016, *Chasi v J & I Security*, <http://www.equalitytribunal.ie/en/Cases/2011/February/DEC-E2011-016-Full-Case-Report.html>.

<sup>73</sup> Section 11 (5)(a) ESA.

(i) such harassment has occurred, and (ii) either  
(I) the victim is treated differently in the workplace or otherwise in the course of his or her employment by reason of rejecting or accepting the harassment, or  
(II) it could reasonably be anticipated that he or she would be so treated,  
the harassment or sexual harassment constitutes discrimination by the victim's employer in relation to the victim's conditions of employment.

There is a statutory defence for the employer if he or she took such steps as were reasonably practicable to prevent the harassment in question.

Service providers (e.g. landlords, schools, hospitals) are liable for harassment or discrimination in the provision of the service. This would include tenants, clients or customers. There is a statutory defence available, if the service provider took such steps as were reasonably practicable to prevent harassment.<sup>74</sup>

The equality legislation does not provide for liability by the individual harasser or discriminator. There is no specific liability for trade unions or professional associations other than as employer or service provider.

## **2.5 Instructions to discriminate (Article 2(4))**

### **a) Prohibition of instructions to discriminate**

In Ireland instructions to discriminate are prohibited in national law. Instructions are not defined.

EEA Section 2(1): discrimination includes an instruction to discriminate and, in Parts V and VI, includes prohibited conduct within the meaning of the Equal Status Act 2000. Thus an instruction to discriminate is also prohibited under the terms of the ESA, i.e. beyond the employment field, although the ESA itself contains no specific provision on this point. This is a criminal offence and is actionable both in the Equality Tribunal and the Circuit Court.<sup>75</sup>

In a case the Labour Court held that where a prospective employer is instructed by another not to employ a particular person, and that instruction is tainted with discrimination, liability cannot be avoided by pleading that the instruction was accepted without question. The Court found that under the terms of Section 8 of the Act, which provides that an employer shall not discriminate against an employee or prospective employee and that a provider of agency work shall not discriminate against an agency worker, both the agency and the instructing company could potentially be held liable as "concurrent wrongdoers".<sup>76</sup>

EEA Section 14 prohibits 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. This would cover instruction.

ESA Section 13 prohibits the procurement of another person to engage in prohibited discriminatory conduct. This would cover instruction.

In Ireland instructions explicitly constitute a form of discrimination.

See EEA Section 2 (1).

### **b) Scope of liability for instructions to discriminate**

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<sup>74</sup> Section 11 (3) ESA.

<sup>75</sup> Section 77 EEA and Section 13 ESA.

<sup>76</sup> Labour Court, *A Worker And Two Respondents* - E/11/16, Determination No. EDA1129, <http://www.equalitytribunal.ie/en/Cases/2011/November/EDA1129.html>.



In Ireland the instructor is liable.

EEA Section 8, 14 and 15: Employers and service providers (e.g. landlords, schools, hospitals) are liable for harassment or discrimination, including by instruction, by employees or other persons which is experienced in the workplace, in the course of employment or in the provision of the service. This would include tenants, clients or customers. The equality legislation does not provide for liability by the individual discriminator or instructed person, with the exception of Section 10 which refers to liability being imposed on the person who displays discriminatory advertising.

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

- a) Implementation of the duty to provide reasonable accommodation for people with disabilities in the area of employment

In Ireland the duty to provide reasonable accommodation is included in the law. It is defined.

EEA Section 16(3)(b) states:

"The employer shall take appropriate measures, where needed in a particular case, to enable a person who has a disability  
(i) to have access to employment,  
(ii) to participate or advance in employment, or  
(iii) to undergo training,  
unless the measures would impose a disproportionate burden on the employer."

It is defined with regard to employment. The EEA does not use the term "reasonable accommodation" but uses the term "appropriate measures" which an employer must take.

EEA Section 16(4) states:

" "appropriate measures" in relation to a person with a disability —  
(a) means effective and practical measures, where needed in a particular case, to adapt the employer's place of business to the disability concerned,  
(b) without prejudice to the generality of paragraph (a), includes the adaptation of premises and equipment, patterns of working time, distribution of tasks or the provision of training or integration resources, but  
(c) does not include any treatment, facility or thing that the person might ordinarily or reasonably provide for himself or herself."

EEA Section 16 does not refer to the term essential functions, which is a phrase used in paragraph 17 of the preamble of the Employment Equality Directive. However, the interpretation in cases so far suggests that the courts do incorporate the concept of "essential functions" into the obligation to reasonably accommodate.<sup>77</sup> This was confirmed in a recent High Court judgment.<sup>78</sup>

The requirement to provide reasonable accommodation is a specific cause of action.<sup>79</sup>

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<sup>77</sup> Labour Court, *A Computer Component Company v. A Worker*, EED013, <https://www.workplacerelations.ie/en/Cases/2001/July/EED013.html>.

<sup>78</sup> High Court, *Nano Nagle School v Marie Daly*, 11.12.2015, [2015] IEHC 785 <http://www.courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/86867f31d053511280257f30005c002f?OpenDocument>.

<sup>79</sup> Labour Court, *Michal Wojcik and Sodexo Ireland Ltd*, EDA1517, 23.11.2015 <https://www.workplacerelations.ie:443/en/Cases/2015/November/EDA1517.html>.

b) Practice

EEA Section 16(3)(b):

The employer must take appropriate measures to enable a person with a disability to have access to employment, participate or advance in employment, or undergo training, unless the measures would impose a disproportionate burden on the employer.

In determining whether the measures would impose a disproportionate burden account shall be taken of the financial and other costs entailed, the scale and financial resources of the employer's business, and the possibility of obtaining public funding or other assistance.<sup>80</sup>

In a case, the cost of providing a disabled toilet in the store in which the complainant worked was estimated by the respondent as € 22,000. The Labour Court found that the respondent was a large multi-national company and that expenditure of € 22,000 "could not by any standard be regarded as imposing a disproportionate burden in vindicating the complainant's right to work on the same basis as others."<sup>81</sup>

c) Definition of disability and non-discrimination protection

The definition of disability for reasonable accommodation is the same as the one for claiming protection from discrimination in general.

d) Duties to provide reasonable accommodation in areas other than employment for people with disabilities

In Ireland there is a duty to provide reasonable accommodation for people with disabilities outside the employment field.

ESA Section 4(1) states:

"For the purposes of this Act discrimination includes a refusal or failure by the provider of a service to do all that is reasonable to accommodate the needs of a person with a disability by providing special treatment or facilities, if without such special treatment or facilities it would be impossible or unduly difficult for the person to avail himself or herself of the service."

"Special treatment or facilities" which the goods or service provider must provide are not defined."

A refusal or failure by a provider of goods and services to provide special treatment or facilities which would enable a person with disabilities to avail of the goods or services will not be deemed reasonable unless such provision would give rise to a cost, other than a nominal cost, to the provider of the service in question.<sup>82</sup>

In a case,<sup>83</sup> a complainant who had Asperger's syndrome and a developmental delay was barred from an amusements arcade after he was found to have damaged some of the games equipment by writing expletives on it. The Equality Tribunal found that the complainant and his family's request to the respondent to ignore the damage to the respondent's property because of the complainant's disabilities to be beyond reasonable

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<sup>80</sup> EEA Section 16 (3)(b) and (c).

<sup>81</sup> Labour Court, *A Multinational Employer (represented by Irish Business And Employers' Confederation) - And - A Worker (represented by O'Gorman Solicitors)*, EDA1435  
<https://www.workplacerelations.ie/en/Cases/2014/November/EDA1435.html>.

<sup>82</sup> ESA Section 4(1) and (2).

<sup>83</sup> Equality Tribunal, DEC-S2014-009, *Mr M -v- An Amusement Arcade*, 07.08.2014  
<https://www.workplacerelations.ie/en/Cases/2014/August/DEC-S2014-009.html>.

accommodation. The respondent did not believe that the complainant's family would supervise his behaviour if they allowed him back, and that it would require a member of staff to ensure bingo boards were undamaged each time he attended. The Tribunal held that that such special treatment would be beyond nominal cost and that the respondent was entitled to avail of the Section 4(2) defence.

e) Failure to meet the duty of reasonable accommodation for people with disabilities

In Ireland failure to meet the duty of reasonable accommodation does not count as discrimination explicitly, in employment. The employer has not discriminated if the person is not competent or capable of doing the job, unless the employer has failed to provide reasonable accommodation.<sup>84</sup> If the employee would be competent and capable to do the job with a reasonable accommodation, and the employer has failed to make a reasonable accommodation, that failure does amount to discrimination.

However, case law holds that a failure to provide reasonable accommodation amounted to discrimination.<sup>85</sup> The case law does not state whether it is a form of direct or indirect discrimination. The full range of sanctions for discrimination under the Equality Acts is applicable, including awards of compensation.

The burden of proof is reversed.<sup>86</sup>

As regards justification, EEA Section 16(1) offers employers a defence in relation to disabilities in stating that nothing in the Act requires any person to recruit or promote an individual, retain an individual or provide training or experience if the individual will not undertake the required duties or will not accept the conditions under which those duties are required to be performed, or is not (or no longer) fully competent and available to undertake, and fully capable of undertaking the duties attached to that position.

However, EEA Section 16(3) (a) tempers the defence by clarifying that 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 ("appropriate measures") being provided by the person's employer.

ESA Section 4: In access to goods and services, failure to meet the duty of reasonable accommodation does count as discrimination.<sup>87</sup> It is not specified whether it constitutes direct or indirect discrimination.

Failure to provide reasonable accommodation does not constitute discrimination if, by virtue of another provision of this Act, a refusal or failure to provide the service in question to that person would not constitute discrimination.<sup>88</sup>

There is a justification defence where a person with a disability "could cause harm to the person or to others."<sup>89</sup> This means there is a justification for failure to make a reasonable accommodation where the person with a disability "could cause harm to the person or others" even if the reasonable accommodation at issue was made.

The burden of proof is reversed. The full range of sanctions under the ESA applies.

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<sup>84</sup> EEA Section 16 (1) and (3).

<sup>85</sup> Labour Court, *Michal Wojcik and Sodexo Ireland Ltd*, EDA1517, <https://www.workplacerelations.ie/en/Cases/2015/November/EDA1517.html>.

<sup>86</sup> Equality Tribunal, DEC-E2007-03, *O'Keeffe -v- Walsh t/a By Pass Stores*, <http://www.equalitytribunal.ie/en/Cases/2007/June/DEC-E2007-033-Full-Case-Report.html>, accessed 14.04.2015.

<sup>87</sup> ESA Section 4 (1).

<sup>88</sup> ESA Section (3), <http://www.irishstatutebook.ie/eli/2000/act/8/section/4/enacted/en/html>.

<sup>89</sup> ESA Section 4 (4).

f) Duties to provide reasonable accommodation in respect of other grounds

In Ireland there is no duty to provide reasonable accommodation in respect of other grounds in the public and/or the private sector.

Legislation does not provide for reasonable accommodation in any other areas, and there have been no cases concerning religion on this point. In practice case law has established that the employer may be obliged to make special arrangements for foreign employees, such as providing translated contracts for foreign nationals.<sup>90</sup>

g) Accessibility of services, buildings and infrastructure

In Ireland national law requires services available to the public, buildings and infrastructure to be designed and built in a disability-accessible way.

Disability Act (2005) Section 27 requires each public body to ensure that the goods or services that are supplied to it are accessible to people with disabilities unless it would not be practicable or justifiable on cost grounds or would result in an unreasonable delay.<sup>91</sup>

Building Regulations (Part M Amendment) 2010:<sup>92</sup>

In public buildings adequate provision must be accessible for people with disabilities to safely and independently access and use. If sanitary conveniences are provided, adequate provision must be made for people with disabilities. If a building contains fixed seating for audience or spectators, adequate provision must be made for people with disabilities.

As regards dwellings, or residential buildings, new residential dwellings come within Part M of the building regulations and must be accessible. The regulations address issues 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, not to works in connection with extensions to and the material alteration of existing dwellings. 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.

Building regulations required 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". Part M was subsequently amended with effect from 1 January 2012 and this higher standard of accessibility requirements becomes mandatory for then existing public buildings as from 1 January 2022.

The interaction between the disability and equality legislation here is not clear.

In Ireland national law contains a general duty to provide accessibility by anticipation for people with disabilities, but it is vague and limited.

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<sup>90</sup> Equality Tribunal, DEC – E2006 – 050 *Five Complainants v Hannon's Poultry Export Ltd* <https://www.workplacerelations.ie/en/Cases/2006/October/DEC-E2006-050-Full-Case-Report.html>.

<sup>91</sup> <http://www.irishstatutebook.ie/eli/2005/act/14/enacted/en/html> and <http://www.irishstatutebook.ie/2006/en/si/0163.html>.

<sup>92</sup> Amended Regulations 2010: <http://www.irishstatutebook.ie/eli/2010/si/513/made/en/print>. Technical Guidance document: <http://www.environ.ie/sites/default/files/migrated-files/en/Publications/DevelopmentandHousing/BuildingStandards/FileDownload,24773,en.pdf>.

Disability Act 2005 Part 3:<sup>93</sup> requires access to public buildings, services and information. All of the accessibility obligations are limited by what is “practicable” or “appropriate”.

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.<sup>94</sup>

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. 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.

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.<sup>95</sup>

#### h) Accessibility of public documents

Disability Act 2005 Section 28 requires public services to translate some or all of their documents in Braille (i.e. Tax declarations, general information) or provide translation in sign languages in some of the public services where needed, as far as practicable.

The law does not always result in accessible information given its weak and limited nature.

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<sup>93</sup> <http://www.oireachtas.ie/ViewDoc.asp?DocId=-1&CatID=87&m=1>.

<sup>94</sup> <http://www.corkcoco.ie/co/pdf/515555934.doc?nocache=4304551>.

<sup>95</sup> “O’Reilly warns of Flaws in Disability Legislation”, *Irish Times*, 30.11.2005.

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.

The duty in Ireland is individualised and cannot 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.

### **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)**

In Ireland there are no residence or citizenship/nationality requirements for protection under the relevant national laws transposing the directives, except for three specific exceptions. These are:

EEA Section 36:

It is permissible to impose requirements in relation to residence, citizenship and proficiency in the Irish language, for the following public service jobs: officer holders in the service of the state, including the police service (Garda Síochána), Defence Forces, civil servants, officers of local authorities, harbour authorities, health boards or vocational education committees. While such requirements are permitted, not all of these positions impose such restrictions. The police service has removed the requirement for proficiency in the Irish language, requiring only proficiency in two languages at least one of which is Irish or English, and employment is open to EU and EEA nationals, nationals from Switzerland, refugees under the Refugee Act, 1996; or persons with one year's continuous legal residence in the state, and a total legal residence amounting to four years in the preceding eight years (the asylum process does not count towards the qualifying five year period).

ESA Section 7:

The Minister for Education and Science is permitted to differentiate between nationals and EU nationals on the one hand and non-EU nationals on the other in relation to the provision of educational grants.<sup>96</sup>

ESA Section 14:

Distinctions based on nationality are allowed in relation to 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.

##### **3.1.2 Protection against discrimination (Recital 16 Directive 2000/43)**

###### **a) Natural and legal persons**

Regarding protection, in Ireland the personal scope of anti-discrimination law covers only natural persons for the purpose of protection against discrimination.

EEA:

EEA does not define which persons can avail of protection. However, it would seem to the author that the grounds of discrimination involve characteristics which could only apply to a natural person (gender, age, race, sexual orientation, disability, religion, etc.), and that legal persons are presumably not protected.

ESA:

ESA does not define which persons can avail of protection. Case law has made clear that a legal person cannot avail of the ESA to claim protection against discrimination.<sup>97</sup>

Regarding liability, in Ireland the personal scope of anti-discrimination law covers natural and legal persons for the purpose of liability for discrimination.

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<sup>96</sup> Section 7(5)(b) ESA.

<sup>97</sup> Equality Tribunal, DEC-S2008-078 Gloria (Ireland's Lesbian & Gay Choir) -v- Cork International Choral Festival Ltd, <http://www.equalitytribunal.ie/en/Cases/2008/October/DEC-S2008-078-Full-Case-Report.html>.

EEA:

Regarding liability, Section 8(1) prohibits discrimination both by employers and employment agencies, i.e. includes legal persons. 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, subject to a few exceptions: section 14 imposes liability on the person responsible for procuring or attempting to procure discrimination, and section 10 imposes liability on the person who displays discriminatory advertising.

ESA:

Persons who are liable under the Act are defined in section 2(1) as including organisations, public bodies or other entities. The terms of this Act clearly prohibit discrimination by both natural persons and legal persons.

b) Private and public sector including public bodies

In Ireland the personal scope of national law covers private and public sector including public bodies for the purpose of protection against discrimination.

EEA section 2(3) indicates that employees protected by the Act include private and public sector employees.

This is subject to exceptions (access to employment in another person's home for the provision of personal services where the services affect private or family life,<sup>98</sup> employment in schools or hospitals with a religious ethos,<sup>99</sup> employment in Defence Forces, Garda Síochána (police force), or prison service (in relation to discrimination on the age or disability ground).).<sup>100</sup> Some exceptions appear go beyond the provisions of the directives.

In Ireland the personal scope of anti-discrimination law covers private and public sector including public bodies for the purpose of liability for discrimination.

ESA section 2(1) and section 5 imply that persons prohibited from discriminating under the Act in the supply of goods and services include public and private sector persons and Section 2(1) expressly states that persons who must not discriminate includes legal persons such as organisations, public bodies or other entities.

## **3.2 Material scope**

### **3.2.1 Employment, self-employment and occupation**

In Ireland national legislation applies to all sectors of private and public employment, self-employment and occupation, including contract work, self-employment, military service, holding statutory office, for the five grounds. EEA Section 2(1) and 8(1).

### **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))**

In Ireland national legislation includes 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 for the five grounds in both private and public sectors as described in the directives.

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<sup>98</sup> EEA, s. 2.

<sup>99</sup> EEA, s. 12(4).

<sup>100</sup> EEA, s. 37(5).



EEA Section 2(1) and 8 (1):

EEA Section 2(1): The definition of employee excludes, as far as access to employment is concerned, a person employed in another person's home to provide personal services such as childcare or domestic work. This does not seem to be in compliance with the directive.

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

In Ireland national legislation includes working conditions including pay and dismissals, for all five grounds and for both private and public employment. EEA Section 2(1), 7, 8(1), 8(6), 29.

In Section 7 EEA the definition of "like work" for purposes of equal pay does not include the use of a hypothetical comparator to establish discrimination,<sup>101</sup> contrary to Article 2 of the Employment Equality Directive and Article 2 of the Racial Equality Directive.

Section 35 EEA 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. There is nothing to suggest that the work should be remunerated at a proportionate level to that of the employee without the disability. This does not seem to comply with the directive.

#### **3.2.3.1 Occupational pensions constituting part of pay**

The definition of remuneration in EEA Section 2(1) specifically excluded pensions from its ambit.

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.<sup>102</sup> The Pensions Act 1990-2008 as amended now prohibits discrimination in respect of occupational pensions schemes and other occupational benefits on all grounds.

Most of the reported cases to date concern the gender and marital status grounds, but in one case a complainant who had been denied admittance to an occupational pension scheme succeeded in his claim of discrimination on grounds of race, and the company was ordered to register him in the scheme and to pay the contributions due.<sup>103</sup>

### **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))**

In Ireland national legislation applies to vocational training outside the employment relationship, such as that provided by technical schools or universities, or such as adult lifelong learning courses.

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<sup>101</sup> Labour Court, EDA 1429, Services Industrial Professional Technical Union & Annette Glass, 07.2014, <https://www.workplacerelations.ie/en/Cases/2014/July/EDA1429.html>.

<sup>102</sup> Pensions Act 1990-2004 as amended by the Social Welfare (Miscellaneous Provisions) Act 2004 available at: [www.irlgov.ie](http://www.irlgov.ie).

<sup>103</sup> Equality Tribunal DEC-P2011-007-, *Michal Czyzycki v Mark Fegan*, <http://www.equalitytribunal.ie/en/Cases/2011/December/DEC-E2011-260-Full-Case-Report.html>.

EEA section 8(1) and (7) prohibit 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 which 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."<sup>104</sup>

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.

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.<sup>105</sup>

The broad exceptions contained in EEA Section 12 may not be in compliance with the directive.

The Equal Status Act 2000-2015 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.<sup>106</sup>

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<sup>104</sup> EEA Section 12(4).

<sup>105</sup> EEA Section 12(1).

<sup>106</sup> ESA Section 7. See section 3.2.8 below for more on this provision.

### **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))**

In Ireland national legislation includes membership of, and involvement in workers or employers' organisations as formulated in the directives for all five grounds and for both private and public employment. This covers trade unions and employers' organisations.

Section 13(c) EEA prohibits discrimination on all five grounds 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.

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

In Ireland national legislation does not expressly include social protection, including social security and healthcare as formulated in the Racial Equality Directive.

ESA prohibits discrimination in relation to goods and services, on all five EU grounds and nine grounds of Irish legislation.

ESA Section 2(1):

"service" means a service or facility of any nature which is available to the public generally or a section of the public.

It is not entirely clear whether the prohibition would apply to all State services including social security and healthcare.

In *Donovan v. Donnellan*<sup>107</sup> 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." Judicial interpretation at the level of the courts will be crucial in determining whether Ireland is in compliance with Directive 2000/43/EC.

Compliance with the Racial Equality Directive is dependent on future judicial interpretation. This situation is further impacted by Section 14 ESA. This section provides a statutory exemption from ESA where an act or action is required by virtue of another statute. 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.

#### **3.2.6.1 Article 3.3 exception (Directive 2000/78)**

Irish law does not rely on the exception in Article 3.3 of the Employment Equality Directive in relation to religion or belief, age, disability and sexual orientation.

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

In Ireland national legislation does not expressly include social advantages as formulated in the Racial Equality Directive.

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<sup>107</sup> Equality Tribunal, *Donovan v. Donnellan* DEC-S2001-011, 17.10.2001  
<http://www.equalitytribunal.ie/en/Cases/2001/October/DEC-S2001-011.html>.

The term “social advantage” is not expressly referred to in the Irish equality legislation. It is likely that case law on discrimination in relation to “social protection” would apply to “social advantages”.

In Ireland the lack of definition of social advantages raises problems in relation to how Section 14 ESA is to be viewed regarding compliance with the Racial Equality Directive.

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

In Ireland national legislation includes education as formulated in the Racial Equality Directive.

ESA Section 7 covers educational establishments. “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. Grounds covered are Gender, age, race, religion, family status, disability, civil status, sexual Orientation, membership of the Traveller Community, housing assistance.

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.<sup>108</sup> The majority of Irish schools are denominational in nature, the bulk of those being Roman Catholic.<sup>109</sup> 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.<sup>110</sup> However, there is a growing number of non-denominational schools as well as minority faith schools. In general, the religious influence in schools has greatly diminished.

The education system provides a complaints procedure by virtue of the Education Act 1998, under which most complaints regarding schooling are received. However, some cases have been taken under ESA. In a high-profile case regarding access to education,<sup>111</sup> the higher court overturned an earlier decision of the Equality Tribunal and ruled that a school admission policy that prioritised former pupil's children did not constitute indirect discrimination against Travellers. The court found that the school's policy did not place Travellers in a situation of “particular” disadvantage, as other groups such as foreign applicants would be in the same position. Regarding compliance, it is questionable whether this is a correct interpretation of the directive.

The government announced its intention of legislating in order to ensure that school admissions policies do not discriminate on the basis of any of nine grounds: gender, civil status, family status, sexual orientation, religion, disability, race, Traveller community grounds or special educational needs, but this had not happened when the current government went out of office in 2016.

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<sup>108</sup> Article 44.2.4 Bunreacht na hÉireann.

<sup>109</sup> The schools are owned by the churches whose ethos they profess.

<sup>110</sup> 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.

<sup>111</sup> Supreme Court, *Stokes v Christian Brothers' High School Clonmel*, 24.02.2015, <http://www.courts.ie/Judgments.nsf/597645521f07ac9a80256ef30048ca52/a09897a48211897980257df6005a3c31?OpenDocument>.

In another case<sup>112</sup> 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. 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.

There are a number of exceptions to the general prohibition of discrimination, permitting the existence of single sex schools,<sup>113</sup> the provision of training for religious purposes to one gender only or to those of a particular belief,<sup>114</sup> different fee arrangements for EU members and nationals on the one hand and pupils from third-countries on the other,<sup>115</sup> different access arrangements to third level institutions for mature students,<sup>116</sup> and also distinctions made in relation to the organisation of sporting events.<sup>117</sup> A specific exception in relation to students with disabilities exists. The prohibition on discrimination does not apply 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.<sup>118</sup>

There is an exception in ESA 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.<sup>119</sup>

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."<sup>120</sup>

#### a) Pupils with disabilities

In Ireland the general approach to education for pupils with disabilities does not raise problems.

The prohibition on discrimination does not apply 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.<sup>121</sup> 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. 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 severe/profound general learning disability; emotionally disturbed students; students with autistic spectrum disorders; students with physical and multiple disabilities; students with visual and hearing impairment; and students with

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<sup>112</sup> Equality Tribunal, DEC-S2006-037 *Nora Faulkner (represented by the Kerry Traveller Development Project) v St Ita's & St Joseph's School, Tralee* <http://www.equalitytribunal.ie/en/Cases/2006/May/DEC-S2006-037-Full-Case-Report.html>.

<sup>113</sup> ESA Section 7(3)(a).

<sup>114</sup> ESA Section 7(3)(b).

<sup>115</sup> ESA Section 7(3)(d).

<sup>116</sup> ESA Section 7(3)(e).

<sup>117</sup> ESA Section 7(4)(a).

<sup>118</sup> ESA Section 7(4)(b).

<sup>119</sup> ESA Section 7(3)(c).

<sup>120</sup> Education Act 1998, Section 15.

<sup>121</sup> ESA Section 7(4)(b).

specific learning disability. Special classes for students in most of these categories are attached to mainstream schools, mainly at primary level. There is insufficient national funding in the wake of the Troika austerity programme to provide the necessary support/accommodations to enable disabled children to participation in mainstream education.

#### b) Trends and patterns regarding Roma pupils

In Ireland there are no specific patterns existing in education regarding Roma pupils such as segregation.

The Irish education system has yet to develop a culturally appropriate response to specific issues relating to Roma. The Intercultural Education Strategy 2010 – 2015 which was developed by the Department of Education and Skills and the Office of the Minister for Integration aimed to ensure that:

- all students experience an education that “respects the diversity of values, belief, languages and traditions in Irish society and is conducted in a spirit of partnership” (Education Act 1998);
- all education providers are assisted with ensuring that inclusion and integration within an intercultural learning environment.<sup>122</sup>

However, the implementation of the strategy has been patchy and its impact on Roma children minimal other than a limited amount of English language supports which were significantly cut in 2010. Training in the area of intercultural education is not compulsory for qualified teachers so that there is no system in place to challenge the prejudices and bias of practicing teachers. Immigrant and Traveller children are more likely to experience bullying in school.<sup>123</sup> There remains an absence of curriculum linked resources which explore Traveller and Roma language and culture which makes it difficult for willing teachers to explore these cultures with their students in the classroom.

Given that the Roma and Traveller populations in Ireland are relatively small, in many schools there may only be one or two Traveller/Roma children. This leaves children particularly vulnerable and isolated when identity based bullying occurs, particularly if the response from the school is inadequate.

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

In Ireland national legislation includes access to and supply of goods and services as formulated in the Racial Equality Directive.

ESA Section 5(1) Gender, age, race, religion, family status, disability, civil status, sexual orientation, membership of the Traveller Community, housing assistance are covered.

In *Two Complainants v. Department of Education and Science*<sup>124</sup> 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

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<sup>122</sup> Department of Education and Skills & Office of the Minister for Integration, Intercultural Education Strategy, 2010–2015, Dublin: 2010.

<sup>123</sup> Department of Children and Youth Affairs, State of the Nation's Children: Ireland 2012. Dublin: Government Publications, 2012 <http://www.dcyv.gov.ie/documents/research/StateoftheNationsChildren2012.pdf>.

<sup>124</sup> Equality Tribunal, DEC-S2003-042/043 [http://www.equalitytribunal.ie/en/Cases/2003/May/DEC-S2003-042-043\\_Full\\_Case\\_Report.html](http://www.equalitytribunal.ie/en/Cases/2003/May/DEC-S2003-042-043_Full_Case_Report.html).

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.”

The Equality Officer held that a maintenance grant was a “facility” covered by the Act.<sup>125</sup>

### 3.2.9.1 Distinction between goods and services available publicly or privately

In Ireland national law does not 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).

ESA Section 5(1): However Section 15(1) ESA 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.”<sup>126</sup> 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.

ESA Section 8 prohibits clubs from discriminating, but permits certain exceptions to this rule in Section 9, where a club is set up to cater for the needs of a particular gender, civil 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, to restrict women members to certain hours. The decision was appealed to the superior courts. 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 possible non-compliance with the Racial Equality Directive. The Supreme Court upheld the decision on 4 November 2009.<sup>127</sup>

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

In Ireland, national legislation includes housing as formulated in the Racial Equality Directive.

ESA Section 6(1) 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. Gender, age, race, religion, family status, disability, civil status, sexual orientation and membership of the Traveller community are covered.

There are exceptions. The prohibition on discrimination does not apply to accommodation that is provided in a person’s home, “or where the provision of accommodation affects the person’s private or family life or that of any other person residing in the home.”<sup>128</sup>

Section 6(5) allows for reservation of housing for a particular category of people covered by one of the discriminatory grounds, such as a residential centre for people with

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<sup>125</sup> This provision was amended in 2004, now section 12 Employment Equality Act 1998-2015, see also Equality Tribunal DEC-S2001-011 *Donovan v. Garda Donnellan* <http://www.equalitytribunal.ie/en/Cases/2001/October/DEC-S2001-011.html>, which supports the contention that the Equal Status Act covers services and facilities provided by public authorities.

<sup>126</sup> Section 15(1) ESA.

<sup>127</sup> <http://www.bailii.org/ie/cases/IESC/2009/S73.html>.

<sup>128</sup> Section 6(2)(d) ESA.



disabilities, or a nursing home for the elderly, or grants for housing or adaptations to a home provided to such persons.<sup>129</sup>

Section 6(6) ESA allows housing authorities to provide different treatment in respect of housing accommodation to persons based on family size, family status, civil status, disability, age or membership of the Traveller community. 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 has clarified that this exception cannot result in less favourable treatment in the provision of housing.<sup>130</sup>

Section 6(7) ESA allows a housing Minister to apply differential treatment in housing provision to persons on the basis of their nationality, gender, family size, family status, civil status, disability, age or membership of the Traveller community.<sup>131</sup> However any difference in treatment is not permitted to amount to a derogation from the obligations of the State under EU treaties legislation. This ensures that any 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(2), 6(5) or 6(6).)

As of the 1st January 2016, the Equality (Miscellaneous Provisions) Act 2015<sup>132</sup> introduced "housing assistance" as a new ground to protect against discrimination in accommodation. This means that people in receipt of housing assistance, rent supplement or other social welfare payments can no longer be discriminated against in relation to the provision of accommodation.

### 3.2.10.1 Trends and patterns regarding housing segregation for Roma

There is no specific information about patterns of segregation affecting the Roma Community in Ireland because of the absence of Government data in relation to Roma. There are estimated to be in the region of 3,000-5000 Roma people in Ireland. Roma families and children are believed to be living in Ireland in extremely poor and sometimes dangerous living conditions without access to basic necessities.<sup>133</sup> The Department of Justice and Equality has partnered with Pavee Point Traveller and Roma Centre to carry out an Assessment of Need for the Roma Community. The results were to have been known by end August 2015 but do not appear to have been published. The assessment is intended to contribute to improved interactions with and service delivery for the Roma community in Ireland.

Many of the issues concerning patterns of segregation that are known to affect the Traveller Community are also likely to affect the Roma Community. A recent submission to a UN monitoring body by one of the main organisations representing Travellers and Roma in Ireland called for concrete measures to support travellers who are nomadic or semi-nomadic, as follows:<sup>134</sup>

"Section 24 of the Housing Miscellaneous Provisions Act (2002) continues to criminalise nomadism and disproportionately impacts upon Travellers. This is a form of institutionalised racism. This section of the legislation needs to be repealed.

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<sup>129</sup> Section 6(5) ESA.

<sup>130</sup> [2007] IEHC 4.

<sup>131</sup> No reference is made in this section to the ground of race or sexual orientation.

<sup>132</sup> Ireland, Equality (Miscellaneous Provisions) Act, 10.12.2015.

<http://www.irishstatutebook.ie/eli/2015/act/43/enacted/en/html>.

<sup>133</sup> Pavee Point Traveller and Roma Centre Submission to CESCPR, 09.2014, <http://www.paveepoint.ie/wp-content/uploads/2015/04/Pavee-Point-Submission-CESCPR-International-Covenant-on-Economic-Social-and-Cultural-Rights-September-2014.pdf>.

<sup>134</sup> Pavee Point Traveller and Roma Centre Submission to ICCPR, 06.2014, <http://www.paveepoint.ie/wp-content/uploads/2015/04/Pavee-Point-Traveller-and-Roma-Centre-Submission-to-ICCPR-June-20141.pdf>.



In each local authority area, Traveller Accommodation Plans are required to be developed by the authorities, under the Housing (Traveller Accommodation) Act 1998. The lack of political will and the lack of incentives or sanctions in the legislation have resulted in local authorities failing to provide adequate accommodation for Travellers under the Housing (Traveller Accommodation) Act 1998. Transient sites are required to enable nomadic Travellers to move. Currently, there is only one transient site in Ireland. ECRI (2013) has stated 'National authorities should envisage introducing measures binding on local authorities and raising awareness among the general public of Traveller accommodation rights and promote respect thereof.' "

The submission pointed out that Traveller accommodation has seen a huge disinvestment in recent years. It quoted from research 'Travelling with Austerity' showing the disproportionate impact of austerity policies on Travellers, e.g. a fall in allocations in relation to accommodation from € 40m in 2008 to € 6m in 2012, down 85%. In addition, it pointed out that substantial parts of the reduced allocation were unspent. For example, in 2012, 34% of the reduced accommodation budget was unspent. Given the cuts in other relevant programmes affecting Travellers, the quoted research concluded:

These figures tell an egregious story of an extraordinary level of disinvestment by the Irish state in the Traveller community. One can think of no other section of the community which has suffered such a high level of withdrawal of funding and human resources, compounded by the failure of the state to spend even the limited resources that it has made available.

The submission asked the UN body to recommend that the Irish Government should:

- Repeal the Housing Miscellaneous Provisions Act;
- Introduce measures binding on local authorities to implement the Housing (Traveller Accommodation) Act 1998 including the provision of transient sites in each local authority area, with the appropriate funding to do so.

## **4 EXCEPTIONS**

### **4.1 Genuine and determining occupational requirements (Article 4)**

In Ireland national legislation provides for an exception for genuine and determining occupational requirements.

EEA 37(2):

.. a difference of treatment which is based on a characteristic related to any of the discriminatory grounds (..) shall not constitute discrimination where, by reason of the particular occupational activities concerned or of the context in which they are carried out (a) the characteristic constitutes a genuine and determining occupational requirement, and (b) the objective is legitimate and the requirement proportionate.

ESA 5(2)(i):

The prohibition on discrimination in disposing of goods or in providing a service does not apply in the case of Section 5(2)(i):

“differences in the treatment of persons on the gender, age or disability ground or on the ground of race, reasonably required for reasons of authenticity, aesthetics, tradition or custom in connection with a dramatic performance or other entertainment.”

### **4.2 Employers with an ethos based on religion or belief (Article 4(2) Directive 2000/78)**

In Ireland national law provides for an exception for employers with an ethos based on religion or belief.

EEA 37(1) provides that an institution with a religious ethos does not discriminate if (a) it gives more favourable treatment, on the religion ground, to an employee or a prospective employee over another person where it is reasonable to do so in order to maintain the religious ethos of the institution, or (b) it takes action which is reasonably necessary to prevent an employee or a prospective employee from undermining the religious ethos of the institution.

As the section was originally drafted, there was no requirement that differential treatment should be “legitimate” or “proportionate,” or that it needed to be shown that a person’s religion or belief is relevant to the individual post in question. There was no limitation of the Section 37 (1) exception to discrimination based on the grounds of religion or belief so that it could not be used to justify discrimination on another ground. This appeared to go beyond the terms of the exception permitted by the directive.

EEA 12(4) concerning vocational training reflects the terms of the 37(1) exception. It permits difference in treatment with regard to access to training or vocational courses under the direction of a body established for religious purposes, in order to maintain the religious ethos of educational or medical institutes.

- Conflicts between rights of organisations with an ethos based on religion or belief and other rights to non-discrimination

In Ireland there are no 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. However, the exceptions relating to religious ethos in the equality legislation was widely considered too broad. The teacher’s unions maintained that the exception relating to protection of religious ethos was unnecessary, of sweeping scope and made teachers genuinely fearful of discriminatory dismissal from their posts on

grounds of LGBT sexual orientation. They pointed out that 95% of primary schools in Ireland remain under religious control.<sup>135</sup> In a case, one such primary school was found to have discriminated against a teacher on the ground of sexual orientation in terms of promotion to Principal and ordered to pay € 54,000 damages to the complainant.<sup>136</sup> The current government committed to legislate to narrow the exception and legislation was adopted on 10 December 2015.<sup>137</sup> It amends section 37 of the Employment Equality Act so that the current exclusion for discrimination by religious educational or medical institutions on grounds of religion can only be relied upon by institutions that are maintained in whole or in part by public money, if the more favourable treatment on grounds of religion is a genuine, legitimate and justified occupational requirement having regard to the institution's ethos and the means of achieving that aim are objectively justified and are appropriate and necessary (both terms are narrowly and specifically defined in the new Act in this context). This effectively removes the possibility for religious-run schools or institutions to discriminate against LGBT teachers on the grounds of their sexuality.

- Religious institutions affecting employment in state funded entities

In Ireland religious institutions are not permitted to 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, unless (a) the action is objectively justified by the institution's aim of preventing the undermining of the religious ethos of the institution, and (b) the means of achieving that aim are appropriate and necessary. The action is not objectively justified unless it is rationally and strictly related to the institution's religious ethos, is a response to conduct of the employee or prospective employee undermining the religious ethos of the institution rather than a response to that employee's, or prospective employee's, gender, civil status, family status, sexual orientation, age, disability, race or membership of the Traveller community, and is proportionate to the conduct of the employee or prospective employee, as the case may be, having due regard to:

- (i) any other action the employer may take in the circumstances,
- (ii) the consequences of that action for that employee or prospective employee,
- (iii) the employee's or prospective employee's right to privacy, and
- (iv) the actual damage caused to the religious ethos of the institution by the conduct of that employee or prospective employee.<sup>138</sup>

The possibility is provided for in national law (EEA 37(1), not in international agreements with the Holy See.

#### **4.3 Armed forces and other specific occupations (Article 3(4) and Recital 18 Directive 2000/78)**

In Ireland national legislation provides for an exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78).

EEA 37(5) states that the prohibition on discrimination on the age ground or disability does not apply in relation to employment in the Defence Forces.

<sup>135</sup> Irish National Teachers Organisation Submission in Relation to Section 37(1) in 2007 and 2011 <http://www.into.ie/lgbt/Section371/>.

<sup>136</sup> Equality Tribunal, DEC-E2014-097, A Teacher and A National School, 30.12.2014, <http://www.workplacerelations.ie/en/Cases/2014/December/DEC-E2014-097.html> (s. 37 exemption was not pleaded in this case, although it was briefly considered by the Tribunal which judged that it would not avail the respondent).

<sup>137</sup> Equality (Miscellaneous Provisions) Act 2015 <http://www.irishstatutebook.ie/eli/2015/act/43/enacted/en/print.html?printonload=true>.

<sup>138</sup> Equality (Miscellaneous Provisions) Act 2015 <http://www.oireachtas.ie/documents/bills28/acts/2015/a4315.pdf>.

EEA 37(3) provides that it is an occupational requirement that those employed in the police, prison services or emergency services are competent and capable to undertake the range of functions associated with this position.

#### **4.4 Nationality discrimination (Article 3(2))**

##### **a) Discrimination on the ground of nationality**

Under EEA 6 (2)(h) and ESA 3(2)(h) the race ground includes nationality, or ethnic or national origin.

In Ireland national law includes exceptions relating to difference of treatment based on nationality.

EEA 12(7) allows different treatment on the basis of nationality in relation to admission or attendance fees or allocation of places at any vocational or training course, between citizens of Ireland or nationals of another Member States of the European Union.

This exception would appear to comply with the provisions of Racial Equality Directive 3(2).

EEA 17(2) 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.

ESA 6(7)(a) permits differential treatment of persons on the basis of nationality in relation to housing or accommodation provided by local authorities.

ESA 5(2)(f) permits 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.

ESA 9 provides that a club will not be a discriminating club if it excludes membership by reason that its principal purpose is to cater for the needs of a particular nationality.

In Ireland nationality (as in citizenship) is explicitly mentioned as a protected ground in national anti-discrimination law.

##### **b) Relationship between nationality and 'race or ethnic origin'**

Under EEA 6 (2)(h) and ESA 3(2)(h) the race ground includes nationality, or ethnic or national origin.

There is no definition of nationality, nor any case law which would shed light on any overlap with ethnicity, nor whether or not statelessness is covered.

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

##### **a) Benefits for married employees**

In Ireland it would constitute unlawful discrimination in national law if an employer only provides benefits to those employees who are married. Marriage includes same-sex marriage.

EEA 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, a benefit to or in respect of a person as a member of an employee's

family, or a benefit to an employee on or by reference to an event occasioning a change in the civil status of the employee.<sup>139</sup> The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 Section 102 extends any such benefits under the equality legislation to include families based on civil partnership.

b) Benefits for employees with opposite-sex partners

In Ireland it would constitute unlawful discrimination in national law if an employer only provides benefits to those employees with opposite-sex partners.

The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 Section 102 extends any such benefits under the equality legislation to include families based on civil partnership and civil partners under the Act are same-sex partners.<sup>140</sup>

#### **4.6 Health and safety (Article 7(2) Directive 2000/78)**

a) Exceptions in relation to disability and health/safety

In Ireland there are exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78).

EEA 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.

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.

#### **4.7 Exceptions related to discrimination on the ground of age (Article 6 Directive 2000/78)**

##### **4.7.1 Direct discrimination**

In Ireland national law provides an exception for direct discrimination on age.

EEA 6(3)(c) does not require the employer to justify offering only a fixed term contract to a person over the compulsory retirement age for that employment.

This may not be in compliance with the directive.

a) Justification of direct discrimination on the ground of age

In Ireland it is possible, generally, or in specified circumstances, to justify direct discrimination on the ground of age.

EEA 34(4) permits an employer to set retirement ages for employees, which can be different for different employees.

Case law provides guidelines as to what will be considered satisfactory objective

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<sup>139</sup> EEA 34(1) as amended by Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, Section 102.

<sup>140</sup> Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, Section 3.

justifications for imposing a retirement age.<sup>141</sup>

The guidelines are:

- a) Does the compulsory retirement age seek to achieve a legitimate aim?
- b) Is the aim legitimate in the particular circumstances of the business?
- c) Are the means of achieving the aim proportionate?

In Ireland national law permits differences of treatment based on age for any activities within the material scope of Directive 2000/78/EC.

EEA 34(5) permits employers to set a maximum age for recruitment which takes account of 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.

In Ireland national law allows occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits, taking up the possibility provided for by article 6(2).

EEA Section 34 provides that it does not amount to discrimination on the age ground for an employer to fix ages for admission to an occupational benefits 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.<sup>142</sup> 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.'<sup>143</sup>

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

In Ireland there are 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.

The Protection of Young Persons (Employment) Act 1996<sup>144</sup> 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 he/she must keep a register of such workers, which should set out the hours worked, the rate of pay and the total amount in wages paid.

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<sup>141</sup> Equality Tribunal DEC-E 2012-086, *Paul Doyle v ESB International*  
<http://www.equalitytribunal.ie/en/Cases/2012/June/DEC-E2012-086-Full-Case-Report.html>.

<sup>142</sup> Section 34 EEA.

<sup>143</sup> Section 34(3A) EEA.

<sup>144</sup> [http://acts.oireachtas.ie/en.act.1996.0016.1.html?highlight\\_term=The+Protection+of+Young+Persons+%28Employment%29+Act+1996&result\\_number=6&search\\_session=1470830699398&q\\_phrase=The+Protection+of+Young+Persons+%28Employment%29+Act+1996](http://acts.oireachtas.ie/en.act.1996.0016.1.html?highlight_term=The+Protection+of+Young+Persons+%28Employment%29+Act+1996&result_number=6&search_session=1470830699398&q_phrase=The+Protection+of+Young+Persons+%28Employment%29+Act+1996).

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. EEA prohibits discrimination on the grounds of age for everyone above 16, but employers are still allowed to set minimum recruitment ages of 18.

EEA prohibits discrimination on the grounds of a person's family status. This covers a parent or a person *in loco parentis* to a person who has yet to attain the age of 18, and also covers a resident primary carer to a person who has a disability 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 EEA 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.

EEA 6(2)(c) prohibits discrimination on the grounds of a person's family status. This includes a parent or a person *in loco parentis* to a person under 18, and a resident primary carer to a person who has a disability 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 narrow definition which covers 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.

#### **4.7.3 Minimum and maximum age requirements**

In Ireland there are exceptions permitting minimum and/or maximum age requirements in relation to access to employment (notably in the public sector) and training.

The Protection of Young Persons (Employment) Act 1996<sup>145</sup> prohibits the employment of children (under 13), and limits the employment of children (under 16) and young persons (16-18).

EEA 6(3) (a) prohibits discrimination on the grounds of age for persons above 16.

EEA 6(3)(b) an employer may set a minimum recruitment age of 18.

EEA 6(3)(b) provides that an employer may set a minimum recruitment age of 18.

EEA 34 (5) provides that it does not constitute discrimination on the age ground to set, in relation to any job, a maximum age for recruitment which takes account of  
(a) any cost or period of time involved in training a recruit to a standard at which the recruit will be effective in that job, and

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<sup>145</sup> <http://www.irishstatutebook.ie/eli/1996/act/16/enacted/en/html>.

(b) 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.

There are maximum age requirements for access to certain types of training, particularly access to the police and defence forces. Age limits include the following:

- Army and Air Corps under 25 at time of enlistment;
- Naval Service under 27 at time of enlistment;
- Air Corp Apprenticeship under 19 at time of apprenticeship;
- Police under 35 to commence training.

#### **4.7.4 Retirement**

##### **a) State pension age**

In Ireland there is no state pension age, at which individuals must begin to collect their state pensions.

If the person wishes to work longer, their pension can be deferred. An individual cannot collect a State Pension (Transition) and still work. But when a person has transferred to the State Pension (Contributory), they can 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, the recipient 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, one transfers to the State Pension (Contributory).

It is not permitted to work and receive a State Pension (Transition). However, when a recipient has transferred to the State Pension (Contributory) at age 66, he/she can work and get the 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) Occupational pension schemes**

In Ireland there is no single age when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements. This is subject to individual contract and deferral of pension is also subject to the terms of the employment contract.

##### **c) State imposed mandatory retirement ages**

In Ireland there is no state-imposed mandatory retirement age(s) in public or private employment.

Ireland does not have a state-imposed mandatory retirement age. In general, the retirement age is provided for in the contract of employment.

##### **d) Retirement ages imposed by employers**



In Ireland national law permits employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract or collective bargaining or unilaterally.

EEA 34(4) permits employers to fix different ages for the retirement of employees whether voluntary or compulsory, within the terms of the contract of employment. This was challenged as discriminatory in the case of *Eileen McEvoy v Mount Temple School* in 2007, but the claim did not succeed.<sup>146</sup>

A recent case before the higher Irish courts was *McCarthy v HSE* (unreported) in March 2011, where the claimant lost her challenge to the Health Service Executive's decision to dismiss her at 65. Unlike previous decisions the judge addressed, albeit briefly, EU law and stated that the CJEU in *Palacios de la Villa* had affirmed that "a law providing for a retirement age of 65 could not be seen as discriminatory or unreasonable in its effect". The Judge made no reference to the need for objectively justifiable reasons for having a mandatory retirement age and, as such, the issue of compatibility of mandatory retirement ages with EU law remained to be decided authoritatively.

In *Goss v Ryanair*, the Equality Tribunal found that there was no requirement on an employer in the Irish Employment Equality Act to objectively justify a mandatory retirement age.<sup>147</sup>

A different outcome was reached in *Kiernan v Longford County Council*.<sup>148</sup> Here the complainant worked for the respondent as a General Services Supervisor. The general retirement age was 66 for outdoor workers but they were allowed to work beyond 66 and in some cases into their 70s, up to 73. The complainant wanted to work beyond 66 in order to give himself more service towards his pension, but the respondent forced him to retire at age 67, thus refusing him the same retirement age as others had been permitted. The respondent contended that their policy was implemented for legitimate aims, namely financial and manpower planning. The Equality Officer found that at the time the complainant reached 66 it was custom and practice within the employment that there was no retirement age, in that working beyond 66 was at the discretion of the employee and up till then nobody who asked to work on had been refused. He therefore concluded that making the complainant retire before his legitimate expectation did not satisfy a legitimate aim and that the complainant's enforced retirement was discriminatory on the grounds of his age.<sup>149</sup>

The Equality (Miscellaneous Provisions) Act 2015 was adopted on 10 December 2015.<sup>150</sup> With effect from 1 January 2016, 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 if -

- (a) it is objectively and reasonably justified by a legitimate aim, and
- (b) the means of achieving that aim are appropriate and necessary.

What constitutes "objective justification" is not currently defined by Irish case law or

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<sup>146</sup> Labour Court 2007, Determination No. EDA0716  
<http://www.equalitytribunal.ie/en/Cases/2007/October/EDA0716.html>.

<sup>147</sup> Ireland, WRC, *Equality Authority v. Ryanair*, DEC-E2000-014, 12.2014 (exact date not given),  
<https://www.workplacerelations.ie/en/Cases/2015/December/DEC-E2015-138.html>.

<sup>148</sup> DEC-E2011-067, <http://www.workplacerelations.ie/en/Cases/2011/March/DEC-E2011-067-Full-Case-Report.html>.

<sup>149</sup> A similar finding was made in DEC-E2012-093 *O'Neill v Fairview Motors Ltd* 18.07.2012  
<http://www.equalitytribunal.ie/en/Cases/2012/July/DEC-E2012-093-Full-Case-Report.html>,  
where the Equality Tribunal concluded that the Act must be interpreted to require the respondent to justify its reliance on the mandatory retirement age, in accordance with Article 6 of the FED Directive.

<sup>150</sup> <http://www.irishstatutebook.ie/eli/2015/act/43/enacted/en/html>.

regulations, but a decision of the Equality Tribunal, *Paul Doyle v ESB International*,<sup>151</sup> provided guidelines as to what will be considered satisfactory objective justifications for imposing a retirement age. Examples of objective and proportionate grounds justifying compulsory retirement are:

- to create opportunities in the labour market;
- allowing for a balanced age structure, encouraging the recruitment of young people and preventing disputes arising where older employee's performance was called into question;
- to ensure motivation and dynamism through the increased prospect of promotion; and
- for health and safety reasons, where the particular work requires physicality.

e) Employment rights applicable to all workers irrespective of age

To be covered by the Unfair Dismissals Act 1977-2007 a number of basic requirements must be satisfied, including the *fact that* employees must not have reached the normal retirement age for the employment in question.<sup>152</sup> However, it seems that the Employment Appeals Tribunal (EAT) may find that the dismissal was unfair and unlawful if the issue of retirement is not dealt with consistently by employers. In *Cole v Pressometric Ltd* (unreported) the EAT held that an employee who was forced to retire at 65 had been unfairly dismissed in circumstances where his request to continue working past this age was rejected, whereas a similar request from another employee had been granted.

f) Compliance of national law with CJEU case law

In Ireland national legislation is not in line with the CJEU case law on age regarding compulsory retirement.

Firstly, EEA section 6(3) (c) provides that offering 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 does not constitute age discrimination. However, the CJEU has made clear in *Mangold* and *Georgiev* that such a provision comes within the scope of the prohibition on discrimination and must be justified.

Secondly, EEA section 34(4) allows an employer to fix different retirement ages for employees, whether voluntary or compulsory. However, CJEU case law makes clear that any such provision must be objectively and reasonably justified by a legitimate aim of social or employment policy, and the means to achieve it must be shown to be appropriate and necessary.

#### 4.7.5 Redundancy

a) Age and seniority taken into account for redundancy selection

In Ireland national law does not permit age or seniority to be taken into account in selecting workers for redundancy.

Unfair Dismissals (Amendment) Act 1993 section 5 (a).<sup>153</sup> The dismissal of an employee shall be deemed, for the purposes of the Act, to be an unfair dismissal if it results wholly or mainly from...: ... (ee) the age of the employee.

b) Age taken into account for redundancy compensation

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<sup>151</sup> Equality Tribunal DEC-E 2012-086, <http://www.equalitytribunal.ie/en/Cases/2012/June/DEC-E2012-086-Full-Case-Report.html>.

<sup>152</sup> Section 2(1) Unfair Dismissals Act 1977-2007.

<sup>153</sup> <http://www.irishstatutebook.ie/1993/en/act/pub/0022/sec0005.html> - sec 5.

In Ireland national law provides compensation for redundancy. This is not affected by the age of the worker.

Redundancy Payments Acts 1967-2007.

#### **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)**

In Ireland national law includes exceptions that seek to rely on Article 2(5) of the Employment Equality Directive.

EEA 16 (5) and (6) states that an employer is not required 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.

ESA Section 15 states that a person who provides goods or services is not required 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.<sup>154</sup> In addition any action taken in good faith by or on behalf of a publican or hotel<sup>155</sup> for the purpose of complying with the Licensing Acts shall not constitute discrimination.<sup>156</sup>

#### **4.9 Any other exceptions**

In Ireland other exceptions to the prohibition of discrimination (on any ground) provided in national law are the following:

EEA section 36 permits inclusion of certain requirements in the context of certain posts, such as holding office under or in the service of the State, posts with the Defence Forces, police, civil servants, officers of local authorities, health boards and vocational education committees. The requirements relate to residence, citizenship and proficiency in the Irish language. It is also permissible under the Act to require Irish-language proficiency from teachers in both primary and post primary schools. Finally, this section permits the imposition of certain educational requirements for certain posts, professions, or vocations.

EEA Section 35(1) provides that 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.

ESA's principal and most problematic exception is contained in section 14 which provides that nothing in the Act can be construed as prohibiting the taking of any action required by any enactment, order of a court, any measure adopted by the European Union, or any international convention.

ESA contains a number of exceptions to the prohibition on discrimination in the supply of goods and services, including:

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<sup>154</sup> ESA Section 15(1).

<sup>155</sup> The term used in the legislation is the 'holder of a licence or other authorisation which permits the sale of intoxicating liquor.'

<sup>156</sup> ESA Section 15(2).

- 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.<sup>157</sup>
- Difference in the treatment of persons on the religion ground in relation to goods or services provided for a religious purpose.<sup>158</sup>
- 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.<sup>159</sup>
- Having an age requirement for persons to be either an adoptive or foster parent.<sup>160</sup>
- 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.<sup>161</sup>

ESA Section 46 provides that the provisions of this Act apply in respect of ships and aircraft registered in the State, but that 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.

ESA Section 7 provides that it will not amount to age discrimination to allocate places at third level institutes for mature students (over 23).<sup>162</sup>

ESA Section 16 permits the imposition or maintenance of preferential fee charges in respect of goods or services being offered in respect of persons with 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.<sup>163</sup>

ESA 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.<sup>164</sup>

The position taken by the Equality Tribunal in respect of this provision is that the meaning of "in good faith" means that the actions must be done honestly and without prejudice.<sup>165</sup> 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."<sup>166</sup> Any action taken should be for the sole purpose of ensuring compliance with the provisions of the Licensing Acts.<sup>167</sup>

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.

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<sup>157</sup> ESA 5(2)(d).

<sup>158</sup> ESA 5(2)(e).

<sup>159</sup> ESA 5(2)(f).

<sup>160</sup> ESA 5(2)(k).

<sup>161</sup> ESA 5(2)(j).

<sup>162</sup> ESA 7(3)(e).

<sup>163</sup> ESA 16(2)(a) and (b).

<sup>164</sup> *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.

<sup>165</sup> *Delaney v. The Harp Bar*, DEC-S2002-53/56.

<sup>166</sup> DEC-S2001-014.

<sup>167</sup> *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) Scope for positive action measures**

In Ireland positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation is provided for in national law.

EEA section 33 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.

ESA 14(1)(b) 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 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.

ESA Section 6(6) permits different treatment by housing authorities and voluntary housing associations in the provision of accommodation on the basis of family size, family status, civil status, disability, age or membership of the Traveller community (race and ethnicity are not mentioned in this section.)

ESA Section 7 (3)(b),(c),(e) also provide that in respect of educational establishments differences of treatment are permitted on the grounds of religion and age.

ESA 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.

### **b) Main positive action measures in place on national level**

Section 42 of the Irish Human Rights and Equality Commission Act introduces a positive duty on public bodies to have due regard to human rights and equality. The Irish Human Rights and Equality Commission will assist public bodies to comply with the positive duty, including by producing guidelines, and codes of practice.<sup>168</sup>

## **Quota**

The attainment of a 3% quota for the employment of people with disabilities has long been a government policy in respect of both the civil and public service.<sup>169</sup> This policy holds that the civil and public service should aim to ensure that 3% of its work force are people with disabilities. The National Disability Authority monitors the implementation of this process but there are no sanctions for not achieving the target.

## **Broad social policy measure**

Immigrant Council of Ireland worked in partnership with the public transport sector on an

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<sup>168</sup> <http://www.irishstatutebook.ie/2014/en/act/pub/0025/print.html#sec42>.

<sup>169</sup> 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, but not on a statutory footing.

anti-racism project which resulted in Dublin Bus, Irish Rail and Transdev (Luas (tram) Operator) publishing anti-racism strategies for their companies.<sup>170</sup>

BeLongTo and the Irish Congress of Trade Unions worked together to produce a video which highlights the negative impact that homophobia and transphobia can have on young people in the workplace.<sup>171</sup>

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<sup>170</sup> *Towards an Inclusive Public Transport Service Full Report*  
<http://immigrantcouncil.ie/files/publications/ef1d7-towards.pdf>.

<sup>171</sup> Link to video <http://www.youtube.com/watch?v=IfesuLQLnzw>.

## 6 REMEDIES AND ENFORCEMENT

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

- a) Available procedures for enforcing the principle of equal treatment

In Ireland the following procedures exist for enforcing the principle of equal treatment: judicial, administrative, and alternative dispute resolution procedures such as mediation).

ESA provides for judicial procedures and mediation, both binding.

The enforcement mechanisms apply equally to most public and private sector employees; there is an exception in respect of members of the Defence Forces, who must address their complaint first to the authorities before they can have access to the Workplace Relations Commission (WRC).<sup>172</sup>

EEA 77(7) requires certain public sector employees to exhaust internal complaints procedures prior to taking a case to the WRC.

EEA section 78 provides the option of mediation. A mediated settlement agreed by the parties becomes legally binding and its terms can be enforced at the Circuit Court.<sup>173</sup> The IHREC may provide assistance in the enforcement procedures.<sup>174</sup>

Complaints under EEA or ESA may be brought before the WRC. The WRC 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.

Complaints of dismissal due to discrimination<sup>175</sup> may also be brought under the Unfair Dismissals Acts 1977 and 2007. The WRC makes legally binding determinations, with the possibility of appeal to the Circuit Court, and subsequently the High Court.

The former Equality Tribunal and Labour Court are both now grouped together under the Workplace Relations Commission. The Workplace Relations Act 2015<sup>176</sup> reformed workplace relations bodies and the equality tribunal system. The Workplace Relations Commission brings together the previous services of the Labour Relations Commission, Rights Commissioner Service, Equality Tribunal, the National Employment Rights Authority and the first instance functions of the Employment Appeals Tribunal and the Labour Court. The WRC (Labour Court) will be the single appeal body for all workplace relations appeals, including those currently heard by the Employment Appeals Tribunal. Although access to goods and services is not a workplace issue, cases of discrimination in access to goods and services (equal status cases) are now to be heard by the WRC.

In relation to access to goods and services, the Intoxicating Liquor Act 2003 transferred jurisdiction for cases alleging discrimination against a licensed premise to the District Court, a court of local and limited jurisdiction with jurisdiction over a range of criminal and civil matters.

In all equal status Decisions, the appeal lies to the Circuit Court, where a new hearing of the issue will take place. The Circuit Court is a court of local and limited jurisdiction, with jurisdiction over a range of criminal and civil matters.

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<sup>172</sup> ESA 77(9) and 104.

<sup>173</sup> EEA Section 91(2).

<sup>174</sup> EEA Section 67(1)(b)(iii).

<sup>175</sup> Not all the grounds are covered, see section 2.1 above.

<sup>176</sup> <http://www.irishstatutebook.ie/eli/2015/act/16/enacted/en/pdf> .

Discrimination claims are brought before the relevant body by way of application using standard forms. Hearings are in private. The decisions of each of the bodies are available for public inspection, as they are published on the Workplace Relations Service website.<sup>177</sup> Both District and Circuit Court Cases are heard in public; it is rare for decisions of either court to be published.

Decisions of the WRC and civil courts are binding, as are mediated settlements which have been agreed.

b) Barriers and other deterrents faced by litigants seeking redress

Both EEA and ESA impose time limits for bringing complaints to the appropriate body. These time limits are quite strict; ESA 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 WRC.<sup>178</sup> 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.

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 period for bringing a case may be extended for a further two months, if the WRC is satisfied that reasonable cause<sup>179</sup> prevented the complainant from sending the notification within the normal time period.

An amendment to ESA required 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.<sup>180</sup> This amendment was controversial and was strongly opposed by the Equality Authority and the Human Rights Commission.<sup>181</sup> A further and significant concern relates to the fact that the Equality Authority (now IHREC) 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 nobody disseminates information about the legal protection against discrimination contained within this Act, nor collects the case law. 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 (now IHREC) through its case work and work with the public highlighted a number of relevant concerns. These concerns include the cost of court 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 WRC, this is not the position with regard to appeals in the District Court,<sup>182</sup> or the Circuit Court.<sup>183</sup>

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<sup>177</sup> <http://www.workplacerelations.ie/en/>.

<sup>178</sup> ESA section 21 (2).

<sup>179</sup> Section 21 (3), Equal Status Act 2000-2015.

<sup>180</sup> Intoxicating Liquor Act 2003.

<sup>181</sup> Irish Times, 28.05.2003.

<sup>182</sup> Equal Status Cases under the Intoxicating Liquor Act, 2003 go to the District Court at first instance.

<sup>183</sup> Appeals from the Labour Court, Gender Cases and enforcement orders may be heard in the Circuit Court.



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

ESA Section 21 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; this is unhelpful and decreases the potential for matters to be resolved by means other than litigation.

There is no provision under the legislation for a body to instigate procedures on their own behalf, there must always be an individual claimant; this does limit the potential of the Equality legislation.

c) Number of discrimination cases brought to justice

In Ireland there are no available statistics on the number of cases related to discrimination brought to justice in the civil courts. 515 cases were decided by the (then) Equality Tribunal in 2014, the most recent statistics available, (compared to 685 cases decided in 2013). 50 equality cases were decided by the Labour Court in 2014, compared to 39 in 2013.

d) Registration of discrimination cases by national courts

In Ireland discrimination cases are not registered as such by national courts.

Judgments of the High and Supreme Courts may be published, but are not always. Discrimination cases in the civil courts are not registered as such nor are data generally available to the public.

## **6.2 Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78)**

a) Engaging on behalf of victims of discrimination (representing them)

In Ireland associations, organisations, and trade unions are entitled to act on behalf of victims of discrimination, but only in the Equality Tribunal and Labour Court.

The IHREC may act on victims' behalf in the Equality Tribunal, Labour Court and civil courts.<sup>184</sup> Other bodies or associations may act on behalf of a claimant before the Equality Tribunal and Labour Court,<sup>185</sup> but are not entitled to do so in civil courts and may do so only at discretion of those civil courts.<sup>186</sup> National law does not distinguish between actions of associations on behalf and in support of victims of discrimination.

b) Engaging in support of victims of discrimination

In Ireland associations, organisations and trade unions are entitled to act in support of victims of discrimination, but only in the WRC (Equality Tribunal and Labour Court) not civil courts.

The IHREC as successor to the Equality Authority may act in support of victims in the Equality Tribunal, Labour Court (now WRC)<sup>187</sup> and civil courts. Other bodies or associations

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<sup>184</sup> Irish Human Rights and Equality Commission Act 2014 section 40(3) and (10), <http://www.irishstatutebook.ie/pdf/2014/en.act.2014.0025.pdf>.

<sup>185</sup> EEA Section 77 (11) and ESA 25A.

<sup>186</sup> Court rules <http://www.courts.ie/rules.nsf/LookupPageLink/index?OpenDocument>.

<sup>187</sup> EEA Section 67, which also refers to determinations under ESA.

may act on behalf of a claimant before the Equality Tribunal and Labour Court,<sup>188</sup> but are not entitled to do so in civil courts and may do so only at discretion of those civil courts.<sup>189</sup> National law does not distinguish between actions of associations on behalf and in support of victims of discrimination.

c) **Actio popularis**

In Ireland national law does not allow associations, organisations or trade unions to act in the public interest on their own behalf, without a specific victim to support or represent (**actio popularis**).

d) **Class action**

In Ireland national law does not allow associations, organisations or trade unions to act in the interest of more than one individual victim (**class action**) for claims arising from the same event.

### **6.3 Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78)**

In Ireland national law requires a shift of the burden of proof from the complainant to the respondent.

EEA section 85(A) 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 IHREC, 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 enforcement provisions in the Employment Equality Act 1998-2015 also govern the enforcement of the Equal Status Act 2000-2015, therefore there is now an explicit shifting of the burden of proof in these cases also, and in all grounds and all fields covered by the Directives.

### **6.4 Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)**

In Ireland there are legal measures of protection against victimisation.

EEA Section 14 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 activities.<sup>190</sup> In two instances victimisation may amount to a criminal offence: where a person procures another to do anything that could be considered victimisation or discrimination<sup>191</sup> or where the victimisation amounts to dismissal then it is an offence.<sup>192</sup> 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.

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<sup>188</sup> EEA Section 77 (11), which also refers to determinations under ESA.

<sup>189</sup> Court rules <http://www.courts.ie/rules.nsf/LookupPageLink/index?OpenDocument>.

<sup>190</sup> EEA Section 74 (2).

<sup>191</sup> EEA Section 14.

<sup>192</sup> EEA Section 98.

In *McGinn v St Anthony's BNS*<sup>193</sup> the claimant was awarded two years' salary (€ 117,362) 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. 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.

Complaints of discrimination or victimisation must be brought within six months of the most recent occurrence of the act.<sup>194</sup> This may be extended to a maximum of twelve months in certain circumstances.<sup>195</sup>

Victimisation is also prohibited in ESA Section 3(2)(j), 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, *Salmon v. Para Equestrian Ireland*<sup>196</sup> 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 these elements are established, the burden of proof shifts.

This case was appealed to the Circuit Court with the assistance of the Equality Authority, and the claimant succeeded in establishing victimisation.<sup>197</sup>

## **6.5 Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)**

- a) Applicable sanctions in cases of discrimination – in law and in practice

EEA Section 82:

EEA Section 82 provides for a broad range of remedies in both private and 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.<sup>198</sup>

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<sup>193</sup> Equality Tribunal DEC-E2004-032 <http://www.equalitytribunal.ie/en/Cases/2004/June/DEC-E2004-032-Full-Case-Report.html>.

<sup>194</sup> EEA Section 77(5).

<sup>195</sup> EEA Section 77(6)(a).

<sup>196</sup> Equality Tribunal DEC-S2004-002 <http://www.equalitytribunal.ie/en/Cases/2004/January/DEC-2004-002-Full-Case-Report.html>.

<sup>197</sup> 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/en/Publications/Annual-Reports/Annual-Report-2004.html>.

<sup>198</sup> EEA Section 30.

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.<sup>199</sup>

ESA Section 27:

ESA provides for orders for compensation, or for a certain course of action to be followed, in access to goods and services.

b) Ceiling and amount of compensation

There are maximum limits on financial awards by the Equality Tribunal and also by the Labour Court. In the context of employment the limits are a maximum of two years' pay, calculated on the basis of the complainant's weekly pay at the time the case was referred.<sup>200</sup> Where the complainant was not an employee (discriminatory interview for example) then the maximum award is € 12,697.<sup>201</sup> 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.<sup>202</sup> There is no provision for the payment of interest in cases like this.

ESA also has maximum award limits, which are linked to limits set on the jurisdiction of the District Court and the current limit is € 15,000.<sup>203</sup> 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) Assessment of the sanctions

It is difficult to say whether the sanctions are satisfactory or not. The recent increase in respect of ESA was a welcome and long overdue development. However, in considering the adequacy of sanctions on the five EU grounds, 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.<sup>204</sup> In the Circuit Court compensation for unequal pay may cover a period of a maximum of six years,<sup>205</sup> and interest may be paid on compensation in gender discrimination cases.<sup>206</sup> 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.<sup>207</sup> It is questionable whether the remedies available in the context of non-gender discrimination could generally be described as 'effective, proportionate and dissuasive' sanctions.<sup>208</sup> EEA 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.'<sup>209</sup> The potential of this remedy should not be underestimated; it has been used as a means of ensuring employers create an equal opportunities policy,<sup>210</sup> re-training of staff,<sup>211</sup> reviewing recruitment procedures.<sup>212</sup>

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<sup>199</sup> EEA Section 9.

<sup>200</sup> EEA Section 82(4).

<sup>201</sup> EEA Section 82(4).

<sup>202</sup> EEA Section 82(1)(a).

<sup>203</sup> The limit was raised with effect from 04.02.2014, [Courts and Civil Law \(Miscellaneous Provisions\) Act 2013](#).

<sup>204</sup> EEA Section 82(3).

<sup>205</sup> EEA Section 82(3)(a).

<sup>206</sup> EEA Section 82(5).

<sup>207</sup> Case C-271/91 *Marshall No. 2*, ECJ.

<sup>208</sup> Article 17 Employment Equality Directive (2000/78/EC).

<sup>209</sup> EEA Section 82(1)(e).

<sup>210</sup> *Nevin v. Plaza Hotel*, DEC-E2001-033.

<sup>211</sup> *Mr. O v. A Named Company* DEC-E2003-052.

<sup>212</sup> *Equality Authority v. Ryanair*, DEC-E2000-014.

As regards dismissal cases, the Labour Court,<sup>213</sup> and now the Equality Tribunal can make orders for re-instatement or re-engagement of the employee that can occur with or without compensation.<sup>214</sup> Unfair dismissal legislation also provides for a maximum of two years' salary or re-instatement / re-engagement.

EEA is not a criminal statute, and does not in general provide for penal sanctions for unlawful discrimination, but 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,<sup>215</sup> or where the victimisation amounts to dismissal, or the giving of a false statement in response to an IHREC inquiry,<sup>216</sup> these actions can amount to a criminal offence.

The IHREC is the only independent body permitted to instigate litigation under the Acts,<sup>217</sup> however section 82(6)(7) provides that compensation orders may not be made in favour of the Authority. The IHREC is dependent on the State for funding; this unwillingness to permit the IHREC to receive compensation stifles its ability to litigate.

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<sup>213</sup> Prior to the amendments of jurisdiction.

<sup>214</sup> EEA Section 82(2)(b).

<sup>215</sup> EEA Section 14.

<sup>216</sup> EEA Section 60(3).

<sup>217</sup> EEA Section 85.

## **7 BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43)**

- a) Body/bodies designated for the promotion of equal treatment irrespective of racial/ethnic origin according to Article 13 of the Racial Equality Directive

The Equality Authority merged with the Irish Human Rights Commission to become the Irish Human Rights and Equality Commission with the adoption of the Irish Human Rights and Equality Commission Act 2014 which came into effect on 1 November 2014.<sup>218</sup>

The IHREC is one of the two designated bodies for 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, civil status and family status.<sup>219</sup> It was established on 1 November 2014.<sup>220</sup>

The other body is the Equality Tribunal, which is now reorganised into the Workplace Relations Commission.<sup>221</sup> The Equality Tribunal still exists as such with the same name within the WRC.

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, civil status and family status.

- b) Status of the designated body/bodies – general independence

IHREC is an independent statutory body charged with protecting and promoting human rights and equality, encouraging the development of a culture of respect for human rights, equality and intercultural understanding, promoting understanding and awareness of the importance of human rights and equality, encouraging good practice in intercultural relations, promoting tolerance and acceptance of diversity and respect for the freedom and dignity of each person, and working towards the elimination of human rights abuses, discrimination and prohibited conduct by the provision of information to the public, and assisting litigants.<sup>222</sup> The 15 Commissioners including the Chief Commissioner were appointed by the President of Ireland. They come from a background of knowledge of, or experience in, human rights and equality issues relating to any of the nine protected grounds. Members serve a term of three or five years.

The Director of the Commission, on receipt of the agreement of the Members, 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 Commission's annual grant is a sum which the Minister, after consultation with the Commission, considers to be reasonably sufficient for the Commission in the performance of its functions.<sup>223</sup> The Commission with the consent of the Minister appoints its own staff, who have the status of civil servant of the state, a status which requires independence from Government. They may also be seconded from other bodies at the Commission's discretion. The Commission is independent in the performance of its functions under the

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<sup>218</sup> <http://www.irishstatutebook.ie/2014/en/act/pub/0025/print.html>.

<sup>219</sup> The Equality Tribunal is the other body.

<sup>220</sup> Irish Human Rights and Equality Commission Act (2014)

<http://www.irishstatutebook.ie/pdf/2014/en.act.2014.0025.pdf>.

<sup>221</sup> <http://www.oireachtas.ie/documents/bills28/bills/2014/7914/b7914d-memo.pdf>.

<sup>222</sup> Irish Human Rights and Equality Commission Act 2014, section 10

<http://www.irishstatutebook.ie/2014/en/act/pub/0025/sec0010.html> - sec10.

<sup>223</sup> Irish Human Rights and Equality Commission Act, section 26

<http://www.irishstatutebook.ie/2014/en/act/pub/0025/print.html> - sec26.

Act.<sup>224</sup> It must lay its strategy statement and annual report before the Oireachtas (houses of parliament). The Director is separately accountable to the parliamentary public finance committee for financial transactions and effective use of resources.

The legislation stipulates the Commission's independence in general and also states that it has the power to carry out specific functions independently (e.g. reviews, inquiries etc.). It reports to Parliament, which is favourable. On the other hand, there is no full insulation or protection of budgets from ministerial intervention. By contrast, a level of insulation is evident for other state agencies with sensitive functions (for example, the Ombudsman and the Health & Safety Authority).

c) Grounds covered by the designated body/bodies

The grounds which the designated bodies deal with are gender, age, race, religion, family status, disability, civil status, sexual orientation, membership of the Traveller community, and housing assistance.

d) Competences of the designated body/bodies – and their independent exercise

IHRECA 10(2) (c),(d),(f),(j),(p):

IHREC has the competence to provide independent assistance to victims, conduct independent surveys and publish independent reports, and issue independent recommendations on discrimination issues. The body is too new to assess whether these competences are effectively exercised in an independent manner, in practice.

EEA S 79, ESA S 25:

The Equality Tribunal (now WRC) has the competence to provide independent assistance to victims.

e) Legal standing of the designated body/bodies

In Ireland the designated body (or bodies) has standing to bring discrimination complaints (on behalf of identified victim(s)) or to intervene in legal cases concerning discrimination. IHRECA 10(2)(e) and (g) in Equality Tribunal and civil courts.

f) Quasi-judicial competences

In Ireland one of the bodies (the Equality Tribunal, now subsumed into WRC) is a quasi-judicial institution, the other (the IHREC) is not.

The WRC (Equality Tribunal) is a quasi-judicial institution. 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.<sup>225</sup> A mediated settlement agreed by the parties is binding and is enforceable by the Circuit Court.<sup>226</sup> 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.

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<sup>224</sup> Irish Human Rights and Equality Commission Act, section 9  
<http://www.irishstatutebook.ie/2014/en/act/pub/0025/print.html - sec9>.

<sup>225</sup> EEA Section 78.

<sup>226</sup> EEA Section 91(2).

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 Tribunal is statutorily required to provide in writing the reasons for its decisions all of which are made available to the public. The Equality Tribunal publishes an annual report, an annual legal review, an annual mediation review and statistics on its work.

Appeals are to the Labour Court (employment cases) and Circuit Court (equal status cases). It does not appear that these procedural rules will change according to the current reform instituting the workplace relations service.

g) Registration by the body/bodies of complaints and decisions

In Ireland the bodies register the number of complaints and decisions (by ground, field, type of discrimination, etc.). These data are available to the public.

h) Roma and Travellers

The bodies do not treat Roma and Travellers as a priority issue.



## **8 IMPLEMENTATION ISSUES**

### **8.1 Dissemination of information, dialogue with NGOs and between social partners**

The Irish Human Rights and Equality Commission is a very new body which has only been in existence since November 2014 so it is not possible to answer this question for that body as yet. The answers given relate to its predecessor the Equality Authority.

#### **Dialogue with NGOs**

Formerly it was the practice of the Equality Authority to hold regular quarterly meetings with NGOs, but for the last years prior to the setting up of the Irish Human Rights and Equality Commission no regular meetings were held.

#### **Legal protection against discrimination**

The Equality Authority as former designated body was required to 'provide information to the public' on the workings of both the Employment Equality Act 1998-2015 and the Equal Status Act 2000-2015.<sup>227</sup> The Equality Authority did not have a statutory duty to provide information to the public on Section 19 of the Intoxicating Liquor Act, 2003. Therefore, the Equality Authority did 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 nobody disseminated information about the legal protection against discrimination in licensed premises. This does not appear to be in compliance with Article 10 Directive 2000/43/EC, or Article 12 Directive 2000/78/EC.

As regards the Equality Authority's statutory duty to provide information, it published extensively in respect of all nine grounds.<sup>228</sup> The Equality Authority was empowered to prepare codes of practice in furtherance of the elimination of discrimination and the promotion of equality of opportunity.<sup>229</sup> Once the Minister approved a code of practice it became admissible in evidence for the purposes of proceedings. In drafting the codes of practice the Equality Authority was mandated to consult with such person or persons as it considered appropriate.

#### **Promotion of dialogue between social partners**

Together with the Department of Education and Science, the Equality Authority in the past built up partnerships and joint ventures, with the Irish Congress of Trade Unions and IBEC<sup>230</sup> 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 also worked with the Department of Enterprise Trade and Employment in seeking to mainstream policy and practice learning from the EQUAL projects. These partnerships included anti-racist training. A number of publications were produced.<sup>231</sup> The Irish Congress of Trade Unions also published a pack entitled 'Lesbian, Gay and Bisexual Rights in the Workplace.'<sup>232</sup>

- Situation of Roma and Travellers

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<sup>227</sup> Section 39 Employment Equality Act 1998-2015: it also provided information on The Maternity Protection Acts 1994-2004, The Adoptive Leave Acts 1995-2005 and the Parental Leave Act 1998. It was not granted the function to provide information on the access to goods and services under Intoxicating Liquor Act 2003.

<sup>228</sup> <http://www.equality.ie/en/Publications/>.

<sup>229</sup> Section 56 Employment Equality Act 1998-2015.

<sup>230</sup> Irish Business and Employer's Confederation.

<sup>231</sup> <http://www.equality.ie/en/Publications/Good-Practice-Publications/An-Action-Strategy-To-Support-Integrated-Workplaces.html>.

<sup>232</sup> [http://www.ictu.ie/download/pdf/gay\\_lesbian\\_leaflet.pdf](http://www.ictu.ie/download/pdf/gay_lesbian_leaflet.pdf).

There is currently no specific body or organ appointed on the national level to address Roma issues.

## **8.2 Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)**

### **a) Mechanisms**

The Employment Equality Act 1998-2015 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.<sup>233</sup> 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.<sup>234</sup> The legislation does not contain a mechanism aimed at a review of collective agreements, or other rules.

### **b) Rules contrary to the principle of equality**

While it is the case that discriminatory clauses are not valid, the reality is that this fact may only be established through litigation. Where 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.

Section 13 of the Employment Equality Act 1998-2015 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.

The major concern remains section 14(a)(i) of the Equal Status Act 2000-2015 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 remains subordinate to other legislative enactments.

In relation to entitlement to leave in respect of public holidays, the entitlement of an employer under the Organisation of Working Time Act, 1997 to substitute a Christian or Roman Catholic Church holiday for a public holiday may be contrary to the principle of equal treatment.<sup>235</sup>

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<sup>233</sup> EEA Section 30.

<sup>234</sup> EEA Section 9.

<sup>235</sup> Organisation of Working Time Act 1997,  
<http://www.irishstatutebook.ie/eli/1997/act/20/enacted/en/html?q=Organisation+of+Working+Time+Act&years=1997>.

## 9 COORDINATION AT NATIONAL LEVEL

The Department of Justice and Equality is responsible for dealing with or coordinating issues regarding anti-discrimination on the grounds covered.

There is currently no action plan or strategy against racism/discrimination. There was an action plan against racism from 2005-2008,<sup>236</sup> which was abolished in the budget of October 2008, at the start of austerity measures in Ireland. This had aimed to provide strategic direction to combat racism and to promote the development of a more inclusive, intercultural society in Ireland. The plan highlighted five key points to this end, namely Protection, Inclusion, Provision, Participation, and Recognition.<sup>237</sup> This action plan was intended to follow on from the 'Know Racism' campaign. The aim of this scheme was to enable organisations to raise awareness about racism and to highlight cultural diversity in Ireland. The grant scheme was organised in association with the National Consultative Committee on Racism and Interculturalism, now abolished.<sup>238</sup> The National Action Plan Against Racism was not followed by another national plan on its expiry. Instead the Government established a new Office of the Minister for Integration with a junior minister to oversee anti-racism measures.

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<sup>236</sup> National Action Plan Against Racism 2005-2008, <http://www.mie.ie/getdoc/52ce1e5a-c95d-4490-b250-da8d97ecb3bd/ActionPlan.aspx>.

<sup>237</sup> <http://www.justice.ie/en/JELR/Pages/Planning-for-Diversity>.

<sup>238</sup> This committee was established by the Department of Justice, Equality and Law Reform in 1998, the committee consisted of members of government departments, agencies and non-governmental organisations.

## **10 CURRENT BEST PRACTICES**

Positive duty on public bodies to have due regard to human rights and equality under the Irish Human Rights and Equality Commission Act.<sup>239</sup>

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<sup>239</sup> See para 5(b) Positive Action.

## 11 SENSITIVE OR CONTROVERSIAL ISSUES

### 11.1 Potential breaches of the directives (if any)

Both Acts: In a recent judgment the Supreme Court considered the interpretation of indirect discrimination for the first time, and held that statistical analysis is required in order to establish that a person belonging to a protected group is at a “particular disadvantage” compared with others.<sup>240</sup> This appears to be more restrictive than the concept of indirect discrimination in the directives.

#### Employment Equality Act 1998-2015

- Complaints about discriminatory advertisements or statements can only be brought by the IHREC (as successor to the Equality Authority), not by an individual.<sup>241</sup>
- Associations do not have standing in discrimination cases in civil courts.<sup>242</sup>
- Exclusion of “persons employed in another person’s home for the provision of personal services” from protection against discrimination in regard to access to employment.<sup>243</sup>
- Use of a hypothetical comparator is not permitted when claiming equal pay discrimination.<sup>244</sup>
- Maximum levels of compensation arguably not in compliance with directives.<sup>245</sup>
- It is not discrimination to offer a fixed term contract to a person over the compulsory retirement age for that employment.<sup>246</sup>
- It is not discriminatory to pay a disabled person a lesser rate of remuneration.<sup>247</sup>
- Not all provisions in other statutes containing discriminatory measures have been abolished.<sup>248</sup>

#### Equal Status Act 2000-2015

- Complaints must be instigated within two months of the discriminatory act, and a written notification sent to the alleged discriminator.<sup>249</sup>
- Uncertain that the scope of ESA covers all state services, such as social security, health care; also anything required to be done under another statute is not in breach of ESA.<sup>250</sup> In *Donovan v. Donnellan*, it was suggested that this could cover State services such as but the matter has to be finally determined. The impact of Section 14 of ESA may prove difficult in this regard, as it provides a broad statutory exemption to the Equal Status Act 2000-2015 where an act or action is required by virtue of another piece of legislation.
- Harassment is not defined as discrimination in ESA.<sup>251</sup>
- No information is disseminated about discrimination in access to goods and services under the Intoxicating Liquor Act 2003.
- Transfer of jurisdiction regarding discrimination in access to premises licensed for the sale of alcohol from the Equality Tribunal to the District Court under the Intoxicating

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<sup>240</sup> *Stokes v Christian Brothers High School, Clonmel*, [2015] IESC 13, <http://www.courts.ie/Judgments.nsf/597645521f07ac9a80256ef30048ca52/a09897a48211897980257df6005a3c31?OpenDocument>.

<sup>241</sup> EEA 1998 - 2011, Section 10(5). Equality Tribunal, DEC 2003-024 GTS Reprographics, and DEC E2004 - 016 Burke v FÁS.

<sup>242</sup> See para 6(2) Legal Standing and Associations.

<sup>243</sup> See para 3.2.2. Material scope, Conditions for access to employment.

<sup>244</sup> See para 3(2)(3). Labour Court, EDA 1429, Services Industrial Professional Technical Union & Annette Glass, July 2014, <https://www.workplacerelations.ie/en/Cases/2014/July/EDA1429.html>.

See para 3.2.3. Employment and working conditions, including pay and dismissals.

<sup>245</sup> See para 6.5. Sanctions and remedies.

<sup>246</sup> See para 4.7.4. (f) Retirement.

<sup>247</sup> See para 4.9 Any other exceptions.

<sup>248</sup> See para 8.2.(b) Compliance, Rules contrary to the principle of equality.

<sup>249</sup> See para 6.1.(b) Remedies and Enforcement, Barriers and other deterrents.

<sup>250</sup> See para 3.2.6. Social Protection.

<sup>251</sup> See para 2.4.1.(a) Harassment.

- Liquor Act 2003 seems to be a breach of the non-regression provisions of Article 15 of the Racial Equality Directive, due to the prohibitive cost of court proceedings.
- Clubs such as an all-male golf club can discriminate against other groups, where a club is set up to cater for the needs of a particular ground, such as gender, race or religion.<sup>252</sup>

### **11.2 Other issues of concern**

Abolition at the start of the austerity period 2008 of the body responsible for promoting integration (National Consultative Committee on Racism and Interculturalism), and of The National Action Plan Against Racism, which had provided strategic direction to combating racism and to promoting a more inclusive, intercultural society in Ireland.<sup>253</sup>

Lack of state recognition of Irish Travellers as an ethnic group.

Ireland's workplaces are becoming increasingly tough places for both immigrants and minorities, according to research from the Economic and Social Research Institute (ESRI).<sup>254</sup> The study shows that the greater levels of discrimination being seen in Ireland are more attributable to changing attitudes towards minorities rather than the effects of the recent recession. The findings are worrying:

1. Non-Irish nationals consistently report higher rates of discrimination than Irish nationals;
2. Ethnicity rather than nationality is especially important it seems – Black Africans and EU nationals of minority ethnicity are particularly likely to report greater discrimination when looking for work;
3. Most non-white ethnic groups are more likely than White Irish or other White Europeans (UK nationals for example) to report discrimination in Ireland

The report finds that discrimination between White Irish nationals and "acceptable, non-ethnic" non-nationals actually decreased between 2004 and 2010, suggesting racial prejudice rather than the recession is responsible for the trends being seen. The study suggests that between 2004 and 2010 Ireland went from being a country with little experience of immigration to one with a great deal of experience, and that employer attitudes have changed towards non-white minorities and Black Africans. Ethnic minorities are thus described as "particularly vulnerable in the Irish labour market".

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<sup>252</sup> See para 3(2)(9) Access to and supply of goods and services.

<sup>253</sup> See para 9 Coordination at national level.

<sup>254</sup> <https://static.rasset.ie/documents/news/esri-report-discrimination-in-the-labour-market.pdf>.

## 12 LATEST DEVELOPMENTS IN 2015

### 12.1 Legislative amendments

The Equality Tribunal was subsumed into the Workplace Relations Commission. The Workplace Relations Commission (WRC) was established under the **Workplace Relations Act 2015** (WRA).<sup>255</sup> It is an independent, statutory body which assumes the roles and functions previously carried out by the National Employment Rights Authority (NERA), Equality Tribunal (ET), Labour Relations Commission (LRC), Rights Commissioners Service (RCS), and the first-instance (Complaints and Referrals) functions of the Employment Appeals Tribunal (EAT).

The Workplace Relations Commission (WRC) has responsibility for

1. promoting the improvement of workplace relations, and maintenance of good workplace relations,
2. promoting and encouraging compliance with relevant enactments,
3. providing guidance in relation to compliance with codes of practice approved under Section 20 of the Workplace Relations Act 2015,
4. conducting reviews of, and monitor developments as respects, workplace relations,
5. conducting or commissioning research into matters pertaining to workplace relations,
6. providing advice, information and the findings of research conducted by the Commission to joint labour committees and joint industrial councils,
7. advising and apprising the Minister in relation to the application of, and compliance with, relevant enactments, and
8. providing information to members of the public in relation to employment.

These functions are in addition to the quasi-judicial functions of the former Equality Tribunal, which it took over by virtue of Section 84 of the WRA.

The website description of the Commission's core services does not refer to equality. They include the inspection of employment rights compliance, the provision of information, the processing of employment agency and protection of young persons (employment) licenses and the provision of mediation, conciliation, facilitation and advisory services.

The Commission has a board consisting of a chairperson and 8 ordinary members appointed by the Minister for Jobs, Enterprise and Innovation.

Although access to goods and services does not concern workplace relations, the functions of the former Equality Tribunal have been transferred to the WRC.<sup>256</sup>

The Equality (Miscellaneous Provisions) Act 2015 was adopted on 10 December 2015.<sup>257</sup> With effect from 1 January 2016, a new "housing assistance" ground has been added as a new discriminatory ground. This means that people in receipt of rent supplement, housing assistance payments or other social welfare payments can no longer be discriminated against in relation to the provision of accommodation or related services or amenities. Landlords, letting agents, and property advertisers are also prohibited from publishing or displaying advertisements which indicate an intention to discriminate on the housing assistance ground.

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<sup>255</sup> Ireland, Workplace Relations Act (2015), 20.05.2015, <http://www.irishstatutebook.ie/eli/2015/act/16/enacted/en/print>.

<sup>256</sup> Section 84 WRA.

<sup>257</sup> Ireland, Equality (Miscellaneous Provisions) Act, 2015, 10.12.2015, <http://www.irishstatutebook.ie/eli/2015/act/43/enacted/en/html>.

## 12.2 Case law

Age

**Name of the court:** Workplace Relations Commission (former Equality Tribunal)

**Date of decision:** December 2015 (exact date not given)

**Name of the parties:** Goss v Ryanair

**Reference number:** DEC-E2015-138

**Address of the webpage:**

<https://www.workplacerelations.ie/en/Cases/2015/December/DEC-E2015-138.html>

**Brief summary:** The complainant alleged that the respondent airline discriminated against him on grounds of age when they wrote to him in April 2013 informing him that he was to be retired in October 2013 upon reaching the age of 60. The respondent's policy was at variance with the Irish Aviation Authority's policy known as JAR/FCL060 which came into operation on the 1st July 1999 which increased the maximum age for licensed pilots to 65. The complainant's contract of employment, letters of appointment and employee handbook were all silent on the issue of retirement age. The respondent's pension scheme, of which the complainant was a member, allowed him to draw down his pension at the age of 60. The complaint failed. The WRC found that there was no requirement on an employer in the Irish Employment Equality Act to objectively justify a mandatory retirement age. It said: "I must conclude that in light of the fact that Section 34 (4) (of the EEA) specifically provides for the setting of different retirement ages, and despite many amendments, the Act is still silent in relation to the requirements as set out in Article 6 (of Directive 2000/78), that the respondent, in the case of the complainant, was entitled to set a mandatory retirement age of 60 without the need to objectively justify that decision. I further conclude that even if the Directive places an obligation on State bodies to objectively justify its decision to set mandatory retirement ages, the directive does not place any such obligation on a private company."

Disability

**Name of the court:** Labour Court

**Date of decision:** 23 November 2015

**Name of the parties:** Michal Wojcik and Sodexo Ireland Ltd

**Reference number:** EDA1517

**Address of the webpage:**

<https://www.workplacerelations.ie/en/Cases/2015/November/EDA1517.html>

**Brief summary:** This case concerned discrimination on the disability ground, failure to provide reasonable accommodation, and reasonable accommodation duty as a free standing cause of action. Although the complainant's claim of discrimination on the ground of disability was not upheld in this case, the court clarified that the requirement to provide reasonable accommodation is a specific cause of action. This was not the case prior to the 2004 amendments of the Irish Equality Acts and had never been explicitly addressed since, apart from obiter comments in previous court determinations.

**Name of the court:** High Court

**Date of decision:** 11 December 2015

**Name of the parties:** *Nano Nagle School v Marie Daly*

**Reference number:** [2015] IEHC 785

**Address of the webpage:**

<http://www.courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/86867f31d053511280257f30005c002f?OpenDocument>

**Brief summary:** The complainant was employed as a special need assistant (SNA) in a school for children with special needs. Following an accident, she was paralysed from the waist down and became a wheelchair-user. The school assessed her fitness to carry out her employment duties. It identified various categories of duties which the complainant would be expected to perform as part of her role as SNA and concluded that due to her



disability, the complainant would be capable of fulfilling 9 out of the 16 categories. The school wrote to the complainant advising her that she was not medically fit for the position of SNA in the school and effectively dismissing her. The complainant did not claim discriminatory dismissal but claimed that the school had failed to provide reasonable accommodation of her disability under s 16 of the EEA.

The High Court upheld the Labour Court's decision in favour of the complainant, finding that the school had wrongly interpreted s. 16 to mean that unless it was in a position to put steps in place to enable the complainant to do the entirety of her job, as opposed to merely the essential duties, it owed no further obligation to her. The Labour Court held that this interpretation was incorrect. The school never properly engaged with the concept of adapting the job in light of the complainant's disability. It had a duty to duly consider the possibility of a reorganisation of work and a redistribution of tasks amongst the SNAs so as to relieve the complainant of those duties that she was unable to perform. The court was satisfied that the school did not give any real consideration to these possibilities. Had it done so, it might or might not have concluded that they were viable, reasonable and proportionate. The court upheld the earlier award of € 40,000 in damages to the complainant.

Race or ethnic origin

**Name of the court:** Equality Tribunal

**Date of decision:** 6 February 2015

**Name of the parties:** Ms. A (on behalf of her daughter, B) -v- A Girls Secondary School

**Reference number:** DEC-S2015-001.html

**Address of the webpage:**

<https://www.workplacerelations.ie:443/en/Cases/2015/February/DEC-S2015-001.html>

**Brief summary:** This case concerned a claim that a school's admissions policy indirectly discriminated against the applicant's daughter on grounds of race. The child was an adopted daughter of foreign origin and the admissions policy was that offers were made in accordance with an applicant's date of application. The claimant's case was that she was unable to make an early application due to the fact that her daughter was born in China and then adopted before being brought to Ireland, whereas other applicant's could have their name placed on the list on birth. The Tribunal was satisfied that the complainant had established a prima facie case of indirect discrimination on the ground of race which the respondent must rebut. It subsequently found that the aim of the policy was legitimate, namely to have a fair and reasonable admissions policy, but that the respondent had not proved that this criterion is objectively justified by a legitimate aim and is appropriate and necessary. It ordered the school to provide a place for the applicant's child, to review its admissions policy to ensure that it did not indirectly discriminate against applicants on the grounds of race, and to pay to the complainant the sum of € 3,000 to compensate her for the effects of the discriminatory treatment experienced by her.

Traveller community

**Name of the court:** Supreme Court

**Date of decision:** 24 February 2015

**Name of the parties:** Stokes v Christian Brothers High School Clonmel

**Reference number:** [2015] IESC 13

**Address of the webpage:**

<http://www.courts.ie/Judgments.nsf/597645521f07ac9a80256ef30048ca52/a09897a48211897980257df6005a3c31?OpenDocument>

**Brief summary:** In the original case the Equality Tribunal had held that a common school admissions policy was indirectly discriminatory against members of the Traveller community, and the case had been appealed to successively higher courts. In a final decision on the case, the Supreme Court upheld the school's admission policy, and for the first time considered the definition of indirect discrimination under the equality legislation.

Problematically, the Supreme Court set an onerous evidential barrier for indirect discrimination. In order to decide whether a protected category had suffered a particular disadvantage the extent of that disadvantage must be “significant or appreciable”. To determine such a disadvantage in this case, a statistical calculation of the figures of applicants to the school over a number of years was required, and an assessment of the effect of that rule on the *relevant members* of the Traveller Community. It held that national statistics indicating educational completion rates of members of the Traveller Community were not sufficient to indicate “particular disadvantage”. Instead what was required were statistics covering members of that community specific to the local area. This is an onerous barrier for any potential litigant, and it is doubtful whether such statistics even exist. The availability of statistics on grounds such as sexual orientation or disability would be even harder to acquire. The Supreme courts notably failed to consider the provisions of the Equal Status Act in the light of the EU directives which it transposes, and failed to consider CJEU jurisprudence on indirect discrimination. The interpretation of indirect discrimination in this case is likely now to be the standard for all claims of indirect discrimination in access to goods and services, and also likely to apply to cases of indirect discrimination in employment.

There is currently no information available on cases taken in relation to Travellers and Roma in 2015.

## ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Please list below the **main transposition and anti-discrimination legislation** at both federal and federated/provincial level.

**Country: Ireland**

**Date: 31 December 2015**

<b>Title of legislation (including amending legislation)</b>	Title of the law: Employment Equality Act 1998-2015 Abbreviation: EEA Date of adoption: 18.6.1998 Latest amendments: 10.12.2015 Entry into force: 18.10.1999 Web link: <a href="http://www.justice.ie/en/JELR/EmpEqActsConsldtd.pdf/Files/EmpEqActsConsldtd.pdf">http://www.justice.ie/en/JELR/EmpEqActsConsldtd.pdf/Files/EmpEqActsConsldtd.pdf</a> Grounds covered: Gender, Age, Race, Religion, Family Status, Disability, Civil Status, Sexual Orientation, membership of the Traveller Community, housing assistance, Housing assistance
	Civil/administrative/criminal law: Civil
	Material scope: public employment, private employment, access to goods or services (including housing), social protection, social advantages, education.
	Principal content: prohibition of direct and indirect discrimination, harassment, instruction to discriminate or creation of a specialised body
<b>Title of legislation (including amending legislation)</b>	Title of the law: Equal Status Act 2000-2015 Abbreviation: ESA Date of adoption: 26.4.2000 Latest amendments: 10.12.2015 Entry into force: 10.12.2015 Web link: <a href="http://www.justice.ie/en/JELR/EqualStatusActsConsldtd_00_04.pdf/Files/EqualStatusActsConsldtd_00_04.pdf">http://www.justice.ie/en/JELR/EqualStatusActsConsldtd_00_04.pdf/Files/EqualStatusActsConsldtd_00_04.pdf</a> Grounds covered: Gender, age, race, religion, family status, disability, civil status, Sexual Orientation, membership of the Traveller Community, housing assistance, Housing assistance
	Civil/administrative/criminal law: Civil
	Material scope: public employment, private employment, access to goods or services (including housing), social protection, social advantages, education.
	Principal content: prohibition of direct and indirect discrimination, harassment, instruction to discriminate or creation of a specialised body
<b>Title of legislation (including amending legislation)</b>	Material scope: Public and private employment with certain exceptions Title of the law: Pensions Act 1990-2015 Abbreviation: PA Date of adoption: 24.7.1990 Latest amendments: 10.12.2015 Entry into force: 21.12.1990 Web link: <a href="http://www.irishstatutebook.ie/pdf/2012/en.act.2012.0012.pdf">http://www.irishstatutebook.ie/pdf/2012/en.act.2012.0012.pdf</a> Grounds covered: Gender, age, race, religion, family status, disability, civil status, Sexual Orientation, membership of the Traveller Community, housing assistance, Housing assistance
	Civil/administrative/criminal law: Civil
	Material scope: Pensions including occupational pensions
	Principal content: Pension provisions and prohibition on discrimination

## ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

**Country: Ireland**

**Date: 31 December 2015**

<b>Instrument</b>	<b>Date of signature (if not signed please indicate) Dd/mm/Yyyy</b>	<b>Date of ratification (if not ratified please indicate) Dd/mm/Yyyy</b>	<b>Derogations/ reservations relevant to equality and non- discrimination</b>	<b>Right of individual petition accepted?</b>	<b>Can this instrument be directly relied upon in domestic courts by individuals?</b>
European Convention on Human Rights (ECHR)	04.11.1950	25.02.1953	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 (international NGOs only)	No
International Covenant on Civil and Political Rights	01.10.1973	08.12.1989	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	01.02.1995	07.05.1999	No	N/A	No
International Covenant on Economic, Social and Cultural Rights	1.10.1973	8.12.1989	Article 2, paragraph 2 promote use of the Irish language - knowledge of Irish for	N/A	No

<b>Instrument</b>	<b>Date of signature (if not signed please indicate) Dd/mm/Yyyy</b>	<b>Date of ratification (if not ratified please indicate) Dd/mm/yyyy</b>	<b>Derogations/ reservations relevant to equality and non- discrimination</b>	<b>Right of individual petition accepted?</b>	<b>Can this instrument be directly relied upon in domestic courts by individuals?</b>
			certain occupations.		
Convention on the Elimination of All Forms of Racial Discrimination	21.03.1968	29.12.2000	No	Yes	No
Convention on the Elimination of Discrimination Against Women	23.12.1985	23.12.1985	No	Yes	No
ILO Convention No. 111 on Discrimination	Signed (no dates available)	22.04.1999	No	No	No
Convention on the Rights of the Child	30.09.1990	28.9.1992	No	N/A	No
Convention on the Rights of Persons with Disabilities	30.03.2007	No	No	N/A	No

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