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Country report

Non-discrimination

Ireland

2018

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Country report

Non-discrimination

Ireland

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Reporting period 1 January 2017 – 31 December 2017

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EXECUTIVE SUMMARY

1. Introduction

Irish society is quite homogeneous. According to the 2016 census,¹ of a population of just under 4.8 million, 78.3 % are Roman Catholic, 9.8 % non-religious (an increase of 73.6 % from 2011), and the remainder are of various other religions. 82.2 % describe themselves as 'White Irish' and 0.7 % as Irish Travellers.² 57 850 people identify as 'Black African' or 'Black Irish' and 9.5 % as 'Any other White background'. 643 131 people, approximately 13.5 % of the population, recorded having a disability. A total of 6 034 same sex couples live in Ireland. Non-Irish nationals consist of 535 475 (11.6 % of the population), with nationals of other EU countries comprising the top five nationality groups (Polish, UK, Lithuanian, Romanian and Latvian).

Ireland's anti-discrimination laws were expanded significantly in the late 1990s. The Employment Equality Act 1998³ and the Equal Status Act 2000⁴ provided for nine discriminatory grounds and established a national equality body as well as a dedicated forum for hearing anti-discrimination complaints, the Equality Tribunal. From 2008 successive national budgets severely curtailed funding for equality infrastructure. In November 2014, the Irish Human Rights and Equality Commission (IHREC)⁵ was established as Ireland's national equality body. The body is equipped with equivalent powers to its predecessor and the funding position has improved. The Equality Tribunal was subsumed, along with several employment rights bodies, into the Workplace Relations Commission (WRC) in 2015.⁶ The impact of this change (if any) on discrimination complaints cannot yet be evaluated.

Ireland's indigenous ethnic minority, the Travelling community, experiences high levels of relative social deprivation and discrimination. In this respect, the formal recognition of Traveller ethnicity in March 2017 was a welcome development.⁷ While no new legislative provisions accompanied that shift in government policy, the *National Traveller and Roma Inclusion Strategy 2017–2021*, published in June 2017, contains a commitment to reviewing the statute that governs the provision of Traveller-specific accommodation. An implementation plan will be published in 2018. A number of bills purporting to amend discrimination law were debated before the Oireachtas (parliament) across 2017 but none were enacted by year-end. Religious criteria in school admission policies have featured in national debates about equality law over the past few years and in 2016 a bill was published which purports to reform law and practice in this area. IHREC's observations on the draft law suggest changes aimed at securing compliance with inter alia the Racial Equality Directive.⁸ A substantially revised bill will be put before the Oireachtas in 2018.

There were no major developments in anti-discrimination principles in the 2017 case law. The Supreme Court made a preliminary reference concerning judicial and administrative

¹ <http://www.cso.ie/en/census/census2016reports/>.

² There are no official statistics on Roma.

³ Ireland, Employment Equality Act 1998, 18.06.1998, <http://www.irishstatutebook.ie/eli/1998/act/21/enacted/en/print>.

⁴ Ireland, Equal Status Act 2000, 26.03.2000, <http://www.irishstatutebook.ie/eli/2000/act/8/enacted/en/html>.

⁵ Ireland, Irish Human Rights and Equality Commission Act 2014, 27.07.2014, <http://www.irishstatutebook.ie/2014/en/act/pub/0025/print.html>.

⁶ Ireland, Workplace Relations Act 2015, 20.05.2015, <http://www.irishstatutebook.ie/eli/2015/act/16/enacted/en/pdf>.

⁷ The statement by an Taoiseach (Prime Minister) is available here: [http://www.taoiseach.gov.ie/eng/News/Taoiseach%27s Speeches/Statement by An Taoiseach Enda Kennedy TD on the recognition of Travellers as an ethnic group Dail Eireann 1 March 2017.html](http://www.taoiseach.gov.ie/eng/News/Taoiseach%27s%20Speeches/Statement%20by%20An%20Taoiseach%20Enda%20Kennedy%20TD%20on%20the%20recognition%20of%20Travellers%20as%20an%20ethnic%20group%20Dail%20Eireann%201%20March%202017.html).

⁸ Irish Human Rights and Equality Commission (2016) *Observations on the Education (Admission to Schools) Bill 2016*, available at: <https://www.ihrec.ie/app/uploads/2016/11/Observations-on-Education-Admission-to-Schools-Bill-2016.pdf>.

procedures to the CJEU in June 2017.⁹ The question relates to whether EU law requires that the Workplace Relations Commission must have jurisdiction to hear a complaint where the remedy sought is the disapplication of secondary legislation but where the WRC does not have jurisdiction to commence such proceedings under national law. A high proportion of Traveller community ground complaints against service providers were dismissed because they were referred to the incorrect forum, highlighting the continuing problems generated by transferring jurisdiction in 2003 to the District Court for discrimination encountered on or at the point of entry to licensed premises. In a case concerning denial of access to an English language interpreter for the purposes of participating in a grievance process, the Labour Court reiterated principles established in case law concerning vulnerable migrants to the effect that direct discrimination could result from a failure to treat different situations differently.¹⁰

2. Main legislation

The Irish Constitution enshrines a guarantee of equality before the law with no specified discriminatory grounds. It is invoked relatively infrequently.¹¹

Irish anti-discrimination legislation consists of the Employment Equality Acts 1998-2015, which govern employment and occupation, and the Equal Status Acts 2000-2015, which cover goods, services, housing/ accommodation and education. The Pensions Acts 1990-2015¹² apply to occupational pension schemes. They cover the grounds of gender, age, race, religion, family status, disability, civil status, sexual orientation, and membership of the Traveller Community. A further 'housing assistance' ground was added to the Equal Status Acts in 2015 to prohibit discrimination in providing rental accommodation to people who receive social protection benefits such as housing assistance payments.¹³

Other laws also contain provisions prohibiting discrimination, namely, the Unfair Dismissals Acts 1977-2015,¹⁴ the Prohibition of Incitement to Hatred Act 1989,¹⁵ which criminalises hate speech, and the Intoxicating Liquor Act 2003,¹⁶ Section 19 of which provides for enforcement of discrimination law in the context of premises licensed for the sale of alcohol.

Irish anti-discrimination legislation goes beyond the EU equality directives, in that the personal scope of the Equal Status Acts 2000-2015 prohibit discrimination in access to goods and services not just on grounds of race and gender but also on the grounds of disability, age, religion, sexual orientation, membership of Traveller community, family status, civil status, and housing assistance. Nationality-based discrimination is also expressly prohibited under the 'race' ground. The definition of disability is broader than in EU law and reasonable accommodation on that ground must be provided to people accessing goods and services. There is a substantial body of case law on all discriminatory

⁹ Supreme Court, *Minister for Justice, Equality and Law Reform v The Workplace Relations Commission and ors.* [2017] IESC 43, 15.06.2017, <http://www.courts.ie/Judgments.nsf/bce24a8184816f1580256ef30048ca50/7b97206199a365a480258141004d3f72?OpenDocument>.

¹⁰ *Boxmore Plastics v Zimareva*, EDA 1732, 30.11.2017, <https://www.workplacerelations.ie/en/Cases/2017/November/EDA1732.html>.

¹¹ Dewhurst, E. (2015) 'Principles of Irish Constitutional Equality Law: Recent Developments', *Bar Review* 20(4), pp. 74-77, available at: <https://www.lawlibrary.ie/rss/barreview/4-2015.pdf>.

¹² Ireland, Pensions Act 1990, 24.07.1990, <http://www.irishstatutebook.ie/eli/1990/act/25/enacted/en/print.html>; amended by section 22 of the Social Welfare (Miscellaneous Provisions) Act 2004, <http://www.irishstatutebook.ie/eli/2004/act/9/section/22/enacted/en/html#sec22>.

¹³ Ireland, Equality (Miscellaneous Provisions) Act 2015, 10.12.2015: <http://www.irishstatutebook.ie/eli/2015/act/43/enacted/en/pdf>.

¹⁴ Ireland, Unfair Dismissals Acts 1997-2015, 06.04.1997, http://www.lawreform.ie/fileupload/RevisedActs/WithAnnotations/HTML/EN_ACT_1977_0010.htm.

¹⁵ Ireland, Prohibition of Incitement to Hatred Act 1989, 29.11.1989, <http://www.irishstatutebook.ie/eli/1989/act/19/enacted/en/html>.

¹⁶ Ireland, Intoxicating Liquor Act 2003, 14.07.2003, <http://www.irishstatutebook.ie/eli/2003/act/31/enacted/en/print#sec19>.

grounds, the bulk of which is from the Equality Tribunal (now the WRC) and the Labour Court.¹⁷ Studies suggest that under-reporting of discrimination and failure to take action in response to perceived discrimination are significant problems.¹⁸

Ireland has ratified the main Council of Europe human rights instruments but not Protocol 12 of the European Convention on Human Rights. It has also ratified most of the primary United Nations instruments. Ratification of the UN Convention on the Rights of Persons with Disabilities is expected to occur in 2018 along with the enactment of a law, which in its draft form, designates the Irish Human Rights and Equality Commission as the independent mechanism to promote, protect and monitor implementation of the Convention.¹⁹ Ireland is a dualist state, meaning that for international law to be enforceable in the Irish legal system, it must be transposed by means of legislation into the national legal order. The main 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 2003.²⁰

3. Main principles and definitions

Direct discrimination is defined in the anti-discrimination laws as treating one person less favourably than another person is treated, has been treated or would be treated on any of the 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 as occurring where an apparently neutral provision would put a person covered by one of the discriminatory grounds at a particular disadvantage compared with other persons. This differential impact may be permitted where it can be objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary. Harassment is defined as any unwanted conduct related 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. 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. Instructions to discriminate are prohibited expressly under the Employment Equality Acts and covered to an extent under the Equal Status Acts by the prohibition on the procurement of discrimination.

The Employment Equality Acts 1998-2015 provide 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

¹⁷ The determinations of both bodies are published here:

https://www.workplacerelations.ie/en/Decisions_Determinations/.

¹⁸ See e.g. Equality and Rights Alliance (2013) *Access to Justice and Under-Reporting of Discrimination and Human Rights Abuses*, available at:

<http://www.eracampaign.org/uploads/Access%20to%20Justice%20and%20under-reporting%20ERA%20Aug%202013.pdf>;

McGinnity, F., Grotti, R., Kenny, O., and Russell, H. (2017) *Who experiences discrimination in Ireland? Evidence from the CSO Equality Modules*, Dublin: ESRI, available at: <https://www.ihrec.ie/app/uploads/2017/11/Who-experiences-discrimination-in-Ireland-Report.pdf>.

¹⁹ Disability (Miscellaneous Provisions) Bill 2016,

<https://www.oireachtas.ie/viewdoc.asp?DocID=34322&CatID=59>.

²⁰ Ireland, European Convention on Human Rights Act 2003, 30.06.2003,

<http://www.irishstatutebook.ie/eli/2003/act/20/enacted/en/print.html>.

public funding or other assistance. The Equal Status Acts 2000-2015 provide that a provider of goods or services must 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. The duty is subject to a nominal cost ceiling, which varies according to the scale of the organisation and the resources available to it.

The Employment Equality Acts contain a number of exceptions to the principle of non-discrimination, which does not apply to access to employment in another person's home for the provision of personal services. There are exceptions where the characteristic in question is a genuine and determining occupational requirement for the post and the objective is legitimate and the requirement proportionate. There are exceptions relating to the grounds of age and disability in occupational pensions and remuneration in respect of someone with a restricted capacity respectively. There is an exception relating to discrimination in employment for the purposes of maintaining the religious ethos of an institution, provided that this is 'legitimate', 'proportionate', and limited so that it could not be used to justify discrimination on another ground. There are also exceptions in respect of certain forms of employment such as the armed forces, the Garda Síochána (police) and the emergency services. With regard to the Equal Status Acts 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 Acts also contains a number of exceptions in respect of education on the grounds of age, gender, religious ethos and disability.

Multiple discrimination is not explicitly prohibited.

4. Material scope

The Employment Equality Acts 1998-2015 apply to the field of employment and vocational training and do not distinguish between public and private sector employees. Discrimination is prohibited in access to employment, conditions of employment (including pay), training or experience for or in relation to employment, promotion, re-grading or classification of posts, and advertisements. Employment agencies and agency workers are also covered.

The Equal Status Acts 2000-2015 prohibit discrimination in relation to goods and services, including education and housing/accommodation. State services are not explicitly mentioned but are covered according to case law. The main compliance issue relates to a provision that exempts any action required by law from scrutiny.²¹

5. Enforcing the law

Complaints under the Employment Equality Acts 1998-2015, the Equal Status Acts 2000-2015 and the Pensions Acts 1990-2015 may be brought before the Workplace Relations Commission (WRC). The WRC 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 available. A mediated settlement agreed by the parties becomes legally binding and its terms can be enforced at the Circuit Court. The decisions may be appealed; the Labour Court hears the employment appeals,

²¹ Section 14(a)(i), <http://www.irishstatutebook.ie/eli/2000/act/8/enacted/en/print#sec14>.

whereas the Circuit Court hears the equal status appeals. Labour Court and Circuit Court determinations can be appealed on a point of law to the High Court.

Claims are brought before the relevant body by way of application using online forms. Equal Status Acts complaints are subject to an additional requirement: the service provider must be notified in writing of the incident and of the complainant's intention to seek redress. Hearings are held in private before the WRC. The decisions of the WRC are available for public inspection since they are published on its website.

From 2003 complaints about discrimination involving licensed premises (i.e. pubs etc.) must be brought to the District Court rather than the WRC. The major impact of this amendment is increased costs and procedural complexity for complainants.

Organisations may represent an individual complainant at the WRC and the Labour Court where they are authorised to do so by the complainant, but not before the Circuit Court or the High Court. Trade unions regularly represent their members. Organisations are not permitted to take a complaint, with the exception of the Irish Human Rights and Equality Commission (IHREC). IHREC enjoys legal standing to bring complaints to the WRC relating to patterns of discrimination, discriminatory advertising or the contents of a collective agreement. It can also provide assistance and legal representation to an individual complainant. IHREC was providing legal assistance in 20 ongoing anti-discrimination law cases at the end of 2016.²²

The legislation provides for a shift in the burden of proof in non-discrimination cases, where the facts established suggest that there is a prima facie case of discrimination. The use of statistics is permitted, but is not required in order to raise a prima facie case of discrimination. Situation testing has not been used to any great extent. There are no procedural or other rules prohibiting its use.

The Employment Equality Acts 1998-2015 provide 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 and 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 EUR 13 000.

The Equal Status Acts 2000-2015 also provide for a variety of remedies including compensation, or orders for service providers to take specific courses of action. This legislation also imposes maximum award limits, which is currently set at EUR 15 000. Under both Acts the financial sanctions are much lighter than those provided for in the case of gender discrimination. This suggests that the sanctions available in the case of the non-gender grounds may not be effective, proportionate or dissuasive.

A 3% quota applies to the employment of people with disabilities in the civil and public service. The Government has undertaken to progressively increase the statutory target towards 6% by 2024.²³ The Higher Education Authority oversees a range of measures that provide support to distinct categories of students covered by the discriminatory grounds

²² Irish Human Rights and Equality Commission (2017) *Annual Report 2016*, p.32, available at: <https://www.ihrec.ie/app/uploads/2017/06/IHREC-Annual-Report-2016.pdf>.

²³ Government of Ireland (2015) *Comprehensive Employment Strategy for People with Disabilities 2015-2024*, <http://www.justice.ie/en/JELR/Comprehensive%20Employment%20Strategy%20for%20People%20with%20Disabilities%20-%20FINAL.pdf/Files/Comprehensive%20Employment%20Strategy%20for%20People%20with%20Disabilities%20-%20FINAL.pdf>.

including mature students and students with disabilities.²⁴ Additional English language support is provided to migrant children in schools.

IHREC is the primary vehicle through which dialogue and consultation with NGOs and the social partners takes place. It is equipped with a range of relevant statutory powers and functions, including the power to establish advisory committees and to draft codes of practice.

6. Equality bodies

The Equality Authority was merged with the Irish Human Rights Commission to form the Irish Human Rights and Equality Commission (IHREC).²⁵ 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 anti-discrimination law and review various legislative enactments including the primary anti-discrimination laws. 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 and Equality, under the direction of the Minister, funds IHREC, which reports to the Irish Parliament.

7. Key issues

An interesting innovation 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 in carrying out their functions. IHREC will assist public bodies to comply with the positive duty; it has produced a preliminary guide and is empowered to draw up codes of practice. During 2017 it collaborated with numerous public sector bodies on pilot initiatives, which will inform good practice guidance.

Flexible sanctions are available, which enable remedies to be tailored to particular circumstances and which can also generate significant effects beyond the immediate case. However, the limits set on compensation arguably undermine the requirement that sanctions be 'effective, proportionate and dissuasive'. It is uncertain that the ESA adequately covers social protection and social advantages, due in part to the broad exemption for measures that are required by law. The pursuit of complaints about discrimination in accessing goods and services is hampered by some procedural obstacles. Potential problems with the EEA include a narrow definition of vocational training, failure to cover beliefs that are not religious in nature, and a provision that enables lower rates of remuneration to be paid to persons with disabilities.

²⁴ See further Higher Education Authority (2015) *National Plan for Equity of Access to Higher Education 2015–2019*, available at: http://hea.ie/assets/uploads/2017/04/national_plan_for_equity_of_access_to_higher_education_2015-2019_single_page_version_01.pdf.

²⁵ Ireland, Irish Human Rights and Equality Commission Act 2004, 27.07.2014, <http://www.irishstatutebook.ie/2014/en/act/pub/0025/print.html>.

RÉSUMÉ

1. Introduction

La société irlandaise est assez homogène. Selon le recensement de 2016,²⁶ la population d'un peu moins de 4,8 millions d'habitants comprend 78,3 % de catholiques romains et 9,8 % de non-religieux (soit une hausse de 73,6 % par rapport à 2011), le solde étant formé de personnes appartenant à d'autres religions diverses. Selon la même source, 82,2 % se décrivent comme des «Irlandais de race blanche» et 0,7 % comme des gens du voyage irlandais;²⁷ 57 850 personnes s'identifient comme des «Africains de race noire» ou comme des «Irlandais de race noire»; et 9,5 % comme étant de «toute autre origine blanche». Environ 13,5 % de la population (643 131 personnes) déclarent souffrir d'un handicap. Un total de 6 034 couples de même sexe vivent en Irlande. Les ressortissants étrangers sont au nombre de 535 475 (11,6 % de la population), parmi lesquels des ressortissants d'autres États membres de l'UE - les cinq nationalités les plus représentées étant la polonaise, la britannique, la lituanienne, la roumaine et la lettone.

La législation irlandaise en matière d'égalité a été considérablement élargie à la fin des années 1990. La loi de 1998 sur l'égalité dans l'emploi²⁸ et la loi de 2000 sur l'égalité des statuts²⁹ prévoient neuf motifs de discrimination et instituent un organisme national pour la promotion de l'égalité ainsi qu'une instance spécifiquement chargée de l'audition des plaintes pour discrimination, à savoir l'*Equality Tribunal* (Tribunal pour l'égalité). Les restrictions budgétaires successivement appliquées à partir de 2008 ont considérablement réduit le financement de cette infrastructure. La Commission irlandaise pour les droits de l'homme et l'égalité ou IHREC,³⁰ instituée en novembre 2014 en tant qu'organisme national pour l'égalité, est dotée de pouvoirs équivalents à ceux de son prédécesseur et la situation s'améliore sur le plan du financement. L'*Equality Tribunal* a été intégré en 2015, de même que plusieurs autres organismes de défense des droits en matière d'emploi, à la Commission pour les relations sur le lieu de travail (WRC).³¹ Il est trop tôt pour mesurer l'impact (éventuel) de ce changement sur les recours en matière de discrimination.

La minorité ethnique autochtone irlandaise des gens du voyage connaît un niveau relatif élevé de misère sociale et de discrimination, et la reconnaissance officielle de l'ethnicité de ce groupe en mars 2017 a été une évolution bienvenue à cet égard.³² Si aucune disposition législative nouvelle n'a accompagné ce revirement de la politique gouvernementale, la stratégie nationale 2017-2021 en faveur de l'inclusion des gens du voyage et des Roms (*National Traveller and Roma Inclusion Strategy 2017-2021*), publiée en juin 2017, contient l'engagement d'examiner la loi qui régit la mise à disposition d'aménagements spécifiques à l'intention des gens du voyage. Un plan de mise en œuvre sera publié en 2018. Une série de projets de loi censés modifier la législation en matière de discrimination ont été débattus devant le parlement (*Oireachtas*) tout au long de 2017 mais aucun d'entre eux n'avait été adopté en fin d'année. Les critères religieux appliqués dans le cadre des politiques d'inscription scolaire font l'objet depuis quelques années de débats nationaux concernant la législation relative à l'égalité, et un projet de loi publié en 2016 vise à réformer la loi et la pratique dans ce domaine. Les observations de la Commission pour les droits de l'homme et l'égalité à propos du projet de loi suggèrent des modifications

²⁶ <http://www.cso.ie/en/census/census2016reports/>.

²⁷ Il n'existe aucune statistique officielle concernant les Roms.

²⁸ Irlande, *Employment Equality Act 1998* du 18 juin 1998, <http://www.irishstatutebook.ie/eli/1998/act/21/enacted/en/print>.

²⁹ Irlande, *Equal Status Act 2000* du 26 mars 2000, <http://www.irishstatutebook.ie/eli/2000/act/8/enacted/en/html>.

³⁰ Irlande, *Irish Human Rights and Equality Commission Act (2014)* (Loi du 27 juillet 2014 sur la Commission pour les droits de l'homme et l'égalité), <http://www.irishstatutebook.ie/2014/en/act/pub/0025/print.html>.

³¹ Irlande, *Workplace Relations Act 2015* du 20 mai 2015.

³² La déclaration du Taoiseach (Premier ministre) est disponible sur: [http://www.taoiseach.gov.ie/eng/News/Taoiseach%27s%20Speeches/Statement by An Taoiseach Enda Kennedy TD on the recognition of Travellers as an ethnic group Dail Eireann 1 March 2017.html](http://www.taoiseach.gov.ie/eng/News/Taoiseach%27s%20Speeches/Statement%20by%20An%20Taoiseach%20Enda%20Kennedy%20on%20the%20recognition%20of%20Travellers%20as%20an%20ethnic%20group%20Dail%20Eireann%201%20March%202017.html)

destinées à assurer une conformité avec la directive sur l'égalité raciale entre autres.³³ Un projet de loi substantiellement révisé sera soumis au parlement en 2018.

Aucune évolution majeure n'est à signaler dans la jurisprudence de 2017 en ce qui concerne les principes de non-discrimination. La Cour suprême a adressé à la CJUE en juin 2017 une demande de décision préjudicielle concernant les procédures judiciaires et administratives.³⁴ La question porte sur le point de savoir si la législation de l'UE exige que la Commission pour les relations sur le lieu de travail (WRC) soit habilitée à être saisie lorsque le recours porte sur la non-application de la législation dérivée mais que le droit national n'habilite pas la Commission en question à entamer des poursuites de ce type. Une forte proportion de plaintes déposées par la communauté des gens du voyage à l'encontre de prestataires de services ont été rejetées pour n'avoir pas été adressées à l'instance voulue – une situation qui met en évidence la persistance de problèmes causés depuis 2003 par le transfert de compétence vers le tribunal de district (*District Court*) pour ce qui concerne la discrimination pratiquée à l'entrée ou à l'intérieur d'établissements titulaires d'une licence de débit de boissons. Dans une affaire relative au refus d'accès à un interprète de langue anglaise dans le cadre d'une participation à un processus de grief, le tribunal du travail (*Labour Court*) a réaffirmé les principes consacrés par la jurisprudence concernant les migrants vulnérables en vertu desquels le fait de ne pas traiter différemment des situations différentes peut donner lieu à une discrimination directe.³⁵

2. Législation principale

La Constitution irlandaise consacre la garantie d'une égalité devant la loi sans spécifier de motifs discriminatoires. Il est assez rare qu'elle soit invoquée.³⁶

La législation irlandaise antidiscrimination comprend les lois sur l'égalité dans l'emploi (1998-2015), qui régissent l'emploi et le travail, et les lois sur l'égalité des statuts (2000-2015), qui couvrent les biens, les services, le logement/hébergement et l'éducation. Les lois sur les pensions (1990-2015)³⁷ s'appliquent aux régimes de pensions professionnels. Elles visent les motifs suivants: le genre, l'âge, la race, la religion, la situation familiale, le handicap, l'état civil, l'orientation sexuelle et l'appartenance à la communauté des gens du voyage. Le motif supplémentaire de «l'aide au logement» a été ajouté aux lois sur l'égalité des statuts en 2015 pour interdire la discrimination en matière de location d'une habitation à l'encontre de bénéficiaires de prestations sociales telles qu'une aide au logement.³⁸

D'autres lois contiennent également des dispositions interdisant la discrimination, à savoir, les lois sur les licenciements abusifs (1977-2015),³⁹ la loi de 1989 sur l'interdiction de l'incitation à la haine,⁴⁰ qui pénalise les discours haineux, et la loi de 2003 sur les boissons

³³ Irish Human Rights and Equality Commission (2016) *Observations on the Education (Admission to Schools) Bill 2016*, disponible sur: <https://www.ihrec.ie/app/uploads/2016/11/Observations-on-Education-Admission-to-Schools-Bill-2016.pdf>.

³⁴ Cour suprême, *Minister for Justice, Equality and Law Reform c. The Workplace Relations Commission & others*. [2017] IESC 43, 15.06.2017, <http://www.courts.ie/Judgments.nsf/bce24a8184816f1580256ef30048ca50/7b97206199a365a480258141004d3f72?OpenDocument>.

³⁵ *Boxmore Plastics c. Zimareva*, EDA 1732, 30.11.2017, <https://www.workplacerelations.ie/en/Cases/2017/November/EDA1732.html>.

³⁶ Dewhurst, E. (2015) «Principles of Irish Constitutional Equality Law: Recent Developments», *Bar Review* 20(4), p. 74-77, disponible sur: <https://www.lawlibrary.ie/rss/barreview/4-2015.pdf>.

³⁷ Irlande, *Pensions Act 1990* du 24 juillet 1990, <http://www.irishstatutebook.ie/eli/1990/act/25/enacted/en/print.html>; modifiée par l'article 22 de la loi de 2004 sur la sécurité sociale (dispositions diverses) (*Social Welfare (Miscellaneous Provisions) Act 2004*), <http://www.irishstatutebook.ie/eli/2004/act/9/section/22/enacted/en/html#sec22>.

³⁸ Irlande, *Equality (Miscellaneous Provisions) Act 2015*, loi du 10 décembre 2015 sur l'égalité (dispositions diverses), <http://www.irishstatutebook.ie/eli/2015/act/43/enacted/en/pdf>.

³⁹ Irlande, *Unfair Dismissals Acts 1997-2015*, 6 avril 1997, http://www.lawreform.ie/fileupload/RevisedActs/WithAnnotations/HTML/EN_ACT_1977_0010.htm.

⁴⁰ Irlande, *Prohibition of Incitement to Hatred Act 1989*, 29 novembre 1989, <http://www.irishstatutebook.ie/eli/1989/act/19/enacted/en/html>.

alcoolisées,⁴¹ dont l'article 19 prévoit une mise en application du droit antidiscrimination dans le cadre des établissements titulaires d'une licence de vente d'alcool.

La législation antidiscrimination irlandaise va au-delà des directives de l'Union européenne sur l'égalité dans la mesure où le champ d'application personnel des lois sur l'égalité des statuts (2000-2015) interdit la discrimination dans l'accès aux biens et aux services non seulement pour des motifs de race et de genre, mais également de handicap, d'âge, de religion, d'orientation sexuelle, d'appartenance à la communauté des gens du voyage, de situation familiale, d'état civil et d'aide au logement. La discrimination fondée sur la nationalité est également interdite de façon expresse au titre du motif de la «race». La définition du handicap est plus large que celle figurant dans le droit de l'UE et un aménagement raisonnable doit être assuré aux personnes concernées pour leur permettre d'accéder aux biens et aux services. Il existe une jurisprudence assez abondante pour tous les motifs discriminatoires, laquelle provient principalement de l'*Equality Tribunal* (aujourd'hui Commission pour les relations sur le lieu de travail) et de la *Labour Court*.⁴² Des études conduisent à penser que le sous-signalisation d'actes discriminatoires et l'absence de mesures en réponse à la discrimination perçue constituent des problèmes majeurs.⁴³

L'Irlande a ratifié les principaux instruments du Conseil de l'Europe en matière de droits de l'homme, mais pas le protocole n° 12 à la Convention européenne des droits de l'homme. Elle a également ratifié la plupart des grands instruments des Nations unies. La ratification de la Convention des Nations unies relative aux droits des personnes handicapées devrait intervenir en 2018 parallèlement à l'adoption d'une loi qui, dans sa version préliminaire, désigne la Commission irlandaise pour les droits de l'homme et l'égalité comme le mécanisme indépendant en charge de la promotion, de la protection et du suivi de l'application de la Convention.⁴⁴ L'Irlande est un État dualiste, ce qui signifie que pour être exécutoire au niveau du système juridique irlandais, la législation internationale doit être transposée en droit interne par voie législative. La principale 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 2003*.⁴⁵

3. Principes généraux et définitions

La discrimination directe est définie dans les lois antidiscrimination 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 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. La discrimination indirecte est définie comme se produisant lorsqu'une disposition apparemment neutre ferait qu'une personne concernée par l'un des motifs discriminatoires subirait un désavantage particulier par rapport à d'autres personnes. Cette différence d'impact est autorisée lorsqu'elle peut être objectivement justifiée par un but légitime et que les moyens pour atteindre ce but sont appropriés et nécessaires. Le harcèlement est défini comme tout

⁴¹ Irlande, *Intoxicating Liquor Act 2003* du 14 juillet 2003, <http://www.irishstatutebook.ie/eli/2003/act/31/enacted/en/print#sec19>.

⁴² Les décisions des deux instances sont publiées sur: https://www.workplacerelations.ie/en/Decisions_Determinations/.

⁴³ Voir notamment Equality and Rights Alliance (2013) *Access to Justice and Under-Reporting of Discrimination and Human Rights Abuses*, disponible sur: <http://www.eracampaign.org/uploads/Access%20to%20Justice%20and%20under-reporting%20ERA%20Aug%202013.pdf>; McGinnity, F., Grotti, R., Kenny, O., & Russell, H. (2017) *Who experiences discrimination in Ireland? Evidence from the CSO Equality Modules*, Dublin: ESRI, disponible sur: <https://www.ihrec.ie/app/uploads/2017/11/Who-experiences-discrimination-in-Ireland-Report.pdf>.

⁴⁴ Projet de loi sur le handicap (dispositions diverses) 2016, <https://www.oireachtas.ie/viewdoc.asp?DocID=34322&CatID=59>.

⁴⁵ Irlande, *European Convention on Human Rights 2003*, 30 juin 2003, <http://www.irishstatutebook.ie/eli/2003/act/20/enacted/en/print.html>.

comportement indésirable lié à un motif discriminatoire et ayant pour objet ou pour effet de porter atteinte à la dignité d'une personne et de créer pour elle un environnement intimidant, hostile, dégradant, humiliant ou offensant. Ce comportement peut consister en actes, demandes, mots exprimés, gestes ou production, affichage ou distribution de mots écrits, de dessins ou d'autre matériel. Les rétorsions visent toute situation dans laquelle une personne se déclarant victime de discrimination engage des poursuites ou soutient un plaignant, agit en qualité de comparateur ou comme témoin dans une procédure de plainte, s'oppose à la discrimination par des moyens légaux ou fait part de son intention d'agir de l'une des manières précitées et fait l'objet pour cette raison d'un licenciement ou d'un traitement défavorable. L'injonction de discriminer est expressément interdite par les lois sur l'égalité dans l'emploi et couverte dans une certaine mesure par les lois sur l'égalité des statuts au travers d'une interdiction d'obtenir une discrimination.

Les lois sur l'égalité dans l'emploi (1998-2015) disposent 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. Les lois sur l'égalité des statuts (2000-2015) stipulent qu'un fournisseur de biens et de services doit prendre toutes les mesures raisonnables 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 coût nominal de cette obligation est plafonné – son montant maximum variant selon la taille de l'organisation et les ressources dont elle dispose.

Les lois sur l'égalité dans l'emploi prévoient un certain nombre d'exceptions au principe de non-discrimination, lequel ne s'applique pas aux personnes travaillant au domicile d'une autre personne dans le cadre de la prestation de services personnels. Il existe aussi des dérogations lorsque la caractéristique en question constitue une exigence professionnelle véritable et déterminante pour le poste à pourvoir et que l'objectif est légitime et l'exigence proportionnée. Il existe un certain nombre d'exceptions liées aux motifs de l'âge et du handicap qui s'appliquent respectivement aux retraites professionnelles et à la rémunération d'une personne à capacité restreinte. Une exception concerne la discrimination dans l'emploi liée au maintien de l'éthique religieuse d'une institution pour autant que la dérogation soit «légitime», «proportionnée» et limitée de façon à ne pouvoir servir de justification à une discrimination fondée sur un autre motif. On trouve également des exceptions concernant certaines formes d'emploi telles que les forces armées, la *Garda Síochána* (police irlandaise) et les services d'urgence. Les lois sur l'égalité des statuts contiennent 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. Les lois sur l'égalité des statuts contiennent 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.

La discrimination multiple n'est pas explicitement interdite.

4. Champ d'application matériel

Les lois sur l'égalité dans l'emploi (1998-2015) s'appliquent au domaine de l'emploi et de la formation professionnelle et n'établissent pas de distinction entre les travailleurs du secteur public et ceux du secteur privé. La discrimination est interdite en ce qui concerne l'accès à l'emploi, les conditions de travail (y compris la rémunération), la formation ou l'expérience requise pour l'emploi ou en rapport avec celui-ci, la promotion, le reclassement et la classification professionnels, et les offres d'emploi. Les agences de placement et les travailleurs intérimaires sont également couverts.

Les lois sur l'égalité des statuts (2000-2015) interdisent la discrimination en matière de biens et services, y compris dans le domaine de l'enseignement et du logement/de l'hébergement. Elles ne mentionnent pas spécifiquement les services publics, mais ceux-ci sont couverts en vertu de la jurisprudence. Le principal problème de conformité concerne une disposition prévoyant l'exemption de contrôle de toute action exigée par la loi.⁴⁶

5. Mise en application de la loi

Les recours invoquant les lois sur l'égalité dans l'emploi (1998-2015), les lois sur l'égalité des statuts (2000-2015) et les lois sur les pensions (1990-2015) peuvent être adressés à la Commission pour les relations sur le lieu de travail (WRC). Cette dernière 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. Un règlement intervenant au terme d'une médiation est exécutoire pour les parties et le respect de ses clauses peut être imposé par le tribunal itinérant (*Circuit Court*). Il peut être fait appel des décisions auprès de la juridiction du travail (*Labour Court*) 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* et du *Circuit Court* sur un point de droit auprès de la *High Court*.

La requête est déposée auprès de l'instance concernée au moyen d'un formulaire en ligne. Les recours invoquant les lois sur l'égalité des statuts doivent répondre à une exigence supplémentaire, à savoir que le prestataire de service doit être averti par écrit de l'incident et de l'intention de la partie plaignante de demander réparation. Les audiences se tiennent à huis clos devant la WRC. Les décisions de la WRC sont disponibles pour consultation publique, étant donné qu'elles sont publiées sur son site Internet.

Depuis 2003, les recours relatifs à une discrimination impliquant des établissements titulaires d'une licence de débit de boissons (pubs, etc.) doivent être adressés à la *District Court* (tribunal de district) plutôt qu'à la WRC. Cette modification se traduit principalement par des frais plus importants et une plus grande complexité de procédure pour les plaignants.

Des organisations peuvent représenter un plaignant individuel devant la WRC et la *Labour Court* pour autant que ledit plaignant les y autorise, mais pas devant la *Circuit Court* ou la *High Court*. Il est courant que des syndicats représentent leurs membres. Les organisations ne sont pas autorisées à déposer plainte, à l'exception de l'*Irish Human Rights and Equality Commission* ou IHREC (Commission irlandaise pour les droits de l'homme et l'égalité), laquelle est habilitée à saisir la WRC à propos de pratiques discriminatoires, de publicités à caractère discriminatoire ou du contenu de conventions collectives. L'IHREC peut également offrir une assistance et une représentation juridique à un plaignant individuel. Fin 2016, elle apportait son aide juridique dans 20 affaires en cours en rapport avec la législation antidiscrimination.⁴⁷

⁴⁶ Article 14(a)(i), <http://www.irishstatutebook.ie/eli/2000/act/8/enacted/en/print#sec14>.

⁴⁷ IHREC (Irish Human Rights and Equality Commission) (2017), *Annual Report 2016*, p. 32, disponible sur: <https://www.ihrec.ie/app/uploads/2017/06/IHREC-Annual-Report-2016.pdf>.

La législation prévoit le renversement de la charge de la preuve dans les affaires de discrimination lorsque les faits établis conduisent à présumer l'existence d'une discrimination. L'utilisation de statistiques est autorisée mais n'est pas requise pour établir une présomption de discrimination. Le test de situation est peu utilisé, bien qu'aucune règle procédurale ou autre ne l'interdise.

Les lois sur l'égalité dans l'emploi (1998-2015) prévoient un large éventail de recours: indemnisation, ordres aux employeurs de prendre des mesures spécifiques, réintégration dans la fonction ou réengagement. Tous les contrats de travail sont censés posséder une clause d'égalité transformant toute disposition du contrat susceptible d'entraîner autrement une discrimination illégale. Toutes les dispositions discriminatoires figurant dans les conventions collectives sont nulles et non avenues, et aucun contrat ne peut être soustrait à l'application des dispositions de la législation garantissant l'égalité. Les indemnisations financières sont plafonnées: dans le cadre de l'emploi, elles représentent deux ans de salaire; en dehors de l'emploi, l'indemnisation maximale est fixée à 13 000 euros.

Les lois sur l'égalité des statuts (2000-2015) prévoient également divers recours, parmi lesquels des indemnisations et des ordres aux prestataires de services de prendre des mesures spécifiques. Cette législation plafonne également l'indemnisation, laquelle est actuellement limitée à 15 000 euros. Les sanctions financières prises en vertu des deux séries de lois sont beaucoup plus légères que celles appliquées en cas de discrimination fondée sur le genre – ce qui conduit à penser que les sanctions possibles pour d'autres motifs que le genre pourraient ne pas être efficaces, proportionnées ou dissuasives.

Un quota de 3% s'applique à l'emploi de personnes handicapées dans la fonction publique et les services publics. Le gouvernement s'est engagé à augmenter progressivement cette proportion-cible obligatoire à 6 % d'ici 2024.⁴⁸ La *Higher Education Authority* supervise l'application d'une série de mesures destinées à soutenir des catégories déterminées d'étudiants concernés par des motifs de discrimination (étudiants adultes et étudiants handicapés notamment).⁴⁹ Un soutien complémentaire en langue anglaise est prévu dans les écoles à l'intention des enfants issus de l'immigration.

L'IHREC est la principale interface de dialogue et de consultation avec les ONG et les partenaires sociaux. Elle est dotée d'un large éventail de compétences et de fonctions statutaires, y compris le pouvoir d'instituer des comités consultatifs et de rédiger des codes de pratique.

6. Organismes de promotion de l'égalité de traitement

L'*Equality Authority* (Autorité pour l'égalité) et l'*Irish Human Rights Commission* (Commission irlandaise des droits de l'homme) ont fusionné et forment désormais l'*Irish Human Rights and Equality Commission* ou IHREC (Commission irlandaise pour les droits de l'homme et l'égalité).⁵⁰ Cette 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 le droit antidiscrimination et à l'examen de divers textes législatifs, y compris les lois primaires en

⁴⁸ Gouvernement d'Irlande (2015) *Comprehensive Employment Strategy for People with Disabilities 2015-2024*, <http://www.justice.ie/en/JELR/Comprehensive%20Employment%20Strategy%20for%20People%20with%20Disabilities%20-%20FINAL.pdf/Files/Comprehensive%20Employment%20Strategy%20for%20People%20with%20Disabilities%20-%20FINAL.pdf>.

⁴⁹ Pour de plus amples informations, voir Higher Education Authority (2015) *National Plan for Equity of Access to Higher Education 2015–2019*, disponible sur: http://hea.ie/assets/uploads/2017/04/national_plan_for_equity_of_access_to_higher_education_2015-2019_single_page_version_01.pdf.

⁵⁰ *Irish Human Rights and Equality Commission Act 2004* (Loi de 2004 sur la Commission pour les droits de l'homme et l'égalité), <http://www.irishstatutebook.ie/2014/en/act/pub/0025/print.html>.

matière de non-discrimination. 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 et de l'égalité, sous la direction du ministre, finance l'IHREC – laquelle rapporte au Parlement irlandais.

7. Points essentiels

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 dans l'exercice de leurs fonctions. L'IHREC aidera les organismes publics à respecter cette obligation positive; elle a produit un manuel préliminaire et est habilitée à rédiger des codes de pratique. Elle a collaboré en 2017 avec plusieurs organismes du secteur public dans le cadre d'initiatives pilotes destinées à étayer des orientations en matière de bonnes pratiques.

Des sanctions flexibles sont prévues, ce qui permet d'adapter les réparations à des situations particulières et de générer des effets au-delà de la seule affaire en cause. Par ailleurs, les limites imposées à l'indemnisation compromettent sans doute le respect de l'exigence de sanctions «efficaces, proportionnées et dissuasives». Il n'est pas certain que les lois sur l'égalité des statuts couvrent la protection sociale et les prestations sociales de manière adéquate, étant donné notamment la vaste exemption à l'égard de mesures exigées par la loi. Le règlement de plaintes pour discrimination en matière d'accès à des biens et services est entravé par une série de blocages procéduraux. Les lois sur l'égalité dans l'emploi pourraient poser problème en raison de leur définition étroite de la formation professionnelle, de leur non-couverture des convictions n'ayant pas un caractère religieux, et d'une disposition permettant d'appliquer des taux inférieurs de rémunération à des personnes handicapées.

ZUSAMMENFASSUNG

1. Einleitung

Die irische Gesellschaft ist ziemlich homogen. Der Volkszählung von 2016⁵¹ zufolge sind von den knapp 4,8 Millionen Einwohnern des Landes 78,3 % römisch-katholisch, 9,8 % nicht religiös (ein Zuwachs von 73,6 % gegenüber 2011) und gehört der Rest verschiedenen anderen Glaubensrichtungen an. 82,2 % bezeichnen sich selbst als „weiße Iren“, 0,7 % als irische Landfahrer (*Irish Travellers*).⁵² 57 850 Menschen sehen sich als „Schwarzafrikaner“ bzw. „schwarze Iren“, 9,5 % rechnen sich der Kategorie „Sonstiger weißer Hintergrund“ zu. 643 131 Menschen, rund 13,5 % der Bevölkerung, gaben an, eine Behinderung zu haben. In Irland leben insgesamt 6034 gleichgeschlechtliche Paare. Die Zahl der ausländischen Staatsbürger beträgt 535 475 (11,6 % der Bevölkerung), wobei Staatsangehörige anderer EU-Länder die fünf größten Nationalitätengruppen stellen (Polen, Briten, Litauer, Rumänen und Letten).

Die irischen Antidiskriminierungsgesetze wurden in den späten 1990er Jahren deutlich ausgeweitet. Das *Employment Equality Act 1998* (Gesetz zur Gleichstellung im Bereich der Beschäftigung von 1998)⁵³ und das *Equal Status Act 2000* (Gleichbehandlungsgesetz von 2000)⁵⁴ sahen neun Diskriminierungsgründe vor und führten eine nationale Gleichbehandlungsstelle sowie ein spezielles Forum für die Anhörung von Diskriminierungsbeschwerden, das *Equality Tribunal*, ein. Ab 2008 haben die aufeinander folgenden Staatshaushalte die Finanzierung der Gleichstellungsinfrastruktur stark eingeschränkt. Im November 2014 wurde die *Irish Human Rights and Equality Commission* (Irische Kommission für Menschenrechte und Gleichstellung, IHREC)⁵⁵ als Irlands Gleichbehandlungsstelle etabliert. Die Stelle ist mit den gleichen Befugnissen wie ihre Vorgängereinrichtung ausgestattet und die Finanzierungslage hat sich verbessert. 2015 wurde das *Equality Tribunal* zusammen mit verschiedenen arbeitsrechtlichen Einrichtungen in die *Workplace Relations Commission* (Kommission für Arbeitsbeziehungen, WRC) aufgenommen.⁵⁶ Die (etwaigen) Auswirkungen dieser Veränderung auf Diskriminierungsbeschwerden sind noch nicht abzusehen.

Irlands indigene ethnische Minderheit, die Gemeinschaft der Fahrennden (*Travelling Community*), leidet unter einem hohen Maß an relativer sozialer Benachteiligung und Diskriminierung. Insofern war die formelle Anerkennung der Traveller als Ethnizität im März 2017 eine begrüßenswerte Entwicklung.⁵⁷ Neue Rechtsvorschriften gingen mit dieser Änderung in der Regierungspolitik zwar nicht einher, die im Juni 2017 veröffentlichte *National Traveller and Roma Inclusion Strategy 2017-2021* enthält jedoch eine Verpflichtung zur Überarbeitung des Statuts, das die Bereitstellung spezieller Unterkünfte für Traveller regelt. 2018 soll ein Umsetzungsplan veröffentlicht werden. Im Verlauf des Jahres 2017 wurden im Oireachtas (irisches Parlament) verschiedene Gesetzentwürfe zur Änderung des Antidiskriminierungsrechts diskutiert; keiner davon wurde bis Ende des Jahres jedoch verabschiedet. In der nationalen Debatte über Gleichstellungsrechte ging es in den letzten Jahren unter anderem um religiöse Kriterien in der Aufnahmepolitik von Schulen, und 2016 wurde ein Gesetzentwurf veröffentlicht, der Recht und Praxis in diesem Bereich angeblich reformiert. In ihren Kommentaren zu dem Gesetzentwurf schlägt die IHREC Änderungen vor, die unter anderem darauf abzielen, die Einhaltung der

⁵¹ <http://www.cso.ie/en/census/census2016reports/>.

⁵² Es gibt keine offiziellen Statistiken zu Roma.

⁵³ Irland, *Employment Equality Act 1998*, 18.06.1998, <http://www.irishstatutebook.ie/eli/1998/act/21/enacted/en/print>.

⁵⁴ Irland, *Equal Status Act 2000*, 26.03.2000, <http://www.irishstatutebook.ie/eli/2000/act/8/enacted/en/html>.

⁵⁵ Irland, *Irish Human Rights and Equality Commission Act 2014*, 27.07.2014, <http://www.irishstatutebook.ie/2014/en/act/pub/0025/print.html>.

⁵⁶ Irland, *Workplace Relations Act 2015*, 20.05.2015, <http://www.irishstatutebook.ie/eli/2015/act/16/enacted/en/pdf>.

⁵⁷ Die Erklärung des Taoiseach (Premierminister) ist abrufbar unter: http://www.taoiseach.gov.ie/eng/News/Taoiseach%27s_Speeches/Statement_by_An_Taoiseach_Enda_Kenny_TD_on_the_recognition_of_Travellers_as_an_ethnic_group_Dail_Eireann_1_March_2017.html.

Antirassismusrichtlinie zu gewährleisten.⁵⁸ 2018 soll dem Parlament ein grundlegend überarbeiteter Gesetzentwurf vorgelegt werden.

In der Rechtsprechung von 2017 waren keine wesentlichen Entwicklungen in den Antidiskriminierungsgrundsätzen zu erkennen. Im Juni 2017 legte der Supreme Court dem EuGH ein Ersuchen um Vorabentscheidung vor, das Gerichts- und Verwaltungsverfahren betrifft.⁵⁹ Es geht um die Frage, ob die *Workplace Relations Commission* (WRC) nach dem EU-Recht zwingend für Klagen zuständig ist, die auf die Nichtanwendung sekundärrechtlicher Vorschriften abzielen, obwohl die WRC nach nationalem Recht nicht dafür zuständig ist, derartige Verfahren zu eröffnen. Ein großer Teil der Beschwerden gegen Dienstleistende wegen Diskriminierung aufgrund der Zugehörigkeit zur Gemeinschaft der Fahrenden wurde abgewiesen, da die Beschwerden dem falschen Gericht vorgelegt wurden – ein deutlicher Hinweis auf die anhaltenden Probleme, die durch die Übertragung der Zuständigkeit für Diskriminierung am Eingang zu Schanklokalen auf den District Court im Jahr 2003 entstanden sind. In einem Fall, in dem es darum ging, dass in einem Beschwerdeverfahren die Teilnahme eines Englisch-Dolmetschers nicht zugelassen wurde, bekräftigte der Labour Court die in der Rechtsprechung zu benachteiligten Migrantinnen und Migranten festgelegten Grundsätze, wonach aus der Tatsache, dass unterschiedliche Situationen nicht unterschiedlich behandelt werden, eine unmittelbare Diskriminierung resultieren kann.⁶⁰

2. Wichtigste Rechtsvorschriften

Die Irische Verfassung garantiert die Gleichheit aller Menschen vor dem Gesetz, ohne ausdrückliche Diskriminierungsgründe zu nennen. Sie wird relativ selten in Anspruch genommen.⁶¹

Das irische Antidiskriminierungsrecht besteht aus den *Employment Equality Acts* von 1998 bis 2015, die für die Bereiche Beschäftigung und Beruf gelten, und den *Equal Status Acts* von 2000 bis 2015, die die Bereiche Güter, Dienstleistungen, Wohnraumversorgung/Unterbringung und Bildung abdecken. Die *Pensions Acts* (Rentengesetze)⁶² von 1990 bis 2015 gelten für betriebliche Systeme der Altersversorgung. Sie decken die Diskriminierungsgründe Geschlecht, Alter, Rasse, Religion, familiärer Status, Behinderung, zivilrechtlicher Status, sexuelle Orientierung und Zugehörigkeit zur Gemeinschaft der Fahrenden ab. Die *Equal Status Acts* wurden 2015 um einen Diskriminierungsgrund „Wohngeldbezug“ erweitert, der Diskriminierung von Personen, die Sozialleistungen wie z. B. Wohngeld beziehen, beim Zugang zu Mietwohnraum verbietet.⁶³

Auch andere Gesetze enthalten Bestimmungen, die Diskriminierung verbieten, nämlich die *Unfair Dismissals Acts* (Gesetze über rechtswidrige Kündigungen) von 1977 bis 2015,⁶⁴

⁵⁸ Irish Human Rights and Equality Commission (2016), *Observations on the Education (Admission to Schools) Bill 2016*, abrufbar unter: <https://www.ihrec.ie/app/uploads/2016/11/Observations-on-Education-Admission-to-Schools-Bill-2016.pdf>.

⁵⁹ Supreme Court, *Minister for Justice, Equality and Law Reform v The Workplace Relations Commission and ors.* [2017] IESC 43, 15.06.2017, <http://www.courts.ie/Judgments.nsf/bce24a8184816f1580256ef30048ca50/7b97206199a365a480258141004d3f72?OpenDocument>.

⁶⁰ *Boxmore Plastics v Zimareva*, EDA 1732, 30.11.2017, <https://www.workplacerelations.ie/en/Cases/2017/November/EDA1732.html>.

⁶¹ Dewhurst, E. (2015), „Principles of Irish Constitutional Equality Law: Recent Developments“, *Bar Review* 20(4), S. 74-77, abrufbar unter: <https://www.lawlibrary.ie/rss/barreview/4-2015.pdf>.

⁶² Ireland, *Pensions Act 1990*, 24.07.1990, <http://www.irishstatutebook.ie/eli/1990/act/25/enacted/en/print.html>; geändert durch Art. 22 des *Social Welfare (Miscellaneous Provisions) Act 2004*, <http://www.irishstatutebook.ie/eli/2004/act/9/section/22/enacted/en/html#sec22>.

⁶³ Ireland, *Equality (Miscellaneous Provisions) Act 2015*, 10.12.2015, <http://www.irishstatutebook.ie/eli/2015/act/43/enacted/en/pdf>.

⁶⁴ Ireland, *Unfair Dismissals Acts 1997-2015*, 06.04.1997, http://www.lawreform.ie/fileupload/RevisedActs/WithAnnotations/HTML/EN_ACT_1977_0010.htm.

das *Prohibition of Incitement to Hatred Act* (Gesetz über das Verbot der Aufstachelung zum Hass) von 1989,⁶⁵ das Hassrede unter Strafe stellt, und das *Intoxicating Liquor Act* (Gesetz über alkoholische Getränke) von 2003,⁶⁶ das in Artikel 19 die Anwendbarkeit des Diskriminierungsrechts auf konzessionierte Schankstätten regelt.

Die irische Antidiskriminierungsgesetzgebung geht insofern über die EU-Gleichbehandlungsrichtlinien hinaus, als der persönliche Geltungsbereich der *Equal Status Acts 2000-2015* Diskriminierung beim Zugang zu Gütern und Dienstleistungen nicht nur aufgrund der Rasse und des Geschlechts, sondern auch aufgrund einer Behinderung, des Alters, der Religion, der sexuellen Orientierung, der Zugehörigkeit zur Gemeinschaft der Fahrenden, des familiären Status, des zivilrechtlichen Status und des Bezugs von Wohngeld verbietet. Diskriminierung aus Gründen der Staatsangehörigkeit ist im Rahmen des Diskriminierungsgrunds „Rasse“ ebenfalls ausdrücklich verboten. Die Definition des Begriffs „Behinderung“ ist weiter gefasst als im EU-Recht, und für Menschen mit Behinderung müssen beim Zugang zu Gütern und Dienstleistungen angemessene Vorkehrungen getroffen werden. Es gibt eine umfangreiche Rechtsprechung zu allen Diskriminierungsgründen, die größtenteils vom *Equality Tribunal* (nunmehr WRC) und vom *Labour Court* stammt.⁶⁷ Studien lassen vermuten, dass Untererfassung von Diskriminierung und Untätigkeit gegenüber wahrgenommener Diskriminierung große Probleme darstellen.⁶⁸

Irland hat die wichtigsten Menschenrechtsinstrumente des Europarats ratifiziert, mit Ausnahme des 12. Protokolls der Europäischen Menschenrechtskonvention. Es hat auch die meisten grundlegenden Instrumente der Vereinten Nationen ratifiziert. Die Ratifizierung des UN-Übereinkommens über die Rechte von Menschen mit Behinderungen wird voraussichtlich 2018, zusammen mit der Einführung eines Gesetzes erfolgen, das in seiner Entwurfsform die Irische Kommission für Menschenrechte und Gleichstellung dazu bestimmt, als unabhängiger Mechanismus die Umsetzung des Übereinkommens zu fördern, zu schützen und zu überwachen.⁶⁹ Irland ist ein dualistischer Staat, was so viel bedeutet, dass internationales Recht im irischen Rechtssystem nur dann angewendet werden kann, wenn es im Zuge der Gesetzgebung in nationales Recht überführt wurde. Das wichtigste internationale Übereinkommen, das in irisches Recht überführt wurde, ist die Europäische Menschenrechtskonvention, die im Zuge des *European Convention on Human Rights Act* (Gesetz über die Europäische Menschenrechtskonvention) von 2003 übernommen wurde.⁷⁰

3. Wichtigste Grundsätze und Begriffe

Unmittelbare Diskriminierung im Sinne der Antidiskriminierungsgesetze liegt vor, wenn eine Person aus einem der Diskriminierungsgründe eine weniger günstige Behandlung erfährt, als eine andere Person erfährt, erfahren hat oder erfahren würde. Das Verbot gilt auch für Diskriminierung durch Assoziierung und für Diskriminierung aufgrund eines Diskriminierungsgrundes, der besteht, früher bestanden hat, womöglich bestehen wird oder der betroffenen Person unterstellt wird. Mittelbare Diskriminierung wird definiert als Situation, in der eine dem Anschein nach neutrale Bestimmung eine Person, die einer

⁶⁵ Irland, *Prohibition of Incitement to Hatred Act* 1989, 29.11.1989, <http://www.irishstatutebook.ie/eli/1989/act/19/enacted/en/html>.

⁶⁶ Irland, *Intoxicating Liquor Act* 2003, 14.07.2003, <http://www.irishstatutebook.ie/eli/2003/act/31/enacted/en/print#sec19>.

⁶⁷ Die Entscheidungen beider Organe werden veröffentlicht unter: https://www.workplacerelations.ie/en/Decisions_Determinations/.

⁶⁸ Siehe z. B. Equality and Rights Alliance (2013), *Access to Justice and Under-Reporting of Discrimination and Human Rights Abuses*, abrufbar unter:

<http://www.eracampaign.org/uploads/Access%20to%20Justice%20and%20under-reporting%20ERA%20Aug%202013.pdf>; McGinnity, F., Grotti, R., Kenny, O., und Russell, H. (2017), *Who experiences discrimination in Ireland? Evidence from the CSO Equality Modules*, Dublin: ESRI, abrufbar unter: <https://www.ihrec.ie/app/uploads/2017/11/Who-experiences-discrimination-in-Ireland-Report.pdf>.

⁶⁹ *Disability (Miscellaneous Provisions) Bill* 2016, <https://www.oireachtas.ie/viewdoc.asp?DocID=34322&CatID=59>.

⁷⁰ Irland, *European Convention on Human Rights Act* 2003, 30.06.2003, <http://www.irishstatutebook.ie/eli/2003/act/20/enacted/en/print.html>.

geschützten Gruppe angehört, im Vergleich zu anderen Personen in besonderer Weise benachteiligt. Solche unterschiedlichen Auswirkungen können jedoch zulässig sein, wenn sie durch ein rechtmäßiges Ziel sachlich gerechtfertigt und die Mittel zur Erreichung dieses Ziels angemessen und erforderlich sind. Belästigung ist definiert 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 solche 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 anstrengen, eine Klägerpartei unterstützen, in einem Verfahren als Vergleichsperson oder als Zeuge auftreten, auf gesetzlichem Wege Diskriminierung bekämpfen oder ihre Absicht, eine der oben genannten Handlungen vorzunehmen, ankündigen. Anweisungen zur Diskriminierung sind nach den *Employment Equality Acts* ausdrücklich verboten und werden in den *Equal Status Acts* in gewissem Maße durch das Verbot des „Bewirkens“ (*procurement*) von Diskriminierung abgedeckt.

Nach den *Employment Equality Acts 1998-2015* gelten Menschen mit Behinderungen als qualifiziert, 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 stark belasten. Bei der Entscheidung, was eine unverhältnismäßig starke 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 den *Equal Status Acts 2000-2015* sind Anbieter von Gütern oder Dienstleistungen verpflichtet, alle angemessenen Maßnahmen zu treffen, um den Bedürfnissen von Personen mit Behinderungen gerecht zu werden, und dazu auch spezielle Verfahren oder Einrichtungen bereitzustellen, ohne die es für die betroffene Person unmöglich oder unverhältnismäßig schwierig wäre, die Güter oder Dienstleistungen in Anspruch zu nehmen. Die Verpflichtung unterliegt einer nominellen Kostenobergrenze, die je nach Größe des Unternehmens und den ihm zur Verfügung stehenden Mitteln variiert.

Die *Employment Equality Acts* enthalten 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 ist 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 von Menschen mit eingeschränkten Fähigkeiten möglich. Es gibt eine Ausnahme vom Verbot der Diskriminierung im Bereich Beschäftigung, wenn diese dem Zweck dient, den religiösen Ethos einer Organisation aufrechtzuerhalten, wobei die Ungleichbehandlung „rechtmäßig“, „verhältnismäßig“ und begrenzt sein muss, sodass sie nicht zur Rechtfertigung anderer Arten von Diskriminierung benutzt werden kann. Weitere Ausnahmen im Bereich Beschäftigung betreffen die Streitkräfte, die Garda Síochána (Polizei) und die Rettungsdienste. Auch die *Equal Status Acts* enthalten Ausnahmen und Beschränkungen des Diskriminierungsverbots. Eine Ungleichbehandlung in Bezug auf Renten, Pensionen und Versicherungspolice ist zulässig, wenn die Ungleichbehandlung aus versicherungsmathematischen Gründen angemessen ist. Weitere Ausnahmen vom Gleichbehandlungsgebot betreffen die Organisation von Sportveranstaltungen, die Authentizität dramatischer Darstellungen oder sonstiger Unterhaltungsevents bzw. die Bereitstellung von Dienstleistungen zu religiösen Zwecken. Eine weitere Ausnahme sieht vor, dass Diskriminierung bei der Bereitstellung von Gütern oder Dienstleistungen in Situationen nicht strafbar ist, in denen die hinreichende Gründe

für die Annahme vorliegen, dass ein erhebliches Risiko kriminellen oder ordnungswidrigen Verhaltens besteht. Die *Equal Status Acts* lassen außerdem im Bildungswesen bestimmte Ausnahmen aufgrund von Alter, Geschlecht, religiösem Ethos und Behinderung zu.

Mehrfachdiskriminierung ist nicht ausdrücklich verboten.

4. Sachlicher Geltungsbereich

Die *Employment Equality Acts 1998-2015* gelten für die Bereiche Beschäftigung und berufliche Bildung und unterscheiden nicht zwischen privaten und öffentlichen Arbeitgebern. Diskriminierung ist verboten beim Zugang zu Beschäftigung, in Bezug auf die Arbeitsbedingungen (einschließlich der Vergütung), auf Aus- und Weiterbildung für eine bzw. auf Erfahrung in einer beruflichen Tätigkeit, auf Beförderung, auf Einstufung oder Neueinstufung von Stellen sowie auf Stellenausschreibungen. Arbeitsvermittlungen und Leiharbeiternehmer/innen fallen ebenfalls in ihren Geltungsbereich.

Die *Equal Status Acts 2000-2015* verbieten Diskriminierung in Bezug auf Güter und Dienstleistungen einschließlich Bildung und Wohnraumversorgung/Unterbringung. Staatliche Dienstleistungen werden nicht ausdrücklich erwähnt, werden nach der Rechtsprechung jedoch vom Geltungsbereich erfasst. Die wichtigste Compliance-Frage stellt sich im Zusammenhang mit einer Bestimmung, die jegliche gesetzlich vorgeschriebene Maßnahme von der Kontrolle ausnimmt.⁷¹

5. Rechtsdurchsetzung

Beschwerden auf der Grundlage der *Employment Equality Acts 1998-2015*, der *Equal Status Acts 2000-2015* und der *Pensions Acts 1990-2015* können bei der *Workplace Relations Commission* (WRC) eingereicht werden. Die WRC 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. Es besteht die Möglichkeit, Mediationsverfahren durchzuführen. Eine durch Mediation erreichte Einigung zwischen den Parteien ist rechtlich bindend und kann beim Circuit Court durchgesetzt werden. Gegen die Entscheidungen kann Berufung eingelegt werden; Berufungsinstanz in Verfahren, die den Bereich der Beschäftigung betreffen, ist der Labour Court, in Verfahren nach dem Gleichbehandlungsgesetz der Circuit Court. Gegen Urteile des Labour Court und des Circuit Court kann beim High Court Kassationsbeschwerde eingelegt werden.

Beschwerden werden bei der zuständigen Stelle mithilfe von Online-Formularen eingereicht. Für Beschwerden aufgrund der *Equal Status Acts* gilt außerdem, dass dem Dienstleister das Vorkommnis und die Absicht der beschwerdeführenden Partei, ihre Rechte geltend zu machen, schriftlich mitgeteilt werden müssen. Die Verfahren vor der WRC finden unter Ausschluss der Öffentlichkeit statt. Die Entscheidungen der WRC sind öffentlich einsehbar, da sie auf der Webseite der WRC veröffentlicht werden.

Seit 2003 müssen Diskriminierungsklagen, die konzessionierte Schankstätten (Pubs usw.) betreffen, nicht beim WRC, sondern beim District Court eingereicht werden. Diese Änderung führt vor allem zu höheren Kosten und komplizierteren Verfahren für die Betroffenen.

Organisationen dürfen Betroffene vor der WRC und dem Labour Court vertreten, wenn sie von der jeweiligen Person entsprechend bevollmächtigt sind, jedoch nicht vor dem Circuit Court oder dem High Court. Gewerkschaften vertreten häufig ihre Mitglieder. Organisationen dürfen nicht im eigenen Namen klagen, mit Ausnahme der *Irish Human Rights and Equality Commission* (IHREC). Die IHREC kann bei der WRC gegen diskriminierende Strukturen, diskriminierende Werbung oder den Inhalt von Tarifverträgen klagen. Sie kann außerdem Betroffene bei ihrer Klage unterstützen und vertreten. Ende

⁷¹ Art. 14 Buchst. a Pkt. i, <http://www.irishstatutebook.ie/eli/2000/act/8/enacted/en/print#sec14>.

2016 leistete die IHREC in 20 laufenden antidiskriminierungsrechtlichen Verfahren rechtliche Unterstützung.⁷²

Die Rechtsvorschriften sehen eine Verlagerung der Beweislast bei Diskriminierungsklagen vor, sofern die vorgebrachten Tatsachen den Anscheinsbeweis für eine Diskriminierung begründen. Die Verwendung statistischer Daten ist zulässig, jedoch nicht zwingend erforderlich, um das Vorliegen einer Diskriminierung glaubhaft zu machen. Testing-Verfahren wurden bisher kaum eingesetzt. Es gibt jedoch weder Verfahrensvorschriften noch sonstige Regeln, die ihren Einsatz verbieten.

Die *Employment Equality Acts 1998-2015* sehen diverse Maßnahmen der Wiedergutmachung vor: Entschädigung, Auflagen an die Arbeitgeber, bestimmte Maßnahmen zu treffen, Weiterbeschäftigung bzw. Wiedereinstellung. Alle Beschäftigungsverträge enthalten eine Gleichbehandlungsklausel, mit der sämtliche Bestimmungen des Vertrags aufgehoben werden, die eine rechtswidrige Diskriminierung darstellen. Diskriminierende Bestimmungen in Tarifvereinbarungen sind null und nichtig und es ist nicht möglich, außerhalb der Bestimmungen der Gleichbehandlungsgesetzgebung Verträge abzuschließen. Es gibt Obergrenzen für Entschädigungssummen, die bei arbeitsrechtlichen Fällen zwei Jahresgehälter oder, wenn die Klägerpartei nicht beschäftigt war, 13 000 Euro betragen.

Auch die *Equal Status Acts 2000-2015* sehen diverse Wiedergutmachungsmaßnahmen vor, darunter Schadensersatz und Anordnungen an Dienstleister, bestimmte Maßnahmen zu ergreifen. Für zugesprochene Summen enthalten diese Gesetze eine Obergrenze von derzeit 15 000 Euro. In beiden Gesetzeswerken sind die finanziellen Sanktionen wesentlich milder als die, die in Fällen geschlechtsbezogener Diskriminierung vorgesehen sind. Dies lässt vermuten, dass die Sanktionen, die bei anderen Diskriminierungsgründen als Geschlecht zur Verfügung stehen, möglicherweise nicht wirksam, verhältnismäßig und abschreckend sind.

Für die Beschäftigung von Menschen mit Behinderungen im staatlichen und öffentlichen Dienst gilt eine Quote von 3 Prozent. Die Regierung hat zugesagt, die gesetzliche Zielvorgabe bis 2024 schrittweise auf 6 Prozent anzuheben.⁷³ Die Hochschulbehörde überwacht eine Reihe von Maßnahmen, mit denen verschiedene Gruppen von Studierenden, die unter die Diskriminierungsgründe fallen (z. B. ältere Studierende und Studierende mit Behinderungen), unterstützt werden.⁷⁴ Für Migrantenkinder wird in den Schulen zusätzliche Sprachförderung in Englisch angeboten.

Die IHREC ist das vorrangige Instrument, über das Dialog und Konsultationen mit NROs und Sozialpartnern stattfinden. Sie verfügt über mit einer Reihe von wichtigen gesetzlichen Befugnissen und Funktionen, darunter auch die Befugnis, beratende Ausschüsse einzurichten und Verhaltenskodexe zu erstellen.

6. Gleichbehandlungsstellen

⁷² Irish Human Rights and Equality Commission (2017) *Annual Report 2016*, S. 32, abrufbar unter: <https://www.ihrec.ie/app/uploads/2017/06/IHREC-Annual-Report-2016.pdf>.

⁷³ Regierung der Republik Irland (2015), *Comprehensive Employment Strategy for People with Disabilities 2015-2024*, <http://www.justice.ie/en/JELR/Comprehensive%20Employment%20Strategy%20for%20People%20with%20Disabilities%20-%20FINAL.pdf/Files/Comprehensive%20Employment%20Strategy%20for%20People%20with%20Disabilities%20-%20FINAL.pdf>.

⁷⁴ Siehe dazu auch Higher Education Authority (2015), *National Plan for Equity of Access to Higher Education 2015-2019*, abrufbar unter: http://hea.ie/assets/uploads/2017/04/national_plan_for_equity_of_access_to_higher_education_2015-2019_single_page_version_01.pdf.

Die *Equality Authority* wurde mit der *Irish Human Rights Commission* zur *Irish Human Rights and Equality Commission* (IHREC) zusammengelegt.⁷⁵ Die 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 das Antidiskriminierungsrecht zu informieren und die Umsetzung verschiedener gesetzlicher Regelungen einschließlich der primären Antidiskriminierungsgesetze zu überwachen. Zur Erfüllung dieser Aufgaben kann sie Forschungsprojekte und Aufklärungskampagnen durchführen, Gesetze überprüfen und gesetzliche Verfahrensregeln ausarbeiten. 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 und Gleichstellung, unter Leitung des Ministers, finanziert und ist gegenüber dem irischen Parlament rechenschaftspflichtig.

7. Zentrale Punkte

Eine interessante Neuerung ist Artikel 42 des Gesetzes über die Irische Menschenrechts- und Gleichbehandlungskommission von 2014, der öffentliche Stellen dazu verpflichtet, Menschenrechte und Gleichbehandlung bei der Wahrnehmung ihrer Aufgaben gebührend zu berücksichtigen. Die IHREC wird die öffentlichen Stellen darin unterstützen, dieser Pflicht nachzukommen; sie hat einen vorläufigen Leitfaden erstellt und ist befugt, Verhaltenskodexe zu entwickeln. Im Laufe des Jahres 2017 hat sie mit zahlreichen öffentlichen Stellen bei Pilotinitiativen zusammengearbeitet, die Anregungen für bewährte Verfahren liefern werden.

Es stehen flexible Sanktionen zur Verfügung, die es ermöglichen, den Schadensausgleich auf die speziellen Umstände abzustimmen, und die auch über den konkreten Fall hinaus erhebliche Wirkungen erzielen können. Allerdings wird die Anforderung, dass Sanktionen „wirksam, verhältnismäßig und abschreckend“ sein müssen, durch die Höchstgrenzen für Entschädigungen wohl untergraben. Es ist zweifelhaft, ob die *Equal Status Acts* Sozialschutz und soziale Vergünstigungen angemessen abdecken, was zum Teil auf die weit gefasste Ausnahme für gesetzlich vorgeschriebene Maßnahmen zurückzuführen ist. Beschwerden wegen Diskriminierung beim Zugang zu Gütern und Dienstleistungen nachzugehen, wird durch verschiedene verfahrenstechnische Hindernisse erschwert. Mögliche Probleme im Zusammenhang mit den *Employment Equality Acts* sind unter anderem eine eng gefasste Definition der beruflichen Bildung, die Nichtberücksichtigung von Überzeugungen nichtreligiöser Art und eine Bestimmung, die es ermöglicht, Menschen mit Behinderungen geringere Vergütungen zu bezahlen.

⁷⁵ Irland, *Irish Human Rights and Equality Commission Act 2004*, 27.07.2014, <http://www.irishstatutebook.ie/2014/en/act/pub/0025/print.html>.

INTRODUCTION

The national legal system

The basic law of Ireland is the Constitution, Bunreacht na hÉireann, 1937. It establishes the State and its institutions, sets out the fundamental principles guiding the governance of the State and contains an entrenched bill of rights.⁷⁶ The Constitution takes precedence over all other sources of law, subject to Article 29.4.6°, which ensures that nothing in the Constitution can invalidate laws enacted, acts done or measures adopted by the State where these are necessitated by membership of the EU. Article 15.4 prohibits the Oireachtas (national parliament) from enacting laws that conflict with the Constitution, including its human rights guarantees, while Article 34.3.2° vests in the High Court, Court of Appeal and Supreme Court the express power of judicial review of legislation.

The Constitution provides that the sole law making body in the State is the Oireachtas.⁷⁷ Legislation must be passed by both houses of the Oireachtas and is then signed into law by the President. Legislation is the most significant source of non-discrimination measures.

Ireland is a dualist state; ratification of an international treaty does not automatically result in its provisions becoming part of the internal legal system.⁷⁸ In order to become enforceable under domestic law, a treaty must be incorporated either through an Act of the Oireachtas or by an amendment to the Constitution. The European Convention on Human Rights Act 2003 gave further effect to the provisions of the Convention under Irish law.⁷⁹ It places obligations on organs of the State to comply with the Convention and provides remedies for individuals whose rights have been infringed.

List of main legislation transposing and implementing the directives

Employment Equality Acts 1998-2015 (EEA)⁸⁰

Date of adoption: 18.06.1998

Latest amendments: 10.12.2015

Entry into force: 18.10.1999

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

Material scope: Employment (including occupation and vocational training)

Equal Status Acts 2000-2015 (ESA)⁸¹

Date of adoption: 26.04.2000

Latest amendments: 10.12.2015

Entry into force: 25.10.2000

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

Material scope: Access to goods and services, housing/ accommodation, education, registered clubs

⁷⁶ Ireland, Constitution of Ireland, 29.12.1937, available at: <http://www.irishstatutebook.ie/eli/cons/en/html>.

⁷⁷ 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.

⁷⁸ Oireachtas Library and Research Service (2016) *International human rights law: operation and impact*, available at: https://www.oireachtas.ie/parliament/media/housesoftheoireachtas/libraryresearch/spotlights/20160609_in_tIHR_spotlight_095201.pdf, accessed 25.01.2018.

⁷⁹ Ireland, European Convention on Human Rights Act 2003, 30.06.2003, <http://www.irishstatutebook.ie/eli/2003/act/20/enacted/en/print.html>.

⁸⁰ Ireland, Employment Equality Acts 1998-2015, <http://revisedacts.lawreform.ie/eli/1998/act/21/revised/en/html>.

⁸¹ Ireland, Equal Status Acts 2000-2015, <http://revisedacts.lawreform.ie/eli/2000/act/8/revised/en/html>.

Pensions Acts 1990-2015⁸²

Date of adoption: 24.07.1990

Latest amendments: 10.12.2015

Entry into force: 21.12.1990

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

Material scope: Occupational pensions, occupational benefit schemes

Irish Human Rights and Equality Commission Act 2014 (IHRECA)⁸³

Date of adoption: 27.07.2014

Entry into force: 01.11.2014

Latest amendments: N/a

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

Material scope: Establishment of Irish Human Rights and Equality Commission as national equality body, powers and functions of IHREC

Workplace Relations Act 2015⁸⁴

Date of adoption: 20.05.2015

Entry into force: 01.10.2015

Latest amendments: 08.02.2016

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

Material scope: Establishment of Workplace Relations Commission (WRC) as primary forum for hearing anti-discrimination complaints, powers and functions of WRC

⁸² Ireland, Pensions Act 1990, 24.07.1990, <http://www.irishstatutebook.ie/eli/1990/act/25/enacted/en/print.html>; Amended by section 22 of the Social Welfare (Miscellaneous Provisions) Act 2004, 25.03.2004, <http://www.irishstatutebook.ie/eli/2004/act/9/section/22/enacted/en/html#sec22>.

⁸³ Ireland, Irish Human Rights and Equality Commission Act 2014, 27.07.2014, <http://www.irishstatutebook.ie/eli/2014/act/25/enacted/en/html>.

⁸⁴ Ireland, Workplace Relations Act 2015, 20.05.2015, <http://www.irishstatutebook.ie/eli/2015/act/16/enacted/en/print.html>.

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

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

General clause

Article 40.1 provides: 'All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and social function.'

The grounds covered implicitly by this provision include sex/gender, race, language, religious or political opinions, age, marital status, pedigree, disability and sexual orientation.⁸⁵

This provision appears to apply to all areas covered by the directives. Its material scope is unclear but broader than those of the directives in that it extends to access to goods and services on all grounds.

Specific clauses

Article 44.2.3^o applies to the religion ground and provides that 'the State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status.' With regard to education, the Constitution further provides under Article 44.2.4^o that 'State aid for schools shall not discriminate between schools under the management of different religious denominations, nor be such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school.'

Article 40.6.2^o requires that laws regulating the formation of associations and unions and the right of free assembly shall 'contain no political, religious or class discrimination.'

These provisions are directly applicable.

These provisions cannot be enforced against private actors (in addition to against the State). Although the question requires further judicial interpretation, it seems that the general equality clause cannot be enforced against private actors.⁸⁶ Article 44.2.3^o cannot be enforced against private actors.⁸⁷ The other two provisions explicitly apply only to State activities.

⁸⁵ *Murphy v Ireland and Others* [2014] IESC 19, at 34-35; *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321; *An Blascaod Mór Teoranta v Commissioners of Public Works* [2000] 1 IR 6; *MD v Ireland* [2012] IESC 12; *DX v Buttimer* [2012] IEHC 175; *Minister for Justice and Equality v O'Connor* [2017] IESC 21, at 20.

⁸⁶ High Court, *Equality Authority v Portmarnock Golf Club* [2005] IEHC 235, <http://www.bailii.org/ie/cases/IEHC/2005/H235.html>: O'Higgins J. found that 'the equality guarantee does not impose obligations on citizens in their private relations'. The constitutional issue was not dealt with on appeal.

⁸⁷ *McGrath and O'Ruairc v The Trustees of Maynooth College* [1979] ILRM 166.

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, housing assistance.⁸⁸

2.1.1 Definition of the grounds of unlawful discrimination within the directives

Race and ethnic origin

The race ground under both the ESA and EEA covers people who are of different 'race, colour, nationality or ethnic or national origin'.⁸⁹ None of these concepts are defined.

According to case law 'national origin' is 'acquired by a person at the time of birth and connects that person with one or more groups of people who can be described as a "nation"'.⁹⁰ 'Nationality' is in effect equated with citizenship.⁹¹

Case law has not considered the meaning of 'race' as such.⁹²

Under EEA and ESA, the race ground prohibits discrimination against people who are *inter alia* of a different 'ethnic or national origin'. According to the High Court 'ethnic origin' under ESA will usually refer to an immutable characteristic over which an individual has no control while recognising there are 'instances where an individual belonging to one nationality or ethnic group might elect to adhere to another'.⁹³ The Court approved of the definition of 'ethnic group' set out by the House of Lords in *Mandla v Dowell-Lee*.⁹⁴ In that case Lord Fraser found that such a group must regard itself and be regarded by others as a distinct community by virtue of certain characteristics: '(1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of

⁸⁸ With effect from 01.01.2016, 'housing assistance' may be invoked as a discriminatory ground but only in the context of accommodation, which is covered by the Equal Status Acts. People in receipt of rent supplement, housing assistance payments or other social welfare payments can no longer be discriminated against in relation to the provision of accommodation or related services or amenities. Landlords, letting agents, and property advertisers are also prohibited from publishing or displaying advertisements which indicate an intention to discriminate on the housing assistance ground: Ireland, Equality (Miscellaneous Provisions) Act 2015, 10.12.2015, <http://www.irishstatutebook.ie/eli/2015/act/43/enacted/en/html>.

⁸⁹ Section 6(2)(h) EEA, Section 3(2)(h) ESA.

⁹⁰ Equality Tribunal, *Curran v The Department of Education & Science*, DEC-E2009-075, 03.09.2009, at 5.5, <https://www.workplacerelations.ie/en/Cases/2009/September/DEC-E2009-075-Full-Case-Report.html>.

⁹¹ *Sabherwal v ICTS (UK) Ltd.*, DEC-S2008-037, 11.06.2008, <https://www.workplacerelations.ie/en/Cases/2008/June/DEC-S2008-037-Full-Case-Report.html>; *Kerry County Council v Jurczewski*, EDA1311, 15.05.2013, <https://www.workplacerelations.ie/en/Cases/2013/May/EDA1311.html>.

⁹² The Labour Court conflated the terms 'race', 'racial origin' and 'ethnic origin' in determining that people of the EU Member States could not be regarded en masse as a racial or ethnic group in *Dublin Institute of Technology v Awojuola*, EDA 1335, 23.12.2013, <https://www.workplacerelations.ie/en/Cases/2013/December/EDA1335.html>. The case involved a challenge to the criteria used to set fees for admission to a course of education in a third level institution. Lower fee rates applied to EU citizens and persons who had been resident in the EU for at least three of the previous five years. The complainant, a Nigerian national, contended that the criteria gave rise to indirect discrimination on the race ground. In relation to the 'colour' aspect of the ground, according to the Labour Court it 'could readily be accepted that substantially more white people are citizens of the EU Members States than black people and that fewer black people than white people meet the residency criteria for the EU rate of fees chargeable by the Respondent.' However, the appropriate pool for comparison was not white and black people in general: 'In order to make out a prima facie case of indirect discrimination it would be necessary for the Complainant to show that a significant imbalance in racial makeup defined by colour exists between those actually charged the EU rate of fees compared to those charged the non-EU rate. No such evidence was adduced and the Court could not merely assume that such an imbalance exists.'

⁹³ *Fitzgerald v Minister for Community, Equality and Gaeltacht Affairs* [2011] IEHC 180, at 10, <http://www.courts.ie/Judgments.nsf/0/EC76855E27F339BA802578B1004AC770>.

⁹⁴ House of Lords, *Mandla v Dowell Lee* [1983] 2 AC 548, 24.03.1982, <http://www.bailii.org/uk/cases/UKHL/1982/7.html>.

which it keeps alive (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition to those two essential characteristics the following characteristics are, in my opinion, relevant: (3) either a common geographical origin, or descent from a small number of common ancestors (4) a common language, not necessarily peculiar to the group (5) a common literature peculiar to the group (6) a common religion different from that of neighbouring groups or from the general community surrounding it (7) being a minority or being an oppressed or a dominant group within a larger community...⁹⁵ Applying this formula the High Court concluded that for the purposes of the ESA farmers are an occupational group, not an ethnic group. The complainant could not, therefore, base a discrimination complaint on his status as a member of the farming community.⁹⁶

Membership of the Traveller community is a separate ground. 'Traveller community' is defined as '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.'⁹⁷ Neither legislation nor case law has definitively determined whether members of the Traveller community are a racial or ethnic minority for the purposes of Irish equality law. In several decisions the first instance forum for hearing such complaints found that Travellers could not invoke the race ground either because there was inadequate evidence that they constitute an ethnic group,⁹⁸ or because it was considered that no additional protection would be afforded by advancing a complaint on both grounds.⁹⁹ On 1 March 2017 the Taoiseach (Prime Minister) announced that the State formally recognises Travellers as an ethnic group.¹⁰⁰ According to the Taoiseach's statement, the policy change will 'create no new individual, constitutional or financial rights'.¹⁰¹ Nonetheless this development should affect how existing provisions are *interpreted* and in particular confirm that Travellers constitute an ethnic group for the purposes of Irish law that implements the Racial Equality Directive (and so are covered by the race ground as well as the Traveller community ground under EEA and ESA). The primary ESA case to reach the superior courts on appeal proceeded as a Traveller ground case exclusively.¹⁰² The Court omitted to consider the application of the Racial Equality Directive, even though the amicus submission of the Equality Authority argued that the Directive should be deployed in interpreting the ESA provisions on indirect discrimination as applying to the Traveller ground.¹⁰³ It should now be clear that the Directive is applicable

⁹⁵ Per Lord Fraser in *Mandla v Dowell Lee* at p. 562.

⁹⁶ *Mandla* was applied by the WRC in finding that being a 'Catholic Irish Republican' did not constitute a different ethnicity in the context of the case: *Cregan v Coillte Teoranta*, DEC-E2016-086, 03.06.2016, <https://www.workplacerelations.ie/en/Cases/2016/June/DEC-E2016-086.html>.

⁹⁷ Section 2(1) EEA, Section 2(1) ESA.

⁹⁸ E.g. *Mrs X (on behalf of her son, Mr Y) v A Post-Primary School*, DEC-S2010-009, 02.02.2010, at 4.17, <https://www.workplacerelations.ie/en/Cases/2010/February/DEC-S2010-009-Full-Case-Report.html>; *Mrs K (on behalf of her son) v A Primary School*, DEC-S2011-003, 18.01.2011, at 4.15, <https://www.workplacerelations.ie/en/Cases/2011/January/DEC-S2011-003-Full-Case-Report.html>.

⁹⁹ E.g. *Mrs Z (on behalf of her three children) v A National School*, DEC-S2010-055, 30.12.2010, at 4.9, <https://www.workplacerelations.ie/en/Cases/2010/December/DEC-S2010-055-Full-Case-Report.html>.

¹⁰⁰ <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2017030100051?opendocument>.

¹⁰¹ The High Court considered the legal status of the policy change in a 2017 case. Justice Eagar held that the Taoiseach's statement had 'no legal effect' and declined an application to amend the reliefs sought in a judicial review application to include *inter alia* discrimination on the basis of ethnicity. The applicant Traveller family had sought a series of orders directing the respondent County Council to fulfill the duties imposed on it under statute to provide accommodation. According to the Court, while it has been open to the applicants to ground their application on ethnic bias, they did not take that opportunity when applying for leave to apply for judicial review; the amendments sought would amount to an entirely different case to that which had been made by the applicants to date: *Mongans v Clare County Council* [2017] IEHC 709, 27.10.2017, <http://courts.ie/Judgments.nsf/0/BC93B5F638096D63802581E600315575>.

¹⁰² *Stokes v Christian Brothers High School* [2015] IESC 13: <http://www.courts.ie/Judgments.nsf/597645521f07ac9a80256ef30048ca52/a09897a48211897980257df6005a3c31?OpenDocument>.

¹⁰³ https://www.ihrec.ie/app/uploads/download/pdf/mary_stokes_v_christian_brothers_high_school_clonmel_or_13_dec_2012_.pdf.

in all cases involving Travellers and falling within its material scope. Moreover, the Workplace Relations Commission (the first instance forum for complaints under EEA and ESA) should reverse its stance when/if a dual ground complaint is lodged.¹⁰⁴ It should also be open to members of the Traveller community to rely exclusively on the race ground.

Religion or belief

Under ESA and EEA the 'religion ground' applies as between people where 'one has a different religious belief from the other, or that one has a religious belief and the other has not'.¹⁰⁵ 'Religious belief' is defined as 'religious background or outlook'.¹⁰⁶ Religious background has been interpreted as affording protection to members of 'a specific faith', while the term 'outlook' covers 'specific attitudes which go with a religious belief'.¹⁰⁷ National legislation does not refer to philosophical beliefs.

According to the Labour Court protection extends to manifestations of beliefs relating to religious teaching or observance. In an employment context, however, the right to engage in the practice or manifestation of religion could not be exercised 'in a way that is disruptive of the business of the employer or constitutes an interference with the legitimate interests of the employer'.¹⁰⁸

It appears from the wording of the provisions concerning discrimination on the religion ground that the belief in question must be a religious one and so the provisions do not adequately prohibit discrimination on the grounds of religion *or* belief.

The Labour Court appears to accept that humanist beliefs may be covered, but apparently as constituting a lack of religious belief similar to atheism and not because Humanism could be considered a 'religious belief'.¹⁰⁹ In a 2016 decision the WRC rejected the complaint of an individual who was not permitted to wear a colander on his head for the purposes of a photograph when he was making an application to renew his driver's license.¹¹⁰ The complainant argued that the action was discriminatory as wearing such an item was a feature of his religious beliefs as a Pastafarian and the respondent's guidelines permitted individuals to wear head coverings for religious reasons. Having reviewed the definitions of religion and philosophical belief developed in case law under the UK Equality Act 2010 the WRC determined that the belief system in question did not constitute a 'religious belief' for the purposes of the ESA. In reaching that conclusion the WRC referred to the fact that Pastafarianism uses 'satire as an effective tool of communication' and to the 'occasional and selective nature' of the complainant's use of the colander. While the precise basis for the finding is not clear, the WRC's reference to a definition of philosophical belief suggests that it may be prepared to interpret the provision broadly.

Disability

Under EEA and ESA the disability ground may be availed of where 'one is a person with a disability and the other either is not or is a person with a different disability'.¹¹¹ Disability is defined as:

¹⁰⁴ It is difficult to envisage how pursuing a dual ground complaint would materially affect a case since the material scope of both grounds are the same. Nonetheless it may be symbolically significant for individual complainants.

¹⁰⁵ Section 6(2)(e) EEA; Section 3(2)(e) ESA.

¹⁰⁶ Section 2(1) EEA; Section 2(1) ESA.

¹⁰⁷ Equality Tribunal, *A Teacher v A National School*, DEC-E2014-097, 30.12.2014, <https://www.workplacerelations.ie/en/Cases/2014/December/DEC-E2014-097.html>.

¹⁰⁸ *Tipperary County Council v McAteer*, EDA 3/2015, 30.01.2015, <https://www.workplacerelations.ie/en/Cases/2015/January/EDA153.html>.

¹⁰⁹ Labour Court, *Department of Defence v Barrett*, EET081, 20.05.2008, <https://www.workplacerelations.ie/en/Cases/2008/May/EET081.html>.

¹¹⁰ *Mulryan v Road Safety Authority*, DEC-S2016-018, 09.03.2016, <https://www.workplacerelations.ie/en/Cases/2016/March/DEC-S2016-018.html>.

¹¹¹ Section 28(1)(f); Section 3(2)(g) ESA.

- '(a) the total or partial absence of a person's bodily or mental functions, including the absence of a part of a person's body;
- (b) the presence in the body of organisms causing, or likely to cause, chronic disease or illness;
- (c) the malfunction, malformation or disfigurement of a part of a person's body;
- (d) a condition or malfunction which results in a person learning differently from a person without the condition or malfunction; or
- (e) a condition, illness or disease which affects a person's thought processes, perception of reality, emotions or judgment or which results in disturbed behaviour.'¹¹²

The definition of disability does not fully accord with the concept adopted by the CJEU in *Skouboe Werge and Ring*¹¹³ in that it does not explicitly refer to barriers that may hinder the full and effective societal participation of a person with disabilities. In practice, however, when applying the duty to reasonably accommodate adjudicators require employers to comprehensively consider how work practices and the general employment environment might be adjusted so as to eliminate barriers to participation in employment.¹¹⁴ The Irish definition of disability does not require a condition to last a long time in order to qualify as a disability,¹¹⁵ nor does it make the distinction between disability and sickness/illness.¹¹⁶ It covers those that have a disability at present, a history of a disability, a future disability or an imputed disability. In accordance with the CJEU judgment in *FOA (Kaltoft) v Billund*¹¹⁷ 'obesity' is an imputed disability under the EEA.¹¹⁸

Age

The age ground is defined as referring to people of different ages,¹¹⁹ but in employment applies only in relation to persons above the maximum age at which a person is statutorily obliged to attend school.¹²⁰ In access to goods and services it does not apply to persons aged under 18.¹²¹

Sexual orientation

This is defined as heterosexual, homosexual or bisexual orientation.¹²² Gay and lesbian people have pursued the vast majority of complaints on the ground under both ESA and EEA and the definition has not been interpreted as such.

2.1.2 Multiple discrimination

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

¹¹² Section 2(1) EEA; Section 2(1) ESA.

¹¹³ Joined Cases C-335/11 and C-337/11.

¹¹⁴ E.g. High Court, *Nano Nagle School v Daly*, [2015] IEHC 785, 11.12.2015, <http://www.courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/86867f31d053511280257f30005c002f?OpenDocument>; Workplace Relations Commission, *Doocey v Colso Fruit Enterprises Ltd.*, DEC-E2016-109, 22.07.2016, <https://www.workplacerelations.ie/en/Cases/2016/July/DEC-E2016-109.html>; applying *Skouboe Werge and Ring*.

¹¹⁵ See e.g. Labour Court, *Cregg Labour Solutions v Cahill*, EDA1634, 01.12.2016, <http://www.workplacerelations.ie/en/Cases/2016/December/EDA1634.html>.

¹¹⁶ A person who has recovered from an illness and returns to employment following sick leave will not automatically have a disability as defined under EEA, such a finding rests on the facts: *An Employee v A Cleaning Company*, DEC-E2017-065, 04.09.2017, <https://www.workplacerelations.ie/en/Cases/2017/September/DEC-E2017-065.html>.

¹¹⁷ [2014] CJEU Case C-354/13.

¹¹⁸ *Health Service Employee v The Health Service Executive*, DEC-E2006-013, 10.04.2006, <https://www.workplacerelations.ie/en/Cases/2006/April/DEC-E2006-013-Full-Case-Report.html>.

¹¹⁹ Section 6(1)(f) EEA; Section 3(2)(f) ESA.

¹²⁰ Section 6(3)(a) EEA.

¹²¹ Section 3(3)(a) ESA.

¹²² Section 2(1) EEA; Section 2(1) ESA.

However, complaints may be referred on more than one ground. The legislation specifies that complaints lodged on several grounds must be investigated as a single case but that a decision must be made on each of the claims.¹²³ In practice adjudicators deal with each ground in turn, requiring a case to be established separately on each ground.¹²⁴ Even where a complaint succeeds on several discriminatory grounds the applicable compensation limits apply.

Nonetheless, in a limited number of cases adjudicators have recognised multiple discrimination. In an equal pay case, *O'Brien v ComputerScope Limited*,¹²⁵ the issues of age and gender were treated together, perhaps because the actual comparators were both of a different gender and a different age to the complainant. In other cases, it was determined that discrimination on one ground was 'compounded' by discrimination on another ground.¹²⁶ *Lindberg v Press Photographers Association of Ireland*¹²⁷ is notable for a finding that direct discrimination arose from a *combination* of the race and gender grounds. In the more recent case of *Parris v Trinity College Dublin*¹²⁸ the Equality Tribunal accepted in principle that a *prima facie* case of indirect discrimination could arise from a combination of discriminatory grounds. However, on a request for a preliminary ruling the CJEU determined that where a national rule does not constitute discrimination either on the ground of sexual orientation or on the ground of age taken in isolation there is 'no new category of discrimination resulting from the combination of more than one of those grounds'.¹²⁹

The approach to multiple discrimination adopted in national cases is exceptional and arguably unlikely to be developed further absent legislative amendment.

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, civil status, sexual orientation, membership of the Traveller community, based on perception or assumption of what a person is:

Section 6(1)(a)(iv) EEA:

'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....(iv) is imputed to the person concerned.'

¹²³ Section 79(1)(A) EEA; Section 25(1)(A) ESA.

¹²⁴ In *Superquinn v Freeman* (DEE0211, 14.11.2002) the Labour Court overturned an Equality Tribunal finding apparently on the basis that the first instance body had failed to require the complainant to establish a *prima facie* case of discrimination on each ground separately:

<https://www.workplacerelations.ie/en/Cases/2002/November/DEE0211.html>.

¹²⁵ DEC-E2006-030, 01.08.2006, <http://www.lrc.ie/en/Cases/2006/August/DEC-E2006-030-Full-Case-Report.html>.

¹²⁶ *Luzak v Sales Placement Ltd*, DEC-E2011-010, 24.01.2011, <https://www.workplacerelations.ie/en/Cases/2011/January/DEC-E2011-010-Full-Case-Report.html>; *McDermott v Connacht Gold Cooperative Society Ltd*, DEC-E2011-147, 04.08.2011, <https://www.workplacerelations.ie/en/Cases/2011/August/DEC-E2011-147-Full-Case-Report.html>.

¹²⁷ Equality Tribunal, DEC-S2011-041, 05.10.2011, <https://www.workplacerelations.ie/en/Cases/2011/October/DEC-S2011-041-Full-Case-Report.html>.

¹²⁸ DEC-P2013-004, 16.12.2013, <https://www.workplacerelations.ie/en/Cases/2013/December/DEC-P2013-004.html>.

¹²⁹ *Parris v Trinity College Dublin and others*, [2016] EUECJ C-443/15, 24.12.2016, at 80, <http://www.bailii.org/eu/cases/EUECJ/2016/C44315.html>.

Case law under EEA has established that people who are treated less favourably because of their body mass are subjected to disability discrimination by assumption.¹³⁰ Irish law thereby recognises that obesity may constitute a disability, albeit in a different manner to the CJEU judgment in *FOA (Kaltoft) v Billund*.¹³¹

Section 3(1)(iv) ESA:

'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 ... (iv) is imputed to the person concerned.'

An Irish citizen who was born in Indonesia lodged a successful race ground complaint concerning correspondence issued by the Department of Social Protection.¹³² She was sent a series of letters seeking proof of her nationality in the context of accessing child benefit payments. The respondent acknowledged that such correspondence was issued to non-Irish nationals as an anti-fraud measure. The WRC found that the Department's practice was a clear form of direct discrimination in contravention of ESA and that the complainant was subjected to less favourable treatment based on an assumption as to her race (nationality). An order for EUR 3 000 in compensation was made and the respondent was directed to review its fraud detection practices for the child benefit scheme to ensure compliance with ESA.

b) Discrimination by association

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

Section 6(1)(b) EEA:

'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.'

Sexual orientation ground discrimination by association was established in a 2015 case.¹³³ The complainant teacher was discriminated against when a school principal made insulting comments about her son's sexual orientation. A separate complaint of harassment on the religion ground was also sustained. The WRC awarded the complainant EUR 3 000 in compensation for the breaches of the EEA and also directed the respondent to arrange training for the school's board of management and all staff on employment policies, particularly in relation to equality, discrimination and harassment.

Section 3(1)(b) ESA:

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

¹³⁰ Equality Tribunal, *A Health Service Employee v Health Service Executive*, DEC-E2006-013, 10.04.2006, <https://www.workplacerelations.ie/en/Cases/2006/April/DEC-E2006-013-Full-Case-Report.html>: The complainant was unlawfully denied access to a post when the respondent imputed a disability to her.

¹³¹ [2014] CJEU Case C-354/13.

¹³² *Smith v Department of Social Protection*, DEC-S2015-014, 20.10.2015, <https://www.workplacerelations.ie/en/Cases/2015/October/DEC-S2015-014.html>.

¹³³ Workplace Relations Commission, *Marron v Board of Management of St Paul's National School*, DEC-E2015-121, November 2015, <https://www.workplacerelations.ie/en/Cases/2015/November/DEC-E2015-121.html>.

- (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.'

Several complaints of discrimination by association have been established under ESA, many on the Traveller community ground. For example in *Battles v The Killarney Heights Hotel* the complainant, a Traveller, and her husband, a settled person, had been discriminated against when refused service in a hotel. Mr Battles' claim was that of discrimination by association under section 3(1)(b).¹³⁴ Discrimination by association on the victimisation ground occurred in a number of cases, such as *O'Brien v Dunnes Stores, Tralee*.¹³⁵ A man was refused access to a store some weeks after his brother had been asked to leave while he was shopping there. The brother had notified the respondent in writing that he intended to lodge a discrimination complaint. When the complainant tried to enter the shop he was denied access by a security guard who told him that it was because his brother "was taking a case to the court". By suggesting that he was going to refer a complaint the man's brother was covered by the victimisation ground. The victimisation ground protects people from adverse treatment for using or indicating an intention to use ESA. In being denied access a few weeks later the complainant was therefore treated less favourably by virtue of his association with someone covered by a discriminatory ground.

National law is in line with the judgment in Case C-303/06 *Coleman v Attridge Law and Steve Law*.¹³⁶

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 under both the EEA and the ESA as occurring 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 discriminatory grounds, which exists, existed but no longer exists or may exist in the future.¹³⁷

b) Justification of direct discrimination

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

2.2.1 Situation testing

a) Legal framework

¹³⁴ DEC-S2004-143/144, 11.10.2004, <https://www.workplacerelations.ie/en/Cases/2004/October/DEC-S2004-143-144-Full-Case-Report.html>. See also *Sweeney v The Ship Inn, Sligo*, DEC-S2002-032; *Dooley and Boyne v The Grand Hotel*, DEC-S2002-015/016; *Feighery v MacMathuna's Pub*, DEC-S2003-051; *Kiernan v The Newbury Hotel*, DEC-S2006-080; *McDonagh v O'Keeffe, Ocean View Park*, DEC-S2005-161/164 (all of which were successful claims of discrimination by association on the Traveller community ground).

¹³⁵ *O'Brien v Dunnes Stores, Tralee*, DEC-S2007-038, 30.03.2007, <https://www.workplacerelations.ie/en/Cases/2007/March/DEC-S2007-038-Full-Case-Report.html>. See also, *Palmer v Connacht Hospitality (Group) Ltd. aka Connacht Accommodation Ltd t/a Active Fitness Leisure Club at the Connacht Hotel*, DEC-S2015-009, 29.06.2015, <https://www.workplacerelations.ie/en/Cases/2015/June/DEC-S2015-009.html>.

¹³⁶ *Coleman* has been applied by adjudicators in several cases including: *A Former Employee v A Financial Services Company*, DEC-E2016-107, WRC, 19.07.2016, <https://www.workplacerelations.ie/en/Cases/2016/July/DEC-E2016-107.html>; *A Worker v Two Respondents*, EDA1129, 22.11.2011, Labour Court, <https://www.workplacerelations.ie/en/Cases/2011/November/EDA1129.html>.

¹³⁷ Section 6(1) EEA; Section 3(1) ESA. Both sections go on to prohibit discrimination by assumption and by association (see Chapter 2.1.3 of this report).

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 situation testing. Situation testing does not occur with any regularity in the Irish context.

Anecdotal evidence suggests that the Irish superior courts would be hostile to this form of evidence, seeing it as a form of entrapment.¹³⁸ There is, therefore, a reluctance to use situation 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 an interrelated set of Equality Tribunal cases.¹³⁹ The four complainants were members of the Traveller community and were refused entry to seven different licensed premises in the course of one evening. A member of the settled community accompanied them. She had instigated the night out in part with a view to seeing whether Travellers experienced discrimination. The Equality Tribunal noted that she 'played a significant role in encouraging the complainants to test their rights'¹⁴⁰ but nonetheless 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.¹⁴¹

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

a) Prohibition and definition of indirect discrimination

In Ireland, indirect discrimination is prohibited in national law (Sections 31 and 22 EEA; Section 3(1)(c) ESA). It is defined as occurring where an apparently neutral provision would put a person belonging to a protected group at a particular disadvantage compared with other employees of their employer, or where an apparently neutral provision would put 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 test is compatible with the directives.

c) Comparison in relation to age discrimination

The legislation simply specifies that the comparators for age ground discrimination should be of different ages.¹⁴²

¹³⁸ This issue has yet to be addressed in a court action.

¹³⁹ *Delaney v The Harp Bar*, DEC-S2002-53/56; *Delaney and others v The Kilford Arms*, DEC-S2002-033/036; *Delaney and others v Shems Bar*, DEC-S2002-037/040; *Delaney and others v Biddy Earlys*, DEC-S2002-041/044; *Delaney and others v Quays Bar (River Court Hotel)*, DEC-S2002-045/048; *Delaney and others v Matt the Millars*, DEC-S2002-049/052; *Delaney and others v Paris Texas Bar*, DEC-S2002-057/060.

¹⁴⁰ *Delaney and others v Shems Bar*, DEC-S2002-037/040, at 5.4, 31.05.2002, <http://www.lrc.ie/en/Cases/2002/May/DEC-S2002-037-040.html>.

¹⁴¹ Equality Authority (2009) *Discrimination in Recruitment: Evidence from a Field Experiment*. Available at: https://www.ihrec.ie/app/uploads/download/pdf/discrimination_in_recruitment.pdf.

¹⁴² Section 6(1)(f), section 28(1)(e) EEA; Section 3(2)(f) ESA.

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: Sections 19(4)(c) and 22(1A) EEA and Section 3(3A) ESA. It is admissible as evidence in court. Statistical data do not appear to be used in any coherent manner to design positive action measures, with the exception of the disability ground in employment¹⁴³ and in order to address disadvantage in access to third level education.¹⁴⁴ According to IHREC the lack of relevant data is an impediment to evidence-based action on equality in the workplace.¹⁴⁵

The Data Protection Acts 1988-2003 permit 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.¹⁴⁶ Data relating to these grounds would be classified as sensitive data, and certain criteria apply in the processing of this form of personal data.¹⁴⁷ The primary purpose of amending the Data Protection Act 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.¹⁴⁸ 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 2016. 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. While there were no questions that directly address sexual orientation, respondents could designate their relationship to other persons in the household as being a same-sex partner. These questions require the individual to self-identify their characteristics. The Central Statistics Office released its analyses of that data over the course of 2017.¹⁴⁹

b) Practice

In Ireland, statistical evidence in order to establish indirect discrimination is used in practice. There is no reluctance to use statistical data as evidence in court¹⁵⁰ but there has been a tendency to accept that it is often not necessary to use it.

In a 2002 decision the Labour Court emphasised that its procedures are intended to facilitate parties whether legally represented or not, 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

¹⁴³ Government of Ireland (2015) *Comprehensive Employment Strategy for People with Disabilities 2015-2024*, available at: [http://www.justice.ie/en/JELR/Pages/Comprehensive_Employment_Strategy_for_People_with_Disabilities_\(2015_2024\)](http://www.justice.ie/en/JELR/Pages/Comprehensive_Employment_Strategy_for_People_with_Disabilities_(2015_2024)).

¹⁴⁴ Higher Education Authority (2015) *National Plan for Equity of Access to Higher Education 2015-2019*, available at: http://hea.ie/assets/uploads/2017/04/national_plan_for_equity_of_access_to_higher_education_2015-2019_single_page_version_01.pdf.

¹⁴⁵ <https://www.ihrec.ie/guides-and-tools/human-rights-and-equality-for-employers/building-a-culture-of-human-rights-and-equality-in-the-workplace/>.

¹⁴⁶ Ireland, Data Protection Act 1988, 13.07.1998; Ireland, Data Protection (Amendment) Act 2003, 10.04.2003. Revised text available at: <http://revisedacts.lawreform.ie/eli/1988/act/25/revised/en/html>.

¹⁴⁷ Section 2(b) Data Protection Acts 1988-2003.

¹⁴⁸ Ireland, Data Protection (Amendment) Act 2003, 10.04.2003, <http://www.irishstatutebook.ie/eli/2003/act/6/enacted/en/html>.

¹⁴⁹ <http://www.cso.ie/en/census/census2016reports/>.

¹⁵⁰ The Labour Court has noted that statistics 'are frequently used as an evidential tool in seeking to establish a prima facie case of indirect discrimination': *The Nationalist & Leinster Times Ltd v Ashmore*, EDA133, 21.01.2013, <https://www.workplacerelations.ie/en/Cases/2013/January/EDA133.html>.

members of the Court by drawing on their own knowledge and experience.¹⁵¹ Adjudicators have consistently adopted this approach relying on matters within their specialist expertise to ease the evidential burden associated with indirect discrimination complaints.¹⁵²

The Labour Court emphasises that statistics are not decisive in themselves, but one factor that may be taken into account in determining whether a measure is indirectly discriminatory.¹⁵³

In a 2015 judgment the Supreme Court considered the interpretation of indirect discrimination under ESA for the first time, and held that statistical analysis is required in order to establish that a person belonging to a protected group is at a 'particular disadvantage' compared with others.¹⁵⁴ The case was taken on the Traveller community ground and the Court made no reference to EU law on the burden of proof. To date the judgment has not impacted on decisions issued by the first instance forum for discrimination complaints.¹⁵⁵ It remains to be seen whether it will over time. The Equality (Miscellaneous Provisions) Act 2015 effected a slight change to the wording of the national indirect discrimination provisions that may militate against a shift towards 'requiring' statistical evidence.¹⁵⁶ Formerly ESA, EEA and the Pensions Acts applied to a provision that 'puts' a person at a particular disadvantage. In line with the wording of the directives the definitions now refer to provisions that 'would put' persons at a particular disadvantage compared with other persons.¹⁵⁷

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

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

Section 14(A) EEA prohibits harassment in employment on grounds of gender, age, race, religion, family status, disability, civil status, sexual orientation, and membership of the Traveller community. It is defined as any unwanted conduct related to any 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.¹⁵⁸ This conduct can include acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material.

¹⁵¹ Labour Court, *NBK Designs Ltd. v Inoue* [2003] ELR 98, 25.11.2002, <https://www.workplacerelations.ie/en/Cases/2002/November/EED0212.html>.

¹⁵² E.g. Equality Tribunal, *Mr A v Department of Social Protection*, DEC-S2013-010, 11.10.2013, <https://www.workplacerelations.ie/en/Cases/2013/October/DEC-S2013-010.html>; Workplace Relations Commission, *An Employee v An Employer*, DEC-E2016-080, May 2016, <https://www.workplacerelations.ie/en/Cases/2016/June/DEC-E2016-080.html>.

¹⁵³ *The Nationalist & Leinster Times Ltd v Ashmore*, EDA133, 21.01.2013, <https://www.workplacerelations.ie/en/Cases/2013/January/EDA133.html>.

¹⁵⁴ Supreme Court, *Stokes v Christian Brothers High School, Clonmel*, [2015] IESC 13, 24.02.2015, <http://www.courts.ie/Judgments.nsf/597645521f07ac9a80256ef30048ca52/a09897a48211897980257df6005a3c31?OpenDocument>.

¹⁵⁵ The primary case in which *Stokes* appeared to affect the evidential burden is discussed in Chapter 3.2.8 - Education.

¹⁵⁶ Ireland, Equality (Miscellaneous Provisions) Act 2015, 10.12.2015, <http://www.irishstatutebook.ie/eli/2015/act/43/enacted/en/print.html>. The 2015 Act effected a number of changes to Irish anti-discrimination law, many of which sought to align national law with the requirements of the EU anti-discrimination directives. It amended the EEA by introducing an objective justification requirement for both mandatory retirement ages and offers of fixed term contracts to persons over the compulsory retirement age (see Chapter 4.7 of this report). The religious ethos exception provided for under Section 37 EEA was altered substantially (see Chapter 4.2 of this report). Individuals may now lodge EEA complaints about discriminatory advertising; formerly such cases could be taken solely by IHREC. Further, a new housing assistance ground was included under ESA, enabling persons in receipt of various social protection payments to challenge discrimination in the context of accommodation provision.

¹⁵⁷ Section 3(1)(c) ESA; Section 19(4)(a) and Section 22(1)(a) EEA; Section 68 Pensions Act 1990.

¹⁵⁸ Section 14A(7)(a) EEA.

Section 11 ESA prohibits harassment in access to goods and services on grounds of gender, age, race, religion, family status, disability, civil status, sexual orientation, and membership of the Traveller community. It is defined as unwanted conduct related 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.¹⁵⁹ This conduct can include acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material.

Various forms of communication have been the subject of successful harassment complaints under ESA and EEA, including 'spoken words',¹⁶⁰ text messages¹⁶¹ and graffiti.¹⁶² In a 2017 case, disability ground harassment took place when a store manager recorded and shared, with other members of staff, video footage of the complainant carrying out his work duties. EUR 7 500 in compensation was awarded.¹⁶³ A complainant does not need to demonstrate that she or he falls under one of the discriminatory grounds since it is sufficient that the impugned conduct is 'related to' a ground. Thus, in *Kane v Eirjet Ltd.*¹⁶⁴ a non-disabled woman and her disabled son were both subjected to harassment when airline staff dealt with them in an offensive manner.

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

b) Scope of liability for harassment

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

Section 14A EEA provides:

'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.'

¹⁵⁹ Section 11 (5)(a) ESA.

¹⁶⁰ E.g. *Muresan v G&C Power Limited t/a Dominos Waterford*, DEC-E2017-040, 31.05.2017, <https://www.workplacerelations.ie/en/Cases/2017/May/DEC-E2017-040.html>.

¹⁶¹ E.g. *Merriman v O'Flaherty's Ltd. t/a Reads Print Design and Photocopying Bureau*, DEC-S2011-049, 08.11.2011, <https://www.workplacerelations.ie/en/Cases/2011/November/DEC-S2011-049-Full-Case-Report.html>.

¹⁶² *Labour Court, Ely Property Group Ltd. v Boyle*, EDA0920, 15.10.2009, <https://www.workplacerelations.ie/en/Cases/2009/October/EDA0920.html>.

¹⁶³ *An Employee v A Chain of Retail Stores*, ADJ-00003084, 03.05.2017, <https://www.workplacerelations.ie/en/Cases/2017/May/ADJ-00003084.html>.

¹⁶⁴ DEC-S2008-026, 18.04.2008, <https://www.workplacerelations.ie/en/Cases/2008/April/DEC-S2008-026-Full-Case-Report.html>.

In a 2016 decision the Labour Court reaffirmed that the provision applies to conduct that occurs outside the workplace.¹⁶⁵ Moreover, there is no requirement to show that the *perpetrator* was acting in the course, or within the scope, of their employment. The proper test is whether the victim experienced harassment in the course of their employment. The conduct in issue included an abusive message posted by an employee on social media, which was directed at the complainant in his capacity as a worker representative. Consequently, Section 14A of the Acts applied and the employer was responsible. However, the employer was entitled to avail of the statutory defence set out under Section 14A(2). The defence applies where the employer can show that it took reasonably practicable steps to prevent harassment. Employers must demonstrate, at a minimum, that an anti-harassment policy was in place before the harassment occurred and that the policy was effectively communicated to all employees. Additionally, managers should receive appropriate training.¹⁶⁶ In the instant case, such an approach had been adopted, an investigation was undertaken and a disciplinary sanction was imposed.

An employer could not avail of the defence in a 2017 case on race-ground harassment. A complainant of Moldovan national origin was advised by her manager that racist comments made by co-workers could only be investigated on foot of a written complaint. She did not submit such a document. The Court found that the respondent did not have an adequate anti-discrimination policy and associated complaints procedure in place:

'It is not, in the Court's view, best practice for an employer to seek to deal with alleged infringements of the Employment Equality Act 1998 by directing employees to a basic Grievance Policy or a general Bullying Policy. Furthermore, it is no defence for an employer who has failed to investigate complaints of the magnitude raised by the Complainant in this case to seek to justify their inaction on the basis that the complaints were not presented to them in written format. The Court expects an employer to be proactive and, if necessary, to take a statement of the complaint(s) from the alleged target of the discriminatory behaviour.'¹⁶⁷

Liability for the conduct of an employer's client was established in the 2017 case of *Rusu v Sensure Security Ltd*.¹⁶⁸ The complainant, a Romanian national, was employed as a security guard and assigned to work at a hotel that had contracted with the respondent to provide security services. The owner of the hotel approached the complainant one evening and said that 'All Romanians are thieves and liars.' When the complainant reported this incident, Sensure Security instructed him to desist from work at the premises, and advised him that it would find another suitable work location. However, it subsequently failed to redeploy the complainant. The employer could not rely on the defence under section 14A(2) since it failed to take any steps to prevent or remedy the harassment.

Service providers (e.g. landlords, schools, hospitals) are liable for harassment that occurs in the provision of the service. Under the vicarious liability principle set out under Section 42 ESA service providers are legally responsible for the discriminatory actions of their employees and agents. Section 11(2) ESA further obliges service providers to also protect people from harassment or sexual harassment committed by a third party, subject to a defence. This would include liability for harassment perpetrated by e.g. other tenants, clients or customers. A statutory defence is available if the service provider took such steps as were reasonably practicable to prevent harassment (Section 11(3)).

¹⁶⁵ *Dublin Bus v McCamley*, EDA 164, 18.02.2016, <https://www.workplacerelations.ie/en/Cases/2016/February/EDA164.html>; See further, S.I. No. 208/2012 - Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2012, <http://www.irishstatutebook.ie/eli/2012/si/208/made/en/print>.

¹⁶⁶ See further, *A Store v A Worker*, EDA 163, 28.01.2016, <https://www.workplacerelations.ie/en/Cases/2016/January/EDA163.html>.

¹⁶⁷ *Johnstown Garden Centre v Berghie*, EDA1720, 10.07.2017, <https://www.workplacerelations.ie/en/Cases/2017/July/EDA1720.html>.

¹⁶⁸ Workplace Relations Commission, DEC-E2017-056, 24.07.2017, <https://www.workplacerelations.ie/en/Cases/2017/July/DEC-E2017-056.html>.

The equality legislation does not provide for liability on the part of the individual harasser. 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.

Section 2(1) EEA specifies that 'discrimination includes the issue of an instruction to discriminate and, in Part V and VI, includes prohibited conduct within the meaning of the Equal Status Acts 2000.' Part V and VI EEA set out the functions and powers of IHREC. This section thus ensures that IHREC can take or support proceedings involving an instruction to discriminate.

Section 14 EEA provides that a person who 'procures or attempts to procure' another person to engage in discrimination or victimisation shall be guilty of an offence. This criminal offence, which would cover at least some forms of instruction, is actionable in the District Court. Proceedings may be instituted by the Workplace Relations Commission or by IHREC.¹⁶⁹

ESA does not explicitly prohibit the issuing of instructions to discriminate, although it might be argued that the prohibition on procurement or attempted procurement of 'prohibited conduct' under Section 13 includes the issuing of instructions. 'Prohibited conduct' means discrimination against, or sexual harassment or harassment of, or permitting the sexual harassment or harassment of a person (Section 2(1)). Section 13 is not confined to employees of the procurer, and so it covers third parties including agents. Procurement is a criminal offence and proceedings may only be instigated by the Workplace Relations Commission or by IHREC. It appears that no such proceedings have been initiated.

In Ireland, instructions explicitly constitute a form of discrimination under the EEA (Section 2(1)).

b) Scope of liability for instructions to discriminate

In Ireland, the instructor is liable.

Equality legislation does not explicitly provide for liability by the individual discriminator or instructed person, with the exception of Section 10 EEA and Section 12 ESA, which enable liability to be imposed on a person who displays or publishes discriminatory advertising. The generic provisions on vicarious liability under EEA and ESA apply to instructions to discriminate and render employers and service providers liable for instructions issued by employees and agents (subject to a defence).

Employers and service providers (e.g. landlords, schools, hospitals) are liable for discrimination, including by instruction, perpetrated by employees. The legislation specifies that anything done by a person in the course of his or her employment shall be treated as done also by that person's employer, whether or not it was done with the employee's knowledge or approval.¹⁷⁰ Consequently, an employer would be liable for an instruction to

¹⁶⁹ Section 100 EEA. The Supreme Court concluded that the provision in the Employment Equality Bill 1996 was not repugnant to the Constitution. The Court noted that it would have to be proved in the ordinary way that the person in question had an intention to commit the offence: *Article 26 of the Constitution and the Employment Equality Bill 1996, Re* [1997] 2 IR 321 at 369.

¹⁷⁰ Section 15(1) EEA, section 42(1) ESA.

discriminate issued by a manager, for example. An employer can evade liability by proving that it took such steps as were reasonably practicable to prevent the employee—(a) from doing that act, or (b) from doing in the course of his or her employment acts of that description.¹⁷¹

The provisions on vicarious liability for agents make it clear that persons cannot discriminate through an intermediary. Both ESA and EEA specify that: 'Anything done by a person as agent for another person, with the authority (whether express or implied and whether precedent or subsequent) of that other person shall, in any proceedings brought under this Act, be treated for the purposes of this Act as done also by that other person.'¹⁷² Where a principal directs or instructs an agent to engage in prohibited conduct both parties can potentially be found liable. However, since the provisions that outlaw discrimination under EEA are addressed to employers, the respondent (and hence liable person) will generally be the employer.¹⁷³ 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 could not 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'.¹⁷⁴

Under ESA service providers have been found liable for implementing discriminatory policies set by other entities such insurance underwriters, tour operators, and landlords. Some of the impugned measures took the form of instructions to discriminate, such as a landlord's explicit direction to a letting agent not to accept tenants in receipt of rent allowance,¹⁷⁵ and an insurance company's instruction not to provide persons with epilepsy access to certain cosmetic treatments.¹⁷⁶

Liability may be imposed on a person for the offences of procuring or attempting to procure discrimination (Section 14 EEA; Section 13 ESA). In the absence of case law its parameters are unclear.

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

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

In Ireland, the duty on employers to provide reasonable accommodation for people with disabilities is included in the law. It is defined.

Section 16(3)(a) EEA provides 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 (in this subsection referred to as 'appropriate measures') being provided by the person's employer.' Section 16(3)(b) specifies:

¹⁷¹ Section 15(3) EEA, section 42(3) ESA.

¹⁷² Section 15(2) EEA, Section 42(2) ESA.

¹⁷³ The WRC accepted that an equal pay case could proceed against the Department of Education and Skills even though it was not the complainant teachers' employer since the Department was responsible for setting teachers' remuneration: *Horgan and Keegan v Department of Education and Skills and others*, DEC-E2016-041, 04.03.2016, <https://www.workplacerelations.ie/en/Cases/2016/March/DEC-E2016-041.html>.

¹⁷⁴ Labour Court, *A Worker v Two Respondents*, EDA1129, 22.11.2011, <https://www.workplacerelations.ie/en/Cases/2011/November/EDA1129.html>.

¹⁷⁵ *A Service User v A Letting Agency*, ADJ-00004073, 20.03.2017, <https://www.workplacerelations.ie/en/Cases/2017/March/ADJ-00004073.html>.

¹⁷⁶ *Forde v The Body Clinic*, DEC-S2007-085, 28.11.2017, <https://www.workplacerelations.ie/en/Cases/2007/November/DEC-S2007-085-Full-Case-Report.html>.

'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.'

'Appropriate measures' are defined under Section 16(4):

'(a)...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.'

Section 16 does not refer to the term 'essential functions' used in Paragraph 17 of the preamble of the Employment Equality Directive. However, in practice courts do incorporate the concept of 'essential functions' into the obligation to reasonably accommodate as confirmed in a 2015 High Court judgment.¹⁷⁷

The requirement to provide reasonable accommodation is a specific cause of action.¹⁷⁸

b) Practice

Under Sections 16(3)(b)-(c) EEA 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.

Decisions emphasise that the duty is a proactive one, which requires employers to undertake a two-stage inquiry. They must carry out a full assessment of the employee's needs and then consider the measures necessary to accommodate them, which may include relieving an employee of certain tasks.¹⁷⁹ In the event that reasonable accommodation cannot be devised which would render an employee fully competent and capable of undertaking the duties attached to a position, there is no obligation to retain or promote that individual.¹⁸⁰ Adjudicators routinely have regard to the scale and financial resources of employers' businesses in assessing the extent of the duty. In one case, for example, the respondent estimated the cost of providing a disabled toilet in the store where the complainant worked at EUR 22 000. The Labour Court found that since the respondent was a large multi-national company expenditure of EUR 22 000 'could not by any standard

¹⁷⁷ High Court, *Nano Nagle School v Daly*, [2015] IEHC 785, 11.12.2015, <http://www.courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/86867f31d053511280257f30005c002f?OpenDocument>.

¹⁷⁸ Labour Court, *Wojcik v Sodexo Ireland Ltd*, EDA1517, 23.11.2015, <https://www.workplacelrelations.ie:443/en/Cases/2015/November/EDA1517.html>.

¹⁷⁹ See e.g. *An Employee v A Multi-National Retailer*, DEC-E2016-021, 28.01.2016, <https://www.workplacelrelations.ie/en/Cases/2016/January/DEC-E2016-021.html>; *Ms A v A Retail Business*, DEC-E2017-078, 05.10.2017, <https://www.workplacelrelations.ie/en/Cases/2017/October/DEC-E2017-078%20.html>.

¹⁸⁰ Section 16(1)(b) EEA. See e.g. *Iarnród Éireann v Flanagan*, EDA1716, 06.06.2017, <https://www.workplacelrelations.ie/en/Cases/2017/June/EDA1716.html>.

be regarded as imposing a disproportionate burden in vindicating the complainant's right to work on the same basis as others'.¹⁸¹

c) Definition of disability and non-discrimination protection

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

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

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

Section 4 ESA provides:

'(1) 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.

(2) A refusal or failure to provide the special treatment or facilities to which subsection (1) refers shall 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.'

The 'special treatment or facilities' which the goods or service provider must provide are not defined. Owing to a Supreme Court judgment the duty is subject to a nominal cost threshold, which is less onerous than the 'disproportionate burden' standard applicable under the EEA.¹⁸²

A service provider must 'do all that is reasonable' in providing treatment or facilities, meaning that it must address a range of options and case law establishes that in order to comply with its obligations the service provider must engage in a process of consultation with the disabled person. However, the term 'reasonable' also limits the duty, in that a service provider is not expected to undertake very burdensome measures.¹⁸³ In other words, restrictions are placed on the obligation both by the term 'reasonable' and by the nominal cost ceiling. The extent of a service provider's duties depends on its scale and resources, and on whether grants are available.¹⁸⁴ In that regard, adjudicators tend to adopt a more stringent approach to the duties of public bodies such as housing authorities. *A Complainant v A Local Authority*¹⁸⁵ addressed grant aid to fund an extension to a house in order to meet the needs of an autistic boy. The nominal cost defence could not avail the respondent because it provided no evidence as to how much the extension would cost and any such work would only amount to a small proportion of the overall housing budget funded by Government. In a 2017 case the WRC found that a requirement to give 24 hours notice in order to guarantee access to an accessible public transport bus did not contravene the reasonable accommodation duty. Given the factors involved in ensuring wheelchair

¹⁸¹ Labour Court, *A Multinational Employer v A Worker*, EDA1435, 10.11.2014, <https://www.workplacerelations.ie/en/Cases/2014/November/EDA1435.html>.

¹⁸² Article 26 of the Constitution and the Employment Equality Bill 1996, Re [1997] 2 IR 321, 15.05.1997.

¹⁸³ WRC, *A Service User v A Forum*, DEC-S2016-023, 18.04.2016, <https://www.workplacerelations.ie/en/Cases/2016/April/DEC-S2016-023.html>.

¹⁸⁴ E.g. *A Complainant v Marks and Spencer PLC*, DEC-S2009-005, 22.01.2009, at 5.6, <https://www.workplacerelations.ie/en/Cases/2009/January/DEC-S2009-005-Full-Case-Report.html>.

¹⁸⁵ DEC-S2007-049, <https://www.workplacerelations.ie/en/Cases/2007/May/DEC-S2007-049-Full-Case-Report.html>; See also, *Ms D (a tenant) v A Local Authority*, DEC-S2007-057, <https://www.workplacerelations.ie/en/Cases/2007/June/DEC-S2007-057-Full-Case-Report.html>.

access (staff training, adaption of vehicles and ground infrastructure) the notice requirement was reasonable and tempered by the nominal cost threshold.¹⁸⁶

Very few cases have failed solely on the nominal cost issue. The two main examples concern educational establishments. *Mrs A (on behalf of her son, B) v A Childcare Facility*,¹⁸⁷ concerned the admission of the complainant's child (B) to a crèche. She was informed that a place would not be available unless the boy was accompanied by a full-time personal assistant, a requirement which the respondent maintained was necessary due a combination of factors. The respondent referred to its obligations concerning child-staff ratios under childcare regulations and to the fact that due to a disability B was unable to physically move on his own without assistance. Government funding was available to provide five hours of assistance per week for the child and so the respondent could only accommodate B by employing another childcare worker. The Tribunal accepted that the costs involved went beyond what was required under Section 4. Hiring an additional staff member in a private crèche that catered for some 30 children would have amounted to more than a nominal cost in an organisation of that size. In *Regan v Old Bawn Community School*,¹⁸⁸ the Tribunal found that the provision of sign language interpretation facilities by a community college would also have exceeded the nominal cost ceiling. The respondent claimed that it was instructed by the Department of Education to run all of its part-time adult education programmes on a self-financing basis. For the year 2007/2008 a surplus of EUR 119.39 was generated from the entire adult education programme. Provision of a sign language interpreting service would have cost between EUR 1 300 and EUR 1 700. The equality officer accepted that evidence in finding that the school did not breach Section 4.

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

In Ireland, failure to meet the duty of reasonable accommodation counts as discrimination.

If an employee would be fully competent and capable of undertaking the duties attached to a position on reasonable accommodation, an employer that fails to provide such reasonable accommodation discriminates.¹⁸⁹

Since failure to provide reasonable accommodation is a sui generis form of discrimination case law does not state whether it is a form of direct or indirect discrimination. The full range of sanctions for discrimination is applicable, including awards of compensation.

The burden of proof is reversed.¹⁹⁰

As regards justification, Section 16(1) EEA offers employers a defence 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 being provided by the person's employer.

¹⁸⁶ *O'Doherty v Bus Éireann*, DEC-S2017-016, 13.04.2017, <https://www.workplacerelations.ie/en/Cases/2017/April/DEC-S2017-016.html>.

¹⁸⁷ Equality Tribunal, *Mrs A (on behalf of her son, B) v A Childcare Facility*, DEC-S2009-041, <https://www.workplacerelations.ie/en/Cases/2009/June/DEC-S2009-041-Full-Case-Report.html>.

¹⁸⁸ *Regan v Old Bawn Community School*, DEC-S2010-043, <https://www.workplacerelations.ie/en/Cases/2010/August/DEC-S2010-043-Full-Case-Report.html>.

¹⁸⁹ Section 16 (1) and (3) EEA.

¹⁹⁰ Equality Tribunal, *O'Keeffe v Walsh t/a By Pass Stores*, <https://www.workplacerelations.ie/en/Cases/2007/June/DEC-E2007-033-Full-Case-Report.html>.

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.

However, building on EU law principles, in Ireland case law has established a modest form of reasonable accommodation in practice. This development stems from the principle that direct discrimination may arise from a failure to afford different treatment to persons who are differently situated.¹⁹¹ To date all cases appear to be on the race ground and concern migrant workers.¹⁹² In essence, employers may be obliged to modify certain employment practices to accommodate the needs of individuals who encounter linguistic and cultural difficulties in the workplace. Employers have been obliged to provide translated contracts for foreign nationals¹⁹³ and in the context of disciplinary proceedings have 'a positive duty to ensure that all workers fully understand what is alleged against them, the gravity of the alleged misconduct and their right to mount a full defence, including the right to representation.'¹⁹⁴ In one such decision the Director of the Equality Tribunal described the case law as establishing a 'duty of care to foreign employees.'¹⁹⁵

The duty to modify employment practices is not, however, applicable to all migrant workers. Decisions generally emphasise that the employees must essentially be in a 'potentially vulnerable position'.¹⁹⁶ In assessing whether migrant workers are in that position adjudicators make reference to their capacity to understand the English language, their knowledge of employment rights and their ability to access support from families and other social networks.¹⁹⁷

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. The duties are, however, qualified with reference to multiple considerations and compliance mechanisms are weak.

Part 3 of the Disability Act 2005 sets out the accessibility obligations of public bodies towards people with disabilities.¹⁹⁸ It does not apply to the private sector.¹⁹⁹ The definition

¹⁹¹ The primary decision on this matter is that of the Labour Court in *Campbell Catering v Rasag* [2004] ELR 15, applying *Finanzamt Köln-Altstadt v Roland Schumacker*, Case C-279/93, [1995] ECR I-225. In a 2017 decision the Labour Court addressed similar issues as giving rise to both direct and indirect discrimination: *Boxmore Plastics v Zimareva*, EDA 1732, 30.11.2017, <https://www.workplacerelations.ie/en/Cases/2017/November/EDA1732.html>. See discussion of this case in Chapter 12.2 of this report.

¹⁹² Case law does not distinguish between EU nationals and third country nationals.

¹⁹³ Equality Tribunal, *Five Complainants v Hannon's Poultry Export Ltd.*, DEC-E2006-050, 18.10.2006, <https://www.workplacerelations.ie/en/Cases/2006/October/DEC-E2006-050-Full-Case-Report.html>.

¹⁹⁴ Workplace Relations Commission, *Kostrzewski v C&F Automotive Ltd t/a Iralco*, DEC-E2015-167, 30.12.2015, at 4.4, <https://www.workplacerelations.ie/en/Cases/2015/December/DEC-E2015-167.html>.

¹⁹⁵ *Mikoliuniene v Halcyon Contract Cleaners Ltd.*, DEC-E2015-036, 26.06.2015, <http://www.lrc.ie/en/Cases/2015/June/DEC-E2015-036.html>.

¹⁹⁶ Equality Tribunal, *Francis v Bus Átha Cliath*, DEC-E2006-046, 26.09.2006, at 4.14, <http://www.lrc.ie/en/Cases/2006/September/DEC-E2006-046-Full-Case-Report.html>.

¹⁹⁷ See e.g. *Zaniewsha v Templemichael Enterprises Limited*, DEC-E2011-166, 07.09.2011, <http://www.lrc.ie/en/Cases/2011/September/DEC-E2011-166-Full-Case-Report.html>; *Mikoliuniene v Halcyon Contract Cleaners Ltd.*, DEC-E2015-036, 26.06.2015, <http://www.lrc.ie/en/Cases/2015/June/DEC-E2015-036.html>; *Gegeckiene v Bradbury*, DEC-E-2016-009, 21.01.2016, <http://www.lrc.ie/en/Cases/2016/January/DEC-E2016-009.html>.

¹⁹⁸ Ireland, Disability Act 2005, 08.07.2005, <http://www.irishstatutebook.ie/eli/2005/act/14/enacted/en/print.html>.

¹⁹⁹ Under Section 2 of the Disability Act 2005 'public body' includes government departments, local authorities and the Health Service Executive, as well as bodies or organisations (other than the Defence Forces) established by or under any enactment. The last category includes universities and a range of state and semi-state organisations: <http://www.irishstatutebook.ie/eli/2005/act/14/section/2/enacted/en/html#sec2>.

of 'disability' employed is more restrictive than that set out under the ESA and EEA. It refers to 'a substantial reduction in the capacity of the person to carry on a profession, business or occupation in the State or to participate in social or cultural life in the State by reason of an enduring physical, sensory, mental health or intellectual impairment.'²⁰⁰

Section 26 deals with access to services. It obliges public bodies to integrate, where practical and appropriate, their services for people with disabilities with those provided to other people. Section 27 requires each public body to ensure that the goods or services 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.²⁰¹ The legislation 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. Six government departments are obliged to prepare 'Sectoral Plans' demonstrating how key accessibility issues are to be addressed.²⁰² Sections 32–40 of the Act supply general guidelines as to the areas that should be dealt with under each plan, specify that an internal complaints system should be established by all six departments, and provide an oversight role for the Ombudsman in relation to implementation of the plans and the related general accessibility measures contained in the remainder of Part 3. Access officers have been appointed in each public body to coordinate these arrangements. In 2006 the National Disability Authority published a *Code of Practice on Accessibility of Public Services and Information Provided by Public Bodies*.²⁰³ The code provides guidance on how public bodies can comply with their statutory duties under the 2005 Act.

The Irish Sign Language Act 2017 recognised Irish Sign Language (ISL) as an official language.²⁰⁴ Currently very few public bodies provide ISL translation for service users and 'only a very small fraction of government information provision uses Irish Sign Language'.²⁰⁵ Section 6 is the key provision for the purposes of this report:

'6. (1) A public body shall do all that is reasonable to ensure that interpretation into Irish Sign Language is provided for a person who is competent in that language and cannot hear or understand English or Irish when that person is seeking to avail of or access statutory entitlements or services provided by or under statute by that public body.

(2) The provision of interpretation shall be at no cost to the person concerned.

(3) The Minister may by regulations—

(a) provide that where a person intends to avail of Irish Sign Language services provided by a public body, the person shall give the public body

²⁰⁰ <http://www.irishstatutebook.ie/eli/2005/act/14/section/2/enacted/en/html#sec2>.

²⁰¹ <http://www.irishstatutebook.ie/eli/2005/act/14/enacted/en/html> and <http://www.irishstatutebook.ie/2006/en/si/0163.html>.

²⁰² The six departments are: 1) Communications, Marine and Natural Resources; 2) Enterprise, Trade and Employment; 3) Environment and Local Government; 4) Health and Children; 5) Social and Family Affairs; and 6) Transport. The plans were published in July 2006 and are available for consultation on the website of the National Disability Authority: <http://nda.ie/Disability-overview/Key-Policy-Documents/Sectoral-plans/>.

²⁰³ Available at: <http://nda.ie/Good-practice/Codes-of-Practice/Code-of-Practice-on-Accessibility-of-Public-Services-and-Information-Provided-by-Public-Bodies/>.

²⁰⁴ Ireland, Irish Sign Language Act 2017, 24.12.2017, <https://data.oireachtas.ie/ie/oireachtas/act/2017/40/eng/a4017.pdf>.

²⁰⁵ Citizens Information Board (2017) *Information provision and access to public and social services for the Deaf Community*, p. 60, available at: http://www.citizensinformationboard.ie/downloads/social_policy/Deaf_Community_Research_Rpt_Feb2018.pdf.

such prior notification of his or her intention within such period as specified in the regulations, or
(b) provide for the procedure in relation to the provision of such services by a public body...'

The Act is not yet commenced. Its provisions must be brought into operation before 24 December 2020.²⁰⁶

Access to the built environment is mainly controlled by Part M of the Building Regulations (2000), entitled 'Access for People with Disabilities'.²⁰⁷ It does not apply to existing buildings unless they are being altered or refurbished, although under the Disability Act 2005 public areas of public buildings were required to comply with Part M by 2015. The Regulations require all buildings to have wheelchair access and in the event that they trade on more than one floor there must be a wheelchair-accessible lift giving access between the floors. In addition, if stores are providing public toilets they must include at least one wheelchair-accessible toilet. Section 5 of the Building Control Act 2007 effected a modest improvement in providing for a Disability Access Certificate, which requires building control authorities to certify that designs comply with Part M before work commences.

Failure to comply with the legislation cannot be relied upon in discrimination cases under the legislation transposing directive 2000/78, the EEA.²⁰⁸

In Ireland, national law contains general duties to provide accessibility by anticipation for people with disabilities, but they are limited by what is 'practicable' or 'appropriate' and in some instances must be triggered by an actual individual and so cannot be regarded as anticipatory. The provisions are set out under Part 3 of the Disability Act 2005, as outlined above.

An individual with a disability can make a complaint about any failure by a public body to provide access under Part 3 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 40.²⁰⁹ The Ombudsman has consistently expressed concern about the apparent lack of awareness of the legislation; just five complaints were received in 2016, while four were lodged the previous year.²¹⁰

h) Accessibility of public documents

Section 28 of the Disability Act 2005 deals with the accessibility of information provided by public bodies and their communications systems; again the obligations need only be met where practicable.²¹¹

'28. — (1) Where a public body communicates with one or more persons, the head of the body shall ensure—

²⁰⁶ Section 11(2), Irish Sign Language Act 2017.

²⁰⁷ Amended Regulations 2010: <http://www.irishstatutebook.ie/eli/2010/si/513/made/en/print>. Technical Guidance document: <http://www.environ.ie/sites/default/files/migrated-files/en/Publications/DevelopmentandHousing/BuildingStandards/FileDownload,24773,en.pdf>.

²⁰⁸ It is well established in case law concerning the ESA that the forums for hearing anti-discrimination complaints have no jurisdiction to consider compliance with the Disability Act or other legal measures on accessibility: e.g. *Hennessy v Network Catering/Iarnród Éireann*, DEC-S2009-029, at 4.19-4.21, <https://www.workplacerelations.ie/en/Cases/2009/May/DEC-S2009-029-Full-Case-Report.html>.

²⁰⁹ <https://www.ombudsman.gov.ie/en/About-Us/Legislation/The-Disability-Act/Making-a-complaint-to-the-Ombudsman-under-the-Disability-Act/>.

²¹⁰ Office of the Ombudsman (2017) *Annual Report 2016*, available at: https://www.ombudsman.ie/en/Publications/Annual-Reports/2016-Annual-Report/media/ombudsman_annual_report_2016.pdf; Office of the Ombudsman (2016) *Annual Report 2015*, available at: http://www.ombudsman.gov.ie/en/Publications/Annual-Reports/2015-Annual-Report/AnnualReport2015/media/ombudsman_annual_report_2015.pdf.

²¹¹ <http://www.irishstatutebook.ie/eli/2005/act/14/enacted/en/print#sec28>.

- (a) if the communication is an oral one and the person or persons aforesaid has a hearing impairment and so requests, or
- (b) if the communication is a written one and the person or persons aforesaid has a visual impairment and so requests,

that, as far as practicable, the contents of the communication are communicated in a form that is accessible to the person concerned.

(2) Where a public body communicates in electronic form with one or more persons, the head of the body shall ensure, that as far as practicable, the contents of the communication are accessible to persons with a visual impairment to whom adaptive technology is available.

(3) The head of a public body shall ensure, as far as practicable, that information published by the body, which contains information relevant to persons with intellectual disabilities, is in clear language that is easily understood by those persons.'

The duty in Ireland is largely individualised and so cannot be said to be anticipatory in practice. It is only envisaged that action will be taken 'as far as practicable'. In the absence of a monitoring mechanism it is difficult to assess whether the duty is implemented. The Ombudsman's annual reports suggest there is inadequate awareness of the duty in practice.²¹²

²¹² <http://www.ombudsman.gov.ie/en/Publications/Annual-Reports/>.

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.

However, although EEA contains no express provision concerning employees who work outside the State, the Labour Court has found that an employee must habitually carry out their work in the jurisdiction to avail of its protection.²¹³ It is also unclear whether non-EU/EEA nationals working without an employment permit can invoke EEA since their contract of employment will be void by reason of illegality.²¹⁴ No such restrictions have been applied in the field of goods and services, which is governed by ESA.

Specific exceptions relating to treatment based on nationality are provided for under both ESA and EEA. These are discussed in greater detail in Chapter 4.4 of this report.

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

a) Protection against discrimination

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

ESA and EEA do not specify which persons can avail of protection. However, an Equality Tribunal decision has made it clear that a legal person cannot avail of ESA to claim protection against discrimination.²¹⁵ The complainant in the case was an unincorporated body of persons in the form of a choir called 'Gloria (Ireland's Lesbian and Gay Choir)'. It referred a claim of direct discrimination on the sexual orientation ground when the respondent removed the description of Gloria as Ireland's gay and lesbian choir from promotional material for a choral festival. Having considered several provisions in detail and various principles of interpretation, the equality officer concluded:

'Whilst the term 'person' is usually interpreted broadly to include corporate and unincorporated bodies, I am satisfied that a contrary intention is evident from the Equal Status Acts given the manner in which the discriminatory grounds are set out and the particular definition of 'person' as contained in the Acts. I am therefore of

²¹³ *A Retail Company v A Worker*, DEE 4/2001, 05.09.2001, <https://www.workplacerelations.ie/en/Cases/2001/September/EED014.html>.

²¹⁴ An EEA complaint taken by an undocumented worker was upheld in *A Domestic Worker v An Employer*, DEC-E2011-117, <https://www.workplacerelations.ie/en/Cases/2011/June/DEC-E2011-117-Full-Case-Report.html>. However, subsequently the High Court ruled that non-EU/EEA nationals who do not have an employment permit, contrary to the Employment Permits Act 2003, have no legal standing to rely on employment legislation since their "contract of employment" would be void by reason of illegality: *Hussein v Labour Court* [2012] IEHC 364, <http://www.bailii.org/ie/cases/IEHC/2012/H364.html>. The decision was reversed on appeal on technical grounds. Section 4 of the Employment Permits (Amendment) Act 2014 modified the impact of the High Court judgment somewhat. It permits the Minister for Jobs, Enterprise and Innovation to take a civil claim for compensation against the employer, notwithstanding the illegality of the contract, where it can be proved that the worker took all reasonable steps to comply with the requirement to have an employment permit: <http://www.irishstatutebook.ie/eli/2014/act/26/section/4/enacted/en/html>.

²¹⁵ Equality Tribunal, *Gloria (Ireland's Lesbian & Gay Choir) v Cork International Choral Festival Ltd.*, DEC-S2008-078, 28.10.2008, <https://www.workplacerelations.ie/en/Cases/2008/October/DEC-S2008-078-Full-Case-Report.html>; applied in *Cork Deaf Club v Office of Public Works*, DEC-S2017-039, 10.11.2017, <https://www.workplacerelations.ie/en/Cases/2017/November/DEC-S2017-039.html>.

the view that the legislative intent in this regard was to protect individuals and not bodies from discrimination.²¹⁶

He reasoned that a body could not be of a particular gender, marital status, sexual orientation, religion and so on. In the context of identifying potential *respondents* under the Act 'person' is defined in Section 2(1) as including 'an organisation, public body or other entity'. The Tribunal concluded that the Oireachtas (Parliament) thus intended that the wider definition of person should not apply to complainants. The net effect of the decision is that only natural persons can act as complainants under the ESA. The same principles should apply to the EEA since the discriminatory grounds are set out in the same manner under both laws. Members of an association could pursue a complaint under EEA or ESA but it appears they would have to establish that they were discriminated against as individuals.²¹⁷

b) Liability for discrimination

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

Section 8(1) EEA prohibits discrimination both by employers and employment agencies, i.e. it includes legal persons. Most of the prohibitions contained within the legislation are aimed at the employer²¹⁸ and no clear provision is made to enable actions against the person(s) who actually discriminated, subject to a couple of 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 or publishes discriminatory advertising.

Persons who are liable under ESA 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.

Natural persons and a 'body corporate' are liable to be prosecuted for offences under both equality laws (Section 44(2) ESA; Sections 100(5), 100(6)).

3.1.3 Private and public sector including public bodies (Article 3(1))

a) Protection against discrimination

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

Section 2(3) EEA 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;²¹⁹ employment in schools or hospitals with a religious ethos;²²⁰ employment in Defence

²¹⁶ *Gloria (Ireland's Lesbian & Gay Choir) v Cork International Choral Festival Ltd.*, DEC-S2008-078, at para 5.5.

²¹⁷ Under Irish law the general position is that an unincorporated association lacks a legal personality and so cannot be the subject of legal proceedings. Such bodies may, however, be conferred with the capacity to sue and be sued by legislation: *Sandymount and Merrion Residents Association v An Bord Pleanála* [2013] IESC 51, 27.11.2013, <http://www.courts.ie/Judgments.nsf/0/E57D6CA0F350359280257C31004816EF>. In that case the Supreme Court held that Section 50(A) of the Planning and Development Act 2000 conferred legal standing on unincorporated bodies to bring judicial review proceedings.

²¹⁸ Section 15 EEA imposes vicarious liability on employers and principals for the acts of their employees and agents.

²¹⁹ Section 2 EEA.

²²⁰ Section 37(1) EEA. See further Chapter 4.2.

Forces, Garda Síochána (police force), or prison service (in relation to discrimination on the age or disability grounds).²²¹ The exception concerning employment in a person's home appears to go beyond the provisions of the equality directives.

b) Liability for discrimination

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

Section 2(1) ESA expressly states that the persons who must not discriminate in the supply of goods and services includes legal persons such as organisations, public bodies or other entities. The scope of EEA also clearly covers the private and public sector.

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, and holding statutory office, for the five grounds (Sections 2(1), 2(3), 8 EEA).

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 prohibits discrimination in the following areas: 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 (Section 8 EEA).

The definition of 'employee' under Section 2(1) EEA 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 may not be in compliance with the directives.

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

In Ireland, national legislation prohibits discrimination in the following areas: working conditions including pay and dismissals,²²² for all five grounds and for both private and public employment (Sections 2(1), 7, 8, 29 EEA).

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, which is that the employee should not be remunerated at a

²²¹ Section 37(5) EEA.

²²² Employees who are dismissed for putative discriminatory reasons may opt instead to pursue an unfair dismissals complaint under the Unfair Dismissals Acts 1997-2015: Ireland, Unfair Dismissals Act 1997, 6.04.1977; Ireland, Unfair Dismissals (Amendment) Act 1993, 14.07.1993. Revised text available at: <http://revisedacts.lawreform.ie/eli/1977/act/10/revised/en/html>. Under Section 6(2) of that legislation 'the dismissal of an employee shall be deemed...to be an unfair dismissal if it results wholly or mainly from one or more of the following: [...] (b) the religious or political opinions of the employee... (e) the race, colour or sexual orientation of the employee, (ee) the age of the employee, (eee) the employee's membership of the travelling community'.

rate below the level required by the National Minimum Wage Act 2000.²²³ There is nothing to suggest that the work should be remunerated at a proportionate level to that of an employee without a disability. This may not comply with the directive.

3.2.3.1 Occupational pensions constituting part of pay

In Ireland, Part VII of the Pensions Acts 1990-2015 implements the principle of equal treatment with respect to occupational pensions.²²⁴ The definition of remuneration in Section 2(1) EEA specifically excludes pension rights, meaning a pension or any other benefits flowing from an occupational pension scheme, from its ambit.

The Pensions Acts cover the same nine grounds as the EEA: race, religious belief, gender, age, sexual orientation, civil status, family status, disability and membership of the Traveller community. It prohibits direct and indirect discrimination, discriminatory instructions and procurement to discriminate, as well as victimisation, in respect of occupational benefit schemes, occupational benefits and occupational pensions. Key exceptions include those that provide for different treatment on the age ground²²⁵ and on the disability ground to take account of a lesser amount of work undertaken by virtue of a disability and to provide for more favourable treatment where early retirement arises from a disability.²²⁶

Many of the reported cases to date concern the gender and civil 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.²²⁷ A discrimination complaint on the age, civil status and sexual orientation grounds did not succeed before the Tribunal and was the subject of a reference to the CJEU.²²⁸ Mr Parris argued that the pension scheme operated by his employer was discriminatory as it provided that an employee's partner would only be entitled to a survivor's pension where the employee had married or entered a civil partnership before reaching the age of 60. National law prohibited the complainant from marrying and did not enable him to enter a civil partnership prior to his 60th birthday. It was, therefore, impossible for him to comply with the so-called survivor's rule in the pension scheme. His complaint before the Equality Tribunal did not succeed. The Equality Officer concluded that complainant had established indirect discrimination on the combined grounds of sexual orientation, civil status, and age:

'I am satisfied that the complainant has established that the impact of the introduction of civil partnership only in 2011, combined with the limit placed upon his ability to regularise his civil status as a homosexual in an ongoing relationship prior to that point, when further combined with the difference in treatment based on age carried out in relation to this pension scheme renders the complainant at a particular disadvantage in relation to, for example, a heterosexual man of a similar age who would have had the opportunity to regularise a heterosexual relationship at a younger age.'²²⁹

²²³ Ireland, National Minimum Wage Act 2000, 31.03.2000, <http://www.irishstatutebook.ie/eli/2000/act/5/enacted/en/html>.

²²⁴ Inserted by section 22 of the Social Welfare (Miscellaneous Provisions) Act 2004, 25.03.2004, <http://www.irishstatutebook.ie/eli/2004/act/9/section/22/enacted/en/html#sec22>.

²²⁵ Section 72(1), Pensions Acts 1990-2015.

²²⁶ Section 73, Pensions Acts 1990-2015.

²²⁷ Equality Tribunal, DEC-P2011-007, *Czyzycki v Fegan*, <https://www.workplacerelations.ie/en/Cases/2011/December/DEC-P2011-007-Full-Case-Report.html>.

²²⁸ Equality Tribunal, *Parris v Trinity College Dublin and others*, DEC-P2013-004, 16.12.2013, <https://www.workplacerelations.ie/en/Cases/2013/December/DEC-P2013-004.html>; *Parris v Trinity College Dublin and others*, [2016] EUECJ C-443/15, 24.12.2016, <http://www.bailii.org/eu/cases/EUECJ/2016/C44315.html>.

²²⁹ *Parris v Trinity College Dublin and others*, DEC-P2013-004, at 4.15.

He could not find in the complainant's favour, however, because to do so would convey retrospective effect on the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.

On appeal the Labour Court referred three questions to the CJEU: whether the survivor rule was directly or indirectly discriminatory under Directive 2000/78/EC on grounds of: (1) sexual orientation, (2) age, or (3) if neither age nor sexual orientation in isolation, the combined effect of both. Each question was answered in the negative, leaving Dr Parris and others in his position, without a remedy under either domestic or EU law.²³⁰

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 adult lifelong learning courses or vocational training provided by technical schools or universities. Discrimination in these areas is prohibited under nine grounds: age, civil status, disability, family status, gender, race, religious belief, sexual orientation, and membership of the Traveller community.

Sections 8(1) and 8(7) EEA prohibit discrimination in relation to training or experience for or in relation to 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 on the nine discriminatory grounds. 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.²³¹

Vocational training is defined, in Section 12(2), 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 an occupational activity it is covered by the Act.²³² According to the Labour Court²³³ the definition may not align with the meaning of vocational training adopted by the CJEU in cases such as Case C-293/83, *Gravier v City of Liege*²³⁴ and Case C-24/86, *Blaizot v University of Liege*.²³⁵ It noted, however, that both judgments concerned the free movement principle in Regulation 1612/68 and it could not be assumed that a 'similarly

²³⁰ *Parris v Trinity College Dublin and others*, [2016] EUECJ C-443/15, 24.12.2016, <http://www.bailii.org/eu/cases/EUECJ/2016/C44315.html>.

²³¹ Section 12(1) EEA.

²³² Training to become a member of the volunteer Garda Reserve was not covered by Section 12 EEA since the Garda Reserve is not an occupational activity: High Court, *An Garda Síochána v Oberoi* [2013] IEHC 267, <http://www.courts.ie/Judgments.nsf/0/53FE83D658C8C00480257B9600322FCD>; A Masters in Social Science degree programme that comprised 50 % academic and 50 % practical work was not vocational training according to the Equality Tribunal 'as it was not exclusively concerned with perfecting the knowledge or technical capacity to carry out an occupational activity': *Kelly v University College Dublin*, DEC-S2006-076, <https://www.workplacerelations.ie/en/Cases/2006/November/DEC-S2006-076-Full-Case-Report.html>.

²³³ *Dublin Institute of Technology v Awojuola*, EDA 1335, 23.12.2013, <https://www.workplacerelations.ie/en/Cases/2013/December/EDA1335.html>.

²³⁴ [1985] E.C.R. 593.

²³⁵ [1988] E.C.R. 379.

expansive interpretation' of the term would be taken for the purpose of Directive 2000/43/EC. Other education and training courses are subject instead to the anti-discrimination provisions of the Equal Status Acts 2000-2015.²³⁶ Cumulatively the provisions of both Acts cover the vocational programmes and work experience referred to under Article 3(1)(b). However, the narrow definition of vocational training under the EEA may give rise to a compliance issue since the duty to provide reasonable accommodation on the disability ground under the ESA is less extensive than that required under Directive 2000/78.

An exception concerning the religion ground may raise compliance issues. Subsections 3-5 of Section 12 empower the relevant Minister, with the consent of the Minister for Justice and Equality, to make an order reserving places on programmes of training for nurses and primary school teachers to persons of a certain religion. The exemption may be applied for by an educational or training body '[f]or the purposes of ensuring the availability of nurses to hospitals and teachers to 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, and in order to maintain the religious ethos of the hospitals or primary schools.'²³⁷ Pursuant to that section, the Employment Equality Act 1998 (section 12) (Church of Ireland College of Education) Order 2013 (S.I. No. 288 of 2013) reserves 32 places in the College of Education for students who are members of the Church of Ireland or who belong to the broad Protestant tradition.²³⁸ This provision may be too broad to comply with the terms of Article 4(2) since there is no requirement to demonstrate that the group of prospective teachers' religious beliefs constitute a genuine, legitimate and justified occupational requirement.

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 prohibits discrimination in the following areas: 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(1) 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, which fall instead under the ambit of Part VII of the Pensions Acts 1990-2015. Section 13(2) outlaws discriminatory advertising by such bodies. Section 13A prohibits 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 prohibits discrimination in the followings areas: social protection, including social security and healthcare as formulated in the Racial Equality Directive.

²³⁶ Section 7 ESA. See Chapter 3.2.8 for more on this provision.

²³⁷ Section 12(4) EEA.

²³⁸ <http://www.irishstatutebook.ie/eli/2013/si/288/made/en/print?q=college+of+education>; see further, O'Kelly, E. (2016) 'Religion, nursing and teacher training - what's the connection?', *RTÉ News*, 24.08.2016, <https://www.rte.ie/news/2016/0822/811138-nursing-teacher-training/>.

ESA prohibits discrimination in relation to goods and services on all EU grounds and also on the grounds of civil status, family status, and membership of the Traveller community (which overlaps with the race ground).

Under Section 5(1) ESA: 'A person shall not discriminate in disposing of goods to the public generally or a section of the public or in providing a service, whether the disposal or provision is for consideration or otherwise and whether the service provided can be availed of only by a section of the public.' 'Service' means a service or facility of any nature, which is available to the public generally or a section of the public (Section 2(1)). The legislation does not refer specifically to social protection, healthcare or social security. However, the first instance forum, the Equality Tribunal (now the Workplace Relations Commission) has interpreted the definition of 'service' to include social protection from the outset.²³⁹ For example, cases have upheld discrimination in relation to social welfare payments such as rent supplement²⁴⁰ and established that allowances for people with disabilities are 'services'.²⁴¹ Healthcare is also covered.²⁴²

The main compliance concern in this regard concerns the exemption provided for under Section 14(1) ESA which provides:

'Nothing in this Act shall be construed as prohibiting—
(a) the taking of any action that is required by or under—
(i) any enactment or order of a court,
(ii) any act done or measure adopted by the European Union, by the European Communities or institutions thereof or by bodies competent under the Treaties establishing the European Communities, or
(iii) any convention or other instrument imposing an international obligation on the State,...

The word 'enactment' is not defined in the ESA. It covers Acts of the Oireachtas and statutory instruments,²⁴³ but not government Department circulars and other administrative rules.²⁴⁴ Where some element of discretion exists in relation to the grant of a benefit, other good or service the statutory exemption is inapplicable since it relates only to discriminatory treatment *required* by law.²⁴⁵ However, where the putative discriminatory treatment is required by law Section 14(1)(a) operates to remove the measure from the ambit of the ESA. Several challenges to social protection provisions have failed on that basis.²⁴⁶ In 2016, for example, the WRC determined that it did not have jurisdiction to

²³⁹ The foundational case is: Equality Tribunal, *Donovan v Donnellan* DEC-S2001-011, 17.10.2001 <https://www.equalitytribunal.ie/en/Cases/2001/October/DEC-S2001-011.html>; Applied in e.g. *McQuaid v Department of Social Protection*, DEC-S2014-015, 02.10.2014, <https://www.workplacerelations.ie/en/Cases/2014/October/DEC-S2014-015.html>.

²⁴⁰ Equality Tribunal, *Mr A v Department of Social Protection*, DEC-S2013-010, 11.10.2013, <https://www.workplacerelations.ie/en/Cases/2013/October/DEC-S2013-010.html>.

²⁴¹ *Mrs X (on behalf of her daughter, Ms Y) v The Minister for Social and Family Affairs*, DEC-S2009-039, 10.06.2009, at 5.1-5.2, <https://www.workplacerelations.ie/en/Cases/2009/June/DEC-S2009-039-Full-Case-Report.html>.

²⁴² A person detained in a mental health institution can avail of the ESA to contest the nature of the facilities provided there: *A Patient v Health Service Provider and A Hospital*, DEC-S2010-053, 01.12.2010, <https://www.workplacerelations.ie/en/Cases/2010/December/DEC-S2010-053-Full-Case-Report.html>.

²⁴³ Secondary legislation is covered by the term 'enactment' in Section 14(1)(a)(i). Following the entry into force of the Equal Status Act 2000 Section 2(1) of the Interpretation Act 2005 defined 'enactment' to mean 'an Act or statutory instrument or any portion of an Act or statutory instrument'. The Interpretation Act was applied by the Equality Tribunal in finding that tax regulations were enactments and so immune from challenge under the ESA: *Dowd v Minister for Finance*, DEC-S2011-061, 15.11.2011, <https://www.workplacerelations.ie/en/Cases/2011/December/DEC-S2011-061-Full-Case-Report.html>.

²⁴⁴ See, for example, *Health Service Executive v Quigley* (Circuit Court Dublin, Linnane J., unreported, 26.04.2010).

²⁴⁵ Equality Tribunal, *Mr A v Department of Social Protection*, DEC-S2013-010, 11.10.2013, <https://www.workplacerelations.ie/en/Cases/2013/October/DEC-S2013-010.html>.

²⁴⁶ In *A Complainant v Department of Social and Family Affairs*, DEC-S2008-013, 19.02.2008, <https://www.workplacerelations.ie/en/Cases/2008/February/DEC-S2008-013-Full-Case-Report.html>, the equality officer found that the ESA could not be used to challenge the method of calculating Pay Related

assess a discrimination complaint about eligibility for a medical card because the criteria are set out in legislation.²⁴⁷

Since the Racial Equality Directive does not envisage any blanket exemption for discriminatory measures required by law, it is questionable whether Section 14(1)(a) conforms to its terms.

Judicial interpretation at the level of the courts will be crucial in determining whether Ireland is in compliance with Directive 2000/43/EC. Pending such interpretation of the various provisions, it is not possible to say definitively whether Ireland is or is not in compliance with the Racial Equality Directive.

3.2.6.1 Article 3.3 exception (Directive 2000/78)

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

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

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

The term 'social advantage' is not expressly referred to under ESA. Section 2(1) defines 'service' as including 'facilities for — (i) banking, insurance, grants, loans, credit or financing, (ii) entertainment, recreation or refreshment, (iii) cultural activities, or (iv) transport or travel...'. Case law establishes that 'service' encompasses a broad category of benefits provided by public and private actors such as free travel passes on public transport,²⁴⁸ maintenance grants for third level students,²⁴⁹ and sports scholarships.²⁵⁰ However, a Circuit Court judgment concerning an ex gratia payment scheme set up by the Irish government to compensate people affected by the liberalisation of the taxi industry has cast some doubt on the applicability of anti-discrimination law to social advantages provided by the public sector.²⁵¹ The Court found that 'the Tribunal had no jurisdiction to entertain the complaint because to do so was "in effect, to purport to review a decision of the Government, which... falls outside the scope of the powers conferred on it by the 2000 Act"'.²⁵²

In Ireland, the lack of a definition of social advantages raises concerns in relation to determining the material scope of the ESA for the purposes of compliance with the Racial Equality Directive.

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

Social Insurance (PRSI) contributions for the purposes of the Old Age Contributory Pension. The scheme in question is governed by statute: Section 108 of the Social Welfare Consolidation Act 2005 (as amended by Section 8 of the Social Welfare Law Reform and Pensions Act 2006). See also *A Complainant v Department of Social Protection*, DEC-S2011-053, 18.11.2011, <https://www.workplacerelations.ie/en/Cases/2011/November/DEC-S2011-053-Full-Case-Report.html>.

²⁴⁷ *Donaghy v Department of Health*, DEC-S2016-024, 19.04.2016, <https://www.workplacerelations.ie/en/Cases/2016/April/DEC-S2016-024.html>.

²⁴⁸ Equality Tribunal, *Thompson v Iarnród Éireann*, DEC-S2009-015, 02.03.2009, <https://www.workplacerelations.ie/en/Cases/2009/March/DEC-S2009-015-Full-Case-Report.html>.

²⁴⁹ Equality Tribunal, *Two Complainants v Department of Education and Science*, DEC-S2003-042/043, 28.05.2003, <https://www.workplacerelations.ie/en/Cases/2003/May/DEC-S2003-042-043-Full-Case-Report.html>.

²⁵⁰ Equality Tribunal, *MacMahon v Department of Physical Education and Sport, University College Cork*, DEC-S2009-014, 02.03.2009, <https://www.workplacerelations.ie/en/Cases/2009/March/DEC-S2009-014-Full-Case-Report.html>.

²⁵¹ Circuit Court, *Pobal v Hoey*, unreported judgment, 14.04.2011.

²⁵² Fennelly, D. (2012) *Selected Issues in Irish Equality Case Law 2008 – 2011*, at p.91, available at: <https://www.ihrec.ie/download/pdf/20150602161702.pdf>.

In Ireland, national legislation prohibits discrimination in the following areas: education as formulated in the Racial Equality Directive.

Section 7 ESA 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 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. The grounds covered are gender, age, race, religion, family status, disability, civil status, sexual orientation, and membership of the Traveller Community.²⁵³

Section 7 only refers to students or prospective students. But other people, such as parents of pupils, can refer cases against schools or other educational establishments under Section 5 (provided they are accessing a service, good or facility).²⁵⁴ The Department of Education and Skills is not an 'educational establishment' but may be regarded as providing goods and services under Section 5, as may other entities involved in providing facilities or setting policies in the area of education.²⁵⁵

Case law has dealt with the accommodation of disabled students²⁵⁶ and broader questions of access across all levels of the education system.²⁵⁷ In a 2015 race ground case a criterion in a school admissions policy contravened the indirect discrimination prohibition. The criterion accorded priority to prospective students based on the date of application. The complainant as an adopted child of Chinese national and ethnic origins was not in a position to submit her application as early applicants of Irish national origins who are not adopted. Her mother was unable to apply for a place close to the complainant's birth date due to the fact that the adoption process was not concluded until the complainant was 16 months old. Evidence was presented to the effect that 82% of non-family adoptions involved children of a non-Irish national origin and that such adoptions took between six and 24 months to complete. The Tribunal found that the provision put the complainant and foreign adopted children generally at a particular disadvantage compared with Irish born children.²⁵⁸ It concluded that while the admission criterion pursued the legitimate aim of operating a fair and reasonable admissions policy, the respondent did not establish that the provision was necessary to achieve that aim.

²⁵³ Section 29 of the Education Act 1998 provides for a general complaints mechanism in relation to enrolment, suspension or exclusion of students from schools: Ireland, Education Act 1998, 23.12.1998, <http://www.irishstatutebook.ie/eli/1998/act/51/section/29/enacted/en/html>.

²⁵⁴ See, for example, *A Separated Father v A Community School*, DEC-S2010-049, 05.11.2010, <https://www.workplacerelations.ie/en/Cases/2010/November/DEC-S2010-049-Full-Case-Report.html>: access to students' records was a service provided to parents having regard to both ESA and the Education Act 1998.

²⁵⁵ For example, *Two Named Complainants v Minister for Education and Science*, DEC-S2006-077, 03.11.2006, <https://www.workplacerelations.ie/en/Cases/2006/November/DEC-S2006-077-Full-Case-Report.html>, and *A Mother on behalf of her Son v Department of Education & Skills/State Examinations Commission*, DEC-S2016-040, 09.06.2016, <https://www.workplacerelations.ie/en/Cases/2016/June/DEC-S2016-040.html>.

²⁵⁶ See for example, *A mother on behalf of her son v The Board of Management of a National School*, DEC-S2016-048, 18.07.2016, <https://www.workplacerelations.ie/en/Cases/2016/July/DEC-S2016-048.html> (failure to permit assistance dog to accompany student to school contravened reasonable accommodation duty).

²⁵⁷ See, for example, *Mr X and Ms Y (on behalf of their daughter Z) v A Boys National School*, DEC-S2009-017, 13.03.2009, <https://www.workplacerelations.ie/en/Cases/2009/March/DEC-S2009-017-Full-Case-Report.html> (gender ground); *Faulkner v St Ita's & St Joseph's School, Tralee*, DEC-S2006-037, 24.06.2006, <https://www.workplacerelations.ie/en/Cases/2006/May/DEC-S2006-037-Full-Case-Report.html> (Traveller community ground); and *Lyamina v The Department of Education and Science*, DEC-S2009-016, 06.03.2009, <https://www.workplacerelations.ie/en/Cases/2009/March/DEC-S2009-016-Full-Case-Report.html> (race ground).

²⁵⁸ *Ms. A (on behalf of her daughter, B) v A Girls Secondary School*, DEC-S2015-001, 06.02.2015, <https://www.workplacerelations.ie/en/Cases/2015/February/DEC-S2015-001.html>.

The primary compliance issue concerns access to schools. In a high-profile case, the Supreme Court overturned an earlier decision of the Equality Tribunal and ruled that a school admission policy that prioritised former pupils' children did not constitute indirect discrimination against Travellers.²⁵⁹ It determined that the evidence presented by the complainant did not demonstrate that the school's policy placed Travellers in a situation of particular disadvantage. In effect the Court held that statistical evidence was *required* to establish a prima facie case; it did not consider EU law in assessing the ESA prohibition on indirect discrimination. In its amicus curiae submission the Equality Authority argued that the indirect discrimination test should conform to that of the Racial Equality Directive.²⁶⁰ The Supreme Court, however, applied a test formulated with reference to the provisions of the domestic statute (ESA) and did not consider whether Travellers constitute an ethnic group for the purposes of EU law.

School admissions criteria are also liable to place migrant children at a particular disadvantage given that many of them will have not been resident in the country for equivalent periods of time to their Irish national counterparts. For instance, preferences for applicants with parents or other relatives who attended the school (as in *Stokes*) or a requirement that one has been resident in the local area for a certain period²⁶¹ could have an exclusionary effect on migrants.

The Equality Tribunal applied the *Stokes* judgment in a 2015 case, which challenged a criterion that allocated school places according to the date of application from those living in the school's catchment area.²⁶² The complainant, a British national who had migrated to Ireland in 2002, claimed that the provision was indirectly discriminatory on the race ground. He maintained that the school's policy was intrinsically liable to disadvantage the children of migrants, since they would move into the catchment area of the school at a later date than indigenous children. The Director of the Equality Tribunal noted that the absence of statistical evidence was 'not necessarily fatal' to the complainant's case, which appears to be a less stringent evidential burden than that applied in *Stokes*. Nevertheless, the Tribunal was 'unwilling, in the absence of hard evidence on the demographics of the catchment and movements into it in the relevant time period, to assume that non-Irish children are put at a particular disadvantage.' The decision illustrates the significant obstacles to be overcome by complainants in some indirect discrimination cases and the need for greater access to equality data.

National data suggests that migrant children are more likely than Irish national children to experience bullying at school.²⁶³

A religious ethos exception also raises compliance concerns. Denominational schools are permitted to distinguish between prospective students on the basis of their religious background. They are also entitled to refuse admission to a child who is not of that denomination where it is essential to maintain the ethos of the school.²⁶⁴ Religion and

²⁵⁹ Supreme Court, *Stokes v Christian Brothers' High School Clonmel*, [2015] IESC 13, 24.02.2015, <http://www.courts.ie/Judgments.nsf/597645521f07ac9a80256ef30048ca52/a09897a48211897980257df6005a3c31?OpenDocument>.

²⁶⁰ https://www.ihrec.ie/download/pdf/mary_stokes_v_christian_brothers_high_school_clonmel_ors_13_dec_2012.pdf.

²⁶¹ Data suggests that migrant children are adversely affected by criteria that favour settlement in the area. Darmody, M., McGinnity, F. and Kingston, G. (2016) 'The Experiences of Migrant Children in Ireland' in Williams, J., Nixon, E., Smyth, E. and Watson, D. (eds.), *Cherishing All the Children Equally? Children in Ireland 100 Years on from the Easter Rising*, pp. 175-193, at p. 181, Available at: <https://www.esri.ie/pubs/CB201609.pdf>.

²⁶² *A Father on behalf of his son v A second level school*, DEC-S2015-008, 26.06.2015, <https://www.workplacerelations.ie/en/Cases/2015/June/DEC-S2015-008.html>.

²⁶³ Department of Children and Youth Affairs (2016) *State of the Nation's Children: Ireland 2016*. Dublin: Government Publications, available at: <https://www.dcyh.gov.ie/documents/stateofthenationschildren/20170302SOTNCRReport2016.pdf>.

²⁶⁴ Section 7(3)(c) ESA. This position is reinforced by Section 15(2)(b) of the Education Act 1998 which requires the school management board to uphold the 'characteristic spirit' of the school as established by its

ethnicity are closely intertwined for some groups such as Sikhs and Jews. And so, a decision to refuse admission to, for example, a Jewish child could amount to direct discrimination on both the race and religion grounds. With respect to migrants the provision could give rise to indirect discrimination on the race ground. The 2011 Census found that 89.8% of Irish nationals were Roman Catholics compared with 52% of nationals of all other countries resident in Ireland.²⁶⁵ The exemption was the subject of extensive media commentary in August and September of 2007, when a large number of migrant children could not secure primary school places in Balbriggan, Co. Dublin. An 'emergency school' was opened by Educate Together, a non-denominational education provider, to accommodate the children who could not access any local Catholic schools as they did not possess the required Catholic baptismal certificate.²⁶⁶

Several international human rights bodies have called on the Government to revise the legislative exception, especially in light of the dominance of Catholic schools in education provision at primary level.²⁶⁷ In July 2016 the Education (Admission to Schools) Bill 2016 was published.²⁶⁸ According to IHREC the Bill doesn't adequately address the religious ethos exception in light of inter alia the Racial Equality Directive.²⁶⁹ A substantially revised bill was in the process of being drafted at the end of 2017 and will be put before the Oireachtas in 2018.²⁷⁰

The Directive does not cover difference of treatment based on nationality (Article 3(2)). ESA provides for such difference in treatment in the education field as between EU citizens, Swiss or EEA nationals, and nationals of other countries. Different treatment is permissible with respect to fees or allocation of places for vocational or training courses, adult, continuing or further education or attendance at a university or other third-level institution (Section 12(7) EEA; Section 7(3)(d) ESA). Section 7(5)(b) ESA further allows different treatment on the basis of nationality in the provision of educational grants. The latter exception was introduced in 2004 overturning an Equality Tribunal finding that confining eligibility for grants to EU nationals would amount to unlawful discrimination.²⁷¹ The Irish Human Rights Commission objected to the change arguing that it would be likely to have a 'serious detrimental effect' on access to education, which in turn would impact on employment prospects and wider economic, social and cultural rights.²⁷² While these

'cultural educational, moral, religious, social, linguistic and spiritual values and traditions'. Boards must also 'have respect and promote respect for the diversity of values, beliefs, traditions, languages and ways of life in society' (Section 15(2)(e)). The exemption was applied in *Ms A (on behalf of her son X, A Minor) v A Secondary School*, DEC-S2014-010, 12.08.2014, <http://www.lrc.ie/en/Cases/2014/August/DEC-S2014-010.html>.

²⁶⁵ <http://www.cso.ie/en/census/census2011reports/census2011profile6migrationanddiversity-aprofileofdiversityinireland/>.

²⁶⁶ Boland, R. (2007) 'Faith before Fairness' *Irish Times*. 08.09.2007, <http://www.irishtimes.com/news/faith-before-fairness-1.960595>; Irish Times (2007) 'Catholic schools say enrolment policy not illegal', *Irish Times*, 28.09.2007, <http://www.irishtimes.com/news/catholic-schools-say-enrolment-policy-not-illegal-1.967071>.

²⁶⁷ See e.g. UN Committee on the Rights of the Child (2016) *Concluding observations on the combined third and fourth periodic reports of Ireland*, at 64(a), 29.01.2016, CRC/C/IRL/CO/3-4, available at: <http://www.refworld.org/docid/56c17f574.html>; UN Committee on Elimination of Racial Discrimination (2011) *Concluding observation of the Committee on the Elimination of Racial Discrimination: Ireland*, CERD/C/IRL/CO/3-4, at 26, available at: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsl%2fyrM1B9TT0oGmEKq0FjIGMDN9GaDxXjccJrXyrYI%2f%2fcNOv7wnHIb0L7jDoxEB0Xhj6wo%2f5mWhBPqF7MFyODF2Qj0zgpRtrVm9esS4KT3%2ft>.

²⁶⁸ <https://www.oireachtas.ie/viewdoc.asp?DocID=33318&&CatID=59>.

²⁶⁹ Irish Human Rights and Equality Commission (2016) *Observations on the Education (Admission to Schools) Bill 2016*, at p.5, available at <https://www.ihrec.ie/app/uploads/2016/11/Observations-on-Education-Admission-to-Schools-Bill-2016.pdf>.

²⁷⁰ https://www.taoiseach.gov.ie/eng/Taoiseach_and_Government/Government_Legislation_Programme/State_of_Play_of_Bills_before_the_D%C3%A1il/.

²⁷¹ Equality Tribunal, *Two Complainants v Department of Education and Science*, DEC-S2003-042/043, 28.05.2003, https://www.workplacerelations.ie/en/Cases/2003/May/DEC-S2003-042-043_Full_Case_Report.html.

²⁷² Irish Human Rights Commission (2004) *Observations on the Equality Bill*, Dublin, IHRC, pp.8-9, available at: <https://www.ihrec.ie/documents/observations-on-the-equality-bill-2004/>.

exceptions constitute barriers for migrants seeking access to education they would appear to comply with the Racial Equality Directive.

The *Intercultural Education Strategy 2010 – 2015* is the primary policy that aims to address discrimination against migrants in the education system (see further Chapter 3.2.8.b). It was developed by the Department of Education and Skills and the Office of the Minister for Integration, aiming 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';
- all education providers are assisted with ensuring that inclusion and integration within an intercultural learning environment.²⁷³

However, implementation of the strategy has not been monitored in part due to the closure of the Integration Unit within the Department of Education and Skills.

a) Pupils with disabilities

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

The legislative approach favours inclusive education, that is, education of children with disabilities in 'mainstream' schools.²⁷⁴ The National Council for Special Education (NCSE) was established in 2003 to improve the delivery of education services to persons with special educational needs arising from disabilities with particular emphasis on children.²⁷⁵ However, insufficient national funding has been allocated to provide the necessary support/accommodations to enable disabled children to participate in mainstream education. This is exemplified by the fact that the Education for Persons with Special Educational Needs Act 2004 has not yet been fully commenced. Specifically, the provisions that provide for individual education plans are not in operation. International human rights bodies have raised concerns about the inadequacy of educational supports, an incoherent approach to reasonable accommodation for state examinations, and the over-concentration of pupils with disabilities in schools that are designated as disadvantaged.²⁷⁶ In this regard the adoption of a new model for allocating teaching resources in September 2017 is a positive development. Under the previous system resources were contingent on medical diagnoses, which resulted in delays and disadvantaged pupils who couldn't afford to have their needs assessed.²⁷⁷ The new model allocates funds based on the school's profile and also provides baseline funding for each school.²⁷⁸ Moreover, Budget 2018 provides an additional EUR 30 million to enable recruitment of a further 1 000 Special

²⁷³ Department of Education and Skills and Office of the Minister for Integration (2010) *Intercultural Education Strategy, 2010–2015*, available at: https://www.education.ie/en/Schools-Colleges/Information/Intercultural-Education-Strategy/miq_intercultural_education_strategy.pdf.

²⁷⁴ Section 2 of the Education for Persons with Special Educational Needs Act 2004 establishes in law the principle of inclusive education for students with special educational needs: Ireland, Education for Persons with Special Educational Needs Act 2004, 19.07.2004, <http://www.irishstatutebook.ie/eli/2004/act/30/enacted/en/html>.

²⁷⁵ See generally: <http://ncse.ie/>.

²⁷⁶ UN Committee on the Rights of the Child (2016) *Concluding observations on the combined third and fourth periodic reports of Ireland*, at 48, 29.01.2016, CRC/C/IRL/CO/3-4, available at: <http://www.refworld.org/docid/56c17f574.html>; UN Committee on Economic, Social and Cultural Rights (2015) *Concluding observations on the third periodic report of Ireland* E/C.12/IRL/CO/3, 08.07.2015, at 31-32, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/150/67/PDF/G1515067.pdf?OpenElement>.

²⁷⁷ National Council for Special Education (2013) *Supporting Children with Special Educational Needs in Schools. NCSE Policy Advice Paper No. 4*, available at: http://ncse.ie/wp-content/uploads/2014/09/Supporting_14_05_13_web.pdf.

²⁷⁸ Department of Education and Skills (2017) *Circular 0013/2017*, available at: https://www.education.ie/en/Circulars-and-Forms/Active-Circulars/cl0013_2017.pdf.

Needs Assistants (SNAs) in 2018. SNAs are allocated to schools to provide non-teaching care support to children.²⁷⁹

b) Trends and patterns regarding Roma pupils

In Ireland, no data is available as to whether there are specific patterns existing in education regarding Roma pupils such as segregation.

In 2017 data was published for the first time on the number of Roma children attending primary schools. The figure was 1 323 pupils in 2016.²⁸⁰ The Irish education system has yet to develop a culturally appropriate response to specific issues relating to Roma. No reference is made to Roma in the main policy document, the *Intercultural Education Strategy 2010 – 2015*.²⁸¹

Training in the area of intercultural education is not compulsory for qualified teachers and there remains an absence of curriculum-linked resources that explore Traveller and Roma language and culture.²⁸² Researchers have criticised the failure to address racism in school curricula more generally.²⁸³ A large quantitative study canvassing the attitudes of 4 970 Irish national post-primary students concluded that the 'levels of reported negativity towards Irish Travellers are disturbing and need to be urgently addressed by our education system.'²⁸⁴ National data suggests that migrant and Traveller children are more likely to experience bullying in school.²⁸⁵ Anti-bullying procedures were published in 2013, which include a template for schools to record incidents.²⁸⁶ 'However the completion of this template is not compulsory and there does not appear to be any intention to inspect these reports as part of the whole school evaluation process. This makes it all but impossible for the State to monitor in any real way the incident of identity based bullying in schools.'²⁸⁷ The *National Traveller and Roma Inclusion Strategy 2017–2021*, published in June 2017, contains commitments to reviewing the effectiveness of the anti-bullying guidelines and teacher education.²⁸⁸ An implementation plan will be published in 2018.

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

²⁷⁹ See further, <https://www.education.ie/en/Press-Events/Press-Releases/2017-Press-Releases/PR2017-06-12.html>.

²⁸⁰ <https://www.education.ie/en/Publications/Statistics/Primary-Online-Database-POD-/POD-Interesting-Facts-First-Look-at-Data-from-POD-2016-2017.pdf>.

²⁸¹ Department of Education and Skills and Office of the Minister for Integration (2010) *Intercultural Education Strategy, 2010–2015*, available at: https://www.education.ie/en/Schools-Colleges/Information/Intercultural-Education-Strategy/miq_intercultural_education_strategy.pdf.

²⁸² Pavee Point Traveller and Roma Centre (2015) *Convention on the Rights of the Child Shadow Report*, available at: <http://www.paveepoint.ie/convention-on-the-rights-of-the-child-shadow-report/>.

²⁸³ See e.g. Bryan, A. (2012) 'You've got to teach people that racism is wrong and then they won't be racist': Curricular representations and young people's understandings of 'race' and racism', *Journal of Curriculum Studies*, 44(5), 599–629, available at: http://doras.dcu.ie/21468/1/10_SCAN.pdf; Kitching, K., and Curtin, A. (2012) *Addressing the concept and evidence of institutional racism in Irish education*. Cork, School of Education, University College Cork; Institute for Social Sciences in the 21st Century, available at: <https://cora.ucc.ie/handle/10468/816>.

²⁸⁴ Tormey, R., and Gleeson, J. (2012) 'Irish post-primary students' attitudes towards ethnic minorities' *Irish Educational Studies*, 31(2), 157–173, at 170.

²⁸⁵ Department of Children and Youth Affairs (2016) *State of the Nation's Children: Ireland 2016*. Dublin: Government Publications, available at: <https://www.dcy.gov.ie/documents/stateofthenationschildren/20170302SOTNCRReport2016.pdf>.

²⁸⁶ See further: <http://www.education.ie/en/Schools-Colleges/Information/Bullying/Anti-Bullying-Procedures-in-Schools.html>.

²⁸⁷ Pavee Point Traveller and Roma Centre (2015) *Convention on the Rights of the Child Shadow Report*, at p.19, available at: <http://www.paveepoint.ie/convention-on-the-rights-of-the-child-shadow-report/>.

²⁸⁸ Department of Justice and Equality (2017) *The National Traveller and Roma Inclusion Strategy 2017–2021*, p.26, available at: <http://www.justice.ie/en/JELR/National%20Traveller%20and%20Roma%20Inclusion%20Strategy,%202017-2021.pdf/Files/National%20Traveller%20and%20Roma%20Inclusion%20Strategy,%202017-2021.pdf>.

In Ireland, national legislation prohibits discrimination in the following areas: access to and supply of goods and services as formulated in the Racial Equality Directive.

Section 5(1) ESA provides:

'A person shall not discriminate in disposing of goods to the public generally or a section of the public or in providing a service, whether the disposal or provision is for consideration or otherwise and whether the service provided can be availed of only by a section of the public.'

Gender, age, race, religion, family status, disability, civil status, sexual orientation, and membership of the Traveller Community are covered.

'Goods' are defined in Section 2(1) as 'any articles of movable property' (i.e. property apart from land) and has not been contentious in the case law to date.

In *Two Complainants v Department of Education and Science*²⁸⁹ the Equality Officer considered what was covered by the definition of service provision. This related to the provision of maintenance grants payable to adults on further education courses. The then non-statutory rules provided that these grants were only available to EU nationals or persons with official refugee status. The Department had refused the complainants' applications for the grants. The question before the Tribunal was whether a maintenance grant was covered by the Act. Section 2(1) 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.

3.2.9.1 Distinction between goods and services available publicly or privately

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

However, distinct provisions govern registered clubs, which are bodies that have applied for or hold a certificate of registration under the Registration of Clubs Acts 1904–1999.²⁹⁰ Registration enables clubs to sell alcohol to members and certain visitors. Clubs that do not hold a liquor licence are governed instead by the general prohibition on discrimination set out under Section 5 ESA. Sections 8 to 10 ESA apply exclusively to registered clubs. The provisions only relate to matters concerning membership of clubs and cases must be taken before the District Court. Clubs which have the principal purpose of catering for the needs of persons who are members of the Traveller community or people of a particular gender, sexual orientation, religious belief (or persons of no religious belief), family status, civil status, age, disability, or nationality or ethnic or national origin can restrict membership to people from those groups (Section 9). The 'race' and 'colour' aspects of the race ground are not exempt. Further, the Traveller community exception is asymmetrical. It remains to be seen whether these provisions comply with the Racial Equality Directive. Recital 17 envisages the establishment of 'organisations of persons of a particular racial or ethnic origin where their main object is the promotion of the special needs of those persons' as positive action measures. However, the Irish Superior Courts have not taken account of disadvantage or substantive equality of opportunity principles in construing relevant provisions of the ESA. The High Court interpreted Section 9 of that Act as permitting male-

²⁸⁹ Equality Tribunal, DEC-S2003-042/043, 28.05.2003, http://www.equalitytribunal.ie/en/Cases/2003/May/DEC-S2003-042-043_Full_Case_Report.html.

²⁹⁰ Ireland, Registration of Clubs (Ireland) Act 1904, 15.08.1904, <http://www.irishstatutebook.ie/eli/1904/act/9/enacted/en/print.html>.

only membership in golf clubs, holding that the principal purpose of such clubs is to cater for the needs of men.²⁹¹ The Supreme Court upheld the decision on 4 November 2009.²⁹²

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

In Ireland, national legislation prohibits discrimination in the following areas: housing as formulated in the Racial Equality Directive.

Section 6(1) ESA prohibits discrimination in disposing of any estate or interest in premises, in terminating any tenancy or other interest in premises, or in the provision of accommodation and related services and amenities. Gender, age, race, religion, family status, disability, civil status, sexual orientation, and membership of the Traveller community are covered. The Equality (Miscellaneous Provisions) Act 2015 introduced 'housing assistance' as a new ground to protect against discrimination in the accommodation context.²⁹³ As of 1 January 2016, people in receipt of housing assistance, rent supplement or other social welfare payments cannot be discriminated against in relation to the provision of accommodation and related service and amenities.

There are several exceptions.

For example, 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.'²⁹⁴ Section 6(5) permits reservation of housing for use by particular categories of people such as a home for people with disabilities, or as a retirement or nursing home for older people.

Housing authorities may 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 (Section 6(6) ESA). The Circuit Court has clarified that this exception cannot result in less favourable treatment in the provision of housing.²⁹⁵

Section 6(7) allows the 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.²⁹⁶ Any such difference in treatment is not permitted to amount to a derogation from the obligations of the State under EU law. There is no case law on the provision to date.

This nationality aspect of the exception coupled with the exemption for measures required by law (Section 14(1)(a)) means that migrants are unable to challenge many forms of potential discrimination in public sector housing using ESA. For instance, eligibility for social housing and some forms of housing assistance payments are contingent on one's residence status in the State.²⁹⁷

There is no major anti-discrimination case law in the field of housing involving migrants. Available data, in the form of experience of perceived discrimination, suggests that Black non-Irish nationals are a high-risk group for encountering discriminatory practices in

²⁹¹ *Equality Authority v Portmarnock Golf Club*, [2005] IEHC 235, 10.06.2005, <http://www.bailii.org/ie/cases/IEHC/2005/H235.html>.

²⁹² *Equality Authority v Portmarnock Golf Club*, [2009] IESC 73, 04.11.2009, <http://www.bailii.org/ie/cases/IESC/2009/S73.html>.

²⁹³ <http://www.irishstatutebook.ie/eli/2015/act/43/enacted/en/print.html>.

²⁹⁴ Section 6(2)(d) ESA.

²⁹⁵ *Dublin City Council v Deans* (Circuit Court Dublin, Hunt J., unreported, 15.04.2008), at p. 29.

²⁹⁶ No reference is made in this section to the ground of race or sexual orientation.

²⁹⁷ See generally: <http://www.integration.ie/website/omi/omiwebv6.nsf/page/infoformigrants-Housing-LocalAuthority-SocialHousing-en>.

accessing accommodation,²⁹⁸ while a 2014 survey found that 95 % of landlords who responded would rent to non-Irish nationals (400 interviews were conducted with landlords).²⁹⁹ There is an identified need for further research in this area³⁰⁰ and no major policies that address discrimination against migrants in accommodation provision. The *Migrant Integration Strategy*, which was published in February 2017 and runs from 2017 to 2020 contains no such measures.³⁰¹

3.2.10.1 Trends and patterns regarding housing segregation for Roma

There is no specific information about patterns of segregation affecting the Roma Community in Ireland because of the absence of relevant Government data.³⁰² An estimated 3 000 to 5 000 Roma people live in Ireland.³⁰³ According to a civil society organisation, many Roma families and children are living in extremely poor and often dangerous living conditions without access to basic facilities.³⁰⁴ The UN Committee on Economic, Social and Cultural Rights has recommended the State address the lack of culturally appropriate accommodation provided to Roma and Travellers.³⁰⁵ Pavee Point Traveller and Roma Centre reports that many issues concerning patterns of segregation that are known to affect the Traveller Community also affect the Roma Community. Major issues common issues 'include discrimination in accessing accommodation, racism, lack of access to social housing and rent allowance, a lack of security of tenure and substandard conditions.'³⁰⁶ The findings of a small-scale study on *Experiences of Travellers in the Private Rented Sector*, published in 2017, suggest that Travellers experience discrimination on the part of landlords and settled neighbours.³⁰⁷ Landlords believed that discrimination had diminished in recent years due to compliance with legislation. However, a 2014 survey conducted on behalf of the Residential Tenancies Board found that 82% of those landlords who responded were unwilling to rent property to members of the Travelling community (400 interviews were conducted with landlords).³⁰⁸

The European Committee of Social Rights upheld a complaint against Ireland in 2015, finding that a shortfall in sufficient accommodation for Travellers, as well as inadequate

²⁹⁸ McGinnity, F., Grotti, R., Kenny, O., and Russell, H. (2017) *Who experiences discrimination in Ireland? Evidence from the CSO Equality Modules*, Dublin: ESRI, available at: <https://www.ihrec.ie/app/uploads/2017/11/Who-experiences-discrimination-in-Ireland-Report.pdf>.

²⁹⁹ DKM Consultants (2014) *Private Rented Sector Survey Findings: Tenants, Landlords & Estate Agents*, Dublin, DKM, available at: https://onestopshop.rtb.ie/images/uploads/general/DKM_2014-10-prs-survey-findings-for-prtb-report-final.pdf.

³⁰⁰ Barrett, A., McGinnity, F., and Quinn, E. (eds.) (2017) *Annual Monitoring Report on Integration 2016*, Dublin, ESRI, p. 57, available at: <https://www.esri.ie/publications/monitoring-report-on-integration-2016/>.

³⁰¹ Department of Justice and Equality (2017) *The Migrant Integration Strategy – A Blueprint for the Future*, available at: http://www.justice.ie/en/JELR/Migrant_Integration_Strategy_English.pdf/Files/Migrant_Integration_Strategy_English.pdf.

³⁰² Pavee Point Traveller and Roma Centre (2016) *Policy and practice in ethnic data collection and monitoring*, available at: http://www.paveepoint.ie/wp-content/uploads/2016/04/Counting-Us-In-A4_WEB.pdf.

³⁰³ Department of Justice and Equality (2017) *National Traveller and Roma Inclusion Strategy, 2017 – 2021*, p.15, available at: <http://www.justice.ie/en/JELR/National%20Traveller%20and%20Roma%20Inclusion%20Strategy.%202017-2021.pdf/Files/National%20Traveller%20and%20Roma%20Inclusion%20Strategy.%202017-2021.pdf>.

³⁰⁴ Pavee Point Traveller and Roma Centre (2016) *Presentation to the Oireachtas Committee on Housing and Homelessness*, 19.05.2016, available at: http://www.paveepoint.ie/wp-content/uploads/2015/04/PP-Final-Traveller-Accommodation-Presentation-to-Oireachtas_RF-4.pdf.

³⁰⁵ UN Committee on Economic, Social and Cultural Rights (2015) *Concluding observations on the third periodic report of Ireland* E/C.12/IRL/CO/3, 08.07.2015, at 26-17, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/150/67/PDF/G1515067.pdf?OpenElement>.

³⁰⁶ Pavee Point Traveller and Roma Centre (2016) *Presentation to the Oireachtas Committee on Housing and Homelessness*, 19.05.2016, at p. 8, available at: http://www.paveepoint.ie/wp-content/uploads/2015/04/PP-Final-Traveller-Accommodation-Presentation-to-Oireachtas_RF-4.pdf.

³⁰⁷ RSM PACEC Ltd. (2017) *Experiences of Travellers in the Private Rented Sector*, Dublin, Housing Agency, available at: <https://onestopshop.rtb.ie/images/uploads/general/experiences-of-travellers-in-the-private-rented-sector-on-the-web.pdf>.

³⁰⁸ DKM Consultants (2014) *Private Rented Sector Survey Findings: Tenants, Landlords & Estate Agents*, Dublin, DKM, available at: https://onestopshop.rtb.ie/images/uploads/general/DKM_2014-10-prs-survey-findings-for-prtb-report-final.pdf.

site conditions, violated Article 16 of the European Social Charter.³⁰⁹ Underlying factors include a disinvestment in Traveller accommodation since 2008 coupled with the failure of local authorities to access available funds. The Housing (Traveller Accommodation) Act 1998 obliges each local authority to prepare, adopt and implement a five-year rolling accommodation programme to meet the existing and projected accommodation needs of Travellers in their areas.³¹⁰ All local authorities have adopted Traveller Accommodation Programs for the period 2014-2018. Capital funding of EUR 9 million was provided for Traveller-specific accommodation in 2017, an increase of 64% on the 2016 allocation. Budget 2018 allocated EUR 12 million for Traveller-specific accommodation, an increase of EUR 3 million on the previous year. However, this falls far short of the EUR 40 million provided in 2008. In 2016, local authorities spent EUR 4.2 million of the EUR 5.5 million allocated for the purpose of providing accommodation for Travellers.³¹¹ In 2017, local authorities drew down just EUR 4.835 million of the EUR 9 million allocation for that year.³¹² The situation is exacerbated by both the enabling legal provisions and the practice of evictions, in violation of the European Social Charter.³¹³

An Oireachtas Committee on Housing and Homelessness issued several recommendations in 2016 including a ban on evictions where alternative accommodation is unavailable and a mechanism for enforcing local authorities' duties under the 1998 Act.³¹⁴ In 2016 the UN Committee on the Rights of the Child called for increased funding for accommodation facilities that address the needs of Traveller and Roma children and their families and the amendment or repeal of legislation that criminalises nomadism.³¹⁵

To date, the Government has not implemented the bulk of those recommendations. There are no plans to reform the laws that enable evictions. However, the *National Traveller and Roma Inclusion Strategy 2017–2021*, published in June 2017, does contain a commitment to a review of the 1998 Act.³¹⁶ An Expert Group is to be established to carry out that review.³¹⁷ The review will be informed by the findings of an independent research report that the provision of Traveller-specific accommodation under the 1998 Act from 2000-2016.³¹⁸ Published in June 2017, the Report found that an average of 376 Traveller-specific homes were provided per year. This was below the targets set, which if achieved would

³⁰⁹ European Committee of Social Rights (2016) *European Roma Rights Centre (ERRC) v Ireland*, Complaint No. 100/2013, available at <http://hudoc.esc.coe.int/eng/?i=cc-100-2013-dmerits-en>.

³¹⁰ Ireland, Housing (Traveller Accommodation) Act 1998, 13.07.1998, <http://www.irishstatutebook.ie/eli/1998/act/33/enacted/en/html>.

³¹¹ Minister of State with responsibility for Urban Planning and Housing, Damien English TD, Written Answers, Traveller Accommodation, 21 November 2017, *Dáil Éireann Debate Vol. 961 No. 7*, [49197/17], <http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/DebatesWebPack.nsf/takes/dail2017112100093?opendocument&highlight=%22Traveller%20accommodation%22%20Damien%20English#WRF05100>.

³¹² Minister of State at the Department of Housing, Planning, Community and Local Government, Damien English TD, Written Answers, Traveller Accommodation, 27 February 2018, *Dáil Éireann Debate Vol. 961 No. 7*, [10173/18],

<http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/DebatesWebPack.nsf/takes/dail2018022700112?opendocument&highlight=%22Traveller%20accommodation%22%20Damien%20English#WREE00600>.

³¹³ European Committee of Social Rights (2016) *European Roma Rights Centre (ERRC) v Ireland*, Complaint No. 100/2013, available at <http://hudoc.esc.coe.int/eng/?i=cc-100-2013-dmerits-en>.

³¹⁴ Houses of the Oireachtas (2016) *Report of the Committee on Housing and Homelessness*, available at: <http://www.oireachtas.ie/parliament/media/committees/32housingandhomelessness/Final-Report-.pdf>.

³¹⁵ UN Committee on the Rights of the Child (2016) *Concluding observations on the combined third and fourth periodic reports of Ireland*, 29.01.2016, CRC/C/IRL/CO/3-4, at 17, available at: <http://www.refworld.org/docid/56c17f574.html>.

³¹⁶ Department of Justice and Equality (2017) *The National Traveller and Roma Inclusion Strategy 2017–2021*, p.41, available at: <http://www.justice.ie/en/JELR/National%20Traveller%20and%20Roma%20Inclusion%20Strategy.%202017-2021.pdf/Files/National%20Traveller%20and%20Roma%20Inclusion%20Strategy.%202017-2021.pdf>.

³¹⁷ Minister of State with responsibility for Urban Planning and Housing, Damien English TD, Written Answers, Traveller Accommodation, 28 November 2017 [50489/17], <https://beta.oireachtas.ie/en/debates/debate/dail/2017-11-15/29/>.

³¹⁸ RSM PACEC Ltd (2017) *Research Report: Review of Funding for Traveller-Specific Accommodation and the Implementation of Traveller Accommodation Programmes*, Dublin, Housing Agency, available at: <https://www.housingagency.ie/getattachment/Our-Publications/Housing-Management/17-11-21-Independent-Review-of-Funding-for-Traveller-Specific-Accommodation.pdf>.

have seen an average of 494 Traveller-specific homes provided per annum. The Report highlights planning issues as a key challenge to the delivery of Traveller-specific accommodation, in particular opposition to planning applications by settled residents and elected representatives. According to the national and local Traveller representative groups consulted for the report believe accommodation is of poor quality with overcrowding mentioned as a major factor.³¹⁹ Data collected by local authorities reinforces the need for Traveller-specific accommodation: 536 Traveller families were living on unauthorised sites in 2016.³²⁰

³¹⁹ RSM PACEC Ltd (2017) *Research Report: Review of Funding for Traveller-Specific Accommodation and the Implementation of Traveller Accommodation Programmes*, pp.34-35.

³²⁰ Department of Housing, Planning and Local Government (2017) *Annual Count of Traveller Families in 2016 in LA and LA Assisted Accommodation and on Unauthorised Halting Sites*, https://www.housing.gov.ie/sites/default/files/publications/files/annual_count_of_traveller_families_in_2016_in_la_and_la_assisted_accommodation_and_on_unauthorised_halting_sites.pdf.

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.

Under Section 37(2) EEA:

'[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.'

To date this provision has been considered exclusively in age ground case law concerning compulsory retirement.³²¹ Since the decisions largely rested on analyses of the provision that permits employers to set retirement ages (section 34(4) EEA), the precise ambit of this exception is as yet unclear. The main precedent is *Saunders v CHC Ireland Ltd.* in which a retirement age of 55 for a category of emergency services personnel (helicopter winch operators) was justified under section 37(2) and section 34(4).³²² Applying the *Wolf* judgment the adjudicator accepted that the possession of a high physical capacity was a genuine and determining occupational requirement for the role and that this standard of capacity diminishes with age.³²³

Under Section 5(2)(i) ESA the prohibition on discrimination in disposing of goods or in providing a service does not apply in the case of '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.' To date there is no case law on this exception. It would presumably allow the selection of a person of a particular ethnicity, for example, to play a role where being of that ethnicity was reasonably required.

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

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

Section 37(1) EEA provides:

'Subject to *subsections (1A) and (1B)*, a religious, educational or medical institution which is under the direction or control of a body established for religious purposes or whose objectives include the provision of services in an environment

³²¹ A parallel provision that applies to the gender ground only, section 25 EEA, has been applied in a number of cases. See e.g. *A Prospective Employee v A Company*, DEC-E2015-101, 07.10.2015, <https://www.workplacerelations.ie/en/Cases/2015/October/DEC-E2015-101.html>.

³²² DEC-E2011-142, 19.07.2011, <https://www.workplacerelations.ie/en/Cases/2011/July/DEC-E2011-142-Full-Case-Report.html>. See also *McPhilips v Monaghan County Council*, DEC-E2011-257, 22.11.2011, <https://www.workplacerelations.ie/en/Cases/2011/December/DEC-E2011-257-Full-Case-Report.html>; *Transdev Light Rail Limited v Chrzanowski*, EDA1632, 29.11.2016, <https://www.workplacerelations.ie/en/Cases/2016/November/EDA1632.html>; *A Worker v A Healthcare Provider*, ADJ-00003418, 20.01.2017, <https://www.workplacerelations.ie/en/Cases/2017/January/ADJ-00003418.html>.

³²³ *Wolf v Stadt Frankfurt Am Main*, Case C-229/08 ECJ, 12.01.2010, <http://curia.europa.eu/juris/liste.jsf?num=C-229/08>.

which promotes certain religious values shall not be taken to discriminate against a person... if—

(a) it gives more favourable treatment, on the religion ground, to an employee or a prospective employee over that 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.³²⁴

Further sub-sections ensure that state funded entities may only avail of the exception in circumstances that cohere with Article 4(2) Directive 2000/78:

‘(1A) Where an educational or medical institution referred to in *subsection (1)* is maintained, in whole or in part, by monies provided by the Oireachtas more favourable treatment on the religion ground referred to in *paragraph (a)* of that subsection shall be taken to be discrimination unless —

(a) that treatment does not constitute discrimination on any of the other discriminatory grounds, and

(b) by reason of the nature of the institution’s activities or the context in which the activities are being carried out, the religion or belief of the employee or prospective employee constitutes a genuine, legitimate and justified occupational requirement having regard to the institution’s ethos.

(1B) Where an educational or medical institution referred to *subsection (1)* is maintained, in whole or in part, by monies provided by the Oireachtas, action of the type referred to in *paragraph (b)* of that subsection shall be taken to be discrimination unless by reason of the nature of the employment concerned or the context in which it is carried out —

(a) the action is objectively justified by the institution’s aim of preventing the undermining of the religious ethos of the institution, and

(b) the means of achieving that aim are appropriate and necessary.

(1C) An action referred to in *subsection (1B)* shall not be objectively justified in accordance with *paragraph (a)* of that subsection, or appropriate and necessary in accordance with *paragraph (b)* of that subsection, unless the action of the institution is —

(a) rationally and strictly related to the institution’s religious ethos,

(b) a response to conduct of the employee or prospective employee undermining the religious ethos of the institution rather than a response to that employee’s, or prospective employee’s, gender, civil status, family status, sexual orientation, age, disability, race or membership of the Traveller community, and

(c) proportionate to the conduct of the employee or prospective employee, as the case may be, having due regard to —

(i) any other action the employer may take in the circumstances,

(ii) the consequences of that action for that employee or prospective employee,

(iii) the employee’s or prospective employee’s right to privacy, and

(iv) the actual damage caused to the religious ethos of the institution by the conduct of that employee or prospective employee.’

The exception was inserted by the Equality (Miscellaneous Provisions) Act 2015, which came into force on 1 January 2016 and has yet to be considered in case law. It replaced a provision that did not appear to comply with Article 4(2) since *inter alia* there was no requirement that differential treatment should be ‘legitimate’ or ‘proportionate’, nor did it explicitly provide that the exception could not be used to justify discrimination on another ground.

The previous provision, although never fully tested in legal proceedings (see below) was controversial at the national level. Teachers’ unions opposed the exemption from the outset

³²⁴ <http://revisedacts.lawreform.ie/eli/1998/act/21/revised/en/html#SEC37>.

arguing, in particular, that it would impact lesbian, gay and bisexual staff.³²⁵ Those concerns were reinforced by a small-scale research study, which found that the exemption caused considered anxiety on the part of such teachers affecting their ability to 'come out' at work.³²⁶ The Equality Authority and the Irish Human Rights Commission had also called for its amendment.³²⁷

The former provision was considered in one case in which a primary school discriminated against a teacher on the grounds of religion and age in respect of promotion to the position of principal.³²⁸ In the course of an interview the complainant had been questioned about her views on religious patronage of schools and pluralism in education. The Labour Court found that the questioning amounted to discrimination on the religion ground. The Court rejected the respondent's contention that Section 37 allowed the interview panel to do so without infringing the principle of equal treatment on grounds of religion. Noting that Section 37 must be interpreted and applied in conformity with Directive 2000/78/EC and 'ascribed a narrow ambit' as an exception to the general prohibition of discrimination it reasoned as follows:

'The question of whether the preferment of candidates by reference to their religious belief is justified in a particular case is a matter of evidence to be adduced by the person seeking to rely on the exception that the statute provides. In the instant case the Respondent did not adduce any evidence on which it could be held that the canvassing of the private views of candidates for the post in issue on the question of religious patronage and pluralism was reasonable or necessary in order to maintain the religious ethos of the school. Nor was there any evidence to suggest that whatever views the Complainant had on that topic would impact on her capacity to act in good faith and with loyalty to the school's Catholic ethos.'

The Labour Court's approach suggests that the previous provision would have been interpreted narrowly. Nonetheless, the revised section brings national law into alignment with the exception as framed under Article 4(2).

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).

Section 37(5) EEA provides that the prohibition on discrimination on the age and disability grounds does not apply in relation to employment in the armed forces.³²⁹

In relation to other specific occupations, under Section 37(3) EEA it is an occupational requirement that those employed in the police, prison service or any emergency service

³²⁵ See e.g. various submissions of the Irish National Teachers' Organisation: <http://www.into.ie/lgbt/NewsArchive/Section371/>.

³²⁶ Walsh, J., Conlon, C., Fitzpatrick, B., and Hansson, U. (2007) *Enabling lesbian, gay and bisexual individuals to access their rights under equality law*, Dublin, Equality Authority, pp. 61-63, available at: https://www.ihrec.ie/download/pdf/enabling_lesbian_gay_and_bisexual_individuals_to_access_their_rights_under_equality_law.pdf.

³²⁷ See e.g. IHREC (2014) *IHREC Designate Report on Ireland's 4th Periodic Review by the UN Human Rights Committee on the ICCPR*, available at: <https://www.ihrec.ie/app/uploads/download/pdf/20140616113130.pdf>.

³²⁸ *A National School v A Worker*, EDA1515, 05.10.2015, <https://www.workplacerelations.ie/en/Cases/2015/October/EDA1515.html>; on appeal from the Equality Tribunal's decision in, *A Teacher and A National School*, DEC-E2014-097, 30.12.2014, <http://www.workplacerelations.ie/en/Cases/2014/December/DEC-E2014-097.html>. Prior to its enactment, the Supreme Court found that the religious ethos exemption was compatible with the Irish Constitution in *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321.

³²⁹ The High Court has confirmed that the provision exempts use of an age restriction in respect of persons seeking to join the Defence Forces: *Smyth v Minister for Justice Equality & Defence & ors*, [2013] IEHC 110, 02.01.2013.

are fully competent, available and capable of undertaking the range of functions associated with such positions so that the operational capacity of the services concerned may be preserved. Although not directed at employees with disabilities 'the clear implication on reading the section is that it is'.³³⁰ This provision reflects the wording of Recital 18 and was applied by the Labour Court in a case concerning a prison officer.³³¹ It was accepted that the complainant was unable to carry out the full range of duties attached to his post because of a medical condition called 'benign essential hypertension'. The respondent did not breach its duty to provide reasonable accommodation under Section 16 when it declined to provide the officer with alternative employment outside of any contact with prisoners:

'Once the Complainant cannot carry out the full range of duties due to an alleged disability and no reasonable accommodation can enable him to do so then the Respondent is entitled to rely on the provision of Section 37(3) of the Acts as a complete defence to a complaint that they failed to provide appropriate measures to accommodate his disability within the meaning of Section 16(3).'

In effect the exception provided for under Section 37(3) qualifies the duty to provide reasonable accommodation for employees in specific occupations since the usual obligation to consider alternative duties under Section 16 is subject to preserving the operational capacity of the services listed.

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.

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

Section 12(7) EEA 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 nationals of other countries and citizens of Ireland, Swiss and EEA nationals, or nationals of another Member State of the European Union. This exception would appear to comply with the provisions of Racial Equality Directive 3(2).

Section 17(2) EEA 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 Acts 2003-2006.³³²

Section 7(5)(b) ESA permits the Minister for Education and Science to differentiate between Irish and EU nationals, Swiss and EEA nationals on the one hand and nationals of other countries on the other, in relation to the provision of educational grants.

Section 14(1)(aa) ESA provides that distinctions based on nationality are allowed in relation to enforcement of the Immigration Act 2004, or in respect of other residency

³³⁰ Per Bolger, M., Bruton C., and Kimber, C. (2012) *Employment Equality Law*, Dublin, Thomson Reuters, p. 373.

³³¹ *Department of Justice, Equality and Law Reform v Kavanagh*, EDA1120, 14.06.2011, <https://www.workplacerelations.ie/en/Cases/2011/June/FDA1120.html>.

³³² Ireland, Employment Permits Act 2003, 10.04.2003, <http://www.irishstatutebook.ie/eli/2003/act/7/enacted/en/html>; Ireland, Employment Permits Act 2006, 23.06.2006, <http://www.irishstatutebook.ie/eli/2006/act/16/enacted/en/index.html>.

requirements.³³³ This exception comes within the provisions contained in the Racial Equality Directive.

Section 6(7) ESA permits differential treatment of persons on the basis of nationality in relation to housing or accommodation provided by or on behalf of the Minister.

Section 5(2)(f) ESA 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.

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 under Section 9 ESA.

In Ireland, nationality (as in citizenship) is explicitly mentioned as a protected ground in national anti-discrimination law.³³⁴

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

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

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

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

a) Benefits for married employees

In Ireland, it does not constitute unlawful discrimination in national law if an employer only provides benefits to those employees who are married or in a civil partnership.

The Marriage Act 2015 removed the bar on marriage between persons of the same sex.³³⁵ Prior to its enactment partners of the same sex could only enter into a civil partnership under the terms of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.³³⁶

Section 34(1) EEA 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. Under Section 2(1) EEA:

"member of the family", in relation to any person, means—

(a) that person's spouse [or civil partner within the meaning of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010], or

(b) a brother, sister, uncle, aunt, nephew, niece, lineal ancestor or lineal descendant of that person or that person's spouse [or civil partner within the meaning of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010].'

³³³ Ireland, Immigration Act 2004, 13.02.2004, <http://www.irishstatutebook.ie/eli/2004/act/1/enacted/en/index.html>.

³³⁴ 'Nationality' was equated with 'citizenship' in *Sabherwal v ICTS (UK) Ltd.*, DEC-S2008-037, 11.06.2008, <https://www.workplacerelations.ie/en/Cases/2008/June/DEC-S2008-037-Full-Case-Report.html>.

³³⁵ Ireland, Marriage Act 2015, 29.10.2015, <http://www.irishstatutebook.ie/eli/2015/act/35/enacted/en/html>.

³³⁶ Ireland, Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, 19.07.2010, <http://www.irishstatutebook.ie/eli/2010/act/24/enacted/en/html>.

Case law has established that it is not unlawful for an employer to provide a benefit (the payment of allowances in respect of children) to a person as a member of an employee's family which includes certain persons whilst at the same time excluding others (children of a cohabiting partner) who are not included in the definition of 'member of the family' in Section 2(1) of the Act.³³⁷

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.

However, the *Parris* case on occupational pensions illustrates that the unequal treatment of opposite-sex partners prior to the introduction of civil partnership and then marriage may have a continuing impact (see Chapter 3.2.3.1).³³⁸

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

In Ireland, there are exceptions in relation to disability and health and safety as allowed under Article 7(2) of the Employment Equality Directive.

Section 33 EEA 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 codes 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. Case law suggests that adjudicators will scrutinise dress codes for discriminatory impacts. In one case a male retail worker was dismissed for not wearing a facemask after he refused to shave off his beard. The Labour Court found that the requirement to wear a facemask or remove facial hair was not motivated by considerations of hygiene or food safety. The dress code operated in a way that restricted the complainant's freedom to determine his own appearance to a significantly greater degree than it did in the case of women. As a consequence the dismissal was discriminatory on the gender ground.³³⁹

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 the age ground.

Section 34(4) EEA permits an employer to set retirement ages (voluntary or compulsory) for employees, or categories of employees. Section 6(3)(c) EEA permits employers to offer fixed term contracts to persons over the compulsory retirement age for that employment. Both provisions are subject to the objective justification requirement described immediately below.

³³⁷ *McGrane v Department of Finance*, DEC-E2005-011, 25.02.2005, https://www.workplacerelations.ie/en/Cases/2005/February/DEC-E2005-011_Full_Case_Report.html.

³³⁸ Equality Tribunal, *Parris v Trinity College Dublin and others*, DEC-P2013-004, 16.12.2013, <https://www.workplacerelations.ie/en/Cases/2013/December/DEC-P2013-004.html>; *Parris v Trinity College Dublin and others*, [2016] EUECJ C-443/15, 24.12.2016, at 80, <http://www.bailii.org/eu/cases/EUFCJ/2016/C44315.html>.

³³⁹ Labour Court, *Dunnes Stores v O'Byrne*, EED0314, 28.10.2003, <https://www.workplacerelations.ie/en/Cases/2003/October/EED0314.html>.

A maximum age for recruitment may be set if an employer can show that there will not be a reasonable return on the investment needed to train a new recruit to the necessary standard prior to retirement age (Section 34(5) EEA).

a) Justification of direct discrimination on the ground of age

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

The Equality (Miscellaneous Provisions) Act 2015 amended the statutory provisions on retirement ages and fixed term contracts to explicitly provide that such measures must be objectively justified. In essence the 2015 Act codified principles set out in case law, which had sought to align domestic law with the requirements of Directive 2000/78.³⁴⁰ The test is now compliant with EU law.

b) Permitted differences of treatment based on age

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

Section 34(5) EEA 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. There is no case law interpreting this exception. It is availed of by the armed forces and by the police service (see further Chapter 4.7.3).

c) Fixing of ages for admission or entitlements to benefits of occupational pension schemes

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).³⁴¹

Section 34(3) EEA 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. 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

³⁴⁰ In *Donnellan v The Minister for Justice, Equality and Law Reform* [2008] IEHC 467 the High Court held that: '[N]ational measures relating to retirement ages are not excluded from consideration under [the Framework Directive]. Any discrimination with regards to age must, as put by that Directive serve a legitimate aim or purpose and the means taken to achieve that purpose be appropriate...' *Donnellan* was routinely cited by adjudicators prior to the changes effected by the 2015 Act in requiring objective justification of retirement ages. See further, *O'Mahony v Southwest Doctors On Call Ltd.*, DEC-E2014-031, 14.05.2014, <https://www.workplacerelations.ie/en/Cases/2014/May/DEC-E2014-031.html>.

³⁴¹ Section 72(1) Pensions Acts 1990-2015. Applied in e.g. *Charlton v Bus Éireann*, DEC-P2011-004, 16.11.2011, <http://www.workplacerelations.ie/en/Cases/2011/November/DEC-P2011-004-Full-Case-Report.html>; *Kelly v Iarnród Éireann*, DEC-P2013-001, 11.11.2013, <https://www.workplacerelations.ie:443/en/Cases/2013/November/DEC-P2013-001.html>; *Grey v Local Government Computer Services Board*, DEC-P2010-004, 26.08.2010, <https://www.workplacerelations.ie:443/en/Cases/2010/August/DEC-P2010-004-Full-Case-Report.html>.

pension scheme providing for pensions, gratuities or other allowances payable on retirement or death.³⁴²

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 1996³⁴³ limits the employment of young persons (young persons are over 16 but not yet 18). In general the Act prohibits the employment of children, that is, persons under 16 years of age (Section 3). However, children over the age of 14 may be employed to undertake light work: during the school holidays, provided there is a minimum three weeks break from work during the summer; part-time during the school term (over 15 years old only, and for a maximum of 8 hours in the week); as part of an approved work experience or education programme where the work is not harmful to their safety, health or development (Section 3). Where licensed by the Minister for Enterprise and Employment children may also be employed in cultural, artistic, sports or advertising work which does not interfere with their attendance at school, vocational guidance or training programmes or capacity to benefit from the instruction received.

Employers that hire children or young persons must comply with several requirements including maintaining a register of such workers, which should set out the hours worked, the rate of pay and the total amount in wages paid. Before employing a child, the employer must obtain written permission from their parent or guardian (Section 5).

A second provision aimed at protecting young workers is the Safety, Health and Welfare at Work (Children and Young Persons) Regulations 1998.³⁴⁴ 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 consideration should also be given to their 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 protects persons with caring responsibilities by prohibiting discrimination on the family status ground (Section 6(2)(c)). This covers a parent or a person in loco parentis to a person who has yet to attain the age of 18. It also applies to a parent or 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 (covering some but not all carers because of the residence requirement). All of the protections granted by EEA are provided for those with a family status as defined by the Act.

³⁴² Section 34(3A) EEA.

³⁴³ Ireland, Protection of Young Persons (Employment) Act 1996, 26.06.1996, <http://www.irishstatutebook.ie/eli/1996/act/16/enacted/en/html>.

³⁴⁴ Ireland, Safety, Health and Welfare at Work (Children and Young Persons) Regulations 1998, 18.12.1998, <http://www.irishstatutebook.ie/eli/1998/si/504/made/en/print#>.

The Carer's Leave Act 2001 entitles employees to unpaid leave to provide full time care for a dependant.³⁴⁵ The maximum leave entitlement is 104 weeks and the minimum is 13 weeks. Carer's Benefit is payable for up to 104 weeks for a carer who takes leave from work under 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.

As noted in the previous section, the Protection of Young Persons (Employment) Act 1996 in effect prohibits the employment of children aged under 14, while imposing various restrictions and conditions on the employment of children (14-15) and young persons (16-18).

Section 6(3)(a) EEA prohibits discrimination on the grounds of age for persons above 16. Under Section 6(3)(b) an employer may set a minimum recruitment age of 18.

Section 34(5) EEA 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 is no case law addressing the parameters of this exception.³⁴⁶ In practice it seems the exception is primarily used to set maximum age requirements for recruitment to posts in the police³⁴⁷ and armed forces.³⁴⁸ Age limits include the following:

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

4.7.4 Retirement

a) State pension age

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

If the person wishes to work longer, their pension can be deferred. An individual can collect a pension and still work.

The State Pension (Contributory) is paid to people from the age of 66 who made have adequate social insurance contributions. It is not means-tested and persons can derive

³⁴⁵ Ireland, Carer's Leave Act 2001, 2.07.2001, <http://www.irishstatutebook.ie/eli/2001/act/19/enacted/en/html>.

³⁴⁶ A complaint that sought to challenge the maximum age for entry to training in the police service was referred to the Equality Tribunal in 2006. The hearing did not proceed because the respondent successfully challenged the Tribunal's jurisdiction to investigate the claim on the basis that the contested provision was set down in a statutory instrument: High Court, *Minister for Justice, Equality and Law Reform and anor. v Director of the Equality Tribunal and ors.* [2009] IEHC 72, 17.02.2009, <http://www.courts.ie/Judgments.nsf/0/56ED2DFBACF3ABA28025757600581C87>. On appeal the Supreme Court sought a preliminary ruling from the CJEU. The case is discussed at Chapter 12.2.

³⁴⁷ Ireland, S.I. No. 470/2013 Garda Síochána (Admission and Appointments) Regulations 2013, <http://www.irishstatutebook.ie/eli/2013/si/470/made/en/print>.

³⁴⁸ Age limits for recruitment to the Defence Forces are also covered by Section 37(5) EEA.

income from other sources while in receipt of the pension. The pension is subject to tax. Persons aged 66 and over who do not qualify for the contributory pension are entitled to the means-tested State Pension (Non-Contributory). It is also subject to tax.³⁴⁹ The state pension age applies equally to men and women.

The qualifying age for both forms of pension will rise to 67 in 2021 and 68 in 2028.³⁵⁰

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 private employment. There is a statutory retirement age for some public servants, which is dependent on the date of recruitment. For people who joined the public service before 1 April 2004 this is generally 65. In December 2017, the Government announced that it plans to introduce legislation that will increase the compulsory retirement age to 70 for that group.³⁵¹ Public servants recruited between April 2004 and December 2012 have no compulsory retirement age. Those who took up posts since 1 January 2013 have a retirement age of 70.³⁵² Distinct compulsory retirement ages are set for members of An Garda Síochána (police), the Defence Force, firefighters and prison officers.³⁵³

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.

Section 34(4) EEA permits employers to fix different ages for the retirement of employees whether voluntary or compulsory, within the terms of the contract of employment, provided that (a) it is objectively and reasonably justified by a legitimate aim, and (b) the means of achieving that aim are appropriate and necessary.

The objective justification requirement was expressly provided for under the Equality (Miscellaneous) Provisions Act 2015.³⁵⁴ The amendment is welcome since prior to its enactment case law was inconsistent on the application of the requirement. This was in part attributable to a High Court judgment, which found that the Equality Tribunal (now the WRC) could not issue a ruling that sought to align domestic law with EU law where to do so would contravene the express terms of a national legal provision.³⁵⁵

³⁴⁹ <https://www.welfare.ie/en/Pages/a-retired-or-an-older-person.aspx>.

³⁵⁰ Section 7, Social Welfare and Pensions Act 2011, <http://www.irishstatutebook.ie/eli/2011/act/9/section/7/enacted/en/html#sec7>.

³⁵¹ See further: <http://www.per.gov.ie/en/minister-donohoe-secures-cabinet-approval-to-increase-compulsory-retirement-age-for-public-service-workers/>.

³⁵² See further, Department of Public Expenditure and Reform (2017) *Review of Barriers to Extended Participation in Public Service Workforce*, available at: <http://www.per.gov.ie/wp-content/uploads/Report-of-Review-re-Compulsory-Retirement-Age-in-Public-Service-Nov-2017.pdf>.

³⁵³ The WRC has confirmed that civilian employees within the Defence Force are not subject to the mandatory retirement age: *Devereux v Permanent Defence Force Other Ranks Representative Association*, ADJ-00007926, 17.11.2017, <https://www.workplacerelations.ie/en/Cases/2017/November/%20ADJ-00007926.html>.

³⁵⁴ <http://www.irishstatutebook.ie/eli/2015/act/43/section/10/enacted/en/html#sec10>.

³⁵⁵ High Court, *Minister for Justice, Equality and Law Reform and anor. v Director of the Equality Tribunal and ors.* [2009] IEHC 72, 17.02.2009,

A Code of Practice on Longer Working was adopted in December 2017.³⁵⁶ Reflecting the explicit requirement now set out under section 34(4) EEA, as well as decisions of the Equality Tribunal that pre-date the legislative change, the Code advises employers that any mandatory retirement age must be capable of objective justification both by the existence of a legitimate aim and evidence that the means of achieving that aim is appropriate and necessary.³⁵⁷ It sets out the following examples of what may constitute a legitimate aim:

- Intergenerational fairness (allowing younger workers to progress);
- Motivation and dynamism through the increased prospect of promotion;
- Health and Safety (generally in more safety critical occupations);³⁵⁸
- Creation of a balanced age structure in the workforce;³⁵⁹
- Personal and professional dignity (avoiding capability issues with older employees);
- or
- Succession planning.

Case law has established that reducing financial costs is not in and of itself a legitimate aim.³⁶⁰

e) Employment rights applicable to all workers irrespective of age

To be covered by the Unfair Dismissals Acts 1977-2015³⁶¹ employees must not have reached the normal retirement age for 'employees of the same employer in similar employment.'³⁶² It is, however, possible for an employee to contest their dismissal in the form of compulsory retirement under the legislation by, for example, establishing that the employer did not have a normal retirement age in place or that it was inconsistently applied.³⁶³ Employees contesting age-based discrimination (or discrimination on any other ground) may avail of their rights under EEA, which are not subject to an upper age limit.

f) Compliance of national law with CJEU case law

In Ireland, national legislation is in line with the CJEU case law on age regarding compulsory retirement.

<http://www.courts.ie/Judgments.nsf/0/56ED2DFBACF3ABA28025757600581C87>. Applied in e.g. *Goss v Ryanair*, DEC-E2015-138, December 2014,

<https://www.workplacerelations.ie/en/Cases/2015/December/DEC-E2015-138.html>. The principles set out in that High Court judgment are the subject of a preliminary reference by the Supreme Court to the CJEU (see further Chapter 12.2 of this report).

³⁵⁶ Ireland, S.I. No. 600/2017 - Industrial Relations Act 1990 (Code of Practice on Longer Working) (Declaration) Order 2017, 20.12.2017, <http://www.irishstatutebook.ie/eli/2017/si/600/made/en/print>.

³⁵⁷ The primary precedent on objective justification prior to the 2015 Act changes is: *Doyle v ESB International*, DEC-E2012-086, 27.06.2012, <http://www.equalitytribunal.ie/en/Cases/2012/June/DEC-E2012-086-Full-Case-Report.html>.

³⁵⁸ See e.g. *Transdev Light Rail Limited v Chrzanowski*, EDA1632, 29.11.2016, <https://www.workplacerelations.ie/en/Cases/2016/November/EDA1632.html>.

³⁵⁹ See e.g. *A Worker v A Healthcare Provider*, ADJ-00003418, 20.01.2017, <https://www.workplacerelations.ie/en/Cases/2017/January/ADJ-00003418.html>.

³⁶⁰ See e.g. *Devereux v Permanent Defence Force Other Ranks Representative Association*, ADJ-00007926, 17.11.2017, <https://www.workplacerelations.ie/en/Cases/2017/November/%20ADJ-00007926.html>.

³⁶¹ Ireland, Unfair Dismissals Act 1997, 06.04.1977; Ireland, Unfair Dismissals (Amendment) Act 1993, 14.07.1993. Revised text available at: http://www.lawreform.ie/fileupload/RevisedActs/WithAnnotations/HTML/EN_ACT_1977_0010.htm.

³⁶² Section 2(1)(b), Unfair Dismissals Acts 1977-2015. Under the Equality Act 2004 the automatic exclusion of employees over the statutory retirement age under the Redundancy Payments legislation (i.e. 66 years or over) from bringing an unfair dismissal claim was removed.

³⁶³ See e.g. *Flynn v Se Quirk Limited*, UD295/2015, May 2016, http://www.lrc.ie/en/Cases/2016/May/UD295_2015.html, in which the Employment Appeals Tribunal upheld a complaint of unfair dismissal based on the employee's age since the 'claimant did not have a written contact of employment and there was no written or verbal agreement or understanding between the parties as to retirement age'.

Section 34(4) EEA was amended in 2015 to provide that while employers may fix different retirement ages for employees, such a provision must be objectively and reasonably justified by a legitimate aim, and the means of achieving that aim must be appropriate and necessary.

4.7.5 Redundancy

a) Age and seniority taken into account for redundancy selection

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

Section 8(6)(c) EEA provides that employers will discriminate on any of the nine grounds, including age, if they do not afford employees the same treatment in relation to redundancies.³⁶⁴

b) Age taken into account for redundancy compensation

In Ireland, national law provides compensation for redundancy. Such compensation may be affected by the age of the worker.

The Redundancy Payments Acts 1967-2014 provide for a minimum entitlement to a redundancy payment for employees who have a set period of service with the employer.³⁶⁵ In order to qualify for a payment, employees must be aged over 16 and have worked continuously for the employer for at least 104 weeks over the age of 16. There is no upper age limit.

Employers may agree a redundancy payment above the statutory minimum, and in such circumstances, compensation may be affected by the age of the worker. Section 34(3)(d) EEA provides: 'In an occupational benefits scheme it shall not constitute discrimination on the age ground for an employer... to provide different rates of severance payment for different employees or groups or categories of employees, being rates based on or taking into account the period between the age of an employee on leaving the employment and his or her compulsory retirement age, provided that that does not constitute discrimination on the gender ground.' Occupational benefits schemes include benefits payable on redundancy.

The Labour Court interpreted the exception in a 2013 case.³⁶⁶ The complainants had been employed for periods ranging from 16-25 years and were offered redundancy terms that provided for a payment of five weeks pay per year of service in addition to statutory redundancy payments. However, employees who were close to retirement age would receive either the terms of the agreed package or the amount of salary that they would have earned had they remained in employment until the normal retirement age of 65, whichever was the lesser. Each complainant would receive less than the amount paid to younger workers. According to the Court, Directive 2000/78 provides that Member States, as opposed to individual employers, can provide for differences in treatment on grounds of age where those differences can be objectively justified by a legitimate aim. The Court found that the Oireachtas had made express provision for differences in treatment based on age in respect of severance payments through Section 34(3)(d). It stated that 'the

³⁶⁴ Applied in e.g. *O'Farrell v Mercury Engineering*, DEC-E2012-096, 24.07.2012, <https://www.workplacerelations.ie/en/Cases/2012/July/DEC-E2012-096-Full-Case-Report.html>. Selection for redundancy on the basis of age may also constitute unfair dismissal under Section 6(3) of the Unfair Dismissals Acts 1997-2015.

³⁶⁵ Ireland, Redundancy Payment Act 1967. 18.12.1967, <http://www.irishstatutebook.ie/eli/1967/act/21/enacted/en/html>. A revised text is available here: <http://revisedacts.lawreform.ie/eli/1967/act/21/revised/en/html>.

³⁶⁶ *Hospira v Roper*, EDA 1315, 29.04.2013, <https://www.workplacerelations.ie/en/Cases/2013/April/EDA1315.html>.

underlying rationale for this provision is that workers close to retirement are in a substantially different position than those who have longer periods in which they could have expected to remain in the active labour force and that, as a matter of social and labour market policy, this difference can be legitimately reflected in constructing redundancy packages... Against this backdrop, it appears that the Oireachtas considered it reasonably and objectively justifiable, within the meaning of Article 6(1) of the Directive, to provide for the differences in treatment allowed for by s.34(3)(d) of the Act.’ The Labour Court found that the method of calculating the redundancy packages was permitted under the EEA. Its decision was distinguished in a 2017 case that upheld a complaint of indirect discrimination on the age ground with respect to redundancy compensation.³⁶⁷ The impugned provision (a cap limiting payment to 1.25 times an employee’s salary) was not saved by section 34(3)(d) since it was not directly linked to proximity to retirement. Application of the cap resulted in the two complainants receiving proportionately less compensation per year of service compared with younger workers (years of service being inextricably linked with age). The WRC found that the established disadvantage was not objectively justified. While the respondent’s aim was legitimate, ensuring an equitable distribution amongst the respondent’s workforce, it did not provide any evidence at the time of applying the provision that it had considered whether there were other less discriminatory ways of achieving the aim.

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.

Sections 16 (5) and (6) EEA state that an employer is not required to recruit, retain or promote a person if they are 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.

4.9 Any other exceptions

In Ireland, other exceptions to the prohibition of discrimination provided in national law are the following:

Under Section 36 EEA 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;³⁶⁸ or persons with one year’s continuous legal residence in the state, and a total legal residence amounting to four years in the preceding eight years (the asylum process does not count towards the qualifying five year period).³⁶⁹ It is also permissible under the Act to require Irish-language proficiency from teachers in both primary and post primary schools. Finally, this section

³⁶⁷ 2 *Named Complainants v A Catering Company*, DEC-E2017-054, 18.07.2017, <https://www.workplacerelations.ie/en/Cases/2017/July/DEC-E2017-054.html>.

³⁶⁸ Ireland, Refugee Act 1996, 26.06.1996, <http://www.irishstatutebook.ie/eli/1996/act/17/enacted/en/html>.

³⁶⁹ Ireland, S.I. No. 470/2013 Garda Síochána (Admission and Appointments) Regulations 2013, <http://www.irishstatutebook.ie/eli/2013/si/470/made/en/print>.

permits the imposition of certain educational requirements for certain posts, professions, or vocations.

Section 35(1) EEA 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 contravene the principle of equal pay where disabled employees are concerned.

ESA's principal and most problematic exception is contained in Section 14(1)(a) 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.³⁷⁰
- Difference in the treatment of persons on the religion ground in relation to goods or services provided for a religious purpose.³⁷¹
- 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.³⁷²
- Having an age requirement for persons to be either an adoptive or foster parent.³⁷³
- 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.³⁷⁴

Section 46 ESA 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.

Section 7(3)(e) ESA provides that it will not amount to age discrimination to allocate places at third level institutes for mature students (over 23).

Section 16 ESA 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.³⁷⁵

Section 15(1) ESA stipulates 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

³⁷⁰ Section 5(2)(d) ESA.

³⁷¹ Section 5(2)(e) ESA.

³⁷² Section 5(2)(f) ESA.

³⁷³ Section 5(2)(k) ESA.

³⁷⁴ Section 5(2)(j) ESA.

³⁷⁵ Section 16(2)(a) and (b) ESA.

vicinity of the place in which the goods or services or the premises or accommodation are located.³⁷⁶

Actions taken in good faith by owners of licensed premises for the purpose of complying with the Licensing Acts do not constitute discrimination (Section 15(2) ESA). Case law establishes that 'in good faith' means that the actions must be done honestly and without prejudice.³⁷⁷ 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.'³⁷⁸ Any action taken should be for the sole purpose of ensuring compliance with the provisions of the Licensing Acts.³⁷⁹

³⁷⁶ Applied in e.g. *McDonagh and Stokes v City Cinemas Limited*, DEC-S2017-024, 21.07.2017, <https://www.workplacerelations.ie/en/Cases/2017/July/DEC-S2017-024.html>: denial of access to cinema was not due to complainants' membership of the Traveller community but resulted from 'their threatening and abusive behaviour on the night previous to the incident'.

³⁷⁷ Equality Tribunal, *Delaney v The Harp Bar*, DEC-S2002-53/56, 31.05.2002, <https://www.workplacerelations.ie/en/Cases/2002/May/DEC-S2002-053-056.html>.

³⁷⁸ Equality Tribunal, *Conroy v Costello*, DEC-S2001-014, November 2001, <https://www.workplacerelations.ie/en/Cases/2001/November/DEC-S2001-014.html>.

³⁷⁹ Equality Tribunal, *Mongan and Ors v The Waterside Hotel*, DEC-S2003-008/014, 25.02.2003, https://www.workplacerelations.ie/en/Cases/2003/February/DEC-S2003-008-014_Full_Case_Report.html.

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 permitted in national law.

Section 33 EEA 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.

Several ESA provisions permit positive action. Section 14(1)(b) ESA provides that nothing in the Act shall prohibit preferential treatment or the taking of positive measures that 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; or
- 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.

A compensation scheme for disabled taxi drivers came within the terms of Section 14(1)(b) since it was based on evidence that such persons experienced particular financial hardship when the industry was liberalised.³⁸⁰

Section 5(2)(h) allows differences in treatment in relation to services that are provided for the principal purpose of promoting the special interests of people in a 'category of persons'. Any difference in treatment of people in that category must be reasonably necessary to promote their special interests and be undertaken in a bona fide manner. The term 'category' is not defined, but seems to be used throughout ESA to denote a sub-group of people falling under one of the discriminatory grounds e.g. persons with a particular disability or of a specific nationality or age. The Equality Tribunal has noted that the meaning of Section 5(2)(h) is ambiguous and commented: 'On the basis that the treatment must flow from the promotion of the special interests of persons in the category...this subsection of the Equal Status Act, 2000 will normally, if not always, relate to the justification of more favourable treatment of a particular category of persons'.³⁸¹ In *Keane v World Travel Centre*³⁸² a company that offered reduced fares on flights only to Filipino nationals could not justify its policy under Section 5(2)(h). World Travel Centre maintained that it was engaging in 'positive discrimination'. The Equality Officer disagreed and found that it did not meet any of 'the strict and comprehensive criteria required by Section 5(2)(h)' (5.5). The sole purpose of the special offer was to gain a commercial advantage over competitors and not to advance the special interests of the Filipino community.

Section 6(6) ESA 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).

³⁸⁰ *McCall v Area Development Management Ltd.*, DEC-S2007-058, <https://www.workplacerelations.ie/en/Cases/2007/July/DEC-S2007-058-Full-Case-Report.html>.

³⁸¹ *Shanahan v One Pico Restaurant*, DEC-S2003-056, 30.06.2003, at 7.2, <https://www.workplacerelations.ie/en/Cases/2003/June/DEC-S2003-056-Full-Case-Report.html>.

³⁸² Equality Tribunal, DEC-S2011-035, 15.08.2011, <https://www.workplacerelations.ie/en/Cases/2011/August/DEC-S2011-035-Full-Case-Report.html>.

Section 16(1) ESA 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

A limited range of positive action measures is in place for Ireland's migrant community, which are underpinned by the *Migrant Integration Strategy*, which runs from 2017 to 2020.³⁸³ These include training in English for work, interview skills, living and working in Ireland and information technology, under the Employment of People from Immigrant Communities (EPIC) programme.³⁸⁴ English language tuition is provided to migrant children at school. In 2017, the system for allocating additional resources for 'English as an Additional Language' (EAL) students was reformed.³⁸⁵ The government acknowledges that improved data is required to assess the effectiveness of EAL provision and has undertaken to monitor its impact.³⁸⁶

Quotas

The attainment of a 3% quota for the employment of people with disabilities in the civil and public service is a long-standing government policy. The National Disability Authority monitors the implementation of this process but there are no sanctions for not achieving it. The target was met in 2011 and has been slightly exceeded since then.³⁸⁷ The Government has undertaken to progressively increase the statutory target towards 6% by 2024.³⁸⁸

Broad social policy measures

The Department of Social Protection administers an extensive number of schemes that are aimed at addressing economic disadvantage linked to the discriminatory grounds, such as household allowances for older people³⁸⁹ and free travel passes.³⁹⁰

Preferential treatment narrowly tailored

The Higher Education Authority³⁹¹ oversees a range of measures that provide support to distinct categories of third level students covered by the discriminatory grounds including mature students and students with disabilities. Travellers are the only ethnic minority

³⁸³ Department of Justice and Equality (2017) *The Migrant Integration Strategy – A Blueprint for the Future*, available at: http://www.justice.ie/en/JELR/Migrant_Integration_Strategy_English.pdf/Files/Migrant_Integration_Strategy_English.pdf.

³⁸⁴ See further: <https://www.bitc.ie/business-action-programmes/business-action-on-employment/are-you-a-jobseeker/>

³⁸⁵ Department of Education and Skills (2017) *Circular No 0014/2017: Special Education Teaching Allocation*, https://www.education.ie/en/Circulars-and-Forms/Active-Circulars/cl0014_2017.pdf; Department of Education and Skills (2017) *Circular No 0013/2017: Circular to the Management Authorities of all Mainstream Primary Schools, Special Education Teaching Allocation*, https://www.education.ie/en/Circulars-and-Forms/Active-Circulars/cl0013_2017.pdf.

³⁸⁶ Department of Education and Skills (2017) *DEIS Plan 2017: Delivering Equality of Opportunity in Schools*, p.26, <https://www.education.ie/en/Publications/Policy-Reports/DEIS-Plan-2017.pdf>.

³⁸⁷ See further: <http://nda.ie/Publications/Employment/Employment-of-people-with-disabilities-in-the-public-service/Reports-on-compliance-with-public-sector-jobs-target/>.

³⁸⁸ Government of Ireland (2015) *Comprehensive Employment Strategy for People with Disabilities 2015-2024*, <http://www.justice.ie/en/JELR/Comprehensive%20Employment%20Strategy%20for%20People%20with%20Disabilities%20-%20FINAL.pdf/Files/Comprehensive%20Employment%20Strategy%20for%20People%20with%20Disabilities%20-%20FINAL.pdf>.

³⁸⁹ <https://www.welfare.ie/en/Pages/Household-Benefits.aspx>.

³⁹⁰ https://www.welfare.ie/en/Pages/204_Free-Travel.aspx.

³⁹¹ <http://www.heai.ie/>.

group targeted under the main policy on equality in higher education, the *National Plan for Equity of Access to Higher Education 2015-2019*.³⁹² The Plan does not address migrants.

³⁹² See further, Higher Education Authority (2015) *National Plan for Equity of Access to Higher Education 2015–2019*, available at: http://hea.ie/assets/uploads/2017/04/national_plan_for_equity_of_access_to_higher_education_2015-2019_single_page_version_01.pdf.

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:

The Workplace Relations Commission (WRC) is the primary first instance forum for complaints under EEA, ESA and the Pensions Acts.³⁹³ It operates as a quasi-judicial body. The Director of the WRC assigns an adjudication officer to investigate complaints received. Complainants may represent themselves, costs may not be awarded against either party, and the procedure is informal. Provided both parties consent, complaints may be referred instead to the WRC's mediation service.³⁹⁴ Mediation is held in private and the agreement is not published.

An appeal lies to the Labour Court for EEA and Pensions Acts cases, while ESA appeals are heard by the Circuit Court. Appeals entail a re-hearing of all matters of fact and law.³⁹⁵ The Labour Court is a quasi-judicial statutory tribunal, which following the enactment of Workplace Relations Act 2015 became the only appellate tribunal in employment rights disputes. The Circuit Court is a court of local and limited jurisdiction.

Gender ground complaints under EEA and ESA may be referred instead directly to the Circuit Court.³⁹⁶

In relation to access to goods and services, the Intoxicating Liquor Act 2003 transferred jurisdiction for cases alleging discrimination '...on or at the point of entry to, licensed premises' to the District Court, a court of local and limited jurisdiction with jurisdiction over a range of criminal and civil matters.³⁹⁷

Determinations of the WRC and Labour Court, as well as mediated settlements, are legally binding.³⁹⁸ In the event of non-compliance, the complainant may bring enforcement proceedings.³⁹⁹ IHREC may provide assistance in the enforcement procedures.⁴⁰⁰

The procedures apply to employment in the private and public sectors, subject to two exceptions. Members of the Defence Forces must address their complaint first to the authorities before they can have access to the WRC.⁴⁰¹ Complaints of discrimination in relation to the recruitment processes for certain public sector positions must be referred in the first instance to internal complaints procedures.⁴⁰²

Discrimination claims are brought before the WRC by way of application using online forms.⁴⁰³ No fees are payable and hearings are conducted in private.⁴⁰⁴ The Director of the

³⁹³ The WRC assumed the functions of the Equality Tribunal on 01.10.2015 under the terms of the Workplace Relations Act 2015: Ireland, Workplace Relations Act 2015, 20.05.2015, <http://www.irishstatutebook.ie/eli/2015/act/16/enacted/en/print.html>.

³⁹⁴ Section 39 Workplace Relations Act 2015; Section 78 EEA; Section 24 ESA.

³⁹⁵ Affirmed by the Labour Court in *Public Appointments Service v Flynn*, EDA1637, 07.12.2016, <https://www.workplacerelations.ie/en/Cases/2016/December/EDA1637.html>.

³⁹⁶ Section 21(1A) ESA, Section 77(3) EEA.

³⁹⁷ Ireland, Intoxicating Liquor Act 2003, 14.07.2003, <http://www.irishstatutebook.ie/eli/2003/act/31/section/19/enacted/en/html#sec19>.

³⁹⁸ Section 91(2) EEA.

³⁹⁹ Section 31 ESA; Section 91 EEA.

⁴⁰⁰ Section 40 IHRECA.

⁴⁰¹ Sections 77(9)-(10) and 104 EEA.

⁴⁰² Section 77(7)-(8) EEA.

⁴⁰³ http://www.workplacerelations.ie/en/Complaints_Disputes/Refer_a_Dispute_Make_a_Complaint/.

⁴⁰⁴ Section 79(2) EEA, Section 25(2) ESA.

WRC is required to publish decisions under ESA and EEA 'on the internet in such form and in such manner' as they consider appropriate.⁴⁰⁵ Pursuant to that requirement, the decisions of both the WRC and Labour Court are available for public inspection as they are published on the Workplace Relations Commission website.⁴⁰⁶ In many instances the parties' identities are concealed in published decisions. This practice stems from the Director's discretion to publish decisions in such form and manner as they consider appropriate, which discretion is delegated to the individual adjudication officers that hear complaints.⁴⁰⁷ It is at the officer's discretion whether or to not anonymise one or both parties in a case and it should be open to the parties to make representations on the matter to the WRC.⁴⁰⁸ Indeed, an *ex tempore* judgment of the High Court suggests that the WRC is *obliged* to elicit the views of the parties.⁴⁰⁹ The discretion to anonymise is generally exercised in sexual harassment complaints and many of those concerning the disability and sexual orientation grounds, unless the complainant requests otherwise.⁴¹⁰ Where the complainant is a child, the names of the parties to the case are also frequently recorded by the use of random initials. Anonymity has been applied in other sensitive cases, such as those involving criminal matters.⁴¹¹ Outside of those situations, however, the precise rationale for concealing names is unclear since it is often not set out in WRC decisions. IHREC is of the view that, where an adjudication officer has found that a respondent has engaged in discrimination, the principle of effectiveness will normally require that the decision of the adjudication officer be published in a manner that identifies the employer or service provider concerned.⁴¹² It remains to be seen whether EU law principles will affect decisions in future cases.

⁴⁰⁵ Section 89(1) EEA; Section 30(1) ESA.

⁴⁰⁶ https://www.workplacerelations.ie/en/Decisions_Determinations/.

⁴⁰⁷ As discussed in Chapter 7.f.iii of this report, IHREC issued an information note about this issue in April 2017 that led to discontinuance of a routine practice of anonymising the names of parties to WRC equality law proceedings. The WRC issued a guide to its procedures in October 2015, which specified that all parties and witnesses would be anonymised: Workplace Relations Commission (2015) *Procedures in the Investigation and Adjudication of Employment and Equality Complaints*, available at: http://www.workplacerelations.ie/en/Publications_Forms/Procedures_Employment_and_Equality_Complaint_s.pdf. Following IHREC's intervention a further note was published in August 2017, which states that 'parties will be named on the version uploaded to the website unless the Adjudication Officer decides there is a reason to anonymise the parties': WRC (2017) *Guidance Note for a WRC Adjudication Hearing*, available at: http://www.workplacerelations.ie/en/Publications_Forms/Guides_Booklets/Guidance_Note_for_a_WRC_Adjudication_Hearing.pdf.

⁴⁰⁸ It appears that for a time officers were directed to exercise their discretion without eliciting the parties' views but that this practice changed following the intervention of IHREC. In a 2017 case the adjudication officer stated that: 'As this case was heard before the most recent WRC direction on naming parties in Employment Equality Cases, I have used my discretion and anonymised the parties for the purposes of this decision as I did not have an opportunity to canvas their views on this recent development at the time of the hearing.': *A Prospective Employee v A Company*, ADJ-00004761, 12.06.2017, <https://www.workplacerelations.ie/en/Cases/2017/June/ADJ-00004761.html>. The applicable 'Frequently Asked Questions' page of the WRC's website states that 'in certain sensitive cases, the parties may ask to have their names withheld': https://www.workplacerelations.ie/en/Frequently_Asked_Questions/Employment_Equality_and_Equal_Statu_s/. The Equality Tribunal denied the complainant's request for anonymity in *Lavery v Health Service Executive (Mid-Western Region)*, DEC-E2008-046, 01.09.2008, <https://www.workplacerelations.ie/en/Cases/2008/September/DEC-E2008-046-Full-Case-Report.html>.

⁴⁰⁹ The text of the High Court judgment in question is not available: *Sheehan v Director of Equality Tribunal*, unreported, High Court, *ex tempore*, Kearns P., 11.06.2012. According to the authors of the main book on EEA, the Court 'granted a declaration that the Equality Tribunal is not entitled to unilaterally censor the names of parties and witnesses in a complaint under the Employment Equality Acts': Bolger, M., Bruton C., and Kimber, C. (2012) *Employment Equality Law*, Dublin, Thomson Reuters, p. 750. The High Court judgment is referred to in a few 2013 decisions of the Equality Tribunal; see e.g. *Nayaranasami v Sheldon Park Hotel*, DEC-E2013-199, 30.12.2013, <https://www.workplacerelations.ie/en/Cases/2013/December/DEC-E2013-199.html>.

⁴¹⁰ See e.g. *A Sales Representative v A Books Wholesaler*, DEC-E2016-131, 20.09.2016, <https://www.workplacerelations.ie/en/Cases/2016/September/DEC-E2016-131.html>. The adjudication officer states, at 1.1: 'It is the policy of the Equality Tribunal (now Workplace Relations Commission) to anonymise decisions in the case of disability unless specifically requested by the complainant otherwise.'

⁴¹¹ See e.g. *A Nigerian National v A Financial Institution*, DEC-S2005-114, 19.08.2005, <https://www.workplacerelations.ie/en/Cases/2005/August/DEC-S2005-114-Full-Case-Report.html>.

⁴¹² Logan, E. (2017) 'Restrictions on identifying the parties involved in disputes do not apply to decisions under the equality legislation', *Law Society of Ireland Gazette*, 111(4), at p.27, available at: <https://www.lawsociety.ie/globalassets/documents/gazette/gazette-2017/may-2017-gazette.pdf>.

Both District Court and Circuit Court cases are heard in public; it is exceptionally rare for decisions of either court to be published.

Further avenues of redress for discrimination are provided for under other legislative provisions. For instance, complaints of dismissal due to discrimination may instead be brought under the Unfair Dismissals Acts 1977-2015. Under those Acts the dismissal of an employee is deemed to be an unfair dismissal if it results wholly or mainly from the employee's age, race, colour or sexual orientation, religious or political opinions, or membership of the Travelling community.⁴¹³ The WRC is also the first instance forum under that legislation.

Discrimination encountered in the course of accessing many public services can be directed to the Office of the Ombudsman,⁴¹⁴ which oversees an administrative process that examines complaints about decisions, refusals to take action and procedures of public bodies.⁴¹⁵ Bodies within the remit of the Ombudsman include government departments and offices, local authorities, the Health Service Executive (HSE), voluntary hospitals and voluntary agencies that provide services on behalf of the HSE, and third level colleges and universities. The Ombudsman can examine a complaint about an action taken by one of those bodies if someone has been adversely affected and the action was: taken without proper authority; taken on irrelevant grounds; the result of negligence or carelessness; based on incorrect or incomplete information; improperly discriminatory; based on an undesirable administrative practice; otherwise contrary to fair or sound administration.⁴¹⁶ The complaints process is conciliatory in nature and no fees are payable. Many complaints are resolved informally and do result in a written report; an investigation report is drawn up and published in respect of some complaints that are especially complex or have broad implications for public policy. Following an investigation, the Ombudsman may make a general recommendation to the body concerned. Recommendations issued are not legally binding, however. Where it appears to the Ombudsman that the response to a recommendation is not satisfactory they may make a special report on the matter to the Oireachtas.⁴¹⁷ Two such reports were issued on compliance with provisions of ESA.⁴¹⁸

b) Barriers and other deterrents faced by litigants seeking redress

EEA, ESA and the Pensions Acts impose a restrictive six-month time limit for bringing complaints to the appropriate body. Additionally 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 seek redress under ESA.⁴¹⁹ This may present difficulties for complainants.⁴²⁰ For example, a complainant who has been the victim of harassment may

⁴¹³ Section 6(2) Unfair Dismissals Acts 1977-2015.

⁴¹⁴ Ireland, Ombudsman Act 1980, 14.07.1980, <http://www.irishstatutebook.ie/eli/1980/act/26/enacted/en/html>.

⁴¹⁵ See generally: <http://ombudsman.gov.ie/en/>.

⁴¹⁶ Section 4(2), Ombudsman Act 1980.

⁴¹⁷ Section 6(7), Ombudsman Act 1980.

⁴¹⁸ The reports can be viewed here: <http://www.ombudsman.ie/en/publications/investigation-reports/government-departments-other-public-bodies/motorised-transport-grant-report-to-dail-and-seanad/>; <http://www.ombudsman.ie/en/Publications/Investigation-Reports/government-departments-other-public-bodies/Too-Old-to-be-Equal---A-Follow-up/>.

⁴¹⁹ Section 21(2) ESA.

⁴²⁰ A significant number of complaints are dismissed annually at the hearing stage for failure to comply with the notification requirement. With respect to 2017 see, for example, *2 Complainants v A Limerick Spar Shop*, DEC-S2017-027, 11.08.2017, <https://www.workplacerelations.ie/en/Cases/2017/August/DEC-S2017-027.html>; *Sfar v Abbey Court Hotel*, DEC-S2017-029, 15.09.2017, <https://www.workplacerelations.ie/en/Cases/2017/September/DEC-S2017-029.html>; *Applicant D v A Property Letting Company*, ADJ-00005541, 27.07.2017, <https://www.workplacerelations.ie/en/Cases/2017/July/ADJ-00005541.html>; *Applicant B v A Property Letting Company*, ADJ-00005546, 27.07.2017, <https://www.workplacerelations.ie/en/Cases/2017/July/ADJ-00005546.html>; *A Reader v A Local Newspaper*, ADJ-00006129, 11.04.2017, <https://www.workplacerelations.ie/en/Cases/2017/July/%20ADJ-00006129.html>; *A Passenger v An Airline*, ADJ-00004893, 05.02.2017, <https://www.workplacerelations.ie/en/Cases/2017/July/%20ADJ->

be concerned about commencing his/her complaint with an initial notice to the alleged perpetrator. 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 notification period may be extended for a further two months, if the WRC is satisfied that reasonable cause prevented the complainant from sending the notification within the normal time period. 'Exceptionally' the notification requirement may be dis-applied.⁴²¹

Complaints of discrimination occurring '...on or at the point of entry to, licensed premises' must be brought to the District Court instead of the WRC. The major impact of this amendment is the cost implications for complainants as well as the complexity of legal proceedings.⁴²² Under the WRC system it is possible to represent oneself and costs cannot be awarded against either complainant or respondent; this is not the case at the District Court. Moreover, it generates confusion in practice; several complaints have been, and continue to be, lodged before the incorrect forum.⁴²³ Consequently, the number of cases taken against such service providers has dropped significantly. The European Commission against Racism and Intolerance notes 'that in particular members of the Traveller Community are often affected by discrimination in the provision of goods and services in licensed premises.'⁴²⁴

While there is no potential for awards of costs against either party in the WRC, this is not the position with regard to appeals in the District Court,⁴²⁵ or the Circuit Court.⁴²⁶

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

There is no provision under the legislation for a body (other than IHREC) to instigate complaints, which limits 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.

The Equality Tribunal, which operated as the primary forum of redress prior to the establishment of the WRC on 1 October 2015, provided extensive details of the cases it determined in its annual reports. Its annual legal review provided figures on complaints received and decisions reached under each ground, a summary of every decision issued and also assessed patterns in case law. The WRC's annual report, which covers a much broader mandate, does not supply such detailed information and analysis.⁴²⁷ It provides

[00004893.html](https://www.workplacerelations.ie/en/Cases/2017/January/ADJ-00001493.html); *A Complainant v A Public House*, ADJ-00001493, 27.02.2017, <https://www.workplacerelations.ie/en/Cases/2017/January/ADJ-00001493.html>; *A Member of the Travelling Community v A Hotel*, ADJ-00001811, 14.06.2017, <https://www.workplacerelations.ie/en/Cases/2017/June/%20ADJ-00001811.html>. No data is available about complaints that were not pursued when prospective complainants became aware of the notification requirement.

⁴²¹ Section 21(3) ESA.

⁴²² Fennelly, D. (2012) *Selected Issues in Irish Equality Case Law 2008 – 2011*, at pp. 106-7, available at: <https://www.ihrec.ie/download/pdf/20150602161702.pdf>.

⁴²³ See further Chapter 7(f)(iii) of this report.

⁴²⁴ European Commission against Racism and Intolerance (ECRI) (2016) *ECRI conclusions on the implementation of the recommendations in respect of Ireland subject to interim follow-up (adopted on 11.12.2015)*, CRI (2016)4, at p. 5, available at: <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Ireland/IRL-IFU-IV-2016-004-ENG.pdf>.

⁴²⁵ Equal Status cases under the Intoxicating Liquor Act, 2003 go to the District Court at first instance.

⁴²⁶ Appeals from the Labour Court, gender ground cases and enforcement orders may be heard in the Circuit Court.

⁴²⁷ Workplace Relations Commission (2017) *Annual Report 2016*, available at: https://www.workplacerelations.ie/en/Publications_Forms/WRC_Annual_Report_2016.pdf; Workplace Relations Commission (2016) *Annual Report 2015*, available at: https://www.workplacerelations.ie/en/Publications_Forms/WRC-Annual-Report-2015-English.pdf.

overall figures for the number of 'Complaint Applications' it receives (the cases referred to it) and further breaks this down into the number of 'Specific Complaints' lodged (separate legislative breaches asserted within each complaint application). In 2016 there were 131 ESA Complaint Applications, comprising 658 Specific Complaints. The grounds specified in the ESA Specific Complaints were: Age 13; Civil Status 12; Disability 75; Family Status 15; Gender 20; Membership of the Traveller Community 416; Race 462; Religion 25; Sexual Orientation 7; Housing Assistance 43. 340 Complaint Applications, comprising 691 Specific Complaints were referred to the WRC in 2016. The grounds indicated in the 691 Specific Complaints under EEA were: Age 161; Civil Status 52; Disability 204; Family Status 114; Gender 353; Membership of the Traveller Community 7; Race 189; Religion 9; Sexual Orientation 24. In 2016, there were two Complaint Applications comprising nine Specific Complaints under the Pensions Acts. The grounds specified were: Age 5; Civil Status 0; Disability 4; Family Status 1; Gender 3; Membership of the Traveller Community 1; Race 1; Religion 0; Sexual Orientation 3. Of the 14 004 Specific Complaints received by the WRC across its entire mandate, 1 537 (11 %) concerned anti-discrimination law. A total of 1 232 decisions were issued across the WRC's remit in 2016; data is not provided on the proportion that pertain to anti-discrimination law. The Labour Court provides a breakdown of the number of EEA appeals heard each year; these were classified according to ground in 2015 but not in the 2016 data.⁴²⁸ Annual reports are published on the WRC's website and so are available to the public.

d) Registration of discrimination cases by national courts

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

Many judgments of the superior courts (the High Court, the Court of Appeal and the Supreme Court) are published, but are not always. Discrimination cases in the civil courts are not registered as such nor are data generally available to the public.

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

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

In Ireland, associations, organisations, and trade unions are entitled to act on behalf of victims of discrimination, but only in the Workplace Relations Commission (WRC) and Labour Court.

Organisations, trade unions or associations may act on behalf of a claimant before the WRC and Labour Court (as may any person authorised by the complainant),⁴²⁹ but are not entitled to do so in civil courts and may do so only at discretion of those civil courts.⁴³⁰

b) Engaging in support of victims of discrimination

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

National law does not distinguish between actions of associations on behalf and in support of victims of discrimination.

c) Actio popularis

⁴²⁸ Labour Court (2017) *Annual Report 2016*, pp. 12-14, 22, available at: http://www.workplacerelations.ie/en/Publications_Forms/Labour_Court_Annual_Report_2016_English.pdf; Labour Court (2016) *Annual Report 2015*, available at: https://www.workplacerelations.ie/en/Publications_Forms/Labour_Court_Annual_Report_2015.pdf.

⁴²⁹ Section 77 (11) EEA and Section 25A ESA.

⁴³⁰ Court rules: <http://www.courts.ie/rules.nsf/LookupPageLink/index?OpenDocument>.

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*).

Civil society organisation such as the Equality and Rights Alliance, have long sought the extension of standing under EEA and ESA to NGOs and trade unions.⁴³¹ The matter has not been considered by parliament, however.

In the fields of constitutional law and judicial review courts have developed the general principles on legal standing significantly over the past decades. However, just one case to date recognises an organisation's right to bring an *actio popularis*.⁴³² In *Digital Rights Ireland Ltd. v Minister for Communications*⁴³³ the High Court held that an NGO, which was incorporated as a limited company, had locus standi to assert its own rights and also to bring an *actio popularis* in challenging legislation on data retention that could potentially affect the entire population. Standing was granted on the basis that *inter alia* 'it would be an effective way to bring the action – individuals owners of mobile phones would be unlikely to litigate the matter'.

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.

When the WRC receives multiple complaints under either EEA or ESA arising from the same event it may convene a meeting with the parties prior to the hearing with a view to investigating the claims as a single grouped case.⁴³⁴ This practice is adopted as a matter of administrative convenience and is not a class action.⁴³⁵ In a grouped case each person involved must refer a complaint and a decision is issued in respect of every complaint.⁴³⁶

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.

Section 85(A)(1) EEA 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.' An identical provision governs cases under the ESA (Section 38(A)(1)).

This also applies to cases brought by IHREC (Section 85(A)(3) EEA; Section 38(A)(2) ESA).

The EEA provision expressly includes proceedings relating to indirect discrimination, victimisation and harassment, but not reasonable accommodation. However, in practice

⁴³¹ See e.g. Crowley, N. (2011) *A Roadmap to a Strengthened Equality and Human Rights Infrastructure in Ireland*, Dublin, Equality and Rights Alliance, available at: <http://www.eracampaign.org/uploads/ERA%20Roadmap%202011.pdf>.

⁴³² See further, Whyte, G. (2015) *Social Inclusion and the Legal System: Public Interest Law in Ireland*, Dublin, Institute of Public Administration, pp. 121-152.

⁴³³ [2010] IEHC 221, 05.05.2010, at 91.

⁴³⁴ See, for example, *McCann, Collins and 31 others v Eircom Ltd.*, DEC-S2003-076/108, https://www.workplacerelations.ie/en/Cases/2003/September/DEC-S2003-076-108_Full_Case_Report.html; *Johnson and sixty-five others v Tesco Ireland Limited*, DEC-E2001-024, 10.08.2001, <https://www.workplacerelations.ie/en/Cases/2001/August/DEC-E2001-024.html>.

⁴³⁵ The High Court ruled out use of class actions in the employment case of *Verbatim Ltd. v Duffy and others* [1994] ELR 159.

⁴³⁶ See e.g. *58 Named Complainants v Goode Concrete Limited*, DEC-E2008-020, 30.04.2008, <http://www.lrc.ie/en/Cases/2008/April/DEC-E2008-020-Full-Case-Report.html>.

adjudicators shift the burden of proof once a prima facie case has been established.⁴³⁷

The Labour Court has held that a requirement to be competent in a particular language is prima facie indirectly discriminatory on grounds of race as it is likely to place persons whose native language is other than the required language at a disadvantage relative to persons whose native language is the required language.⁴³⁸

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

In Ireland, there are legal measures of protection against victimisation.

Section 14 EEA prohibits victimisation, which is deemed to occur where a person is dismissed or any other adverse treatment occurs because they have involved themselves in any of the following activities: made a complaint of discrimination, been involved in proceedings by a complainant, been an employee having represented or otherwise supported a complainant, been a comparator in an equality action, been a witness under either Equality Acts, having opposed by lawful means a discriminatory act, or stated an intention to take any of the preceding activities.⁴³⁹ In two instances victimisation may amount to a criminal offence: where a person procures another to do anything that could be considered victimisation or discrimination⁴⁴⁰ or where the victimisation amounts to dismissal.⁴⁴¹ The form of redress available is the same as that for discrimination claims, being a compensation award or an order that the employer take a specified course of action.⁴⁴² Adjudicators consistently reiterate that victimisation is a serious matter and successful cases tend to result in significant compensation awards.⁴⁴³

Complaints of victimisation must be brought within six months of the most recent occurrence of the act.⁴⁴⁴ This may be extended to a maximum of twelve months in certain circumstances.⁴⁴⁵

Victimisation is also prohibited under the ESA. As with the EEA, protection extends to people other than the complainant. Section 3(2)(j) applies 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.⁴⁴⁶

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

⁴³⁷ See e.g. Labour Court, *Public Appointments Service v Flynn*, EDA1637, 07.12.2016, <https://www.workplacerelations.ie/en/Cases/2016/December/EDA1637.html>.

⁴³⁸ *Noonan Services Ltd. v A Worker*, EDA1126, 29.07.2011, <https://www.workplacerelations.ie/en/Cases/2011/July/EDA1126.html>; *Aer Lingus v Kacmarek, Turczyk and Wilczkiew*, EDA1712, 08.05.2017, <https://www.workplacerelations.ie/en/Cases/2017/May/EDA1712.html>.

⁴³⁹ Section 74(2) EEA.

⁴⁴⁰ Section 14 EEA.

⁴⁴¹ Section 98 EEA.

⁴⁴² Section 82 EEA.

⁴⁴³ The claimant was awarded two years' salary (EUR 117 362) for victimisation by the Equality Tribunal in *McGinn v St Anthony's BNS*, DEC-E2004-032, <http://www.equalitytribunal.ie/en/Cases/2004/June/DEC-E2004-032-Full-Case-Report.html>; EUR 75 000 (18 months' salary) was awarded in *A Female Teacher v Board of Management of a Secondary School*, DEC-E2012-103, 03.08.2012. Victimisation that occurred as a reaction to a previous complaint to the Tribunal attracted a EUR 48 750 award in *Higgins v Permanent TSB Plc*, DEC-E2016-037, 25.02.2016, <https://www.workplacerelations.ie/en/Cases/2016/February/DEC-E2016-037.html>.

⁴⁴⁴ Section 77(5) EEA.

⁴⁴⁵ Section 77(6)(a) EEA.

⁴⁴⁶ See e.g. *Salmon v Para Equestrian Ireland*, Equality Tribunal, DEC-S2004-002, 09.01.2004, <http://www.equalitytribunal.ie/en/Cases/2004/January/DEC-2004-002-Full-Case-Report.html>.

Section 82 EEA provides for a broad range of remedies that are equally applicable with respect to private and public employment: compensation awards, orders for employers to take specific courses of action, an order for equal treatment in whatever respect is relevant to the case, and re-instatement or re-engagement.

In the area of goods and services, Section 27 ESA provides for the remedies of compensation and orders that a certain course of action be followed. A successful discrimination case taken against licensed premises before the District Court may attract a compensation award. The judge may also order the licensee to take 'a course of action' and has an additional power not enjoyed by the WRC to make an order for temporary closure of the premises.⁴⁴⁷

A limited range of criminal sanctions can be imposed under EEA and ESA: Where a person procures another to do anything that could be considered victimisation or discrimination,⁴⁴⁸ where victimisation amounts to dismissal,⁴⁴⁹ or in a range of circumstances concerning obstruction of the Workplace Relations Commission or of IHREC in conducting inquiries.⁴⁵⁰

b) Ceiling and amount of compensation

There are maximum limits on financial awards by the Workplace Relations Commission and 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.⁴⁵¹ Where the complainant was not an employee (in the case of a discriminatory interview, for example) the maximum award is EUR 13 000.⁴⁵² In unequal pay cases, compensation in the mode of arrears of pay may be awarded, up to a maximum of three years prior to the referral of the case.⁴⁵³ There is no provision for the payment of interest.⁴⁵⁴

ESA also has maximum award limits, which are linked to limits set on the jurisdiction of the District Court and currently set at EUR 15 000.⁴⁵⁵

A successful discrimination case taken against licensed premises before the District Court may attract a maximum award of EUR 15 000.⁴⁵⁶

c) Assessment of the sanctions

The primary compliance issue pertains to the limits set on compensation. Claims under the gender ground are treated exceptionally; they can be taken directly to the Circuit Court and can attract higher compensation awards since no monetary limit is applicable. It is questionable whether the remedies available in the context of non-gender ground discrimination could generally be described as 'effective, proportionate and dissuasive' sanctions. As noted above, a cap of EUR 13 000 applies at the access or recruitment stage. The ceiling of EUR 15 000 under ESA may be inadequate for particularly egregious

⁴⁴⁷ Section 19(3), Intoxicating Liquor Act 2003. Where an order has been made under Subsection (3) any person may make an objection, related to the prohibited conduct concerned, to the renewal of the licence: Section 19(10) Intoxicating Liquor Act 2003.

⁴⁴⁸ Section 14 EEA; Section 13 ESA.

⁴⁴⁹ Section 98 EEA.

⁴⁵⁰ See e.g. Section 60(3) EEA, Section 37(1) ESA.

⁴⁵¹ Section 82(4) EEA.

⁴⁵² Section 82(4)(b) EEA.

⁴⁵³ Section 82(1)(a) EEA.

⁴⁵⁴ Interest may be awarded only in gender ground cases as provided for under section 82(5) EEA; applied in *O'Brien v Persian Properties*, DEC-E2012-010, 06.02.2012, <https://www.workplacerelations.ie/en/Cases/2012/February/DEC-E2012-010-Full-Case-Report.html>.

⁴⁵⁵ Section 27(2) ESA; the limit was raised from EUR 6 348.69 with effect from 04.02.2014 under section 15 of the Courts and Civil Law (Miscellaneous Provisions) Act 2013, 24.07.2013, <http://www.irishstatutebook.ie/eli/2013/act/32/section/15/enacted/en/html#sec15>.

⁴⁵⁶ Section 19(4), Intoxicating Liquor Act 2003

violations of the law in situations such as discriminatory denial of access to education.⁴⁵⁷ Interest is not payable on compensation awards under ESA and for non-gender ground EEA cases. Moreover, the general compensation limits apply even where a case of discrimination has been made out on several grounds or in cases of established discrimination as well as harassment.⁴⁵⁸

IHREC is the only independent body permitted to instigate litigation under the Acts⁴⁵⁹ but compensation orders may not be made in its favour.⁴⁶⁰ This arguably raises a compliance issue since the CJEU has found that national rules on sanctions implementing the Racial Equality Directive must be effective, proportionate and dissuasive even where there is no identifiable victim.⁴⁶¹

It seems that the offence provisions of the Acts have never been invoked.

Equality laws also provide for non-financial sanctions, which bolster their effectiveness since the remedy can be tailored to the particular circumstances and can also generate significant effects beyond the immediate case.⁴⁶² Adjudicators have used this power to order persons to take a specified course of action⁴⁶³ as a means of ensuring that respondents create an equal opportunities policy,⁴⁶⁴ re-train staff,⁴⁶⁵ and that employers review recruitment⁴⁶⁶ or other employment procedures.⁴⁶⁷

⁴⁵⁷ In a 2017 housing assistance ground case the adjudication officer commented as follows: 'I am constrained by the maximum award of €15,000 which by virtue of Section 27(2) is fixed at the maximum District Court civil jurisdiction, and in my view does not reflect the seriousness of the discrimination': *Tenant C v A Landlord*, ADJ-00004705, 09.08.2017, <https://www.workplacerelations.ie/en/Cases/2017/August/ADJ-00004705.html>.

⁴⁵⁸ Section 27(3) ESA; Section 82(6)(a) EEA.

⁴⁵⁹ Section 85 EEA; Section 82(6)(7) EEA.

⁴⁶⁰ Section 27(4) ESA.

⁴⁶¹ *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, Case C-54/07, [2008] ECR I-1587.

⁴⁶² Fennelly, D. (2012) *Selected Issues in Irish Equality Case Law 2008 – 2011*, at pp.27-29, available at: <https://www.ihrec.ie/download/pdf/20150602161702.pdf>.

⁴⁶³ Section 82(1)(e) EEA; Section 27(1)(b) ESA.

⁴⁶⁴ See e.g. *Nevin v Plaza Hotel*, DEC-E2001-033, 07.11.2011, <http://www.lrc.ie/en/Cases/2001/November/DEC-E2001-033.html>.

⁴⁶⁵ See e.g. *Marron v Board of Management of St Paul's National School*, DEC-E2015-121, November 2015, <https://www.workplacerelations.ie/en/Cases/2015/November/DEC-E2015-121.html>.

⁴⁶⁶ See e.g. *A Prospective Employee v A Company*, ADJ-00004761, 12.06.2017, <https://www.workplacerelations.ie/en/Cases/2017/June/ADJ-00004761.html>.

⁴⁶⁷ See e.g. *Kako v Rosderra Irish Meats Group*, DEC-E2017-081, 21.11.2017, <https://www.workplacerelations.ie/en/Cases/2017/November/DEC-E2017-081.html>.

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 Irish Human Rights and Equality Commission (IHREC) is Ireland's designated body for the promotion of equal treatment irrespective of racial or ethnic origin. Its mandate also extends to the other discriminatory grounds set out under domestic anti-discrimination law: age, civil status, disability, family status gender, housing assistance, religion, and sexual orientation.

It was established on 1 November 2014, replacing the Equality Authority as the country's specialised equality body and the Irish Human Rights Commission as Ireland's national human rights institution.⁴⁶⁸

- b) Political, economic and social context for the designated body

The political, economic and social context in which IHREC operates has been relatively positive since its establishment in November 2014. There is evidence of recent political support for the Commission: the Minister for Justice and Equality acknowledged the 'important work' of the body in sanctioning increased funding to provide for the appointment of additional staff in 2017⁴⁶⁹ and the government is supportive of a private member's bill that purports to confer an additional monitoring function on the Commission with respect to reporting on the gender pay gap.⁴⁷⁰ This compares favourably with the experience of its predecessor equality body, the Equality Authority. The Authority's budget was drastically cut in Budget 2009 from approximately EUR 5.9 million to EUR 3.3 million, which represented a 43 % reduction. The Equality Authority's capacity to carry out the full range of its functions was severely compromised as a result.⁴⁷¹

The 2016 financial allocation for the Commission was EUR 6.31 million, which was increased by EUR 300 000 in 2017 to provide for additional staff.⁴⁷² Its budget for 2018 is EUR 6.7 million, representing an increase of 1 % from the previous year.⁴⁷³ Nonetheless, spending on IHREC remains below what the combined budgets for the Equality Authority and Irish Human Rights Commission were in 2007, prior to a series of cuts (Equality Authority EUR 5.459 million and Irish Human Rights Commission EUR 2.342 million).

Popular debate on equality and diversity has been dominated in recent years by the successful referendum on marriage equality in 2015 and a forthcoming referendum on repealing a provision in the Constitution, which in effect prohibits abortion. The referenda

⁴⁶⁸ Ireland, Irish Human Rights and Equality Commission Act 2014, 27.07.2014, <http://www.irishstatutebook.ie/eli/2014/act/25/enacted/en/html>; Irish Human Rights and Equality Commission Act 2014 (Establishment Day) Order 2014 (S.I. No. 450 of 2014). <http://www.irishstatutebook.ie/eli/2014/si/450/made/en/print>.

⁴⁶⁹ Select Committee on Justice and Equality, Vote 25 - Irish Human Rights and Equality Commission (Revised), 12 April 2017, <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/committeetakes/JUS2017041200002>.

⁴⁷⁰ Irish Human Rights and Equality Commission (Gender Pay Gap Information) Bill 2017, <http://www.oireachtas.ie/viewdoc.asp?DocID=35183>.

⁴⁷¹ Free Legal Advice Centres (2014) *Our Voice, Our Rights: A Parallel Report in response to Ireland's Third Report under the International Covenant on Economic, Social and Cultural Rights*, pp. 19-22, https://www.ourvoiceourrights.ie/download/pdf/our_voice_our_rights.pdf; Harvey, B. and Walsh, K. (2009) *Downgrading Equality and Human Rights: Assessing the Impact*, <http://www.eracampaign.org/uploads/Downgrading%20Equality%20&%20Human%20Right%20Assessing%20the%20Impact.pdf>.

⁴⁷² Government of Ireland (2016) *Revised Estimates for Public Services 2017*, www.per.gov.ie/wp-content/uploads/RevisedEstimatesforPublicServices2017.pdf; See further: <http://www.justice.ie/en/JELR/Pages/PR16000284>.

⁴⁷³ Government of Ireland (2017) *Revised Estimates for Public Services 2018*, <http://www.per.gov.ie/en/rev/>.

along with a wider range of social justice issues have been the subject of deliberations by the Convention on the Constitution⁴⁷⁴ and the Citizens' Assembly⁴⁷⁵ respectively. The positions adopted at both forums could be regarded as pro-equality; the Convention supported marriage equality and explicit constitutional protection of socio-economic rights, while the Assembly supported abolishing mandatory retirement based on age and liberalisation of abortion law.

A nationwide survey of public awareness of and attitudes towards human rights and equality was commissioned by IHREC in 2015. Based on a sample of 1 000 individuals, it found that overall people express positive views on human rights and equality issues, with the more negative attitudes directed toward ethnic minorities. The survey uncovered 'almost universal endorsement of the general importance of equality and human rights'.⁴⁷⁶ There is no robust evidence of popular debate that is either supportive of or hostile to the Commission.

c) Institutional architecture

IHREC has a dual status as Ireland's national human rights institution and equality body. It is also the body designated for the purposes of Directive 2014/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers.⁴⁷⁷ The Commission is 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.⁴⁷⁸

The human rights and equality functions of the body are integrated. In other words, the equality and non-discrimination mandate is not structured separately within the body, nor is a percentage of staff resources and budget dedicated to the equality mandate. Along with the Director, staff assigned to each of the Commission's five sections work across the body's mandate: Legal and Information; Public Engagement; Policy and Review; Research; Corporate Services.⁴⁷⁹

At this juncture it is difficult to appraise the *level* of attention accorded to the equality/anti-discrimination mandate of IHREC. Data relating to exercise of the Commission's functions is primarily contained in the two annual reports issued since its establishment in November 2014.⁴⁸⁰ As outlined below, some of its compliance and enforcement powers have yet to be invoked. This position should change as the Commission moves out of its establishment phase, which has involved the recruitment of a significant number of staff, as well as the establishment of new offices. As to the *nature* of the attention accorded to the equality/anti-discrimination mandate, in the author's assessment greater attention could be paid to exercise of certain powers that pertain specifically to the anti-discrimination laws that give effect to the EU equality directives. Two of those functions in particular could be further utilised: the provision of legal assistance to victims of discrimination and the power to conduct equality reviews and prepare equality action plans. The latter power has yet to be deployed (see further Chapter 7.f.iv). It's difficult to assess the Commission's exercise

⁴⁷⁴ See further: <https://www.constitution.ie/>.

⁴⁷⁵ See further: <https://www.citizensassembly.ie/en/>.

⁴⁷⁶ IHREC (2015) *Awareness and Attitudes Research*, p. 23, https://www.ihrec.ie/download/pdf/ihrec_awareness_and_attitudes_research_2015.pdf.

⁴⁷⁷ Section 10(2)(i) IHRECA.

⁴⁷⁸ Section 10(1) IHRECA, <http://www.irishstatutebook.ie/2014/en/act/pub/0025/sec0010.html - sec10>.

⁴⁷⁹ IHREC (2017) *Annual Report 2016*, Appendix 4, <https://www.ihrec.ie/app/uploads/2017/06/IHREC-Annual-Report-2016.pdf>.

⁴⁸⁰ IHREC (2016) *Annual Report 2015*, <https://www.ihrec.ie/documents/annual-report-2015/>; IHREC (2017) *Annual Report 2016*, <https://www.ihrec.ie/app/uploads/2017/06/IHREC-Annual-Report-2016.pdf>.

of its legal assistance function given the limited nature of the data that is publicly available. Nevertheless the number of equality cases supported appears to be significantly lower than the average number supported by the Equality Authority (see further Chapter 7.f.i).

In the author's assessment the level of visibility achieved for the equality mandate (as understood with reference to EU law) is satisfactory.⁴⁸¹ An awareness-raising campaign concerning the new housing assistance ground conducted in 2016 brought a welcome focus on ESA more generally.⁴⁸² Research conducted by IHREC in 2015 suggests that public awareness and understanding of ESA is lower than that of EEA and human rights laws.⁴⁸³

d) Status of the designated body/bodies – general independence

i) Status of the body

IHREC was established as a body corporate with perpetual succession under the Irish Human Rights and Equality Commission Act 2014.⁴⁸⁴ It was accredited as an A status national human rights institution in November 2015.⁴⁸⁵

Sections 12-13 IHRECA provide for membership and appointment of the Commission. The Minister for Justice agrees with the Public Appointments Service the selection criteria and process to be implemented in respect of filling vacancies. The Service puts in place an independent selection panel with prescribed relevant experience and including one nominee of the Director of the European Union Agency for Fundamental Rights. Following an open competition, the panel recommends people for appointment. The legislation specifies that the 'Government shall accept that recommendation' save in defined 'exceptional circumstances'⁴⁸⁶ and that the members shall be appointed by the President on the advice of Government, following a resolution of Oireachtas (parliament). While the appointments process contains checks and balances that secure its independence from Government, greater transparency could perhaps be secured by according the Oireachtas an oversight role in the appointment of the selection panel.

In terms of qualifying criteria for membership of the Commission, the Service and the Government must have regard to the need to ensure that the members 'broadly reflect the nature of Irish society' and possess knowledge of, or experience in matters connected with human rights and matters connected with persons or classes of persons who are disadvantaged by reference to the discriminatory grounds.⁴⁸⁷ There must be gender balance in the composition of the 12-15 members. Members serve a term of three or five years. One of the members acts as the Chief Commissioner and chairs Commission meetings, which must take place at least every three months.⁴⁸⁸

⁴⁸¹ It should be noted that the Commission's equality mandate is considerably broader than the coverage of the EU equality directives e.g. high-profile activities such as its work on human rights and equality proofing of budgets fall outside the material scope of the directives but aim to advance equality of opportunity and eliminate discrimination.

⁴⁸² IHREC (2017) *Annual Report 2016*, p. 30; See further: <https://www.ihrec.ie/ihrec-alerts-landlords-tenants-and-accommodation-advertisers-to-new-equality-law/>; <https://www.ihrec.ie/irish-human-rights-equality-commission-welcomes-myhome-ies-procedures-property-advertisements/>.

⁴⁸³ IHREC (2015) *Awareness and Attitudes Research*, https://www.ihrec.ie/download/pdf/ihrec_awareness_and_attitudes_research_2015.pdf.

⁴⁸⁴ Section 9 IHRECA, <http://www.irishstatutebook.ie/2014/en/act/pub/0025/print.html - sec9>.

⁴⁸⁵ International Coordinating Committee of National Human Rights Institutions (2015) *Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA) Geneva, 16-20 November 2015*, <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA%20FINAL%20REPORT%20-%20NOVEMBER%202015-English.pdf>.

⁴⁸⁶ Sections 13(11)-(12) IHRECA.

⁴⁸⁷ Section 13(13) IHRECA.

⁴⁸⁸ Section 16 IHRECA.

The Commission's annual grant is a sum that the Minister for Justice and Equality, after consultation with the Commission, considers to be reasonably sufficient for the Commission in the performance of its functions.⁴⁸⁹ Concerns about this provision were raised by the Sub-Committee on Accreditation of the UN's Global Alliance of National Human Rights Institutions, which pointed out that 'the Minister for Justice and Equality has significant discretion over the allocation of funds to the IHREC, and that this has the potential to impact on its effectiveness and independence.'⁴⁹⁰

The Commission appoints its own staff with the consent of the Minister for Justice and Equality as approved by the Minister for Public Expenditure and Reform.⁴⁹¹ They may also be seconded from other bodies at the Commission's discretion. Staff are civil servants of the state, a status which requires independence from Government. The Director of the Commission manages its administration and is accountable to parliament for financial and other operational matters.⁴⁹² The Director holds office under a written contract of service the terms of which, including its duration, are determined by the Commission with the approval of the Minister for Justice and Equality. At 31 December 2016, the Commission had 41 staff, up from 33 at the end of 2015.⁴⁹³ With recruitment ongoing, five of the 46 posts sanctioned for 2016 were not filled by the end of that year.⁴⁹⁴

The Commission is accountable to parliament; it must lay its strategy statement⁴⁹⁵ and annual report⁴⁹⁶ before the Oireachtas. The Director is accountable to the parliamentary public accounts committee for financial transactions and effective use of resources⁴⁹⁷ and may be requested to account for administrative matters before other Oireachtas committees.⁴⁹⁸

ii) Independence of the body

Legislation stipulates that the Commission shall be independent in the performance of its functions.⁴⁹⁹ In the author's assessment, the Commission's functions are exercised in an independent manner in practice. However, as noted above, the role of the Minister for Justice and Equality in setting the Commission's budget is problematic. Submissions concerning the establishment of IHREC suggested that its budget could be attached to a more 'neutral' department such as the Department of the Taoiseach.⁵⁰⁰ The process for appointing Commission members could also be rendered more transparent by, for instance, according the Oireachtas an oversight role in the appointment of the selection panel.

⁴⁸⁹ Section 26 IHRECA, <http://www.irishstatutebook.ie/2014/en/act/pub/0025/print.html - sec26>.

⁴⁹⁰ International Coordinating Committee of National Human Rights Institutions (2015) *Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA) Geneva, 16-20 November 2015*, p.10, <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA%20FINAL%20REPORT%20-%20NOVEMBER%202015-English.pdf>.

⁴⁹¹ Section 24 IHRECA, <http://www.irishstatutebook.ie/eli/2014/act/25/section/24/enacted/en/html#sec24>.

⁴⁹² Sections 20-23 IHRECA.

⁴⁹³ IHREC (2017) *Annual Report 2016*, p. 43.

⁴⁹⁴ Office of the Comptroller and Auditor General (2017) *Appropriation Account 2016: Vote 25 Irish Human Rights and Equality Commission*, <http://www.audgen.gov.ie/documents/annualreports/2016/appacc/en/vote%2025.pdf>.

⁴⁹⁵ Section 25 IHRECA, <http://www.irishstatutebook.ie/eli/2014/act/25/section/25/enacted/en/html#sec25>.

⁴⁹⁶ Section 28 IHRECA, <http://www.irishstatutebook.ie/eli/2014/act/25/section/28/enacted/en/html#sec28>.

⁴⁹⁷ Section 22 IHRECA, <http://www.irishstatutebook.ie/eli/2014/act/25/section/22/enacted/en/html#sec22>.

⁴⁹⁸ Section 23 IHRECA, <http://www.irishstatutebook.ie/eli/2014/act/25/section/23/enacted/en/html#sec23>.

⁴⁹⁹ Section 9(2) IHRECA, <http://www.irishstatutebook.ie/2014/en/act/pub/0025/print.html - sec9>.

⁵⁰⁰ See further: Pegram, T. (2013) *Bridging the Divide: The Merger of the Irish Equality Authority and Human Rights Commission*, https://www.tcd.ie/policy-institute/assets/pdf/Studies_Policy_29_web.pdf.

e) Grounds covered by the designated body/bodies

IHREC has a mandate to deal with the following grounds under Irish anti-discrimination law: gender, age, race, religion, family status, disability, civil status, sexual orientation, membership of the Traveller community, and housing assistance. It does not prioritise any of the grounds as such. No information is in the public domain as to how the Commission ensures that adequate and appropriate expertise and attention is given to each ground. Staff work across all of the grounds and the human rights mandate in each of the Commission's functional divisions (Chapter 7.c). The Commission's *Strategy Statement 2016-2018* adopts a holistic approach to the grounds, save that it refers specifically to the UN Convention on the Rights of Persons with Disabilities in the context of ensuring robust implementation of human rights and equality standards.⁵⁰¹ Ireland is expected to ratify the Convention in 2018.⁵⁰² In the author's assessment each ground is accorded an appropriate level of attention by the Commission. It has addressed the intersection between grounds in various submissions and has called for the introduction of a provision on multiple discrimination under anti-discrimination law.⁵⁰³ According to the minutes of the Commission's plenary meeting held in April 2017, it has agreed to give further consideration to 'how to adequately capture queries relating to multiple grounds/intersectionality in reporting on the handling of public information queries.'⁵⁰⁴

IHREC does not treat migrants as a priority issue. It is the body designated for the purposes of Directive 2014/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers.⁵⁰⁵ In practice the Commission deals with discrimination against migrants across all its major functions, principally under the rubric of its human rights mandate. It has also highlighted indirect discrimination liable to affect migrants in commentary on anti-discrimination law.⁵⁰⁶ A team from the Commission's information service hosted a stand at the International Organization for Migration's information fair for migrants in November 2016, providing information to migrants about their rights under equality and human rights law. In 2016 it reported on the outcome of a case in which it provided legal assistance to 'an EU national who was subject to severe labour exploitation at a family-run bed and breakfast. This included claims for non-payment of wages, holidays, rest breaks and overtime, as well as alleged discrimination on grounds of race, disability, gender and civil status.' The case was settled prior to hearing on terms that included the payment of EUR 20 000 and an undertaking on the employer's part to respect their obligations under employment legislation in the future.⁵⁰⁷ That year the Commission acted as *amicus curiae* in a case concerning the human rights compatibility of the decision-making process on immigration status of non-EEA nationals, which is currently under appeal to the Supreme Court.⁵⁰⁸ IHREC has supported several educational and research projects aimed concerning migrants' rights, such as a project on the employment of migrants in the home care sector conducted by the Migrant

⁵⁰¹ IHREC (2016) *Strategy Statement 2016-2018*, <https://www.ihrec.ie/download/pdf/strategystatement.pdf>.

⁵⁰² <http://www.justice.ie/en/JELR/Pages/PR18000033>.

⁵⁰³ See e.g. IHREC (2017) *Submission to the United Nations Committee on the Elimination of Discrimination Against Women on Ireland's Combined Sixth and Seventh Periodic Reports*, <https://www.ihrec.ie/app/uploads/2017/02/Ireland-and-the-Convention-on-the-Elimination-of-All-Forms-of-Discrimination-Against-Women.pdf>.

⁵⁰⁴ <https://www.ihrec.ie/app/uploads/2017/12/Minutes-of-18th-Ordinary-Plenary-Meeting-11.04.2017-APPROVED.pdf>.

⁵⁰⁵ Section 10(2)(i) IHRECA.

⁵⁰⁶ See e.g. IHREC (2016) *Observations on the Education (Admission to Schools) Bill 2016*, <https://www.ihrec.ie/app/uploads/2016/11/Observations-on-Education-Admission-to-Schools-Bill-2016.pdf>; IHREC (2017) *Submission to the United Nations Committee on the Elimination of Discrimination Against Women on Ireland's Combined Sixth and Seventh Periodic Reports*, pp.15, 86, 91, <https://www.ihrec.ie/app/uploads/2017/02/Ireland-and-the-Convention-on-the-Elimination-of-All-Forms-of-Discrimination-Against-Women.pdf>.

⁵⁰⁷ IHREC (2017) *Annual Report 2016*, p.34.

⁵⁰⁸ See further: <https://www.ihrec.ie/human-rights-equality-commission-appears-supreme-court-right-private-family-life-cases/>; <https://www.ihrec.ie/documents/luximon-v-minister-justice-equality-balchand-v-minister-justice-equality-november-2017/>.

Rights Centre Ireland in conjunction with the Services, Industrial, Professional and Technical Union (SIPTU) and the Carers Association. The project published employment guidelines for the home care sector in 2015 and was part-funded by the European Social Fund.⁵⁰⁹ Researchers based at Maynooth University conducted an audit and evaluation of the integration policies of public bodies under the auspices of a scheme operated by the Commission. The project report, published in November 2017, also devises a model of best practice for integration policy.⁵¹⁰

f) Competences of the designated body and their independent and effective exercise

i) Independent assistance to victims

In Ireland, IHREC has the competence to provide independent assistance to victims.⁵¹¹ It does so in two primary ways: by providing general information on anti-discrimination law and through the provision of legal assistance in a limited number of cases.

IHREC is required to 'provide information to the public' on the Employment Equality Acts 1998-2015 (EEA), the Equal Status Acts 2000-2015 (ESA) and Section 19 of the Intoxicating Liquor Act 2003.⁵¹² On its website IHREC provides an accessible overview of those laws aimed at the general public as well as organisations and businesses.⁵¹³ It published detailed guides to EEA and ESA in 2015⁵¹⁴ and produced a video on ESA in 2017. The Commission also operates a Public Information Service that individuals may avail of to obtain information on their rights to protection against discrimination.⁵¹⁵ It processed 3 953 queries from members of the public between November 2014 and December 2016.

Legal assistance can take the form of the provision, or the arranging for the provision of, legal advice to the applicant; the provision, or the arranging for the provision of, legal representation to the applicant; the provision of such other assistance to the applicant as the Commission deems appropriate in the circumstances.⁵¹⁶ Such assistance is available for inter alia references of discrimination complaints under ESA, EEA and section 19 of the Intoxicating Liquor Act 2003, as well as for appellate or enforcement⁵¹⁷ proceedings under those statutes.

At 31st December 2016, IHREC was providing legal assistance in 30 cases, nine of which concerned ESA with 11 relating to EEA (the remaining ten related to

⁵⁰⁹ <https://www.mrci.ie/resources/publications/ihrec-home-care-project/>.

⁵¹⁰ Murphy, C., Caulfield, L. and Gilmartin, M. (2017) *Developing Integration Policy in the Public Sector: A Human Rights Approach*, Maynooth University, <https://www.maynoothuniversity.ie/sites/default/files/assets/document/MU%20Developing%20Integration%20Policy%20in%20the%20Public%20Sector%20FOR%20WEB%200.pdf>.

⁵¹¹ Section 10(2)(f) and section 40 IHRECA. See further: <https://www.ihrec.ie/our-work/legal-activity/legal-assistance/>.

⁵¹² Sections 10(2)(a) and 30 IHRECA: <http://www.irishstatutebook.ie/eli/2014/act/25/section/10/enacted/en/html#sec10>; <http://www.irishstatutebook.ie/eli/2014/act/25/enacted/en/print#sec30>.

⁵¹³ <https://www.ihrec.ie/guides-and-tools/>.

⁵¹⁴ https://www.ihrec.ie/app/uploads/download/pdf/ihrec_equal_status_rights_explained.pdf.

⁵¹⁵ See further: <https://www.ihrec.ie/your-rights/can-we-help/>.

⁵¹⁶ Section 40(10) IHRECA.

⁵¹⁷ In a number of cases, the WRC has issued orders directing the respondent to report to the Commission on compliance within a given time frame, underlining that IHREC could thereafter commence enforcement proceedings with the complainant's consent: *Sheehy Skeffington v National University of Ireland, Galway*, DEC-E2014-078, 13 November 2014, <https://www.workplacerelations.ie/en/Cases/2014/November/DEC-E2014-078.html>; *Clavin v Marks and Spencers Ireland Ltd.*, DEC-S2015-055, 28 July 2015, <https://www.workplacerelations.ie/en/Cases/2015/July/DEC-E2015-055.html>; *A mother (on behalf of her son) v The Board of Management of a National School*, DEC-S2016-048, 18 July 2016, <https://www.workplacerelations.ie/en/Cases/2016/July/DEC-S2016-048.html>.

human rights). It granted assistance to 17 new clients that year.⁵¹⁸ Available data suggests that IHREC is supporting fewer equality cases than the Equality Authority was prior to the drastic cuts to its budget in 2009.⁵¹⁹ In 2008, the Authority granted legal assistance in 68 cases, this dropped to 21 in 2009 and to 15 the following year.

Independence:

In the author's assessment, decisions on granting legal assistance are exercised in an independent manner. Safeguards include the publication of the applicable criteria, the provision of a reasoned decision to applicants in writing, and the delegation of decision-making to the Head of Legal who is a civil servant of the state.

The Commission published revised guidelines for deciding on applications for assistance in April 2017.⁵²⁰ Section 40(4) IHRECA underpins the guidelines; it stipulates that the Commission may grant assistance on the following criteria: '(a) the matter to which the proceedings concerned relate raises a question of principle; (b) it would be unreasonable to expect the person to deal with the matter to which the proceedings concerned relate without assistance because of its complexity or for any other reason; (c) there are other special circumstances which make it appropriate for the Commission to grant such assistance.' It has delegated the function of deciding on applications for assistance to staff: the Head of Legal decides whether to grant assistance, subject to an appeal to the Director.⁵²¹

Effectiveness:

It is difficult to assess the effectiveness of the Commission's legal assistance activity for two reasons: The Commission has been in a development phase until recently and it provides limited data on the exercise of this competence. A significant number of new employees have been recruited since IHREC's establishment; 41 of the 48 sanctioned staff positions had been filled at end December 2016. Further, it appears that the Commission's approach to the exercise of this function was not fully clarified until April 2017 when it endorsed a Strategic Litigation and Enforcement Plan.⁵²² IHREC provides limited information to the public on how this function is exercised. Its annual reports set out the number of open case files, providing basic information on the legislative base involved and the applicable discriminatory grounds (see further Chapter 7.h). Brief accounts of case outcomes are set out in the annual reports and are publicised in media work and on the Commission's website. It is evident from these accounts that IHREC has supported multiple significant cases, such as proceedings before the High Court concerning the ambit of ESA⁵²³ and before the Supreme Court on reasonable accommodation for

⁵¹⁸ IHREC (2017) *Annual Report 2016*, p.32.

⁵¹⁹ Free Legal Advice Centres (2014) *Our Voice, Our Rights: A Parallel Report in response to Ireland's Third Report under the International Covenant on Economic, Social and Cultural Rights*, pp. 19-22, https://www.ourvoiceourrights.ie/download/pdf/our_voice_our_rights.pdf.

⁵²⁰ IHREC (2017) *Guidelines on Applications for Legal Assistance*, <https://www.ihrec.ie/app/uploads/2017/06/Guidelines-on-applications-for-legal-assistance-April-2017-3.pdf>.

⁵²¹ Under section 10(6) IHRECA the Commission may authorise its staff to perform any of its functions.

⁵²² <https://www.ihrec.ie/app/uploads/2017/12/Minutes-of-18th-Ordinary-Plenary-Meeting-11.04.2017-APPROVED.pdf>.

⁵²³ IHREC supported the complainant in a 2015 case in which the High Court held that a mother could not rely on ESA to argue that the social welfare code discriminated unlawfully against her on the disability and gender grounds by not providing her with maternity benefit when she had a child through a surrogacy

students sitting state examinations.⁵²⁴ However, in contrast to the Equality Authority, the Commission does not provide information on overarching patterns as to the reasons for declining / deciding to grant assistance.⁵²⁵ It is thus unclear what informs the Commission's strategic approach, such as perhaps, research findings suggesting that discrimination in a given area is endemic and persistent over time. Nor it is clear at this juncture whether IHREC supports a 'critical mass of cases' as recommended by the Council of Europe's Commissioner for Human Rights.⁵²⁶ Without such data it is difficult to appraise the effectiveness of its work and the Commission risks reinforcing concerns that its approach to legal assistance is more restrictive or less well resourced than that of the Equality Authority. The Equality Authority's legal assistance work was widely regarded as being effective in driving compliance with anti-discrimination law and its depletion was a major concern of civil society organisations when the body was merged with the Irish Human Rights Commission.⁵²⁷

In the author's assessment, the profile of IHREC's anti-discrimination case work has been impacted by factors outside its control. At 31st December 2017, there were five reported cases in which IHREC has provided legal assistance before the WRC or the Labour Court.⁵²⁸ In two of these cases IHREC's role is not mentioned in the published decisions. This is regrettable since it impacts the visibility of the Commission's legal work.

Resources:

Information is not available as to the amount or proportion of the Commission's budget allocated to the legal assistance function. At end December 2016, 11 of the Commission's 41 full-time equivalent staff were assigned to the Legal and Information team.⁵²⁹ This appears proportionate.

ii) Independent surveys and reports

arrangement: *G v Department of Social Protection* [2015] IEHC 419, 07.07.2015, <http://www.courts.ie/Judgments.nsf/0/CE885D9FE65B899B80257E7E00504287>.

⁵²⁴ IHREC provided legal representation before the Supreme Court to a woman who challenged the Department of Education's policy of annotating the examination transcripts of students who had been granted a spelling and grammar waiver. The Court found that the practice did not amount to disability ground discrimination: *Cahill v Minister for Education and Science* [2017] IESC 29, 24.05.2017, <http://www.courts.ie/Judgments.nsf/bce24a8184816f1580256ef30048ca50/37599fdc9c7e6c3c8025812b00421aa8?OpenDocument>; See further: <https://www.ihrec.ie/supreme-court-clarifies-duties-towards-students-disability-discrimination-case/>.

⁵²⁵ Individual applicants who are refused legal assistance are informed of the reasons in writing: IHREC (2017) *Guidelines on Applications for Legal Assistance*, para 27.

⁵²⁶ Commissioner for Human Rights (2011) *Opinion of the Commissioner for Human Rights on National Structures for Promoting Equality*, CommDH(2011)2, p. 21, <https://rm.coe.int/16806da939>.

⁵²⁷ See further, Pegram, T. (2013) *Bridging the Divide: The Merger of the Irish Equality Authority and Human Rights Commission*, https://www.tcd.ie/policy-institute/assets/pdf/Studies_Policy_29_web.pdf; Free Legal Advice Centres (2014) *Our Voice, Our Rights: A Parallel Report in response to Ireland's Third Report under the International Covenant on Economic, Social and Cultural Rights*, pp. 19-22, https://www.ourvoiceourrights.ie/download/pdf/our_voice_our_rights.pdf.

⁵²⁸ *Calor Teoranta v Brierton*, EDA 1510, 26.06.2015, <https://www.workplacerelations.ie/en/Cases/2015/June/EDA1510.html>; *Brady v Cavan VEC and Virginia College*, DEC-E2016-048, 10.03.2016, <https://www.workplacerelations.ie/en/Cases/2016/March/DEC-E2016-048.html>; *Ms A (on behalf of her daughter B) v A Girls Secondary School*, DEC-S2015-001, 06.02.2015, <https://www.workplacerelations.ie/en/Cases/2015/February/DEC-S2015-001.html>; *A Prison Officer v The Minister for Justice and Equality*, DEC-E2017-045, 07.06.2017, <https://www.workplacerelations.ie/en/Cases/2017/June/DEC-E2017-045.html>; *A Tenant v A Landlord*, ADJ00002629, 7 November 2017, <http://www.workplacerelations.ie/en/Cases/2017/November/ADJ-00002629.html>.

⁵²⁹ IHREC (2017) *Annual Report 2016*, Appendix 4.

In Ireland, IHREC has the competence to conduct independent surveys and publish independent reports. It is empowered to undertake, sponsor, commission or provide financial or other assistance for research⁵³⁰ and to prepare and publish, in such manner as it sees fit, reports including research reports.⁵³¹

Independence:

In the author's assessment this competence is exercised in an independent manner in practice. The research reports produced were almost exclusively commissioned by IHREC and so carried out by independent actors; many positions advanced within the reports are critical of the status quo.

Effectiveness:

In the author's assessment the activities carried out under this competence are of an excellent quality. Carrying on the work of the Equality Authority, the Commission produced a significant report in 2017 which analyses data on the experience of inequality derived from the equality module of the 2014 Quarterly National Household Survey, carried out by the Central Statistics Office.⁵³² In 2015, the Commission undertook a national survey about awareness of and attitudes towards human rights and equality in the general population.⁵³³ It has further commissioned research reports on aspects of Irish compliance with two UN conventions.⁵³⁴ The Commission has also sponsored several research projects conducted by universities and by civil society bodies through its 'Human Rights and Equality Grants Scheme' (see further Chapter 7.f.iv).

Resources:

It is difficult to assess the scale of activity at this juncture given the time frames involved in producing research and since the Commission's Research team expanded significantly in 2016 from a staff allocation of four to seven in the latter half of 2016.⁵³⁵ No information is available as to the amount or proportion of the Commission's budget allocated to the research function.

iii) Independent recommendations

In Ireland, IHREC has the competence to issue independent recommendations on discrimination issues. Statutory provisions empower the Commission to: keep under review the adequacy and effectiveness of equality law and practice in the State;⁵³⁶ examine any legislative proposal and report its views on any

⁵³⁰ Section 10(2)(j) IHRECA.

⁵³¹ Section 10(2)(p) IHRECA.

⁵³² McGinnity, F., Grotti, R., Kenny, O. and Russell, H. (2017) *Who experiences discrimination in Ireland?: Evidence from the QNHS Equality Modules*, available at: <https://www.ihrec.ie/documents/who-experiences-discrimination-in-ireland-evidence-from-the-qnhs-equality-modules/>.

⁵³³ IHREC (2015) *Awareness and Attitudes Research*, https://www.ihrec.ie/download/pdf/ihrec_awareness_and_attitudes_research_2015.pdf.

⁵³⁴ See further: <https://www.ihrec.ie/our-work/research-reports/>.

⁵³⁵ IHREC (2017) *Annual Report 2016*, Appendix 4.

⁵³⁶ Sections 10(2)(b) and 30 IHRECA: <http://www.irishstatutebook.ie/eli/2014/act/25/section/10/enacted/en/html#sec10>; <http://www.irishstatutebook.ie/eli/2014/act/25/section/30/enacted/en/html#sec30>.

implications for equality;⁵³⁷ and make recommendations to the Government on measures which should be taken to strengthen, protect and uphold equality in the State.⁵³⁸ These powers may be exercised on the Commission's own initiative or triggered by government ministers.

IHREC has deployed its function to keep under review the adequacy and effectiveness of equality law and practice, through various channels including in submissions made to international treaty monitoring bodies. On occasion the Commission has issued recommendations on foot of its legal assistance work. For instance, it highlighted the need to amend ESA following an unsuccessful challenge to the exclusion from maternity benefits of a woman who had a child by means of a surrogacy arrangement.⁵³⁹

Independence:

In the author's assessment this competence is exercised in an independent manner in practice. Many of the recommendations put forward by the Commission to date have been openly critical of Government.

Effectiveness:

In the author's assessment the Commission's activities under this competence are of an excellent quality; written submissions draw on an extensive range of sources including empirical studies and international best practice.

The Commission made a significant intervention in 2017 with respect to its function to keep under review the adequacy and effectiveness of equality law and practice. IHREC issued an information note, which pointed out that the practice of automatically anonymising the names of parties to proceedings before the WRC ran counter to the legislative framework.⁵⁴⁰ In response to the Commission's concerns the Director of the WRC said that a note would be circulated to all adjudication officers setting out the parameters under which they might want to consider publication of the names in equality cases.⁵⁴¹

IHREC has examined ten legislative proposals since its establishment in November 2014; four of these pertain to discrimination law.⁵⁴² It is difficult to assess the impact of its discrimination law submissions, since at the time of writing all legislative proposals are yet to be finalised and debated before parliament. Two of the Commission's observations concern the Disability (Miscellaneous Provisions) Bill 2016, which purports to amend Irish law to enable ratification of the UNCPRD and to add a gender identity and expression ground to anti-discrimination law more

⁵³⁷ Section 10(2)(c) IHRECA:
<http://www.irishstatutebook.ie/eli/2014/act/25/section/10/enacted/en/html#sec10>.

⁵³⁸ Section 10(2)(d) IHRECA:
<http://www.irishstatutebook.ie/eli/2014/act/25/section/10/enacted/en/html#sec10>

⁵³⁹ <https://www.ihrec.ie/ihrec-recommends-changes-to-equal-status-acts-following-high-court-decision-on-maternity-benefit-claim/>.

⁵⁴⁰ <https://www.ihrec.ie/app/uploads/2017/04/Publication-of-Decisions-by-the-Workplace-Relations-Commission-Under-the-EEA-and-ESA-3.pdf>.

⁵⁴¹ Gartland, F. (2017) *Private dispute system better for workers, says WRC head*, Irish Times, 22 May 2017, <https://www.irishtimes.com/news/ireland/irish-news/private-dispute-system-better-for-workers-says-wrc-head-1.3091046>.

⁵⁴² The Commission's legislative observations are available here: <https://www.ihrec.ie/legislative-observations/>.

generally.⁵⁴³ A third submission undertakes a detailed analysis of the Education (Admission to Schools) Bill 2016,⁵⁴⁴ highlighting inter alia conformity with the Racial Equality Directive.⁵⁴⁵ A recent legislative observation, issued in December 2017, welcomes the publication of a private member's bill that seeks to add 'disadvantaged socio-economic status' as a ground under national discrimination law.⁵⁴⁶

To date the Commission has largely exercised its powers in a reactive manner. It has not conducted a review of the principal anti-discrimination statutes. Arguably a strong case could be made for undertaking a review of section 19 of the Intoxicating Liquor Act 2003. The 2003 Act transferred jurisdiction for cases alleging discrimination '...on or at the point of entry to, licensed premises' to the District Court, a court of local and limited jurisdiction with jurisdiction over a range of criminal and civil matters.⁵⁴⁷ The major impact of this amendment is the cost implications for complainants as well as the complexity of legal proceedings.⁵⁴⁸ Under the WRC system it is possible to represent oneself and costs cannot be awarded against either complainant or respondent; this is not the case at the District Court. Consequently, the number of cases taken against such service providers has dropped significantly. Moreover, it generates confusion in practice; several complaints have been, and continue to be, lodged before the incorrect forum. The European Commission against Racism and Intolerance notes 'that in particular members of the Traveller Community are often affected by discrimination in the provision of goods and services in licensed premises.'⁵⁴⁹ Five complaints, all on the Traveller community ground, were dismissed by the WRC in 2017 since it did not have jurisdiction to hear the cases.⁵⁵⁰

Resources:

The scale of activities appears reasonable. No information is available as to the amount or proportion of the Commission's budget allocated to this function.

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- ⁵⁴³ <https://www.oireachtas.ie/viewdoc.asp?DocID=34322>; IHREC (2016) *Observations on the General Scheme of the Equality /Disability (Miscellaneous Provisions) Bill*, <https://www.ihrec.ie/app/uploads/2016/11/Observations-on-the-General-Scheme-Equality-Disability-Miscellaneous-Provisions-Bill.pdf>; IHREC (2017) *Supplementary Observations on the Disability (Miscellaneous Provisions) Bill 2016*, <https://www.ihrec.ie/app/uploads/2017/01/Supplementary-Observations-on-Disability-Miscellaneous-Provisions-Bill-2016.pdf>.
- ⁵⁴⁴ <https://www.oireachtas.ie/viewdoc.asp?DocID=33318&CatID=59>.
- ⁵⁴⁵ IHREC (2016) *Observations on the Education (Admission to Schools) Bill 2016*, at p.5, available at <https://www.ihrec.ie/app/uploads/2016/11/Observations-on-Education-Admission-to-Schools-Bill-2016.pdf>.
- ⁵⁴⁶ IHREC (2017) *Observations on the Equality (Miscellaneous Provisions) Bill 2017*, <https://www.ihrec.ie/documents/observations-equality-miscellaneous-provisions-bill-2017/>.
- ⁵⁴⁷ Ireland, Intoxicating Liquor Act 2003, 14.07.2003, <http://www.irishstatutebook.ie/eli/2003/act/31/section/19/enacted/en/html#sec19>.
- ⁵⁴⁸ Fennelly, D. (2012) *Selected Issues in Irish Equality Case Law 2008 – 2011*, Dublin, Equality Authority, pp. 106-7, <https://www.ihrec.ie/download/pdf/20150602161702.pdf>.
- ⁵⁴⁹ European Commission against Racism and Intolerance (ECRI) (2016) *ECRI conclusions on the implementation of the recommendations in respect of Ireland subject to interim follow-up (adopted on 11.12.2015)*, CRI (2016)4, at p. 5, available at: <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Ireland/IRL-IFU-IV-2016-004-ENG.pdf>.
- ⁵⁵⁰ *A Customer v An Off Licence*, ADJ 00005652, <https://www.workplacerelations.ie/en/Cases/2017/June/%20ADJ-00005652.html>; *Mongan v Donal & Martha Duffy Limited t/a SuperValu Edgeworthstown*, DEC-2017-044, <https://www.workplacerelations.ie/en/Cases/2017/November/DEC-S2017-044.html>; *A Customer v A Hotel*, ADJ-00004878, <https://www.workplacerelations.ie:443/en/Cases/2017/March/ADJ-00004878.html>; *A member of the Travelling community v A Hotel*, ADJ-00004874, <https://www.workplacerelations.ie:443/en/Cases/2017/March/ADJ-00004874.html>; *A Member of the Travelling Community v A Public House*, ADJ-0001389, <https://www.workplacerelations.ie:443/en/Cases/2017/January/ADJ-0001389.html>.

iv) Other competences

IHREC is empowered to prepare draft codes of practice in furtherance of *inter alia* the elimination of discrimination and the promotion of equality of opportunity.⁵⁵¹ It is obliged to do so if requested by the Minister for Justice and Equality. In drafting codes of practice IHREC is mandated to consult with such other Minister of the Government or such other person or body as the Commission considers appropriate, or as the Minister may recommend. If the Minister approves a code of practice it becomes admissible in evidence in legal proceedings.⁵⁵² To date IHREC has not produced a code. In June 2016 the Commission initiated engagement with the Minister for Justice and Equality concerning preparation of a draft code of practice in the area of age discrimination and retirement.⁵⁵³ Two months later, the Report of the Interdepartmental Working Group on Fuller Working Lives⁵⁵⁴ recommended that the Workplace Relations Commission (WRC) be requested to prepare a code of practice around the issue of longer working, and that IHREC be requested to issue guidance in relation to the use of fixed-term contracts beyond normal retirement age. On foot of this report IHREC engaged with the WRC to ensure that there was no unnecessary overlap between the work of the two bodies.⁵⁵⁵ The WRC code of practice received Ministerial approval and was published in December 2017.⁵⁵⁶ At its May 2017 meeting the Commission endorsed a memorandum submitted by the Head of Legal that guidance be prepared in relation to the use of fixed term contracts after the normal retirement age and that this be reviewed at IHREC's next meeting.⁵⁵⁷ This guidance should be issued in 2018.⁵⁵⁸

IHREC may conduct equality reviews and prepare equality action plans, or invite others to do so.⁵⁵⁹ An equality review comprises an audit of the level of equal opportunity within an organisation/s and an examination of an organisation/s' practices, procedures and other relevant factors (including the working environment).⁵⁶⁰ An equality action plan is a programme of actions to be implemented to further the promotion of equality of opportunity.⁵⁶¹ A review or plan may relate to equality of opportunity generally or to a particular aspect of discrimination. The Commission has the power to invite a particular undertaking, group of undertakings or the undertakings making up a particular industry or sector thereof to conduct a review or prepare and implement an action plan, or both. In the case of firms with more than 50 employees the Commission may instigate a review or prepare an action without such invitation. An 'undertaking' for these purposes includes 'an activity giving rise to employment, whether or not in the industrial or commercial sector and whether or not with a view to profit', as well as providers of goods and services regulated

⁵⁵¹ Section 31 IHRECA, <http://www.irishstatutebook.ie/eli/2014/act/25/enacted/en/print#sec31>.

⁵⁵² A code of practice concerning Sexual Harassment and Harassment at Work was produced by the Equality Authority and is referred to extensively in legal proceedings: S.I. No. 208/2012 - Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2012: <http://www.irishstatutebook.ie/eli/2012/si/208/made/en/print>.

⁵⁵³ IHREC (2017) *Annual Report 2016*, p.21.

⁵⁵⁴ Department of Public Expenditure and Report (2016) *Report of the Interdepartmental Working Group on Fuller Working Lives*, <http://www.per.gov.ie/en/report-of-the-interdepartmental-group-on-fuller-working-lives/>.

⁵⁵⁵ IHREC (2017) *Annual Report 2016*, p.21.

⁵⁵⁶ S.I. No. 600/2017 - Industrial Relations Act 1990 (Code of Practice on Longer Working) (Declaration) Order 2017, <http://www.irishstatutebook.ie/eli/2017/si/600/made/en/print>.

⁵⁵⁷ <https://www.ihrec.ie/app/uploads/2017/12/Minutes-of-19th-Ordinary-Plenary-Meeting-17.05.2017-APPROVED.pdf>.

⁵⁵⁸ <https://www.ihrec.ie/app/uploads/2017/12/Minutes-of-20th-Ordinary-Plenary-Meeting-28.06.2017-APPROVED.pdf>.

⁵⁵⁹ Section 32 IHRECA, <http://www.irishstatutebook.ie/eli/2014/act/25/enacted/en/print#sec32>.

⁵⁶⁰ Section 29 IHRECA, <http://www.irishstatutebook.ie/eli/2014/act/25/enacted/en/print#sec29>.

⁵⁶¹ Section 29 IHRECA.

by the ESA, which includes educational establishments, accommodation providers and public sectors bodies.⁵⁶² The Commission may require an undertaking, which has fifty or more employees, to supply information for the purpose of an equality review or an equality action plan. It may also serve a substantive notice on an undertaking seeking compliance with the terms of an equality action plan.⁵⁶³ This is a potentially valuable mechanism in securing compliance with equality law but it has not been employed by IHREC to date.⁵⁶⁴ In April 2017 the Commission authorised the Head of Legal, in consultation with the Director, to exercise this function since it would allow for 'a more responsive and agile approach'.⁵⁶⁵

IHREC is conferred with a number of statutory powers with respect to awareness raising, training and education. It is empowered to undertake, sponsor, commission or provide financial or other assistance for educational activities⁵⁶⁶ and to provide or assist in the provision of education and training on equality issues.⁵⁶⁷ Further, either of its own volition or at the request of the Minister, it may undertake, sponsor, commission, or provide financial or other assistance for programmes of activities and projects for the promotion of integration of migrants and other minorities, equality (including gender equality) and respect for diversity and cultural difference.⁵⁶⁸ The 'Human Rights and Equality Grants Scheme' is one of the vehicles through which the Commission exercises these interrelated functions. In 2016, EUR 250 000 in grant funding was provided to 25 successful applicant organisations to carry out activities to promote human rights and equality across the themes of 'Collaboration and Dissemination', 'Capacity Building' and 'Project Implementation'.⁵⁶⁹ One of the funded projects resulted in a guide for trade unions to taking employment equality cases produced by the Irish Congress of Trade Unions.⁵⁷⁰ 32 organisations were awarded funding for projects under the Commission's 2017 Scheme under the themes of activities 'Intercultural Understanding and Diversity' and 'Supporting Implementation of the Public Sector Equality and Human Rights Duty'.⁵⁷¹ In 2016 the Commission established a Professional Diploma in Human Rights and Equality, which was developed in collaboration with the Institute of Public Administration and is accredited by University College Dublin.⁵⁷² IHREC has also sought to increase awareness of equality issues in schools. The main tool is a training manual designed to provide teachers with equality-based teaching resources for use across the curriculum to encourage pupils to take action on equality, human rights and social justice issues in the classroom, at school or within their wider community.⁵⁷³

⁵⁶² Section 29 IHRECA. Matters concerning members and access to membership of registered clubs are exempt from equality reviews: Section 69(7) EEA.

⁵⁶³ Section 33 IHRECA.

⁵⁶⁴ In 2015 Dublin Simon Community was supported to carry out a voluntary equality review of its workplace policies and practices. This was one of the final projects supported under an equality mainstreaming programme run by the Equality Authority: IHREC (2016) *Annual Report 2015*, p.35.

⁵⁶⁵ <https://www.ihrec.ie/app/uploads/2017/12/Minutes-of-18th-Ordinary-Plenary-Meeting-11.04.2017-APPROVED.pdf>.

⁵⁶⁶ Section 10(2)(j) IHRECA.

⁵⁶⁷ Section 10(2)(k) IHRECA.

⁵⁶⁸ Section 10(2)(l), IHRECA.

⁵⁶⁹ See further: <https://www.ihrec.ie/our-work/grant-awardees/>.

⁵⁷⁰ Duffy, K. (2017) *Employment Equality Acts 1998 – 2015: A Guide For Trade Unions*, Dublin, Irish Congress of Trade Unions, https://www.ictu.ie/download/pdf/employment_equality_guide.pdf.

⁵⁷¹ See further: <https://www.ihrec.ie/our-work/human-rights-equality-grant-awardees-2017/>.

⁵⁷² See further: <https://www.ihrec.ie/inaugural-human-rights-equality-professional-diploma-underpins-role-public-sector-duty/>.

⁵⁷³ See further, IHREC (2016) *Annual Report 2015*, p. 38.

Section 35 IHRECA equips IHREC with the power to conduct inquiries.⁵⁷⁴ The threshold is relatively high: the Commission may conduct an inquiry if it considers that—

- '(a) there is, in any body (whether public or otherwise) institution, sector of society, or geographical area, evidence of—
 - (i) a serious violation of human rights or equality of treatment obligations in respect of a person or a class of persons, or
 - (ii) a systemic failure to comply with human rights or equality of treatment obligations,
- and
- (b) the matter is of grave public concern, and
- (c) it is in the circumstances necessary and appropriate so to do.'⁵⁷⁵

A number of measures must be undertaken prior to the conduct of an inquiry. The Commission must draw up terms of reference and an outline of the procedures to be followed, and then lay these before parliament. Notice of intention to conduct the inquiry should then be published. This power has not been deployed to date. IHREC took decisions with respect to 23 requests to conduct an inquiry in 2015 and 2016, declining each one. According to its 2017 annual report the 'majority of requests did not meet the threshold for intervention by the Irish Human Rights and Equality Commission as set out in section 35'.⁵⁷⁶ In May 2016, the Commission adopted a resolution on requests for inquiries, which underscores that only the Minister has the statutory right to seek an inquiry and that it will not in general conduct an assessment of the merits or otherwise of requests that it conduct an inquiry made by persons other than the Minister.⁵⁷⁷ Inclusion Ireland⁵⁷⁸ has criticised IHREC's failure to conduct an inquiry into the ongoing institutionalisation of thousands of persons with an intellectual disability, as well as the process by which the Commission dealt with its request for an inquiry.⁵⁷⁹

The Commission is empowered to consult with such national, European Union or international bodies or agencies having a knowledge or expertise in the field of human rights or equality as it sees fit.⁵⁸⁰

Finally, a residual provision under IHRECA provides that the Commission shall have all such powers as are necessary or expedient for the performance of its functions.⁵⁸¹ IHREC has invoked this subsection in issuing resolutions on its approach to its statutory functions.⁵⁸²

v) Positive duties

Section 42 of the Irish Human Rights and Equality Commission Act 2014 introduced a positive duty on public bodies in exercising their functions to have

⁵⁷⁴ <http://www.irishstatutebook.ie/eli/2014/act/25/enacted/en/print#sec35>.

⁵⁷⁵ Section 35(1) IHRECA.

⁵⁷⁶ IHREC (2017) *Annual Report 2016*, p. 16.

⁵⁷⁷ <https://www.ihrec.ie/app/uploads/2016/12/IHREC-Policy-on-Requests-for-Inquiries.pdf>.

⁵⁷⁸ Inclusion Ireland is a national rights-based advocacy organisation that works to promote the rights of people with an intellectual disability and their families. See further: <http://www.inclusionireland.ie/>.

⁵⁷⁹ Inclusion Ireland (2018) *Deinstitutionalisation in Ireland; a failure to act*, <http://www.inclusionireland.ie/sites/default/files/attach/basic-page/1655/deinstitutionalisation-ireland-failure-act.pdf>; Edwards, E. (2016) 'Call for inquiry into use of outdated institutions', *Irish Times*, 26 January 2016, <https://www.irishtimes.com/news/social-affairs/call-for-inquiry-into-use-of-outdated-institutions-1.2511336>;

⁵⁸⁰ Section 10(2)(h) IHRECA.

⁵⁸¹ Section 10(5) IHRECA, <http://www.irishstatutebook.ie/eli/2014/act/25/section/10/enacted/en/html#sec10>.

⁵⁸² See e.g. <https://www.ihrec.ie/app/uploads/2016/12/IHREC-Policy-on-Requests-for-Inquiries.pdf>.

due regard to the need to: '(a) eliminate discrimination, (b) promote equality of opportunity and treatment of its staff and the persons to whom it provides services, and (c) protect the human rights of its members, staff and the persons to whom it provides services'.⁵⁸³ A public body is obliged to demonstrate compliance with the duty by including in its strategic plans an assessment of the human rights and equality issues it believes to be relevant to the functions and purpose of the body and the policies, plans and actions in place or proposed to be put in place to address those issues. They are further required to report on developments and achievements on in their annual reports.⁵⁸⁴ IHREC is charged with assisting public bodies to comply with the positive duty, which may include producing guidelines and preparing codes of practice.⁵⁸⁵ In 2016 it published a booklet, which outlines the core elements of the duty⁵⁸⁶ and a range of pilot measures are currently underway.⁵⁸⁷ Where the Commission considers that there is evidence of a failure by a public body to perform its functions in a manner consistent with the duty and that it is appropriate in all the circumstances to do so, it may invite the public body to carry out a review or an action plan, or both. The review or action plan may relate to equality of opportunity or human rights generally or a particular aspect of human rights or discrimination.⁵⁸⁸ The body must accept the Commission's invitation to trigger the review/action plan; there are no powers to compel engagement or ultimately to secure compliance with an action plan. Failure to comply with the duty is not otherwise actionable.⁵⁸⁹ The Commission may, and if requested by the Minister must, carry out a review of the operation of duty.⁵⁹⁰

g) Legal standing of the designated body/bodies

In Ireland, IHREC has legal standing to:

- Bring discrimination complaints (on behalf of identified victims) to court
- Bring discrimination complaints (on behalf of non-identified victims) to court
- Bring discrimination complaints ex officio to court
- Intervene in legal cases concerning discrimination

Section 85 EEA empowers IHREC to refer certain cases to the WRC, which are dealt with as if they had been referred by an individual complainant. IHREC may instigate complaints with respect to discriminatory advertising or the procurement of victimisation or discrimination (Section 85(d)-(f)). In such cases there may be no actual victim. IHREC is also empowered, under Section 85 (a)-(c), to refer a complaint to the WRC where it appears to the Commission:

- that discrimination or victimisation is being generally practised against persons or that an employer has applied or operated discriminatory rules or instructions.
- that discrimination or victimisation has occurred in relation to a particular person who has not made a reference to the WRC and that it is not reasonable to expect that person to make such a reference.
- that there is a failure to comply with an equal remuneration term or an equality clause either generally in a business or in relation to a particular person who has not made a reference and it is not reasonable to expect them to make such a reference.

⁵⁸³ Section 42(1) IHRECA, <http://www.irishstatutebook.ie/eli/2014/act/25/enacted/en/print#sec42>.

⁵⁸⁴ Section 42(2) IHRECA.

⁵⁸⁵ Section 10(2)(n), Section 42(3), Section 42(4) IHRECA.

⁵⁸⁶ IHREC (2016) *The Public Sector Duty*, https://www.ihrec.ie/download/pdf/ihrec_public_duty_booklet.pdf.

⁵⁸⁷ IHREC (2017) *Annual Report 2016*, p.13; <https://www.ihrec.ie/app/uploads/2017/12/Minutes-of-19th-Ordinary-Plenary-Meeting-17.05.2017-APPROVED.pdf>.

⁵⁸⁸ Section 42(5), section 42(6) IHRECA.

⁵⁸⁹ Section 42(11) IHRECA.

⁵⁹⁰ Sections 42(7)-(10) IHRECA.

Under Section 86 EEA IHREC may refer a collective agreement to the WRC where it is considered that any provision of the agreement is discriminatory. The legislation does not specify whether the consent of persons affected by the purported discrimination must be obtained by IHREC.

Similar provisions enable IHREC to refer cases under ESA to the WRC (Section 23 ESA). It may also apply to the District Court for a determination as to whether a club is a discriminating club under Section 8(3) ESA.

To date the Commission has referred two cases to the WRC. Both involve discriminatory advertising complaints taken against companies under section 23 ESA on the housing assistance, family and age grounds.⁵⁹¹ The minutes of the Commission's plenary meeting held in June 2017 record that one case was settled prior to hearing;⁵⁹² presumably the other case is pending before the WRC.

Section 100(3) EEA and Section 41(1) ESA empower IHREC to institute summary proceedings for an offence under any provision of that legislation. It seems that this power has not been deployed to date.

Section 41(1) IHRECA empowers the Commission to 'institute proceedings in any court of competent jurisdiction for the purpose of obtaining relief of a declaratory or other nature in respect of any matter concerning the human rights of any person or class of persons.' Declarations of unconstitutionality are expressly envisaged under Section 42(2). The reference to relief of another nature should ensure that a court could award a range of remedies such as damages and injunctions depending on the legal basis of the proceedings. 'Human rights' for this purpose are defined as those guaranteed under the Irish Constitution, the European Convention on Human Rights Act 2003 or under 'any agreement, treaty or convention to which the State is a party and which has been given the force of law in the State...' (Section 29 IHRECA). This definition should be broad enough to enable IHREC to litigate on compliance with EU equality provisions. However, because Section 41 has not been invoked to date its parameters are unclear. In particular it remains to be seen whether the reference to a 'class of persons' will enable IHREC to bring an *actio popularis* or whether a court will require identifiable victims. A provision in the Heads of Bill had clarified it would not 'be necessary for the Commission to name or identify the class of persons individually and a class of persons shall be constituted by more than one person in relation to whom the same relief is sought.'⁵⁹³ However, this provision was omitted from the legislation passed by the Oireachtas.

IHREC can intervene in legal cases concerning discrimination. But its express power to apply for liberty to appear as *amicus curiae* is confined to proceedings before the Superior Courts (the High Court, the Supreme Court and the Court of Appeal).⁵⁹⁴ The vast bulk of discrimination cases are litigated at the Workplace Relations Commission and the Labour Court, while several significant cases come before courts of local and limited jurisdiction. The express power to intervene in those forums would, therefore, be useful and enable IHREC to contribute to the development of discrimination law principles without having to instigate or fund litigation. In October 2006, the Supreme Court held that the Equality Authority had an implied power to apply to court to act as *amicus* in proceedings relating

⁵⁹¹ IHREC (2017) *Annual Report 2016*, p.16.

⁵⁹² <https://www.ihrec.ie/app/uploads/2017/12/Minutes-of-20th-Ordinary-Plenary-Meeting-28.06.2017-APPROVED.pdf>.

⁵⁹³ Department of Justice (2012) *Heads of Irish Human Rights and Equality Commission Bill 2012*, at p. 57, <http://www.justice.ie/en/JELR/20120605HeadsOfIHRECBill.pdf/Files/20120605HeadsOfIHRECBill.pdf>.

⁵⁹⁴ Under Section 10(e) IHRECA may apply to the High Court or the Supreme Court for liberty to appear before that court as *amicus curiae* in proceedings that involve or are concerned with the human rights or equality rights of any person. IHREC may also apply to the Court of Appeal for liberty to appear before it as *amicus curiae*: Section 44(1) IHRECA transferred the power set out under Section 8(h) of the Human Rights Commission Act 2000 to IHREC.

⁵⁹⁴ <https://www.ihrec.ie/app/uploads/2016/12/IHREC-Amicus-Curiae-Guidelines.pdf>.

to its statutory functions.⁵⁹⁵ It would, therefore, seem that IHREC could seek to assert a similar power with respect to legal proceedings before any tribunal or court. With respect to WRC proceedings, IHREC may be able to intervene by way of a generic provision under Irish anti-discrimination law, which stipulates that in the course of an investigation if the Director of the WRC considers it appropriate, they may 'hear persons appearing to the Director to be interested'.⁵⁹⁶ The provision has been used, albeit rarely, to introduce third party expert testimony in first instance discrimination law proceedings but it seems that it has never been invoked by IHREC or by its predecessor equality body.⁵⁹⁷ In order to ensure that the provision could be activated by IHREC in practice, a procedure for notifying it of discrimination law proceedings should be put in place.⁵⁹⁸

On foot of its express statutory power, IHREC has acted as *amicus curiae* before the Superior Courts in numerous cases since its establishment.⁵⁹⁹ Liberty to appear is at the discretion of the court. IHREC published revised guidelines to the exercise of its *amicus curiae* function in 2016.⁶⁰⁰ According to its 2015 annual report the Commission acted as *amicus curiae* in five cases that reached outcomes since its establishment and applied to be joined in relation to two new legal proceedings. The 2016 annual report notes a 'significant increase in *amicus curiae* activity', with five of the seven applications made that year granted by the Superior Courts.⁶⁰¹ The bulk of the Commission's *amicus curiae* work falls under the rubric of its human rights mandate. The main cases concerning discrimination in which IHREC has intervened are the following:

- In a case concerning whether a school admissions policy gave rise to discrimination on the Traveller community ground, the *amicus curiae* submission of IHREC argued that the indirect discrimination test under ESA should conform to that of the Racial Equality Directive.⁶⁰² The Supreme Court, however, applied a test formulated with reference solely to the provisions of the domestic statute and did not consider whether Travellers constitute an ethnic group for the purposes of EU law.⁶⁰³
- *Culkin v Sligo County Council*⁶⁰⁴ addressed whether an individual can simultaneously pursue both a discrimination complaint under EEA before the Workplace Relations Commission, and a personal injuries claim before the courts, where the claims arise from the same set of facts. IHREC's submission contended that the statutory provision in question, section 101 EEA, should be given a liberal and purposive interpretation in light of EU law, and in particular the requirements of effectiveness and equivalence.⁶⁰⁵ The Court of Appeal found that the provision does not bar subsequent personal injuries claims *per se* where an earlier discrimination claim before the WRC has failed.

⁵⁹⁵ *Doherty v South Dublin County Council* [2006] IESC 57, 31 October 2006, <http://www.courts.ie/Judgments.nsf/WebJudgmentsByYearAll/8D5ED1E371F88CBE80257219004955BD?openDocument>.

⁵⁹⁶ Section 25(1) ESA; Section 79(1) EEA. It should also be noted that under IHRECA the Commission 'shall have all such powers as are necessary or expedient for the performance of its functions': Section 10(5) IHRECA, <http://www.irishstatutebook.ie/eli/2014/act/25/section/10/enacted/en/html#sec10>.

⁵⁹⁷ See further Walsh, J. (2012) *Equal Status Acts 2000-2011: Discrimination in the Provision of Goods and Services*, Dublin, Blackhall Press, at Ch. 10.4.

⁵⁹⁸ IHREC is given notice of proceedings in which a declaration of incompatibility is sought pursuant to section 6 of the European Convention on Human Rights Act 2003 and 2014, <http://www.irishstatutebook.ie/eli/2003/act/20/section/6/enacted/en/html>.

⁵⁹⁹ See further: <https://www.ihrec.ie/our-work/legal-activity/amicus-curiae-power/>

⁶⁰⁰ <https://www.ihrec.ie/app/uploads/2016/12/IHREC-Amicus-Curiae-Guidelines.pdf>.

⁶⁰¹ IHREC (2017) *Annual Report 2016*, p.4, pp.14-17.

⁶⁰² The brief submitted by IHREC was originally drafted by the Equality Authority and is available here: https://www.ihrec.ie/download/pdf/mary_stokes_v_christian_brothers_high_school_clonmel_or_13_dec_2012_.pdf.

⁶⁰³ Supreme Court, *Stokes v Christian Brothers' High School Clonmel*, [2015] IESC 13, 24.02.2015, <http://www.courts.ie/Judgments.nsf/597645521f07ac9a80256ef30048ca52/a09897a48211897980257df6005a3c31?OpenDocument>.

⁶⁰⁴ Court of Appeal, *Culkin v Sligo County Council & Anor*, [2017] IECA 104, 29.03.2017, <http://www.courts.ie/Judgments.nsf/0/A4341EEA5E39DC55802580F800354B47>.

⁶⁰⁵ <https://www.ihrec.ie/app/uploads/2017/03/Culkin-v-Sligo-County-Council-March-2017.pdf>.

g) Quasi-judicial competences

In Ireland, IHREC is not a quasi-judicial institution.

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

In Ireland IHREC registers the number of inquiries received, complaints of discrimination made, and decisions (by ground, field, type of discrimination, etc.). It only registers inquiries it has received and those complaints and decisions in which it has acted. These data are published in its annual report and are available to the public; the Commission's annual reports are available on its website.⁶⁰⁶

The Commission's first annual report, which was published in June 2016, covers the period November 2014 to December 2015. IHREC processed 2 173 public queries over that period, a substantial proportion of which related to anti-discrimination law: 491 concerned ESA, 459 EEA, 12 the Intoxicating Liquor Act 2003, while 25 related to discriminatory advertising.⁶⁰⁷ The breakdown of the grounds for all anti-discrimination legislation queries is as follows: Age 140; Civil Status 25; Disability 264; Family Status 82; Gender 112; Race 140; Religion 40; Sexual Orientation 31; Traveller Community 26; Victimisation 4; no ground stated 266. In the 2016 calendar year 1 780 queries were handled. Again a substantial number pertained to anti-discrimination law with 510 on ESA, 26 concerning the Intoxicating Liquor Act 2003, and 368 related to EEA.⁶⁰⁸ The Commission's annual report for that year does not supply the precise number of queries on each ground but rather sets out the most frequently arising grounds and themes as follows:

- ESA: 30 % housing assistance; 22 % disability; 16% race
 - 45 % goods and services providers; 40 % accommodation service providers; 12 % educational establishments
 - EEA: 25 % disability; 22 % family status; 17 % race
 - 44 % terms and conditions; 28 % access to employment; 11 % sexual harassment and harassment
 - Section 19, Intoxicating Liquor Act: 31 % Traveller community; 15 % race
- According to the minutes of the Commission's plenary meeting held in April 2017, it has agreed to give further consideration to 'how to adequately capture queries relating to multiple grounds/ intersectionality in reporting on the handling of public information queries.'⁶⁰⁹

The Commission received 32 applications for legal assistance in 2015. It decided not to grant legal assistance for 26 applications and a further 29 applications were pending by the end of 2015. At the conclusion of 2015, 45 cases were ongoing. 40 of these were carried over from the casework of IHREC's predecessor bodies, the Equality Authority and the Irish Human Rights Commission. IHREC granted legal assistance in five 'new' cases. 26 of the 45 cases were under ESA, with 15 relating to EEA (the other four cases concerned general human rights protection). The breakdown of the discriminatory grounds is as follows:

- 29 grounds were invoked in the 26 ESA cases (there were three multiple ground cases): Religion 16; Disability 7; Family Status 2; Race 2; Gender 2; Civil Status 1.

⁶⁰⁶ IHREC (2016) *Annual Report 2015*, available at: <https://www.ihrec.ie/documents/annual-report-2015/>; IHREC (2017) *Annual Report 2016*, available at: <https://www.ihrec.ie/app/uploads/2017/06/IHREC-Annual-Report-2016.pdf>.

⁶⁰⁷ 398 queries processed related to other human rights protections and 788 were referred to another information or recourse service.

⁶⁰⁸ 210 queries pertained to human rights issues, 12 concerned IHRECA, while 654 related to referrals to other information or recourse service.

⁶⁰⁹ <https://www.ihrec.ie/app/uploads/2017/12/Minutes-of-18th-Ordinary-Plenary-Meeting-11.04.2017-APPROVED.pdf>.

- 17 grounds were invoked in the 15 EEA cases (there were two multiple ground cases): Age 8; Gender 4; Sexual Orientation 1; Family Status 1; Religion 1; Disability 1; Race 1.

During 2016, decisions were made on 43 requests for legal assistance. 29 decisions were pending at year end and the Commission had 30 legal assistance client files open, of which 17 were new clients. Nine of the 30 ongoing cases concerned ESA, with 11 relating to EEA (the remaining ten related to human rights).⁶¹⁰ The Commission does not provide information on the grounds invoked for that year.

Data from 1st January 2017 to 31st December are not available since the Commission's annual report for 2017 will not be published until the summer of 2018.

j) Planning

The Commission has a strategic plan, which was launched in January 2016 and covers the period 2016–2018.⁶¹¹ An extensive consultation process, conducted in 2015 with the general public and NGOs, informed the plan.⁶¹² IHREC has an annual work plan; it is an internal document and so is not published. Its annual report for 2015 notes that over the course of the year the 'Commission's Legal Team engaged in detailed scoping and analysis' of its compliance and enforcement functions 'in order to strategically plan their longer term potential impact.'⁶¹³ The Commission endorsed a Strategic Litigation and Enforcement Plan in April 2017.⁶¹⁴ It is an internal document and so is not published.

IHREC has an annual report as required by legislation.⁶¹⁵ It is obliged to present the annual report to Parliament and to subsequently publish it.

It appears that the Commission has not conducted an evaluation of its first strategic plan, which runs until the end of 2018.

It is not possible at this juncture to evaluate the quality of the planning cycle implemented by IHREC: Implementation of the Commission's first strategic plan is still underway and it has published just two annual reports.

k) Stakeholder engagement

IHREC engages with a broad range of stakeholders in implementing its mandate, including civil society associations, business/ employer/ service provider networks and organisations, public bodies, local government entities, trade unions and the general public. Engagement is underpinned by several statutory provisions that direct or enable IHREC to consult with 'relevant agencies and civil society.'⁶¹⁶ An overarching obligation to engage with stakeholders is set out under section 18(1) IHRECA, which provides:

⁶¹⁰ IHREC (2017) *Annual Report 2016*, p.32.

⁶¹¹ IHREC (2016) *Strategy Statement 2016-2018*, available at: <https://www.ihrec.ie/download/pdf/strategystatement.pdf>.

⁶¹² IHREC (2016) *Feedback report on the public consultation process 2015*, https://www.ihrec.ie/download/pdf/ihrec_consultation_full_feedback_report.pdf.

⁶¹³ IHREC (2016) *Annual Report 2015*, p.5.

⁶¹⁴ <https://www.ihrec.ie/app/uploads/2017/12/Minutes-of-18th-Ordinary-Plenary-Meeting-11.04.2017-APPROVED.pdf>.

⁶¹⁵ Section 28, IHRECA: <http://www.irishstatutebook.ie/eli/2014/act/25/enacted/en/print#sec28>.

⁶¹⁶ Section 2(2) IHRECA defines 'relevant agencies and civil society' as including '(a) non-governmental organisations concerned with the promotion or protection of human rights or equality, including organisations specialising in the promotion of economic and social development, (b) trade unions and other business, professional and social organisations, (c) third level institutions and other experts in education, (d) religious bodies, secular bodies (within the meaning of the Civil Registration (Amendment) Act 2012) or other groups that are representative of religious thought and beliefs or philosophical beliefs, and (e) public bodies.'

'The Commission shall, for the purpose of establishing and maintaining effective co-operation with representatives of relevant agencies and civil society—
(a) appoint such and so many advisory committees as it thinks fit to assist and advise it on matters relating to its functions, and
(b) support, establish or participate in such networks, public consultation processes or public forums, as it sees appropriate.'⁶¹⁷

To date the Commission has undertaken extensive public consultations with NGOs and the general public on various facets of its work, including the formulation of its strategic plan.⁶¹⁸

A high level of engagement with public bodies and local government entities has occurred in the context of assisting compliance with the public sector equality and human rights duty set out under section 42 IHRECA. A number of such stakeholders have agreed to act as pilot sites for testing implementation of the duty in practice.⁶¹⁹ For example, in partnership with the Local Government Management Agency, the Commission commenced work in 2016 with one urban and one rural local authority to act as pilot sites to trial guidance and identify good practices in the local authority setting.⁶²⁰

Establishing advisory committees, in accordance with Section 18(1)(a) IHRECA, is one of the primary formal mechanisms for securing stakeholder engagement. IHREC has appointed two such advisory committees. The first meeting of the Worker and Employer Advisory Committee took place on 30 March 2017. It comprises four worker and four employer representatives nominated by the Irish Congress of Trade Unions (ICTU) and by the Irish Business and Employers' Confederation (IBEC), as well as two Commission members. The Committee advises IHREC on employment equality and workplace issues; equal status in service provision; human rights in the workplace and service provision; diversity and interculturalism; and such other matters as are referred to it by the Commission.⁶²¹ A research advisory committee has also been established but no information is publicly available as to its composition, terms of reference and so on.

In the author's assessment the level and nature of engagement with stakeholders is very good overall. IHREC places a strong emphasis on its work being informed by those who have experienced inequality and human rights violations. Greater use could perhaps be made of the power to establish advisory committees since it provides a structured means of incorporating external expertise. Establishment of the Worker and Employer Advisory Committee is a welcome vehicle for building engagement on equality issues in employment and should help to offset the loss of such expertise from the board of the former Equality Authority.

l) Accessibility

IHREC has an accessible and publicly visible office located in Dublin city centre. In terms of disability access, universal design principles and 'optimal accessibility' were central to the refurbishment of the Commission's premises in 2016.⁶²² Two accessible parking bays are located directly outside the offices. In addition, the public at large can use a changing and toilet facility in the Commission's premises, which provides adequate space and

⁶¹⁷ <http://www.irishstatutebook.ie/eli/2014/act/25/section/18/enacted/en/html#sec18>.

⁶¹⁸ IHREC is obliged to consult stakeholders on the formulation of its strategic plan in accordance with Section 25(3) IHRECA, <http://www.irishstatutebook.ie/eli/2014/act/25/enacted/en/print#sec25>. See further, IHREC (2016) *Feedback report on the public consultation process 2015*, https://www.ihrec.ie/download/pdf/ihrec_consultation_full_feedback_report.pdf.

⁶¹⁹ See further: <https://www.ihrec.ie/our-work/public-sector-duty/>.

⁶²⁰ IHREC (2017) *Annual Report 2016*, p.13; <https://www.ihrec.ie/app/uploads/2017/12/Minutes-of-19th-Ordinary-Plenary-Meeting-17.05.2017-APPROVED.pdf>.

⁶²¹ <https://www.ihrec.ie/worker-employer-advisory-committee-hold-inaugural-meeting/>.

⁶²² IHREC (2017) *Annual Report 2016*, p.46.

appropriate equipment for people with disabilities, such as a hoist and a height-adjustable changing bench.⁶²³

IHREC does not have local or regional offices.

The Commission regularly conducts outreach actions to local areas and communities. These have largely taken the form of consultations, which are used to inform IHREC's assessment of human rights and equality issues. A video on ESA was launched at the National Ploughing Championships in 2017; the Commission has operated an information stand at the annual event twice.⁶²⁴

Procedures are in place to identify and respond to the access needs of people with disabilities; no information is publicly available with respect to other groups.⁶²⁵ As required under section 26 of the Disability Act 2005, IHREC has nominated a member of staff as the organisation's access officer.⁶²⁶ The access officer is charged with providing or arranging for and coordinating assistance and guidance to persons with disabilities accessing the body's services. The Commission has published 'easy to read' versions of some key publications.⁶²⁷

In the author's assessment the Commission has a clear process in place for responding to and accommodating the access needs of people with disabilities but appears to have no systematic approach to addressing other access needs.

m) Roma and Travellers

IHREC does not treat Roma and Travellers as a priority issue.⁶²⁸ To date the Commission has adopted a holistic approach to the discriminatory grounds.

⁶²³ <https://www.ihrec.ie/changing-places>.

⁶²⁴ <https://www.ihrec.ie/newsletter/human-rights-equality-update-issue-3-2017/?frame=0#anchor7>.

⁶²⁵ The Commission's *Strategy Statement* and annual reports refer to some measures taken to secure the participation of marginalised groups in Commission activities but the author could not find information on a systematic approach.

⁶²⁶ <https://www.ihrec.ie/access-officer/>.

⁶²⁷ See e.g. IHREC (2017) *An easy-to-read guide to Country report on Torture in Ireland*, <https://www.ihrec.ie/app/uploads/2017/07/Easy-to-Read-guide-to-IHRECs-CAT-Report.pdf>.

⁶²⁸ IHREC (2016) *Strategy Statement 2016-2018*, available at: <https://www.ihrec.ie/download/pdf/strategystatement.pdf>.

8 IMPLEMENTATION ISSUES

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

The Irish Human Rights and Equality Commission (IHREC) is the primary vehicle through which Ireland implements non-discrimination law. IHREC has several statutory powers and functions pertaining to dissemination of information about legal protection against discrimination, and as to dialogue between the social partners and with NGOs.

a) Dissemination of legal protection against discrimination

IHREC is required to 'provide information to the public' and to keep under review the effectiveness of the working of the Employment Equality Acts 1998-2015, the Equal Status Acts 2000-2015 and Section 19 of the Intoxicating Liquor Act 2003.⁶²⁹ On its website IHREC provides an accessible overview of those laws aimed at the general public as well as organisations and businesses.⁶³⁰ It published detailed guides to EEA and ESA in 2015.⁶³¹ Its predecessor equality body, the Equality Authority, did not have a statutory duty to provide information to the public on Section 19, which relates to discrimination in licensed premises. The Commission provides some basic information on the operation of discrimination law in that context but little information on the operation of the District Court.⁶³² It remains to be seen whether IHREC will further develop its information function in that regard.

The Commission also operates a Public Information Service that individuals may avail of to obtain information on their rights to protection against discrimination.⁶³³ It processed 3 953 queries from members of the public between November 2014 and December 2016 (see further Chapter 7.i).

b) Dialogue with NGOs

IHREC fosters dialogue with NGOs with in implementing its mandate, which is underpinned by several statutory provisions that direct or enable IHREC to consult with 'relevant agencies and civil society' (see further Chapter 7(k) of this report). An overarching obligation to engage with stakeholders is set out under section 18(1) IHRECA, which provides:

'The Commission shall, for the purpose of establishing and maintaining effective co-operation with representatives of relevant agencies and civil society—
(a) appoint such and so many advisory committees as it thinks fit to assist and advise it on matters relating to its functions, and
(b) support, establish or participate in such networks, public consultation processes or public forums, as it sees appropriate.'⁶³⁴

The Government, principally through the Department of Justice and Equality, frequently establishes consultation mechanisms to receive input from civil society organisations on major law reform initiatives in the field of equality.

c) Promotion of dialogue between social partners

⁶²⁹ Section 30 IHRECA: <http://www.irishstatutebook.ie/eli/2014/act/25/enacted/en/print#sec30>.

⁶³⁰ <https://www.ihrec.ie/guides-and-tools/>.

⁶³¹ https://www.ihrec.ie/app/uploads/download/pdf/ihrec_equal_status_rights_explained.pdf.

⁶³² <https://www.ihrec.ie/your-rights/i-have-an-issue-with-a-service/i-have-an-issue-about-a-pub-nightclub-or-other-place-which-sells-alcohol/>.

⁶³³ See <https://www.ihrec.ie/your-rights/can-we-help/>.

⁶³⁴ <http://www.irishstatutebook.ie/eli/2014/act/25/section/18/enacted/en/html#sec18>.

Pursuant to Section 18 IHRECA, the Commission established an advisory comprising social partners in 2017 (see Chapter 7(k) of this report).

IHREC is empowered to prepare codes of practice in furtherance of the elimination of discrimination and the promotion of equality of opportunity (see further Chapter 7(f)(iv) of this report). In drafting codes of practice IHREC is mandated to consult with such other persons or bodies as it considers appropriate.⁶³⁵ To date the only code of practice produced by an Irish equality body is that concerning Sexual Harassment and Harassment at Work.⁶³⁶ It was produced after consultation with the Irish Business and Employers Confederation (IBEC), ICTU and other relevant organisations representing equality interests.

d) Addressing the situation of Roma and Travellers

The Traveller and Roma Inclusion Unit within the Department of Justice and Equality coordinates policy in this area and acts as Ireland's National Contact Point under the EU Framework for National Roma Integration Strategies.⁶³⁷ A revised Traveller and Roma inclusion strategy was published in 2017.⁶³⁸ It sets out a range of measures to be taken in fields such as education, housing and employment. An implementation plan will be published in 2018.

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

a) Mechanisms

IHREC may conduct equality reviews and prepare equality action plans. This is a potentially valuable mechanism in securing compliance with equality law but it has not been employed by IHREC to date (see further Chapter 7(f)(iv) of this report).

Under Section 30 EEA 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.⁶³⁹ 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.⁶⁴⁰ IHREC or a person who is affected by a collective agreement may refer it to the WRC.⁶⁴¹

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 an adjudicator determines that the clause in question is contrary to the legislation that part of the collective agreement/contract cannot be enforced and must be modified.⁶⁴²

It appears there are no specific laws or regulations in force that are contrary to the directives. There are however, a number equality legislation provisions that may not be in compliance with the directives.

⁶³⁵ Section 31 IHRECA, <http://www.irishstatutebook.ie/eli/2014/act/25/enacted/en/print#sec31>.

⁶³⁶ S.I. No. 208/2012 - Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2012: <http://www.irishstatutebook.ie/eli/2012/si/208/made/en/print>.

⁶³⁷ <http://www.travellerinclusion.ie/website/TravPolicy/travinclusionweb.nsf/page/index-en>.

⁶³⁸ Department of Justice and Equality (2017) *National Traveller and Roma Inclusion Strategy, 2017 – 2021*, <http://www.justice.ie/en/JELR/National%20Traveller%20and%20Roma%20Inclusion%20Strategy.%202017-2021.pdf/Files/National%20Traveller%20and%20Roma%20Inclusion%20Strategy.%202017-2021.pdf>.

⁶³⁹ With respect to occupational pensions and benefit schemes the equivalent provision is section 81 Pensions Acts 1990-2015.

⁶⁴⁰ Section 9 EEA.

⁶⁴¹ Sections 86-87 EEA.

⁶⁴² See e.g. *A Customer Assistant v a Grocery Retailer*, ADJ-00005316, 21.07.2017, <https://www.workplacerelations.ie/en/Cases/2017/July/%20ADJ-00005316.html>.

The major concern remains Section 14(1)(a) ESA, which provides that nothing in that Act will prohibit any action required under any enactment.⁶⁴³ In effect this provision ensures that ESA remains subordinate to other legislation. The Racial Equality Directive does not envisage any blanket exemption for discriminatory measures required by law.

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.⁶⁴⁴

A further overarching concern relates to the ability of the WRC and the Labour Court to interpret and apply EU law principles that conflict with domestic law. The High Court has found that such bodies cannot issue a ruling that seeks to align domestic law with EU law where to do so would contravene the express terms of a national legal provision.⁶⁴⁵ On appeal, the Supreme Court upheld the reasoning with respect to domestic law but employed the preliminary reference procedure to ascertain whether the limits placed on the jurisdiction of the WRC and Labour Court are compatible with Directive 2000/78 (see further Chapter 12.2 of this report).⁶⁴⁶ A procedure is available under Section 90(2) EEA, which enables the Labour Court to refer a question of law for determination by the High Court. However, no such mechanism is available before the WRC as the first instance forum for cases under both ESA and EEA.⁶⁴⁷ Parties to the case may also appeal a finding of the (appellate) Labour Court to the High Court on a point of law under Section 90(1) EEA and of the (appellate) Circuit Court under Section 28 ESA.

⁶⁴³ See further Chapter 3.2.6 Social protection.

⁶⁴⁴ Ireland, Organisation of Working Time Act 1997, 07.05.1997, <http://www.irishstatutebook.ie/eli/1997/act/20/enacted/en/html?q=Organisation+of+Working+Time+Act&years=1997>.

⁶⁴⁵ High Court, *Minister for Justice, Equality and Law Reform and anor. v Director of the Equality Tribunal and ors.* [2009] IEHC 72, 17.02.2009, <http://www.courts.ie/Judgments.nsf/0/56ED2DFBACF3ABA28025757600581C87>.

⁶⁴⁶ Supreme Court, *Minister for Justice, Equality and Law Reform v The Workplace Relations Commission and ors.* [2017] IESC 43, 15.06.2017, <http://www.courts.ie/Judgments.nsf/bce24a8184816f1580256ef30048ca50/7b97206199a365a480258141004d3f72?OpenDocument>.

⁶⁴⁷ Section 79(5A) EEA had provided for such a procedure in respect of EEA cases but it was deleted under Section 83(1)(f) of the Workplace Relations Act 2015: <http://www.irishstatutebook.ie/eli/2015/act/16/enacted/en/print#sec83>.

9 COORDINATION AT NATIONAL LEVEL

The Department of Justice and Equality coordinates issues regarding anti-discrimination on the grounds covered.

Several units under the auspices of the Department are charged with overseeing implementation of given strategies and policies. The Traveller and Roma Inclusion Unit within the Department of Justice and Equality coordinates policy in this area and acts as Ireland's National Contact Point under the EU Framework for National Roma Integration Strategies.⁶⁴⁸ The Department's Office for the Promotion of Migrant Integration coordinates migrant integration policy across other Government Departments, agencies and services. Its functions include the promotion of migrant integration, the coordination of Ireland's international reporting requirements relating to racism and integration and the administration of funding from national and EU sources to promote integration.⁶⁴⁹

There is currently no national action plan or strategy against racism or discrimination. The *National Action Plan against Racism 2005-2008*⁶⁵⁰ has not been renewed since its expiry contrary to the recommendations of several international human rights bodies.⁶⁵¹ There are, however, several national plans that deal with discrete groups who experience discrimination such as the *Migrant Integration Strategy*,⁶⁵² the *National Traveller and Roma Inclusion Strategy 2017-2021*,⁶⁵³ and the *National Disability Inclusion Strategy 2017 - 2021*.⁶⁵⁴

⁶⁴⁸ <http://www.travellerinclusion.ie/website/TravPolicy/travinclusionweb.nsf/page/index-en>.

⁶⁴⁹ <http://www.integration.ie/website/omi/omiwebv6.nsf/page/index-en>.

⁶⁵⁰ Department of Justice, Equality and Law Reform (2008) *Planning for Diversity: The National Action Plan Against Racism 2005-2008*, available at: <http://www.integration.ie/website/omi/omiwebv6.nsf/page/Racism-npar-en>.

⁶⁵¹ UN Committee on the Rights of the Child (2016) *Concluding observations on the combined third and fourth periodic reports of Ireland*, 29.01.2016, CRC/C/IRL/CO/3-4, available at: <http://www.refworld.org/docid/56c17f574.html>; Council of Europe: European Commission Against Racism and Intolerance (ECRI) (2013) *ECRI Report on Ireland (fourth monitoring cycle)*, Strasbourg: Council of Europe, at 115, available at: <https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Ireland/IRL-CbC-IV-2013-001-ENG.pdf>.

⁶⁵² Department of Justice and Equality (2017) *The Migrant Integration Strategy – A Blueprint for the Future*, available at: [http://www.justice.ie/en/JELR/Migrant Integration Strategy English.pdf/Files/Migrant Integration Strategy English.pdf](http://www.justice.ie/en/JELR/Migrant%20Integration%20Strategy%20English.pdf/Files/Migrant%20Integration%20Strategy%20English.pdf).

⁶⁵³ Department of Justice and Equality (2017) *The National Traveller and Roma Inclusion Strategy 2017-2021*, p.41, available at: <http://www.justice.ie/en/JELR/National%20Traveller%20and%20Roma%20Inclusion%20Strategy.%202017-2021.pdf/Files/National%20Traveller%20and%20Roma%20Inclusion%20Strategy.%202017-2021.pdf>.

⁶⁵⁴ Department of Justice and Equality (2017) *National Disability Inclusion Strategy 2017 - 2021*, available at: <http://www.justice.ie/en/JELR/dept-justice-ndi-inclusion-strategy-booklet.pdf/Files/dept-justice-ndi-inclusion-strategy-booklet.pdf>.

10 CURRENT BEST PRACTICES

- Section 42 of the Irish Human Rights and Equality Commission Act 2014 introduced a positive duty on public bodies to have due regard to human rights and equality in exercising their functions. IHREC will assist public bodies to comply with the positive duty, including by producing guidelines and codes of practice. In 2016 it published a booklet, which outlines the core elements of the duty and a range of pilot measures are currently underway (see further Chapter 7(f)(v) of this report).
- IHREC operates a human rights and equality grants scheme, which provides opportunities for funded research, education and training projects to be conducted by civil society organisations and universities (see further Chapter 7 f (iv) of this report).
- The WRC and Labour Court have interpreted the prohibition of direct discrimination on the race ground as requiring different treatment to take account of linguistic and cultural barriers experienced by potentially vulnerable migrant workers.⁶⁵⁵
- No fees are payable by complainants before the first instance forum for discrimination law cases under the ESA and EEA.⁶⁵⁶
- The availability of non-financial sanctions as redress under EEA and ESA enables remedies to have an impact beyond the parties to the case since they may entail changes to respondents' practices and procedures.⁶⁵⁷

⁶⁵⁵ See Chapter 2.6.f Duties to provide reasonable accommodation in respect of other grounds.

⁶⁵⁶ See Chapter 6.1.a Available procedures for enforcing the principle of equal treatment.

⁶⁵⁷ See Chapter 6.5 Sanctions and remedies.

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives (if any)

Both acts:

- In a 2015 judgment the Supreme Court considered the interpretation of indirect discrimination under ESA for the first time, and held that statistical analysis is required in order to establish that a person belonging to a protected group is at a 'particular disadvantage' compared with others.⁶⁵⁸ This appears to be more restrictive than the concept of indirect discrimination in the directives.⁶⁵⁹
- Maximum levels of compensation and failure to provide for payment of interest arguably not in compliance with directives.⁶⁶⁰
- The capacity of the WRC and the Labour Court to interpret and apply EU law is hampered by their limited jurisdiction under Irish law (preliminary ruling from the CJEU is pending).⁶⁶¹

Employment Equality Acts 1998-2015

- It appears from the wording of the provisions concerning discrimination on the religion ground that the belief in question must be a religious one and so the provisions may not adequately prohibit discrimination on the grounds of religion *or* belief.⁶⁶²
- Associations do not have standing in discrimination cases in civil courts.⁶⁶³
- 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.⁶⁶⁴
- The definition of 'vocational training' may be too restrictive.⁶⁶⁵
- It is not discriminatory to pay a disabled person a lesser rate of remuneration.⁶⁶⁶

Equal Status Acts 2000-2015

- Complaints must be instigated within two months of the discriminatory act by sending a written notification to the alleged discriminator.⁶⁶⁷
- Uncertain that the scope of ESA covers fully social protection and social advantages; also anything required to be done under another statute is not in breach of ESA.⁶⁶⁸
- Denominational schools are permitted to distinguish between prospective students on the basis of their religious background raising possible compliance issues with the Racial Equality Directive.⁶⁶⁹
- 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 raises compliance issues with the non-regression provisions of Article 15 of the Racial Equality Directive, due to the prohibitive cost and relative complexity of court proceedings.⁶⁷⁰

⁶⁵⁸ *Stokes v Christian Brothers High School, Clonmel*, [2015] IESC 13, 24.02.2015, <http://www.courts.ie/Judgments.nsf/597645521f07ac9a80256ef30048ca52/a09897a48211897980257df6005a3c31?OpenDocument>.

⁶⁵⁹ See 3.2.8 Education; 3.2.1.b Statistical evidence.

⁶⁶⁰ See 6.5 Sanctions and remedies.

⁶⁶¹ See 8.2.b Compliance.

⁶⁶² See 2.2.1 Definitions.

⁶⁶³ See 6.2 Legal Standing and Associations.

⁶⁶⁴ See 3.2.2 Material scope, Conditions for access to employment.

⁶⁶⁵ See 3.2.4 Access to vocational training.

⁶⁶⁶ See 4.9 Any other exceptions.

⁶⁶⁷ See 6.1.b Remedies and Enforcement, Barriers and other deterrents.

⁶⁶⁸ See 3.2.6 Social Protection.

⁶⁶⁹ See 3.2.8 Education.

⁶⁷⁰ See 6.1.b Barriers and other deterrents faced by litigants seeking redress.

- Where a registered club is set up to cater for the needs of members of a particular ground it can exclude persons who do not fall under that ground from membership.⁶⁷¹

11.2 Other issues of concern

Failure to renew the National Action Plan Against Racism, which had provided strategic direction to combating racism and to promoting a more inclusive, intercultural society in Ireland.⁶⁷²

Research on people's experiences of discrimination suggests that high levels of discrimination are experienced by certain sectors of Irish society. For instance, Travellers reported being over 22 times more likely to encounter discrimination in access to private services, than those who identified as 'White Irish'. Skin colour rather than nationality appears to increase the likelihood of adverse treatment in the workplace and in accessing services, with Black respondents reporting significantly higher levels of discrimination than their White counterparts of any nationality. People with disabilities are twice as likely as non-disabled people to experience discrimination in all domains. The report is based on data generated from the responses of 15 000 adults collected for the Equality Module of the 2014 Quarterly National Household Survey, carried out by the Central Statistics Office. Survey participants were asked if, in the previous two years, they had experienced discrimination in the workplace, while seeking work, in accessing public or private sector services.⁶⁷³

⁶⁷¹ See 3.2.9 Access to and supply of goods and services.

⁶⁷² See 9 Coordination at national level.

⁶⁷³ McGinnity, F., Grotti, R., Kenny, O., and Russell, H. (2017) *Who experiences discrimination in Ireland? Evidence from the CSO Equality Modules*, Dublin: ESRI, available at: <https://www.ihrec.ie/app/uploads/2017/11/Who-experiences-discrimination-in-Ireland-Report.pdf>.

12 LATEST DEVELOPMENTS IN 2017

12.1 Legislative amendments

There were no amendments to anti-discrimination laws in 2017.

12.2 Case law

Age

Name of the court: Workplace Relations Commission

Date of decision: 5 July 2017

Name of the parties: *A Job Applicant v A Sporting Organisation*

Reference number: ADJ-00005822

Address of the webpage: <https://www.workplacerelations.ie/en/Cases/2017/July/ADJ-00005822.html>

Brief summary:

The complainant referred an age discrimination complaint when he was unsuccessful in applying for the post of Chief Executive Officer with a national sporting organisation. He contended that his experience as a former professional in the sport coupled with an extensive career in sports administration, including a senior international role, made him vastly more qualified than the successful candidate. The complainant asserted that his age was the reason he was not appointed; he was 58 years of age at the time of application and the comparator was approximately 44 years of age. The WRC applied the principle set out in a High Court judgment to the effect that a prima facie case of direct discrimination could be established where the facts disclosed a significant difference between the qualifications of the candidate and a valid comparator under a discriminatory ground (*Davis v Dublin Institute of Technology*, High Court, Quirke J. unreported, 23.06.2000). In the instant case these conditions were met: the successful candidate was significantly less qualified than the complainant and this combined with an age difference of about 14 years established facts from which age discrimination could be inferred. While the respondent argued that the successful applicant had demonstrated a better 'fit' with the job criteria the WRC concluded it was 'clear that the chosen criteria were applied inconsistently between candidates, as well as the complainant being better qualified: Both candidates had qualifications and experience which enabled to them to meet the respondent's stated priorities, and the complainant was significantly better qualified and had all his professional experience in the sport which the respondent represents.' Consequently it found that the respondent failed to rebut the prima facie case and ordered the respondent to pay EUR 6 500 in compensation for the effects of the discrimination.

Disability

Name of the court: Labour Court

Date of decision: 06 June 2017

Name of the parties: *Iarnród Éireann v Flanagan*

Reference number: EDA1716

Address of the webpage: <https://www.workplacerelations.ie/en/Cases/2017/June/EDA1716.html>

Brief summary:

On appeal the Labour Court reversed a finding of the WRC to the effect that the complainant's employer did not afford him reasonable accommodation. Mr Flanagan worked as a rail-crossing keeper with the respondent since 2004. When he became ill and was unable to work for a period of time in 2015, he was referred to the respondent's medical advisors for an assessment of his medical condition and its effect on his capacity to work. In the course of that assessment the complainant revealed that he had been diagnosed with epilepsy in 1997, that the condition was managed with medication and that he had not had a seizure since 2001. The respondent's medical advisors concluded that Mr

Flanagan could not be deployed in the safety critical role for which he had been employed. It did, however, find that he was fit to work in other positions. The respondent activated its applicable policy where an employee acquires a disability, which entails a company-wide search for a suitable role into which it might redeploy such an employee. However, it could not identify any suitable positions for the complainant and he was placed on ill health retirement under the terms of its superannuation scheme. The Court found that no accommodation, including a rearrangement of tasks in accordance with established jurisprudence, could render the complainant capable of undertaking the work for which he had been employed or any other safety critical role. On that basis the respondent was entitled to avail of the defence in 16(1) EEA which specifies that employers are not required to *inter alia* retain an individual who is not (or no longer) fully competent and available to undertake, and fully capable of undertaking the duties attached to that position.

Name of the court: Workplace Relations Commission

Date of decision: 12 June 2017

Name of the parties: *A Prospective Employee v A Company*

Reference number: ADJ-00004761

Address of the webpage:

<https://www.workplacerelations.ie/en/Cases/2017/June/ADJ-00004761.html>

Brief summary:

In this case the WRC upheld a complaint of direct discrimination on the disability ground in access to employment. The complainant applied for a position with the respondent, a charity operating in the disability sector, and was not called for interview. His application included information about his status as a disabled person. The complainant subsequently sought an explanation as to why he had not been interviewed and was informed that an error had been made in the short-listing process. Specifically, some of his qualifications were overlooked. The complainant then availed of the statutory mechanism that enables persons to seek 'material information' from employers in advance of referring an EEA complaint. In accordance with section 76 EEA such information is sought using a document known as an 'EE2 form'. The respondent maintained that 'human error' resulted in the complainant's unwarranted exclusion and that it was not linked to the complainant's disability. The WRC found that the selection process was 'bereft of transparency'. It was concerned by a number of erasures and revisions on the final marking sheet for applications and found that the complainant's application had been treated inconsistently to those of the other applicants. The adjudicator noted that the respondent was on notice of the complainant's disability because that information was explicitly included in his application. The adjudicator was satisfied that these factors gave rise to an inference of discrimination on the disability ground, which the respondent failed to rebut. An award of EUR 8 000 was made along with an order that the respondent review its recruitment processes to ensure that those involved in short listing candidates were trained in equality and a direction to issue a formal letter of apology to the complainant.

Race/ ethnic origin

Name of the court: Labour Court

Date of decision: 30 November 2017

Name of the parties: *Boxmore Plastics v Zimareva*

Reference number: EDA 1732

Address of the webpage:

<https://www.workplacerelations.ie/en/Cases/2017/November/EDA1732.html>

Brief summary:

In this appeal the Labour Court upheld a finding of race discrimination (nationality element of the ground). The complainant, a Latvian national, sought to use an English language interpreter in meetings with the respondent when she invoked the company's internal grievance procedure. Her employer continually denied her request; it maintained that the complainant had a sufficient command of the English language to proceed without an interpreter. The Court reiterated the principles established in previous case law to the effect

that direct discrimination could result from a failure to treat different situations differently (see Chapter 2.6.f of this report), and found on the facts that the respondent had discriminated against Ms Zimareva as she could not fully participate in the grievance process. The Court also considered whether the respondent's practice amounted to indirect discrimination. It found that the 'prohibition on the attendance of an interpreter in a grievance investigation is a provision, criterion or practice in relation to employment, which puts persons whose proficiency in English is limited, at a disadvantage. It is also self-evident that persons who are not nationals of an English-speaking country are significantly more likely to have limited proficiency in English than those of a nationality where English is their first language.' Given the manner and frequency with which the complainant raised the issue, the Court concluded that Ms Zimareva was disadvantaged by the application of the practice. It then assessed whether the practice was objectively justified. The respondent advanced the need to preserve the integrity of its agreed grievance procedure as the basis for refusing to allow an interpreter to be present during the process. The Court could not 'accept that any procedures could be so inflexible as not to allow for translation services where they may be required.' It found that the respondent's practice was wholly disproportionate to any perceived need to adhere strictly to the agreed procedures and was not therefore objectively justified. The complainant was awarded compensation of EUR 8 000.

Name of the court: Workplace Relations Commission

Date of decision: 7 June 2017

Name of the parties: *A Prison Officer v Minister for Justice and Equality*

Reference number: DEC-E2017-045

Address of the webpage: <https://www.workplacerelations.ie/en/Cases/2017/June/DEC-E2017-045.html>

Brief summary:

The complainant in this case was one of two Black prison officers working for the respondent. In the course of his employment he was subjected to multiple, severe incidents of racist harassment perpetrated by prisoners, which he duly reported to the prison authorities. He claimed that the respondent has taken inadequate measures to deal with the prisoners' conduct and was thus liable for harassment on the race ground, had further discriminated against him in terms of how the harassment complaints were dealt with, and had victimised him for lodging those complaints. The respondent successfully defended the complaint before the WRC.

With respect to the harassment claim, the WRC decided that the respondent could avail of the defence set out under section 14(2) EEA, which applies where an employer can show that it took reasonably practicable steps to prevent the harassment and to reverse its effects. Harassment by prisoners was dealt with under prison disciplinary procedures, which are governed by Part 3 of the Prisons Act 2007 and the Irish Prison Rules 2007. These provisions specified that racial harassment constituted a breach of prison discipline and set out a range of sanctions. The adjudication officer considered that the respondent's reactions to the complaints were not 'perfect' and that it could improve its overall approach to raising awareness of and tackling racism. Nonetheless, it did take reasonable steps to prevent the harassment of the complainant by prisoners and to reverse the effects of such harassment: The respondent had a procedure in place for investigating incidents of harassment, the incidents reported by the complainant were investigated and sanctions applied to the perpetrators. When the complainant returned from sick leave, which was due to stress caused by the harassment, the respondent offered him 'low conflict' duties in an attempt to remove him from contact with the perpetrators of the racist abuse.

The complainant submitted that he was assigned to 'low conflict' duties in retaliation for his having made a complaint of discrimination and harassment against the respondent. However, the WRC was 'satisfied that it would not be possible or practical to remove the individual harassers from the situation in this case as they are prisoners incarcerated on foot of a court order' [8.20]. It concluded that the victimisation claim was not made out

because the placing of the complainant on low conflict duties did not amount to adverse treatment. A direct discrimination complaint did not succeed either. In essence, the employee argued that the sanctions applied were not adequate or severe enough. According to the WRC it was clear that the sanctions applied were within the range of sanctions provided for in the Prison Rules and it was satisfied that the complainant was not treated less favourably on grounds of his race in respect of the procedures applied or the sanctions applied.

Race/ ethnic origin (Traveller community ground)

Name of the court: Workplace Relations Commission

Date of decision: 1 February 2017

Name of the parties: *A Customer v A Leisure Centre*

Reference number: ADJ-00005248

Address of the webpage:
<https://www.workplacerelations.ie/en/Cases/2017/February/ADJ-00005248.html>

Brief summary:

On seeking to become a member of a leisure club the complainant, a member of the Traveller community, was provided with a list of rules, one of which stipulated that no more than three persons could enter the premises at any given time. When he asked a staff member what this rule was about and whether it was a policy of the respondent, she said that the rule only applied to Travellers. The respondent did not attend the WRC hearing and so the adjudication officer reached his decision on the basis of the complainant's testimony and the membership documentation. He noted that the impugned 'rule is not practicable or workable as it would, if effected, exclude' families, groups of friends, work colleagues, school groups and so on. Such groups are very frequent users of leisure centres and it is 'impossible to accept that such groups could or would be barred from using a leisure centre.' On that basis the WRC found that the respondent had engaged in direct discrimination on the Traveller community ground. It awarded EUR 7 000 in compensation and ordered the respondent to remove the discriminatory rule.

Name of the court: Workplace Relations Commission

Date of decision: 15 March 2017

Name of the parties: *Berry v Dublin City Council*

Reference number: DEC-S2017-012

Address of the webpage:
<https://www.workplacerelations.ie/en/Cases/2017/March/DEC-S2017-012.html>

Brief summary:

The complainant referred a case of direct discrimination on the Traveller community ground following a significant delay by Dublin City Council in providing a service. In late January 2015 a fire damaged a sanitation unit adjacent to the complainant's home. The unit comprised basic kitchen, shower and toilet facilities and the respondent was under contract to maintain it. On reporting the damage, Mrs Berry was refused maintenance services due to an alleged previous incident of anti-social behaviour by other persons on site. The unit was refurbished some six months after Mrs Berry alerted the respondent. Mrs Berry claimed that in failing, refusing or neglecting to provide a maintenance service, the respondent contravened section 5 ESA, which outlaws discrimination in access to services. The respondent denied that it had engaged in discrimination, arguing that the delay was due to concerns about the health and safety of its staff. It further said that emergency accommodation and use of an alternative sanitation unit on the site had been offered to but declined by the complainant. The WRC considered that the Council's response was neither reasonable nor adequate and found that the delay in providing proper access to a sanitation unit was discriminatory since it would not have occurred in similar circumstances for a person from the settled community. EUR 6 000 in compensation was awarded for the distress caused.

Judicial and administrative procedures

Name of the court: Supreme Court

Date of decision: 15 June 2017

Name of the parties: *Minister for Justice, Equality and Law Reform & ors v The Workplace Relations Commission & ors*

Reference number: [2017] IESC 43

Address of the webpage:

<http://www.courts.ie/Judgments.nsf/bce24a8184816f1580256ef30048ca50/7b97206199a365a480258141004d3f72?OpenDocument>

Brief summary:

This case was the culmination of lengthy legal proceedings concerning the jurisdiction of the first instance forum that hears discrimination law complaints. Between 2005-2007 three individuals were refused entry to train as members of the police force (An Garda Síochána) because they were outside the upper age limit of 35 set out in the Garda Síochána (Admissions and Appointments) (Amendment) Regulations, 2014. They subsequently lodged EEA age discrimination complaints with the Equality Tribunal. The Minister sought to have the Tribunal's jurisdiction to disapply a statutory instrument determined as a preliminary issue, but the Tribunal declined to do so and set a date for hearing in 2008. The Minister issued judicial review proceedings before the High Court. The High Court found that the Tribunal, a body created by statute, did not have jurisdiction to disapply the legislation and therefore lacked jurisdiction to hear the complaint (*Minister for Justice, Equality and Law Reform & anor v Director of the Equality Tribunal & ors* [2009] IEHC 72). The Tribunal appealed that decision to the Supreme Court.

The judgment of Justice Clarke for the Supreme Court pointed out that the jurisdiction of tribunals, including the Equality Tribunal (now the Workplace Relations Commission) is derived from Article 37.1 of the Constitution. In accordance with that provision, the powers and functions, which can be conferred on a tribunal or a body that is not a court in the constitutional sense must be limited. A significant power to disapply duly enacted legislation could not be described as a limited power and so as a matter of national law the Equality Tribunal could not exercise such a power.

Both the High Court and Supreme Court acknowledged that for the purposes of ensuring conformity between domestic law and EU law a national mechanism must be available to assess the compatibility of legislation with EU norms. The appropriate mechanism would be instituting proceedings before the High Court. However, EEA cases, other than gender discrimination claims, must be heard by the WRC at first instance. Further, as discussed in Chapter 8.2.b of this report, there is no statutory mechanism for referring a case to the High Court from that forum and an appeal to the High Court on a point of law is only available from the appellate Labour Court. Justice Clarke's judgment addresses this procedural obstacle in the following terms: 'While it would, ordinarily, be the case that the High Court could not embark on a hearing dealing with an ordinary employment equality case (for the jurisdiction in that regard is, ordinarily, conferred on the Tribunal), in circumstances where the complaint, if it is to be upheld and if the rights of the persons making the complaint are to be vindicated, would require the disapplication of a measure of national legislation, then it would be necessary to disapply any rules of national law which stood in the way of the High Court exercising the full powers which would ordinarily be enjoyed by the Tribunal in order that the Union law rights of the complainant concerned be fully vindicated' [5.13].

Having assessed the position under national law, the Supreme Court decided to make a reference to the Court of Justice of the European Union under Article 267 of the Treaty on the Functioning of the European Union. The question relates to whether EU law requires that the Workplace Relations Commission must have jurisdiction to hear a complaint where the remedy sought is the disapplication of secondary legislation but where the Tribunal does not have jurisdiction to commence such proceedings under national law.

There are no accurate figures available on cases brought by Roma and Travellers in 2017. To the author's knowledge, 15 complaints on the Traveller community ground were determined by the WRC's adjudication service in 2017, with no cases involving Roma heard. 14 of those complaints concerned direct discrimination in access to goods and services provided by private sector bodies such as shops, restaurants and hotels. Five of the 15 complaints concerned access to licenced premises and were accordingly dismissed by the WRC since the District Court has jurisdiction to hear such cases at first instance (see further Chapter 7(f)(iii)). A successful case was taken against a local authority with respect to accommodation provision (see discussion of *Berry v Dublin City Council* above).

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

The **main transposition and anti-discrimination legislation** at both federal and federated/provincial level.

Country: Ireland
Date: 1 January 2018

Title of legislation (including amending legislation)	Title of the law: Employment Equality Acts 1998-2015 Abbreviation: EEA Date of adoption: 18.06.1998 Latest amendments: 10.12.2015 Entry into force: 18.10.1999 Web link: http://revisedacts.lawreform.ie/eli/1998/act/21/revised/en/html .
	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, vocational education
	Principal content: prohibition of direct and indirect discrimination, harassment, instruction to discriminate
Title of legislation (including amending legislation)	Title of the law: Equal Status Acts 2000-2015 Abbreviation: ESA Date of adoption: 26.4.2000 Latest amendments: 10.12.2015 Entry into force: 10.12.2015 Web link: http://revisedacts.lawreform.ie/eli/2000/act/8/revised/en/html .
	Grounds covered: Gender, age, race, religion, family status, disability, civil status, sexual orientation, membership of the Traveller Community, housing assistance
	Civil/administrative/criminal law: Civil
	Material scope: access to goods or services (including housing), social protection, social advantages, education.
	Principal content: prohibition of direct and indirect discrimination, harassment, instruction to discriminate
Title of legislation (including amending legislation)	Title of the law: Pensions Acts 1990-2015 Abbreviation: PA Date of adoption: 24.07.1990 Latest amendments: 10.12.2015 Entry into force: 21.12.1990 Web link: http://www.irishstatutebook.ie/eli/1990/act/25/enacted/en/print.html ; http://www.irishstatutebook.ie/eli/2004/act/9/section/22/enacted/en/html#sec22 .
	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 2018

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	04.11.2000	No	No	No	No
Revised European Social Charter	04.11.2000	04.11.2000	Article 8(3), Article 21, Article 31(1), (2) and (3).	Ratified collective complaints protocol? Yes (international NGOs only)	No
International Covenant on Civil and Political Rights	01.10.1973	08.12.1989	Article 10(2)	Yes	No
Framework Convention for the Protection of National Minorities	01.02.1995	07.05.1999	No	N/A	No
International Covenant on Economic, Social and Cultural Rights	01.10.1973	08.12.1989	A reservation applies with respect to article 2(2). In order to promote use of the Irish language knowledge of Irish may be required or	No	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?
			given favourable consideration for certain occupations.		
Convention on the Elimination of All Forms of Racial Discrimination	21.03.1968	29.12.2000	No	Yes	No
Convention on the Elimination of Discrimination Against Women	23.12.1985	23.12.1985	Articles 11(1), 13(a); 16(1)(d); 16(1)(f)	Yes	No
ILO Convention No. 111 on Discrimination	Signed (no dates available)	22.04.1999	No	No	No
Convention on the Rights of the Child	30.09.1990	28.09.1992	No	Yes	No
Convention on the Rights of Persons with Disabilities	30.03.2007	No	No	No	No

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