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Country report

Gender equality



Ireland
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Country report

Gender equality

How are EU rules transposed into
national law?

Ireland

Frances Meenan

Reporting period 1 January 2014 – 1 July 2015

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1. Introduction

1.1 Basic structure of the national legal system

Irish law consists of a written Constitution¹. The Government in Ireland is divided between a legislature, executive and judiciary. The national legislature (the Oireachtas) comprises the President of Ireland and two houses namely the upper chamber Seanad Éireann and the lower house Dáil Éireann. The judicial system² comprises courts of first instance and courts of appeal. The courts of first instance comprise the High Court, the Circuit Court and the District Court. There is also the Court of Appeal and the Supreme Court (which in the main deals with constitutional cases and matters of public importance). There are also criminal courts to include the Central Criminal Court and a Special Criminal Court.

Most employment and equality disputes are dealt with by adjudication bodies specifically legislated to determine employment and equality disputes. From 1 October 2015, all employment and equality claims will be heard by an adjudication officer of the Workplace Relations Commission. Decisions of an adjudication officer may be appealed to the Labour Court and may be appealed on a point of law only to the High Court.³

Sources of Irish law comprise EU law, constitutional law, legislation and the common law.

1.2 List of main legislation transposing and implementing Directives

All Acts from 1922-2015 and statutory instruments (from 1922-2015) are available on <http://www.irishstatutebook.ie/home.html>.

Consolidated employment legislation is available on www.westlaw.ie, a commercial service.

- The Employment Equality Act 1998 (in effect 18 October 1998) as amended by the Equality Act 2004 (in effect 18 July 2004), the Civil Law (Miscellaneous Provisions) Act 2008, the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, and the Civil Law (Miscellaneous Provisions) Act 2011 (the Employment Equality Acts 1998-2011);
- The Equal Status Act 2000 (in effect 25 October 2000), as amended by the Intoxicating Liquor Act 2003, the Equality Act 2004 (in effect 18 July 2004), the Civil Law (Miscellaneous Provisions) Act 2008, the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, Civil Law (Miscellaneous Provisions) Act 2011, and the Equal Status (Amendment) Act 2012 (Equal Status Acts 2000-2012);
- The Irish Human Rights and Equality Act 2014;
- The Maternity Protection of Employees Act 1994, as amended by the Maternity Protection of Employees (Amendment) Act 2004 (in effect 18 October 2004) (the Maternity Protection Acts 1994 and 2004), and as amended by the Maternity Protection Act 1994 (Extension of Periods of Leave) Order 2006 (SI No. 51 of 2006);
- The Adoptive Leave Act 1995 (in effect 20 March 1995) as amended by the Adoptive Leave Act 2005 (the Adoptive Leave Acts 1995 and 2005) and as

¹ *Bunreacht na hÉireann* (Constitution of Ireland) 1937.

² Articles 34-37 of the Constitution.

³ The Workplace Relations Act 2015 set up this new adjudication system. In this paper, there is reference to the Equality Tribunal; this body will be dissolved when all claims initiated prior to 1 October 2015 have been heard. There are some other more minor procedural issues, for example, a decision of an adjudication officer under the Equal Status Act 2000 is appealed to the Circuit Court.

- amended by the Adoptive Leave Act 1995 (Extension of Periods of Leave) Order 2006 (SI No. 52 of 2006);
- The Parental Leave Act 1998 (in effect 3 December 1998) as amended by the Parental Leave (Amendment) Act 2006 (in effect 18 May 2006) as amended by the Civil Law (Miscellaneous Provisions) Act 2008 and the European Union (Parental Leave) Regulations 2013 SI No. 81 of 2013 (Parental Leave Acts 1998-2006);
 - The Social Welfare (Consolidation) Act 2005 (as amended);
 - The Pensions Act 1990 (equal treatment provisions in effect 1 January 1993) replaced by the Social Welfare (Miscellaneous Provisions) Act 2004 (and as amended) (Pensions Acts 1990-2013);
 - The Carer's Leave Act 2001 (as amended);
 - The Employment Equality Act (Code of Practice) (Harassment) 2012, SI No. 208 of 2012;
 - The Irish Human Rights and Equality Commission Act 2014;
 - The Workplace Relations Act 2015 (commenced 1 October 2015).

2. General legal framework

2.1 Constitution

2.1.1 Does your national Constitution prohibit sex discrimination?

Yes. Articles 40 and 45 of the Constitution of Ireland 1937 prohibit sex discrimination.

The Irish Constitution of 1937 forbids any exclusion by reason of sex from Irish nationality and citizenship. Article 40 states that 'all citizens shall, as human persons, be held equal before the law' and proceeds to allow the State, in its enactments, to 'have due regard to differences of capacity, physical and moral, and of social function.' Article 45 provides that all citizens, 'men and women equally,' have the right to 'an adequate means of livelihood,' and directs the State to ensure that they may 'through their occupations find the means of making reasonable provision for their domestic needs.'

2.1.2 Does the Constitution contain other Articles pertaining to equality between men and women?

No.

2.1.3 Can the Article(s) mentioned in the two previous questions be invoked in horizontal relations (between private parties)?

No.

2.2 Equal treatment legislation

2.2.1 Does your country have specific equal treatment legislation?

Yes.

The Employment Equality Acts 1998-2015 are concerned with matters in relation to employment, the Equal Status Acts 2000-2015 are concerned with the provision of goods and services, the Pensions Acts 1990-2014 are concerned with pensions. The Irish Human Rights and Equality Commission Act 2014 established the Irish Human Rights and Equality Commission to inter alia provide information to the public and keep under review the effectiveness of the equality and human rights legislation.

The Employment Equality Acts⁴, the Equal Status Acts⁵ and the Pensions Acts⁶ provide for the following discriminatory grounds namely gender, civil status, family status, age, religion, disability, sexual orientation and being a member of the traveller community.

⁴ Section 6 of the Employment Equality Act 1998 (as amended).

⁵ Section 3 of the Equal Status Act 2000 (as amended).

⁶ Section 66 of the Pensions Act 1990 as amended by the Social Welfare (Miscellaneous Provisions) Act 2004 (as amended).

3. Implementation of central concepts

3.1 Sex/gender/transgender

3.1.1 Are the terms gender/sex defined in your national legislation?

No.

3.1.2 Is discrimination due to gender reassignment explicitly prohibited in your national legislation?

No. Whilst discrimination due to gender reassignment is not explicitly prohibited in the Employment Equality Act 1998 (as amended), the Equality Tribunal has decided that the gender ground protects transgender persons from sex discrimination.⁷ The Gender Recognition Act 2015 provides for gender recognition certificates and the subsequent amendment of the Register of Births, Marriages and Deaths.

3.2 Direct sex discrimination

3.2.1 Is direct sex discrimination explicitly prohibited in national legislation?

Yes, in Section 6 of the Employment Equality Act 1998 (as amended).

Direct discrimination is defined in national legislation:

'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 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) exists,

(ii) existed but no longer exists,

(iii) may exist in the future, or

(iv) is imputed to the person concerned,

(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, and

(ii) similar treatment of that other person on any of the discriminatory grounds would, by virtue of paragraph (a), constitute discrimination.

(2) As between any 2 persons, the discriminatory grounds (and the descriptions of those grounds for the purposes of this Act) are—

(a) that one is a woman and the other is a man (in this Act referred to as "the gender ground"), ...'

Section 21 of the Employment Equality Act 1998 provides that an equality clause is implied in the contract of employment.

This definition in my view complies with the EU definition.

3.2.2 Are pregnancy and maternity discrimination explicitly prohibited in legislation as forms of direct sex discrimination?

⁷ *Hannon v First Direct Logistics Ltd.* DEC – E2011-66.

Yes. Section 6 (2A) of the Employment Equality Act 1998 (as amended). In addition, it is a statutory unfair dismissal if an employee is dismissed by reason of her pregnancy (or matters connected therewith) under the Unfair Dismissals Acts 1977-2011 (this is in addition to a discriminatory dismissal under the Employment Equality Acts 1998-2011). Furthermore, if an employer refuses to re-employ an employee in their employment (or in suitable alternative employment if their contractual employment no longer exists) following maternity, adoptive, parental or carer's leave it is an unfair dismissal under the Maternity Protection Acts 1994-2004, the Adoptive Leave Acts 1995-2005, the Parental Leave Acts 1998-2006 or the Carer's Leave Act 2001, as the case may be.

The provision complies with Article 2(2)(c) of Directive 2006/54.

3.2.3 Are there specific difficulties in your country in applying the concept of direct sex discrimination? If so, please explain these difficulties, with reference to legislation and/or (national) case law if relevant

No.

3.3 Indirect sex discrimination

3.3.1 Is indirect sex discrimination explicitly prohibited in national legislation?

Yes. Section 19 Employment Equality Act 1998 (as amended) provides that there cannot be indirect discrimination in respect of remuneration and section 22 of the same Act provides that there cannot be indirect discrimination in relation to equal treatment.

Indirect discrimination is prohibited in respect of remuneration and equal treatment.⁸ Section 19(4) (remuneration) provides:

'(a) Indirect discrimination occurs where an apparently neutral provision would put persons of a particular gender (being As or Bs) at a particular disadvantage in respect of remuneration compared with other employees of their employer. (b) Where paragraph (a) applies, the persons referred to in that paragraph shall each be treated for the purposes of subsection (1) as complying or, as the case may be, not complying with the provision concerned, whichever results in the higher remuneration, unless the provision is objectively justified by a legitimate aim and the means of achieving the aim are appropriate and necessary. (c) In any proceedings statistics are admissible for the purpose of determining whether this subsection applies in relation to A or B.' Section 19(5) provides 'Subject to subsection (4), nothing in this Part shall prevent an employer from paying on grounds other than the gender ground, different rates of remuneration to different employees.'

Section 22(1) (equal treatment) provides:

'(a) Indirect discrimination occurs where an apparently neutral provision would put persons of a particular gender (being As or Bs) at a particular disadvantage in respect of any matter other than remuneration compared with other employees of their employer. (b) Where paragraph (a) applies, the employer shall be treated for the purposes of this Act as discriminating against each of the persons referred to (including A or B) unless the provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. (c) In any proceedings statistics are admissible for the purpose of determining whether subsection (1) applies in relation to A or B'.

⁸ Sections 19 and 22 of the Employment Equality Act 1998 (as amended) by sections 8 and 9 respectively of the Equality (Miscellaneous Provisions) Act 2015.

The wording as set out in sections 19 and 22 above was not fully compliant with the definition in article 2(1)(b) of Directive 2006/54. This lacuna will be rectified by the Equality (Miscellaneous Provisions) Act 2015 where the definitions will be amended by the substitution of 'apparently neutral provision *would put*' for apparently neutral provision puts'.⁹ Some years ago the Labour Court observed in *Department of Justice, Equality and Law Reform v Civil Public and Services Union*¹⁰ that the definition of 'indirect discrimination' in respect of equal pay did not fully comply with the definition of that concept in Directive 97/80 and noted that if there is a conflict between national law and Community law then Community law shall prevail. This case arose from equal pay proceedings by clerical officers in the Department of Justice, Equality and Law Reform who were assigned to work as clerical officers in the police force.¹¹ The comparators were members of the police force who were assigned to carry out clerical duties. The Labour Court observed that the definition of 'indirect discrimination' in the Employment Equality Act 1998 and the amending Equality Act 2004 did not comply with the definition in Directive 97/80. In the interim article 2(1)(b) of Directive 2006/54 provided a definition of 'indirect discrimination'. The Court went on to adopt the test for 'objective justification' utilised in *Barton v Investec Henderson Crosthwaite Securities Ltd.*¹² namely '(1) that there were objective reasons for the difference; (2) unrelated to sex; (3) corresponding to a real need on the part of the undertaking; (4) appropriate to achieving the objective pursued; (5) it was necessary to that end; (6) that the difference conformed to the principle of proportionality; (7) that was the case throughout the period during which the differential existed.'

3.3.2 Is statistical evidence used in your country in order to establish a presumption of indirect sex discrimination? Please provide some examples of cases, if available.

Yes. Section 22(1)(c) of the Employment Equality Act 1998 (as amended) provides that statistics are admissible in indirect discrimination proceedings. *King v Minister for Finance*,¹³ *The Nationalist & Leinster Times Ltd. v Ashmore*¹⁴ and *Inoue v NBK Designs Ltd.*¹⁵

3.3.3 Is in your view the objective justification test applied correctly by national courts? Please provide some examples of cases, if available.

Yes. In *Inoue v NBK Designs Ltd.*,¹⁶ the Labour Court was satisfied that the dismissal of a part-time/job-sharing secretary who was a female lone parent with a child attending school was indirect discrimination following on the employer's decision to amalgamate the position into a full-time post. The questions asked were: whether the need to work full-time corresponds to a real need on the part of the employer? Were the means chosen appropriate? Was the method chosen appropriate to meet the end in view? The Labour Court was satisfied that the impugned requirement (i.e. to work full time) was not necessary and appropriate and cannot be justified by objective factors unrelated to the claimant's sex.

⁹ Sections 8 and 9 of the Equality (Miscellaneous Provisions) Act 2015 which will commence on 1 January 2016.

¹⁰ [2008] ELR 140; this determination was referred to the CJEU *sub nom. Kenny v Minister for Justice, Equality and Law Reform* Case C-427/11.

¹¹ *An Garda Síochána*.

¹² [2003] IRLR 332.

¹³ [2010] IEHC 307 and

¹⁴ EDA 3/2013 (Labour Court).

¹⁵ DEE 12/2002; [2003] ELR 98 (Labour Court).

¹⁶ DEE 12/2002; [2003] ELR 98 (Labour Court) applying *Bilka-Kaufhaus GmbH* Case C-170/84.

3.3.4 Are there specific difficulties in your country in applying the concept of indirect sex discrimination? If so, please explain these difficulties, with reference to legislation and/or (national) case law if relevant.

No.

3.4 Multiple discrimination and intersectional discrimination

3.4.1 Is multiple discrimination – i.e. discrimination based on two or more grounds simultaneously – and/or intersectional discrimination – i.e. discrimination resulting from the interaction of grounds of discrimination which interact to produce a new and different type of discrimination – explicitly addressed in national legislation?

Yes. Section 6 of the Employment Equality Act 1998 (as amended) and Pensions Acts 1990-2011.

There are nine grounds of discrimination in the legislation and a prospective claimant may bring proceedings on one or more grounds of discrimination. However, the legislation provides that in practice those who claim discrimination on a particular ground must compare themselves with somebody else on the same ground, e.g., two persons of the opposite sex so that one is a man and the other is a woman. There is no 'compound' discrimination where each ground adds to the other ground. Each ground is a separate case which must be pleaded and defended.

It is important to note that even if a claimant succeeds on more than one ground of discrimination, the maximum award can only be two years' remuneration (i.e. the same ceiling as if a claimant was successful on one ground).

3.4.2 Is there any case law that addresses multiple discrimination and/or intersectional discrimination (where gender is one of the grounds at stake)?

Yes. In *Lawless v Eurozone Investment Options Ltd.*,¹⁷ the Equality Tribunal confirmed that each ground had to be considered separately. In *Freeman v Superquinn*,¹⁸ the Labour Court on appeal overturned a recommendation where it considered that an equality officer dealt with the three grounds of discrimination of marital status (now civil status), family status and age as one issue.

The cases do not raise a concern but there is the issue that each ground stands on its own merits and likewise even if a claimant succeeds on more than one ground the compensation will still be as if they succeeded on only one ground.

3.5 Positive action

3.5.1 Is positive action explicitly allowed in national legislation?

Yes. Section 24 of the Employment Equality Act 1998 (as amended) provides for certain limited positive action.

'24 (1) This Act is without prejudice to any measures –

- (a) maintained or adopted with a view to ensuring full equality in practice between men and women in their employments, and
- (b) providing for specific advantages so as –

¹⁷ E/2007/101 (Equality Tribunal).

¹⁸ DEC-E/2002/13 (Labour Court).

- (i) to make it easier for an under-represented sex to pursue a vocational activity, or
- (ii) to prevent or compensate for disadvantages in professional careers.'

It is considered that this definition complies with the said Article. In addition to this provision the Electoral (Amendment) (Political Funding) Act 2012¹⁹ provides that state funding of political parties for the next general election (as of now no later than spring 2016) is dependent on the political party having no less than 30 % female candidates in the general election.

3.5.2 Are there specific difficulties in your country in relation to positive action? If so, please explain these difficulties, with reference to legislation and/or (national) case law if relevant.

As of November 2015, there are no difficulties but there has been considerable discourse about gender quotas and positive discrimination in relation to numbers of female candidates in the next general election to be held in the spring of 2016. It should be noted that if a political party fails to have at least 30 % of its candidates being female then there will be a severe reduction in state funding in the next parliamentary term.

3.5.3 Has your country adopted measures that aim to improve the gender balance in company boards?

Yes but only in relation to state or semi-state boards, for example commercial semi-state companies. By background, company law adopts 'a relatively hands-off approach in relation to the procedures for appointing directors.'²⁰ The reason is that historically the appointment of directors was seen as an internal company matter and, secondly, company law provides for rules in the form of model articles (Articles of Association or the constitution of the company) which can be adapted or departed from by companies at their discretion. The reason for such a lack of procedures is because of the different types of company, for example, as to whether the company is owner managed, the types of persons who can be appointed and so on. Therefore, shareholders have considerable flexibility in choosing appointment procedures. The Companies Act 2014 does not prescribe which organ of the company is to be entrusted with the appointment of directors. The appointment of directors is an accepted function of the shareholders in general meeting and the members have the power to appoint directors.

In the case of state/semi-state companies set up by statute, the relevant Minister appoints the directors. The relevant statute more usually provides that there should be a gender balance on the board (see earlier report on equality and company boards where there is a full list of Irish statutes setting out equality requirements). Since February 2015, the state Public Appointment Service manages the recruitment process for members of state boards. On its website, there is a full breakdown of candidates applying, male, female etc.²¹

The Worker Participation (State Enterprises) Acts 1977 provides for employee participation at board level in certain semi-state companies. The legislation provides for election to the board among employees. In addition, the Worker Participation (State Enterprises) Amendment Act 1998 provided for sub-board level participation in certain semi-State companies and organisations; again that is provided for by election to the

¹⁹ <http://www.irishstatutebook.ie/eli/2012/act/36/enacted/en/print.html>. Accessed 10 November 2015. It should be noted that as of 9 November 2015, the said legislation is being challenged on the basis that it is not in compliance with the Constitution of Ireland.

²⁰ Ahern, D. (2009), *Directors' Duties – Law and Practice*, Round Hall, Dublin, at paragraph 1-49.

²¹ <http://www.stateboards.ie/stateboards/>. Accessed 10 November 2015.

sub-board. Obviously in both situations men and women can seek election to the relevant board.

An employee can be an executive director, e.g. a managing director of a company. Such a person would be an employee working under a contract of service in addition to being a member of the board as approved by shareholders in general meeting. Such employee's original employment and recruitment would be subject to the Employment Equality Acts 1998-2014.

The relevant line Minister appoints the members of the relevant board of a commercial semi-state company and ensures that there is a gender balance on the board (see above). The Programme for Government in 2011 provided that at least 40 % of persons on state boards should be women.²² To this end various pieces of legislation setting up state boards and committees in recent years have contained provisions requiring appointments to have either a set minimum number of male and female members or to have as far as reasonably practicable an equitable balance between women and men.²³

However, there are no proposals for gender balance in respect of companies generally.

There are various women's groups promoting gender balance on company boards.²⁴

3.5.4 Has your country adopted other positive action measures to improve the gender balance in some fields, e.g. in political candidate lists or political bodies? If so, please describe these measures.

The Electoral (Amendment) (Political Funding) Act 2012 provides that in order to obtain state funding in the next parliamentary term for a political party the said party must have at least 30 % women as candidates in the next general election (spring 2016).²⁵

3.6 Harassment and sexual harassment

3.6.1 Is harassment explicitly prohibited in national legislation?

Yes. Section 14A of the Employment Equality Act 1998 (as amended).

Section 14A (7) (a) (i):

'Harassment' is defined as 'any form of unwanted conduct related to any of the discriminatory grounds, and

(b) Being conduct which in either case has the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person.

(c) Without prejudice to the generality of paragraph (a), such unwanted conduct may consist of acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material.'

This definition in my view complies with the EU definition found in Article 2(1)(c) of Directive 2006/54.

²² http://www.taoiseach.gov.ie/eng/Work_Of_The_Department/Programme_for_Government accessed 21 December 2015.

²³ Such legislation includes for example s. 12 of the Inland Fisheries Act 2010; s. 98 of the Adoption Act 2010; Schedule 1 Art. 4 of the Charities Act 2009; s. 8 of the Broadcasting Act 2009; s. 19 of the National Asset Management Agency Act 2009.

²⁴ E.g. The 30 % Club <http://30percentclub.org/about/chapters/ireland>. Accessed 10 November 2015.

²⁵ <http://www.irishstatutebook.ie/eli/2012/act/36/enacted/en/html>. Accessed 10 November 2015.

3.6.2 Does the definition of harassment cover a broader scope than employment in your country? If so, please specify the scope.

Yes the Equal Status Act 2000 (as amended) provides that there cannot be harassment or sexual harassment in respect of the provision of goods and services.

3.6.3 Is sexual harassment explicitly prohibited in national legislation?

Yes. Section 14A of the Employment Equality Act 1998 (as amended).

Section 7 (a) (ii) provides that

'(ii) references to sexual harassment are to any form of verbal, non-verbal or physical conduct of a sexual nature,
(b) being conduct which in either case has the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person.
(c) Without prejudice to the generality of paragraph (a), such unwanted conduct may consist of acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material.'

This definition in my view complies with the EU definition in Article 2(1)(d) of Directive 2006/54.

3.6.4 Does the definition of sexual harassment cover a broader scope than employment in your country? If so, please specify the scope.

No but there is also a definition of 'sexual harassment' in respect of the provision of goods and services in s. 11 of the Equal Status Act 2000 (as amended).

3.6.5 Does national legislation specify that harassment and sexual harassment as well as any less favourable treatment based on the person's rejection of or submission to such conduct amounts to discrimination (see Article 2(2)(a) of Directive 2006/54)?

Yes.

3.7 Instruction to discriminate

3.7.1 Is an instruction to discriminate explicitly prohibited in national legislation?²⁶

Yes. Section 14 of the Employment Equality Act 1998.

Section 14 provides that a person who procures or attempts to procure another person to do anything which constitutes discrimination which is unlawful under the Act or constitutes victimisation shall be guilty of an offence.

3.7.2 Are there specific difficulties in your country in relation to the concept of instruction to discriminate? If so, please explain these difficulties, with reference to legislation and/or (national) case law if relevant.

No.

3.7.3 Is incitement to discrimination explicitly prohibited in your country?

²⁶ See Article 2(2)(b) of Directive 2006/54.

No.

3.8 Other forms of discrimination

Are any other forms of discrimination prohibited in national law, such as discrimination by association or assumed discrimination?

Yes. Section 6 of the Employment Equality Act 1998 (as amended):

'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 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) exists,

(ii) existed but no longer exists,

(iii) may exist in the future, or

(iv) is imputed to the person concerned,

(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, and

(ii) similar treatment of that other person on any of the discriminatory grounds would, by virtue of paragraph (a), constitute discrimination.

(2) As between any 2 persons, the discriminatory grounds (and the descriptions of those grounds for the purposes of this Act) are—

(a) that one is a woman and the other is a man (in this Act referred to as "the gender ground"),'

This is clearly a broad definition of 'discrimination'.

4. Equal pay and equal treatment at work (Article 157 TFEU and Recast Directive 2006/54)

4.1 Equal pay

4.1.1 Is the principle of equal pay for equal work or work of equal value implemented in national legislation?

Yes. Section 7 of the Employment Equality Act 1998 provides that two persons are employed to do 'like work' if: (a) both perform the same work under the same or similar conditions or each is interchangeable with the other in relation to the work; or (b) the work performed by one is similar in nature to that performed by the other employee or if the conditions under which it is performed by each are of small importance in relation to the work as a whole or occur with such irregularity as not to be significant to the work as a whole; or (c) the work performed by one is equal in value to the work performed by the other, having regard to such matters as skill, physical or mental requirements, responsibility and working conditions. In the event that a 'primary worker' receives less remuneration than another worker ('the comparator') and the work performed by the primary worker is greater in value to that performed by the comparator, the work shall be regarded as equal in value to the work performed by the comparator. A claimant for equal pay must have a comparator of the opposite sex.

Section 19 of the Employment Equality Act 1998 (as amended)

4.1.2 Is the concept of pay defined in national legislation?

Yes. Section 2 of the Employment Equality Act 1998 (as amended).

'Remuneration' is defined as 'in relation to an employee, does not include pension rights but, subject to that, includes any consideration, whether in cash or in kind, which the employee receives, directly or indirectly, from the employer in respect of the employment.'

Equal treatment in respect of occupational benefit schemes is regulated by Part VII of the Pensions Act 1990 as inserted by the Social Welfare (Miscellaneous Provisions) Act 2004.

This definition complies with the definition of Article 157(2) TFEU.

4.1.3 Does national law explicitly implement Article 4 of Recast Directive 2006/54 (prohibition of direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration)?

Yes. Section 19 of the Employment Equality Act 1998 (as amended).

It is a term of the contract of employment that two persons are entitled to the same rate of remuneration as another employee of the other sex if they are employed to do like work by the same or an associated employer at the relevant time, i.e. during the preceding three years or the three following years. Indirect discrimination in respect of remuneration is also prohibited that is where an apparently neutral provision puts persons of a particular gender at a particular disadvantage in respect of remuneration compared with other employees of the same employer unless the said provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. In any proceedings, statistics are admissible for the purpose of determining whether there is indirect discrimination in respect of remuneration or not. There may be different rates of remuneration on grounds other than the gender ground.

4.1.4 Is a comparator required in national law as regards equal pay?

Yes. Section 7 of the Employment Equality Act 1998 (as amended) requires that a claimant must have a comparator of the opposite sex.

A hypothetical comparator is not allowed.

4.1.5 Does national law lay down parameters for establishing the equal value of the work performed, such as the nature of the work, training and working conditions?

Yes. Section 7(1)(c) of the Employment Equality Act 1998.

The parameters are skill, physical or mental requirements, responsibility and working conditions.

4.1.6 Does national (case) law address wage transparency in any way?

No.

4.1.7 Is the European Commission's Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency applied in your country? If so, how?

No. However, the Department of Jobs, Enterprise and Innovation has published *Ireland's National Plan on Corporate Social Responsibility 2014-2016*²⁷ which provides for equal pay audits *inter alia*.

4.1.8 Which justifications for pay differences are allowed in legislation and/or case law?

As stated above, there may be differences in pay on grounds other than the gender grounds. Examples may be the performance of extra duties,²⁸ 'red circling' or the retention of a personal rate of pay because of particular circumstances that are not based on sex may be permissible,²⁹ the performance of a wider range of tasks, thus requiring higher qualifications is also permissible.³⁰

4.1.9 Are there specific difficulties related to the application of the principle of equal pay for equal work and work of equal value in practice? For example in case of out-sourcing?

No.

4.2 Access to work and working conditions

4.2.1 Is the personal scope in relation to access to employment, vocational training, working conditions etc. defined in national law (see Article 14 of Directive 2006/54)?

Yes, in Section 2 of the Employment Equality Act 1998 (as amended).

²⁷ There is no link to this document but it is available on <https://www.djei.ie/en/>. Accessed 11 November 2015.

²⁸ *Dunnes Stores (Parkway) Ltd. v 28 Dunnes Stores (Parkway) Ltd. Female Employees* (EP/6/1987).

²⁹ E.g. *Schiesser (International) Ireland Ltd. v 217 Female Employees* (EP/11-15/1988) where one of the male comparators was not working the full range of duties because of illness, yet he retained his original higher rate of pay.

³⁰ *Twenty-five Named Employees v Irish Aviation Authority* [2010] ELR 211.

Section 2 defines an 'employee' as a person who works or worked under a 'contract of employment' but that in relation to access to employment does not include a person employed in another person's home for the provision of personal services for persons residing in that home where the services affect the private or family life of those persons. The 'contract of employment' includes a contract of employment or apprenticeship or where a person agrees personally to execute any work or service for that other person.

This definition encompasses a self-employed person, i.e. a person who personally executes any work or service. In addition, section 13A provides that a partner in a partnership also falls within the scope of the legislation.

National law has a definition of a 'worker' – but each piece of legislation has a separate definition. In the case of the employment equality legislation, the definition of 'employee' and 'contract of employment' is clearly very broad. See 4.2.1 above. This definition of a 'worker' reflects the relevant case law of the CJEU.

4.2.2 Is the material scope in relation to (access to) employment defined in national law (see Article 14(1) of the Recast Directive 2006/54)?

Yes. Section 8 of the Employment Equality Act 1998 (access to employment), section 12 of the Employment Equality Act 1998 (as amended) (vocational training) and section 13 of the Employment Equality Act 1998 (membership of certain bodies).

'8(1) In relation to –

- (a) access to employment.
- (b) conditions of employment,
- (c) training or experience for or in relation to employment.
- (d) promotion or re-grading, or
- (e) classification of posts,

An employer shall not discriminate against an employee or prospective employee and a provider of agency work shall not discriminate against an agency worker.'

Section 8(5) and (6) provides –

'Without prejudice to the generality of subsection (1), an employer shall be taken to discriminate against an employee or prospective employee in relation to access to employment if the employer discriminates against the employee or prospective employee –

- (a) in any arrangements the employer makes for the purpose of deciding to whom employment should be offered, or
- (b) by specifying in respect of one person or class of persons, entry requirements for employment which are not specified in respect of other persons or classes of persons, where the circumstances in which both such persons or classes would be materially different.

(6) Without prejudice to the generality of subsection (1), an employer shall be taken to discriminate against an employee or a prospective employee in relation to conditions of employment if, on any of the discriminatory grounds, the employer does not offer or afford to that employee or prospective employee or to a class of persons of whom he or she is one –

- (a) the same terms of employment (other than remuneration and pension rights),
- (b) the same working conditions, and
- (c)

as the employer offers or affords to another person or class of persons, where the circumstances in which both such persons or classes are or would be employed are not materially different.'

Section 12 provides

- '(1) Subject to subsection (7) any person, including an educational or training body, who offers a course of vocational training shall not, in respect of any such course offered to persons over the maximum age at which those persons

are statutorily obliged to attend school, discriminate against a person (whether at the request of an employer, a trade union or a group of employers or trade union or otherwise) –

- (a) In the terms on which any such course or facility is offered,
- (b) By refusing or omitting to afford access to any such course or facility, or
- (c) In the manner in which any such course or facility is provided.

(2) In this section “vocational training” means 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.....’

Section 13 provides –

‘A body which –

- (a) Is an organisation of workers or of employers,
 - (b) Is a professional or trade organisation, or
 - (c) Controls entry to, or the carrying on of, a profession, vocation or occupation,
- Shall not discriminate against a person in relation to membership of that body or any benefits, other than pension rights, provided by it or in relation to entry to, or the carrying on of, that profession, vocation or occupation.’

The legislation is in compliance with Article 14(1) of the Recast Directive.

4.2.3 Has the exception on occupational activities been implemented into national law (see Article 14(2) of Recast Directive 2006/54)?

Yes. Section 25 of the Employment Equality Act 1998 (as amended).

The section provides that a particular characteristic that is based on the gender ground in respect of access to employment in a particular post 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 for the post, and
- (b) The objective is legitimate and the requirement proportionate.

The reference to employment includes a reference to any training leading to such employment.

4.2.4 Has the exception on protection for women, in particular as regards pregnancy and maternity, been implemented in national law (see Article 28(1) of Recast Directive 2006/54)?

Yes in section 6 (2A) of the Employment Equality Act 1998 (as amended).

4.2.5 Are there particular difficulties related to the personal and/or material scope of national law in relation to access to work, vocational training, employment, working conditions etc.?

No.

5. Pregnancy and maternity protection; maternity, paternity, parental leave and adoption leave (Directive 92/85, relevant provisions of the Directives 2006/54 and 2010/18)

5.1 Pregnancy and maternity protection

5.1.1 Does national law define a pregnant worker?

Yes. Section 2 of the Maternity Protection Act 1994.

“pregnant employee” means an employee who is pregnant and who has informed her employer of her condition.’

The definition is consistent with the definition in Article 2 of Directive 92/85.

It should be noted that there are two further definitions of importance in section 2 of the Maternity Protection Act 1994 namely –

“employee who has recently given birth” means at any time an employee whose date of confinement was not more than 14 weeks earlier and who has informed her employer of her condition.’

“employee who is breastfeeding” means at any time an employee whose date of confinement was not more than twenty-six weeks earlier, and who has informed her employee of her condition.’

5.1.2 Are the protective measures mentioned in the Articles 4-7 of Directive 92/85 implemented in national law?

Yes. Safety, Health and Welfare at Work (General Application) Regulations 2007³¹ and also section 18 of the Maternity Act 1994 provide for health and safety leave.

These Regulations provide for risk assessment for sensitive risk groups of employees namely pregnant, post-natal and breastfeeding employees and the taking of protective or preventative measures to include the transfer of the employee where there is not a risk to the employee; also in respect of night work where there is medical certification, the employee may be removed from night work and transferred to day work, in the event that this is not feasible the employee shall be placed on leave or maternity leave extended. In the event that an employee cannot be transferred to safer work, they may be placed on health and safety leave.

The Regulations also list the agents, processes and working conditions that are the subject of the risk assessment.

In my view this is a correct implementation and it should be noted that there has been little litigation in this area. If there is a risk to the employee the employee is placed on health and safety leave, the employer pays the first 21 days of such leave and the state thereafter at the same rate as state disability benefit. Such leave only arises during pregnancy or 26 weeks post confinement.

5.1.3 Is dismissal prohibited in national law from the beginning of the pregnancy until the end of the maternity leave (see Article 10(1) of Directive 92/85)?

Yes. Section 6 of the Unfair Dismissals Act 1977 (as amended) (see 5.1.3 below). If an employee is dismissed by reason of pregnancy she may bring a claim under the Unfair

³¹ S.I. No. 299 of 2007.

Dismissals Acts or under section 8 of the Employment Equality Act 1998 (as amended). An employee would have to elect which statute she would claim under.

It is an unfair dismissal to dismiss an employee for reasons of the exercise or the proposed exercise by the employee of the right to parental leave, *force majeure* leave under the Parental Leave Act 1998 or carer's leave under the Carer's Leave Act 2001; the employee's pregnancy, attendance at ante-natal classes, giving birth or breastfeeding or any matters connected therewith; the exercise or proposed exercise by the employee of a right under the Maternity Protection Act 1994 to any form of protective leave or natal care absence, to attend ante-natal classes or to time-off from work or a reduction in working hours for breastfeeding under the Maternity Protection Acts; the exercise or the contemplated exercise by an adoptive parent of the parent's right under the Adoptive Leave Acts 1995 and 2005 to adoptive leave or additional adoptive leave or a period of time-off to attend certain pre-adoption classes or meetings. If an employee is not permitted to return to work after maternity leave,³² adoptive leave,³³ parental leave,³⁴ they may bring a claim under the Unfair Dismissals Acts. However, an employer can argue that the employee was dismissed for some other reason, e.g., capability, conduct, competence, redundancy etc.

If the employee is dismissed by reason of pregnancy, she may bring a claim under either the Unfair Dismissals Acts or the Employment Equality Acts. The redress under both is the same namely that an unfairly dismissed employee or an employee who was dismissed for a discriminatory reason may be reinstated, re-engaged or awarded two years' remuneration. If an employee brings a claim under the Employment Equality Acts, they must show that the dismissal was for one of the discriminatory grounds and the employee must show a *prima facie* case of discrimination. Whilst if an employee brings an unfair dismissal claim, the burden of proof is on the employer to show that the dismissal was reasonable in all the circumstances. The burden of proof is only on the employee under the Unfair Dismissals Acts if the employee has less than one year's service.

An employee can be dismissed fairly, e.g. if the employee was dismissed by reason of capability, competence, conduct, redundancy (provided that they were fairly selected for redundancy). The Labour Court has summarised the position as being that 'no employee can be dismissed while they are pregnant unless there are exceptional circumstances unconnected with the pregnancy and those exceptional circumstances are notified to the employee in writing.'³⁵

An employee cannot be dismissed during maternity leave. Dismissal by reason of redundancy would only come into effect on the completion of the maternity leave (or additional maternity leave); the employee would also be entitled to their period of notice as well.

5.1.4 In cases of dismissal from the beginning of pregnancy until the end of maternity leave, is the employer obliged to indicate substantiated grounds for the dismissal in writing (see Article 10(2) of Directive 92/85)?

Yes. Section 14 of the Unfair Dismissals Act 1977 requires an employer to provide the reasons for dismissal.

³² Section 40 of the Maternity Protection Act 1994.

³³ Section 26 of the Adoptive Leave Act 1995.

³⁴ Sections 16A(4) and 25(3)(a) of the Parental Leave Act 1998.

³⁵ E.g. see *Carroll v Cullen* DEE13/2002 and *Trailer Care Holdings Ltd. v Healy* EDA 14/2013.

5.2 Maternity leave

5.2.1 How long (in days or weeks) is maternity leave? Please specify the relevant legislation and Article(s).

Twenty six weeks. Section 8 of the Maternity Protection Act 1994 (as amended). There is no entitlement to remuneration from the employer during maternity leave.

5.2.2 Is there an obligatory period of maternity leave before and/or after birth?

Yes. Section 10 of the Maternity Protection Act 1994 (as amended). This period is two weeks.

5.2.3 Is there a legal provision insuring that the employment rights relating to the employment contract are ensured in the cases referred to in Articles 5, 6 and 7 of Directive 92/85?

Yes. Section 18 provides for health and safety leave.

The employer is required to carry out a risk assessment.³⁶ If an employee is pregnant, has recently given birth or is breastfeeding and there is a risk to the employee and their baby, an employer is required to move the employee to another position. However, if it is not technically or objectively feasible to move the employee or where such a move cannot reasonably be required on duly substantiated grounds or the other work which the employer proposes to move the employee to is not suitable for her, then the employee is entitled to health and safety leave. This is also applicable where the employee cannot be required to do night work. Entitlement to health and safety leave ceases when the employee goes on maternity leave and receives maternity benefit.

5.2.4 Is there a legal provision that ensures the employment rights relating to the employment contract (including pay or an adequate allowance) are ensured during the pregnancy and maternity leave?

Yes. Section 22 of the Maternity Act 1994 (as amended).

Section 52 of the Social Welfare (Consolidation) Act 2005 (as amended). There is an entitlement to health and safety benefit. The employer pays for the employee's normal remuneration during the first 21 days of health and safety leave; thereafter the employee is entitled to health and safety benefit which is paid at the rate of EUR 147.30 per week with additional payments for adult and child dependants. This entitlement ends when the employee becomes entitled to maternity benefit. Such payment is subject to income tax and any other levies required by law.

Section 22 of the Maternity Protection Act 1994 (as amended) provides that during any period of health and safety leave, maternity leave and time-off under the Act, the employee is deemed to be in employment. However, the employee's right to remuneration is suspended (i.e. she has no entitlement to remuneration) during maternity leave; in addition, the employer is not obliged to pay contributions in respect of superannuation.

Section 52 of the Social Welfare (Consolidation) Act 2005 (as amended). Such payment is subject to income tax and any other levies required by law.

³⁶ Safety, Health and Welfare at Work (General Application) Regulations 2007 S.I. No. 299 of 2007.

5.2.5 Is pay or an allowance during the pregnancy and maternity leave at the same level as sick leave or is it higher?

Yes. Health and safety benefit is paid at a lower rate than maternity benefit. Chapter 9 of the Social Welfare Consolidation Act 2005 (as amended) provides that maternity benefit is presently EUR 230 gross per week.

The ceiling in national law is EUR 230 gross per week (i.e. subject to income tax and any other levies required by law).

5.2.6 Are statutory maternity benefits supplemented by some employers up to the normal remuneration?

Yes. This is a contractual matter between employer and employee. However, civil and public servants are more usually entitled to full pay during maternity leave.

5.2.7 Are there conditions for eligibility for benefits applicable in national legislation (see Article 11(4) of Directive 92/85)?

Yes. Chapter 9 of the Social Welfare Consolidation Act 2005 (as amended)

The employee must have 39 weeks paid Pay Related Social Insurance in the 39 weeks paid in the 12-month period prior to the commencement of maternity leave or at least 39 weeks' contributions paid since first starting work and at least 39 weeks paid contributions in the relevant tax year or 26 weeks' contributions paid in the relevant tax year and 26 weeks' contributions paid in the tax year prior to the relevant tax year.

5.2.8 In national law, is there a provision that guarantees the right of a woman to return after maternity leave to her job or to an equivalent job, on terms and conditions that are no less favourable to her, and to benefit from any improvement in working conditions to which she would have been entitled during her absence (see Article 15 of Directive 2006/54)?

Yes. Sections 26 and 27 of the Maternity Protection Act 1994 (as amended).

The employee is entitled to return to the job which they had immediately before going on maternity leave. There is full protection for the employee in the event of a transfer of undertaking. In the event that it is not reasonably practicable for the employee to return to her job then she is entitled to suitable alternative employment. The terms and conditions of employment should be no less favourable than her original contract of employment.

5.3 Adoption leave

5.3.1 Does national legislation provide for adoption leave?

Yes. Adoptive Leave Acts 1995 and 2005. Section 6 of the Adoptive Leave Act 1995 (as amended).

The length of the leave is 24 weeks. Adoptive leave benefit is paid on the same terms as maternity benefit.

5.3.2 Did the Government take measures to address the specific needs of adoptive parents (see Clause 4 of Directive 2010/18)?

Yes. The Parental Leave Regulations 2013.

The European Union (Parental Leave) Regulations 2013³⁷ increased parental leave from 14 to 18 working weeks for all natural or adopting (where an adoption order is awaited)³⁸ or adoptive parents (where an adoption order is in place)³⁹ (or a parent *in loco parentis*) in all sectors of employment. Parental leave shall end not later than the child's eighth birthday. If a child has a disability or a long-term illness, the upper age limit is 16 or the cessation of the child's disability or illness (whichever occurs first). The right of parental leave is individual for each parent. There is provision for the transfer of up to 14 weeks' parental leave entitlements from one parent to the other parent where both are employed by the same employer and the employer consents to the transfer of leave. Therefore, the 'donor' parent retains the right to four weeks' parental leave. The employee may be a part-time employee or an employee working on a fixed-term contract.

5.3.3 Does national legislation provide for protection against dismissal of workers who take adoption leave and/or specify their rights after the end of adoption leave (see Article 16 of Directive 2006/54)?

Yes. Adoptive Leave Act 1995 (as amended). Sections 18 and 19 (right to suitable alternative employment if their original job is not available).

The provisions mirror the same provisions as for protection against dismissal for workers who take maternity leave.

5.4 Parental leave

5.4.1 Has Directive 2010/18 been explicitly implemented in your country?

Yes/no.

European Union (Parental Leave) Regulations 2013 ('the 2013 Regulations') which entered into effect on 8 March 2013 and amended the Parental Leave Acts 1998 and 2006. The Parental Leave Acts 1998 and 2006⁴⁰ now provide for 18 weeks of unpaid parental leave for the parents of natural or adopting parents (where an adoption order is awaited)⁴¹ or adoptive parents (where an adoption order is in place)⁴² (or a parent *in loco*

³⁷ S.I. No. 81 of 2013.

³⁸ An 'adopting parent' means 'an adopting father, adopting mother or sole male adopter' within the meaning of Section 2 of the Adoptive Leave Act 1995. Section 2(1) of the Adoptive Leave Act 1995 provides that 'an adopting father' means 'a male employee in whose care a child has been placed with a view to the making of an adoption order or to the effecting of a foreign adoption or following on any such adoption where the adoptive mother has died;' 'An adopting mother' means 'a woman, including an employed adopting mother, in whose care a child (of whom she is not the natural mother) has been placed or is to be placed with a view to the making of an adoption order, or the effecting of a foreign adoption or following any such adoption' and a 'sole male adopter' means 'a male employee who is not an adopting father within the meaning of the Act and in whose sole care a child has been placed or is to be placed with a view to the making of an adoption order, or to the effecting of a foreign adoption or following any such adoption.'

³⁹ An 'adoptive parent' in relation to a child means 'a person in whose favour an adoption order in respect of the child has been made and is in force.'

⁴⁰ The relevant legislation is the Parental Leave Act 1998, the Parental Leave (Amendment) Act 2006, the Parental Leave (Notice of *Force Majeure* Leave) Regulations (S.I. No. 454 of 1998), the Parental Leave (Disputes and Appeals) Regulations (S.I. No. 6 of 1999), the Parental Leave (Maximum Compensation) Regulations (S.I. No. 34 of 1999), the Circuit Court Rules (S.I. No. 510 of 2001), and the European Communities (Parental Leave) Regulations (S.I. No. 231 of 2000) and the European Union (Parental Leave) Regulations 2013 (S.I. No. 81 of 2013).

⁴¹ An 'adopting parent' means 'an adopting father, adopting mother or sole male adopter' within the meaning of Section 2 of the Adoptive Leave Act 1995. Section 2(1) of the Adoptive Leave Act 1995 provides that 'an adopting father' means 'a male employee in whose care a child has been placed with a view to the making of an adoption order or to the effecting of a foreign adoption or following on any such adoption where the adoptive mother has died;' 'An adopting mother' means 'a woman, including an employed adopting mother, in whose care a child (of whom she is not the natural mother) has been placed or is to be placed with a view to the making of an adoption order, or the effecting of a foreign adoption or following any such adoption' and a 'sole male adopter' means 'a male employee who is not an adopting father within the meaning of the

parentis) in all sectors of employment. Parental leave shall end not later than the child's eighth birthday. If a child has a disability or a long-term illness, the upper age limit is 16 or the cessation of the child's disability or illness (whichever occurs first).

5.4.2 Is the national legislation applicable to both the public and the private sector (see Clause 1 of Directive 2010/18)?

Yes.

5.4.3 Does the scope of the national transposing legislation include contracts of employment or employment relationships related to part-time workers, fixed-term contract workers or persons with a contract of employment or employment relationship with a temporary agency?

Yes.

5.4.4 What is the total duration of parental leave? If the provisions regarding duration differ between the public and the private sector, please address the two sectors separately.

18 weeks.

5.4.5 Is the right of parental leave individual for each of the parents?

Yes.

5.4.6 What form can parental leave take (full-time or part-time, piecemeal, or in the form of a time-credit system)? Do the various available options allow taking into account the needs of both employers and workers and if so, how is that done (see Clause 3 of Directive 2010/18)?

Leave may be taken in a continuous period of 18 weeks or two separate periods of not less than six weeks each (and not consisting of more than 18 weeks). In other words, two periods of six weeks and the balance, as agreed between employer and employee. Subject to agreement with the employer, parental leave may be taken in shorter blocks or by reduced hours, for example for a time to make up the period of 18 weeks.

5.4.7 Is there a notice period and if so, how long is it? Does the national legislation take sufficient account of the interests of workers and of employers in specifying the length of such notice periods and how is that done? (see Clause 3 of Directive 2010/18)?

The employee must give the employer six weeks' notice in writing of his or her wish to take parental leave and the manner in which it is to be taken. The employee may revoke their notice to take parental leave. The employer will then provide a confirmation document confirming the entitlement to take the parental leave.

5.4.8 Is there a work and/or length of service requirement in order to benefit from parental leave?

Yes. Parental Leave Act 1998 (as amended). Section 6.

Act and in whose sole care a child has been placed or is to be placed with a view to the making of an adoption order, or to the effecting of a foreign adoption or following any such adoption.'

⁴² An 'adoptive parent' in relation to a child means 'a person in whose favour an adoption order in respect of the child has been made and is in force.'

The employee must have one year of continuous service before they are entitled to parental leave. However, if the employee's child is very near the age threshold and where the employee has been working for three months for the employer concerned, there is provision for pro-rata parental leave: one week of leave for every month of employment completed. If an employee changes employment and if the child is still below the age threshold and the parental leave allowance has not been fully used then the employee may use up the balance of the allowance of leave when one year's employment has been completed and the child is still below the qualifying age.

It includes employment under two or more continuous fixed-term contracts with the same employer.

5.4.9 Are there situations where the granting of parental leave may be postponed for justifiable reasons related to the operation of the organisation?

Yes. The employer may postpone the parental leave if there is a substantial adverse effect on the employer's business. The employer may postpone the leave by six months.

5.4.10 Are there special arrangements for small firms?

No.

5.4.11 Are there any special rules/exceptional conditions for access and modalities of application of parental leave to the needs of parents of children with a disability or a long-term illness?

Yes. Section 6 of the Parental Leave Act 1998 (as amended).

If a child has a disability or a long-term illness, the upper age limit is 16 or the cessation of the child's disability or illness (whichever occurs first).

5.4.12 Are there provisions to protect workers against less favourable treatment or dismissal on the grounds of an application for, or the taking of, parental leave (see Clause 5 of Directive 2010/18)?

Yes. Parental Leave Act 1998 (as amended). Section 16A.

There is provision that an employee cannot be penalised by their employer for exercising their rights under the legislation.

5.4.13 Do workers benefitting from parental leave have the right to return to the same job or, if this is not possible, to an equivalent or similar job consistent with their employment contract or relationship?

Yes. On the expiration of parental leave, the employee is entitled to return to work with his or her employer in the job which they held immediately before the commencement of the leave. The employee must work under the same contract of employment on terms which are not less favourable and which contract incorporates any improvement to the terms or conditions of employment which the employee would be entitled to if they had not been absent from work. In a situation where the job carried out by the employee immediately before the period of parental leave was not the employee's normal or usual job, then the employee will be entitled to return to work either in his or her usual job or in that job as soon as reasonably practicable without contravention of any statutory provision. In the event of a transfer of business during the period of parental leave, the employee will be entitled to return to work with the new owner on the same terms as if no transfer of business had taken place. In the event that there is an interruption or a cessation of work (e.g. a lack of work or if a fire had occurred) in an employee's place of

employment, then the employee shall return to work after such interruption or cessation as soon as possible thereafter.⁴³

5.4.14 Are rights acquired or in the process of being acquired by the worker on the date on which parental leave starts maintained as they stand until the end of the parental leave?

During the period of parental leave the employee's contract of employment stands suspended. There is no entitlement to payment from the employer, but there may be a contractual arrangement for payment or partial payment.

During the period of parental leave, the employee retains the right to public holidays and any public holidays that fall in the period of leave are added at the end of the parental leave. Annual leave which accrues during parental leave shall be granted in accordance with the Organisation of Working Time Act 1997, which means that the time at which annual leave is granted to the employee is decided by the employer having regard to the requirements of the employer's business and subject to the employer taking into account the need for the employee to reconcile work and family responsibilities and rest and recreation.⁴⁴

5.4.15 What is the status of the employment contract or employment relationship for the period of the parental leave?

The contract of employment stands suspended.

5.4.16 Is there continuity of the entitlements to social security cover under the different schemes, in particular healthcare, during the period of parental leave?

Yes, all statutory social welfare entitlements remain in place.

5.4.17 Is parental leave remunerated by the employer? If so, how much and in which sectors?

No. There is no statutory entitlement to remuneration; however, there may be private contractual arrangements.

5.4.18 Does the social security system in your country provide for an allowance during parental leave? If so, how much and in which sectors?

No.

5.4.19 In your view, regarding which issues does the national legislation apply or introduce more favourable provisions (see Clause 8 of Directive 2010/18)?

The legislation provides marginally more parental leave than provided for in Directive 2010/18.

5.5 Paternity leave

5.5.1 Does national legislation provide for paternity leave?

No but in the event of the death of the mother, the father is entitled to the balance of the leave.

⁴³ Section 15 of the Parental Leave Act 1998. As noted above, there are similar provisions in the Maternity Protection Act 1994 and the Adoptive Leave Act 1995.

⁴⁴ Section 7 of the Parental Leave Act 1998.

- 5.5.2 Does national legislation provide for protection against dismissal of workers who take paternity leave and/or specify their rights after the end of paternity leave (see Article 16 of Directive 2006/54)?

No *but* in the event of the death of the mother during maternity leave or adoptive leave, the father is entitled to the balance of the leave and he has the same entitlements as the mother would have. See section 16 of the Maternity Protection Act 1994 (as amended).

Maternity Protection Act 1994 (as amended). Section 26.

There is a general right to return to work following maternity leave. It is the same section as applies to mothers. If an employee is dismissed, it would be an automatically unfair dismissal within the meaning of the Unfair Dismissals Act 1977.

5.6 Time off/care leave

- 5.6.1 Does national legislation entitle workers to time off from work on grounds of *force majeure* for urgent family reasons in case of sickness or accident (see Clause 7 of Directive 2010/18)?

Yes. Parental Leave Act 1998 (as amended). Section 13.

An employee is entitled to *force majeure* leave where for urgent family reasons owing to injury or illness, the immediate presence of the employee is indispensable. The provision applies to the following relationships of the employee namely husband, wife or living as husband or wife, parent or adoptive parent, brother or sister, a person in loco parentis of the employee, or grandparent or persons living in domestic dependency (and the sexual orientation of the parties is immaterial).

There must be urgent family reasons due to injury or illness. The immediate presence of the employee at the home or where the person is indispensable.

Force majeure leave shall not exceed three working days in any period of 12 consecutive months or five working days in any period of 36 consecutive months.

5.7 Leave in relation to surrogacy

- 5.7.1 Is parental leave available in case of surrogacy?

No.

[Please note that I will have to revert to this section as the Children and Family Relationships Act 2015 has not yet commenced].

5.8 Leave sharing arrangements

- 5.8.1 Does national law provide a legal right to share (part of) maternity leave?

No – but there is a general election in the spring of 2016 and it is envisaged that two weeks' statutory paternity leave may be introduced.

- 5.8.2 Is there a possibility for one parent to transfer part of the parental leave to the other parent ?

Yes. Parental Leave Act 1998 (as amended). Section 6.

There is provision for the transfer of up to 14 weeks' parental leave entitlements from one parent to the other parent where both are employed by the same employer and the employer consents to the transfer of leave. Therefore, if both parents are not employed by the same employer, such transfer of leave may not take place.

If such a transfer is possible, does the 'donor parent' retain the right to at least 1 month of leave for his/her own use (see Clause 2 of Directive 2010/18)?

The 'donor' parent retains the right to four weeks' parental leave.

5.9 Flexible working time arrangements

5.9.1 Does national law provide workers with a legal right (temporarily or otherwise) to reduce working time on request?

No – it is only by agreement between the employer and employee. However, the Industrial Relations Act 1990 (Code of Practice on Access to Part-Time Working) Declaration Order 2006⁴⁵ sets out benefits for employees, to include a greater sense of responsibility, ownership and control of working life; better relations with management and improved job satisfaction generally; and a better work life balance and reduced stress, addressing the balance of work and non-work issues such as caring responsibilities, commuting and pursuing further education.

In the Code of Practice there is provision for requests by employees to (a) transfer from full-time to part-time work and (b) transfer from part-time to full-time work or to increase their working time should the opportunity arise. Prior to the passage of the Protection of Employees (Part-Time Work) Act 2001, part-time female employees who considered that they were being discriminated against had to rely on the employment equality legislation.⁴⁶ The requirement to work full time was considered in *Inoue v NBK Designs Ltd*⁴⁷ in a claim under the Employment Equality Act 1998. The claimant, a lone parent with a child attending school, was working part time on a job-sharing arrangement. As business expanded, the employer wanted the two part-time positions to be amalgamated into one post; the claimant was offered the post, which she refused, and she was dismissed. The Labour Court⁴⁸ had to decide whether the requirement to work full time was one which could be complied with by a significantly higher proportion of men than women and/or those of a different marital or family status to that of the claimant. If the answer to this was in the affirmative, then the requirement was prima facie discriminatory and the court had to consider whether the requirement could be justified by objective factors unrelated to the claimant's sex. The court was satisfied that the requirement to work full time was not necessary and, accordingly, the claimant was discriminated against on gender, family status and marital status grounds.

The facility⁴⁹ to change hours of work is a matter to be agreed between employer and employee rather than a statutory entitlement. Best practice states that employers should

⁴⁵ Industrial Relations Act 1990 (Code of Practice on Access to Part-Time Working) Declaration Order 2006 (S.I. No. 8 of 2006). See Appendix A.

⁴⁶ E.g. pro rata pay (*St Patrick's College v Nineteen Female Employees* (EP4/1984); (DEP 10/1984)); selection of part-time employees for redundancy ahead of full-time employees (*Two Employees v Michael O' Neill and Sons Ltd* (DEE/1/1988)). Note also, *Hill and Stapleton v Revenue Commissioners* (C-243/95) [1998] I.R.L.R. 466; [1998] E.C.R. I-3739; [1998] All E.R. (EC) 722; [1998] 3 C.M.L.R. 81; [1999] I.C.R. 48.

⁴⁷ [2003] E.L.R. 98.

⁴⁸ The court determined that an expert tribunal can reach conclusions by relying on the knowledge and experience of members without elaborate statistical evidence being adduced on the point. The court commented that the question does not appear to have been previously considered by the court. See also, *Steinicke v Bundesanstalt für Arbeit* (C-77/02) [2003] E.C.R. I-9027; [2003] I.R.L.R. 892 and *Bus Éireann v McLoughlin* (EDA0516).

⁴⁹ Paragraph 8. Industrial Relations Act 1990 (Code of Practice on Access to Part-time Working) Declaration Order 2006 (S.I. No. 8 of 2006).

treat such requests seriously and, where possible, explore with their employees to see whether accommodation can be made. In this regard employers should consider establishing a procedure allowing for (i) application, (ii) relevant consultation and discussion, (iii) decision, and (iv) managing the outcome (implementation or refusal).

The Code states that best practice indicates that such a procedure should provide for the following elements:

1. an application from the applicant outlining the reasons for the request to transfer from full-time to part-time working, indicating whether the request is of a temporary or permanent nature;
2. a reasonable timeframe to consider the request;
3. in considering the application, both the employer and employee should take account of all factors relevant to both the organisation and personal to the applicant.

Relevant factors may include:

- the personal and family needs of the applicant;
 - the number of employees already availing of part-time work;
 - additional resources required to meet part-time cover and other business/operational needs of the organisation and implications of same;
 - the urgency of the request;
 - the period of time covered by the request;
 - the employee's legal rights and entitlements;
 - the equal opportunities policy of the organisation;
 - how the applicant's proposed revised hours will fit with the tasks of his/her job and how these tasks will be performed during the period of part-time work;
 - the implications, if any, for the applicant's conditions of employment;
 - the effect, if any, on the staffing needs of the organisation; and
 - the procedure for reviewing the arrangement.
4. The employer should issue a decision to the applicant. If the applicant is successful, details of how the arrangement will work should be discussed with the applicant (and other work colleagues if appropriate) and agreed. It is useful to draw up an agreement, signed by the parties, detailing any changes to terms and conditions of employment, for example income, annual leave, pension entitlements, etc.
 5. The consideration by an employer of a request for part-time work would have with regard to the business needs of the organisation;
 6. If the application is refused (or deferred), the grounds for doing so should be made clear to the applicant;
 7. The applicant should have recourse to an appeals mechanism in the event that a mutually satisfactory solution is not reached, for example through the normal established grievance procedures in the organisation.

5.9.2 Does national law provide workers with a legal right to adjust working time patterns (temporarily or otherwise) on request?

No – it is only by agreement between employer and employee.

5.9.3 Does national law provide workers with a legal right to work from home or remotely (temporarily or otherwise) on request?

No – it is only by agreement between employer and employee.

5.9.4 Are there any other legal rights to flexible working arrangements, such as arrangements by which workers can "bank" hours to take time off in the future?

No – again this is only by agreement between employer and employee.

6. Occupational pension schemes (Chapter 2 of Directive 2006/54)

6.1 Is direct and indirect discrimination on grounds of sex in occupational social security schemes prohibited in national law?

Yes and it should be noted that there is very little litigation in Ireland in relation to gender equality and pension schemes as Ireland never had different retirement ages in respect of employment. There were never different state retirement ages either and this obviously resulted in the same retirement ages in pensionable employment.

The prohibition of discrimination is laid down in Part VII of the Pensions Act 2004 (contained in section 22 of the Social Welfare (Miscellaneous Provisions) Act 2004). It should be noted that Part VII of the Pensions Acts states that the principle of equal pay and equal treatment is that there shall be no direct or indirect discrimination on any of the discriminatory grounds in respect of any rule of a scheme. Part VII relates to occupational benefits and the Employment Equality Acts 1998-2011 deal with pensions. This is a confusing feature of the Irish legislation and to date it is not entirely clear. Arguably it is safer to issue proceedings under both Acts if it is unclear as to whether it is a pension (i.e. pay) or a benefit matter (under the pensions legislation).

6.2 Is the personal scope of national law relating to occupational social security schemes more restricted or broader than specified in Article 6 of Directive 2006/54? Please explain and refer to relevant case law, if any.

Part VII of the Pensions Acts applies to occupational benefits and it would appear that the self-employed are excluded by virtue of not being an employee. The net effect of this is that the self-employed cannot bring proceedings under the Pensions Acts.

6.3 Is the material scope of national law relating to occupational social security schemes more restricted or broader than specified in Article 7 of Directive 2006/54? Please explain and refer to relevant case law, if any.

Part VII of the Pensions Acts applies to occupational benefit schemes that is pensions and other benefits offered by employers, i.e. in the form of pensions, payable in cash or in kind in respect of the termination of service, retirement, old age or death, interruptions of service due to illness or invalidity accidents, injuries etc. arising in the course of employment, unemployment and expenses in connection with children or other dependants. There is no case law.

6.4 Have the exclusions from the material scope as specified in Article 8 of Directive 2006/54 been implemented in national law?

Yes, in Section 22 of the Social Welfare (Miscellaneous Provisions) Act 2004.

The definition of 'occupational benefit scheme' means—

(a) in relation to self-employed persons, any occupational pension scheme or arrangement which is comprised in one or more instruments or agreements and which provides, or is capable of providing, occupational benefits in relation to self-employed persons in any description of self-employment within the State, but does not include—

- (i) any individual contract made by or on behalf of a self-employed person, or
- (ii) any scheme for a self-employed person which has only one member, or
- (iii) any scheme in so far as benefits are financed by contributions paid by the members on a voluntary basis,

or

(b) in relation to employed persons, any occupational pension scheme or arrangement which is comprised in one or more instruments or agreements

and which provides, or is capable of providing, occupational benefits in relation to employed persons in any description of employment within the State, but does not include—

- (i) any insurance contract made by or on behalf of an employed person to which the employer is not a party, or
- (ii) any scheme in so far as benefits are financed by contributions paid by the members on a voluntary basis.

6.5 Are there laws or case law which would fall under the examples of sex discrimination as mentioned in Article 9 of Directive 2006/54?

Yes. Section 22 of the Social Welfare (Miscellaneous Provisions) Act 2004.

There cannot be direct or indirect discrimination in relation to occupational pension schemes. It should be noted that different retirement ages for men and women has never been a feature of Irish employment. In addition, there is little case law. It should also be noted that there are fewer and fewer occupational pension schemes and many schemes are winding up.

6.6 Is sex used as an actuarial factor in occupational social security schemes?

Yes. Section 71(1) and (2) of the Pensions Act 2004 provides for certain derogations to include differences in employer contributions, differences in benefits under defined contribution schemes and differences on the basis of sex in defined benefit schemes. On a practical point, there are fewer and fewer defined benefit schemes. There is no case law.

6.7 Are there specific difficulties in your country in relation to occupational social security schemes, for example due to the fact that security schemes in your country are not comparable to either statutory social security schemes or occupational social security schemes? If so, please explain with reference to relevant case law, if any.

Not applicable.

7. Statutory schemes of social security (Directive 79/7)

7.1 Is the principle of equal treatment for men and women in matters of social security implemented in national legislation?

Yes. Social Welfare Consolidation Act 2005; however, it is not specifically stated but each entitlement to benefit is considered separately, e.g. chapter 9 of the Act of 2005 (as amended) provides for maternity benefit. It should be noted that there is no relevant case law in Ireland in relation to social protection.

7.2 Is the personal scope of national law relating to statutory social security schemes more restricted or broader than specified in Article 2 of Directive 79/7? Please explain and refer to relevant case law, if any.

Statutory social security or social welfare is provided to all insured contributors and their dependants. It must be noted, however, that the self-employed who are also 'workers' are not in receipt of job seeker's benefits or allowances (i.e. unemployment) and illness benefit although the self-employed pay lower social insurance. There has been no case law for some decades.

7.3 Is the material scope of national law relating to statutory social security schemes more restricted or broader than specified in Article 3 par. 1 and 2 of Directive 79/7? Please explain and refer to relevant case law, if any.

The material scope of social protection in Ireland covers the main provisions of this Article. Again, the self-employed have few entitlements.

7.4 Have the exclusions from the material scope as specified in Article 7 of Directive 79/7 been implemented in national law? Please explain (specifying to what extent the exclusions apply) and refer to relevant case law, if any.

Not all the exclusions have been implemented in Irish law as, for example, a parent who is looking after their child is deemed to be a contributor for state pension purposes. There is no case law.

7.5 Is sex used as an actuarial factor in statutory social security schemes?

No.

7.6 Are there specific difficulties in your country in relation to implementing Directive 79/7? For example due to the fact that security schemes in your country are not comparable to either statutory social security schemes or occupational social security schemes? If so, please explain with reference to relevant case law, if any.

Not applicable.

8. Self-employed workers (Directive 2010/41/EU and some relevant provisions of the Recast Directive)

8.1 Has Directive 2010/41/EU been explicitly implemented in national law?

Yes. The Employment Equality Act 1998 was amended by the Equality Act 2004 so that self-employed persons came within the scope of the legislation as required by Directives 2000/43/EC⁵⁰ and 2000/78/EC.⁵¹ The social protection aspects of the application of Directive 2010/41 are contained in the Social Welfare and Pensions Act 2014 which was signed into law on 17 July 2014. The Department of Social Protection provides a very useful outline of entitlements to spouses or civil partners of the self-employed who are doing similar or ancillary tasks. Such persons must earn over EUR 5 000 per annum and then they must pay the relevant rate of Pay Related Social Insurance. They will then be entitled to maternity/adoptive benefits and state pensions when they have the necessary contributions. Payment commenced in 2014.

8.2 What is the personal scope related to self-employment in national legislation? Has your national law defined self-employed or self-employment? Please discuss relevant legislation and national case law (see Article 2 Directive 2010/41/EU)

The term self-employment is not used in employment legislation but the term to 'personally' provide a service is more usually used. It should be noted that the self-employed technically fall within the scope of the Employment Equality Acts 1998-2014.

8.3 Related to the personal scope, please specify whether all self-employed workers are considered part of the same category and whether national legislation recognises life partners.

All self-employed workers fall within the scope of this legislation without distinction as to occupation.

Yes civil partners. Same-sex marriage legislation will commence on 18 November 2015 and, therefore, a civil partnership will no longer be available.

8.4 How has national law implemented Article 4 Directive 2010/41/EU? Is the material scope of national law relating to equal treatment in self-employment more restricted or broader than specified in Article 4 Directive 2010/41/EU?

As stated above, a self-employed person falls within the scope of the Employment Equality Acts 1998-2011. There is no restriction.

8.5 Has your State taken advantage of the power to take positive action (see Article 5 Directive 2010/41/EU)? If so, what positive action has your country taken? In your view, how effective has this been?

There is no positive action in relation to self-employment.

⁵⁰ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *OJ L 180, 19 July 2000, pp. 22-26.*

⁵¹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *OJ L 303, 2 December 2000, pp. 16-22.*

8.6 Does your country have a system for social protection of self-employed workers (see Article 7 (Directive 2010/41/EU)?

Yes. It covers state pensions but it does not cover illness or unemployment.

There is only one system that is under the Social Welfare Consolidation Act 2005 (as amended).

This Directive has now been put in place further to the Social Welfare and Pensions Act 2014 which ends the exclusion from social insurance of spouses or civil partners of a self-employed worker who participate in the activities of their self-employed spouse or civil partner performing the same or ancillary tasks. The legislation extends social insurance cover to spouses or civil partners of a self-employed contributor in cases where that spouse or civil partner is participating in that person's business and earning more than EUR 5 000 per year. The spouse or civil partner will be liable to pay 'Pay Related Social Insurance' ('PRSI') contributions. Previously only one of the couple could be insured as a self-employed worker for social insurance benefits. This means that the spouse or civil partner will be able to establish, over time, entitlement to maternity benefit, widow's, widower's or surviving civil partner's (as the case may) contributory pension and State contributory pension in their own right. It is understood that about 6 000 people will benefit from this reform. The Department of Social Protection states that entitlement to the state pension provision will be subject to the spouse or civil partner paying PRSI contributions for at least ten years. The main value of the Directive is that self-employed partners have protection under the Employment Equality Acts 1998-2011 and that self-employed women have maternity and adoptive leave benefits (of course, such entitlement was already available provided that the self-employed person had sufficient PRSI contributions). Class S PRSI is paid by farmers, professional people, and partners in a business partnership and provides for widow's and widower's contributory pension, orphan's contributory allowance, old-age contributory pension, maternity and adoptive benefit and bereavement grant. A 'prescribed relative' is a spouse, son or daughter, parent, brother or sister who helps a self-employed person with his or her business but who is not a partner in the business and does not pay class S PRSI. If he or she has previously been self-employed or employed, the person may pay voluntary contributions.

The payment of contributions is mandatory.

8.7 Has Article 8 Directive 2010/41/EU regarding maternity benefits for self-employed been implemented in national law?

Yes. Chapter 9 of the Social Welfare Consolidation Act 2005 (as amended).

The maternity allowance meets the requirement of sufficiency in Article 8(3) – the payment is the same as for those in employment, i.e. EUR 230 gross per week.

The maternity benefit is based on Pay Related Social Insurance contributions in the same manner as for employees. I think that the taking of maternity leave and the allowance is voluntary but the payment of social insurance contributions is mandatory.

There is no provision for temporary replacements.

8.8 Has national law implemented the provisions regarding occupational social security for self-employed persons (see Article 10 of Recast Directive 2006/54)?

No.

8.9 Has national law made use of the exceptions for self-employed persons regarding matters of occupational social security as mentioned in Article 11 of Recast Directive 2006/54? Please describe relevant law and case law.

Yes insofar as single member schemes are excluded from the Pensions Acts.

8.10 Is Article 14(1)(a) of Recast Directive 2006/54 implemented in national law as regards self-employment?

Yes. Section 8 of the Employment Equality Act 1998 (as amended).

The key point is that the scope of the Act covers persons who are self-employed. There cannot be discrimination by employers in relation to access to employment, conditions of employment, etc.

9. Goods and services (Directive 2004/113)

9.1 Does national law prohibit direct and indirect discrimination on grounds of sex in access to goods and services?

Yes. Section 3 of the Equal Status Act 2000 (as amended).

9.2 Is the material scope of national law relating to access to goods and services more restricted or broader than specified in Article 3 of Directive 2004/113? Please explain and refer to relevant case law, if any.

The Equal Status Acts 2000 to 2014 provide that there cannot be direct discrimination, discrimination by association or by imputation, or indirect discrimination based on gender in respect of the access to and supply of goods and services, the disposal of premises and the provision of accommodation, activities of educational establishments and activities of registered clubs.

9.3 Have the exceptions from the material scope as specified in Article 3(3) of Directive 2004/113, regarding the content of media, advertising and education, been implemented in national law?

Yes. Section 12 of the Equal Status Act 2000 (advertising); section 7 of the Equal Status Act 2000 (educational establishments).

Section 12 of the Equal Status Act 2000 provides that certain advertising is prohibited, namely advertisements which indicate an intention to engage in prohibited conduct, i.e. discrimination against or harassment or sexual harassment of a person in contravention of the Act. Section 7 of the Equal Status Act 2000 provides that there are certain exceptions on the ground of gender, namely differences in relation to services of an aesthetic, cosmetic or a similar nature where the services require physical contact between the service provider and the recipient. Therefore, there may be 'discriminatory advertising' for such services.

Section 7 of the Equal Status Act allows for single-sex schools and also allows institutions for the training of ministers of religion to admit students of one gender only (e.g. Roman Catholic seminaries).

The Irish legislation has somewhat gone beyond the exceptions in Art. 3.3.

9.4 Have differences in treatment in the provision of the goods and services been justified in national law (see Article 4(5) of Directive 2004/113)? Please provide references to relevant law and case law.

A male-only golf club was considered not to be discriminatory under the Acts.⁵²

9.5 Does national law ensure that the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits (see Article 5(1) of Directive 2004/113)?

Yes. Equal Status (Amendment) Act 2012. Section 2 of the Act of 2013 amends section 5 of the Act of 2000.

⁵² In the Matter of Section 2 of the Summary Jurisdiction Act, 1857 as amended by section 51 of the Courts (Supplemental Provisions) Act, 1961, *the Equality Authority v Portmarnock Golf Club and Others and Robert C. Cuddy and David Keane, Ireland and the Attorney General* [2005] IEHC 235, [2009] IESC 73.

The Act provides for the amendment of certain provisions of the Equal Status Act 2000 so as to provide in Irish law for the mandatory introduction of unisex premiums and benefits in insurance as from 21 December 2012 (See 9.6 below).

9.6 How has the exception of Article 5(2) of Directive 2004/113 been interpreted in your country? Please report on the implementation of the C-236/09 Test-Achats ruling in national legislation.

The Equal Status (Amendment) Act 2012 commenced on 21 December 2012. The Act amended the Equal Status Act 2000 (as amended).⁵³ Effective from 21 December 2012, the legislation states that the derogation only applies to the classes of insurance where the contract has been concluded before 21 December 2012. In summary there cannot be a difference in treatment on the gender ground or in any other circumstances to which the Gender Goods and Services Directive applies related to the assessment of risk in respect of contracts of insurance. All contracts in relation to car and life assurance entered into force for the first time from 21 December 2012 must comply with the unisex rule.

Section 5(6) of the Equal Status Act 2000 as amended by the Equal Status (Amendment) Act 2012 provides that the Central Bank of Ireland was obliged to cease to compile, publish and maintain data supporting the State's decision to permit gender-sensitive pricing of insurance products based on mortality, morbidity and the risk of road traffic accidents. Insurance providers may, however, continue to collect, store and use gender status or gender-related information which is *bona fide* intended for the purposes of reserving and internal pricing, and reinsurance pricing and life and health underwriting.

9.7 Has your country adopted positive action measures in relation to access to and the supply of goods and services (see Article 6 of Directive 2004/113)?

Yes. Equal Status Act 2000. Section 14.

One cannot give a specific example under the equal status legislation. However, the Electoral (Amendment) (Political Funding) Act 2012 provides that in order for a political party to obtain state funding during the next parliamentary term, each political party must have at least 30 % female candidates running in the next general election (probably in the spring of 2016). This Act and its application has caused much controversy and presently there is a constitutional action initiated in the courts. There is little information on this to date except for newspaper reports.⁵⁴ The net point is that the plaintiff⁵⁵ is arguing that he could not seek a nomination at the party convention (Fianna Fáil – the main opposition party) to run in the general election to be held in the spring of 2016. A candidate who wishes to run for his or her party must secure a party nomination at a convention unless the party executive orders that they be a candidate in the general election. The legislation was enacted because of the low number of women parliamentarians.

⁵³ The Explanatory Memorandum to the Bill stated that the ECJ had declared the provision invalid; the said provision had allowed an exception to the principle of equal treatment provided for in Directive 2004/113/EC so that insurance companies could price insurance products differently for men and women where this difference is reasonable and supported by actuarial or statistical data. Ireland had availed of this exemption in the Equal Status Act 2000 as amended by the Civil Law (Miscellaneous Provisions) Act 2008 that is permitting gender differentiation to continue in the areas of motor insurance, life assurance, critical illness cover, income protection cover and private annuities and pensions. <http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2012/11012/b11012d.pdf>. Accessed 17 April 2014.

⁵⁴ <http://www.irishtimes.com/news/politics/fianna-f%C3%A1il-member-takes-legal-action-over-gender-quotas-1.2420526>. Accessed 21 December 2015.

⁵⁵ *Mohan v Ireland* 2015/8925P.

9.8 Are there specific problems of discrimination on the grounds of pregnancy, maternity or parenthood in your country in relation to access to and the supply of goods and services? Please briefly describe relevant case law.

Yes. One of the grounds of discrimination under this legislation is the family status ground, the definition of which includes 'being pregnant'. In one case, where a pregnant traveller was denied return passage by an airline, the equality tribunal decided that it was not the pregnancy that was the reason for the refusal but the stage of the pregnancy and the issue of safety.⁵⁶ A theatre insisted that a mother breastfeeding a two year old child must pay for a ticket which was held not to be discriminatory. It was considered that the mother and child were not one and the same and thus the claimant did not succeed in her claim.⁵⁷

⁵⁶ In *Kelly v Panorama Holiday Group Limited* DEC – S2008 – 007, the claimant maintained that she was discriminated against on grounds of pregnancy where she was refused passage on a return flight as she was over 28 weeks pregnant. The tour operator stated that it was the air carrier who refused her passage. At the time of the refusal, the claimant did not seek clarification as to the precise nature of the refusal to provide clearance to fly or the requirement for her to have medical certification. She did not seek the precise identity of the person or the company who was refusing clearance for her. Therefore, in the circumstances it is uncertain as to whether the correct respondent was named. The issues involved raised safety issues for everyone and it was for this reason that medical clearance was required. It was also noted that the airline could have sought medical clearance in a range of situations involving medical difficulties. As it was not the pregnancy which was the reason but the stage of the pregnancy which could rise to medical difficulties on the flight, the equality officer decided that the claimant had not established a *prima facie* case.

⁵⁷ *Stevens v The Helix Theatre* DEC – S2008 – 033.

10. Violence against women and domestic violence in relation to the Istanbul Convention

10.1 Has your country ratified the Istanbul Convention?

No. However, Ireland signed the Istanbul Convention on 5 November 2015. The Minister for Justice and Equality has said that this is a step towards full ratification of the Istanbul Convention.⁵⁸ The Government has set out the outstanding actions and these actions form part of the actions in the Second National Strategy on Domestic, Sexual and Gender-based Violence 2015-2020 which is currently being finalised and will be submitted to the Government for approval following consultation with the voluntary and community sector in the near future. The actions to be taken include:

- Education and training for the police force, court services, probation service staff and health and children agency staff, and law students;
- The general scheme of the Domestic Violence Bill was published in July 2015;
- Review of the Criminal Injuries Compensation Scheme for victims of domestic violence;
- The enactment of the Criminal Law (Sexual Offences) Bill 2015;
- The development of a Risk Assessment Matrix for all victims of domestic violence and sexual crimes;
- A National Helpline Service to respond to issues of domestic and sexual violence;
- The Criminal Law (Mutual Assistance) Act 2008 shall be amended to include reference to the Istanbul Convention;
- The Irish Human Rights and Equality Commission is committed to providing information to victims of violence on access to complaint mechanisms such as the European Court of Human Rights;
- The General Scheme of the Domestic Violence Bill was published in July 2015 and referred to the *Oireachtas* (parliamentary) Joint Committee on Justice, Defence and Equality for pre-legislative scrutiny;
- Extend access to barring orders;
- Legislate for extra territoriality where an offence is committed by an Irish national or a person who is habitually resident in Ireland over offences in the Non-Fatal Offences Against the Person Act 1997, sexual offences and the new offence of forced marriage;
- Annual report on the monitoring of the application of the Convention;
- Provide support to child witnesses of domestic and sexual violence;
- Examine the potential for the removal of the common law defence of reasonable chastisement which may be availed of in proceedings under the Non-Fatal Offences Against the Person Act 1997 and under section 246 of the Children's Act 2001.

There are no specific reasons as to why the Istanbul Convention has not been ratified.

There is a detailed action plan in respect of what legislation has to be introduced or amended.⁵⁹ The Government has set out the outstanding actions and these actions form part of the actions in the Second National Strategy on Domestic, Sexual and Gender-based Violence 2015-2020 which is currently being finalised and will be submitted to the Government for approval following consultation with the voluntary and community sector in the near future. The actions to be taken include:

- Education and training for the police force, court services, probation service staff and health and children agency staff, and law students;
- The general scheme of the Domestic Violence Bill was published in July 2015;

⁵⁸ <http://www.justice.ie/en/JELR/Pages/PR15000568>. Accessed 8 December 2015.

⁵⁹ http://www.justice.ie/en/JELR/Pages/Istanbul_Convention_Action_Plan. Accessed 8 December 2015.

⁵⁹ http://www.justice.ie/en/JELR/Pages/Istanbul_Convention_Action_Plan. Accessed 25 November 2015.

- Review of the Criminal Injuries Compensation Scheme for victims of domestic violence;
- The enactment of the Criminal Law (Sexual Offences) Bill 2015;
- The development of a Risk Assessment Matrix for all victims of domestic violence and sexual crimes;
- A National Helpline Service to respond to issues of domestic and sexual violence;
- The Criminal Law (Mutual Assistance) Act 2008 shall be amended to include reference to the Istanbul Convention;
- The Irish Human Rights and Equality Commission is committed to providing information to victims of violence on access to complaint mechanisms such as the European Court of Human Rights;
- The General Scheme of the Domestic Violence Bill was published in July 2015 and referred to the *Oireachtas* (parliamentary) Joint Committee on Justice, Defence and Equality for pre-legislative scrutiny;
- Extend access to barring orders;
- Legislate for extra territoriality where an offence is committed by an Irish national or a person who is habitually resident in Ireland over offences in the Non-Fatal Offences Against the Person Act 1997, sexual offences and the new offence of forced marriage;
- Annual report on the monitoring of the application of the Convention;
- Provide support to child witnesses of domestic and sexual violence;
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11. Enforcement and compliance aspects (horizontal provisions of all directives)

11.1 Victimisation

11.1.1 Are the provisions on victimisation implemented in national legislation and interpreted in case law?

Yes. Employment Equality Act 1998 (as amended). Section 74(2).

Section 74(2) provides that victimisation occurs where dismissal or other adverse treatment of an employee by his or her employer occurs as a reaction to a complaint of discrimination made by the employee to the employer, any proceedings by a complainant, an employee having represented or otherwise supported a complainant, the work of an employee having been compared with that of another employee for any of the purposes of this Act or any enactment repealed by this Act, an employee having being a witness in any proceedings under this Act or the Equal Status Act 2000 or any such repealed enactment, an employee having opposed by lawful means an act which is unlawful under this Act or the said Act of 2000 or which was unlawful or any such repealed enactment, or an employee having given notice of an intention to take any of the above actions.

In *Barrett v Department of Defence*,⁶⁰ the Labour Court set out the three components which must be present for a claim of victimisation under section 74(2) of the Acts to be made out. It stated that the claimant must have taken action of a type referred to in section 74(2) – what it terms a protected act, and the claimant must be subjected to adverse treatment by his or her employer; and the adverse treatment must be in reaction to the protected act having been taken by the claimant to stop the bringing of the complaint filed on 30 April 2010 was a protected act in terms of section 74(2) of the Act.

The protection against victimisation complies with the Directives.

11.2 Burden of proof

11.2.1 Does national legislation and/or case law provide for a shift of the burden of proof in sex discrimination cases?

Yes. Employment Equality Act 1998. Section 85A.

The section of the Act provides-

- '(1) 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.
- (2) This section is without prejudice to any other enactment or rule of law in relation to the burden of proof in any proceedings which may be more favourable to a complainant.'

In *Southern Health Board v Mitchell*⁶¹, the Labour Court considered the extent of the evidential burden which a claimant must discharge before a *prima facie* case of discrimination can be made out. The Court stated:

'The first requirement is that the claimant must establish facts from which it

⁶⁰ EDA/1017 (Labour Court). See also *Matthews v ESB t/a ESB Networks* DEC- E 2015-068 (Equality Tribunal) (on appeal).

⁶¹ [2001] ELR 201.

may be presumed that the principle of equal treatment has not been applied to them. This indicates that a claimant must prove, on the balance of probabilities, the primary facts on which they rely in seeking to raise a presumption of unlawful discrimination.

It is only if these primary facts are established to the satisfaction of the Court, and they are regarded by the Court as being of sufficient significance to raise a presumption of discrimination, that the onus shifts to the respondent to prove that there is no infringement of the principle of equal treatment.'

It is further clear from the Labour Court's comments in *Valpeters v Melbury Developments Limited*⁶² that the initial burden of establishing the necessary primary facts from which an inference of unlawful treatment can be drawn rests squarely on the claimant's shoulders. The claimant had failed to adduce any credible evidence to support this assertion on this point and that he had failed to establish a prima facie case of victimisation contrary to the Acts. In the case of *Dyflen Publications Limited v Spasic*,⁶³ the Labour Court, in adopting the approach of Mummery L.J. in *Madrassy v Numura International plc*,⁶⁴ stated that:

'... the court should consider the primary facts which are relied upon by the Complainant in their proper contexts. It also indicates that in considering if the burden of proof shifts the court should consider any evidence adduced by the Respondent ...'

In the case of *IBM Ireland Product Distribution Limited v Svoboda*,⁶⁵ the Labour Court stated that it had 'consistently found that mere allegations unsupported by any corroborative evidence are insufficient to establish a prima facie case and so transfer the burden of proof.' The Labour Court cited its earlier decision in *Melbury Developments Limited v Valpeters* where it stated that:-

'Mere speculation or assertion, unsupported by evidence, cannot be elevated to a factual basis upon which an inference of discrimination can be drawn.'

The rules on the burden of proof comply with EU law, specifically in light of case C-415/10 *Kelly and Meister*. It should also be added that the Irish legislation provides for a 'right to information' under the Employment Equality Act 1998 (Right to Information) Regulations 1999,⁶⁶ Of course, a claimant or a proposed claimant is not entitled to 'confidential information' (i.e. information in relation to a particular individual to which the individual does not agree). It should be noted that there are also other means of obtaining information, e.g. under the data protection and freedom of information legislation.

11.3 Remedies and Sanctions

11.3.1 What types of remedies and sanctions (e.g. compensation, reinstatement, criminal sanctions, administrative fines etc.) exist in your country for breaches of EU gender equality law? Please specify the applicable legislation.

The Equality Tribunal may order in respect of equal pay arrears of remuneration not earlier than three years prior to the date of reference of the claim with an order for ongoing equal pay, and an order for compensation for the effects of acts of discrimination or victimisation. In equal treatment cases there may be an order for compensation of up

⁶² [2010] ELR 64.

⁶³ ADE/087.

⁶⁴ [2007] IRLR 246.

⁶⁵ EDA 1116.

⁶⁶ S.I. No. 321 of 1999.

to a maximum of two years' remuneration or EUR 40 000 whichever is the greater and/or an order for a specified course of action. In dismissal cases reinstatement, re-engagement or compensation up to a maximum of two years' remuneration may be ordered. If the claim is referred to the Circuit Court there is unlimited compensation (for the effect of the discrimination for six years prior to the reference of the claim).⁶⁷ Where the claimant is not an employee the maximum award is EUR 13 000. Interest may be awarded and the Circuit Court may award costs. If a claimant also succeeds in a victimisation claim, they may get an award of up to an additional two years' remuneration.

11.3.2 In your opinion, do the remedies and sanctions meet the standards of being effective, proportionate and dissuasive? Please explain, if possible referring to relevant legislation or case law.

In general the sanctions are effective, proportionate and dissuasive in that significant orders for compensation have been made. However, if there is discrimination on more than one ground, the claimant may only receive compensation as on the basis of discrimination on one ground only. The Equality Tribunal and the Labour Court have considerable scope in the making of orders. Not only may there be an order for compensation but also an order for equal treatment as is relevant to the particular case and/or an order that a specified person take a particular course of action, for example the introduction of policy guidelines to prevent harassment and sexual harassment. In *O'Brien v Persian Properties trading as O'Callaghan Hotels*,⁶⁸ the claimant succeeded in her claim. The claimant was a very senior sales and marketing director and had her employment terminated when she was on maternity leave. This was a discriminatory dismissal on the gender ground. The claimant was in receipt of a salary of EUR 126 000 per annum which had been reduced by 10 % due to the economic downturn; she also had the benefit of a petrol card and mobile phone and for a number of years was in receipt of a bonus worth 25 % of her salary; she also had an annual pension contribution of 10 % of her salary. The Equality Tribunal awarded her EUR 220 500 that is 21 months' salary in compensation for the harassment and the discriminatory dismissal and EUR 94 500 which equated to nine months' salary for distress caused by victimisation. She was also entitled to interest on part of these sums. The total award of EUR 315 000 plus interest was not subject to income tax.

11.4 Access to courts

11.4.1 In your opinion, is the access to courts safeguarded for alleged victims of sex discrimination? Please explain and discuss particular difficulties and barriers victims of sex discrimination have encountered. Refer to relevant legislation and case law.

Claims are brought under the Employment Equality Acts 1998-2014, the Equal Status Acts 2000-2014 and the Pensions Acts 1990-2014. There is access to the Equality Tribunal but the waiting time for a case to come up has been to two and a half years which is not acceptable. The Workplace Relations Act 2015 will come into operation on 1 October 2015 which provides that adjudicators will hear equality claims, thus replacing the Equality Tribunal. It is envisaged in the future that cases will take six to eight weeks to get on for hearing.

11.4.2 In your opinion, is the access to courts safeguarded for anti-discrimination/gender equality interest groups or other legal entities? Please explain and refer to relevant legislation and case law.

⁶⁷ Claims initiated from 1 October 2015 will not have this remedy available to them.

⁶⁸ [2012] ELR 211.

Yes, but each claimant must bring their own case as it is based on the individual contract of employment. The Irish Human Rights and Equality Commission, however, have extensive powers to carry out equality reviews, inquires etc. for example (see sections 32-39 of the Irish Human Rights and Equality Commission Act 2014).

11.4.3 What kind of legal aid is available for alleged victims of gender discrimination?

Civil legal aid is not generally available for claimants in respect of gender discrimination. However, the Irish Human Rights and Equality Commission may provide legal assistance to a person who in their opinion needs such assistance more usually where there is a point of principle involved (see s. 40 of the Irish Human Rights and Equality Commission Act 2014).

11.5 Equality body

11.5.1 Does your country have an equality body that seeks to implement the requirements of EU gender equality law?

Yes. The Irish Human Rights and Equality Commission. www.ihrec.ie

It covers: gender, civil status, family status, age, religion, race, disability, sexual orientation and the traveller ground.

The Commission was established under the Irish Human Rights and Equality Commission Act 2014 and it is an amalgamation of the Human Rights Commission and the Equality Authority. It is an entirely independent body and the commissioners are appointed by the President of Ireland so that there can be no perception of political interference. The Commission has both a human rights and equality brief. The Commission has only been operational this year so it is too early to comment on its ability to drive forward change. The Irish Human Rights and Equality Commission, however, has extensive powers to carry out equality reviews, inquires etc. for example (see s. 32-39 of the Irish Human Rights and Equality Commission Act 2014). The Commission may of its own volition or if it is requested by the Minister for Justice and Equality conduct an inquiry if the Commission considers that within any body, institution, sector of society or geographical area there is evidence of a serious violation of human rights or equality of treatment obligations in respect of a person or a class of persons or a systematic failure to comply with human rights or equality of treatment obligations where the matter is of grave public concern and it is in the circumstances necessary to carry out such an inquiry.⁶⁹ In conducting the inquiry, the Commission shall to the greatest possible extent consistent with its duties seek the voluntary co-operation of the persons whose evidence is desired for the purpose of the inquiry and facilitate such co-operation.

The Commission may invite a particular undertaking (an activity giving rise to employment) or a group of undertakings or the undertaking making up a particular industry or sector thereof to carry out an equality review in relation to that undertaking or those undertakings, or prepare and implement an equality action plan in respect of the undertaking or those undertakings or both. The Commission may carry out an equality action plan in any undertaking where there is more than 50 employees.

11.6 Social partners

11.6.1 What kind of role do the social partners in your country play in ensuring compliance with and enforcement of gender equality law? Are there any legislative provisions in this respect?

⁶⁹ Sections 34 and 35 of the Irish Human Rights and Equality Commission Act 2014.

The employers' body(ies) and trade unions are essentially lobbying bodies representing their respective interests and both representative bodies have been effective in implementing equality legislation. There are no legislative provisions.

11.7 Collective agreements

11.7.1 To what extent does your country have collective agreements that are used as means to implement EU gender equality law? Please indicate the legal status of collective agreements in your country (binding/non-binding, usually declared to be generally applicable or not).

Collective agreements are non-binding save for registered agreements or sectoral orders but such agreements and orders only deal with basic terms and conditions of employment. Please note that there have been constitutional issues in relation to such orders and hence the Industrial Relations (Amendment) Act 2015 was passed by parliament and commenced on 1 August 2015.

12. Overall assessment

Overall, the EU directives have been satisfactorily transposed into Irish law and are applied continuously by both the Equality Tribunal and the Labour Court. It is questionable, however, whether the legislation includes 'real and effective compensation' given that awards are capped even where there is discrimination on more than one ground. The decisions of the Equality Tribunal and Labour Court are detailed and reasoned decisions. They are available online and the Equality Authority, the Equality Tribunal and the Labour Court all provide excellent annual reports to include detailed legal sections. There are considerable delays in cases getting a date for hearing. In many cases the delay is up to two years after the commencement of the proceedings. In practice this can have a dissuasive effect on a claimant. There has been a considerable volume of case law and the Equality Tribunal, the Labour Court and the courts have applied the jurisprudence of the CJEU.

The Workplace Relations Act 2015 commenced on 1 October 2015. The net effect of this legislation is that all claims under employment legislation will be heard by an adjudication officer of the Workplace Relation Commission and then on appeal to the Labour Court. Therefore, equal pay and equal treatment claims will no longer be heard by an equality officer of the Equality Tribunal although many equality officers will be retained under the new Act as adjudicators.

Annexes

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All these texts are available on Westlaw.ie and Westlaw.uk; Round Hall is the Irish imprint of Sweet and Maxwell (UK).

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