



European network of legal experts in
gender equality and non-discrimination

Country report

Non-discrimination

Ireland
2015

Including summaries in
English, French and
German



EUROPEAN COMMISSION

Directorate-General for Justice and Consumers
Directorate D — Equality
Unit JUST/D1

*European Commission
B-1049 Brussels*

Country report

Non-discrimination

Ireland

Orlagh O'Farrell

Reporting period 1 January 2014 – 31 December 2014

***Europe Direct is a service to help you find answers
to your questions about the European Union.***

Freephone number (*):

00 800 6 7 8 9 10 11

(*) The information given is free, as are most calls (though some operators, phone boxes or hotels may charge you).

LEGAL NOTICE

This document has been prepared for the European Commission however it reflects the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein.

More information on the European Union is available on the Internet (<http://www.europa.eu>).

Luxembourg: Publications Office of the European Union, 2015

ISBN 978-92-79-43357-3

doi: 10.2838/62645

DS-02-15-935-3A-N

© European Union, 2015

CONTENTS

EXECUTIVE SUMMARY	6
RÉSUMÉ	12
ZUSAMMENFASSUNG	19
INTRODUCTION	26
1 GENERAL LEGAL FRAMEWORK	28
2 THE DEFINITION OF DISCRIMINATION	29
2.1 Grounds of unlawful discrimination explicitly covered	29
2.1.1 Definition of the grounds of unlawful discrimination within the directives	29
2.1.2 Multiple discrimination	30
2.1.3 Assumed and associated discrimination	30
2.2 Direct discrimination (Article 2(2)(a))	31
2.2.1 Situation testing	32
2.3 Indirect discrimination (Article 2(2)(b))	32
2.3.1 Statistical evidence	33
2.4 Harassment (Article 2(3))	33
2.5 Instructions to discriminate (Article 2(4))	35
2.6 Reasonable accommodation duties (Article 2(2)(b)(ii) and Article 5 Directive 2000/78)	36
3 PERSONAL AND MATERIAL SCOPE	41
3.1 Personal scope	41
3.1.1 EU and non-EU nationals (Recital 13 and Article 3(2) Directive 2000/43 and Recital 12 and Article 3(2) Directive 2000/78)	41
3.1.2 Protection against discrimination (Recital 16 Directive 2000/43)	41
3.2 Material scope	42
3.2.1 Employment, self-employment and occupation	42
3.2.2 Conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy (Article 3(1)(a))	42
3.2.3 Employment and working conditions, including pay and dismissals (Article 3(1)(c))	43
3.2.4 Access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience (Article 3(1)(b))	43
3.2.5 Membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations (Article 3(1)(d))	45
3.2.6 Social protection, including social security and healthcare (Article 3(1)(e) Directive 2000/43)	45
3.2.7 Social advantages (Article 3(1)(f) Directive 2000/43)	45
3.2.8 Education (Article 3(1)(g) Directive 2000/43)	46
3.2.9 Access to and supply of goods and services which are available to the public (Article 3(1)(h) Directive 2000/43)	48
3.2.10 Housing (Article 3(1)(h) Directive 2000/43)	49
4 EXCEPTIONS	52
4.1 Genuine and determining occupational requirements (Article 4)	52
4.2 Employers with an ethos based on religion or belief (Article 4(2) Directive 2000/78)	52
4.3 Armed forces and other specific occupations (Article 3(4) and Recital 18 Directive 2000/78)	53
4.4 Nationality discrimination (Article 3(2))	53
4.5 Work-related family benefits (Recital 22 Directive 2000/78)	54
4.6 Health and safety (Article 7(2) Directive 2000/78)	54

4.7	Exceptions related to discrimination on the ground of age (Article 6 Directive 2000/78)	55
4.7.1	Direct discrimination	55
4.7.2	Special conditions for young people, older workers and persons with caring responsibilities	56
4.7.3	Minimum and maximum age requirements	57
4.7.4	Retirement	57
4.7.5	Redundancy	59
4.8	Public security, public order, criminal offences, protection of health, protection of the rights and freedoms of others (Article 2(5), Directive 2000/78)	60
4.9	Any other exceptions	60
5	POSITIVE ACTION (Article 5 Directive 2000/43, Article 7 Directive 2000/78)	63
6	REMEDIES AND ENFORCEMENT	65
6.1	Judicial and/or administrative procedures (Article 7 Directive 2000/43, Article 9 Directive 2000/78)	65
6.2	Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78)	67
6.3	Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78) ..	68
6.4	Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)	68
6.5	Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)	69
7	BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43)	72
8	IMPLEMENTATION ISSUES	75
8.1	Dissemination of information, dialogue with NGOs and between social partners	75
8.2	Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)	76
9	COORDINATION AT NATIONAL LEVEL	77
10	CURRENT BEST PRACTICES	78
11	SENSITIVE OR CONTROVERSIAL ISSUES	79
11.1	Potential breaches of the directives (if any)	79
11.2	Other issues of concern	80
12	LATEST DEVELOPMENTS	81
12.1	Legislative amendments	81
12.2	Case law	81
	ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION	83
	ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS	84

List of abbreviations

EEA - Employment Equality Act 1998 - 2011

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

ESA - Equal Status Act 2000 - 2012

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

IHREC - Irish Human Rights and Equality Commission

IHRECA - Irish Human Rights and Equality Commission Act 2014

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

EXECUTIVE SUMMARY

1. Introduction

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

The major impetus for the development of the equality regime in Ireland was its accession to the European Union in 1972. The 1990s witnessed all-party agreement on the necessity for a significant expansion of Ireland's equality laws, governing more than gender discrimination. This resulted in the Employment Equality Act 1998-2011 and the Equal Status Act 2000-2012.³ These Acts also established the Equality Authority and the Equality Tribunal.

At the outset of this equality legislation there was significant support for the bodies and their actions, but subsequently there was something of a backlash. This is evidenced most keenly by the introduction of the Intoxicating Liquor Act 2003. This Act governs the enforcement of non-discrimination in licensed premises, requiring complainants to use the ordinary court system rather than the specialised Equality Tribunal. The introduction of this Act was the direct result of political pressure by the vintners of Ireland. The reason for such pressure would appear to be a direct result of the significant body of case law which established wide spread discrimination by licensed premises against members of the Traveller Community.

For six years following the economic recession in 2008 national budgets severely curtailed funding for the Equality Authority and Tribunal, whose workloads meanwhile continued to increase. With the establishment of the new merged Irish Human Rights and Equality Commission⁴ restored funding has been promised.

2. Main legislation

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

Irish anti-discrimination legislation consists of the Employment Equality Act 1998-2011, and the Equal Status Act 2000-2012. They cover the grounds of gender, age, race, religion,

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

² There are no official statistics on Roma.

³ Employment Equality Act 1998-2011, <http://www.justice.ie/en/JELR/EmpEqActsConsldtd.pdf/Files/EmpEqActsConsldtd.pdf>. Equal Status Act 2000-2012, http://www.justice.ie/en/JELR/EqualStatusActsConsldtd_00_04.pdf/Files/EqualStatusActsConsldtd_00_04.pdf.

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

family status, disability, marital status, sexual orientation, membership of the Traveller Community.

Four other acts also contain provisions prohibiting discrimination, namely the Pensions Act 1990-2008, Unfair Dismissals Act 1977-2007, the Prohibition on the Incitement to Hatred Act 1989, which criminalises hate speech, and the Intoxicating Liquor Act 2003, which provides for enforcement of discrimination law in the context of premises licensed for the sale of alcohol. The transposition of both directives and the necessary changes were provided for in the Equality Act 2004. The Employment Equality Act 1998-2011 established two permanent national institutions with enforcement functions under the equality legislation, namely the Equality Authority and the Equality Tribunal, and these were the specialised bodies designated under the Racial Equality Directive.

Irish anti-discrimination legislation goes beyond EU equality directives, in that the scope of the Equal Status Act 2000-2012 prohibit discrimination in access to goods and services not just on grounds of race and gender but also disability, age, religion, sexual orientation, Traveller community, family and marital status grounds. Nationality is also a named ground under Irish employment equality and equal status legislation. The definition of disability is broader than in EU law.

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

The International Convention against All Forms of Racial Discrimination (CERD) monitoring committee observed⁵ that the economic recession that confronted the State party since 2008 threatens to reverse the achievements that have been made in the State party's efforts to combat racial discrimination. It expressed grave concern over the disproportionate budget cuts to various human rights institutions mandated to promote and monitor human rights such as the Irish Human Rights Commission, Equality Authority and National Consultative Committee on Racism and Interculturalism. It recommended that the government should recognise Travellers as an ethnic group, and produce a positive action programme for Travellers at all levels.

3. Main principles and definitions

The Equality Acts prohibit discrimination across nine grounds, but govern different aspects of discrimination. The Employment Equality Act 1998-2011 prohibits discrimination in the sphere of employment; the Equal Status Act 1998-2012 prohibits discrimination in the provision of goods and services; the Social Welfare (Miscellaneous Provisions) Act 2004 prohibits discrimination in the provision of occupational pensions. These acts prohibit direct

⁵ Concluding Observations of the Committee on the Elimination of Racial Discrimination, March 2011 http://www2.ohchr.org/english/bodies/cerd/docs/co/Ireland_AUV.pdf.

discrimination, indirect discrimination, victimisation, harassment, instructions to discriminate and procuring another person to discriminate on the grounds of race, religion, gender, age, disability, sexual orientation, marital status, family status and membership of the Traveller community. The Equality Acts also require reasonable accommodation on the ground of disability in employment and access to goods and services. Multiple discrimination is not explicitly prohibited. Direct discrimination is defined in the Equality Acts as treating one person less favourably than another person is, treated, has been treated or would be treated on any of the nine discriminatory grounds. This prohibition includes discrimination by association, and discrimination on a discriminatory ground that exists, existed but no longer exists, may exist in the future, or is imputed to the person concerned. Indirect discrimination is defined within the Equality Acts as occurring where an apparently neutral provision puts a person within one of the protected classes at a particular disadvantage when compared with others not within that protected class. This difference of treatment may be permitted where it can be objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary. There is some concern that this definition is not fully in compliance with the directives as no provision is made for the use of hypothetical comparators. There is no necessity for a complainant to show that there was an intention to discriminate, either directly or indirectly; it is sufficient if the actions do in fact discriminate. The Equality Acts define harassment as any unwanted conduct relating to a discriminatory ground, being conduct which has the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person. This conduct can include acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material. Victimisation covers any person who claims discrimination, instigates proceedings, supports a complainant, acts as a comparator or a witness to a complaint, opposes discrimination by lawful means, or gives notice of an intention to do any of the above, and as a result they suffer dismissal or adverse treatment.

The Employment Equality Act 1998-2011 provides that where a person who has a disability can perform the duties of the post with or without the assistance of 'appropriate measures' they will be deemed competent under the Act. The employer has an obligation to take appropriate measures to enable a person with a disability to have access to employment, to participate or advance in employment, to undergo training unless such measures would impose a disproportionate burden on the employer. To determine what amounts to a disproportionate burden account must be taken of the costs of the measure in question, the scale and financial resources of the employer in question, the possibility of obtaining public funding or other assistance. The Equal Status Act 2000-2012 provides that there is a breach when a provider of goods or services fails to do all that is reasonable to accommodate the needs of a person with a disability by providing special treatment or facilities, without which it would be impossible or unduly difficult for the person to avail of the good or service in question. A failure to provide the requisite special treatment or facility in question will not amount to a failure to provide reasonable accommodation where the provision of the treatment or facility would give rise to more than a nominal cost to the provider of the goods or services in question.

The Equality Acts contain a number of exceptions to the principle of non-discrimination, which does not apply to access to employment in another person's home for the provision of personal services. There are exceptions where the characteristic in question is a genuine and determining occupational requirement for the post and the objective is legitimate and the requirement proportionate. There are exceptions relating to the grounds of age and disability in occupational pensions and remuneration in respect of someone with a restricted capacity respectively. There is a problematic exception relating to discrimination in employment for the purposes of maintaining the religious ethos of an institution, with no limitation of "legitimate" or "proportionate," and no limitation of the exception so that it could not be used to justify discrimination on another ground. There are also exceptions in respect of certain forms of employment such as the Defence Forces, the Garda Síochána (police) and the emergency services. With regard to the Equal Status Act there are a

number of exceptions and exemptions to the non-discrimination rule. Differences of treatment are permissible in respect of annuities, pensions and insurance policies where there is actuarial evidence to show that the difference is reasonable. There are exceptions to the non-discrimination norm for the purposes of organising sporting events, for authenticity purposes for a dramatic performance, or other entertainment, or for the provision of services for religious purposes. There is an exception that discrimination in relation to the provision of goods or services is not actionable in circumstances that would lead a reasonable person to believe there is a substantial risk of criminal or disorderly conduct. The Equal Status Act also contains a number of exceptions in respect of education on the grounds of age, gender, religious ethos and disability.

4. Material scope

The Employment Equality Act 1998-2011 applies to the field of employment and vocational training; this does not distinguish between public and private sector employees. This relates to access to employment, conditions of employment, training or experience for or in relation to employment, promotion or re-grading or classification of posts. This Act also covers vocational training, employment advertisements and agencies and agency workers.

The Equal Status Act 2000-2012 prohibits discrimination in relation to goods and services, including education and accommodation. State services are not explicitly mentioned. Section 14 of the Equal Status Act provides a statutory exemption where an act or action is required by virtue of another piece of legislation: then the Equal Status Act 2000-2012 does not apply.

5. Enforcing the law

The Employment Equality Act 1998-2011 introduced the enforcement mechanisms for the Equality Acts. The enforcement mechanisms apply equally to public and private employees with the exception of certain public sector employees. Complaints under either the Employment Equality Act 1998-2011 or the Equal Status Act 2000-2012 may be brought before the Equality Tribunal. The Equality Tribunal assumes an investigative role in the hearing of complaints; complainants may represent themselves, costs may not be awarded against either party, and the procedure is informal. The option of mediation is provided for in section 78 of the Employment Equality Act 1998-2011. A mediated settlement agreed by the parties becomes legally binding and its terms can be enforced at the Circuit Court. The decisions of the Tribunal may be appealed; the Labour Court hears the employment appeals, whereas the Circuit Court hears the equal status appeals. Labour court determinations can be appealed on a point of law to the High Court. Complaints of unfair dismissal may also be brought under the Unfair Dismissals Acts 1977 and 1993. The Employment Appeals Tribunal makes legally binding determinations, with the possibility of appeal to the Circuit Court, and subsequently the High Court. Claims are brought before the relevant body by way of application using standard forms. Once litigation has been instigated the alleged discriminator will be notified. Hearings are in private before the Equality Tribunal and Labour Court; before the Employment Appeals Tribunal the hearings are normally in public. The decisions of each of the bodies are available for public inspection, with both the Equality Tribunal and the Labour Court publishing their decisions on their respective websites. Complaints under the Equal Status Act 2000-2012 involving licensed premises (i.e. pubs etc.) must now be brought to the District Court rather than as previously to the Equality Tribunal. The major impact of this amendment is increased costs for complainants. Organisations may represent an individual complainant, at the Equality Tribunal or the Labour Court where they are authorised to do so by the complainant, but not before the Circuit Court or the High Court. Organisations are not permitted to take a complaint, with the exception of the Equality Authority. The Equality Authority enjoys legal standing to bring complaints to the Equality Tribunal relating to patterns of discrimination, discriminatory advertising or the contents of a collective agreement. The Authority can also provide legal assistance and representation to an individual complainant. The tribunal

system is currently being reorganised into a new structure which will see the Equality Tribunal and Employment Appeals Tribunal replaced by a new Workplace Relations Commission (WRC), and the appellate functions of the EAT transferred to a new expanded Labour Court.

The Equality legislation provides for a shift in the burden of proof in non-discrimination cases, where the facts established suggest that there is a prima facie case of discrimination. The use of statistics is permitted, but is not necessary to raise a prima facie case of discrimination. Situation testing has not been used to any great extent. There are no procedural or other rules prohibiting the use of "situational testing." However judges from the Irish superior courts may be hostile to this form of evidence, seeing it as a form of entrapment. The Employment Equality Act 1998-2011 provides for a broad range of remedies: compensation, orders for employers to take specific courses of action, re-instatement and re-engagement. All employment contracts are deemed to have an equality clause that transforms any provisions of the contract that would otherwise give rise to unlawful discrimination. All discriminatory provisions in collective agreements are deemed null and void it is not possible to contract out of the terms of the equality legislation. There are maximum limits on financial awards, those limits in the context of employment are a maximum of two years pay, and where the complainant was not in employment then the maximum award is €12,697.

The Employment Equality Act 1998-2011 also provides for non-financial remedies, such as an order that a person should take a course of action including orders for re-instatement or re-engagement. The Equal Status Act 2000-2012 also provides for a variety of remedies including compensation, or orders for service providers to take specific course of action. This Act also imposes maximum award limits; the current maximum is €15,000.⁶ The majority of awards granted do not come anywhere near the maximum. Under both Acts the financial sanctions are much lighter than those provided for in the case of gender. This suggests that the sanctions in the case of the non-gender grounds under these Acts may not be effective, proportionate or dissuasive.

6. Equality bodies

The Equality Authority has now been merged with the Irish Human Rights Commission to form the Irish Human Rights and Equality Commission.⁷ The Irish Human Rights and Equality Commission (IHREC), which was established on 1 November 2014, is an independent body mandated to work towards the elimination of discrimination, promote equality of opportunity, provide information to the public on a number of matters and review various legislative enactments. It fulfils these functions by means of research and awareness raising, review of the legislation and the drafting of statutory Codes of Practice. IHREC also has the power to instigate litigation on its own behalf or to assist a litigant. It is authorised to conduct inquiries, and carry out equality reviews. The Department of Justice, Equality and Law Reform, under the direction of the Minister, funds IHREC, which reports to the Irish Parliament.

The Equality Tribunal is a quasi-judicial body established for the purpose of investigating complaints under the Employment Equality Act 1998-2011 and the Equal Status Act 2000-2012, on all nine grounds. Its decisions are binding. The Tribunal Director is charged with the enforcement of the Employment Equality Acts and the Equal Status Acts, and may delegate his/her quasi-judicial functions to Equality Officers and Equality Mediation Officers. The Tribunal also has jurisdiction to deal with discriminatory dismissals and the Pensions Acts as they deal with equality issues.

⁶ The limit was raised with effect from 4 February 2014, [Courts and Civil Law \(Miscellaneous Provisions\) Act 2013](#).

⁷ Irish Human Rights and Equality Commission Act <http://www.irishstatutebook.ie/2014/en/act/pub/0025/print.html>.

The Equality Tribunal is currently being reorganised into a new structure under the responsibility of the Minister for Jobs, Enterprise and Innovation, which will see the Equality Tribunal and Employment Appeals Tribunal replaced by a new Workplace Relations Commission (WRC), and the appellate functions of the EAT transferred to a new expanded Labour Court. The new body will report annually to the Minister for Jobs, Enterprise and Innovation. The legislation is pending and formal adoption is expected in 2015.⁸

7. Key issues

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

The other significant change will be the absorption of the Equality Tribunal into an amalgamated Workplace Relations Commission under impending legislation. It may be a cause of concern that the two equality bodies will now be reporting to different Ministers, only one of whose remit concerns equality.

⁸ Workplace Relations Bill 2014, <http://www.oireachtas.ie/documents/bills28/bills/2014/7914/b7914d-memo.pdf>.

RÉSUMÉ

1. Introduction

La composition de la société irlandaise est assez homogène. Selon le recensement de 2011,⁹ la population de 4 588 252 habitants comprend 84 % de catholiques romains, 2,8 % de membres de l'Église d'Irlande (protestante), 1 % de Musulmans et 1,8 % de personnes déclarant n'appartenir à aucune confession religieuse – le solde comprenant des personnes appartenant à des religions diverses et les personnes n'ayant rien déclaré. Selon la même source, 85 % se décrivent comme des Irlandais de race blanche et 0,6 % comme des gens du voyage irlandais,¹⁰ et 58 697 personnes se décrivent comme étant de race noire ou comme des Irlandais de race noire. Le pourcentage des «autres blancs» (non-Irlandais) a augmenté de près de 43 % entre 2006 et 2011 en raison principalement de l'immigration en provenance de pays d'Europe de l'Est. Le groupe ethnique des «autres asiatiques» comprend des personnes d'origine indienne et philippine (progression de 87 %) et le pays enregistre une hausse de 8 % de résidents d'origine chinoise. L'âge moyen de la population s'établit à 36,1 ans. Les chiffres concernant les personnes se déclarant handicapées ne sont pas disponibles. Le recensement ne contenait aucune question concernant l'orientation sexuelle (le pays comptait 4 042 couples de même sexe vivant en cohabitation). Les ressortissants étrangers étaient au nombre de 544 357 (12 % de la population). Le pourcentage de non-ressortissants originaires d'un autre État membre de l'UE n'est pas disponible, mais devrait représenter la majorité des étrangers vivant dans le pays.

C'est l'adhésion à l'Union européenne en 1972 qui a insufflé le principal élan au développement du régime égalitaire en Irlande. Les années 1990 ont vu tous les partis s'accorder sur la nécessité d'un élargissement sensible de la législation irlandaise en matière d'égalité afin qu'elle aille au-delà de la discrimination fondée sur le genre. C'est ainsi qu'ont été adoptées la loi sur l'égalité dans l'emploi (1998-2011) et la loi sur l'égalité des statuts (2000-2012),¹¹ lesquelles ont également institué l'*Equality Authority* (Autorité pour l'égalité) et l'*Equality Tribunal* (Tribunal pour l'égalité).

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

Au cours des six années écoulées depuis le début de la crise économique en 2008, les budgets nationaux ont considérablement réduit le financement de l'*Equality Authority* et de l'*Equality Tribunal*, dont la charge de travail a pourtant continué d'augmenter. Un rétablissement du financement est promis lors de la mise en place de la nouvelle Commission irlandaise fusionnée en charge des droits de l'homme et de l'égalité.¹²

⁹ <http://www.cso.ie/en/census/census2011reports/>.

¹⁰ Il n'existe aucune statistique officielle concernant les Roms.

¹¹ *Employment Equality Act 1998-2011*, <http://www.justice.ie/en/JELR/EmpEqActsConsldtd.pdf/Files/EmpEqActsConsldtd.pdf>, *Equal Status Act 2000-2012*, http://www.justice.ie/en/JELR/EqualStatusActsConsldtd_00_04.pdf/Files/EqualStatusActsConsldtd_00_04.pdf.

¹² *Irish Human Rights and Equality Commission Act (2014)* (Loi de 2014 sur la Commission pour les droits de l'homme et l'égalité), <http://www.irishstatutebook.ie/2014/en/act/pub/0025/print.html>. Ce nouvel organisme est opérationnel depuis le 1^{er} novembre 2014.

2. Législation principale

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

La législation irlandaise antidiscrimination comprend la loi sur l'égalité dans l'emploi (1998-2011) et la loi sur l'égalité des statuts (2000-2012), qui couvrent les motifs suivants: le genre, l'âge, la race, la religion, la situation familiale, le handicap, l'état matrimonial, l'orientation sexuelle et l'appartenance à la communauté des gens du voyage.

Quatre autres lois contiennent également des dispositions interdisant la discrimination, à savoir, la loi sur les retraites (1990-2008), la loi sur les licenciements abusifs (1977-2007), la loi de 1989 sur l'interdiction de l'incitation à la haine, qui pénalise les discours haineux, et la loi de 2003 sur les boissons alcoolisées, qui prévoit une mise en application du droit antidiscrimination dans le cadre des établissements titulaires d'une licence de vente d'alcool. La transposition des deux directives et les modifications requises ont été assurées par la loi de 2004 sur l'égalité. La loi sur l'égalité dans l'emploi (1998-2011) a créé deux institutions nationales permanentes chargées de faire respecter la législation relative à l'égalité: il s'agit de l'*Equality Authority* (Autorité pour l'égalité) et de l'*Equality Tribunal* (Tribunal pour l'égalité), qui constituent les organismes spécialisés désignés au titre de la directive sur l'égalité raciale.

La législation antidiscrimination irlandaise va au-delà des directives de l'Union européenne sur l'égalité dans la mesure où la loi sur l'égalité des statuts (2000-2012) interdit la discrimination dans l'accès aux biens et aux services non seulement pour des motifs de race et de genre, mais également de handicap, d'âge, de religion, d'orientation sexuelle, d'appartenance à la communauté des gens du voyage, d'état matrimonial et de situation familiale. La nationalité est également désignée en tant que motif de discrimination par la législation irlandaise relative à l'égalité dans l'emploi et à l'égalité des statuts. La définition du handicap est plus large que celle figurant dans le droit de l'UE.

L'Irlande a ratifié presque tous les grands instruments internationaux de lutte contre la discrimination: la Charte des Nations unies, la Déclaration universelle des droits de l'homme, le Pacte des Nations unies relatif aux droits civils et politiques, le Pacte des Nations unies relatif aux droits économiques, sociaux et culturels, la Convention des Nations unies relative aux droits de l'enfant, la Convention des Nations unies sur l'élimination de toutes les formes de discrimination à l'égard des femmes, la Convention des Nations unies sur la nationalité de la femme mariée, la Convention internationale sur l'élimination de toutes les formes de discrimination raciale, la Convention des Nations unies relative au statut des réfugiés, la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales, la Charte sociale européenne, la Charte sociale européenne (révisée), la Convention-cadre européenne pour la protection des minorités nationales et la Convention européenne sur l'exercice des droits de l'enfant. Elle n'a pas ratifié le protocole n° 12 à la Convention européenne des droits de l'homme. L'Irlande est un État dualiste, ce qui signifie que pour avoir un impact au niveau du système juridique irlandais, la législation internationale doit être transposée en droit interne par voie législative. La seule convention internationale qui ait été transposée en droit irlandais est la Convention européenne de sauvegarde des droits de l'homme, laquelle y a été incorporée au moyen de l'*European Convention on Human Rights Act* (loi sur la Convention européenne de sauvegarde des droits de l'homme) de 2003. L'Irlande n'a pas encore ratifié la Convention des Nations unies relative aux droits des personnes handicapées.

Le Comité pour l'élimination de la discrimination raciale (CERD), qui surveille l'application de la Convention sur l'élimination de toutes les formes de discrimination raciale, a

constaté¹³ que la récession économique à laquelle l'État partie est confronté depuis 2008 risque de compromettre les avancées réalisées par ledit État partie dans sa lutte contre la discrimination raciale. Il s'est dit profondément préoccupé par les réductions disproportionnées des budgets de diverses institutions des droits de l'homme chargées de promouvoir et de surveiller le respect des droits de l'homme, telles que l'*Irish Human Rights Commission* (Commission irlandaise des droits de l'homme), l'*Equality Authority* (Autorité pour l'égalité) et le *National Consultative Committee on Racism and Interculturalism* (Comité consultatif national sur le racisme et l'interculturalisme). Il a recommandé que le gouvernement reconnaisse les gens du voyage en tant que groupe ethnique et élabore un programme d'action positive en leur faveur à tous les niveaux.

3. Principes généraux et définitions

Les lois garantissant l'égalité interdisent la discrimination pour neuf motifs, mais régissent des aspects différents de la discrimination. L'*Employment Equality Act* (loi sur l'égalité dans l'emploi) (1998-2011) interdit la discrimination dans le domaine de l'emploi; l'*Equal Status Act* (la loi sur l'égalité des statuts) (2000-2012) interdit la discrimination dans la fourniture de biens et de services; et la *Social Welfare (Miscellaneous Provisions) Act* (loi sur la sécurité sociale (dispositions diverses)) de 2004 interdit la discrimination en matière de pensions de retraite professionnelles. Ces lois interdisent la discrimination directe, la discrimination indirecte, les rétorsions, le harcèlement, l'injonction de discriminer et le fait d'obtenir d'une autre personne qu'elle pratique une discrimination fondée sur la race, la religion, le genre, l'âge, le handicap, l'orientation sexuelle, l'état matrimonial, la situation familiale et l'appartenance à la communauté des gens du voyage. Les lois sur l'égalité exigent également l'aménagement raisonnable en rapport avec le handicap dans les domaines de l'emploi et de l'accès aux biens et aux services. La discrimination multiple n'est pas explicitement interdite. La discrimination directe est définie dans les lois sur l'égalité comme le fait de traiter une personne de manière moins favorable qu'une autre ne l'est, ne l'a été ou ne le serait en raison de l'un des neuf motifs discriminatoires. Cette interdiction inclut la discrimination par association et la discrimination fondée sur un motif existant, ayant existé mais n'existant plus, pouvant exister dans le futur ou imputé à la personne concernée. Les lois sur l'égalité définissent la discrimination indirecte comme se produisant lorsqu'une disposition apparemment neutre fait qu'une personne appartenant à l'une des catégories protégées subit un désavantage particulier par rapport à d'autres personnes n'appartenant pas à cette catégorie protégée. Cette différence de traitement est autorisée lorsqu'elle peut être objectivement justifiée par un but légitime et que les moyens pour atteindre ce but sont appropriés et nécessaires. On peut craindre cependant que cette définition ne soit pas pleinement conforme aux directives dans la mesure où aucune disposition n'est prévue pour ce qui concerne l'utilisation de comparateurs hypothétiques. Il n'est pas nécessaire pour un plaignant de démontrer l'existence d'une intention de discriminer, directement ou indirectement. Il suffit que les actes aient un effet discriminatoire. Les lois sur l'égalité définissent le harcèlement comme tout comportement indésirable lié à un motif discriminatoire et ayant pour objet ou pour effet de porter atteinte à la dignité d'une personne et de créer pour elle un environnement intimidant, hostile, dégradant, humiliant ou offensant. Ce comportement peut consister en actes, demandes, mots exprimés, gestes ou production, affichage ou distribution de mots écrits, de dessins ou d'autre matériel. Les rétorsions visent toute situation dans laquelle une personne se déclarant victime de discrimination engage des poursuites ou soutient un plaignant, agit en qualité de comparateur ou comme témoin dans une procédure de plainte, s'oppose à la discrimination par des moyens légaux ou fait part de son intention d'agir de l'une des

¹³ Observations finales du Comité pour l'élimination de la discrimination raciale, mars 2011
http://www.google.be/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CBwQFjAAahUKEwjpueM_N_YrJAhXDshQKHQFzAxM&url=http%3A%2F%2Fdocstore.ohchr.org%2FSelfServices%2FFilesHandler.ashx%3Fenc%3D6QkG1d%252FPPRiCAqhKb7yhsi%252FyrM1B9TT0oGmEKq0FjIGMDN9GaDxXjccJrXyrYI%252F%252FcNOv7wnHIb0L7jDoxEB0XhLrMV2E0%252B7Oq%252FVkgJwstIoaPAlc7j370zMKLqdNpmCu&usq=AFOjCNFoWTU1-7-OFITRvA_1WuCGvNR5xQ.

manières précitées et fait l'objet pour cette raison d'un licenciement ou d'un traitement défavorable.

La loi sur l'égalité dans l'emploi (1998-2011) dispose que, lorsqu'une personne atteinte d'un handicap peut s'acquitter des fonctions du poste qu'elle occupe avec ou sans l'aide de «mesures appropriées», elle est considérée comme compétente en vertu de la loi. L'employeur est tenu de prendre des mesures appropriées afin de permettre à une personne souffrant d'un handicap d'avoir accès à l'emploi, de participer à l'emploi ou d'y être promue, et de suivre une formation, à moins que ces mesures imposent une charge disproportionnée à l'employeur. Pour déterminer ce que représente une charge disproportionnée, il convient de tenir compte du coût de la mesure en question, de la taille et des ressources financières de l'employeur concerné, et de la possibilité d'obtenir un financement public ou une autre forme d'assistance. La loi sur l'égalité des statuts (2000-2012) stipule qu'il y a infraction lorsqu'un fournisseur de biens et de services ne fait pas tout ce qui est raisonnable pour répondre aux besoins d'une personne handicapée en prévoyant un traitement ou un équipement spécial sans lequel il serait impossible ou excessivement difficile pour cette personne de pouvoir disposer des biens et services en question. Le fait de ne pas offrir le traitement ou l'équipement spécial requis ne sera pas considéré comme un non-respect de l'obligation d'aménagement raisonnable lorsque la mise à disposition de ce traitement ou de cet équipement impose au fournisseur de biens ou services des frais allant au-delà du coût nominal des biens ou services concernés.

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

4. Champ d'application matériel

La loi sur l'égalité dans l'emploi (1998-2011) s'applique au domaine de l'emploi et de la formation professionnelle sans établir de distinction entre les travailleurs du secteur public et ceux du secteur privé. Elle concerne l'accès à l'emploi, les conditions de travail, la formation ou l'expérience requise pour l'emploi, la promotion ou le reclassement, et la classification professionnelle. Cette loi régit également la formation professionnelle, les offres d'emploi, les agences de placement et les travailleurs intérimaires.

La loi sur l'égalité des statuts (2000-2012) interdit la discrimination en matière de biens et services, y compris dans le domaine de l'enseignement et du logement. Elle ne mentionne pas spécifiquement les services publics. Son article 14 prévoit une exemption statutaire dans la mesure où la loi sur l'égalité des statuts (2000-2012) ne s'applique pas lorsqu'une action ou une mesure est requise en vertu d'un autre acte législatif.

5. Mise en application de la loi

La loi sur l'égalité dans l'emploi (1998-2011) a institué les mécanismes de mise en application prévus pour les lois sur l'égalité, lesquels s'appliquent de la même façon aux travailleurs du secteur public et à ceux du secteur privé, à l'exception de certains agents de la fonction publique. Les recours invoquant la loi sur l'égalité dans l'emploi (1998-2011) ou la loi sur l'égalité des statuts (2000-2012) peuvent être adressés au Tribunal pour l'égalité (*Equality Tribunal*). Cette instance assure un rôle d'investigation dans l'audition des plaintes. Les plaignants peuvent se représenter eux-mêmes, les frais ne peuvent être portés à la charge d'aucune des parties et la procédure est informelle. L'option de la médiation est prévue à l'article 78 de la loi sur l'égalité dans l'emploi (1998-2011). Un règlement intervenant au terme d'une médiation est exécutoire pour les parties et le respect de ses clauses peut être imposé par le tribunal itinérant (*Circuit Court*). Il peut être fait appel des décisions de l'*Equality Tribunal* auprès de la juridiction du travail (*Labour Court*) lorsqu'il s'agit d'emploi et auprès du tribunal itinérant (*Circuit Court*) lorsqu'il s'agit d'égalité de statut. Il peut être fait appel des décisions de la *Labour Court* sur un point de droit auprès de la *High Court* (Cour suprême). Les recours pour licenciement abusif peuvent également être portés devant les tribunaux en vertu des lois sur les licenciements abusifs (*Unfair Dismissal Acts*) de 1977 et 1993. L'*Employment Appeals Tribunal* (juridiction d'appel compétente en matière de relations de travail) rend des décisions juridiquement contraignantes avec possibilité d'appel devant la *Circuit Court*, puis devant la *High Court*. La requête est déposée auprès de l'instance concernée au moyen d'un formulaire standard. Une fois l'action intentée, l'auteur allégué de la discrimination en est avisé. Les audiences se tiennent à huis clos en ce qui concerne l'*Equality Tribunal* et la *Labour Court*, mais elles sont généralement publiques dans le cas de l'*Employment Appeals Tribunal*. Les décisions des deux premières de ces instances sont disponibles pour consultation publique puisqu'elles sont publiées sur leurs sites Internet respectifs. Les recours invoquant la loi sur l'égalité des statuts (2000-2012) et impliquant des établissements titulaires d'une licence de débit de boissons (pubs, etc.) doivent désormais être adressés à la *District Court* (tribunal de district) plutôt qu'à l'*Equality Tribunal*, comme c'était le cas auparavant. Cette modification se traduit principalement par des frais plus importants pour les plaignants. Des organisations peuvent représenter un plaignant individuel devant l'*Equality Tribunal* ou la *Labour Court* pour autant que ledit plaignant les y autorise, mais pas devant la *Circuit Court* ou la *High Court*. Les organisations ne sont pas autorisées à déposer plainte, à l'exception de l'*Equality Authority*, laquelle est habilitée à saisir l'*Equality Tribunal* à propos de pratiques discriminatoires, de publicités à caractère discriminatoire ou du contenu de conventions collectives. L'Autorité peut également offrir une assistance juridique et une représentation à un plaignant individuel. Le système judiciaire est en phase de réorganisation et la nouvelle structure prévoit le remplacement de l'*Equality Tribunal* et de l'*Employment Appeals Tribunal* par une nouvelle Commission pour les relations sur le lieu de travail (*Workplace Relations Commission* ou WRC) et le transfert des fonctions d'appel de l'*Employment Appeals Tribunal* vers une nouvelle juridiction du travail renforcée. La législation sur l'égalité prévoit le renversement de la charge de la preuve dans les affaires de discrimination lorsque les faits établis conduisent à présumer l'existence d'une discrimination. L'utilisation de statistiques est autorisée mais n'est pas nécessaire pour établir une présomption de discrimination. Le test de situation n'a guère été utilisé. Il n'existe aucune règle procédurale ou autre qui l'interdise, mais les juges des instances supérieures irlandaises pourraient être hostiles à cette forme de preuve qu'ils considèrent comme une sorte de piège. La loi sur l'égalité dans l'emploi (1998-2011) prévoit un large éventail de recours: indemnisation, ordres aux employeurs de prendre des mesures spécifiques, réintégration dans la fonction ou réengagement. Tous les contrats de travail

sont censés posséder une clause d'égalité transformant toute disposition du contrat susceptible d'entraîner autrement une discrimination illégale. Toutes les dispositions discriminatoires figurant dans les conventions collectives sont nulles et non avenues, et aucun contrat ne peut être soustrait à l'application des dispositions de la législation garantissant l'égalité. Les indemnités financières sont plafonnées: dans le cadre de l'emploi, elles représentent deux ans de salaire; en dehors de l'emploi, l'indemnisation maximale est fixée à 12 697 euros.

La loi sur l'égalité dans l'emploi (1998-2011) prévoit également des sanctions non financières, telles que l'ordre à une personne de prendre une mesure déterminée, y compris la réintégration ou le réengagement. La loi sur l'égalité des statuts (2000-2012) prévoit également divers recours, parmi lesquels des indemnités et des ordres aux prestataires de services de prendre des mesures spécifiques. Cette loi plafonne également l'indemnisation, laquelle est actuellement limitée à 15 000 euros.¹⁴ La majorité des indemnités sont toutefois très loin d'approcher ce montant. Les sanctions financières prises en vertu des deux lois sont beaucoup plus légères que celles appliquées en cas de discrimination fondée sur le genre – ce qui conduit à penser que les sanctions imposées au titre de ces deux lois pour d'autres motifs que le genre pourraient ne pas être efficaces, proportionnées et dissuasives.

6. Organismes de promotion de l'égalité de traitement

L'*Equality Authority* (Autorité pour l'égalité) et l'*Irish Human Rights Commission* (Commission irlandaise des droits de l'homme) ont été fusionnées et forment désormais l'*Irish Human Rights and Equality Commission* ou IHREC (Commission irlandaise pour les droits de l'homme et l'égalité).¹⁵ Cette nouvelle Commission, instituée le 1^{er} novembre 2014, est un organisme indépendant chargé d'œuvrer à l'élimination de la discrimination, à la promotion de l'égalité des chances, à la fourniture au public d'informations sur toute une série de questions, et à l'examen de divers textes législatifs. Elle remplit cette mission au moyen de travaux de recherche et d'actions de sensibilisation, de l'analyse de la législation et de l'élaboration de codes de pratique statutaires. L'IHREC est également habilitée à intenter des poursuites pour son propre compte ou pour aider l'une des parties. Elle est autorisée à mener des enquêtes et à procéder à des bilans en matière d'égalité. Le ministère de la Justice, de l'égalité et des réformes législatives, sous la direction du ministre, finance l'IHREC - laquelle rapporte au Parlement irlandais.

L'*Equality Tribunal* est un organisme quasi-judiciaire institué pour instruire les plaintes déposées en vertu de la loi sur l'égalité dans l'emploi (1998-2011) et la loi sur l'égalité des statuts (2000-2012) en rapport avec les neuf motifs. Ses décisions sont exécutoires. Le directeur/la directrice du Tribunal est chargé(e) de faire appliquer la loi sur l'égalité dans l'emploi et la loi sur l'égalité des statuts, et peut déléguer ses fonctions quasi-judiciaires à des agents responsables de l'égalité ou à des agents en charge de médiations en matière d'égalité. Le Tribunal est également compétent pour traiter de licenciements discriminatoires ainsi que des questions en rapport avec les lois relatives aux retraites dans la mesure où elles concernent l'égalité.

L'*Equality Tribunal* est actuellement en phase de réorganisation et la nouvelle structure, placée sous la responsabilité du ministre de l'Emploi, de l'entreprise et de l'innovation, prévoit le remplacement de l'*Equality Tribunal* et de l'*Employment Appeals Tribunal* par une nouvelle Commission pour les relations sur le lieu de travail (*Workplace Relations Commission* ou WRC) et le transfert des fonctions d'appel de l'*Employment Appeals Tribunal* vers une nouvelle juridiction du travail renforcée. La nouvelle instance fera rapport

¹⁴ La limite supérieure a été relevée avec effet au 4 février 2014, [Courts and Civil Law \(Miscellaneous Provisions\) Act 2013](#).

¹⁵ *Irish Human Rights and Equality Commission Act* (Loi sur la Commission pour les droits de l'homme et l'égalité), <http://www.irishstatutebook.ie/2014/en/act/pub/0025/print.html>.

chaque année au ministre de l'Emploi, de l'entreprise et de l'innovation. La législation est à l'examen et son adoption formelle est prévue en 2015.¹⁶

7. Points essentiels

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

L'autre changement important réside dans l'absorption, en vertu du projet de législation, de l'*Equality Tribunal* par une Commission fusionnée pour les relations sur le lieu de travail. On peut craindre que les deux organismes pour la promotion de l'égalité rapporteront à l'avenir à deux ministres différents, dont un seul a un mandat couvrant l'égalité.

¹⁶ *Workplace Relations Bill 2014* (Projet de loi sur les relations sur le lieu de travail, 2014), <http://www.oireachtas.ie/documents/bills28/bills/2014/7914/b7914d-memo.pdf>.

ZUSAMMENFASSUNG

1. Einleitung

Die Zusammensetzung der irischen Gesellschaft ist relativ homogen. Nach der Volkszählung von 2011¹⁷ sind von den 4.588.252 Einwohnern des Landes 84 % römisch-katholisch, 2,8 % Mitglied der Church of Ireland (Protestanten), 1 % Muslime, 1,8 % nicht religiös und der Rest gehört entweder einer anderen Glaubensrichtung an oder hat keine Angaben gemacht. 85 % bezeichnen sich selbst als weiße Iren, 0,6 % als irische Fahrende oder Landfahrer (Travellers).¹⁸ 58.697 bezeichnen sich selbst als Schwarze oder schwarze Iren. Zwischen 2006 und 2011 ist der Anteil der „sonstigen Weißen“ (Nicht-Iren) um fast 43 % gestiegen, vor allem durch Einwanderer aus osteuropäischen Ländern. Zur ethnischen Gruppe „sonstige Asiaten“ gehören Menschen mit indischer und philippinischer Herkunft (Anstieg um 87 %), die Bevölkerungsgruppe mit chinesischer ethnischer Zugehörigkeit ist um mehr als 8 % gewachsen. Das Durchschnittsalter der Bevölkerung liegt bei 36,1 Jahren. Zur Anzahl der Menschen, die sich selbst als behindert bezeichnen, gibt es keine Angaben. In der Volkszählung wurden keine Daten zur sexuellen Ausrichtung erhoben (es gab jedoch 4042 gleichgeschlechtliche Lebenspartnerschaften). 544.357 Personen besitzen nicht die irische Staatsbürgerschaft (12 % der Bevölkerung). Es liegen keine Zahlen dazu vor, wie viele davon aus anderen EU-Mitgliedstaaten stammen, aber es ist vermutlich die Mehrheit der Nicht-Staatsbürger.

Der wichtigste Impuls für die Entwicklung der irischen Gleichbehandlungspolitik ging vom Beitritt des Landes zur Europäischen Union im Jahr 1972 aus. In den 1990er Jahren waren sich alle Parteien einig, dass Irland ein wesentlich umfassenderes Gleichbehandlungsrecht braucht, das über das Thema Diskriminierung aufgrund des Geschlechts weit hinausgeht. Ergebnisse dieser Bestrebungen waren das Gesetz zur Gleichstellung am Arbeitsplatz 1998-2011 und das Gleichstellungsgesetz 2000-2012.¹⁹ Mit diesen Gesetzen wurde außerdem die Gleichbehandlungsstelle und das Gleichstellungstribunal geschaffen.

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

In den sechs Jahren nach der Wirtschaftskrise von 2008 wurden die Haushaltsmittel für die Gleichbehandlungsstelle und das Tribunal stark gekürzt, wobei deren Arbeitsbelastung eher zugenommen hat. Die Stelle wurde inzwischen mit der neu gegründeten Irischen Menschenrechts- und Gleichbehandlungskommission²⁰ zusammengelegt, in diesem Zusammenhang wurde auch eine Wiederaufstockung der Finanzmittel versprochen.

¹⁷ <http://www.cso.ie/en/census/census2011reports/>.

¹⁸ Es gibt keine offiziellen Statistiken zu den Roma.

¹⁹ Gesetz zur Gleichstellung am Arbeitsplatz 1998-2011, <http://www.justice.ie/en/JELR/EmpEqActsConsldtd.pdf/Files/EmpEqActsConsldtd.pdf>. Gleichstellungsgesetz 2000-2012, http://www.justice.ie/en/JELR/EqualStatusActsConsldtd_00_04.pdf/Files/EqualStatusActsConsldtd_00_04.pdf.

²⁰ Gesetz über die Irische Menschenrechts- und Gleichbehandlungskommission (2014) <http://www.irishstatutebook.ie/2014/en/act/pub/0025/print.html>. Die neue Stelle nahm am 1. November 2014 ihre Arbeit auf.

2. Wichtigste Gesetze

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

Das irische Antidiskriminierungsrecht besteht aus dem Gesetz zur Gleichstellung am Arbeitsplatz 1998-2011 und dem Gleichstellungsgesetz 2000-2012. Es deckt die Diskriminierungsgründe Alter, Rasse, Religion, Familienstand, Behinderung, Personenstand, sexuelle Ausrichtung und Mitgliedschaft in der Gemeinschaft der Landfahrer ab.

Vier weitere Gesetze enthalten ein Verbot von Diskriminierung, nämlich das Rentengesetz 1990-2008, das Kündigungsschutzgesetz 1977-2007, das Gesetz über das Verbot der Anstiftung zum Hass 1989, in dem der Straftatbestand der Hassrede eingeführt wird, und das Gesetz über alkoholische Getränke 2003, das die Durchsetzung des Diskriminierungsverbots gegenüber Betrieben betrifft, die eine Konzession zum Ausschank alkoholischer Getränke haben. Die Umsetzung der beiden Richtlinien und die dafür notwendigen Gesetzesänderungen wurden durch das Gleichstellungsgesetz 2004 durchgeführt. Das Gesetz zur Gleichstellung am Arbeitsplatz von 1998-2011 führte zwei dauerhafte nationale Stellen zur Durchsetzung des Gleichstellungsrechts ein, nämlich die Gleichbehandlungsstelle und das Gleichstellungstribunal. Sie sind die zuständigen Stellen im Sinne der Antirassismusrichtlinie.

Das irische Antidiskriminierungsrecht geht über die Gleichstellungsrichtlinien der EU hinaus, weil das Gleichstellungsgesetz 2000-2012 auch ein Diskriminierungsverbot beim Zugang zu Gütern und Dienstleistungen enthält und zwar nicht nur aufgrund von Rasse und Geschlecht, sondern auch aufgrund von Behinderung, Alter, Religion, sexueller Ausrichtung, Mitgliedschaft in der Traveller-Gemeinschaft sowie Familien- und Personenstand. Das Gesetz zur Gleichstellung am Arbeitsplatz und das Gleichstellungsgesetz nennt auch die Nationalität als verbotenen Diskriminierungsgrund. Die Definition von Behinderung ist weiter als die des EU-Rechts.

Irland hat fast alle wichtigen internationalen Rechtsinstrumente zur Bekämpfung von Diskriminierung ratifiziert: Die Charta der Vereinten Nationen, die Allgemeine Erklärung der Menschenrechte, den Internationalen Pakt über bürgerliche und politische Rechte, den Internationalen Pakt über wirtschaftliche, soziale und kulturelle Rechte, die UN-Kinderrechtskonvention, das Übereinkommen zur Beseitigung jeder Form von Diskriminierung der Frau, das Übereinkommen über die Staatsangehörigkeit verheirateter Frauen, das Übereinkommen zur Beseitigung jeder Form von Rassendiskriminierung, die Genfer Flüchtlingskonvention, die Konvention zum Schutz der Menschenrechte und Grundfreiheiten, die Europäische Sozialcharta, die Europäische Sozialcharta (revidiert), das Rahmenübereinkommen zum Schutz nationaler Minderheiten und das Europäische Übereinkommen über die Ausübung von Kinderrechten. Irland hat das 12. Protokoll der Europäischen Menschenrechtskonvention nicht ratifiziert. Irland ist ein dualistischer Staat, das heißt internationales Recht kann nur dann im irischen Rechtssystem angewendet werden, wenn es durch ein Gesetz in irisches Recht überführt wurde. Das einzige internationale Übereinkommen, das in irisches Recht überführt wurde, ist die Europäische Menschenrechtskonvention, die durch das Gesetz über die Europäische Menschenrechtskonvention 2003 ins nationale Rechtssystem aufgenommen wurde. Irland hat das Übereinkommen über die Rechte von Menschen mit Behinderungen noch nicht ratifiziert.

Der Überwachungsausschuss des Übereinkommens zur Beseitigung jeder Form von Rassendiskriminierung (CERD) hat festgestellt,²¹ dass die wirtschaftliche Rezession, die der

²¹ Concluding Observations of the Committee on the Elimination of Racial Discrimination, März 2011
http://www2.ohchr.org/english/bodies/cerd/docs/co/Ireland_AUV.pdf.

Vertragsstaat seit 2008 erlebt, die Erfolge des Vertragsstaats im Kampf gegen Rassendiskriminierung zunichte zu machen droht. Er drückte schwere Bedenken gegen die unverhältnismäßig starken Budgetkürzungen für mehrere Menschenrechtsinstitutionen aus, die die Aufgabe haben, die Menschenrechte zu fördern und zu überwachen. Dazu gehören die Irische Menschenrechtskommission, die Gleichbehandlungsstelle und der Nationale Beratungsausschuss über Rassismus und interkulturelle Fragen. Er empfahl der Regierung die Anerkennung der Travellers als ethnischer Gruppe und die Einführung eines positiven Maßnahmenprogramms zur Förderung der Travellers auf allen Ebenen.

3. Wichtigste Grundsätze und Begriffe

Die Gleichstellungsgesetze verbieten Diskriminierung aufgrund von neun Gründen, decken jedoch unterschiedliche Aspekte von Diskriminierung ab. Das Gesetz zur Gleichstellung am Arbeitsplatz 1998-2011 verbietet Diskriminierung im Arbeitsleben, das Gleichstellungsgesetz 1998-2010 verbietet Diskriminierung bei der Bereitstellung von Gütern und Dienstleistungen, das Gesetz über soziale Sicherheit 2004 verbietet Diskriminierung bei der betrieblichen Altersversorgung. Diese Gesetze verbieten unmittelbare und mittelbare Diskriminierung, Viktimisierung, Belästigung, Anweisung zur Diskriminierung und Unterstützung Dritter bei der Diskriminierung aufgrund von Rasse, Religion, Geschlecht, Alter, Behinderung, sexueller Ausrichtung, Personen- und Familienstand und Mitgliedschaft in der Landfahrer-Gemeinschaft. Das Gleichstellungsgesetz verpflichtet außerdem zu angemessenen Vorkehrungen, die Menschen mit Behinderung die Teilnahme am Arbeitsleben und den Zugang zu Gütern und Dienstleistungen ermöglichen. Mehrfachdiskriminierung ist nicht ausdrücklich verboten. Unmittelbare Diskriminierung im Sinne des Gleichstellungsgesetzes liegt vor, wenn eine Person aufgrund der neun Diskriminierungsgründe eine weniger günstige Behandlung als eine andere Person erfährt, erfahren hat oder erfahren würde. Das Verbot gilt auch für Diskriminierung durch Assoziierung und Diskriminierung aufgrund eines Diskriminierungsgrundes, der besteht, früher bestanden hat, womöglich bestehen wird oder der betroffenen Person unterstellt wird. Mittelbare Diskriminierung wird im Gleichstellungsgesetz definiert als Situation, in der eine dem Anschein nach neutrale Bestimmung Personen, die einer geschützten Gruppe angehören, im Vergleich zu anderen Personen, die nicht der geschützten Gruppe angehören, in besonderer Weise benachteiligt. Die Ungleichbehandlung ist jedoch zulässig, wenn sie durch ein rechtmäßiges Ziel sachlich gerechtfertigt ist und die Mittel zur Erreichung dieses Ziels angemessen und erforderlich sind. Manche sind der Meinung, dass diese Definition nicht völlig mit den Richtlinien vereinbar ist, weil sie keine Bestimmungen über eine hypothetische Vergleichsperson enthält. Kläger müssen nicht nachweisen, dass eine mittelbare oder unmittelbare Diskriminierung beabsichtigt war, es reicht aus, wenn die Handlung den Kläger tatsächlich diskriminiert. Das Gleichstellungsgesetz definiert Belästigung als unerwünschte Verhaltensweisen, die im Zusammenhang mit einem Diskriminierungsgrund stehen und bezwecken oder bewirken, dass die Würde der betreffenden Person verletzt und ein von Einschüchterungen, Anfeindungen, Erniedrigungen, Entwürdigungen oder Beleidigungen gekennzeichnetes Umfeld geschaffen wird. Unter diese Verhaltensweisen fallen Handlungen, Aufforderungen, Aussagen, Gesten oder die Herstellung, Darstellung oder Verbreitung von Texten, Bildern oder sonstigen Materialien. Viktimisierung bezeichnet die Kündigung oder sonstige Benachteiligung von Personen, die wegen Diskriminierung klagen, ein Verfahren einleiten, einen Kläger unterstützen, eine Klage als Vergleichsperson oder Zeuge untermauern, auf gesetzlichem Wege Diskriminierung bekämpfen oder ihre Absicht zu den oben genannten Handlungen kenntlich machen.

Nach dem Gesetz zur Gleichstellung am Arbeitsplatz 1998-2011 gelten Menschen mit Behinderung als kompetent, wenn sie die mit einer Stelle verbundenen Pflichten mit oder ohne Unterstützung durch „geeignete Maßnahmen“ erfüllen können. Der Arbeitgeber ist verpflichtet, geeignete Maßnahmen zu ergreifen, um einem Menschen mit Behinderung den Zugang zur Beschäftigung, die Ausübung eines Berufes, den beruflichen Aufstieg und die Teilnahme an Aus- und Weiterbildungsmaßnahmen zu ermöglichen, es sei denn, diese

Maßnahmen würden den Arbeitgeber unverhältnismäßig belasten. Bei der Entscheidung, was eine unverhältnismäßige Belastung darstellt, müssen die Kosten der fraglichen Maßnahme, die Größe und die finanziellen Mittel des betreffenden Arbeitgebers und die Möglichkeit, öffentliche oder sonstige Hilfen zu erhalten, berücksichtigt werden. Nach dem Gesetz zur Gleichstellung am Arbeitsplatz 2000-2012 gilt es als Diskriminierung, wenn ein Anbieter von Gütern oder Dienstleistungen nicht alle angemessenen Maßnahmen trifft, um die Bedürfnisse einer Person mit Behinderungen zu erfüllen. Dazu muss er besondere Verfahren oder Einrichtungen bereitstellen, ohne die es für die Person unmöglich oder unverhältnismäßig schwierig wäre, die Güter oder Dienstleistungen in Anspruch zu nehmen. Wenn die Bereitstellung des Verfahrens oder der Einrichtung jedoch für den Anbieter von Gütern und Dienstleistungen zu mehr als symbolischen Kosten führen würde, gilt die mangelnde Bereitstellung nicht als Verstoß gegen das Diskriminierungsverbot.

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

4. Sachlicher Anwendungsbereich

Das Gesetz zur Gleichstellung am Arbeitsplatz 1998-2011 gilt für die Bereiche Beschäftigung und berufliche Bildung und unterscheidet nicht zwischen privaten und öffentlichen Arbeitgebern. Reguliert sind der Zugang zu Beschäftigung, Arbeitsbedingungen, Ausbildung oder Erfahrung für eine Beschäftigung, Beförderung oder Neueinstufung sowie die Einstufung von Stellen. Das Gesetz deckt auch die berufliche Bildung, Stellenausschreibungen, Zeitarbeitsfirmen und Leiharbeiter ab.

Das Gleichstellungsgesetz 2000-2012 verbietet Diskriminierung in Bezug auf Güter und Dienstleistungen, einschließlich Bildung und Wohnraum. Staatliche Dienstleistungen sind nicht ausdrücklich erwähnt. Abschnitt 14 des Gleichstellungsgesetzes sieht eine gesetzliche Ausnahme für Handlungen oder Maßnahmen vor, die durch eine andere Rechtsvorschrift vorgeschrieben sind; in diesem Fall hat das Gleichstellungsgesetz 2000-2012 keine Geltung.

5. Rechtsdurchsetzung

Das Gesetz zur Gleichstellung am Arbeitsplatz 1998-2011 hat Mechanismen zur Durchsetzung der Gleichstellungsgesetze eingeführt. Die Durchsetzungsmechanismen sind für Arbeitnehmer im öffentlichen und im privaten Sektor gleich, wobei für bestimmte Stellen des öffentlichen Dienstes Ausnahmen gelten. Klagen nach dem Gesetz zur Gleichstellung am Arbeitsplatz 1998-2011 oder dem Gleichstellungsgesetz 2000-2012 können vor das Gleichstellungstribunal gebracht werden. Das Gleichstellungstribunal hat bei der Behandlung von Beschwerden eine investigative Rolle; die Kläger können sich selbst vertreten, es können keiner Partei Kosten zugewiesen werden und das Verfahren ist formlos. Abschnitt 78 des Gesetzes zur Gleichstellung am Arbeitsplatz 1998-2011 sieht die Möglichkeit eines Mediationsverfahrens vor. Eine durch Mediation erreichte Einigung zwischen den Parteien ist rechtlich bindend und kann vor einem Bezirksgericht durchgesetzt werden. Gegen die Entscheidungen des Tribunals kann Berufung eingelegt werden, Berufungsinstanz in Arbeitsrechtsfragen ist das Arbeitsgericht, für andere Gleichstellungsklagen das Bezirksgericht. Gegen Urteile des Arbeitsgerichts kann beim Obergericht Kassationsbeschwerde eingelegt werden. Gegen ungerechtfertigte Kündigungen kann auch nach den Kündigungsgesetzen 1977 und 1993 geklagt werden. Das Arbeitsberufungsgericht trifft rechtlich bindende Urteile, gegen die beim Bezirksgericht und letztlich beim Obergericht Berufung eingelegt werden kann. Klagen werden vor der zuständigen Stelle durch Ausfüllen von Standardformularen eingereicht. Sobald ein Verfahren eröffnet wurde, wird der mutmaßliche Täter geladen. Verfahren vor dem Gleichstellungstribunal und dem Arbeitsgericht finden unter Ausschluss der Öffentlichkeit statt, Verfahren vor dem Arbeitsberufungsgericht sind in der Regel öffentlich. Die Urteile sämtlicher Stellen sind der öffentlichen Einsichtnahme zugänglich, wobei sowohl das Gleichstellungstribunal als auch das Arbeitsgericht ihre Urteile auf ihrer jeweiligen Website veröffentlichen. Klagen nach dem Gleichstellungsgesetz 2000-2012 gegen konzessionierte Schankstätten (d. h. Pubs usw.) müssen inzwischen vor das Bezirksgericht gebracht werden und nicht mehr wie früher vor das Gleichstellungstribunal. Diese Gesetzesänderung führt vor allem zu höheren Kosten für die Kläger. Organisationen dürfen einzelne Kläger vor dem Gleichstellungstribunal und dem Arbeitsgericht vertreten, wenn sie vom Kläger entsprechend bevollmächtigt sind, jedoch nicht vor dem Bezirksgericht oder Obergericht. Organisationen dürfen nicht im eigenen Namen klagen, mit Ausnahme der Gleichbehandlungsstelle. Die Gleichbehandlungsstelle kann beim Gleichstellungstribunal gegen diskriminierende Strukturen, diskriminierende Werbung oder den Inhalt von Tarifverträgen Klage einreichen. Die Stelle kann einzelne Kläger außerdem rechtlich beraten und vertreten. Derzeit ist eine Reform des Justizsystems geplant, durch die das Gleichstellungstribunal und das Arbeitsberufungsgericht durch eine neue Kommission für Arbeitsverhältnisse ersetzt und die Berufungsfunktion des Arbeitsberufungsgerichts auf ein erweitertes Arbeitsgericht übertragen werden.

Das Gleichstellungsrecht sieht eine Umkehrung der Beweislast bei Diskriminierungsklagen vor, sofern die vorgebrachten Tatsachen den Anscheinsbeweis für eine Diskriminierung darstellen. Die Verwendung statistischer Daten ist zulässig, jedoch für den Anscheinsbeweis einer Diskriminierung nicht erforderlich. Situationstests wurden bisher kaum verwendet. Es gibt jedoch weder Verfahrens- noch sonstige Regeln, die die Verwendung von Situationstests verbieten. Die Richter der irischen Berufungsgerichte stehen dieser Beweisform jedoch möglicherweise ablehnend gegenüber und fassen sie als Irreführung des Beklagten auf. Das Gesetz zur Gleichstellung am Arbeitsplatz 1998-2011 sieht eine Vielzahl von Rechtsmitteln vor: Entschädigung, die Verurteilung der Arbeitgeber zu bestimmten Maßnahmen und die Wiedereinstellung des Klägers. Alle Beschäftigungsverträge enthalten eine Gleichbehandlungsklausel, die alle Bestimmungen des Vertrags aufhebt, die eine rechtswidrige Diskriminierung darstellen. Diskriminierende Bestimmungen in Tarifvereinbarungen sind null und nichtig und Abweichungen vom Diskriminierungsverbot können nicht vertraglich erlaubt werden. Es gibt eine Obergrenze für die Höhe von Entschädigungssummen, die bei arbeitsrechtlichen Fällen bei zwei Jahresgehältern oder, sofern der Kläger nicht beschäftigt war, bei 12.697 Euro liegt.

Das Gesetz zur Gleichstellung am Arbeitsplatz 1998-2011 sieht auch nicht finanzielle Rechtsmittel vor, bei der bestimmte Maßnahmen gerichtlich angeordnet werden, z. B. eine Wiedereinsetzung oder Wiedereinstellung. Das Gleichstellungsgesetz 2000-2012 sieht ebenfalls viele Rechtsmittel vor, z. B. Schadensersatz oder die Anordnung an die Anbieter von Dienstleistungen, bestimmte Maßnahmen zu treffen. Auch dieses Gesetz sieht eine Obergrenze für Entschädigungen vor, die derzeit bei 15.000 Euro liegt.²² Die Mehrzahl der zugesprochenen Entschädigungen kommen nicht einmal in die Nähe dieses Höchstbetrags. Die nach diesen Gesetzen vorgesehenen finanziellen Sanktionen sind wesentlich milder als bei Diskriminierung aufgrund des Geschlechts. Das deutet darauf hin, dass die Sanktionen bei anderen Diskriminierungsgründen nach diesen Gesetzen möglicherweise nicht wirksam, verhältnismäßig und abschreckend sind.

6. Gleichbehandlungsstellen

Die Gleichbehandlungsstelle wurde inzwischen mit der Irischen Menschenrechtskommission zur neuen Irischen Menschenrechts- und Gleichbehandlungskommission zusammengelegt.²³ Die Irische Menschenrechts- und Gleichbehandlungskommission (IHREC), die am 1. November 2014 gegründet wurde, ist eine unabhängige Stelle mit der Aufgabe, Diskriminierung zu bekämpfen, die Chancengleichheit zu fördern, die Öffentlichkeit über bestimmte Themen zu informieren und die Umsetzung einschlägiger Gesetze zu überwachen. Zur Erfüllung dieser Aufgaben kann sie Forschungsprojekte und Aufklärungskampagnen durchführen, Gesetze überprüfen und Verhaltensrichtlinien erstellen. Die IHREC ist außerdem berechtigt, in eigenem Namen Klage einzureichen oder Kläger zu unterstützen. Sie kann Untersuchungen und Gleichstellungskontrollen durchführen. Die IHREC wird vom Ministerium für Justiz, Gleichstellung und Gesetzesreform unter der Leitung des Ministers finanziert und muss dem irischen Parlament Rechenschaft ablegen.

Das Gleichstellungstribunal ist eine außergerichtliche Stelle und hat die Aufgabe, Beschwerden nach dem Gesetz zur Gleichstellung am Arbeitsplatz 1998-2011 und dem Gleichstellungsgesetz 2000-2012 wegen aller neun Diskriminierungsgründe zu untersuchen. Seine Urteile sind bindend. Der Leiter bzw. die Leiterin des Tribunals ist für die Durchsetzung des Gesetzes zur Gleichstellung am Arbeitsplatz und des Gleichstellungsgesetzes zuständig und kann seine/ihre außergerichtlichen Funktionen an Gleichstellungsbeauftragte und Gleichstellungsmediatoren delegieren. Das Tribunal ist außerdem Gerichtsstand für diskriminierende Kündigungen und die Bestimmungen der Rentengesetze, die Gleichstellungsthemen betreffen.

Das Gleichstellungstribunal wird derzeit neu organisiert, wodurch das Gleichstellungstribunal und das Arbeitsberufungsgericht durch eine neue Kommission für Arbeitsverhältnisse ersetzt werden, die dem Ministerium für Arbeit, Unternehmen und Innovation untersteht, und die Berufungsfunktion des Arbeitsberufungsgerichts auf ein erweitertes Arbeitsgericht übertragen wird. Die neue Stelle wird dem Ministerium für Arbeit, Unternehmen und Innovation jährlich einen Bericht vorlegen. Die Gesetzesänderung wurde im Parlament eingebracht und vermutlich im Jahr 2015 formell verabschiedet.²⁴

7. Wichtige Punkte

Es muss aufmerksam beobachtet werden, ob sich der Zusammenschluss der irischen Gleichstellungs- und Menschenrechtsstellen zur neuen Irischen Menschenrechts- und

²² Die Obergrenzen wurde zum 4. Februar 2014 durch das [Gesetz über Gerichte und Zivilrecht \(sonstige Bestimmungen\) 2013](#) erhöht.

²³ Gesetz über die Irische Menschenrechts- und Gleichbehandlungskommission
<http://www.irishstatutebook.ie/2014/en/act/pub/0025/print.html>.

²⁴ Gesetz über Beschäftigungsverhältnisse 2014,
<http://www.oireachtas.ie/documents/bills28/bills/2014/7914/b7914d-memo.pdf>.

Gleichbehandlungskommission positiv oder negativ auf die Gleichstellung auswirkt. Eine interessante Innovation im Gesetz über die Irische Menschenrechts- und Gleichbehandlungskommission (2014) besteht in Abschnitt 42, mit dem öffentliche Stellen verpflichtet werden, Menschenrechte und Gleichstellung aktiv zu berücksichtigen. Die Irische Menschenrechts- und Gleichbehandlungskommission wird öffentliche Stellen bei der Erfüllung dieser Pflicht unterstützen, indem sie beispielsweise Richtlinien und Verhaltenskodizes erstellt.

Die andere wichtige Änderung ist die Absorption des Gleichstellungstribunals in eine Kommission für Arbeitsverhältnisse, die in einem derzeit anhängigen Gesetz vorgesehen ist. Es gibt Anlass zu Sorge, dass die beiden Gleichbehandlungsstellen nun zwei unterschiedlichen Ministerien unterstehen, von denen nur eines nominell für das Thema Gleichstellung zuständig ist.

INTRODUCTION

The national legal system

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

Inferior sources of law depend on the Constitution for their validity. A common law or a legislative rule that conflicts with a provision of the Constitution is invalid. The Constitution states that the sole law making body in the State is the Oireachtas or national parliament.²⁵ Legislation must be passed by both houses of the Oireachtas and is then signed into law by the President. The common law consists of decisions that have been delivered by judges in the courts over the centuries. The common law adopts the doctrine of precedent, ensuring that court decisions have the binding force of law. The quantity of decisions throughout the centuries has allowed the common law to develop into a substantial body of law. Equality law is an amalgamation of both common law and legislation. Legislation is of increasing importance in the context of non-discrimination measures.²⁶

Ireland is a dualist state; ratification of a Treaty does not automatically result in its provisions becoming part of the internal legal system. This has the effect of externalising our international human rights obligations. Only after incorporation into domestic law, an international Treaty can be relied upon directly in the Irish Courts, for example the European Convention on Human Rights Act, 2003.²⁷ No other Convention has been incorporated into the national legal order; it is contended that Ireland complies with its international legal obligations by means of national legislation.

List of main legislation transposing and implementing the directives

Title of law: Employment Equality Act 1998-2011 (EEA)²⁸

Date of adoption: 18.6.1998

Latest amendments: 17.7.2013

Entry into force: 18.10.1999

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

Material scope: Public and private employment with certain exceptions

Title of the law: Equal Status Act 2000-2012 (ESA)²⁹

Date of adoption: 26.4.2000

Latest amendments: 20.12.2012

Entry into force: 25.10.2000

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

Material scope: Access to goods and services

Title of the law: Pensions Act 1990-2004 (PA)

Date of adoption: 24.7.1990

Latest amendments: 25.3.2004

²⁵ The Oireachtas is the National Parliament. Ireland has a bicameral system, which means that there are two houses of the Oireachtas. The first chamber is Dáil Éireann and the second chamber is Seanad Éireann (Senate). Legislative powers are granted to the two houses by virtue of Article 15.2 of the Constitution.

²⁶ Byrne, G., Kennedy, M., Ni Longain, M., and Shannon, G., (2003) *Employment Law*, Dublin, Blackstone Press Ltd., at p. 1.

²⁷ www.irlgov.ie.

²⁸ www.justice.ie/en/JELR/EmpEqActsConsldtd.pdf/Files/EmpEqActsConsldtd.pdf.

²⁹ www.justice.ie/en/JELR/EqualStatusActsConsldtd_00_04.pdf/Files/EqualStatusActsConsldtd_00_04.pdf.

Entry into force: 21.12.1990

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

Material scope: Pensions including occupational pensions

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

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

General clause:

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

These provisions are presumed to apply to all areas covered by the directives. The grounds covered are presumed to be broader given that they are presumed to apply also to language and political opinions.³⁰ Their material scope is broader than those of the directives in that they extend to access to goods and services on all grounds.

Specific clause applying only to religion:

Article 44 guarantees equality in religion.

The constitutional anti-discrimination provisions are directly applicable.

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

³⁰ In *In Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321, the Supreme Court stated that "the forms of discrimination which are, presumptively at least, proscribed by Article 40.1 are not particularised: manifestly, they would extend to sex, race, language and religious or political opinions." However, in this case the court determined that a requirement on employers to provide reasonable accommodation to disabled workers, providing that accommodation did not give rise to an undue burden, was in fact unconstitutional.

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

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

2.1.1 Definition of the grounds of unlawful discrimination within the directives

EEA and ESA contain broadly similar definitions.

Racial or ethnic origin: The ground of race relates to people who are of a different race, colour, nationality or ethnic or national origin.³¹

Membership of the Traveller community is defined as a separate ground.³² "Traveller community" means the community of people commonly known and identified (both by themselves and others) as people with a shared history, culture and traditions including, historically a nomadic way of life on the island of Ireland. Neither legislation nor case law has determined whether members of the Traveller community are a racial or ethnic minority.³³

Religion or belief: This is defined as "religious background or outlook."³⁴ The legislation prohibits discrimination with respect to people of different religious beliefs and includes discrimination where someone has no religious belief.³⁵ It is not clear whether or not the protection extends to philosophical beliefs; in a 2004 case before the Equality Tribunal the Equality Officer maintained that it was not clear that humanism can be counted as a religion.³⁶ However, in a more recent case both the Equality Tribunal and the Labour Court (on appeal) seemed implicitly to accept that humanist beliefs may be covered, even though it was ruled in that case that the action complained of was not discriminatory.³⁷ The former Equality Authority (now the Irish Human Rights and Equality Commission) considered the protection to apply to different religious belief, background, outlook or none.³⁸

Disability: This is defined as:

- a) the total or partial absence of a person's bodily or mental functions, including the absence of a part of a person's body;
- b) the presence in the body of organisms causing, or likely to cause, chronic disease or illness;
- c) the malfunction, malformation or disfigurement of a part of a person's body;

³¹ Section 6(2)(h) EEA.

³² Section 2(1) EEA, as amended by Section 2(1) ESA.

³³ Bodies such as the Equality Authority and the parliamentary (Oireachtas) Joint Committee on Justice, Defence and Equality have called for Ireland to recognise Travellers as members of a distinct ethnic group. Traveller Ethnicity- An Equality Authority Report (<http://www.equality.ie/en/Publications/Policy-Publications/Traveller-Ethnicity.html>) and The Joint Oireachtas Committee on Justice, Defence and Equality Report on Traveller Ethnicity <http://www.oireachtas.ie/parliament/media/committees/justice/Report-onTraveller-Ethnicity.pdf>. The position of successive governments has been negative on this issue, for reasons that are not clear.

³⁴ Section 2(1) EEA.

³⁵ Section 6(2)(e) EEA.

³⁶ DEC-S2004-015 Mr. Brendan Sheeran, Dublin V Office of Public Works <http://www.workplacerelations.ie/en/Cases/2004/January/DEC-S2004-015-Full-Case-Report.html>.

³⁷ Department of Defence and Barrett (ADE/09/39, Labour Court No EDA1017 30th September, 2010 <http://www.workplacerelations.ie/en/Cases/2010/October/EDA1017.html>).

³⁸ "Your employment rights explained", Equality Authority <http://www.equality.ie/Files/Your-Employment-Equality-Rights-Explained-Easy-to-read-version-pdf.pdf> p. 12.

- d) a condition or malfunction which results in a person learning differently from a person without the condition or malfunction; or
- e) a condition, illness or disease which affects a person's thought processes, perception of reality, emotions or judgment or which results in disturbed behaviour;
- f) and shall be taken to include a disability which exists at present; or
- g) which previously existed but no longer exists, or which may exist in the future or which is imputed to a person.³⁹

The definition of disability does not accord with the concept adopted by the Court of Justice in *Skouboe Werge and Ring*,⁴⁰ or Article 1 UN Convention on the Rights of Persons with Disabilities. It is more in accordance with the language and definitions adopted by the European Court of Justice in the earlier *Chacón Navas* case.⁴¹ The Irish definition of disability does not require a condition to last a long time in order to qualify as a disability, nor does it make the distinction between disability and sickness/illness. It covers those that have a disability at present, a history of a disability, a future disability or an imputed disability.⁴² However, it does not employ the concept of barriers which may hinder the full and effective societal participation of a person with disabilities.

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

Age: The age ground is defined as referring to people of different ages,⁴³ but in employment applies only in relation to persons above the maximum age at which a person is statutorily obliged to attend school.⁴⁴ In access to goods and services it does not apply to persons under age 18.⁴⁵

Sexual orientation: This is defined as heterosexual, homosexual or bisexual orientation.⁴⁶

2.1.2 Multiple discrimination

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

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

O'Brien v. ComputerScope Limited.⁴⁷ The issues of age and gender were treated together but this did not lead to the award of higher damages.

2.1.3 Assumed and associated discrimination

- a) Discrimination by assumption

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

³⁹ Section 2(1) EEA.

⁴⁰ Joined Cases C-335/11 and C-337/11.

⁴¹ Case C-13/05.

⁴² See *Health Service Employee v The Health Service Executive*, DEC-E2006-013 discussed at 0.3 above.

⁴³ EEA Section 6(1)(f), ESA 3(2)(f).

⁴⁴ EEA Section 6(3)(a).

⁴⁵ ESA Section 3(3) (a).

⁴⁶ Section 2(1) EEA.

⁴⁷ DEC-E2006-030, 1 August 2006

<http://www.workplacerelations.ie/en/Cases/2006/August/DEC-E2006-030-Full-Case-Report.html>, accessed 16 July 2015.

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

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

(a) a person is treated less favourably than another person is, has been or would be treated in a comparable situation on any of the grounds specified in *subsection (2)* (in this Act referred to as the “discriminatory grounds”) which (i)...

(ii) ... (iii) ... (iv) is imputed to the person concerned.⁴⁸

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

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

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

(ii) ... (iii) ... (iv) is imputed to the person concerned.⁴⁹

b) Discrimination by association

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

EEA Article 6(1)(b):

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

(a)...

(b) a person who is associated with another person

(i) is treated, by virtue of that association, less favourably than a person who is not so associated is, has been or would be treated in a comparable situation.⁵⁰

ESA Article 3(1)(b):

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

(a)...

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

(i) is treated, by virtue of that association, less favourably than a person who is not so associated is, has been or would be treated in a comparable situation.⁵¹

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

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

a) Prohibition and definition of direct discrimination

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

EEA, Article 6: Direct discrimination is defined as treating a person less favourably than another is, has been or would be treated on any of the nine grounds, in a comparable situation which exists, existed or may exist in the future.

ESA, Article 3: Direct discrimination is defined as treating a person 'less favourably than another is, has been or would be treated on any of the nine grounds, in a comparable situation which exists, existed or may exist in the future.

⁴⁸ www.justice.ie/en/JELR/EmpEqActsConsldtd.pdf/Files/EmpEqActsConsldtd.pdf.

⁴⁹ www.justice.ie/en/JELR/EqualStatusActsConsldtd_00_04.pdf/Files/EqualStatusActsConsldtd_00_04.pdf.

⁵⁰ www.justice.ie/en/JELR/EmpEqActsConsldtd.pdf/Files/EmpEqActsConsldtd.pdf.

⁵¹ www.justice.ie/en/JELR/EqualStatusActsConsldtd_00_04.pdf/Files/EqualStatusActsConsldtd_00_04.pdf.

b) Justification of direct discrimination

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

2.2.1 Situation testing

a) Legal framework

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

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

Anecdotal evidence suggests that Judges from the Irish superior courts would be hostile to this form of evidence, seeing it as a form of entrapment.⁵² There is therefore a reluctance to use situational testing. Thus it would appear that for the present developments in other jurisdictions are not impacting on the position in Irish courts.

b) Practice

In Ireland situation testing is not generally used in practice.

A form of situation testing seems to have been used in one Equality Tribunal case. In *Delaney v. The Harp Bar*,⁵³ the complainants were members of the Traveller community and were refused entry to the respondent’s premises. The complainants visited eight different pubs only one of which was willing to serve them. The complainants litigated against all seven of the discriminating pubs. The Equality Tribunal upheld the complaint of discrimination. However it is not known if such evidence would be accepted in the courts.

Situation testing was used in one study commissioned by the Equality Authority in 2009 to investigate discrimination in access to employment on grounds of race or ethnic origin.⁵⁴

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

a) Prohibition and definition of indirect discrimination

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

b) Justification test for indirect discrimination

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

c) Comparison in relation to age discrimination

The justification test is the same.

⁵² This issue has yet to be addressed in a court action.

⁵³ DEC-S2002-53/56.

⁵⁴ Equality Authority (2009), *Discrimination in Recruitment: Evidence from a Field Experiment*. Available at: <https://www.esri.ie/pubs/BKMNEXT137.pdf>, accessed on 9 April 2015.

2.3.1 Statistical evidence

a) Legal framework

In Ireland there are national rules permitting data collection.

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

The Data Protection Act 1988-2003 permits employers, education providers, health authorities and other public bodies to keep records of their workforce in respect of their ethnic or racial origin, disability, religion or belief or sexual orientation of their workers. Data relating to these grounds would be classified as sensitive data, and certain criteria apply in the processing of this form of personal data.⁵⁵ The primary purpose of amending the Data Protection Act of 1988 by means of the Data Protection (amendment) Act 2003 was to give effect to the Provisions of Directive 95/46/EC of the European Parliament and of the Council. Therefore European provisions clearly influence the content of the Data Protection Laws. On a national level, there is a periodic census of population whereby data is gathered every five years. The last census took place in 2011. It collected data in respect of nationality, religion, age, marital status and ethnic origin, including membership of the Irish Traveller community. A question on disability was included. There were no questions on the issue of sexual orientation. These questions require the individual to self-identify their characteristics.

b) Practice

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

NBK Designs Ltd. and Marie Inoue:⁵⁶ The Labour Court said that its procedures are intended to facilitate parties whether legally represented or unrepresented, and that it would be alien to the ethos of the Court to oblige parties to undertake the inconvenience and expense involved in producing elaborate statistical evidence to prove matters which are obvious to the members of the Court by drawing on their own knowledge and experience.

The Equality Tribunal has frequently followed this approach and found indirect discrimination without requiring statistical evidence, citing the *Inoue* case.⁵⁷

On the other hand cases also fail for lack of substantiation through statistical analysis.⁵⁸

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

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

⁵⁵ Section 2(b) Data Protection Act 1988-2003.

⁵⁶ Labour Court, <http://www.equalitytribunal.ie/en/Cases/2002/November/EED0212.html>, accessed on 13 April 2015.

⁵⁷ Equality Tribunal, Noonan v. Accountancy Connections, <http://www.equalitytribunal.ie/en/Cases/2003/June/DEC-E2004-042-Full-Case-Report.html>, accessed on 13 April 2015.

⁵⁸ E.g. Equality Tribunal, Toner v Department of Communications, Marine and Natural Resources, <http://www.equalitytribunal.ie/en/Cases/2007/October/DEC-E2007-056-Full-Case-Report.html>, accessed on 13 April 2015, where the Equality officer undertook a statistical analysis whose results did not bear out the claim of discrimination.

Employment Equality Act (EEA) 14A:

EEA prohibits harassment in employment on grounds of gender, age, race, religion, family status, disability, marital status, sexual orientation, and membership of the Traveller community in Section 14A. It is defined as any unwanted conduct relating to a discriminatory ground which has the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person.⁵⁹ This conduct can include acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material.

The Equality Officer awarded an employee in one case a total of nearly €50,000 for harassment, victimisation and discriminatory dismissal on grounds of sexual orientation.⁶⁰ In another case €25,000 was awarded by way of compensation for distress suffered as a result of discrimination and harassment on race grounds.⁶¹

Equal Status Act (ESA) 11:

ESA prohibits harassment in access to goods and services on grounds of gender, age, race, religion, family status, disability, marital status, sexual orientation, and membership of the Traveller community in Section 11. It is defined as unwanted conduct relating to any discriminatory grounds which has the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person.⁶² This conduct can include acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material.

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

b) Scope of liability for harassment

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

EEA Section 14A:

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

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

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

(i) such harassment has occurred, and (ii) either

(I) the victim is treated differently in the workplace or otherwise in the course of his or her employment by reason of rejecting or accepting the harassment, or

(II) it could reasonably be anticipated that he or she would be so treated, the harassment or sexual harassment constitutes discrimination by the victim's employer in relation to the victim's conditions of employment.

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

⁵⁹ Section 14A(7)(a) Employment Equality Act 1998-2011.

⁶⁰ Equality Tribunal, DEC-E2008-048, *A Construction Worker v A Construction company*, <http://www.equalitytribunal.ie/en/Cases/2008/September/DEC-E2008-048-Full-Case-Report.html>.

⁶¹ Equality Tribunal, DEC-E2011-016, *Chasi v J & I Security*, <http://www.equalitytribunal.ie/en/Cases/2011/February/DEC-E2011-016-Full-Case-Report.html>.

⁶² Section 11 (5)(a) Equal Status Act 2000-2012.

Service providers (e.g. landlords, schools, hospitals) are liable for harassment or discrimination in the provision of the service. This would include tenants, clients or customers. There is a statutory defence available, if the service provider took such steps as were reasonably practicable to prevent harassment.⁶³

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

2.5 Instructions to discriminate (Article 2(4))

a) Prohibition of instructions to discriminate

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

EEA Section 2(1): discrimination includes an instruction to discriminate and, in Parts V and VI, includes prohibited conduct within the meaning of the Equal Status Act 2000. Thus an instruction to discriminate is also prohibited under the terms of the ESA, i.e. beyond the employment field, although the ESA itself contains no specific provision on this point. This is a criminal offence and is actionable both in the Equality Tribunal and the Circuit Court.⁶⁴

In a case the Labour Court held that where a prospective employer is instructed by another not to employ a particular person, and that instruction is tainted with discrimination, liability cannot be avoided by pleading that the instruction was accepted without question. The Court found that under the terms of Section 8 of the Act, which provides that an employer shall not discriminate against an employee or prospective employee and that a provider of agency work shall not discriminate against an agency worker, both the agency and the instructing company could potentially be held liable as "concurrent wrongdoers".⁶⁵

EEA Section 14 prohibits the procuring of discrimination or victimisation. The provision criminalises the conduct of anyone who "procures or attempts to procure" another person to discriminate or victimise within the terms of the provision. This would cover instruction.

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

In Ireland instructions explicitly constitute a form of discrimination.

See EEA Section 2 (1).

b) Scope of liability for instructions to discriminate

In Ireland the instructor is liable.

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

⁶³ Section 11 (3) ESA.

⁶⁴ Section 77 EEA and Section 13 ESA.

⁶⁵ Labour Court, *A Worker And Two Respondents* - E/11/16, Determination No.EDA1129, <http://www.equalitytribunal.ie/en/Cases/2011/November/EDA1129.html>.

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

- a) Implementation of the duty to provide reasonable accommodation in the field of employment

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

EEA Section 16(3)(b) states:

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

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

EEA Section 16(4) states:

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

EEA Section 16 does not refer to the term essential functions, which is a phrase used in paragraph 17 of the preamble of the Employment Equality Directive. However, the interpretation in cases so far suggests that the courts do incorporate the concept of "essential functions" into the obligation to reasonably accommodate.⁶⁶

- b) Practice

EEA Section 16(3)(b):

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

In determining whether the measures would impose a disproportionate burden account shall be taken of the financial and other costs entailed, the scale and financial resources of the employer's business, and the possibility of obtaining public funding or other assistance.⁶⁷

In a case, the cost of providing a disabled toilet in the store in which the complainant worked was estimated by the respondent as €22,000. The Labour Court found that the respondent was a large multi-national company and that expenditure of €22,000 "could

⁶⁶ Labour Court, *A Computer Component Company v. A Worker*, EED013, <http://www.workplacerelations.ie/en/Cases/2001/July/EED013.html>.

⁶⁷ EEA Section 16 (3)(b) and (c).

not by any standard be regarded as imposing a disproportionate burden in vindicating the complainant's right to work on the same basis as others."⁶⁸

c) Definition of disability and non-discrimination protection

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

d) Duties to provide reasonable accommodation outside the field of employment

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

ESA Section 4(1) states:

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

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

A refusal or failure by a provider of goods and services to provide special treatment or facilities which would enable a person with disabilities to avail of the goods or services will not be deemed reasonable unless such provision would give rise to a cost, other than a nominal cost, to the provider of the service in question.⁶⁹

In a case,⁷⁰ a complainant who suffered from Asperger's syndrome and a developmental delay was barred from an amusements arcade after he was found to have damaged some of the games equipment by writing expletives on it. The Equality Tribunal found that the complainant and his family's request to the respondent to ignore the damage to the respondent's property because of the complainant's disabilities to be beyond reasonable accommodation. The respondent did not believe that the complainant's family would supervise his behaviour if they allowed him back, and that it would require a member of staff to ensure bingo boards were undamaged each time he attended. The Tribunal held that that such special treatment would be beyond nominal cost and that the respondent was entitled to avail of the Section 4(2) defence.

e) Failure to meet the duty of reasonable accommodation

In Ireland failure to meet the duty of reasonable accommodation does not count as discrimination explicitly, in employment. The employer has not discriminated if the person is not competent or capable of doing the job, unless the employer has failed to provide reasonable accommodation.⁷¹

⁶⁸ Labour Court, *A Multinational Employer (represented by Irish Business And Employers' Confederation) - And - A Worker (represented by O'Gorman Solicitors)*, EDA1435
<http://www.workplacerelations.ie/en/Cases/2014/November/EDA1435.html>.

⁶⁹ ESA Section 4(1) and (2).

⁷⁰ Equality Tribunal, DEC-S2014-009, *Mr M -v- An Amusement Arcade*, 7 August 2014.
<http://www.workplacerelations.ie/en/Cases/2014/August/DEC-S2014-009.html>.

⁷¹ EEA Section 16 (1) and (3).

However, case law holds that a failure to provide reasonable accommodation amounted to discrimination.⁷² The case law does not state whether it is a form of direct or indirect discrimination. The full range of sanctions for discrimination under the Equality Acts is applicable, including awards of compensation.

The burden of proof is reversed.⁷³

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

However, EEA Section 16(3) (a) tempers the defence by clarifying that a person who has a disability is fully competent to undertake, and fully capable of undertaking, any duties if the person would be so fully competent and capable on reasonable accommodation ("appropriate measures") being provided by the person's employer.

ESA Section 4: In access to goods and services, failure to meet the duty of reasonable accommodation does count as discrimination.⁷⁴ It is not specified whether it constitutes direct or indirect discrimination.

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

There is a justification defence where the disability "could cause harm to the person or to others."⁷⁵

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

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

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

Legislation does not provide for reasonable accommodation in any other areas, and there have been no cases concerning religion on this point. In practice case law has established that the employer may be obliged to make special arrangements for foreign employees, such as providing translated contracts for foreign nationals.⁷⁶

g) Accessibility of services, buildings and infrastructure

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

Building Regulations (Part M Amendment) 2010:⁷⁷

⁷² *A Complainant v. Bus Éireann* DEC E2003-04.

⁷³ Equality Tribunal, DEC-E2007-03, *O'Keeffe -v- Walsh t/a By Pass Stores*, <http://www.equalitytribunal.ie/en/Cases/2007/June/DEC-E2007-033-Full-Case-Report.html>, accessed 14 April 2015.

⁷⁴ ESA Section 4 (1).

⁷⁵ ESA Section 4 (4).

⁷⁶ Equality Tribunal, DEC – E2006 – 050 *Five Complainants v Hannon's Poultry Export Ltd* <http://www.workplacerelations.ie/en/Cases/2006/October/DEC-E2006-050-Full-Case-Report.html>.

⁷⁷ www.environ.ie/en/Legislation/DevelopmentandHousing/BuildingStandards/FileDownload,24775,en.pdf.

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

As regards dwellings, or residential buildings, new residential dwellings come within Part M of the building regulations and must be accessible. The regulations address issues relating to the approach to new dwellings, circulations within new dwellings and sanitary provision within new dwellings. "People with disabilities" are defined as people who have an impairment of hearing or sight or an impairment which limits their ability to walk, or which restricts them to a wheelchair.

Part M applies to new buildings only, not to works in connection with extensions to and the material alteration of existing dwellings. The primary responsibility for compliance rests with the designers, builders and owners. Building control authorities have powers to inspect design documents and buildings, and powers of enforcement and prosecution where breaches of the regulations occur.

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

Disability Act 2005 Part 3:⁷⁸ requires access to public buildings, services and information. All of the accessibility obligations are limited by what is "practicable" or "appropriate". Commitments contained within the Act are enforced via a complaints mechanism set out in the Act and enforced by the Ombudsman. The Ombudsman charged with the enforcement of the Act has stated that the wording of the Act may not be robust enough to ensure public bodies take sufficient steps to improve access for disabled people to buildings and services.⁷⁹

h) Accessibility of public documents

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

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

Sections 26, 27 and 28 of the Disability Act 2005 place obligations on public bodies to make their services and information accessible to people with disabilities. Section 27 also requires each public body to ensure that the goods or services that are supplied to it are accessible to people with disabilities unless it would not be practicable or justifiable on cost grounds or would result in an unreasonable delay.⁸⁰

A Code of Practice gives guidance to public bodies to meet those obligations.⁸¹

An individual with a disability can make a complaint about any failure by a public body to provide access as required by sections 26, 27 and 28 to an inquiry officer appointed by the body under Section 39. If the complainant is not satisfied with the outcome of their complaint they can appeal to the Ombudsman as provided under Section 40.

The Act is designed to improve access to public services for persons with disabilities. The term "disability" for the purposes of the Act means a substantial restriction in the capacity

⁷⁸ <http://www.oireachtas.ie/ViewDoc.asp?DocId=-1&CatID=87&m=l>.

⁷⁹ "O'Reilly warns of Flaws in Disability Legislation", *Irish Times*, 30 November 2005.

⁸⁰ <http://www.irishstatutebook.ie/2005/en/act/pub/0014/> and <http://www.irishstatutebook.ie/2006/en/si/0163.html>.

⁸¹ <http://www.nda.ie/cntmgmtnew.nsf/0/3DB134DF72E1846A8025710F0040BF3D?OpenDocument>.

of the person to carry on a profession, business or occupation in the State or to participate in social or cultural life in the State by reason of an enduring physical, sensory, mental health or intellectual impairment.

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

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

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

The duty in Ireland is individualised and cannot be said to be anticipatory in practice. It is only envisaged that action will be taken "that is appropriate and can be delivered where practicable", which must be activated by the individual, and is so vague as to be unenforceable.

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

3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

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

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

EEA Section 36:

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

ESA Section 7:

The Minister for Education and Science is permitted to differentiate between nationals and EU nationals on the one hand and non-EU nationals on the other in relation to the provision of educational grants.⁸²

ESA Section 14:

Distinctions based on nationality are allowed in relation to enforcement of the Immigration Act, or in respect of other residency requirements. In these sections a non-national has the same meaning as that used in the Immigration Act of 1999. This exception comes within the provisions contained in the Racial Equality Directive.

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

a) Natural and legal persons

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

EEA:

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

ESA:

ESA does not define which persons can avail of protection. Case law has made clear that a legal person cannot avail of the ESA to claim protection against discrimination.⁸³

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

⁸² Section 7(5)(b) Equal Status Act 2000-2012.

⁸³ Equality Tribunal, DEC-S2008-078 Gloria (Ireland's Lesbian & Gay Choir) -v- Cork International Choral Festival Ltd, <http://www.equalitytribunal.ie/en/Cases/2008/October/DEC-S2008-078-Full-Case-Report.html>.

EEA:

Regarding liability, Section 8(1) prohibits discrimination both by employers and employment agencies, i.e. includes legal persons. Most of the prohibitions contained within the legislation are aimed at the employer and no clear provision is made to enable actions against the person(s) who actually discriminated, subject to a few exceptions: section 14 imposes liability on the person responsible for procuring or attempting to procure discrimination, and section 10 imposes liability on the person who displays discriminatory advertising.

ESA:

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

b) Private and public sector including public bodies

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

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

This is subject to exceptions (access to employment in another person's home for the provision of personal services where the services affect private or family life,⁸⁴ employment in schools or hospitals with a religious ethos,⁸⁵ employment in Defence Forces, Garda Síochána (police force), or prison service (in relation to discrimination on the age or disability ground).).⁸⁶ Some exceptions appear go beyond the provisions of the directives.

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

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

3.2 Material scope

3.2.1 Employment, self-employment and occupation

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

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

In Ireland national legislation includes conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy for the five grounds in both private and public sectors as described in the directives.

⁸⁴ Employment Equality Act 1998-2011, s. 2.

⁸⁵ Employment Equality Act 1998-2011, s. 12(4).

⁸⁶ Employment Equality Act 1998-2011, s. 37(5).

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

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

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

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

In Section 7 EEA the definition of "like work" for purposes of equal pay does not include the use of a hypothetical comparator to establish discrimination,⁸⁷ contrary to Article 2 of the Employment Equality Directive and Article 2 of the Racial Equality Directive.

Section 35 EEA is a cause of concern as it permits employers to pay employees with disabilities different rates of pay if they are restricted in their capacity to do the same amount of work, or the same hours as a person who does not have a disability. This section contains only one limitation and that is that the employee should not be remunerated at a rate below the level required by the National Minimum Wage Act 2000. There is nothing to suggest that the work should be remunerated at a proportionate level to that of the employee without the disability. This does not seem to comply with the directive.

- Occupational pensions constituting part of pay

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

Section 22 of the Social Welfare (Miscellaneous Provisions) Act 2004 amended the Pensions Act 1990. This amendment prohibits discrimination on the grounds of race, religious belief, gender, age, sexual orientation, marital status, family status, disability and membership of the Traveller community. The Act prohibits direct, indirect, instruction and procurement to discriminate, as well as harassment and victimisation, and requires reasonable accommodation in respect of occupational benefit schemes, occupational benefits and occupational pensions.⁸⁸ The Pensions Act 1990-2008 as amended now prohibits discrimination in respect of occupational pensions schemes and other occupational benefits on all grounds.

Most of the reported cases to date concern the gender and marital status grounds, but in one case a complainant who had been denied admittance to an occupational pension scheme succeeded in his claim of discrimination on grounds of race, and the company was ordered to register him in the scheme and to pay the contributions due.⁸⁹

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

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

⁸⁷ Labour Court, EDA 1429, Services Industrial Professional Technical Union & Annette Glass, July 2014, <https://www.workplacerelations.ie/en/Cases/2014/July/EDA1429.html>.

⁸⁸ Pensions Act 1990-2004 as amended by the Social Welfare (Miscellaneous Provisions) Act 2004 available at: www.irlgov.ie.

⁸⁹ Equality Tribunal DEC-P2011-007-, *Michal Czyzycki v Mark Fegan*, <http://www.equalitytribunal.ie/en/Cases/2011/December/DEC-E2011-260-Full-Case-Report.html>.

EEA section 8(1) and (7) prohibit discrimination in relation to training or experience for employment. The employer is not permitted to refuse or not to afford the employee the same opportunities on any of the discriminatory grounds when it comes to "employment counselling, training (whether on or off the job) and work experience."

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

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

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

There are certain exceptions contained within this provision. The first relates to the age ground, this provision only relates to vocational training courses offered to persons over the maximum age at which those persons are statutorily obliged to attend school.

A second exception relates to the religion ground. The Act provides an exception for hospitals and primary schools "which are under the direction or control of a body established for religious purposes or whose objectives include the provision of services in an environment which promotes certain religious values." It says that "in order to maintain the religious ethos of the hospitals or primary schools, the prohibition of discrimination in subsection (1), in so far as it relates to discrimination on the religion ground, shall not apply."⁹⁰

Certain hospitals or places of vocational training may protect their religious ethos, in that where the relevant Government Minister certifies that it is necessary, the provisions in respect of religious discrimination will not apply. This provision is not limited by the necessity for this exception to be related to a genuine occupational requirement, nor is there a requirement for legitimacy or proportionality.

It is not permissible to discriminate in the provision of vocational training in relation to the terms on which the course or facility is offered, by refusing or omitting to afford access to any such course or facility, or in the manner in which any such course or facility is provided.⁹¹

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

The Equal Status Act 2000-2012 also prohibits discrimination on all nine grounds within educational services, in respect of access to courses or facilities as well as the terms and conditions of how that course is provided. This provision is broadly defined and should cover vocational training.⁹²

⁹⁰ EEA Section 12(4).

⁹¹ EEA Section 12(1).

⁹² ESA Section 7. See section 3.2.8 below for more on this provision.

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

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

Section 13(c) EEA prohibits discrimination on all five grounds in relation to a body that controls entry to or the carrying on of a profession, vocation or occupation.

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

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

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

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

ESA Section 2(1):

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

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

In *Donovan v. Donnellan*⁹³ the Equality Officer interpreted the term service and concluded that "while State services are not specifically mentioned as being covered they are not specifically excluded either and I believe that certain services provided by the State are available to the public and are covered by the Act, e.g. social welfare services, health services, etc." Judicial interpretation at the level of the courts will be crucial in determining whether Ireland is in compliance with Directive 2000/43/EC.

Compliance with the Racial Equality Directive is dependent on future judicial interpretation. This situation is further impacted by Section 14 ESA. This section provides a statutory exemption from ESA where an act or action is required by virtue of another statute. Pending further judicial interpretation of the various provisions, it is not possible to say definitively whether Ireland is or is not in compliance with the Racial Equality Directive.

- Article 3.3 exception

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

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

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

⁹³ Equality Tribunal DEC-S2001-011 *Donovan v. Donnellan*
<http://www.equalitytribunal.ie/en/Cases/2001/October/DEC-S2001-011.html>.

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

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

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

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

ESA Section 7 covers educational establishments. ‘Educational establishment’ is broadly defined covering pre-school services through to higher-level institutions, whether or not they are supported by public funds. Public and private establishments providing educational services are therefore covered. Discrimination on all nine grounds is prohibited in respect of: admission to the terms or conditions of admission of a person as a student to the establishment; the access of a student to any course, facility or benefit provided by the establishment; any other term or condition of participation in the establishment by a student, or the expulsion of a student from the establishment or any other sanction against the student. Grounds covered are Gender, age, race, religion, family status, disability, civil status, sexual orientation, membership of the Traveller Community.

The Constitution of Ireland provides that a child has the right to attend a school receiving public money without attending religious instruction at that school.⁹⁴ The majority of Irish schools are denominational in nature, the bulk of those being Roman Catholic.⁹⁵ Children of different faiths from the majority faith in Ireland will not be required to attend religion class, but will in many cases have to attend a school of a different religious ethos from that which they profess themselves.⁹⁶ However, there is a growing number of non-denominational schools as well as minority faith schools. In general the religious influence in schools has greatly diminished.

The education system provides a complaints procedure by virtue of the Education Act 1998, under which most complaints regarding schooling are received. However some cases have been taken under ESA. In a high-profile case regarding access to education,⁹⁷ the higher court overturned an earlier decision of the Equality Tribunal and ruled that a school admission policy that prioritised former pupil's children did not constitute indirect discrimination against Travellers. The court found that the school's policy did not place Travellers in a situation of “particular” disadvantage, as other groups such as foreign applicants would be in the same position. Regarding compliance, it is questionable whether this is a correct interpretation of the directive.

The government has announced its intention of legislating in order to ensure that school admissions policies do not discriminate on the basis of any of nine grounds: gender, civil status, family status, sexual orientation, religion, disability, race, Traveller community grounds or special educational needs.

⁹⁴ Article 44.2.4 Bunreacht na hÉireann.

⁹⁵ The schools are owned by the churches whose ethos they profess.

⁹⁶ The evidence available is that schools do accept pupils from a wide variety of religions into schools with a particular ethos. It is not clear whether it could be deemed to amount to discrimination not to be able to attend a school reflecting a particular religious faith, or a non-denominational school.

⁹⁷ High Court, *Christian Brothers' High School Clonmel v Stokes*, 3 February 2012, HC [2011] IECC, unreported. Judgment upheld by Supreme Court in February 2015.

In another case⁹⁸ a mother was found to have been discriminated against on the Traveller ground when her son was unable to gain admission to a special needs school to which he had been referred by the psychological services. The Tribunal took a grave view of the injustice done to the mother and her son through the school's discrimination against them and awarded compensation of €4000.

There are a number of exceptions to the general prohibition of discrimination, permitting the existence of single sex schools,⁹⁹ the provision of training for religious purposes to one gender only or to those of a particular belief,¹⁰⁰ different fee arrangements for EU members and nationals on the one hand and pupils from third-countries on the other,¹⁰¹ different access arrangements to third level institutions for mature students,¹⁰² and also distinctions made in relation to the organisation of sporting events.¹⁰³ A specific exception in relation to students with disabilities exists. The prohibition on discrimination does not apply where the provision of education to a student with a disability would make it impossible or have a seriously detrimental effect on the provision of education to other students.¹⁰⁴

There is an exception in ESA regarding the promotion of a religious ethos, allowing a primary or post-primary school with a religious ethos to accept pupils of a particular religious denomination in preference to others, or refuse to admit a pupil who is not of that denomination, where it is proved that the refusal is essential to maintain the ethos of the school.¹⁰⁵

This position is reinforced by the Education Act 1998 which requires the school management board to uphold the "characteristic spirit" of the school as established by its "cultural educational, moral, religious, social, linguistic and spiritual values and traditions."¹⁰⁶

- Pupils with disabilities

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

The prohibition on discrimination does not apply where the provision of education to a student with a disability would make it impossible or have a seriously detrimental effect on the provision of education to other students.¹⁰⁷ The legislative approach favours inclusive education, that is, education within an inclusive environment with children who do not have special educational needs. However, this will not be required if it would not be in the best interests of the child with special needs or if it would impair the effective provision of education for the children with whom the child is to be educated. As well as mainstream provision, students with special needs are also accommodated in a variety of special schools and in special classes attached to mainstream primary and post-primary schools. The special schools cater for students with mild general learning disability, moderate general learning disability and severe/profound general learning disability; emotionally disturbed students; students with autistic spectrum disorders; students with physical and multiple disabilities; students with visual and hearing impairment; and students with specific learning disability. Special classes for students in most of these categories are

⁹⁸ Equality Tribunal, DEC-S2006-037 *Nora Faulkner (represented by the Kerry Traveller Development Project) v St Ita's & St Joseph's School, Tralee* <http://www.equalitytribunal.ie/en/Cases/2006/May/DEC-S2006-037-Full-Case-Report.html>.

⁹⁹ ESA Section 7(3)(a).

¹⁰⁰ ESA Section 7(3)(b).

¹⁰¹ ESA Section 7(3)(d).

¹⁰² ESA Section 7(3)(e).

¹⁰³ ESA Section 7(4)(a).

¹⁰⁴ ESA Section 7(4)(b).

¹⁰⁵ ESA Section 7(3)(c).

¹⁰⁶ Education Act 1998, Section 15.

¹⁰⁷ ESA Section 7(4)(b).

attached to mainstream schools, mainly at primary level. There is insufficient national funding in the wake of the Troika austerity programme to provide the necessary support/accommodations to enable disabled children to participation in mainstream education.

- Trends and patterns regarding Roma pupils

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

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

- all students experience an education that “respects the diversity of values, belief, languages and traditions in Irish society and is conducted in a spirit of partnership” (Education Act 1998);
- all education providers are assisted with ensuring that inclusion and integration within an intercultural learning environment.¹⁰⁸

However the implementation of the strategy has been patchy and its impact on Roma children minimal other than a limited amount of English language supports which were significantly cut in 2010. Training in the area of intercultural education is not compulsory for qualified teachers so that there is no system in place to challenge the prejudices and bias of practicing teachers. Immigrant and Traveller children are more likely to experience bullying in school.¹⁰⁹ There remains an absence of curriculum linked resources which explore Traveller and Roma language and culture which makes it difficult for willing teachers to explore these cultures with their students in the classroom.

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

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

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

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

In *Two Complainants v. Department of Education and Science*¹¹⁰ the Equality Officer considered what was covered by the definition of service provision. This related to the provision of maintenance grants payable to adults on further education courses. The then non-statutory rules provided that these grants were only available to EU nationals or persons with official refugee status. The Department had refused the complainants' applications for the grants. The question before the Tribunal was whether a maintenance

¹⁰⁸ Department of Education and Skills & Office of the Minister for Integration, Intercultural Education Strategy, 2010–2015, Dublin: 2010.

¹⁰⁹ Department of Children and Youth Affairs, State of the Nation's Children: Ireland 2012. Dublin: Government Publications, 2012 <http://www.dcyv.gov.ie/documents/research/StateoftheNationsChildren2012.pdf>.

¹¹⁰ Equality Tribunal, DEC-S2003-042/043 http://www.equalitytribunal.ie/en/Cases/2003/May/DEC-S2003-042-043_Full_Case_Report.html.

grant was covered by the Act. Section 2 of the Act defines a service as “a service or facility of any nature which is available to the public generally or a section of the public.”

The Equality Officer held that a maintenance grant was a “facility” covered by the Act.¹¹¹

- Distinction between goods and services available publicly or privately

In Ireland national law does not distinguish between goods and services available to the public (e.g. in shops, restaurants, banks) and those only available privately (e.g. limited to members of a private association).

ESA Section 5(1): However Section 15(1) ESA provides that the Act will not require a person who provides goods or services to deal with a customer where it may be reasonably believed that “the customer would produce a substantial risk of criminal or disorderly conduct or behaviour or damage to property at or in the vicinity of the place in which the goods or services are sought or the premises or accommodation are located.”¹¹² Section 15(2) also provides another broad exception to the non-discrimination provisions. This exception is for owners of licensed premises, which permits actions taken in “good faith” for the purpose of complying with the Licensing Acts, those actions will not constitute discrimination.

ESA Section 8 prohibits clubs from discriminating, but permits certain exceptions to this rule in Section 9, where a club is set up to cater for the needs of a particular gender, civil status, family status, sexual orientation, religious belief, age, disability, nationality or ethnic or national origin or membership of the Traveller Community. The Equality Authority challenged the actions of Portmarnock Golf Club, which is a male-only club, to restrict women members to certain hours. The decision was appealed to the superior courts. The High Court interpreted Section 9 of the Equal Status Act as permitting male-only golf clubs, and holding that the principal purpose of Portmarnock Golf Club is to cater only for the needs of men. This is a very broad interpretation of the section. The implications of this decision are most obvious in the context of possible non-compliance with the Racial Equality Directive. The Supreme Court upheld the decision on 4 November 2009.¹¹³

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

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

ESA Section 6(1) prohibits discrimination in the disposing of any estate or interest in premises, in respect of terminating any tenancy or other interest in the property, or in the provision of accommodation, or amenities related to such accommodation. Gender, age, race, religion, family status, disability, civil status, sexual orientation and membership of the Traveller community are covered.

There are exceptions. The prohibition on discrimination does not apply to accommodation that is provided in a person’s home, “or where the provision of accommodation affects the person’s private or family life or that of any other person residing in the home.”¹¹⁴

¹¹¹ This provision was amended in 2004, now section 12 Employment Equality Act 1998-2011, see also Equality Tribunal DEC-S2001-011 *Donovan v. Garda Donnellan* <http://www.equalitytribunal.ie/en/Cases/2001/October/DEC-S2001-011.html>, which supports the contention that the Equal Status Act covers services and facilities provided by public authorities.

¹¹² Section 15(1) ESA.

¹¹³ <http://www.bailii.org/ie/cases/IESC/2009/S73.html>.

¹¹⁴ Section 6(2)(d) ESA.

Section 6(5) allows for reservation of housing for a particular category of people covered by one of the discriminatory grounds, such as a residential centre for people with disabilities, or a nursing home for the elderly, or grants for housing or adaptations to a home provided to such persons.¹¹⁵

Section 6(6) ESA allows housing authorities to provide different treatment in respect of housing accommodation to persons based on family size, family status, civil status, disability, age or membership of the Traveller community. In *Doherty and Anor v. South Dublin County Council, the Minister for the Environment, Heritage and Local Government, Ireland and the Attorney General*, the High Court has clarified that this exception cannot result in less favourable treatment in the provision of housing.¹¹⁶

Section 6(7) ESA allows a housing Minister to apply differential treatment in housing provision to persons on the basis of their nationality, gender, family size, family status, civil status, disability, age or membership of the Traveller community.¹¹⁷ However any difference in treatment is not permitted to amount to a derogation from the obligations of the State under EU treaties legislation. This ensures that any differences of treatment permitted under section 6(7) should be in compliance with the Racial Equality Directive (although no such statement is made in respect of section 6(2), 6(5) or 6(6).)

- Trends and patterns regarding housing segregation for Roma

There is no specific information about patterns of segregation affecting the Roma Community in Ireland because of the absence of Government data in relation to Roma. There are estimated to be in the region of 3,000-5000 Roma people in Ireland. Roma families and children are believed to be living in Ireland in extremely poor and sometimes dangerous living conditions without access to basic necessities.¹¹⁸ The Department of Justice and Equality has partnered with Pavee Point Traveller and Roma Centre to carry out an Assessment of Need for the Roma Community. The results should be known by end August 2015 and the assessment is intended to contribute to improved interactions with and service delivery for the Roma community in Ireland.

Many of the issues concerning patterns of segregation that are known to affect the Traveller Community are also likely to affect the Roma Community. A recent submission to a UN monitoring body by one of the main organisations representing Travellers and Roma in Ireland called for concrete measures to support travellers who are nomadic or semi-nomadic, as follows:¹¹⁹

"Section 24 of the Housing Miscellaneous Provisions Act (2002) continues to criminalise nomadism and disproportionately impacts upon Travellers. This is a form of institutionalised racism. This section of the legislation needs to be repealed. In each local authority area, Traveller Accommodation Plans are required to be developed by the authorities, under the Housing (Traveller Accommodation) Act 1998. The lack of political will and the lack of incentives or sanctions in the legislation have resulted in local authorities failing to provide adequate accommodation for Travellers under the Housing (Traveller Accommodation) Act 1998. Transient sites are required to enable nomadic Travellers to move. Currently, there is only one transient site in Ireland. ECRI (2013) has stated 'National authorities should envisage introducing measures binding on local authorities and raising awareness among the general public of Traveller accommodation rights and promote respect thereof.' "

¹¹⁵ Section 6(5) ESA.

¹¹⁶ [2007] IEHC 4.

¹¹⁷ No reference is made in this section to the ground of race or sexual orientation.

¹¹⁸ *Pavee Point Traveller and Roma Centre Submission to CESCPR*, September 2014, <http://www.paveepoint.ie/wp-content/uploads/2015/04/Pavee-Point-Submission-CESCPR-International-Covenant-on-Economic-Social-and-Cultural-Rights-September-2014.pdf>.

¹¹⁹ *Pavee Point Traveller and Roma Centre Submission to ICCPR*, June 2014, <http://www.paveepoint.ie/wp-content/uploads/2015/04/Pavee-Point-Traveller-and-Roma-Centre-Submission-to-ICCPR-June-20141.pdf>.

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

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

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

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

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

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

EEA 37(2):

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

ESA 5(2)(i):

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

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

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

- Exception for employers with an ethos based on religion or belief

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

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

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

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

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

In Ireland there are no specific provisions or case law in this area relating to conflicts between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination. However the exceptions relating to religious ethos are widely considered, being too broad. The teachers unions maintain that the exception relating to

protection of religious ethos is unnecessary, is of sweeping scope and makes teachers genuinely fearful of discriminatory dismissal from their posts on grounds of LGBT sexual orientation. They point out that 95% of primary schools in Ireland remain under religious control.¹²⁰ In a case, one such primary school was found to have discriminated against a teacher on the ground of sexual orientation in terms of promotion to Principal and ordered to pay €54,000 damages to the complainant.¹²¹ The current government is committed to legislate to narrow the exception and legislation is expected to be tabled in 2015.

- Religious institutions affecting employment in state funded entities

In Ireland religious institutions are permitted to select people (on the basis of their religion) to hire or to dismiss from a job when that job is in a state entity, or in an entity financed by the State, where it is considered reasonably necessary to prevent an employee or a prospective employee from undermining the religious ethos of the institution.. The possibility is provided for in national law (EEA 37(1), not in international agreements with the Holy See.

The High Court ruled in a case that the dismissal of a single woman who lived with a married man was lawful as it was contrary to the religious ethos of the school.¹²² Divorce was not available in Ireland at the time of the case, and the woman became pregnant by her still married partner. Since the decision, the law in Ireland has been amended to allow divorce, and it also prohibits dismissal for reasons related to pregnancy, so a case on similar facts may be decided differently today. Nonetheless, the case illustrates the extent to which religious ethos requirements may infringe the privacy of the individual.

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

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

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

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

4.4 Nationality discrimination (Article 3(2))

a) Discrimination on the ground of nationality

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

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

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

¹²⁰ Irish National Teachers Organisation Submission in Relation to Section 37(1) in 2007 and 2011 <http://www.into.ie/lgbt/Section371/>.

¹²¹ Equality Tribunal, DEC-E2014-097, A Teacher and A National School, 30 December 2014, <http://www.workplacerelations.ie/en/Cases/2014/December/DEC-E2014-097.html> (s. 37 exemption was not pleaded in this case, although it was briefly considered by the Tribunal which judged that it would not avail the respondent).

¹²² *Flynn v. the Sisters of the Holy Faith* [1985] I.L.R.M., 36.

EEA 17(2) provides that in relation to discrimination on the basis of nationality, nothing in the Act shall render unlawful any action taken in accordance with the Employment Permits Act 2003.

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

ESA 5(2)(f) permits a difference in treatment of persons on the basis of nationality in relation to the provision or organisation of a sporting facility or event to the extent that the differences are reasonably necessary having regard to the nature of the facility or event and are relevant to the purpose of the facility or event.

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

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

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

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

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

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

a) Benefits for married employees

In Ireland it would constitute unlawful discrimination in national law if an employer only provides benefits to those employees who are married.

EEA 34(1) provides an exception from the ban on discrimination where an employer provides a benefit to an employee in respect of events related to members of the employee's family, a benefit to or in respect of a person as a member of an employee's family, or a benefit to an employee on or by reference to an event occasioning a change in the civil status of the employee.¹²³ The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 Section 102 extends any such benefits under the equality legislation to include families based on civil partnership.

b) Benefits for employees with opposite-sex partners

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

The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 Section 102 extends any such benefits under the equality legislation to include families based on civil partnership and civil partners under the Act are same-sex partners.¹²⁴

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

a) Exceptions in relation to disability and health/safety

¹²³ EEA 34(1) as amended by Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, Section 102.

¹²⁴ Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, Section 3.

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

EEA section 33 provides that nothing will render unlawful measures that have been adopted with a view to ensuring equality in practice between employees to protect the health and safety at work of persons with a disability, or to create or maintain facilities for safeguarding or promoting the integration of such persons into the working environment.

There are no specific exemptions in relation to any of the other protected grounds, but issues such as dress code are currently dictated by the policy of the individual employer. For example employers who operate manufacturing processes that require a clean room environment generally impose very strict regulations in respect of attire; no case law has arisen from such practices to date.

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

4.7.1 Direct discrimination

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

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

This may not be in compliance with the directive.

- Justification of direct discrimination on the ground of age

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

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

Case law provides guidelines as to what will be considered satisfactory objective justifications for imposing a retirement age.¹²⁵

The guidelines are:

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

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

EEA 34(5) permits employers to set a maximum age for recruitment which takes account of the cost or period of time involved in training a recruit to a standard at which the recruit will be effective in that job, and the need for there to be a reasonable period of time prior to retirement age during which the recruit will be effective in that job.

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

¹²⁵ Equality Tribunal DEC-E 2012-086, *Paul Doyle v ESB International*
<http://www.equalitytribunal.ie/en/Cases/2012/June/DEC-E2012-086-Full-Case-Report.html>.

EEA Section 34 provides that it does not amount to discrimination on the age ground for an employer to fix ages for admission to an occupational benefits scheme or for entitlement to benefits under it; to fix different ages for all employees or a category of employees; to use, in the context of such a scheme, age criteria in actuarial calculations; to provide different rates for severance payment for different employees these rates being based on or taking into account the period between the age of an employee on leaving employment and his or her compulsory retirement age – provided that none of these measures constitute discrimination on the gender ground.¹²⁶ Occupational benefit schemes are defined as schemes which provide for benefits to employees or categories of employees on their becoming 'ill, incapacitated or redundant but does not include any occupational pension scheme providing for pensions, gratuities or other allowances payable on retirement or death.'¹²⁷

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

In Ireland there are special conditions set by law for older or younger workers in order to promote their vocational integration, or for persons with caring responsibilities to ensure their protection.

The Protection of Young Persons (Employment) Act 1996¹²⁸ limits the employment of young persons (young persons are over sixteen but not yet eighteen.) This Act also restricts the employment of children; children are under sixteen. The Act prohibits children under the age of 13 from working, unless they have received a licence from the Minister for State at the Department of Trade Enterprise and Employment. The Minister may not grant a licence without first considering the education and the safety and health of the child. The employer must also have written permission from the parent or guardian before the child is permitted to work.

If an employer hires young workers then he/she must keep a register of such workers, which should set out the hours worked, the rate of pay and the total amount in wages paid. A second provision aimed at protecting young workers is the Safety, Health and Welfare at Work (Children and Young Persons) Regulations, 1998. Under these regulations an employer must carry out a risk assessment, assessing the risks to the child or young person by the type of employment required. This assessment should consider the safety and health of the child or young person and also consideration should be given to the physical and mental growth. Where the assessment shows that the employment could cause harm to the child or young person then they may not be employed in that employment. Where the assessment shows a risk to the mental and physical growth of the child then the employer must make health surveillance available to them. Parents or guardians should be informed of the outcome of the assessments, and the precautions and preventative measures being put in place to protect the child or young person. EEA prohibits discrimination on the grounds of age for everyone above 16, but employers are still allowed to set minimum recruitment ages of 18.

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

¹²⁶ Section 34 EEA.

¹²⁷ Section 34(3A) EEA.

¹²⁸ <http://acts.oireachtas.ie/zza16y1996.1.html>.

The introduction of the Carer's Leave Act, 2001 entitles employees to unpaid leave to provide full time care for a dependant. The maximum leave entitlement is 65 weeks and the minimum is 13 weeks. The Carer's Benefit is payable for up to 65 weeks for a carer who gives up work under the Act.

EEA 6(2)(c) prohibits discrimination on the grounds of a person's family status. This includes a parent or a person *in loco parentis* to a person under 18, and a resident primary carer to a person who has a disability of such a nature as to give rise to the need for care or support on a continuing, regular or frequent basis. This is a narrow definition which covers some but not all carers as many carers are not resident. All the protections granted by the Employment Equality Act are provided for those with a family status as defined by the Act.

4.7.3 Minimum and maximum age requirements

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

The Protection of Young Persons (Employment) Act 1996¹²⁹ prohibits the employment of children (under 13), and limits the employment of children (under 16) and young persons (16-18).

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

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

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

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

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

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

4.7.4 Retirement

a) State pension age

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

The State Pension (Transition) is paid to people aged 65 who have retired from work and who have enough social insurance contributions. It is not means-tested. In general, the recipient must have been an employee and paying full-rate social insurance contributions, but a small number of self-employed people also qualify. At age 66, one transfers to the State Pension (Contributory).

¹²⁹ <http://www.irishstatutebook.ie/1996/en/act/pub/0016/>.

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

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

b) Occupational pension schemes

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

c) State imposed mandatory retirement ages

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

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

d) Retirement ages imposed by employers

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

EEA 34(4) permits employers to fix different ages for the retirement of employees whether voluntary or compulsory, within the terms of the contract of employment. This was challenged as discriminatory in the case of *Eileen McEvoy v Mount Temple School* in 2007, but the claim did not succeed.¹³⁰

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

A different outcome was reached in *Kiernan v Longford County Council*.¹³¹ Here the complainant worked for the respondent as a General Services Supervisor. The general retirement age was 66 for outdoor workers but they were allowed to work beyond 66 and in some cases into their 70s, up to 73. The complainant wanted to work beyond 66 in order to give himself more service towards his pension, but the respondent forced him to retire at age 67, thus refusing him the same retirement age as others had been permitted. The respondent contended that their policy was implemented for legitimate aims, namely financial and manpower planning. The Equality Officer found that at the time the

¹³⁰ Labour Court 2007, Determination No. EDA0716
<http://www.equalitytribunal.ie/en/Cases/2007/October/EDA0716.html>.

¹³¹ DEC-E2011-067, <http://www.workplacerelations.ie/en/Cases/2011/March/DEC-E2011-067-Full-Case-Report.html>.

complainant reached 66 it was custom and practice within the employment that there was no retirement age, in that working beyond 66 was at the discretion of the employee and up till then nobody who asked to work on had been refused. He therefore concluded that making the complainant retire before his legitimate expectation did not satisfy a legitimate aim and that the complainant's enforced retirement was discriminatory on the grounds of his age.¹³²

What constitutes "objective justification" is not currently defined by Irish case law or regulations, but a decision of the Equality Tribunal, *Paul Doyle v ESB International*,¹³³ provided guidelines as to what will be considered satisfactory objective justifications for imposing a retirement age. Examples of objective and proportionate grounds justifying compulsory retirement are:

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

e) Employment rights applicable to all workers irrespective of age

To be covered by the Unfair Dismissals Act 1977-2007 a number of basic requirements must be satisfied, including the *fact that* employees must not have reached the normal retirement age for the employment in question.¹³⁴ However, it seems that the Employment Appeals Tribunal (EAT) may find that the dismissal was unfair and unlawful if the issue of retirement is not dealt with consistently by employers. In *Cole v Pressometric Ltd* (unreported) the EAT held that an employee who was forced to retire at 65 had been unfairly dismissed in circumstances where his request to continue working past this age was rejected, whereas a similar request from another employee had been granted.

f) Compliance of national law with CJEU case law

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

Firstly, EEA section 6(3) (c) provides that offering a fixed term contract to a person over the compulsory retirement age for that employment or to a particular class or description of employees in that employment does not constitute age discrimination. However, the CJEU has made clear in *Mangold* and *Georgiev* that such a provision comes within the scope of the prohibition on discrimination and must be justified.

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

4.7.5 Redundancy

¹³² A similar finding was made in DEC-E2012-093 O'Neill v Fairview Motors Ltd 18 July 2012 <http://www.equalitytribunal.ie/en/Cases/2012/July/DEC-E2012-093-Full-Case-Report.html>, where the Equality Tribunal concluded that the Act must be interpreted to require the respondent to justify its reliance on the mandatory retirement age, in accordance with Article 6 of the FED Directive.

¹³³ Equality Tribunal DEC-E 2012-086, <http://www.equalitytribunal.ie/en/Cases/2012/June/DEC-E2012-086-Full-Case-Report.html>.

¹³⁴ Section 2(1) Unfair Dismissals Act 1977-2007.

a) Age and seniority taken into account for redundancy selection

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

Unfair Dismissals (Amendment) Act 1993 section 5 (a).¹³⁵ The dismissal of an employee shall be deemed, for the purposes of the Act, to be an unfair dismissal if it results wholly or mainly from...: ... (ee) the age of the employee.

b) Age taken into account for redundancy compensation

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

Redundancy Payments Acts 1967-2007.

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

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

EEA 16 (5) and (6) states that an employer is not required to recruit, retain or promote a person if he is aware on the basis of a criminal conviction or other reliable information that the individual engages or has a propensity to engage in any form of unlawful sexual activity, particularly where the employment involves access to minors or other vulnerable persons.

ESA Section 15 states that a person who provides goods or services is not required to deal with a customer in circumstances which would lead a reasonable individual having the responsibility, knowledge and experience of the person to the belief, on grounds other than discriminatory grounds, that to deal with the customer would produce a substantial risk of criminal or disorderly conduct or behaviour or damage to property at or in the vicinity of the place in which the goods or services or the premises or accommodation are located.¹³⁶ In addition any action taken in good faith by or on behalf of a publican or hotel¹³⁷ for the purpose of complying with the Licensing Acts shall not constitute discrimination.¹³⁸

4.9 Any other exceptions

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

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

¹³⁵ <http://www.irishstatutebook.ie/1993/en/act/pub/0022/sec0005.html> - sec 5.

¹³⁶ ESA Section 15(1).

¹³⁷ The term used in the legislation is the 'holder of a licence or other authorisation which permits the sale of intoxicating liquor.'

¹³⁸ ESA Section 15(2).

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

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

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

- Differences in treatment are permitted in relation to 'annuities, pensions, insurance policies' or other matters related to the assessment of risk. The difference in treatment should relate to actuarial or statistical data or other relevant underwriting or commercial factor and should be reasonable.¹³⁹
- Difference in the treatment of persons on the religion ground in relation to goods or services provided for a religious purpose.¹⁴⁰
- Difference in treatment of persons on the gender, age or disability ground or on the basis of nationality or national origin in the organisation of sporting events.¹⁴¹
- Having an age requirement for persons to be either an adoptive or foster parent.¹⁴²
- Differences in the treatment not otherwise specifically provided for in the treatment, which can reasonably be regarded as goods or a service suitable only to the needs of certain persons.¹⁴³

ESA Section 46 provides that the provisions of this Act apply in respect of ships and aircraft registered in the State, but that actions done in respect of such a ship or aircraft while subject to the jurisdiction of a country outside of the State and that is required by the law of that State shall not constitute discrimination.

ESA Section 7 provides that it will not amount to age discrimination to allocate places at third level institutes for mature students (over 23).¹⁴⁴

ESA Section 16 permits the imposition or maintenance of preferential fee charges in respect of goods or services being offered in respect of persons with children, married couples, persons in a specific age group, or persons with a disability. The section also permits different treatment where a person is treated differently solely in the exercise of a clinical judgment in connection with the diagnosis of illness or his or her medical treatment, or is incapable of entering into an enforceable contract or of giving an informed consent and for that reason the treatment is reasonable in the particular case.¹⁴⁵

ESA 15(2) also provides another broad exception to the non-discrimination provisions. This exception is for owners of licensed premises, which permits actions taken in good faith for the purpose of complying with the Licensing Acts, those actions will not constitute discrimination. This exception has been relied on in numerous cases.¹⁴⁶

The position taken by the Equality Tribunal in respect of this provision is that the meaning

¹³⁹ ESA 5(2)(d).

¹⁴⁰ ESA 5(2)(e).

¹⁴¹ ESA 5(2)(f).

¹⁴² ESA 5(2)(k).

¹⁴³ ESA 5(2)(j).

¹⁴⁴ ESA 7(3)(e).

¹⁴⁵ ESA 16(2)(a) and (b).

¹⁴⁶ *Delaney v. The Harp Bar*, DEC-S2002-53/56, *Mongan and Ors v. The Waterside Hotel* DEC-S2003-008/014, *Moorehouse v. Ayleswood* DEC-S2001-009, *Maughan v. The Glimmer Man* DEC-S2001-020, *Conroy v. Costello* DEC-S2001-014, *McDonagh v. The Castle Inn* DEC-S2001-022.

of “in good faith” means that the actions must be done honestly and without prejudice.¹⁴⁷ In *Conroy v. Costello* the Equality Officer stated that in “order to take an action in good faith it has to be free from any discriminatory motivation.”¹⁴⁸ Any action taken should be for the sole purpose of ensuring compliance with the provisions of the Licensing Acts.¹⁴⁹

The Licensing laws require publicans to run orderly houses, avoiding drunkenness, violent or riotous behaviour, and impose various legal obligations on publicans in respect of health and safety law.

¹⁴⁷ *Delaney v. The Harp Bar*, DEC-S2002-53/56.

¹⁴⁸ DEC-S2001-014.

¹⁴⁹ *Mongan and Ors v. The Waterside Hotel* DEC-S2003-008/014.

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

a) Scope for positive action measures

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

EEA section 33 states that: nothing in the Act shall render unlawful measures that are maintained or adopted with a view to ensuring full equality in practice between employees. Those measures should aim to prevent or compensate for disadvantages linked to any of the discriminatory grounds; to protect the health and safety at work of a person with a disability; to create or maintain facilities for safeguarding or promoting the integration of such persons into the working environment. This provision has yet to be litigated.

ESA 14(1)(b) provides that nothing within the Act shall prohibit preferential treatment or the taking of positive measures which are bona fide intended to promote equality of opportunity for persons who are, in relation to other persons, disadvantaged or likely to be unable to avail themselves of the same opportunities as those other persons; to cater for the special needs of persons, or category of persons, who, because of their circumstances, may require facilities, arrangements, services or assistance not required by persons who do not have those special needs.

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

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

ESA Section 16 also permits preferential fee charges in respect of goods and services in respect of persons with a disability or in specific age groups.

b) Main positive action measures in place on national level

Section 42 of the Irish Human Rights and Equality Commission Act introduces a positive duty on public bodies to have due regard to human rights and equality. The Irish Human Rights and Equality Commission will assist public bodies to comply with the positive duty, including by producing guidelines, and codes of practice.¹⁵⁰

- Quota:

The attainment of a 3% quota for the employment of people with disabilities has long been a government policy in respect of both the civil and public service.¹⁵¹ This policy holds that the civil and public service should aim to ensure that 3% of its work force are people with disabilities. The National Disability Authority monitors the implementation of this process but there are no sanctions for not achieving the target.

- Broad social policy measure

¹⁵⁰ <http://www.irishstatutebook.ie/2014/en/act/pub/0025/print.html#sec42>.

¹⁵¹ In 1973 a draft Bill on the Employment of People with Disabilities was proposed there was widespread opposition to the Bill and as a result it never proceeded. The Government at that time set up a working group to research the issue and in 1977 they reported. One of their recommendations was a 3% quota in the civil and public service and in March of that year the then Government introduced the policy, but not on a statutory footing.

Immigrant Council of Ireland worked in partnership with the public transport sector on an anti-racism project which resulted in Dublin Bus, Irish Rail and Transdev (Luas (tram) Operator) publishing anti-racism strategies for their companies.¹⁵²

BeLongTo and the Irish Congress of Trade Unions worked together to produce a video which highlights the negative impact that homophobia and transphobia can have on young people in the workplace.¹⁵³

¹⁵² *Towards an Inclusive Public Transport Service Full Report*
<http://immigrantcouncil.ie/files/publications/ef1d7-towards.pdf>.

¹⁵³ Link to video <http://www.youtube.com/watch?v=IfesuLQLnzw>.

6 REMEDIES AND ENFORCEMENT

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

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

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

ESA provides for judicial procedures and mediation, both binding.

The enforcement mechanisms apply equally to most public and private sector employees; there is an exception in respect of members of the Defence Forces, who must address their complaint first to the authorities before they can have access to the Equality Tribunal or Labour Court.¹⁵⁴

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

EEA section 78 provides the option of mediation. A mediated settlement agreed by the parties becomes legally binding and its terms can be enforced at the Circuit Court.¹⁵⁵ The IHREC may provide assistance in the enforcement procedures.¹⁵⁶

Complaints under EEA or ESA may be brought before the Equality Tribunal. The Equality Tribunal assumes an investigative role in the hearing of complaints, complainants may represent themselves, costs may not be awarded against either the complainant or the respondent, and the procedure is informal.

Complaints of dismissal due to discrimination¹⁵⁷ may also be brought under the Unfair Dismissals Acts 1977 and 2007. The Labour Court makes legally binding determinations, with the possibility of appeal to the Circuit Court, and subsequently the High Court.

Appeals in employment equality cases are brought to the Labour Court, an industrial relations tribunal operating on a tripartite basis, consisting of a panel, having a full-time chair and one representative each of employers and workers. The Labour Court is empowered to hear employment equality appeals from the Equality Tribunal.¹⁵⁸ Recommendations from the Labour Court are binding on the parties. Where it is acting as an appellate body in cases from the Equality Tribunal, its determinations can be appealed on a point of law to the High Court.¹⁵⁹

The Equality Tribunal and Labour Court are both now to be grouped together under the Workplace Relations Service. The Workplace Relations Bill 2014¹⁶⁰ proposes to reform workplace relations bodies. A Workplace Relations Commission will bring together the existing services of the Labour Relations Commission, Rights Commissioner Service, Equality Tribunal, the National Employment Rights Authority and the first instance functions of the Employment Appeals Tribunal and the Labour Court. The Labour Court will be the single appeal body for all workplace relations appeals, including those currently heard by the Employment Appeals Tribunal.

¹⁵⁴ ESA 77(9) and 104.

¹⁵⁵ EEA Section 91(2).

¹⁵⁶ EEA Section 67(1)(b)(iii).

¹⁵⁷ Not all the grounds are covered, see section 2.1 above.

¹⁵⁸ EEA Section 83(1).

¹⁵⁹ EEA Section 90(3).

¹⁶⁰ <http://www.oireachtas.ie/documents/bills28/bills/2014/7914/b7914d-memo.pdf>.

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

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

Discrimination claims are brought before the relevant body by way of application using standard forms. Hearings are in private before the Equality Tribunal and Labour Court. The decisions of each of the bodies are available for public inspection, as they are published on the Workplace Relations Service website.¹⁶¹ Both District and Circuit Court Cases are heard in public; it is rare for decisions of either court to be published.

Decisions of the Equality Tribunal, Employment Appeals Tribunal, Labour Court, and civil courts are binding, as are mediated settlements which have been agreed.

b) Barriers and other deterrents faced by litigants seeking redress

Both EEA and ESA impose time limits for bringing complaints to the appropriate body. These time limits are quite strict; ESA requires a complainant to initiate his/her complaint by notifying, in writing, the respondent within two months of the date of the occurrence (or the date of the last occurrence if relevant) of the nature of the complaint and the intention to pursue the matter to the Equality Tribunal.¹⁶² This may present difficulties for complainants, for example, a complainant who has been the victim of harassment may be extremely concerned about commencing his/her complaint with an initial notice to the alleged perpetrator of the harassment.

There are also very real concerns in respect of people with literacy difficulties, and individuals who may not have an adequate command of the English language. The Director of the Equality Tribunal may extend this period for a further two months, if satisfied that reasonable cause¹⁶³ prevented the complainant from sending the notification within the normal time period.

An amendment to ESA required complaints under that Act involving licensed premises to be brought to the District Court. The District Court may provide for an order for compensation, an order that the holder of the licence specified take a course of action, or an order for temporary closure of the licensed premises. The major impact of this amendment is the cost implications for complainants. Under the previous system it was possible to represent oneself at the Equality Tribunal, and costs cannot be awarded against either complainant or respondent; this is not the case at the District Court.¹⁶⁴ This amendment was controversial and was strongly opposed by the Equality Authority and the Human Rights Commission.¹⁶⁵ A further and significant concern relates to the fact that the Equality Authority was not granted a function to provide information to the public in relation to the operation of section 19 of the Intoxicating Liquor Act 2003. In practice this means that nobody disseminates information about the legal protection against discrimination contained within this Act, nor collects the case law. This does not appear to comply with either Article 10 of Directive 2000/43, or Article 12 of Directive 2000/78.

Litigating is fraught with difficulties, and the Equality Authority through its case work and work with the public highlighted a number of relevant concerns. These concerns include

¹⁶¹ <http://www.workplacerelations.ie/en/>.

¹⁶² ESA section 21 (2).

¹⁶³ Section 21 (3) , Equal Status Act 2000-2012.

¹⁶⁴ Intoxicating Liquor Act 2003.

¹⁶⁵ Irish Times, 28th May 2003.

the cost of court litigation, which can act as a substantial disincentive to potential claimants.

While there is no potential for awards of costs against either party in the Equality Tribunal or the Labour Court, this is not the position with regard to appeals in the District Court,¹⁶⁶ or the Circuit Court.¹⁶⁷

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

ESA Section 21 requires potential claimants to notify the potential respondent within two months of the incident of the nature of the allegation and also the claimant's intention to seek redress under the Act. The short time frame involved means that in practice the first contact with the respondent involves a threat of litigation; this is unhelpful and decreases the potential for matters to be resolved by means other than litigation.

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

c) Number of discrimination cases brought to justice

In Ireland there are no available statistics on the number of cases related to discrimination brought to justice in the civil courts. There are no recent statistics published by the Equality Tribunal, due to the ongoing reform of the workplace relations bodies.

d) Registration of discrimination cases by national courts

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

Discrimination cases are registered as such by the Equality Tribunal by ground and field, and are published.¹⁶⁸ Judgements of the High and Supreme Courts may be, but are not always, published. Discrimination cases in the civil courts are not registered as such nor are data generally available to the public.

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

a) Standing to act on behalf of victims of discrimination (representing them)

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

The IHREC may act on victims' behalf in the Equality Tribunal, Labour Court and civil courts.¹⁶⁹ Other bodies or associations may act on behalf of a claimant before the Equality Tribunal and Labour Court,¹⁷⁰ but are not entitled to do so in civil courts and may do so

¹⁶⁶ Equal Status Cases under the Intoxicating Liquor Act, 2003 go to the District Court at first instance.

¹⁶⁷ Appeals from the Labour Court, Gender Cases and enforcement orders may be heard in the Circuit Court.

¹⁶⁸ However, due to the current reorganisation of the employment and equality fora into a single body under the Workplace Relations Commission, a process which is not yet complete, the most recent published data of the Equality Tribunal relate to 2012.

¹⁶⁹ Irish Human Rights and Equality Commission Act 2014 section 40(3) and (10), <http://www.irishstatutebook.ie/pdf/2014/en.act.2014.0025.pdf>.

¹⁷⁰ EEA Section 77 (11) and ESA 25A.

only at discretion of those civil courts.¹⁷¹ National law does not distinguish between actions of associations on behalf and in support of victims of discrimination.

b) Standing to act in support of victims of discrimination

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

The IHREC may act in support of victims in the Equality Tribunal, Labour Court¹⁷² and civil courts. Other bodies or associations may act on behalf of a claimant before the Equality Tribunal and Labour Court,¹⁷³ but are not entitled to do so in civil courts and may do so only at discretion of those civil courts.¹⁷⁴ National law does not distinguish between actions of associations on behalf and in support of victims of discrimination.

c) Actio popularis

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

d) Class action

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

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

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

EEA section 85(A) provides: "Where in any proceedings facts are established by or on behalf of a complainant from which it may be presumed that there has been discrimination in relation to him or her, it is for the respondent to prove the contrary."

This also applies in cases brought by the IHREC, and expressly includes proceedings relating to indirect discrimination, victimisation and harassment. The section is silent as to its applicability in the context of reasonable accommodation. The enforcement provisions in the Employment Equality Act 1998-2011 also govern the enforcement of the Equal Status Act 2000-2012, therefore there is now an explicit shifting of the burden of proof in these cases also, and in all grounds and all fields covered by the Directives.

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

In Ireland there are legal measures of protection against victimisation.

EEA Section 14 prohibits victimisation, which is deemed to occur where a person is dismissed or any other adverse treatment occurs because they have involved themselves in any of the following activities: made a complaint of discrimination, been involved in proceedings by a complainant, been an employee having represented or otherwise supported a complainant, been a comparator in an equality action, been a witness under either Equality Acts, having opposed by lawful means a discriminatory act, or stated an

¹⁷¹ Court rules <http://www.courts.ie/rules.nsf/LookupPageLink/index?OpenDocument>.

¹⁷² EEA Section 67 and ESA

¹⁷³ EEA Section 77 (11) and ESA.

¹⁷⁴ Court rules <http://www.courts.ie/rules.nsf/LookupPageLink/index?OpenDocument>.

intention to take any of the preceding activities.¹⁷⁵ In two instances victimisation may amount to a criminal offence: where a person procures another to do anything that could be considered victimisation or discrimination¹⁷⁶ or where the victimisation amounts to dismissal then it is an offence.¹⁷⁷ There are no financial limits on compensation awards for victimisation. This signifies how seriously the legislature takes the issue of victimisation and this is also reflected in the Equality Tribunal's attitude. Successful victimisation cases have resulted in significant compensation awards.

In *McGinn v St Anthony's BNS*¹⁷⁸ the claimant was awarded two years' salary (€117,362) for victimisation and €10,000 for stress. In some cases the award of compensation for victimisation can be higher than the amount given for the initial act of discrimination. A finding of victimisation can be made in situations where the claimant is no longer employed by the alleged offender. Examples of post-employment victimisation include a refusal to give a reference or an adverse reference.

Complaints of discrimination or victimisation must be brought within six months of the most recent occurrence of the act.¹⁷⁹ This may be extended to a maximum of twelve months in certain circumstances.¹⁸⁰

Victimisation is also prohibited in ESA Section 3(2)(j), where a person has in good faith applied for redress under the Act, has been a witness, has given evidence in criminal proceedings under the Act, has opposed by lawful means discriminatory acts, or has given notice of an intention to take any of the preceding actions. This provision has been litigated and in a 2004 case on victimisation on the grounds of disability discrimination, *Salmon v. Para Equestrian Ireland*¹⁸¹ the Equality Officer set out what was necessary to show that victimisation had occurred. The Equality Officer stated:

- (a) that the complainant has in good faith taken any of the actions listed in section 3(2)(j) (i) to (v);
- (b) that the respondent has treated the complainant in a particular way as a result of that action;
- (c) that the treatment is less favourable than the way the respondent treats or would treat a person who had not opposed the alleged discriminatory conduct in the manner the complainant did or the way the respondent would treat the complainant herself, had she not done so.

If these elements are established, the burden of proof shifts.

This case was appealed to the Circuit Court with the assistance of the Equality Authority, and the claimant succeeded in establishing victimisation.¹⁸²

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

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

¹⁷⁵ EEA Section 74 (2).

¹⁷⁶ EEA Section 14.

¹⁷⁷ EEA Section 98.

¹⁷⁸ Equality Tribunal DEC-E2004-032 <http://www.equalitytribunal.ie/en/Cases/2004/June/DEC-E2004-032-Full-Case-Report.html>.

¹⁷⁹ EEA Section 77(5).

¹⁸⁰ EEA Section 77(6)(a).

¹⁸¹ Equality Tribunal DEC-S2004-002 <http://www.equalitytribunal.ie/en/Cases/2004/January/DEC-2004-002-Full-Case-Report.html>.

¹⁸² Circuit Court decisions are not published. Information is available on this decision from the Equality Authority's annual report for 2004 - <http://www.equality.ie/en/Publications/Annual-Reports/Annual-Report-2004.html>.

EEA Section 82:

EEA Section 82 provides for a broad range of remedies in both private and public employment: compensation awards, orders for employers to take specific courses of action, re-instatement and re-engagement.

All employment contracts are deemed to have an equality clause that transforms any provisions of the contract that would otherwise give rise to unlawful discrimination.¹⁸³

All discriminatory provisions in collective agreements are deemed null and void; it is not possible to contract out of the terms of the equality legislation.¹⁸⁴

ESA Section 27:

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

b) Ceiling and amount of compensation

There are maximum limits on financial awards by the Equality Tribunal and also by the Labour Court. In the context of employment the limits are a maximum of two years' pay, calculated on the basis of the complainant's weekly pay at the time the case was referred.¹⁸⁵ Where the complainant was not an employee (discriminatory interview for example) then the maximum award is €12,697.¹⁸⁶ In unequal pay cases, the Equality Tribunal can award compensation in the mode of arrears of pay, where this pay loss is a result of discrimination. This can cover a period of a maximum of three years prior to the referral of the case.¹⁸⁷ There is no provision for the payment of interest in cases like this.

ESA also has maximum award limits, which are linked to limits set on the jurisdiction of the District Court and the current limit is €15,000.¹⁸⁸ The Equality Tribunal may also order a course of action to be taken where discrimination has been found; this remedy has been used extensively under this Act.

c) Assessment of the sanctions

It is difficult to say whether the sanctions are satisfactory or not. The recent increase in respect of ESA was a welcome and long overdue development. However, in considering the adequacy of sanctions on the five EU grounds, the situation with respect of gender discrimination is interesting in comparison.

Gender cases may be brought to the Circuit Court and here there is no monetary limit on the amount of compensation that can be awarded.¹⁸⁹ In the Circuit Court compensation for unequal pay may cover a period of a maximum of six years,¹⁹⁰ and interest may be paid on compensation in gender discrimination cases.¹⁹¹ The more dissuasive sanctions that are available in the context of gender discrimination appear to reflect previous case law of the European Court of Justice.¹⁹² It is questionable whether the remedies available in the context of non-gender discrimination could generally be described as 'effective,

¹⁸³ EEA Section 30.

¹⁸⁴ EEA Section 9.

¹⁸⁵ EEA Section 82(4).

¹⁸⁶ EEA Section 82(4).

¹⁸⁷ EEA Section 82(1)(a).

¹⁸⁸ The limit was raised with effect from 4 February 2014, [Courts and Civil Law \(Miscellaneous Provisions\) Act 2013](#).

¹⁸⁹ EEA Section 82(3).

¹⁹⁰ EEA Section 82(3)(a).

¹⁹¹ EEA Section 82(5).

¹⁹² Case C-271/91 *Marshall No. 2*, ECJ.

proportionate and dissuasive' sanctions.¹⁹³ EEA also provides for non-financial sanctions. Section 82(1)(e) provides for the Equality Tribunal or the Labour Court to make 'an order that a person or persons specified in the order take a course of action which is so specified.'¹⁹⁴ The potential of this remedy should not be underestimated; it has been used as a means of ensuring employers create an equal opportunities policy,¹⁹⁵ re-training of staff,¹⁹⁶ reviewing recruitment procedures.¹⁹⁷

As regards dismissal cases, the Labour Court,¹⁹⁸ and now the Equality Tribunal can make orders for re-instatement or re-engagement of the employee that can occur with or without compensation.¹⁹⁹ Unfair dismissal legislation also provides for a maximum of two years' salary or re-instatement / re-engagement.

EEA is not a criminal statute, and does not in general provide for penal sanctions for unlawful discrimination, but there are a number of situations that can give rise to criminal offences. Where a person procures another to do anything that could be considered victimisation or discrimination,²⁰⁰ or where the victimisation amounts to dismissal, or the giving of a false statement in response to an IHREC inquiry,²⁰¹ these actions can amount to a criminal offence.

The IHREC is the only independent body permitted to instigate litigation under the Acts,²⁰² however section 82(6)(7) provides that compensation orders may not be made in favour of the Authority. The IHREC is dependent on the State for funding; this unwillingness to permit the IHREC to receive compensation stifles its ability to litigate.

¹⁹³ Article 17 Employment Equality Directive (2000/78/EC).

¹⁹⁴ EEA Section 82(1)(e).

¹⁹⁵ *Nevin v. Plaza Hotel*, DEC-E2001-033.

¹⁹⁶ *Mr. O v. A Named Company* DEC-E2003-052.

¹⁹⁷ *Equality Authority v. Ryanair*, DEC-E2000-014.

¹⁹⁸ Prior to the amendments of jurisdiction.

¹⁹⁹ EEA Section 82(2)(b).

²⁰⁰ EEA Section 14.

²⁰¹ EEA Section 60(3).

²⁰² EEA Section 85.

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

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

The IHREC is one of the two designated bodies for the promotion of equal treatment irrespective of racial or ethnic origin (including membership of the Traveller Community), as well as gender, disability, age, sexual orientation, religion, civil status and family status.²⁰³ It was established on 1 November 2014.²⁰⁴

The other body is the Equality Tribunal, which is in the process of being reorganised into the Workplace Relations Commission.²⁰⁵

Both of these bodies are involved in the promotion of equal treatment irrespective of racial or ethnic origin (including membership of the Traveller Community), as well as gender, disability, age, sexual orientation, religion, civil status and family status.

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

IHREC is an independent statutory body charged with protecting and promoting human rights and equality, encouraging the development of a culture of respect for human rights, equality and intercultural understanding, promoting understanding and awareness of the importance of human rights and equality, encouraging good practice in intercultural relations, promoting tolerance and acceptance of diversity and respect for the freedom and dignity of each person, and working towards the elimination of human rights abuses, discrimination and prohibited conduct by the provision of information to the public, and assisting litigants.²⁰⁶ The 15 Commissioners including the Chief Commissioner were appointed by the President of Ireland. They come from a background of knowledge of, or experience in, human rights and equality issues relating to any of the nine protected grounds. Members serve a term of three or five years.

The Director of the Commission, on receipt of the agreement of the Members, submits estimates of income and expenditure to the Minister for Justice, Equality and Law Reform on an annual basis. The Budget of the Department of Justice, Equality and Law Reform is determined annually by the Finance Act of the particular year, and supplied by the national exchequer; the Minister submits the estimate for the specialised body in question. The Commission's annual grant is a sum which the Minister, after consultation with the Commission, considers to be reasonably sufficient for the Commission in the performance of its functions.²⁰⁷ The Commission with the consent of the Minister appoints its own staff, who have the status of civil servant of the state, a status which requires independence from Government. They may also be seconded from other bodies at the Commission's discretion. The Commission is independent in the performance of its functions under the Act.²⁰⁸ It must lay its strategy statement and annual report before the Oireachtas (houses of parliament). The Director is separately accountable to the parliamentary public finance committee for financial transactions and effective use of resources.

The legislation stipulates the Commission's independence in general and also states that it has the power to carry out specific functions independently (e.g. reviews, inquiries etc.).

²⁰³ The Equality Tribunal is the other body.

²⁰⁴ Irish Human Rights and Equality Commission Act (2014)
<http://www.irishstatutebook.ie/pdf/2014/en.act.2014.0025.pdf>.

²⁰⁵ <http://www.oireachtas.ie/documents/bills28/bills/2014/7914/b7914d-memo.pdf>.

²⁰⁶ Irish Human Rights and Equality Commission Act 2014, section 10
<http://www.irishstatutebook.ie/2014/en/act/pub/0025/sec0010.html - sec10>.

²⁰⁷ Irish Human Rights and Equality Commission Act, section 26
<http://www.irishstatutebook.ie/2014/en/act/pub/0025/print.html - sec26>.

²⁰⁸ Irish Human Rights and Equality Commission Act, section 9
<http://www.irishstatutebook.ie/2014/en/act/pub/0025/print.html - sec9>.

It reports to Parliament, which is favourable. On the other hand there is no full insulation or protection of budgets from ministerial intervention. By contrast, a level of insulation is evident for other state agencies with sensitive functions (for example, the Ombudsman and the Health & Safety Authority).

c) Grounds covered by the designated body/bodies

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

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

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

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

EEA S 79, ESA S 25:

Equality Tribunal has the competence to provide independent assistance to victims.

e) Legal standing of the designated body/bodies

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

f) Quasi-judicial competences

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

The Equality Tribunal is a quasi-judicial institution. The Equality Officers investigate complaints and issue a legally reasoned and public decision, which is binding. Discrimination complaints, including dismissal cases are brought at first instance to the Equality Tribunal. Cases may only be sent to mediation where both parties agree to the process.²⁰⁹ A mediated settlement agreed by the parties is binding and is enforceable by the Circuit Court.²¹⁰ The Tribunal has had its legal mandate extended and it now has jurisdiction to deal with discriminatory dismissals and the Pensions Acts as they deal with equality issues.

The Equality Tribunal may in the employment context provide for the following sanctions: compensation awards, arrears of payment (not including interest awards), orders for employers to take specific courses of action, re-instatement and re-engagement.

In the context of the provision of goods and services, the Equality Tribunal may order a course of action to be taken where discrimination has been found, and they may order compensation.

The Tribunal is statutorily required to provide in writing the reasons for its decisions all of which are made available to the public. The increase in workload is significant, and has in turn resulted in a significant backlog of cases. The Equality Tribunal publishes an annual report, an annual legal review, an annual mediation review and statistics on its work.

²⁰⁹ EEA Section 78.

²¹⁰ EEA Section 91(2).

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

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

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

h) Roma and Travellers

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

8 IMPLEMENTATION ISSUES

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

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

- Dialogue with NGOs

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

- Legal protection against discrimination

The Equality Authority as former designated body was required to 'provide information to the public' on the workings of both the Employment Equality Act 1998-2011 and the Equal Status Act 2000-2012.²¹¹ The Equality Authority did not have a statutory duty to provide information to the public on Section 19 of the Intoxicating Liquor Act, 2003. Therefore the Equality Authority did not provide a service on this Act through the medium of its Public Information Centre, leaflets, videos, website or seminars. The impact of this is that nobody disseminated information about the legal protection against discrimination in licensed premises. This does not appear to be in compliance with Article 10 Directive 2000/43/EC, or Article 12 Directive 2000/78/EC.

As regards the Equality Authority's statutory duty to provide information, it published extensively in respect of all nine grounds.²¹² The Equality Authority was empowered to prepare codes of practice in furtherance of the elimination of discrimination and the promotion of equality of opportunity.²¹³ Once the Minister approved a code of practice it became admissible in evidence for the purposes of proceedings. In drafting the codes of practice the Equality Authority was mandated to consult with such person or persons as it considered appropriate.

- Promotion of dialogue between social partners

Together with the Department of Education and Science, the Equality Authority in the past built up partnerships and joint ventures, with the Irish Congress of Trade Unions and IBEC²¹⁴ continuing its work in the Equal Opportunities Framework Committee, the Framework Committee and the Work-Life Balance Framework Committee and Anti-Racist Workplace. The Authority also worked with the Department of Enterprise Trade and Employment in seeking to mainstream policy and practice learning from the EQUAL projects. These partnerships included anti-racist training. A number of publications were produced.²¹⁵ The Irish Congress of Trade Unions also published a pack entitled 'Lesbian, Gay and Bisexual Rights in the Workplace.'²¹⁶

- Situation of Roma and Travellers

²¹¹ Section 39 Employment Equality Act 1998-2011: it also provided information on The Maternity Protection Acts 1994-2004, The Adoptive Leave Acts 1995-2005 and the Parental Leave Act 1998. It was not granted the function to provide information on the access to goods and services under Intoxicating Liquor Act 2003.

²¹² <http://www.equality.ie/en/Publications/>.

²¹³ Section 56 Employment Equality Act 1998-2011.

²¹⁴ Irish Business and Employer's Confederation.

²¹⁵ <http://www.equality.ie/en/Publications/Good-Practice-Publications/An-Action-Strategy-To-Support-Integrated-Workplaces.html>.

²¹⁶ http://www.ictu.ie/download/pdf/gay_lesbian_leaflet.pdf.

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

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

a) Mechanisms

The Employment Equality Act 1998-2011 provides that all employment contracts are deemed to have an equality clause that transforms any provisions of the contracts that would otherwise give rise to unlawful discrimination.²¹⁷ All discriminatory provisions in collective agreements are deemed null and void; it is not possible to contract out of the terms of the equality legislation.²¹⁸ The legislation does not contain a mechanism aimed at a review of collective agreements, or other rules.

b) Rules contrary to the principle of equality

While it is the case that discriminatory clauses are not valid, the reality is that this fact may only be established through litigation. Where the Equality Tribunal to determine that the clause in question is contrary to the legislation, then that part of the collective agreement/contract cannot be enforced and must be modified.

Section 13 of the Employment Equality Act 1998-2011 prohibits discrimination by professional or trade organisations. There are no specific laws or regulations in force that are contrary to the directives there are however, a number of provisions of the Equality legislation that may not be in compliance with the directives.

The major concern remains section 14(a)(i) of the Equal Status Act 2000-2012 as this provides that nothing in that Act will prohibit any action taken under any enactment. Therefore this provision ensures that the Equal Status Act remains subordinate to other legislative enactments.

In relation to entitlement to leave in respect of public holidays, the entitlement of an employer under the Organisation of Working Time Act, 1997 to substitute a Christian or Roman Catholic Church holiday for a public holiday may be contrary to the principle of equal treatment.²¹⁹

²¹⁷ EEA Section 30.

²¹⁸ EEA Section 9.

²¹⁹ Organisation of Working Time Act 1997, <http://www.irishstatutebook.ie/1997/en/act/pub/0020/>.

9 COORDINATION AT NATIONAL LEVEL

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

There is currently no action plan or strategy against racism/discrimination. There was an action plan against racism from 2005-2008,²²⁰ which was abolished in the budget of October 2008, at the start of austerity measures in Ireland. This had aimed to provide strategic direction to combat racism and to promote the development of a more inclusive, intercultural society in Ireland. The plan highlighted five key points to this end, namely Protection, Inclusion, Provision, Participation, and Recognition.²²¹ This action plan was intended to follow on from the 'Know Racism' campaign. The aim of this scheme was to enable organisations to raise awareness about racism and to highlight cultural diversity in Ireland. The grant scheme was organised in association with the National Consultative Committee on Racism and Interculturalism, now abolished.²²² The National Action Plan Against Racism was not followed by another national plan on its expiry. Instead the Government established a new Office of the Minister for Integration with a junior minister to oversee anti-racism measures.

²²⁰ National Action Plan Against Racism 2005-2008, <http://www.mie.ie/getdoc/52ce1e5a-c95d-4490-b250-da8d97ecb3bd/ActionPlan.aspx>.

²²¹ <http://www.justice.ie/en/JELR/Pages/Planning-for-Diversity>.

²²² This committee was established by the Department of Justice, Equality and Law Reform in 1998, the committee consisted of members of government departments, agencies and non-governmental organisations.

10 CURRENT BEST PRACTICES

Positive duty on public bodies to have due regard to human rights and equality under the Irish Human Rights and Equality Commission Act.²²³

²²³ See para 5(b) Positive Action.

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives (if any)

Employment Equality Act 1998-2011

- Complaints about discriminatory advertisements or statements can only be brought by the IHREC (as successor to the Equality Authority), not by an individual.²²⁴
- Associations do not have standing in discrimination cases in civil courts.²²⁵
- Exclusion of "persons employed in another person's home for the provision of personal services" from protection against discrimination in regard to access to employment.²²⁶
- Discrimination in employment for the purposes of maintaining the religious ethos of an institution, with no limitation of "legitimate" or "proportionate," and no limitation of the exception so that it could not be used to justify discrimination on another ground".²²⁷
- Use of a hypothetical comparator is not permitted when claiming equal pay discrimination.²²⁸
- Maximum levels of compensation arguably not in compliance with directives.²²⁹
- Compulsory retirement ages, including different retirement ages, can be set by employer, not limited to objective and reasonable justification by a legitimate aim, appropriate and necessary.²³⁰
- It is not discrimination to offer a fixed term contract to a person over the compulsory retirement age for that employment.²³¹
- It is not discriminatory to pay a disabled person a lesser rate of remuneration.²³²
- Not all provisions in other statutes containing discriminatory measures have been abolished.²³³

Equal Status Act 2000-2012

- Complaints must be instigated within two months of the discriminatory act, and a written notification sent to the alleged discriminator.²³⁴
- Uncertain that the scope of ESA covers all state services, such as social security, health care; also anything required to be done under another statute is not in breach of ESA.²³⁵ In *Donovan v. Donnellan*, it was suggested that this could cover State services such as but the matter has to be finally determined. The impact of Section 14 of ESA may prove difficult in this regard, as it provides a broad statutory exemption to the Equal Status Act 2000-2012 where an act or action is required by virtue of another piece of legislation.
- Harassment is not defined as discrimination in ESA.²³⁶
- No information is disseminated about discrimination in access to goods and services under the Intoxicating Liquor Act 2003.

²²⁴ EEA 1998 - 2011, Section 10(5). Equality Tribunal, DEC 2003-024 GTS Reprographics, and DEC E2004 - 016 Burke v FÁS.

²²⁵ See para 6(2) Legal Standing and Associations.

²²⁶ See para 3.2.2. Material scope, Conditions for access to employment.

²²⁷ See para 4.2. Employers with an ethos based on religion or belief.

²²⁸ See para 3(2)(3). Labour Court, EDA 1429, Services Industrial Professional Technical Union & Annette Glass, July 2014, <https://www.workplacerelations.ie/en/Cases/2014/July/EDA1429.html>.

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

²²⁹ See para 6.5. Sanctions and remedies.

²³⁰ See para 4.7.4. (f) Retirement.

²³¹ See para 4.7.4. (f) Retirement.

²³² See para 4.9 Any other exceptions.

²³³ See para 8.2.(b) Compliance, Rules contrary to the principle of equality.

²³⁴ See para 6.1.(b) Remedies and Enforcement, Barriers and other deterrents.

²³⁵ See para 3.2.6. Social Protection.

²³⁶ See para 2.4.1.(a) Harassment.

- Transfer of jurisdiction regarding discrimination in access to premises licensed for the sale of alcohol from the Equality Tribunal to the District Court under the Intoxicating Liquor Act 2003 seems to be a breach of the non-regression provisions of Article 15 of the Racial Equality Directive, due to the prohibitive cost of court proceedings.
- Clubs such as an all-male golf club can discriminate against other groups, where a club is set up to cater for the needs of a particular ground, such as gender, race or religion.²³⁷

11.2 Other issues of concern

Abolition at the start of the austerity period 2008 of the body responsible for promoting integration (National Consultative Committee on Racism and Interculturalism), and of The National Action Plan Against Racism, which had provided strategic direction to combating racism and to promoting a more inclusive, intercultural society in Ireland.²³⁸

²³⁷ See para 3(2)(9) Access to and supply of goods and services.

²³⁸ See para 9 Coordination at national level.

12 LATEST DEVELOPMENTS

12.1 Legislative amendments

The Equality Authority merged with the Irish Human Rights Commission to become the Irish Human Rights and Equality Commission with the adoption of the Irish Human Rights and Equality Commission Act 2014 which came into effect on 1 November 2014.²³⁹

12.2 Case law

Name of the court: Equality Tribunal

Date of decision: 2 October 2014

Name of the parties: Szczepanska v Arc Royal Limited

Reference number: DEC-E2014-067

Address of the webpage: <http://www.equalitytribunal.ie/en/Cases/2014/October/DEC-E2014-067.html>

Brief summary: In this case concerning disability and reasonable accommodation, the respondent employer was able to successfully defend the claim of discrimination by showing that all reasonable steps to try to provide reasonable accommodation had been undertaken. The Tribunal found that the respondent had worked with the claimant in a responsible and diligent manner to identify alternative roles but these could not be provided. The Tribunal accepted the respondent's arguments that administrative roles in the company were few, specialised, required a high level of academic qualifications and did not constitute similar work. It concluded that the claimant could not carry out the duties for which she was employed, and that there had been no discrimination.

Name of the court: Equality Tribunal

Date of decision: 24 June 2014

Name of the parties: McAteer v South Tipperary County Council

Reference number: DEC-E2014-045

Address of the webpage:

<http://www.equalitytribunal.ie/en/Cases/2014/June/DEC-E2014-045.html>

Brief summary: The claimant was an Evangelical Christian who engaged in proselytising in the workplace and with members of the public at lunch hour. He was asked to desist, was called to a disciplinary meeting, and received a written warning, a final written warning, suspension and dismissal. The Tribunal found that the respondent's imposition of a prohibition against discussing matters relating to religion was *prima facie* indirect discrimination, in that it was intrinsically liable to place persons of the same religious belief as the claimant at a disadvantage relative to persons of no or of a different religious belief, because evangelical Christians are required to proselytise at work whereas persons of other religions or none are not. The measure was not objectively justified as no member of the public had complained and there was no evidence showing that the respondent was brought into disrepute. The claimant was awarded €70,000.

Traveller ground

Name of the court: Equality Tribunal

Date of decision: 4 September 2014

Name of the parties: Anne Joyce (assisted by the Equality Authority) v Michael Ryan Funeral Directors

Reference number: DEC-S2014-012

Address of the webpage:

<http://www.equalitytribunal.ie/en/Cases/2014/September/DEC-S2014-012.html>

Brief summary: The claimant's case was that the funeral undertaker discriminated against her on the ground of her membership of the Traveller community by refusing to

²³⁹ <http://www.irishstatutebook.ie/2014/en/act/pub/0025/print.html>.

provide a service within the meaning of S. 2 of the Equal Status Act in allowing her deceased son to repose in his funeral home because she was a Traveller. The Tribunal found that the claimant had established a *prima facie* case of direct discrimination on the ground of membership of the Travelling community which had not been rebutted by the respondent and ordered the respondent to pay her the maximum sum allowable under the Act of €6,384 in compensation for the effects of the prohibited conduct, taking into consideration the extreme distress caused to the complainant.

Name of the court: Equality Tribunal

Date of decision: 15 April 2014

Name of the parties: Ms. H v A Multi-National Retailer

Reference number: DEC-EE2014-030

Address of the webpage: <http://www.equalitytribunal.ie/en/Cases/2014/April/DEC-E2014-030.html>

Brief summary: The issues at stake were disability, failure to provide reasonable accommodation and disproportionate burden. The installation of a disabled toilet costing under €23,000 was considered necessary in providing reasonable accommodation of the claimant's disability, and this was not a disproportionate burden given that the respondent employer was one of the largest retailers in the world and its revenue in Ireland for the last reporting period was £2,315 million. The claimant was awarded €30,000 in respect of the respondent's failure to provide reasonable accommodation and, additionally, the respondent was ordered to conduct a review of its employment policies and procedures with particular reference to how employees with disabilities are treated.

Trends and patterns in 2014 in cases brought by Roma and Travellers

There is currently no information available.

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Please list below the **main transposition and anti-discrimination legislation** at both federal and federated/provincial level.

Country: Ireland

Date: 1 January 2015

Title of legislation (including amending legislation)	Title of the law: Employment Equality Act 1998-2011 Abbreviation: EEA Date of adoption: 18.6.1998 Latest amendments: 17.7.2013 Entry into force: 18.10.1999 Web link: http://www.justice.ie/en/JELR/EmpEqActsConsldtd.pdf/Files/EmpEqActsConsldtd.pdf Grounds covered: Gender, Age, Race, Religion, Family Status, Disability, Civil Status, Sexual Orientation, membership of the Traveller community
	Civil law
	Material scope: public employment, private employment, access to goods or services (including housing), social protection, social advantages, education.
	Principal content: prohibition of direct and indirect discrimination, harassment, instruction to discriminate or creation of a specialised body
Title of legislation (including amending legislation)	Title of the law: Equal Status Act 2000-2012 Abbreviation: ESA Date of adoption: 26.4.2000 Latest amendments: 25.10.2000 Entry into force: 20.12.2012 Web link: http://www.justice.ie/en/JELR/EqualStatusActsConsldtd_00_04.pdf/Files/EqualStatusActsConsldtd_00_04.pdf Grounds covered: Gender, age, race, religion, family status, disability, civil status, sexual orientation, membership of the Traveller community
	Civil/administrative/criminal law: Civil
	Material scope: public employment, private employment, access to goods or services (including housing), social protection, social advantages, education.
	Principal content: prohibition of direct and indirect discrimination, harassment, instruction to discriminate or creation of a specialised body
Title of legislation (including amending legislation)	Material scope: Public and private employment with certain exceptions Title of the law: Pensions Act 1990-2004 Abbreviation: PA Date of adoption: 24.7.1990 Latest amendments: 25.3.2004 Entry into force: 21.12.1990 Web link: http://www.irishstatutebook.ie/pdf/2012/en.act.2012.0012.pdf Grounds covered: Gender, age, race, religion, family status, disability, civil status, sexual orientation, membership of the Traveller community
	Civil/administrative/criminal law: Civil
	Material scope: Pensions including occupational pensions
	Principal content: Pension provisions and prohibition on discrimination

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Country: Ireland

Date: 1 January 2015

Instrument	Date of signature (if not signed please indicate) Dd.mm. yyyy	Date of ratification (if not ratified please indicate) Dd.mm. yyyy	Derogations/ reservations relevant to equality and non- discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	04.11.1950	25.02.1953	No	Yes	Yes in an interpretative sense, as a result of the passage of the European Convention on Human Rights Act 2003
Protocol 12, ECHR	Yes	No	No	No	No
Revised European Social Charter	Yes	Yes	Article 8(3), Article 21, Article 31(1), (2) and (3).	Ratified collective complaints protocol? Yes (international NGOs only)	No
International Covenant on Civil and Political Rights	1.10.1973	8.12.1989	Article 10 paragraph 2, Article 14, Article 19 paragraph 2, Article 20 paragraph 1, Article 23 paragraph 4.	Yes	No
Framework Convention for the Protection of National Minorities	1.2.1995	7.5.1999	No	N/A	No
International Covenant on Economic, Social and Cultural Rights	1.10.1973	8.12.1989	Article 2, paragraph 2 promote use of the Irish language - knowledge of Irish for certain occupations.	N/A	No

Instrument	Date of signature (if not signed please indicate) Dd.mm. yyyy	Date of ratification (if not ratified please indicate) Dd.mm. yyyy	Derogations/ reservations relevant to equality and non- discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
Convention on the Elimination of All Forms of Racial Discrimination	21.3.1968	29.12.2000	No	Yes	No
Convention on the Elimination of Discrimination Against Women	23.12.1985	23.12.1985	No	Yes	No
ILO Convention No. 111 on Discrimination	Signed (no dates available)	22.4.1999	No	No	No
Convention on the Rights of the Child	30.9.1990	28.9.1992	No	N/A	No
Convention on the Rights of Persons with Disabilities	30-3-2007	No	No	N/A	No

HOW TO OBTAIN EU PUBLICATIONS

Free publications:

- one copy:
via EU Bookshop (<http://bookshop.europa.eu>);
- more than one copy or posters/maps:
from the European Union's representations (http://ec.europa.eu/represent_en.htm);
from the delegations in non-EU countries
(http://eeas.europa.eu/delegations/index_en.htm);
by contacting the Europe Direct service (http://europa.eu/europedirect/index_en.htm)
or calling 00 800 6 7 8 9 10 11 (freephone number from anywhere in the EU) (*).

(*) The information given is free, as are most calls (though some operators, phone boxes or hotels may charge you).

Priced publications:

- via EU Bookshop (<http://bookshop.europa.eu>).

