FLAC Submission to the Department of Children, Equality, Disability, Integration and Youth's Consultation on the Review of the Equality Acts

December 2021

About FLAC

FLAC (Free Legal Advice Centres) was founded in 1969 and is one of Ireland's oldest civil society organisations. It is a voluntary, independent, legal and human rights organisation which for the last fifty years has been promoting access to justice. Our vision is of a society where everyone can access fair and accountable mechanisms to assert and vindicate their rights.

FLAC makes policy recommendations to a variety of bodies including international human rights bodies, drawing on its legal expertise and providing a social inclusion perspective.

FLAC works in a number of ways, it:

- Operates a telephone information and referral line where approximately 12,000 people per annum receive basic legal information.
- Runs a nationwide network of legal advice clinics in 71 locations around the country where volunteer lawyers provide basic free legal advice to approximately 12,000 people per annum.
- Is an Independent Law Centre that takes cases in the public interest, mainly in the areas of homelessness, housing, equality and social welfare.
- Operates a legal clinic for members of the Roma Community.
- Has established a dedicated legal service for Travellers.
- Operates the public interest law project PILA that operates a pro bono referral scheme that facilitates social justice organisations receiving legal assistance from private practitioners acting pro bono.
- Engages in research and advocates for policy and law reform in areas of law that most affect the marginalised and disadvantaged.
- Is a member of the Chief Justice's Access to Justice Committee.

Introduction

FLAC welcomes the opportunity to make this submission to the Department of Children, Equality, Disability, Integration and Youth's Consultation on the Review of the Equality Acts.

FLAC has drawn from its considerable experience and expertise in the areas of equality and anti-discrimination law and in promoting equal access to justice. In addition, this submission is informed by FLAC's extensive engagement with over sixty Civil Society organisations in relation to the Review, as part of the *Equality ACTion* project,[1] a joint project with IHREC, which aims to strengthen the engagement of civil society with the review of the Equality Acts.

FLAC's recent and ongoing work in this field is expansive and we refer to some of that work below by way of example.

In 2017, FLAC became an associate partner in the JUSTROM Programme,[2] which aims to improve the access to justice for Roma and Traveller women. Throughout 2017 to early 2018, FLAC facilitated the operation of legal advice clinics aimed at the Traveller and Roma communities, which provided legal advice and advocacy services. Since June 2018, FLAC has been operating a dedicated legal clinic for the Roma community.[3]

The Traveller Legal Service (TLS) was launched in July 2020. It functions under the auspices of a Steering Group of Traveller organisations and its purpose is to address the unmet legal need of the Traveller community through legal representation and the provision of legal training to Traveller advocates.

As an Independent Law Centre, FLAC engages in litigation in the public interest. In 2020, the majority of this casework was undertaken on behalf of callers to the Roma

[1] As a partner in that joint project with IHREC, we held several events and roundtables which were attended by over sixty civil society organisations.

[2] A joint programme of the Council of Europe and the European Commission.

[3] The FLAC Roma Legal Clinic is supported by the Department of Children, Equality, Disability, Integration and Youth.

Legal Clinic and Traveller Legal Service. More generally, almost one-third of casefiles related to the area of Equality/Anti-Discrimination law.[4]

The Equal Access Project, a project of FLAC and Irish Network Against Racism,[5] seeks to build the capacity of advocates to represent claimants on the Race, Ethnicity and Traveller Community Grounds under Employment Equality Acts and Equal Status Acts before the Workplace Relations Commission. It also seeks to test whether the Race Directive as implemented into Irish law is an effective remedy.

FLAC's detailed submissions to the Independent Anti-Racism Committee's Public Consultation: Towards a National Action Plan against Racism in Ireland[6], and to the Joint Committee on Key Issues Affecting the Traveller Community access to housing and accommodation, including Traveller-specific accommodation[7], contained recommendations in relation to the Equal Status Acts and access to justice.

The Traveller Equality and Justice Project is a collaboration between FLAC and the Centre for Criminal Justice and Human Rights at the UCC School of Law.[8] The Project will establish a legal clinic which will seek to highlight the discrepancies that exist within the current equality system and the measures needed to overcome this.[9] FLAC recently received funding to undertake a project concerned with "addressing unmet legal need in the LGBTI+ community".[10]

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[4] FLAC (2021), *Remote Justice: FLAC Annual Report 2020*. Available at: https://www.flac.ie/publications/flac-annual-report-2020/

[5] The Equal Access Project is a two year project, which commenced in February 2021, and is co-funded by the European Commission, Directorate-General for Justice and Consumers under the Rights Equality and Citizenship Programme (DG-JUST).

[6] FLAC (2021), *Submission to the Independent Anti-Racism Committee's Public Consultation: Towards a National Action Plan against Racism in Ireland*. Available at: https://www.flac.ie/publications/flac-submission-to-the-independent-antiracism-comm/

[7] FLAC (2021) *FLAC Submission to the Joint Committee on Key Issues affecting the Traveller Community: Access to Housing and Accommodation, Including Traveller-Specific Accommodation*. Available at: https://www.flac.ie/publications/flac-submission-to-the-joint-committee-on-key-issu/

[8] The Traveller Equality and Justice Project is supported by a grant from DG-JUST.

[9] In its operation the Clinic will provide legal research supports for lawyers representing members of the Traveller Community in equality and discrimination cases while also providing training to lawyers and Traveller Community groups.

[10] The Pilot Project is funded under the Department of Children, Equality Disability, Integration and Youth's 2021 LGBTI+ Community Services Funding Call.

In June 2021, FLAC, in association with the Law School at Trinity College Dublin, held a series of four *Status Check* seminars to mark the twentieth anniversary of the Equal Status Acts.[11]

FLAC will shortly publish research on the implications of the public sector equality and human rights duty for the Courts Services, the Workplace Relations Commission and the Legal Aid Board.[12]

FLAC makes policy recommendations to national and international bodies, including human rights bodies.

In 2017, the UN Committee on the Elimination of Discrimination against Women (UNCEDAW) adopted several recommendations made by FLAC[13] in its concluding observations on Ireland. The Committee expressed its concern "*that section 14 of the Equal Status Acts 2000-2015 precludes the use of the equality framework to challenge discriminatory laws*" and that "*legislation which discriminates against women, or has a disproportionately negative impact on women, falls outside the scope of the Equal Status Acts 2000-2015".* The Committee therefore recommended that Ireland *"amend section 14 of the Equal Status Acts 2000-2015 to ensure that an effective remedy is available for discrimination that has a legislative basis*".[14]

In December 2019, the UN Committee on the Elimination of Racial Discrimination (UNCERD), in its Concluding Observations in respect of Ireland, adopted several of

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[11] At the *Status Check* Seminar series, academics, practitioners, policy-makers and activists reflected on the experience, impact and limitations of this legislation to date, and explored its future role in Ireland's equality framework. All four *Status Check* seminars were recorded and can be viewed here: https://www.flac.ie/news/2021/05/12/status-check-20-years-of-the-equal-status-acts-fla/

[12] This research was partially funded by IHREC.

[13] FLAC (2016), *Submission in advance of the examination of Ireland's combined sixth and seventh periodic reports under the UN Convention on the Elimination of all forms of Discrimination against Women*. Available at: https://www.flac.ie/assets/files/pdf/flac_cedaw_submission_final.pdf?issuusl=ignore

[14] UN Committee on the Elimination of Discrimination against Women (2017*), Concluding observations on the combined sixth and seventh periodic reports of Ireland*, Geneva: OHCHR. Available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fIRL%2fCO%2f6-7&Lang=en

The Committee also adopted some of FLAC's recommendation in relation to legal aid, in particular the requirement for victims of domestic violence to make financial contributions for civil legal aid. See para. 29: "The Committee recommends that the State party increase funding for civil legal aid services, review the financial eligibility criteria and end the requirement for victims of domestic violence to make financial contributions for civil legal aid when seeking court protection under domestic violence legislation so as to ensure access to justice for all women without sufficient means."

the recommendations made by FLAC,[15] including FLAC's recommendations to "*explicitly [include] the functions of public authorities within the definition of the 'services' in Section 5 of the Equal Status Acts*" and, "[*ensure] that an effective remedy is provided for discrimination that has a legislative basis*". FLAC's recommendations in relation to legal aid were also adopted and UNCERD recommended that Ireland "*extend the scope of the Legal Aid Board to the areas of law that are particularly relevant to Traveller and other ethnic minority groups, including by designating the Social Welfare Appeals Office and Workplace Relations Commission as prescribed tribunals under Section 27(2)(b) of the Civil Legal Aid Act 1995*". Finally, the Committee adopted FLAC's recommendations in relation to racial profiling including a recommendation to introduce "*legislation prohibiting racial profiling*".[16]

FLAC's submission takes an equality, human rights, and access to justice-centred approach to the analysis of the equality framework and recommendations for reform.[17]

FLAC is happy to engage with the Department in the context of the Review, and to discuss any of the matters raised in this submission.

[15] FLAC (2019), *Submission of FLAC to the UN Committee on the Elimination of Racial Discrimination for the examination of Ireland's combined fifth, sixth and seventh periodic reports*. Available at: https://www.flac.ie/publications/flac-submission-to-icerd-1/

[16] UN Committee on the Elimination of Racism (2019), *Concluding observations on the combined fifth to ninth reports of Ireland*. Geneva: OHCHR. Available at: https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/IRL/INT_CERD_COC_IRL_40806_E.pdf

[17] In drafting this submission, FLAC has had regard to the Department's call for submissions which sets out the "purpose of the consultation", and also contains a non-exhaustive list of the legislation "under consideration" and the issues in relation to which the views of the public are sought. We have also had regard to the information in relation to the scope of the Review set out in the Department's statement announcing the Review, and elsewhere. For example, the commitment contained in the National Artificial Intelligence Strategy, "AI – Here for Good", to "consider the implications of [Artificial Intelligence]" in the context of the review of the Equality Acts.

Recommendations

1. The Review Process and its Overarching Aims

1.1. The Review should seek to incorporate the various sources of equality law, including, Bunreacht na hÉireann, European Union Law, including the Charter of Fundamental Rights of the European Union, and international human rights instruments and national legislative requirements such as the positive equality and human rights public sector duty, comprehensively and coherently into the national legislative framework.

1.2. The Review Process must be comprehensive in scope in both the legislation it considers and how the review process is conducted. The Department should conduct further consultations with relevant groups and Civil Society Organisations in an accessible and inclusive manner to address the issues which have arisen from the initial consultation and seek the views of relevant groups as to how they can best be addressed. The Review itself should be informed by an independent, expert group which includes the specialised equality body IHREC and other relevant groups, NGOs such as FLAC who represent groups and individuals experiencing discrimination and academics and legal practitioners who can prepare a report and recommendations to the Minister, which draws upon the outcome of the consultation processes and their own expertise.

1.3. The Review must ensure that the Equality Acts are clear, coherent and use accessible language. The legislation should be drafted so that there is a single overarching definition of key concepts wherever possible. Any exemptions to the prohibition on discrimination must be necessary, proportionate, clear and specific, and, where applicable, comply with EU law.

1.4. The Equality Acts should include "purpose" provisions which: set out the overarching aims of the legislation; the nature of the discrimination prohibited and in what context the prohibition applies; the fact that the legislation implements Ireland's obligations under EU law and international human rights law; and that the legislation is a legislative expression of the Equality Guarantee in Article 40.1 of Bunreacht na hÉireann. Having regard to the State's obligations under EU and international law, and the public sector human rights and

equality duty, the stated overarching aim of the Equality Acts should be to eliminate discrimination and to ensure full equality in practice.

1.5. It is difficult to reconcile the exclusion of the State from the scope of anti-discrimination legislation with the public sector equality and human rights duty. The Review must ensure that the State and its organs and policy are brought comprehensively within the scope of the Equality Acts.

1.6. The Irish Human Rights and Equality Act 2014 should be amended to mandate the Irish Human Rights and Equality Commission to conduct a comprehensive, independent review of the national equality code, and its functioning and effectiveness, every five years. The Commission must be adequately resourced to carry out this function.

2. The Personal Scope of the Equality Acts (The Discriminatory Grounds)

2.1. The Review's approach to the amendment of the existing protected grounds and the addition of new grounds should be guided by international best practice, as well as the provisions of the Constitution, European Union Law, & International and Regional Human Rights Instruments. A purposive and effect-based approach to defining the protected grounds should be adopted

2.2. The Review should examine each of the existing grounds to ensure that all those who experience discrimination on the basis that the ground is intended to protect enjoy its protection in practice. In particular, the Review should:

- **2.2.1.** Ensure the Family Status ground encompasses the full diversity of carers (resident and non-resident carers, and carers providing continuing or intermittent care).
- **2.2.2.** Ensure that the Family Status and Civil Status grounds afford protection to unmarried couples and cohabitees.
- **2.2.3.** Ensure the Religion ground offers protection against discrimination on the basis of non-religious or philosophical beliefs.

- **2.2.4**. Ensure the Sexual Orientation ground prohibits all forms of discrimination on the basis of sexual orientation, including as against those who may not come within the current definition.

2.3. The definitions section of the EEA and ESA should be amended to make it clear that the definition of "gender" for the purposes of the legislation includes "gender identity", "gender expression" and "sex characteristics". These terms should be defined in both pieces of legislation in line with international best practice. The Equality Acts should provide that in addition to prohibiting discrimination as between men and women, the gender ground prohibits discrimination as between persons of different gender, gender identity, gender expression and/or sex characteristics.

2.4. The other provisions of the EEA and ESA aimed at promoting gender equality and prohibiting gender discrimination should be reviewed with a view to amending them to ensure maximum protection for transgender, non-binary and intersex people, and to provide for positive action in respect of those groups.

2.5. While the definition of disability under the Equality Acts predates the UN Convention on the Rights of Persons with Disabilities, it adopts a broad functional approach which has been interpreted in an inclusive manner and has provided effective protection in practice for persons with disabilities. Insofar as any amendment to the definition may be considered, it is important that this does not result in a reduction or regression in the scope of protection and retains a broad, inclusive approach to the definition of disability. It is also important that persons with disabilities should not be required to prove the social and economic impacts or barriers which may hinder their full and effective participation in society.

2.6. The Equality Acts should be amended to prohibit discrimination on the basis of disadvantaged socio-economic status. The Equality (Miscellaneous Provisions) Bill 2021 contains a workable, enforceable definition of this new ground.

2.7. The Review should conduct a detailed examination of the introduction of new grounds based on Criminal Conviction, Trade Union membership and Political Opinion.

2.8. The Review should introduce an "Other Status" ground to the Equality Acts.

2.9. The Equality Acts should be amended to expressly prohibit multiple and intersectional discrimination.

3. The Material Scope of the Equality Acts (Exemptions to the Prohibition of Discrimination)

3.1. Any exemptions to the prohibition of discrimination in the Equality Acts must comply with EU law and be necessary, specific, clear, relevant and proportionate. All exemptions to the EEA and ESA should be reviewed to ensure this, as well as to ensure the legislation as a whole is accessible and clear.

3.2. The ESA should be amended to allow for discrimination complaints on the age ground by people under the age of 18.

3.3. The exemption at section 35(1) of the EEA (which provides that it is not discriminatory to pay a person with a disability a lesser rate of pay if their output is less than that of a person without a disability) should be repealed.

3.4. The Religious Ethos exemptions to the ESA and EEA should be amended to ensure that they are constructed as narrowly as possible and in order to ensure compliance with EU law.

3.5. The Nationality exemption in relation to Education Grants at section 7 of the ESA should be removed.

3.6. The Review must ensure that any exemptions to the prohibition on gender discrimination in the Equality Acts are necessary and are constructed as narrowly as possible, and clearly prohibit overly broad and/or discriminatory exclusion policies (against women, men, transgender people, non-binary people and intersex people).

3.7. The definition of "vocational training" at section 12(2) of the EEA should be expanded to ensure compliance with EU law.

3.8. The definition of "employee" at section 2 of the EEA must be amended to remove the exemption concerning discrimination in access to employment for people employed in another person's home.

3.9. The exemption at section 36(4) of the EEA which allows employers to require employees to have specified educational, technical or professional qualifications should be amended to provide for an objective justification requirement.

3.10. Section 9 of the ESA (the exemptions to the "discriminating clubs" provisions) should be reviewed to ensure compliance with EU law. Section 9 should be amended to clarify that "principal purpose" refers to the activities of the club, and to narrow the definition of "needs". The Review should also consider reframing section 9 of the ESA as a positive action measure with clear aims and objectives, intended to prevent or compensate for disadvantages suffered by groups who come within the discriminatory grounds.

3.11. The exemption in relation to certain forms of accommodation at section 6(5) of the ESA should be reviewed to ensure it is not overly broad.

3.12. The definition of "services" should be amended to expressly include the general functions of public bodies.

3.13. Section 14 of the ESA should be deleted and replaced by a remedy for discriminatory legislation and its affects, which applies across all grounds.

3.14. The exemption at section 14(1)(aa) of the ESA should be amended to allow for discrimination complaints concerning Direct Provision. The exemption should be reviewed to ensure that it is constructed as narrowly as possible.

4. Combatting all Forms of Discrimination & Promoting Equality through the Equality Acts

4.1. The Equality Acts should be amended to include one clear, accessible definition of each key concept relating to the promotion of equality and prohibition of discrimination wherever possible. In provisions concerning the prohibition of discrimination, the burden of proof should be clear and, where relevant, the comparator requirement should be as flexible and clear as possible.

4.2. The Review should examine other mechanisms for the approval of Codes of Practice (such as approval by IHREC), which would avoid delays in their coming into effect. The approval of the Code of Practice concerning Harassment and Sexual Harassment in Employment must be expedited. A Code of Practice in relation to Harassment and Sexual Harassment in Goods and Services and a Code of Practice in relation to Reasonable Accommodation (in employment and goods and services) should be introduced.

4.3. The burden of proof for indirect discrimination cases should be clearly provided for in the Equality Acts (in a manner that accords with EU law), and the legislation should state that statistical evidence is not required in all indirect discrimination cases.

4.4. Victimisation should be defined clearly and consistently in the Equality Acts, in a manner which is accessible, clear, and accords with EU law.

4.5. The ESA should clearly provide that harassment and sexual harassment are forms of discrimination.

4.6. The EEA should be amended to provide for a hypothetical comparator in Equal Pay cases.

4.7. Robust Pay Information legislation (which applies across all grounds and to all employers) should be introduced.

4.8. An obligation to provide reasonable accommodation, except where it would impose a disproportionate burden (as provided for in UNCRPD), should be incorporated into the ESA and the unclear "nominal cost" exemption should be removed.

4.9. The EEA should set out that a failure to provide reasonable accommodation is, of itself, unlawful discrimination.

4.10. The Review should examine the introduction of a duty to provide reasonable accommodation across all grounds.

4.11. Positive action should be allowed as a general exception with a single definition for all grounds and all sectors. There should be one coherent aim for positive action, namely the achievement of full equality in practice. The provisions need to be clear as to their scope and the various activities that they cover. Having regard to the extent of discrimination experienced by Travellers and Roma, FLAC is of the view that positive action measures should be required in public sector employment and service provision where significant imbalances in equality of outcomes are identified.

4.12. The ESA should be amended to provide a mechanism for complaints in relation to racial profiling by individuals, or groups representing their interests, that would allow for such allegations to be investigated and remedied independently.

4.13. The Review should examine the introduction of a prohibition on hate speech into the Equality Acts, either as a form of harassment or as a standalone form of prohibited conduct.

4.14. The Review must introduce the measures to combat structural, systemic and algorithmic discrimination. This must include: Specific measure in relation to Equality Data, including enhanced powers for IHREC; The introduction of specific legislation regulating the use of artificial intelligence technologies, including automated decision-making in the public and private sectors; The amendment of the Equality Acts to provide for representative actions; The amendment of the definition of "services" in the ESA to include the functions of public bodies (to ensure that the use of algorithmic intelligence systems by public bodies falls within the scope of the prohibition of discrimination); the introduction of a power for the Workplace Relations Commission to relax the rules in relation to standing and the burden of proof in cases concerning algorithmic discrimination.

5. Procedural Barriers to Prosecuting Discrimination Complaints under the Equality Acts

5.1. The Notification Requirement under section 21(2) of the ESA should be made optional.

5.2. The time limits for discrimination complaints should run from the date of knowledge of the discrimination, or from the date a grievance procedure or internal procedure in relation to the discrimination ended.

5.3. All complaints and applications under the ESA and EEA should be heard by the Workplace Relations Commission at first instance.

5.4. Section 19 of the Intoxicating Liquor Act 2003 should be repealed and the jurisdiction in respect of complaints of discrimination relating to licensed premises should be transferred to the Workplace Relations Commission.

5.5. The ESA and/or the Private Residential Tenancies Act 2004 should be amended so as to make the existence of an ESA complaint on the HAP ground (or a finding of discrimination against a landlord on foot of such a complaint) a relevant consideration to

be taken into account by the Residential Tenancies Board in determining the validity of the Notice of Termination related to arrears of rent.

5.6. The ESA should be amended to include a requirement for landlords advertising tenancies to be identifiable for the purposes of potential complaints under the ESA.

6. Redress

6.1. The limits on the amount of financial compensation for discrimination complaints heard by the WRC should be removed. This would allow for discrimination complaints on all grounds (including gender) to be heard by the WRC at first instance

6.2. The Equality Acts should be amended to provide that the orders made in all successful cases should act as a deterrent against future acts of discrimination, and to specifically allow for Orders that have an impact beyond the complainant.

6.3. The Equality Acts should be amended to provide for injunctions and interlocutory relief in discrimination matters. The WRC should also adopt a specific procedure for identifying and expediting cases which require an urgent hearing.

6.4. The Equality Acts should be amended to provide for the mandatory anonymised recording of the outcomes in settlement agreements reached in respect of complaints under the Acts.

6.5. The Review should examine prohibiting the use of non-disclosure agreements in all cases under the Equality Acts, save where they are requested by the complainant.

7. Access to Justice

7.1. The Equality Acts should be amended to ensure that that representative NGOs are given unambiguous legal standing in appropriate cases to initiate proceedings on behalf of those affected by discrimination.

7.2. The Department of Children, Equality, Disability, Integration and Youth should ensure that NGOs are adequately resourced to carry out advocacy and representation for those affected by discrimination and inequality.

7.3. Bodies such as IHREC, the Citizens Information Board, the Legal Aid Board, and relevant NGOs should be resourced and enabled (and, where relevant, mandated) to provide information and to conduct targeted education and outreach campaigns in relation to equality and non-discrimination matters.

7.4. The Department of Justice and the Legal Aid Board should implement the recommendations of UNCERD and UNCESCR in relation to the provision of civil legal aid. This includes expanding the scope of the civil legal aid scheme to include the provision of legal aid where legal advice and representation is required in quasi-judicial tribunals such as the Workplace Relations Commission. To achieve this, the Minister for Justice should designate the Workplace Relations Commission as a "prescribed" tribunal for the purposes of Section 27(2)(b) of the Civil Legal Aid Act 1995, as recommended by UNCERD.

7.5. The Department of Children, Equality, Disability, Integration and Youth should support the provision of dedicated legal services for marginalized groups, including through the provision of long-term funding for fully resourced dedicated legal services for Travellers and Roma.

8. Equality Data

8.1. The Irish Human Rights and Equality Commission Act 2014 should be amended to mandate the collection of equality data by public bodies (including local authorities, Government Departments and An Garda Síochána) and IHREC should be given enforcement powers in this regard.

9. The Public Sector Equality & Human Rights Duty

9.1. Section 42 of the Irish Human Rights and Equality Commission Act 2014 should be amended to allow for the introduction of "specific duties" by Government Ministers which apply to specific State Bodies and Government Departments.

9.2. Section 42 of the Irish Human Rights and Equality Commission Act 2014 should be amended to strengthen the enforcement powers available to the Commission, including

by empowering the Commission to investigate individual complaints in relation to failures to comply with the duty.

9.3. Section 42(11) of the Irish Human Rights and Equality Commission Act 2014 should be amended to clearly provide that a failure to comply with the duty may, of itself, constitute a cause of action.

9.4. The Review should consider the introduction of a Private Sector Duty.

10. Equality Bodies

10.1. The Review must examine IHREC's equality mandate, as provided for in the IHREC Act 2014, and consider the introduction of measures to strengthen and clarify this mandate. IHREC must be sufficiently resourced to fulfil its equality mandate.

10.2. IHREC must be adequately resourced to exercise all of its powers under the IHREC Act 2014, including its inquiry powers and its power to take own-name proceedings. Any issues with the ways these powers are defined in the legislation (which may undermine IHREC's ability to exercise the powers) must be dealt with in the context of the Review of the Equality Acts

10.3. IHREC should be mandated and resourced to support a critical mass of casework under each protected ground, in order to promote a culture of compliance.

10.4. IHREC should be mandated and resourced to engage in targeted information campaigns aimed at members of protected groups under the Equality Acts. Such campaigns should provide information as to how rights may be enforced and the assistance which IHREC may provide.

10.5. IHREC should be mandated and resourced to engage with and provide training to other bodies who may provide representation before the WRC in equality matters such as Trade Unions and the Citizens Information Board.

10.6. The WRC must commission an urgent independent review of its procedures in relation to equality cases. That review must examine the accessibility of the WRC website and forms, as well as examining the introduction of a separate equality unit within the WRC for equality matters.

10.7. The WRC must introduce separate complaint forms in respect of complaints under the Equality Acts. These forms must be available in hard copy as well as online, and be equality-proofed and accessible.

10.8. The WRC must introduce specific procedures in relation to hearings that require an urgent or expedited hearing.

10.9. The WRC must introduce procedures which pro-actively ensure that the complainant in discrimination cases has identified the correct respondent.

10.10. The WRC must allow for hearings on preliminary matters in equality cases, including applications for hearings to be heard in private or for decisions to be anonymised.

10.11. The WRC must adopt an Equal Treatment Bench Book.

10.12. The investigative function of the adjudicator in complaints under the Equality Acts needs to be used to ensure that the responsibility for providing all of the evidence and law does not rest solely with the complainant.

1. The Review Process and its Overarching Aims

The Review initiated by the Department of Children, Equality, Disability, Integration and Youth of Ireland's equality and anti-discrimination law (hereinafter referred to as "the Review") is the first comprehensive re-examination of that legislation since the enactment of the Employment Equality Act 1998 and the Equal Status Act 2000 (hereinafter referred to collectively as "the Equality Acts", the Equal Status Acts are referred to as "the ESA" and the Employment Equality Acts as "the EEA").

In this section, we focus on the review process, the understanding of equality which should be adopted by the Review, and make recommendations as to how that understanding should inform how the Review is carried out, as well as its overarching aims.

1.1. Understanding Equality

The idea that all human beings are equal has, for centuries, been a fundamental ideal of society and democracy. However, the concept of equality is often characterised as "controversial" or "contested", by reference to continuous philosophical and political debate concerning the precise meaning of "equality" and how it can be achieved. Rather than undermining the significance of equality, these debates reflect the continued vitality of the concept.

Evolving conceptions of equality arising in legal, political and philosophical discourse reflect the fact that equality is a relational and "living" concept, which continuously evolves in light of economic and social developments which alter the position of individuals and groups within society. Put simply, as society changes, so does the meaning of what it means to be an equal member of that society.

More recently, there is an emphasis on the idea of equality as a multifaceted concept.[18] Fredman has written that the potential of equality law can only be realised if it is approached with a "*searching and nuanced understanding of the rights to equality*":

[18] See, for example: Sandra Fredman (2017), *Substantive Equality Revisited*, 14 International Journal of Constitutional Law 712.

> "This means that the right to equality must be multidimensional, simultaneously redressing disadvantage; addressing stigma, stereotyping prejudice and violence; facilitating participation; and accommodating difference and addressing the need for structural change."[19]

Fredman stresses that "substantive" equality can only be achieved through a range of interlocking measures, each relating to some or all of the multiple dimensions of equality.

Equality is also seen as a fundamental tenet of a just and democratic society, the mechanism by which all citizens may enjoy the freedoms inherent in a democratic society. To achieve this, "*democratic equality aims for equality across a wide range of capabilities*", each of which are necessary to function as an equal citizen.[20]

1.2. Sources of Equality Law

The Review should seek to incorporate the various sources of equality law, including, Bunreacht na hÉireann, European Union Law, including the Charter of Fundamental Rights of the European Union, and international human rights instruments and national legislative requirements such as the positive equality and human rights public sector duty, comprehensively and coherently into the national legislative framework.

1.2.1. International and regional human rights instruments

The right to equality and non-discrimination underpins the enjoyment of many more human rights.[21]

The international human rights instruments to which Ireland is a party require that the rights enumerated are to be enjoyed without discrimination. Article 14 of the European Convention on Human Rights, for example, prohibits discrimination on a wide range

[19] Sandra Fredman, Aaron Reeves and Megan Campbell (2020), *Palliation or protection: How should the right to equality inform the government's response to Covid-19?*, International Journal of Discrimination and the Law (Vol. 20(4) 183–202).

[20] Elizabeth S. Anderson (1999), *What is the Point of Equality?*, Ethics (Vol. 109, No. 2), pp. 287-337. Available at: https://www.philosophy.rutgers.edu/joomlatools-files/docman-files/4ElizabethAnderson.pdf

[21] Thus, Article 1 of the Universal Declaration of Human Rights begins with the declaration that "all human beings are born free and equal in dignity and rights".

of grounds in relation to the enjoyment of the rights guaranteed under the Convention. The prohibition on discrimination has a wide and significant reach.[22]

A number of international human rights instruments such as the Convention on the Elimination of all forms of Discrimination against Women, the Convention for the Elimination of all forms of Racial Discrimination and the Convention on the Rights of Persons with Disabilities are specifically designed to eliminate discrimination.

Walsh notes that "*one of the stated aims of the [Equal Status Act 2000] was securing compliance with Ireland's international law obligations, particularly those under the UN Conventions on Women's Rights (CEDEW) and Racism (ICERD)*".[23] However, Ireland's equality code has subsequently been subject to criticism by a number of international human rights bodies with responsibility for monitoring the implementation of our obligations under international human rights instruments.[24]. The implementation of the specific recommendations by those Committees (and others) will be addressed in detail in the subsequent sections of this submission.

1.2.2. European Union Law

The European Union has competence to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation, under article 19 of the Treaty on the Functioning of the European Union (TFEU).

Directive 2000/43 (the Race Directive) implements the principle of equal treatment between persons irrespective of racial or ethnic origin. The Race Directive prohibits discrimination on the grounds of racial or ethnic origin in employment as well as in relation to social protection, including social security and healthcare, social

[22] The European Court of Human Rights (ECtHR) has clarified the role of Article 14 of the European Convention on Human Rights by finding that there does not have to be a breach of the substantive right involved to apply the article 14 prohibition on discrimination, provided that the discrimination is experienced within the field of that substantive right. See: *E.B v France* (2008) ECHR 55.

[23] Judy Walsh, *Equal Status Acts 2000-2011: Discrimination in the Provision of Goods and Services* (Lonsdale Law Publishing, 2013) pp.8-9.

[24] For example, in 2015, the UN Committee on Economic, Social and Cultural Rights expressed concern that Ireland's equality laws "do not provide a full range of grounds of discrimination prohibited by the Covenant" More recently, in 2019, the UN Committee on the Elimination of Racial Discrimination made a range of highlighted a range of deficiencies in the "legislative framework for the elimination of racial discrimination".

advantages, education and access to and supply of goods and services which are available to the public, including housing.

Directive 2000/78 (the Framework Directive) prohibits discrimination on the grounds of religion or belief, disability, age and sexual orientation in employment.

Directive 2004/113 (the Gender Goods and Services Directive) prohibits discrimination based on gender in the "access to and supply of goods and services".

Directive 2006/54 (the Recast Directive) prohibits gender discrimination in employment. Also relevant to the promotion of equal treatment and opportunities between men and women in work are Directives 92/85 (the Pregnancy Directive), 2010/18 (the Parental Leave Directive), and 97/81 (the Part-time Work Directive).

The EU Directives set minimum requirements for the national equality code. The impact of the Directives is highly significant since all domestic law must be compatible with EU law. Each of the Directives contains a principle of non-regression, meaning that the national law designed to implement the Directives must not reduce the level of protection afforded against discrimination already provided for in national law. As well as being important in laying down substantive protection against discrimination, EU law is also important in shaping the procedural framework for the enforcement of equality law. First, the Directives contain certain rules on the procedure for enforcing claims and the sanctions applicable to such claims. Second, even where the procedures are left to the Member States, the national rules are subject to the principles of equivalence and effectiveness.[25] In its case-law, the Court of Justice has laid emphasis on the role of remedies and sanctions in ensuring effective protection against discrimination.

The Court of Justice in the *Minister for Justice and Equality v. Workplace Relations Commission* held that in order to provide an effective remedy where issues of

[25] The principle of "effectiveness" requires that remedies and procedures provided for in national law must not render it excessively difficult to exercise the rights conferred by EU law. Similarly, the principle of "equivalence" requires that the procedures for taking an action under EU law cannot be less favourable than those relating to similar actions under taken domestic law. In *Levez*, Case C- 326/96 *Levez* [1998] ECR1 -7835, the Court of Justice considered issues such as cost, delay and the simplicity of actions in assessing whether the principle of equivalence had been complied with.

discrimination are raised under Equality Acts, the WRC must have the authority under EU law to disapply national law where it conflicts with EU laws.[26]

Within the wider EU framework, the Equality Chapter in the Charter of Fundamental Rights of the European Union ("the Charter") contains the guarantee of equality before the law at Article 20. The non-discrimination provisions at Article 21(1) prohibit any discrimination based on a wide range of grounds.[27] While the rights provided for in the Charter are confined to situations falling within the scope of EU law, the Charter is undeniably applicable in areas that come within the scope of the EU anti-discrimination Directives and is relevant in respect of the provisions of the Equality Acts which seek to implement the anti-discrimination Directives.

On the role of EU law in shaping the national equality code, Bolger, Bruton and Kimber comment:

> "Upon Ireland's accession to the then European Communities on the January 1, 1973, when Irish law became subordinate to any relevant European law, a far wider and more meaningful concept of equality became part of Irish law. Equality was, even at that early stage, recognised as a cornerstone of European law and from Ireland's earliest relationship with the now European Union, equality was very much a part of the new European values which Ireland was expected to incorporate both in its society and its legal system, albeit that on occasion Ireland had to be coaxed and even dragged by Europe to understand what this really meant. Since then European law has acted as a powerful catalyst in ensuring recognition and respect for principles of non-discrimination in Irish law."[28]

The Equality Act 2004 amended the national equality code to give effect to the Race Directive and the Framework Directive. However, as will be discussed in this submission serious questions remain about the legislation's compatibility with EU law, particularly in the context of race discrimination in the fields of social protection and

[26] Judgment of 4 December 2018, *Minister for Justice and Equality v. Workplace Relations Commission*, Case 378/17, EU:C:2018:979

[27] Such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation"

[28] Marguerite Bolger, Claire Bruton, Cliona Kimber, *Employment Equality Law* (Round Hall, 2012) at [2-02].

social advantages, the breadth of section 14 of the ESA, and the ceilings on compensation.[29]

1.2.3. Bunreacht na hÉireann

Article 40.1 of the Constitution provides that:

> "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 of social function."

In *Murphy v Ireland*[30], O'Donnell J (as he then was) stated that the right to equality contained in Article 40.1 is a "*vital and essential component of the constitutional order*". Scholars have consistently remarked on the potential of the equality guarantee, with Mitchell recently arguing that the wording of Article 40.1 is broad enough to be interpreted as a right to substantive equality (as conceptualised by Fredman).[31] However, this potential is yet to be realised in the jurisprudence of the Superior Courts.

The authors of the definitive text on the Constitution remark that "*in contrast to comparative and international jurisprudence, jurisprudence on the guarantee of equality in the Irish Constitution is remarkably underdeveloped and, to date, the debate about the differing conceptions of equality has, to a large extent, passed Article 40.1 by*".[32]

This restrictive approach to the interpretation of the constitutional equality guarantee has meant that, despite its prominent place in the constitutional catalogue of fundamental rights, the guarantee has consistently been subordinated to other norms in the Constitution, with a very deferential approach to the Oireachtas in this context. Unfortunately, this has meant that Irish constitutional law has rarely been beneficial

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[29] See, for example: Judy Walsh (2019) *Primacy of National Law over EU Law? The Application of the Irish Equal Status Act*. European Equality Law Review (Issue 2, 2019) at p.45.

[30] *Murphy v Ireland* [2014] IESC 19 at para.33

[31] Ben Mitchell (2015), *Process Equality, Substantive Equality and Recognising Disadvantage in Constitutional Equality Law,* The Irish Jurist, 53(1), 36-57.

[32] Gerard Hogan, Gerry Whyte , David Kenny , and Rachael Walsh, *Kelly: The Irish Constitution* (2019, Bloomsbury Professional, 5th Edn.) at para. 7.2.05.

for disadvantaged groups whether homosexuals, non-Irish nationals, members of the Traveller community, or people with disabilities. This restrictive approach has influenced the courts' approach to the interpretation of Equality Acts, as illustrated in the *Portmarnock Golf Club* case.[33]

The Court's restrictive approach to giving effect to Article 40.1 arises (at least in part) out of deference to the legislature. It follows that it is open to the legislature to take a more robust approach to the promotion of equality. Indeed, the High Court has expressly stated that it is available to the Oireachtas to give effect to Article 40.1 through legislation:

> "[The] Oireachtas is entitled to legislate positively to vindicate and promote the value of equality in the legislation promoting those values that may legitimately have an effect on private individuals."[34]

The potential of Equality Acts to give effect to the equality guarantee is also reflected in comments made in the definitive text on the Constitution: "[*T]he principle of equality has recently assumed greater importance in other areas of the Irish legal order through the enactment of domestic and European legislation. It remains to be seen whether these developments will vivify Article 40.1 or whether the availability of remedies in the statutory and European codes will condemn the constitutional guarantee of equality to a relatively somnolent existence".*[35] Equality legislation has led to a significant body of caselaw and outcomes in areas like sexual harassment, pregnancy discrimination, maternity leave, access to employment, promotions, victimisation, equal pay, age discrimination, reasonable accommodation, and migrant workers. However, much remains to be done. What is clear is that the restrictive approach to Article 40.1 makes the content and effectiveness of the Equality Acts all the more important. This Review provides an important opportunity to give life to the equality guarantee in the Irish legal order in an accessible way.

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[33] *Equality Authority v Portmarnock Golf Club & Ors* [2009] IESC 73.

[34] *Equality Authority v Portmarnock Golf Club & Ors* [2005] IEHC 235.

[35] Gerard Hogan, Gerry Whyte , David Kenny , and Rachael Walsh, *Kelly: The Irish Constitution* (2019, Bloomsbury Professional, 5th Edn.) at para. 7.2.06.

1.3. Current & Emerging Threats to the Effectiveness of Equality Law

One of the stated aims of the review process is to examine the effectiveness of the current legal framework in "combatting discrimination and promoting equality".

In this regard, it is important to recognise the significant positive impact to date of the Equality Acts. In the 1980s, the work of the Employment Equality Agency and the Labour Court led the way across Europe in terms of protection against sexual harassment at work.

The enactment of the Equal Status Act 2000 just over 20 years ago represented the fulfilment of a commitment contained in the Good Friday Agreement. The provisions of this legislation significantly exceeded the minimum standards then arising under European Union law. These developments also illustrate that Ireland has the potential to act as a European leader in the field of equality.

However, the Review must also be cognisant of the fact that there are now significant challenges to the transformative potential of the Irish equality code. These challenges arise from issues which are specific to the development of the equality code over the past two decades and from broader challenges to the effectiveness of anti-discrimination law.

1.3.1. The Development of Irish Equality Law

The development of the Equality Acts since their introduction over 20 years ago has been, at best, *ad hoc*. While there have been positive developments, such as the introduction of the Public Sector Equality and Human Rights Duty, there have also been some significant regressive developments. For example, the enactment of section 19 of the Intoxicating Liquor Act came about "*following pressure exerted by vintners' organisations*".[36] This measure transferred the jurisdiction of the Equality Tribunal (now the WRC) to the District Court for certain discrimination complaints against licensed premises. Walsh has noted that the consequence of this change has been a significant drop in complaints in that area. In the last decade, the dedicated

[36] Judy Walsh, *Equal Status Acts 2000-2011: Discrimination in the Provision of Goods and Services* (Lonsdale Law Publishing, 2013) p11.

equality bodies which were in place when the legislation was introduced, the Equality Tribunal and the Equality Authority, have been subsumed into the Workplace Relations Commission and the Irish Human Rights and Equality Commission respectively. As has already been noted, questions have also arisen as to the compliance of Ireland's equality code with the requirements of EU law and regional and international human rights instruments.

Finally, it is important to note the significant decline in discrimination complaints to the WRC in recent years. In 2019, there was overall decline of complaints under the ESA of 25% as compared with 2018. In the same year there was a 3% decline in EEA complaints. In 2020, there was an overall decline of complaints under the ESA of 30% as compared with 2019, and a 27% decline in EEA complaints.

1.3.2. Broader Challenges to the Equality Framework

The challenges noted above, which are largely specific to the development of the Irish equality code over the previous two decades, are exacerbated by more general threats to the efficacy of anti-discrimination law emerging from social and economic changes.

Scholars such as Malleson have noted that there has been a significant change in how the experience of inequalities are understood and experienced, and that equality legislation "*is increasingly at odds with people's lived experiences of discrimination in areas such as health, education and the job market*". She argues that equality law must respond to "*social, political and demographic changes*", by seeking to address socio-economic disadvantage and discrimination, and by ensuring that all those who experience inequality and discrimination enjoy the protection of the equality code.[37]

Malleson's work echoes critiques from several writers concerning the ability of equality and non-discrimination law to deal with structural forms of discrimination and to combat disadvantage. The seeming inability of equality law to combat disadvantage, as currently formulated, has been noted by Clements: "*Although, anti-discrimination law has an incredibly important role in combatting prejudicial behaviours and beliefs, it does not, of itself, address substantive disadvantage*".[38]

[37] Kate Malleson, *Equality Law and the Protected Characteristics* (2018) 81(4) MLR 598–621.

[38] Luke Clements, *Clustered Injustice and the Level Green*, Legal Action Group (2020) at p.60-61.

Fredman has stressed that equality law must develop to the extent that it can address the "*reciprocal interaction between socio-economic disadvantage and status*". She convincingly argues that "*paying attention to socio-economic disadvantage can only assist and strengthen the effectiveness of status-based anti-discrimination laws*".[39] As already discussed, Fredman advocates for a "multi-dimensional" approach to equality legislation in order for it to deliver on its transformative potential in this regard.

Questions have also been raised about whether existing equality frameworks are robust enough to combat new and emerging forms of discrimination. For example, the challenges that Artificial Intelligence and algorithmic discrimination pose to the European anti-discrimination framework has been subject to academic commentary,[40] as well as significant reports from Equinet[41] and the European Commission[42].

1.4. Overarching Aims of the Review

1.4.1 The Review Process must be Comprehensive, Inclusive and Accessible

The comprehensive list of "legislation under consideration" published on the Department's consultation webpage is to be welcomed. So too is the fact that the Department has stated that this list "should not be considered exhaustive". As will become clear throughout this submission, in addition to the Equal Status Act 2000 and the Employment Equality Act 1998 (and the subsequent legislation which has amended those Acts), the Review must also have regard to legislation such as:

- the Workplace Relations Act 2015 (which provides the legal basis for the operation of the Workplace Relations Commission, the tribunal that hears most discrimination complaints);

[39] Sandra Fredman (2010), P*ositive Duties and Socio-economic Disadvantage: Bringing Disadvantage onto the Equality Agenda*, European Human Rights Law Review 290.

[40] Raphaële Xenidis (2020), *Tuning EU equality law to algorithmic discrimination: Three pathways to resilience*, Maastricht Journal of European and Comparative Law Vol. 27(6) 736–758. Available at: https://journals.sagepub.com/doi/full/10.1177/1023263X20982173

[41] Equinet (2020), Regulating for An Equal AI: A New Role for Equality Bodies. Available at: https://equineteurope.org/2020/equinet-report-regulating-for-an-equal-ai-a-new-role-for-equality-bodies/

[42] European Commission, Directorate-General for Justice and Consumers (2021), *Algorithmic discrimination in Europe: Challenges and opportunities for gender equality and non-discrimination law*. Available at: https://op.europa.eu/en/publication-detail/-/publication/082f1dbc-821d-11eb-9ac9-01aa75ed71a1

- the Intoxicating Liquor Act 2003 (which deals with certain discrimination complaints against licensed premises);
- the Irish Human Rights and Equality Commission Act 2014 (which establishes and defines the functions of the Irish Human Rights and Equality Commission, including in respect of the Public Sector Equality and Human Rights Duty);
- The Civil Legal Aid Act 1995 (which provides for the State scheme of Civil Legal Aid as administered by the Legal Aid Board).

It is also important that the Review process is inclusive and accessible (i.e. equality-proofed). The scope of the Review, and the myriad complex pieces of legislation it is considering, presents a challenge for individuals and civil society in fully engaging with the process. Beyond the initial consultation process, it will be necessary for the Department to conduct further bespoke consultations with relevant groups and Civil Society Organisations in an accessible and inclusive manner. These further consultations should address the issues which have arisen from the initial consultation and seek the views of relevant groups as to how they can best be addressed.

The Review itself should be informed by an independent, expert group which includes the Irish Human Rights and Equality Commission, as the national specialised equality body, and other relevant groups, and NGOs such as FLAC who represent groups and individuals experiencing discrimination, and academics and legal practitioners who can prepare a report and recommendations to the Minister, which draws upon the outcome of the consultation process and their own expertise.

1.4.2. The Review must ensure that the Equality Acts are Clear and Accessible

One crucial overarching issue the Review must address is the increased complexity of the Equality Acts. There are several pieces of frequently amended, complex pieces of interlocking legislation, which, at least in certain areas, must also be understood alongside relevant EU instruments. Key concepts within those pieces of legislation - for example direct discrimination, indirect discrimination, victimisation, reasonable accommodation and positive action - are subject to numerous differing definitions, in some cases even within a single piece of legislation, or not defined at all. The result is

that even legal experts and practitioners struggle to navigate and comprehend certain aspects of the legislation.

The Equality Authority noted that the structure of the Equality Acts is "awkward, opaque and inaccessible".[43] The Authority recommended single, clear definitions of key concepts which apply across all grounds.

Clements writes evocatively about the increasing inaccessibility of equality legislation as it has developed in recent decades:

> "The language of anti-discrimination law has grown in complexity – like the Tower of Babel – to the point that it has become increasingly unintelligible to those for whom the edifice was theoretically constructed."[44]

While this comment was made in respect of the UK equality legislation, it applies with even greater force to the Irish legislation.

The result of the Review process must be to ensure that the Equality Acts are accessible, particularly for those they are designed to protect. The legislation should be drafted so that, wherever possible, there is an overarching definition of key concepts. The language used in the legislation should be accessible.

Moreover, any exemptions must be necessary, proportionate, clear and specific, and, where applicable, comply with EU law.

By way of example of clear and well-structured equality legislation, the Review should have regard to the Maltese Equality Bill 2019.[45]

1.4.3 The Review must ensure that the State and its organs and policy are brought comprehensively within the scope of the Equality Acts

One of the most concerning aspects of the scope of the Equality Acts is the extent to which the State and various organs of the State may in fact be exempted from the scope of the ESA, as a result of a combination of specific exemptions and overbroad interpretations of those provisions. It is difficult to reconcile this exclusion of the State

[43] Equality Authority (2002), *Overview of the Employment Equality Act 1998 and the Equal Status Act 2000*.

[44] Luke Clements, *Clustered Injustice and the Level Green*, Legal Action Group (2020) at p61.

[45] Available at: https://parlament.mt/media/101105/3-bill-96-equality-bill.pdf

from the scope of anti-discrimination legislation with the public sector equality and human rights duty.

1.4.4. The Review must provide for Periodic Reviews of the Equality Acts

It is appropriate and necessary to make provision for comprehensive and independent periodic reviews of the equality code and its functioning and effectiveness.

1.4.5. The Equality Acts must set out their "Purpose"

The purpose of the legislation should be clear to those it protects, those upon whom it imposes obligations and decision-makers who must interpret it. In this regard, the Equality Acts should be amended to include "purpose" provisions which: set out the nature of the discrimination prohibited and in what context they apply; the fact that the legislation implements Ireland's obligations under EU law and international human rights law, and that the legislation is a legislative expression of the Equality Guarantee in Article 40.1 of Bunreacht na hÉireann.

Further elements of the "purpose" provisions should be drawn from section 42 of the Irish Human Rights and Equality Act 2014, the jurisprudence of the CJEU, and the provision of the EU Anti-Discrimination Directives on positive action. Section 42 of the IHREC Act 2014 requires public bodies *inter alia* to have regard to the need to promote equality of opportunity. While the elimination of discrimination plays an important role in the promotion of equality of opportunity, equality of opportunity requires more than the mere elimination of discrimination and, in particular, may require the adoption of positive measures.

As Monaghan has remarked in the UK context, equality of opportunity is "*concerned with issues of substantive equality and requires a more penetrating consideration than merely asking whether there has been a breach of the principle of non-discrimination*".[46] An explicit "purpose" provision concerned with achieving equality of

[46] Monaghan, *Equality Law* (2nd ed, Oxford University Press, 2013) para 16.57. See also Ó Cinnéide, *Taking equal opportunities seriously: the extension of positive duties to promote equality* (The Equality and Diversity Forum, 2003).

opportunity would highlight that the aim of the legislation is to address more deep-rooted forms of inequality and discrimination.

In *Webb v EMO Air Cargo (UK) Ltd*[47], the CJEU held that the Gender Equality Treatment Directive "*must be construed so as to achieve substantive equality, and not mere formal equality which would constitute the very denial of the concept of equality*".

The EU Anti-Discrimination Directives contain provisions allowing positive action measures "*with a view to ensuring full equality in practice*".[48]

By way of example of "purpose" provisions in other legislation, the Review should have regard to the section 1 and 2 of the Social Security (Scotland) Act 2018.[49]

1.4.6. The Review must ensure a "Culture of Compliance" with the Equality Acts

There needs to be a sufficient number of claims taken under the Equality Acts to ensure a critical mass of cases which can lead to a culture of compliance with the Equality Acts. The European Commission has stated that "*real change often requires a critical mass of cases*".[50] The Commission's guidelines for Equality Bodies suggest that promoting the achievement of a critical mass of casework under each protected ground should be amongst such body's aims.

It can be extraordinarily difficult for individuals to pursue claims and the burden on individual complainants to enforce compliance must be reduced. Where discrimination does happen, the claimant must have access to information, advice, representation and support. Being part of a critical mass of cases would also mean the individual is not standing alone, but knows they are part of a movement combating discrimination in our society. (The barriers to access to justice in this area are addressed in detail in section 7 of this submission).

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[47] Case C-32/93 [1993] ECR I-3567.

[48] Article 3 of the Gender Recast Directive, Article 5 of the Race Directive, Article 7 of the Framework Employment Directive.

[49] Available at: https://www.legislation.gov.uk/asp/2018/9

[50] European Commission DG-JUST (2015) *Know Your Rights: Protection From Discrimination*. Available at: https://op.europa.eu/en/publication-detail/-/publication/5a511c88-b218-47b5-9f3e-4709d650e28b

However, the onus should not just be on the individual to achieve a culture of compliance. The EU Gender and Race Equality Directives recognise the necessity for Member States to have specialised equality bodies, that have the capacity to provide assistance to individual complainants and have the powers to address systemic discrimination, such as the emerging danger of algorithmic discrimination.

RECOMMENDATIONS

FLAC recommends that:

1.1. The Review should seek to incorporate the various sources of equality law, including, Bunreacht na hÉireann, European Union Law, including the Charter of Fundamental Rights of the European Union, and international human rights instruments and national legislative requirements such as the positive equality and human rights public sector duty, comprehensively and coherently into the national legislative framework.

1.2. The Review Process must be comprehensive in scope in both the legislation it considers and how the review process is conducted. The Department should conduct further consultations with relevant groups and Civil Society Organisations in an accessible and inclusive manner to address the issues which have arisen from the initial consultation and seek the views of relevant groups as to how they can best be addressed. The Review itself should be informed by an independent, expert group which includes the specialised equality body IHREC and other relevant groups, NGOs such as FLAC who represent groups and individuals experiencing discrimination and academics and legal practitioners who can prepare a report and recommendations to the Minister, which draws upon the outcome of the consultation processes and their own expertise.

1.3. The Review must ensure that the Equality Acts are clear, coherent and use accessible language. The legislation should be drafted so that there is a single overarching definition of key concepts wherever possible. Any exemptions to the prohibition on discrimination must be necessary, proportionate, clear and specific, and, where applicable, comply with EU law.

1.4. The Equality Acts should include "purpose" provisions which: set out the overarching aims of the legislation; the nature of the discrimination prohibited and in what context the prohibition applies; the fact that the legislation implements Ireland's obligations under EU law and international human rights law; and that the legislation is a legislative expression of the Equality Guarantee in Article 40.1 of Bunreacht na hÉireann. Having regard to the State's obligations under EU and international law, and the public sector human rights and equality duty, the stated overarching aim of the Equality Acts should be to eliminate discrimination and to ensure full equality in practice.

1.5. It is difficult to reconcile the exclusion of the State from the scope of anti-discrimination legislation with the public sector equality and human rights duty. The Review must ensure that the State and its organs and policy are brought comprehensively within the scope of the Equality Acts.

1.6. The Irish Human Rights and Equality Act 2014 should be amended to mandate the Irish Human Rights and Equality Commission to conduct a comprehensive, independent review of the national equality code, and its functioning and effectiveness, every five years. The Commission must be adequately resourced to carry out this function.

2. The Personal Scope of the Equality Acts (The Discriminatory Grounds)

The EEA prohibits discrimination in employment on the nine grounds of gender, marital status, family status, age, disability, sexual orientation, race, religion, and membership of the Traveller community. The ESA prohibits discrimination on the same grounds in the provision of goods and services, accommodation and education. The ESA was amended in 2016 to prohibit discrimination against people who are in receipt of certain housing assistance payments in the provision of accommodation services ("the HAP ground").[51]

The personal scope of the Equality Acts has been subject to criticism on a number of grounds: first, the list of grounds is exhaustive, rather than open-ended and do not include grounds such as Socio-Economic Status and Trade Union membership; secondly, some of the grounds are defined too restrictively; thirdly, the Acts fail to explicitly prohibit multiple and intersectional discrimination.

2.1 Selecting and Defining the Protected Grounds

The amendment of the existing grounds and the addition of new grounds into the Equality Acts should be informed by an analysis of why certain grounds currently enjoy the protection of the legislation, and how those grounds have been defined. The personal scope of the Equality Acts should also be informed by constitutional norms at national and EU level, Ireland's obligations under regional and international human rights instruments, and international best practice. Finally, the amendment of the existing grounds and the addition of new grounds should be informed by changes in how discrimination and inequalities are understood and experienced, and the need to combat new and emerging forms of discrimination and inequality.

[51] The *Equality (Miscellaneous Provisions) Act 2015* was commenced in January 2016.

2.1.1. The Experience of the Existing Grounds under the Equality Acts: An Analysis of the Rationale for (and Definitions of) the Existing Grounds

The nine protected grounds under the Equality Acts encompass large swaths of the human personality and experience. It is difficult to discern a single, unifying theoretical understanding of the nature of these characteristics and why they merit legal protection. Academic analysis of the protected characteristics in other jurisdictions does, however, offer some useful insights which are equally relevant in the Irish context:

First, it is important to note that the reach of modern equality law extends beyond those characteristics which can be understood as "innate" or "immutable" (or which were once understood in this manner). While "immutability" once offered a neat theoretical underpinning for the protection of characteristics such as race, sex and age under equality law, this theory is less persuasive in the context of the protected grounds under modern equality law:

> "It has become increasingly difficult to sustain the immutability test as the categories have expanded and fragmented. The protected characteristics of religion and belief are particularly challenging in this respect given that they are essentially attitudinal characteristics and so in theory can change as quickly as a person can change their mind."[52]

The extended list of characteristics now constitutes a mixture of legally assigned identities such as gender, age and disability, and identities which are socially lived or externally perceived such as religious beliefs, race and sexual orientation.[53] The expansion of the list of protected grounds has arisen as a result of "*political agitation by disadvantaged groups*"[54] and "*social, political and demographic changes*"[55], rather than as a result of "*formalistic and artificial debates*"[56] about how characteristics can be categorised.

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[52] Kate Malleson, *Equality Law and the Protected Characteristics* (2018) 81(4) MLR 598–621 at 610.

[53] ibid at 600.

[54] ibid.

[55] ibid at 602.

[56] ibid at 620.

It has also become increasingly difficult to categorise certain characteristics as "immutable" as our understanding of these concepts has evolved:

> "The immutability test provided a degree of categorical stability to the protected characteristics. But it required a relatively essentialist view of identity and was difficult to reconcile with the idea of categories as relational, contingent, dynamic and socially constructed. Given that these descriptors are all now commonly applied to the primary protected characteristics of race, gender, sexual orientation and disability, it is perhaps not surprising that the immutability test is coming under considerable pressure."[57]

In the United States, a unifying theory of immutability has also been rejected.[58] Anti-discrimination law in that jurisdiction is better understood as being concerned with characteristics which are subject to pervasive and illegitimate social bias:

> "*Pervasive social bias*: Social bias encompasses both interpersonal and structural bias. Interpersonal bias refers to human judgments based on social stereotypes—group-based generalizations that are potentially inaccurate in individual cases. "Structural" or "institutional" bias refers to the way that 'neutral' policies, developed against a background of social inequality, have the unintended effect of reinforcing that inequality…. Only pervasive bias is likely to constrain a person's overall social mobility—and this is what triggers the principles driving discrimination law.
>
> *Illegitimate social bias*: Traits subject to pervasive social bias do not automatically deserve protection from discrimination. The trait must also be considered an illegitimate basis for judgment—meaning the trait in some ideal sense should not determine a person's opportunities."[59]

There are myriad legal, social, political and economic factors which may give rise to the conclusion that a pervasive social bias is illegitimate. Immutability can sometimes inform why a social bias is illegitimate (on the basis that a person should not be

[57] ibid at 611.

[58] Danieli Evans Peterman, *Socioeconomic Status Discrimination* 104 Va. L. Rev. 1283.

[59] ibid at 1294-5.

burdened by a personal trait over which they have no control) and should therefore enjoy the protection of anti-discrimination. However, given that anti-discrimination law also protects mutable characteristics, immutability alone cannot provide an overarching understanding of what "*animates*" anti-discrimination law:

> "[There] is no single, one-size-fits-all answer to why certain social biases are considered illegitimate. It is not that the protected traits are always irrelevant to capability, nor that they are immutable, nor that they are fundamental to personal identity. Some traits are protected even though they result from irresponsible choices. The common factor seems to be a value judgment that it is bad public policy or fundamentally inconsistent with the ideal of social mobility to treat people differently based on the trait in question."[60]

This analysis seems equally relevant to the development of Irish equality law. The grounds protected under the Equality Acts extend beyond those characteristics which were once considered "immutable", the most striking example perhaps being the recent addition of the "housing assistance" ground (an example which also illustrates how the grounds have evolved to combat pervasive forms of social prejudice).

Much of the above analysis can be extended to the manner in which the grounds are defined in Irish equality law. The "interpretation sections of the Equality Acts set out definitions of six of the nine grounds, and "age", "gender" and "race, colour, nationality or ethnic or national origins" are not defined in either piece of legislation. Quinlivan and Bruton note that the "*non-definitional*" approach to many of the grounds is a result of the influence of EU Law on Irish anti-discrimination legislation: "*Absence of a definition of the protected ground is common in EC anti-discrimination legislation: for example the Equal Treatment Directive (now subsumed into the Recast Gender Directive) prohibits discrimination on grounds of sex but no further detail is provided*".[61] They observe that the legislator has, largely, adopted a "purposive approach" in defining the other six original grounds:

[60] Ibid at 1300.

[61] Shivaun Quinlivan & Claire Bruton, *Disability, EU law and the CRPD: A New Dawn?* in Charles O'Mahony & Gerard Quinn (Eds.), *Disability Law and Policy: An Analysis of the UN Convention* (Clarus Press, 2017)..

> "[The definition of the ground] does not act as a gatekeeper to the protections contained within the legislation. The purpose of these Acts is to prohibit discrimination, thus the focus of the Acts is primarily on whether or not discrimination has occurred, not whether or not a person comes within the terms of a particular definition."

This approach is evident in the definition of "disability" under the Acts. Walsh notes that Disability "*has a broad meaning for the purposes of the Acts which has been reflected in case law which establishes that the definition encompasses transient conditions, people perceived as having a disability, and people who may have had disabilities previously*".[62] Defining the grounds in this manner has ensured their continued relevance as our understanding of particular grounds has evolved.[63]

A purposive approach to selecting and defining the "grounds", echoes the "effects-based approach" proposed by L'Heureux-Dubé J of the Canadian Supreme Court in her influential dissenting judgment in *Egan v Canada*. In that case, the Court was considering whether discrimination against a homosexual couple was prohibited under the Canadian Charter of Rights and Freedoms. L'Heureux-Dubé J argued that the scope of equality law should be concerned with "real people's real experiences"[64]:

> "We will never address the problem of discrimination completely, or ferret it out in all its forms, if we continue to focus on abstract categories and generalizations rather than on specific effects."[65]

She further argued that *"… abstract 'grounds of distinction' are simply an indirect method to achieve a goal which could be achieved more simply and truthfully by asking the direct question: 'Does this distinction discriminate against this group of people?*".[66] Making this determination, she submitted, should involve an examination of external social factors:

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[62] Judy Walsh, *Equal Status Acts 2000-2011: Discrimination in the Provision of Goods and Services* (Lonsdale Law Publishing, 2013) at 22-3.

[63] For example, Malleson discusses the "*fragmentation*" of how society understands traits such as sexual orientation and gender, and significant shifts in how "disability" is conceptualised.

[64] *Egan v Canada* [1995] 2 SCR 513 at 553.

[65] ibid at 551.

[66] ibid at 561.

> "'Is the adversely affected group already a victim of historical disadvantage?'; 'Is this distinction reasonably capable of aggravating or perpetuating that disadvantage?'; 'Are group members currently socially vulnerable to stereotyping, social prejudice and/or marginalization?'; and 'Does this distinction expose them to the reasonable possibility of future social vulnerability to stereotyping, social prejudice and/or marginalization?'."[67]

It follows that the Review should adopt a practical, purposive and effect-based approach to defining the discriminatory grounds, which is cognisant of the lived experience of inequality and discrimination.

2.1.2. International Best Practice

A 2004 Report commissioned by the Department of Justice, recommended the introduction of four new grounds to the Equality Acts (Trade Union membership, Political Opinion, Socio-Economic Status and Criminal Conviction grounds), by reference to significant analysis of how those grounds operated and were defined in several other jurisdictions. [68] More recently, a similar approach was adopted by Tamas Kádár in a report prepared for the Equality and Rights Alliance which convincingly argued how and why a "socio-economic status" ground should be introduced into the Equality Acts, by reference to European best practice and experience.[69]

[67] ibid at 554.

[68] Shane Kilcommins, Emma McClean, Maeve McDonagh, Siobhan Mullally and Darius Whelan (2004), Extending the *Scope of Employment Equality Legislation: Comparative Perspectives on the Prohibited grounds of Discrimination*. Available at: https://www.justice.ie/en/JELR/Pages/Extending-employment-equality-legislation

[69] Tamas Kádár for the Equality and Rights Alliance (2016), *An analysis of the introduction of socio-economic status as a discrimination ground*, available at: https://equineteurope.org/wp-content/uploads/2020/07/Analysis-of-socio-economic-status-as-discrimination-final.pdf

2.1.3. The Constitution, European Law, and International and Regional Human Rights Instruments

It is notable that instruments such as the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights, as well as international treaties to which Ireland is a party, contain a number of additional grounds, which are not contained in the Equality Acts, including the grounds of language, political or other opinion, social origin, property, birth or other status.

Finally, the courts' interpretation of the personal scope of Article 40.1 of the Constitution is relevant. Notwithstanding the underdeveloped jurisprudence under the constitutional equality guarantee, the courts have recently adopted a more expansive approach to the provision's personal scope.[70] The case law which states that, under Article 40.1, "*the socio-economic background of a person cannot be the basis for differential treatment*" is particularly noteworthy. [71]

2.2 The Existing Grounds

The principles set out above inform the following analysis of the scope of the existing grounds under the Equality Acts. The analysis below is also informed by the experience of those grounds to date, including the manner in which they have been interpreted by the Equality Tribunal, the Workplace Relations Commission and the Irish courts.

The Equality and Rights Alliance have highlighted that: "*Some of the grounds already covered by the equality legislation need to be redefined to ensure that they adequately address the groups, within these grounds, that experience discrimination*".[72]

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[70] Gerard Hogan , Gerry Whyte , David Kenny , and Rachael Walsh, *Kelly: The Irish Constitution* (2019, Bloomsbury Professional, 5th Edn.) at para. 7.2.57.

[71] See further: IHREC (2017), *Observations on the Equality (Miscellaneous Provisions) Bill 2017*, at pp.4-5. Available at: https://www.ihrec.ie/app/uploads/2018/01/Observations-on-Equality-Miscellaneous-Provisions-Bill-2017.pdf

[72] The Equality and Rights Alliance (2011), *A Roadmap to A Strengthened Equality and Human Rights Infrastructure in Ireland.* Available at: http://17october.ie/the-equality-rights-alliance-reports/

The EEA and ESA also contain numerous exceptions to the prohibition on discrimination which are specific to certain grounds. These exemptions are discussed in detail in Section 3 of this submission.

2.2.1. The Gender Ground – Ensuring Sufficient Protection against all forms of Gender Discrimination

Irish law has required equal treatment on the ground of gender since 1977. The ESA and EEA prohibit discrimination on the basis of gender.

Further, since the landmark 1991 decision in *Dekker v Stichting Vormingscentrum voor Jong Volwassenen*, European law, and in particular case law of the Court of Justice of the European Union ('CJEU'), has been a strong source of protection from pregnancy discrimination in the workplace. The CJEU applied the then Equal Treatment Directive in a progressive manner in recognising that less favourable treatment of a woman on grounds of her pregnancy constituted unlawful direct discrimination contrary to the Equal Treatment Directive. Later, the Council advanced the protection of pregnancy as of right by implementing the Pregnancy Directive and, subsequently, by expressly providing for pregnancy and maternity-related issues in the amended Equal Treatment Directive and later in the Recast Directive. The Recital of the Recast Directive provides that:

> "23. It is clear from the case-law of the Court of Justice that unfavourable treatment of a woman related to pregnancy or maternity constitutes direct discrimination on grounds of sex. Such treatment should therefore be expressly covered by this Directive.
>
> 24. The Court of Justice has consistently recognised the legitimacy, as regards the principle of equal treatment, of protecting a woman's biological condition during pregnancy and maternity and of introducing maternity protection measures as a means to achieve substantive equality."

Article 2 of the Recast Directive defines direct discrimination to include "*any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC*".

The strong explicit protection against any less favourable treatment on grounds of pregnancy and in relation to maternity leave in the EU Directives and the case law of the CJEU is reflected in the terms of the EEA, the Maternity Protection Acts, and the case law of the WRC and the Labour Court.[73] Section 6(2A) of the EEA states that "*discrimination on the gender ground shall be taken to occur where, on a ground related to her pregnancy or maternity leave, a woman employee is treated, contrary to any statutory requirement, less favourably than another employee is, has been or would be treated"*. Therefore, where a woman is less favourably treated in accessing employment, or the conditions of her employment, or in the termination of her employment, in any way that is related to her pregnancy or the consequences thereof, she may be able to claim a remedy for unlawful discrimination on grounds of her gender contrary to her rights under the EEA. There is no necessity to prove that the person has been less favourably treated than a comparator to establish discrimination on grounds of pregnancy.

Kimber and Bruton comment that:

> "Given the length of time while equal treatment legislation has been in place and the broad acceptance in society of the principle of equal treatment, it is rare to see litigation where an employer has engaged in blatant gender discrimination. Most complaints of gender discrimination currently being taken relate to areas such as equal pay, pregnancy discrimination, indirect discrimination in promotions or claims which overlap with claims of discrimination on grounds of family status, such as, where flexible working hours are sought or where issues arise on a woman's return to work after maternity leave."[74]

This submission deals with many of the topics which (as noted in the comments of Kimber and Bruton above) are particularly relevant to combatting gender

[73] The Labour Court stated in *Intrium Justitia v Kerrie McGarvey* that: ''It is settled law that special protection against dismissal exists during pregnancy. Only the most exceptional circumstances not connected with the condition of pregnancy allow for any deviation from this. It is equally well settled that the dismissal of a pregnant woman (which can obviously only, apply to a woman) raises a prima facie case of discrimination on the gender ground. Once such a case has been raised the burden of proof shifts and it is for the respondent employer to prove that discriminatory ground did not take place".

[74] Clíona Kimber and Claire Bruton (2017), *Employment Equality,* in *Employment Law* (Bloomsbury, 2nd edn., edited by Ailbhe Murphy and Maeve Regan), at pp.619-20.

discrimination in all its forms, including: Intersectional and Multiple Discrimination (section 2.4); Indirect Discrimination (section 4,3); Equal Pay (section 4.6) and Harassment and Sexual Harassment (section 4.5). The myriad exceptions to prohibition on gender discrimination are discussed in detail in section 3.1.6.

2.2.2. The Gender Ground – The Absence of a Specific Prohibition of Discrimination on the Basis of Gender Identity, Gender Expression & Sex Characteristics

The ESA and the EEA prohibit discrimination on the basis of gender, including discrimination against transgender people who intend to undertake, are undertaking, or have undertaken, a gender confirmation process. However, the legislation does not explicitly prohibit discrimination on the basis of gender identity, gender expression, or sex characteristics. As a result, some trans people, as well as those with non-binary and intersex and gender identities, may not come within the scope of the protection afforded by the prohibition of gender discrimination. In order to assess possible reforms of the Equality Acts, it is necessary to consider first the existing law.

2.2.2.1. The EU Equality Directives

The jurisprudence of the Court of Justice of the European Union has long confirmed, through their rulings in a series of cases concerning employment and social security rights, that the prohibition of discrimination on the basis of gender in EU law extends to the protection of transgender people, to the extent that they apply (at least) to persons undertaking a gender confirmation process (as well as persons who have undergone such a process and persons who intend to).[75] This is reflected in Recital 3 to the Recast Directive:

> "The Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view

[75] See: *P v S and Cornwall County Council*, Case C-13/94, [1996] ECR 1-2143, *KB v National Health Service Pensions Agency & Anor*, Case C-117/01, [2004] ECR 1-541, *Richards v Secretary of State for Work and Pensions*, Case C-423/04 [2006] ECR 1-3585, *MB v Secretary of State for Work and Pensions*, Case C-451/16 (2018) 46 BHRC 202.

of its purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person."

The *European Network of Legal Experts in Gender Equality and Non-Discrimination* have noted that "*the restricted vision of trans identities which the CJEU case law seems to emphasise… is, without doubt, partly the product of the limited subject matters which trans litigants bring before the Court and the arguments in which those litigants engage*".[76]

The European Commission's Report on the application of the Gender Goods and Services Directive noted that, insofar as the scope of the Directive is concerned: "*So far the CJEU has only ruled on gender reassignment*". However, the Commission then comments: "*There is no case law concerning gender identity more generally speaking as covered by the protection against sex discrimination but the Commission considers that the approach should be materially similar*".[77]

2.2.2.2 The Irish Equality Legislation

The gender ground under the EEA and the ESA has been interpreted so as to prohibit discrimination against transgender people, to the same extent as the EU Equality Directives. Such an approach is reflected by the decision of the Equality Tribunal in *Hannon v First Direct Logistics Ltd*[78] (in which the Tribunal upheld a complaint by a transgender woman under the EEA in relation to discriminatory conduct on the basis of her gender), and the decision of the Workplace Relations Commission in *McLoughlin v Paula Smith Charlies Barbers*[79] (in which the WRC upheld a complaint made on the gender ground by a transgender man against a service provider under the ESA).

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[76] European Network of Legal Experts in Gender Equality and Non-Discrimination (2018) *Trans and intersex equality rights in Europe– a comparative analysis*. Available at: https://www.equalitylaw.eu/downloads/4739-trans-and-intersex-equality-rights-in-europe-a-comparative-analysis-pdf-732-kb

[77] European Commission (2015), *Report on the application of Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services*. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52015DC0190&from=EN

[78] [DEC-E-2011-066]

[79] [ADJ-00011948]

As noted above, EU law requires that the gender ground must include transgender people undertaking a gender confirmation process (as well as persons who have undergone such a process and person who intend to). The gender ground in the Irish legislation has been interpreted in line with this minimal standard. However, the lack of explicit protection in the legislation for transgender people who do not or cannot undergo a gender confirmation process, as well as for non-binary and intersex people, raises serious concerns. The absence of an explicit prohibition on discrimination on the basis of gender identity and gender expression generally is inconsistent with the requirements of regional and international human rights law, and undermines the right to equality of trans people.

As Mark Bell comments, although gender assignment concerns "*one aspect of the transgender umbrella, there are a wider range of situations where gender identity and gender expression can give rise to discrimination without any connection to the individual undergoing a medical process of gender reassignment".*[80]

In a similar vein, Kimber and Bruton observe that - while the *"Gender Recognition Act 2015 now provides an avenue for transgender people to change their gender and apply for gender recognition certificates" - "the new Act does not go so far as to amend the equality legislation so as to extend the ambit of the Acts to specifically prevent discrimination against transgender persons*".[81]

The Equality Authority noted that the absence of explicit reference to gender identity in the legislation also undermines awareness of the legislation, even amongst those who currently enjoy the protection of the gender ground (while later calling for an expansion of the gender ground's protection for transgender people):

> "[E]mployers, as well as the public at large, may not be aware of the important protections offered by the law as it currently stands. It is suggested, thus, that the grounds of discrimination should include express reference to gender reassignment (as well as transgender identity). Such explicit provision would serve first to put beyond any doubt the position of

[80] Mark Bell (2011), *The principle of equal treatment: widening and deepening*, in Craig and de Búrca, T*he evolution of EU law,* (Oxford University Press, pp,611-639. Available at: http://www.tara.tcd.ie/handle/2262/73140

[81] Clíona Kimber and Claire Bruton (2017), *Employment Equality*, in *Employment Law* (Bloomsbury, 2nd edn., edited by Ailbhe Murphy and Maeve Regan), at p626.

> those who have undergone or wish to undergo gender reassignment as a protected category in equality law. It would, furthermore, act as an express signal to employers, providers of good and services and to the public generally that the law does not tolerate discrimination on the grounds of gender reassignment."[82]

More recently, the *European Network of Legal Experts in Gender Equality and Non-Discrimination* have commented on the difficulties which arise from "*conceptualising [trans peoples'] equality protections through a lens of 'gender reassignment'*". They note that such an approach excludes those who experience discrimination or inequality because they "*experience and express gender identities outside male and female categories*". Further, not all trans people wish to, or are in a position to, undergo a gender confirmation process. In this regard, it should be noted that the Irish public healthcare system does not provide several significant gender confirmation procedures. Transgender people seeking to access such procedures must either obtain them from private healthcare providers in other jurisdictions, or seek to be referred for care in other jurisdictions through the Treatment Abroad Scheme. However, both scenarios inevitably prolong such processes.

The *European Network of Legal Experts in Gender Equality and Non-Discrimination* conclude that a "*highly medicalised*" approach to the gender ground in non-discrimination law "*calls into question the utility and applicability of EU non-discrimination guarantees for the large number of trans EU citizens who cannot or will not access gender confirmation healthcare*", as well as non-binary, intersex, and gender non-conforming people.[83]

2.2.2.3. International & Regional Human Rights Law

There is also increasing recognition of the need to prohibit discrimination on the basis of gender identity in regional and international human rights law.

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[82] Equality Authority, *Submission to the Gender Recognition Advisory Group 2010,* at p.25. Available at: https://www.ihrec.ie/documents/equality-authority-submission-to-the-gender-recognition-advisory-group/

[83] European Network of Legal Experts in Gender Equality and Non-Discrimination (2018) *Trans and intersex equality rights in Europe– a comparative analysis*. Available at: https://www.equalitylaw.eu/downloads/4739-trans-and-intersex-equality-rights-in-europe-a-comparative-analysis-pdf-732-kb

Since 2011, the UN Human Rights Council has, through various resolutions, "*strongly deplor[ed] acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation or gender identity*".[84] In 2011, the UN Human Rights Council appointed an Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity. In a 2018 report, the Independent Expert called upon UN Member States to *"adopt anti-discrimination legislation that includes gender identity*" and to establish policies which tackle the "*spiral of discrimination, marginalization and exclusion that have a negative impact*" on transgender people. The Independent Expert has also noted that addressing the inequalities and discrimination faced by transgender people requires an "*intersectional approach*".[85]

In a landmark report to the UN Human Rights Council in 2011, the UN High Commissioner for Human Rights stated unequivocally that "*[a]ll persons, including trans persons, are entitled to enjoy the protections provided for by international human rights law*".[86] The High Commissioner has called upon states to ensure that "*anti-discrimination legislation includes gender identity among prohibited grounds, and also protects intersex persons from discrimination*".[87]

Article 14 of the European Convention of Human Rights prohibits discrimination in the enjoyment of rights and freedoms provided for in the Convention on the basis of a non-exhaustive list of grounds. In *Identoba and Others v Georgia*, the European Court of Human Rights clarified that all transgender people are protected against discrimination under Article 14 on the ground of gender identity. The ECtHR held that the State has a "*compelling positive obligation*" to protect the LGBT community against foreseeable discriminatory inhuman and degrading treatment.[88] In their recent decision, in *X & Y v*

[84] United Nations Human Rights Council, 'Resolution 17/19 Human rights, sexual orientation and gender identity' (14 July 2011) UN Doc No. A/HRC/RES/17/19, Recital No. 1 to the Preamble.

[85] Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (11 May 2018) UN Doc No. A/HRC/38/43.

[86] United Nations High Commissioner for Human Rights, Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity (17 November 2011) UN Doc No. A/HRC/19/41.

[87] United Nations High Commissioner for Human Rights, Discrimination and violence against individuals based on their sexual orientation and gender identity (4 May 2015) UN Doc No. A/HRC/29/23.

[88] *Identoba and Others v Georgia* [2015] 39 BHRC 510.

Romania, the ECtHR declared that requiring trans persons to undergo gender affirming surgery before they could obtain legal gender recognition violates their right to respect for their private lives under article 8 of the Convention.[89]

2.2.2.4. Approach to Prohibiting Discrimination on the Basis of Gender Identity, Gender Expression & Sex Characteristics

There is therefore a clear imperative to amend the EEA and ESA to prohibit discrimination based on gender identity, gender expression and sex characteristics. FLAC previously noted this in its submission to the Review of the Gender Recognition Act 2015.[90] IHREC have also previously recommended "that the equality acts should explicitly prohibit discrimination against transgender, non-binary and intersex people".[91] The question that then arises is how the Equality Acts should be amended.

The *European Network of Legal Experts in Gender Equality and Non-Discrimination* note that, in European jurisdictions, two approaches to explicitly prohibiting discrimination on the basis of gender identity, gender expression and sex characteristics have emerged:

- "Adding the grounds of gender identity, gender expression and sex characteristics to the non-discrimination grounds"
- "Ensuring a broad interpretation of sex by adding a clarification that 'sex' should be understood broadly to encompass all forms of discrimination related to gender identity, gender expression and sex characteristics."

The same report includes an analysis of "*the effects and impact of one broad 'gender/sex ground' versus various independently formulated grounds*". The report notes that the benefits of a single ground approach include *"the fact that the causes of many forms of discrimination of both cisgender people, women in particular, and*

[89] *X & Y v Romania* [2145/16, 20607/16].

[90] FLAC (2018), *Submission of FLAC to the Review Group on the Current Operation of the Gender Recognition Act 2015*. Available at: https://www.flac.ie/assets/files/pdf/flac_submission_to_the_review_of_the_gender_recognition_act_2015.pdf

[91] IHREC (2020), *Submission to the Citizens' Assembly on Gender Equality*. Available at: https://www.ihrec.ie/app/uploads/2020/03/IHREC-Submission-to-the-Citizens-Assembly-on-Gender-Equality-March-2020_fin.pdf

trans and intersex people, may have similar roots (i.e. gender bias, stereotypical thinking on gender roles, etc.). It also offers better opportunities to deal with intersectional forms of discrimination on these particular grounds". At the same time, the report notes that the arguments in favour of separate grounds include "*the fact that trans and intersex populations may experience discrimination which does not neatly map onto accepted understandings of sex discrimination", which is particularly true in relation to non-binary populations*".

The report also notes that the experience of EU law to date (which provides some, albeit limited, protection for trans people), as well as the experience in other jurisdictions, illustrate that "*expanded categories of protection*" function well in practice:

> "[T]he existing legal framework – sex equality protections – should be expansively interpreted to embrace a wider category of individuals whose gender and bodies are different from expected societal norms. Recent case law from European jurisdictions, such as Germany, illustrates that the notion of sex discrimination is sufficiently malleable to accommodate people who face unequal treatment, laws and policies because of their sex characteristics. Similarly, jurisprudence from the Court of Justice of the European Union (and an expanding body of judgments from the United States) are evidence that sex equality guarantees are capable of protecting a broad category of trans litigants. Furthermore, there may be substantive benefit in exploring the limits of sex stereotyping case law, prohibiting discriminatory treatment which holds trans and intersex people (and indeed cisgender people) to historic, and socially harmful, stereotypes about masculinity and femininity."

The report highlights further practical benefits of a single ground approach – which are particularly compelling in terms of ensuring that the Equality Acts are clear and accessible:

> "Both Malta and the Netherlands have opted for an inclusive definition of 'sex'. Such an approach certainly has advantages, because cases where the exact ground is not clear or grounds may be overlapping can just be dealt with under the same protective heading."

This raises important issues in the practical implementation and effectiveness of equality law, which is a common challenge across all grounds, as well as important considerations of principle insofar as the law in this particular context should support an inclusive approach which challenges, rather than reinforces, a hierarchal gender binary.[92] In particular, it is important that equality law does not create or reinforce a perceived medicalised hierarchy within the legislation as between trans people who have undergone a gender confirmation process (and who would continue to enjoy the protection of the "gender" ground, as a matter of EU law), and those who are unable or unwilling to do so (and who would be covered by new gender identity or gender expression grounds).

As long ago as 2002, the Equality Authority recommended that *"the definition of gender be explicitly extended to include gender expression, gender identity and transgender issues*".[93] More recently, it is notable that Heads 10 and 11 of the General Scheme of the Equality/Disability (Miscellaneous Provisions) Bill 2016 (which has since lapsed) proposed to amend the ESA and EEA by "*broadening of the definition*

[92] For a valuable discussion of these issues, see Ulrike Lembke, *Tackling sex discrimination to achieve gender equality? Conceptions of sex and gender in EU non-discrimination law and policies*, European Equality Law Review (Issue 2, 2016) at p.48. Available at: https://www.equalitylaw.eu/downloads/3938-european-equality-law-review-2-2016.

Lembke comments, "When drafting or applying of or otherwise dealing with non-discrimination law on the grounds of sex, one should be aware that sex discrimination is caused by perceptions of natural sex dichotomy as well as 'sex-based preferences, assumptions, expectations, stereotypes, or norms'. Whether this is called gender or something else, it has to be taken into account. Discrimination can occur as a sanction for disappointing gender/sex expectations or as a consequence of complying with female gender norms. Thus, when tackling sex discrimination, non-discrimination law has to cover both detrimental conformist gender roles and disadvantageous non-conformist sexes or gender performances. Both dimensions of sex discrimination are rooted in the binary sex model. LGBTI* persons are discriminated against because they do not fit into the model. This external hierarchy maintains the naturalness and superiority of dichotomous sexes. Moreover, the relationship between these dichotomous sexes is unequal too, and this internal hierarchy maintains the superiority of male sex and masculine gender". She notes that "[t]he binary sex/gender model as the essential basis for sex discrimination works in two dimensions by producing an external hierarchy between persons fitting into the binary model and persons not fitting into it [i.e. trans, non-binary, and intersex people] and by including an internal hierarchy between men and women. Gender equality law has to cover both". Equality law, she suggests, should not be concerned with differentiating between the determinative effects of "biological sex" versus "social gender", but rather concerned with the "overwhelming significance of sex/gender norms and expectations" which arise from both concepts to the detriment of many. In light of her analysis, she recommends that the approach adopted by the CJEU in interpreting the gender ground in the European Equality Directives so as to apply to trans people, should be extended "to disadvantageous non-conformist sexes as well as to gender performances".

[93] Equality Authority (2002) *Review of Discriminatory Grounds Covered by the Employment Equality Act, 1998*: *An Equality Authority Position*. Dublin: Equality Authority, at page 4.

of the existing ground of 'gender' to incorporate transgender and intersex as categories".[94] This proposal to provide for a single, inclusive gender ground was welcomed by IHREC.[95]

IHREC's observations on the 2016 Bill note that "gender expression", "gender identity" and "intersex" should be defined in the legislation in accordance with international best practice. The observations also provide extremely useful guidance as to how the comparators currently provided for in the Equality Acts should be expanded to a "*broader list that would offer greater protection*". IHREC note that, in line with international best practice and using the example of Maltese law, "*equality legislation should provide protection against discrimination between persons of different gender identity, gender expression and/or sex characteristics*".

IHREC noted in their observations that other provisions of the EEA which deal with gender discrimination (for example in relation to discriminatory advertising and equal pay[96]) "*require careful and detailed examination to ensure that their exclusion from amendment does not inadvertently put trans or intersex people at a disadvantage*" and recommended "*reforming the approach to comparators [insofar as those other provisions are concerned, with a view to] ensuring maximum protection throughout equality legislation…".*

While there are different ways of approaching discrimination in this context, on balance, FLAC considers that an inclusive single-ground approach – which adopts a broad definition of sex with express reference to gender expression, gender identity and sex characteristics - is most consistent with the need for a practical, purposive and effects-based approach to defining the gender ground in anti-discrimination law. Such an approach would avoid placing the responsibility on victims of gender

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[94] *General Scheme of the Equality/Disability (Miscellaneous Provisions) Bill 2016*. Available at: https://www.justice.ie/en/JELR/General-Scheme-of-the-Equality-Disability-(Miscellaneous-Provisions)-Bill-17-August-2016.pdf/Files/General-Scheme-of-the-Equality-Disability-(Miscellaneous-Provisions)-Bill-17-August-2016.pdf

[95] IHREC (2016), *Observations on the General Scheme of the Equality/Disability (Miscellaneous Provisions) Bill 2016*. Available at: https://www.ihrec.ie/app/uploads/2016/11/Observations-on-the-General-Scheme-Equality-Disability-Miscellaneous-Provisions-Bill.pdf

[96] Head 11 of the General Scheme of the Equality/Disability (Miscellaneous Provisions) Bill 2016 noted that the Bill did not propose to amend the following sections of the Employment Equality Acts: 6(2A), 9(1) and (4), 10(2), 18(2), 19 (4) and (5), 21, 22, 25, 26(1), 34, 36(6) and 76(6).

discrimination to identify whether the discrimination arose as a response to their gender, gender identity, gender expression, sex characteristics or some combination of these grounds at the outset of a claim, which may be a significant practical deterrent to challenging discriminatory conduct.

2.2.3. The Disability Ground

In recent decades, there has been a "*very profound shift in the way that disability has been conceptualized*", from a view of disability through a medical lens to an understanding of disability as a social construct.[97] This shift is evident in the United Nations Convention on the Rights of Persons with Disabilities.

Disability is defined in the Employment Equality Act 1998 and the Equal Status Act 2000 as meaning:

> "(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 judgement or which results in disturbed behaviour,
>
> and shall be taken to include a disability which exists at present, or which previously existed but no longer exists, or which may exist in the future or which is imputed to a person;"

While there is a significant medical element in this definition, it adopts a broader functional approach to the definition of disability for the purpose of providing protection

[97] Disability Discrimination G Quinn and S Quinlivan, Equality in Diversity, The new Equality Directives, Costello and Barry, ICEL216

against discrimination. This is reflected in the case-law under the Equality Acts which has adopted a broad and inclusive approach to the definition of disability.[98]

The United Nations Convention on the Rights of the Persons with Disabilities (UNCRPD), a landmark international human rights treaty which protects the rights and dignity of persons with disabilities, was ratified by Ireland in 2018. The Preamble to the Convention recognizes that "*disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others*".

The purpose of the Convention, as defined in Article 1, is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity. In Article 1, it is further provided that persons with disabilities "*include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others*". Article 2 of the Convention defines discrimination, as applied to disability, as meaning "*any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field"* and including *"all forms of discrimination, including denial of reasonable accommodation".*

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[98] *A Civil Servant v Civil Service and Local Appointments Commission* DEC-E2004-029. See also Walsh, *Equal Status Acts 2000-2011: Discrimination in the Provision of Goods and Services* (Lonsdale Law Publishing, 2013) at 22-3Walsh noted that Disability "has a broad meaning for the purposes of the Acts" which has been reflected in case law which establishes that the definition encompasses transient conditions, people perceived as having a disability, and people who may have had disabilities previously.

Eilis Barry BL, Case Law Review under the Employment Equality Legislation on Mental Health in the Workplace, providing the following non-exhaustive list of disabilities recognised in the case-law: Depression, reactive depression, stress, anxiety and depression, severe generalized anxiety disorder, alcoholism, claustrophobia agoraphobia, schizophrenia, anorexia, phobia, epilepsy, wheelchair user, amputated leg, scarring on the face, facial disfigurement, back injury, maxillary osteoma, ulcerative colitis, whiplash injury, serious neck injuries, visual impairment, high myopia and bilateral amblyopia, hearing aid user, profound deafness, diabetes, cerebral palsy, Fredericks' ataxia, hypertension, multiple sclerosis, vertigo, osteoarthritis, autoimmune disease of the liver, HIV status, paraplegia, intellectual disability fibromyalgia, ADHD, dyslexia, downs syndrome, low BMI, a number of digits missing from limbs, broken toe.

Having regard to its broad functional approach, and the broad and inclusive manner in which it has been interpreted in practice, the definition of disability in the Equality Acts does not appear to be inconsistent with the Convention.[99] In this regard, it is relevant to note that there are significant challenges in adopting a more explicitly social definition of disability in the particular context of anti-discrimination law, as this may pose greater barriers for persons with disabilities and may have the unintended consequence of reducing, rather than reinforcing, the class of persons protected.[100] Moreover, having regard to the social model of disability under the UNCRPD, it is important that persons with disabilities should not be required to prove the social and economic impacts or barriers which may hinder their full and effective participation in society.

Furthermore, as discussed later in the submission, other reforms to the Equality Acts are necessary to ensure that the Acts give full effect to the UNCRPD, including the definition of reasonable accommodation.

While the definition of disability under the Equality Acts predates the UNCRPD, it adopts a broad functional approach which has been interpreted in an inclusive manner and has provided effective protection in practice for persons with disabilities. Insofar as any amendment to the definition may be considered, it is important that this does not result in a reduction or regression in the scope of protection and retains a broad, inclusive approach to the definition of disability.

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[99] See e.g. Quinlivan at a recent presentation to AHEAD by Dr Shivaun Quinlivan on the 2 November 2021, it was stated that the UNCPRD Committee have stated that the current definition "*is most likely compliant with the Convention. So again, it is seen as by the members of the Committee as a good, solid definition in that it doesn't seek to exclude people and it is inclusive in that respect*."

[100] Disability Discrimination G Quinn and S Quinlivan, Equality in Diversity, The new Equality Directives, Costello and Barry, ICEL 216 and 218 "In light of the practical experiences of those jurisdiction that have adopted the social definition, there is little doubt that in practice it has proved more of a hindrance to anti- discrimination actions than a help". For example, under the UK Discrimination Act 1995, one prerequisite for maintaining an action is to show that the plaintiff is in fact disabled for the purposes of the legislation. In *Mowat- Brown V University of Surrey* (Unreported, ET Case No, 2305252/98) it was held that the plaintiff, who had multiple sclerosis, was not disabled for the purposes of the DDA. A similar situation has arisen under the American with Disabilities Act 1990 where claimants under the legislation were unable to prove they were disabled. In the US Supreme Court decision of *Toyota Motor Manufacturing Kentucky Inc v. Williams*, the plaintiff has severe repetitive strain injury to her wrist neck and arms, but the Court held that she was not disabled. The use of the social model was intended to take the focus off the medical condition of the person and orient it towards the barriers confronting the participation of that person on equal terms with others. "*Instead the social definition has been used to narrow the number of people covered by the law and therefore there will be no requirement on the employers to accommodate those 'disabled workers*".

2.2.4. The Family Status Ground & The Civil Status Ground – Absence of Protection for all Carers, Unmarried Couples and Cohabitees.

The purpose of the introduction of the family status ground in the Equality Acts was to achieve a family friendly workplace and service provisions. It has clearly failed to achieve that, partly as a result of the narrow definition.

"Family status" in the Equality Acts is defined in the EEA as follows:

> *"'family status*' means responsibility—
>
> (*a*) as a parent or as a person in *loco parentis* in relation to a person who has not attained the age of 18 years, or
>
> (*b*) as a parent or the resident primary carer in relation to a person of or over that age with a disability which is of such a nature as to give rise to the need for care or support on a continuing, regular or frequent basis,
>
> and, for the purposes of *paragraph (b)*, a primary carer is a resident primary carer in relation to a person with a disability if the primary carer resides with the person with the disability;"

The Equality and Rights Alliance previously highlighted a need to: "*Expand the definition of 'carer' under the family status ground to encompass the full diversity of carers (resident and non-resident carers, and carers providing continuing or intermittent care)*".[101] It is notable, that fuller "carer" grounds have been added to equality legislation in other jurisdictions.

The scope of carers who are protected by the family status ground is further limited by the restrictive definitions of "*near relative*" (in the ESA) and "*member of the family*" (in the EEA). The Equality Authority previously called for an amendment to the Acts to "*include unmarried couples*".[102] In this regard, it is notable that the definition of the Civil Status ground does not currently include unmarried couples or cohabitees.

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[101] The Equality and Rights Alliance (2011), *A Roadmap to A Strengthened Equality and Human Rights Infrastructure in Ireland.* Available at: http://17october.ie/the-equality-rights-alliance-reports/

[102] Equality Authority (2002), *Overview of the Employment Equality Act 1998 and the Equal Status Act 2000.*

2.2.5. The Religion Ground

The Religion ground in the Equality Acts refers to religious belief, which is defined to include "*religious belief or outlook*". Judy Walsh has noted that this may not provide adequate protection for non-religious or "*philosophical*" beliefs (the Framework Employment Directive applies to "religion or belief"):

> "National legislation does not refer to philosophical beliefs. 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."[103]

2.2.6. The Sexual Orientation Ground

The Equality Acts provide that "*'sexual orientation' means heterosexual, homosexual or bisexual orientation*". As with other protected characteristics, society's understanding of the concept of sexual orientation has "expanded and fractured" over the previous two decades. The review should consider whether the current definition adequately captures more nuanced and fluid understandings of "sexual orientation".

This could be achieved by substituting the word "means" with the word "includes" in the current definition. The addition of an "umbrella" definition of "sexual orientation" could also be considered. It is notable that the Maltese Equality Bill 2019 defines "sexual orientation" as: "*each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, persons of a different gender, the same gender or more than one gender*".[104]

[103] Judy Walsh (2020), *Country Report: Non Discrimination, Ireland 2020*. European Commission Directorate-General for Justice and Consumers. Available at: https://www.equalitylaw.eu/country/ireland

[104] Available at: https://parlament.mt/media/101105/3-bill-96-equality-bill.pdf

2.3 New Grounds

The Equality Authority and the Irish Human Rights Commission both previously recommended the addition of new grounds in the Equality Acts namely: Trade Union membership, political opinion/political party membership; criminal convictions/spent convictions, and; socio-economic status.[105] Research commissioned by the Department of Justice and published in 2004 provides a detailed comparative analysis of the experience of those grounds in other jurisdictions, and provides useful guidance as to how such grounds may be drafted.[106]

2.3.1. Socio-Economic Status

In recent years, there has been a renewed focus on the question of whether Irish equality law should prohibit discrimination on the basis of socio-economic status. Two Bills have been introduced to the Oireachtas for this express purpose (one of which has since lapsed). The Programme for Government, published in 2020, contains a commitment to "*examine the introduction of a new ground of discrimination, based on socio-economic disadvantaged status to the Employment Equality and Equal Status Acts*".[107]

2.3.1.1. The Rationale for Prohibiting Discrimination based on Socio-Economic Status

There has been a significant change in how the experience of inequalities are understood and experienced. These changes are not reflected in the grounds presently protected under anti-discrimination law:

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[105] See: Equality Authority (2002), *Overview of the Employment Equality Act 1998 and the Equal Status Act 2000*.

Irish Human Rights Commission (2005), *Extending the Scope of Employment Equality Legislation*. Available at: https://www.ihrec.ie/documents/submission-on-extending-the-scope-of-employment-equality-legislation/

[106] Shane Kilcommins, Emma McClean, Maeve McDonagh, Siobhan Mullally and Darius Whelan (2004), Extending the *Scope of Employment Equality Legislation: Comparative Perspectives on the Prohibited grounds of Discrimination*. Available at: https://www.justice.ie/en/JELR/Pages/Extending-employment-equality-legislation

[107] Department of the Taoiseach (2020), *Programme for Government: Our Shared Future*. Available at: https://www.gov.ie/en/publication/7e05d-programme-for-government-our-shared-future/

> "The most determinative fact in relation to most people's life chances is their socio-economic origin and status…
>
> …collectively the discriminatory impact of the protected characteristics has decreased as the more blatant and explicit effects of racism, sexism, disablism and homophobia have been tackled. In recent years the political capital of women, members of BAME groups, disabled and LGBT people from privileged SES ["socio-economic status"] backgrounds has increased. But at the same time the dismantling of the trade union movement, the casualisation of labour and the dominance of neo-liberal ideologies across the political spectrum has weakened the collective leverage of socio-economically disadvantaged groups and individuals, wherever they are situated in relation to the recognised protected characteristics." [108]

The continued exclusion of socio-economic status from the protected characteristics is increasingly at odds with people's lived experiences of discrimination in areas such as health, education and the job market.

In 2002 research by the Equality Authority found that there was high degree of socio-economic discrimination in the Irish jobs market.[109] The continued pervasiveness of such discrimination in the context of employment is illustrated in the findings of the *Mulvey Report* on the Dublin North East Inner City. That report found that unemployment levels in Dublin's North East Inner City are somewhere between double and triple the national average.[110] IHREC commented that: "*this same situation is found not only in Dublin's North Inner City, but in areas of disadvantage around the country*".[111] The introduction of the housing assistance ground in 2016 illustrates the pervasiveness of socio-economic discrimination in Irish society generally. This discrimination is also evidenced in a 2019 report by *ATD Ireland.* As noted by Niall

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[108] Kate Malleson, *Equality Law and the Protected Characteristics* (2018) 81(4) MLR 598–621 at 611-2.

[109] The Equality Authority (2002) *Review of Discriminatory Grounds Covered by the Employment Equality Act 1998: An Equality Authority Position*, p.5.

[110] Kieran Mulvey for Dublin: North East Inner City, *Creating a brighter future: An outline plan for the social and economic regeneration of Dublin's North East Inner City,* available at: https://merrionstreet.ie/merrionstreet/en/imagelibrary/20170218mulveyreport.pdf

[111] IHREC Press Release (2017), *Challenging Employment Discrimination Directly Can Boost Disadvantaged Areas Such as Dublin Inner City*, available at: https://www.ihrec.ie/challenging-employment-discrimination-directly-can-boost-disadvantaged-areas-dublin-inner-city/

Crowley in his foreword, that report "*powerfully chronicles the damaging experience of daily lives persistently crashing up against stigma and stereotyping of socio-economic status. It documents the painful stories of those who have suffered the presumptions and behaviours based on these stereotypes across the public and private sectors in both employment and service provision*".[112]

Malleson's analysis also suggests a separate rationale for the prohibition of discrimination on the basis of socio-economic status: the increased protection that the addition of this ground would offer to those who are already protected by anti-discrimination law. Fredman notes that "*status-based discrimination is frequently closely correlated with socio-economic disadvantage. For example, 40% of women live on incomes of less than £100 per week compared with 20% of men*".[113] She argues that, in light of the "*reciprocal interaction between socio-economic disadvantage and status*", "*paying attention to socio-economic disadvantage can only assist and strengthen the effectiveness of status-based anti-discrimination laws*".[114]

Analysis of socio-economic discrimination in the Irish context has also highlighted the "*reciprocal interaction between socio-economic disadvantage and status*". The 2004 Review of the personal scope of the EEA which was commissioned by the Department of Justice concluded that "*prohibiting discrimination on the basis of social origin/socio-economic status would serve the objectives underpinning the adoption of equality legislation, namely the pursuit of a more equal and just society. It would also promote a more sophisticated intersectional approach to discrimination, leading to greater recognition of the multiple forms of discrimination that many groups face*".[115] In reaching this conclusion, they noted that: "*it is recognised that many of the groups covered under the Employment Equality Act are also identified as being groups that experience a higher risk of poverty and social exclusion. It is this link that gives added*

[112] ATD Ireland (2019), *Does It Only Happen to Me? Living in the shadows of Socio-Economic Discrimination*, available at: http://17october.ie/wp-content/uploads/2019/09/SES-Discrimination-Report-ATD-Ireland-Sept-19.pdf

[113] Sandra Fredman (2010), P*ositive Duties and Socio-economic Disadvantage: Bringing Disadvantage onto the Equality Agenda*, European Human Rights Law Review 290.

[114] Ibid.

[115] S Kicommins, E McClean, M Mc Donagh, S Mullaly and D Whelan, *Extending the Scope of Employment Equality Legislation: Comparative Perspectives on the Prohibited Grounds of Discrimination,* at xiii.

impetus to proposals to prohibit discrimination on the basis of socio-economic status/social origin".[116]

As with the original nine grounds, regional and international law give rise to an obligation to prohibit socio-economic discrimination. In this regard, Kádár notes that: "*The main human rights documents at the United Nations, Council of Europe or European Union level, all of which are legally binding for Ireland, list socio-economic grounds. The treaty bodies and courts responsible for the interpretation and enforcement of these provisions have started to increasingly refer to socio-economic discrimination alone or in conjunction with other human rights violations*".[117]

He specifically highlights Ireland's obligations under the International Covenant on Economic, Social and Cultural Rights:

> "Ireland ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1989 but it has not yet ratified its Optional Protocol, accepting the individual complaints procedure. Similar to the ICCPR, the ICESCR contains a non-discrimination provision with an open list of grounds and makes explicit reference to, among others, social origin, property and birth…
>
> The UN Committee on Economic, Social and Cultural Rights published its latest Concluding Observations on Ireland in July 2015. In this, the Committee regretted that no steps have been taken to incorporate the ICESCR into domestic law and, in particular given the disproportionately adverse effects the austerity measures had on disadvantaged and marginalized individuals and groups that domestic legislation does not provide protection against discrimination on all grounds of discrimination prohibited by the ICESCR."[118]

In 2015, the United Nations Committee on Economic, Social and Cultural Rights (UNCESCR) recommended that Ireland "*adopt comprehensive anti-discrimination*

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[116] Ibid at xxi.

[117] Tamas Kádár for the Equality and Rights Alliance (2016), *An analysis of the introduction of socio-economic status as a discrimination ground,* available at: https://equineteurope.org/wp-content/uploads/2020/07/Analysis-of-socio-economic-status-as-discrimination-final.pdf at 10.

[118] Ibid at 8.

legislation that includes all the grounds for discrimination [including socio-economic status] set out in article 2 (2) of the [International Covenant on Economic, Social and Cultural Rights]".[119]

Kádár also notes that the introduction of socio-economic grounds in anti-discrimination legislation also reflects the recognition of the need for more robust measures to combat socio-economic disadvantage generally:

> "Both at the global and at the European level, poverty and social exclusion and discrimination on the basis of poverty and social exclusion constitute a key social challenge. It is a challenge that has stimulated world leaders to pledge their support to fight poverty in all its forms and European leaders to acknowledge the link between discrimination and poverty and social exclusion and to define equal opportunities as a cornerstone of their aspiration for a European social model."[120]

In summary, the introduction of a disadvantaged socio-economic status ground would reflect how discrimination and inequality are experienced, and would be a significant anti-poverty and social inclusion measure. The measure would also be consistent with Ireland's international obligations.

2.3.1.2. Defining a Socio-Economic Status Ground

Two Private Members' Bills have been introduced to the Oireachtas for the purpose of prohibiting discrimination on the basis of disadvantaged socio-economic status, in the Equality Acts, the Equality (Miscellaneous Provisions) Bill 2017[121] and the Equality (Miscellaneous Provisions) Bill 2021.[122]

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[119] UN Committee on Economic, Social and Cultural Rights (2015) *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland*, Geneva: OHCHR, para.12.

[120] Tamas Kádár for the Equality and Rights Alliance (2016), *An analysis of the introduction of socio-economic status as a discrimination ground,* available at: https://equineteurope.org/wp-content/uploads/2020/07/Analysis-of-socio-economic-status-as-discrimination-final.pdf at 4.

[121] See: https://www.oireachtas.ie/en/bills/bill/2017/87/

[122] See: https://www.oireachtas.ie/en/bills/bill/2021/6/

In the US, concerns have been raised that "*prohibiting SES discrimination would open the floodgates to an overwhelming number of lawsuits*".[123] Similar concerns are evident in the Irish context in the then Minister for Justice's response to the 2017 Bill, which he claimed would "*[create] the risk of exponentially increasing the number of potential claims under equality legislation*".[124]

Such concerns are largely a "*red-herring*" based on the misconception that anti-discrimination law has previously only been concerned with innate, objective or binary human characteristics:

> "None of the traits protected by discrimination law are amenable to this sort of clear-cut categorical definition. Even with respect to traits like race or sex, which are oftentimes mischaracterized as having natural categorical boundaries, people fall along a continuous spectrum from more masculine to more feminine, from appearing more- or less- white (where whiteness is demarcated by a number of attributes including skin color, hair style, dress, accent, etc.). Discrimination cases do not always require proof that a person of one race or sex was treated differently than someone of a categorically different race or sex. All discrimination is relative—a male can be a victim of sex discrimination if he is treated worse than other men due to his relatively effeminate nature. What matters is that the adverse action was driven by stereotypes about race or sex."[125]

Similar observations have been made by IHREC in the Irish context:

> "The nine grounds currently protected under equality law are of varying degrees of clarity and objectivity. While grounds such as age and civil status may be amenable to objective categorisation, the grounds of race, disability and membership of the Traveller community may be seen to contain both objective and subjective components. Definitional challenges have not precluded the advancement of equality law in these areas.

[123] Danieli Evans Peterman, *Socioeconomic Status Discrimination* 104 Va. L. Rev. 1283 at p.1346.

[124] Equality (Miscellaneous Provisions) Bill 2017: Second Stage Debate, available at: https://www.oireachtas.ie/en/debates/debate/dail/2017-11-08/34/

[125] Danieli Evans Peterman, *Socioeconomic Status Discrimination* 104 Va. L. Rev. 1283 at p.1343.

> The Commission is of the view that any potential ambiguities in the law can, in the same way that the understanding of the other grounds has evolved, be advanced through interpretation by the Workplace Relations Commission and the courts."[126]

Both the 2017 and 2021 Bill provide for an "asymmetrical" definition of the new ground i.e., a prohibition on discrimination on the basis of socio-economic "disadvantage" rather than socio-economic "status" more generally. Such an approach was specifically recommended by Kádár who undertook an analysis of the manner in which socio-economic grounds are defined in 20 of the 35 European countries whose anti-discrimination legislation prohibits socio-economic discrimination.[127] It avoids the "*danger*" highlighted by Fredman "*of challenges by better off people against programmes specifically designed to benefit poor people*":

> "More appropriate would be a definition which is expressly asymmetric. The South African statute uses the term 'socio-economic status', but goes on to define it as including 'the social or economic condition or perceived condition of a person who is disadvantaged by poverty, low employment status, or lack of or low-level educational qualifications'. In the light of these alternatives, the formula used on the Equality Act is clearly the most appropriate. Socio-economic disadvantage expressly focuses on disadvantage, making it unnecessary to include further express provisions excluding those who are better off or protecting programmes aimed at substantive equality for disadvantaged people."[128]

The difference between the definitions set out in the Bills is that, while the 2021 Bill offers a non-exhaustive list of circumstances which "*may*" indicate socio-economic disadvantage, the 2017 Bill sets out an exhaustive list of indicators or causes of "*social*

[126] IHREC (2017), *Observations on the Equality (Miscellaneous Provisions) Bill 2017*, available at: https://www.ihrec.ie/app/uploads/2018/01/Observations-on-Equality-Miscellaneous-Provisions-Bill-2017.pdf

[127] Tamas Kádár for the Equality and Rights Alliance (2016), *An analysis of the introduction of socio-economic status as a discrimination ground,* available at: https://equineteurope.org/wp-content/uploads/2020/07/Analysis-of-socio-economic-status-as-discrimination-final.pdf at p. 11.

[128] Sandra Fredman (2010), P*ositive Duties and Socio-economic Disadvantage: Bringing Disadvantage onto the Equality Agenda*, European Human Rights Law Review 290.

or economic disadvantage" (namely "*poverty, level or source of income, homelessness, place of residence, or family background*").

Kádár's analysis of European best practice suggests that the definition of "socio-economic disadvantage" adopted should be broad enough to encompass and respond to: "*Disadvantages in the fields of: Economic and financial means, Education, Employment, Family background, Health, Housing, including the geographic location, and Social class*". He further notes that the purpose of a list of indicators in the definition should be to "*[enable] a situation-specific analysis*".[129]

In this regard, the definition in the 2021 Bill (which includes a non-exhaustive list of indicators) is therefore more consistent with international best practice, and better reflects a purposive approach to drafting protected grounds.

The definition in the 2021 Bill is also likely to be more workable and enforceable in practice, a particularly important consideration in the introduction of a new ground of discrimination. At the FLAC "Status Check" seminars in June 2021, Siobhán Phelan SC (as she then was) examined the definitions of socio-economic status contained in the two Bills from 2017 and 2021, and concluded that the definition in the 2021 Bill was preferable in this regard. Tamas Kádár agreed with this analysis.[130]

Siobhán Phelan SC noted that the provisions of the 2021 Bill could be strengthened by amending the Equality Acts to clearly allow for the use of hypothetical comparators and for claims relating to multiple/intersectional discrimination. Both these topics are discussed elsewhere in this submission. Finally, Siobhán Phelan SC noted the potential "transformative" effect of the addition of a socio-economic status ground in light of the fact that its addition would engage the Public Sector Equality and Human Rights Duty under section 42 of the Irish Human Rights and Equality Commission Act 2014.

[129] Tamas Kádár for the Equality and Rights Alliance (2016), *An analysis of the introduction of socio-economic status as a discrimination ground,* available at: https://equineteurope.org/wp-content/uploads/2020/07/Analysis-of-socio-economic-status-as-discrimination-final.pdf

[130] All four *Status Check* seminars were recorded and can be viewed here: https://www.flac.ie/news/2021/05/12/status-check-20-years-of-the-equal-status-acts-fla/

2.3.2 "Other Status" Ground

As has been noted above, European and International human rights instruments contain a number of additional grounds, which are not provided for in the Equality Acts, including the grounds of language, political or other opinion, social origin, property, birth or other status. Article 14 of the ECHR includes "other status" in its list of grounds. Article 21 of the EU Charter of Fundamental Rights is non-exhaustive in terms of the specified grounds, prohibiting discrimination "*based on any ground*". In addition to the specific "new" grounds discussed above, the Review should also examine the introduction of an "other status" ground, which would ensure that the national equality framework is able to dynamically respond to emerging forms of illegitimate social prejudice. The incorporation of such grounds into the national equality framework would also "*achieve more comprehensive protection and coherence between the various instruments*", such as the provisions of the ECHR and EU Charter.[131]

2.4 Intersectional Discrimination

The extent to which the Equality Acts prohibit "intersectional" (as opposed to "compound") discrimination is unclear. Complaints may be made under multiple grounds. This allows for complaints to be made where "compound" or "additive" discrimination occurs i.e., where discrimination occurs on multiple grounds and the role of each ground can be differentiated and considered separately. However, the Equality Acts do not explicitly prohibit intersectional discrimination i.e., cases where discrimination occurs on multiple grounds and the grounds interact with each other in an inseparable manner (such that an individual complaint on either ground may not succeed). In this regard, it is clear that the Equality Acts are out of step with many people's lived experiences of discrimination, which often occurs as a response to their identity as a whole and cannot be distinctly and artificially categorised into separate grounds.

In FLAC's 2019 Annual Report, FLAC highlighted the intersectional and gendered nature of the discrimination frequently faced by Roma women, particularly those who

[131] Eilis Barry, *Non-Discrimination and Equality*, in "Making Rights Real for Children: A Children's Rights Audit of Irish Law", Childrens Rights Alliance (2015). Available at: https://www.childrensrights.ie/content/making-rights-real-childrens-rights-audit

outwardly express their Roma identity by wearing traditional clothing including headscarves and full-length skirts. FLAC has also previously noted how Traveller women are exposed to multiple and intersectional forms of discrimination on grounds of gender and ethnicity and can be subjected to various forms of violence against women and discrimination.

Similarly, older people with disabilities, women with disabilities, older LGBT people, women from migrant or minority ethnic backgrounds may experience distinct forms of discrimination. The Interim Report of the Independent Anti-Racism Committee acknowledged "*the intersectionality between racism and all other forms of oppression, including the oppressions experienced by people based on gender, sexuality, gender identity, disability and socio-economic circumstances*".[132] In 2019, the UN Committee on the Elimination of Racial Discrimination (UNCERD) had recommended that Ireland review its equality legislation with a view to: "*providing for explicit prohibition of multiple or inter-sectional discrimination*".[133]

As noted above, national and international bodies have highlighted that many groups who currently enjoy the protection of the Equality Acts may experience intersectional discrimination on the basis of their socio-economic status.

It is comparatively easy to provide for intersectional discrimination in the Equality Acts by defining discrimination to include discrimination on one or a combination of the discriminatory grounds. Walsh has noted that "*a legislative amendment could explicitly allow for a flexible approach by specifying that dual or even multiple grounds could be applied with reference to a single hypothetical comparator*".[134]

In the absence of protection for intersectional discrimination, there is a real risk that persons who experience some of the most complex and serious forms of discrimination will be deprived of effective protection under equality law.

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[132] Independent Anti-Racism Committee (2021) *Interim Report to the Minister for Children, Equality, Disability, Integration and Youth*. Available at: https://www.gov.ie/pdf/?file=https://assets.gov.ie/132151/ed3f39e2-4aa1-4991-aa06-52beae8310db.pdf#page=null

[133] UN Committee on the Elimination of Racial Discrimination (2019) *Concluding observations on the combined fifth to ninth reports of Ireland*. Geneva: OHCHR, para. 12.

[134] Judy Walsh, *Equal Status Acts 2000-2011: Discrimination in the Provision of Goods and Services* (Lonsdale Law Publishing, 2013) p 142.

RECOMMENDATIONS

FLAC recommends that:

2.1. The Review's approach to the amendment of the existing protected grounds and the addition of new grounds should be guided by international best practice, as well as the provisions of the Constitution, European Union Law, & International and Regional Human Rights Instruments. A purposive and effect-based approach to defining the protected grounds should be adopted

2.2. The Review should examine each of the existing grounds to ensure that all those who experience discrimination on the basis that the ground is intended to protect enjoy its protection in practice. In particular, the Review should:

- **2.2.1.** Ensure the Family Status ground encompasses the full diversity of carers (resident and non-resident carers, and carers providing continuing or intermittent care).
- **2.2.2.** Ensure that the Family Status and Civil Status grounds afford protection to unmarried couples and cohabitees.
- **2.2.3.** Ensure the Religion ground offers protection against discrimination on the basis of non-religious or philosophical beliefs.
- **2.2.4**. Ensure the Sexual Orientation ground prohibits all forms of discrimination on the basis of sexual orientation, including as against those who may not come within the current definition.

2.3. The definitions section of the EEA and ESA should be amended to make it clear that the definition of "gender" for the purposes of the legislation includes "gender identity", "gender expression" and "sex characteristics". These terms should be defined in both pieces of legislation in line with international best practice. The Equality Acts should provide that in addition to prohibiting discrimination as between men and women, the gender ground prohibits discrimination as between persons of different gender, gender identity, gender expression and/or sex characteristics.

2.4. The other provisions of the EEA and ESA aimed at promoting gender equality and prohibiting gender discrimination should be reviewed with a view to amending them to ensure maximum protection for transgender, non-binary and intersex people, and to provide for positive action in respect of those groups.

2.5. While the definition of disability under the Equality Acts predates the UN Convention on the Rights of Persons with Disabilities, it adopts a broad functional approach which has been interpreted in an inclusive manner and has provided effective protection in practice for persons with disabilities. Insofar as any amendment to the definition may be considered, it is important that this does not result in a reduction or regression in the scope of protection and retains a broad, inclusive approach to the definition of disability. It is also important that persons with disabilities should not be required to prove the social and economic impacts or barriers which may hinder their full and effective participation in society.

2.6. The Equality Acts should be amended to prohibit discrimination on the basis of disadvantaged socio-economic status. The Equality (Miscellaneous Provisions) Bill 2021 contains a workable, enforceable definition of this new ground.

2.7. The Review should conduct a detailed examination of the introduction of new grounds based on Criminal Conviction, Trade Union membership and Political Opinion.

2.8. The Review should introduce an “Other Status” ground to the Equality Acts.

2.9. The Equality Acts should be amended to expressly prohibit multiple and intersectional discrimination.

3. The Material Scope of the Equality Acts (Exemptions to the Prohibition of Discrimination)

The Equality Acts prohibits numerous forms of discrimination in employment, access to goods and services, education and accommodation.

However, there are a large number of exemptions to the applicability of the Equality Acts. Some of these exemptions are specific to certain grounds, and others apply across all grounds. The number of exemptions in itself raises significant concerns both in relation to the effectiveness of the legislation and its clarity and accessibility. As will be discussed in further detail, the general exemptions to the ESA have been interpreted as broad enough to remove large amounts of State activity, including in key areas such as housing, healthcare and social welfare from the scope of the prohibition of discrimination.

Instead of using general or blanket exemption, the legislature should instead adopt a fine-grained approach to exceptions and exemptions: *"Such a course is more appropriate than blanket immunity. It entails legislators proactively considering the rationale behind differential treatment and justifying why such treatment should not amount to discrimination in a legislative process that is open to public scrutiny and contestation*".[135]

The Review presents an opportunity for a full re-evaluation of the exemptions to both Acts, and to examine whether they are still relevant or fit for purpose. Any exceptions to the prohibition of discrimination under the Equality Acts must be necessary, specific, clear, relevant and proportionate. Further, all exemptions must be compliant with EU law where applicable.

3.1. Ground-Specific Exemptions

Both Acts contain exemptions which are specific to certain grounds. While exemptions may be necessary in certain circumstances, and may be mandated or allowed for by the Equality Directives, it is vital to ensure that the exemptions are necessary and

[135] Judy Walsh (2019), P*rimacy of National Law over EU law? The Application of the Irish Equal Status Act,* European Equality Law Review (Issue 2, 2019) at page 44.

proportionate and do not compromise the effectiveness of the prohibition of discrimination and the protection afforded to the protected groups.

3.1.1. Absence of a Prohibition on Age discrimination as between people under 18

There is a significant exemption to the age ground under section 3(3)(a) of the ESA, which means that people under 18 cannot take a claim of discrimination on the basis of their age. This exemption is "*unduly broad in that it also exempts discrimination as between children of different ages. For instance, a health authority could decide that speech therapy will only be afforded to children under 6, introducing an arbitrary cut-off point for access to a vital service. Such a decision cannot be challenged using the ESA because of section 3(3)(a)*".[136]

The Equality and Rights Alliance previously highlighted a need to: "*Redefine the age ground, without age limits, to include people under eighteen*".

It is a broad blanket exemption that can hardly be said to be necessary or proportionate, and may be inconsistent with Ireland's obligations under the UN Convention on the Rights of the Child.

3.1.2. Equal Pay Exemption and People with Disabilities

The EEA contains important "Equal Pay" provisions. However, section 35(1) of the EEA states that it not discriminatory to pay a person with a disability a lesser rate of pay if their output is less than that of a person without a disability.

The Equality Authority stated that section 35(1) undermines the positive provisions of the EEA such as those relating to Reasonable Accommodation.[137] No such exemption is provided for in the EU Framework Employment Directive. The provision is also inconsistent with the UNCPRD.

[136] Judy Walsh, *Equal Status Acts 2000-2011: Discrimination in the Provision of Goods and Services* (Lonsdale Law Publishing, 2013) page 59.

[137] Equality Authority (2002), *Overview of the Employment Equality Act 1998 and the Equal Status Act 2000.*

3.1.3. Religious Ethos Exemptions

Both the EEA and ESA contain "religious ethos" exemptions.

Section 7 of the ESA prohibits discrimination in relation to school admission policies. However, this provision is subject to an exemption at section 7(3) in relation to the promotion of certain religious values in schools. While the scope of this exemption was narrowed by the Education (Admission to Schools) Act 2018, the exemption still allows for discrimination on the basis of religion by privately-funded primary or secondary schools. Further, all schools can refuse to admit a student on the basis of religion where the objective of the school is to provide education in an environment which promotes certain religious values and "*it is proved that the refusal is essential to maintain the ethos of the school*".

Section 37 of EEA permits actions taken against employees to uphold the "*ethos*" of certain institutions. This exemption was narrowed by the Equality (Miscellaneous Provisions) Act 2016. However, it still provides an exemption for religious institutions from the prohibition of discrimination, as well as privately-funded institutions. Such exemptions may be broader than those permitted under the EU Equality Directives.

3.1.4. Nationality Exemption in relation to Educational Grants

Section 7 of the ESA permits the Minister for Education to discriminate as between EU nationals and non-EU nationals in the provision of grants, including all forms of financial assistance to students. The Irish Human Rights Commission previously noted that section 7 is likely to cause: "*[A] serious detrimental effect on the capacity of non-EU nationals to access education, which will significantly impact on their participation in employment and their enjoyment of wider economic, social and cultural rights. The Commission further notes that non-EU nationals are already treated differentially with regard to the rate of fees payable for a number of third level courses. Discrimination in the payment of educational grants represents an additional barrier to education to persons who may be legally resident in the State, in legal employment and/or in enjoyment of a legal right to access education*".[138]

[138] Irish Human Rights Commission (2004), *Observations on the Equality Bill 2004*. Available at: https://www.ihrec.ie/documents/observations-on-the-equality-bill-2004/

3.1.5. Exemptions Specific to the Gender Ground

There are several exemptions to the prohibition of gender discrimination in the ESA. There is also a "*determining occupational requirement*" exemption to the prohibition of gender discrimination in the EEA, as well as a specific exemptions in relation to An Garda Síochána and the Irish Prison Service.

As noted already, any exceptions to the prohibition of discrimination under the Equality Acts must be necessary, specific, clear, relevant and proportionate. To ensure this, the Review should include a full review of the exemptions to the Equality Acts, including the exemptions to the gender ground which are discussed in further detail below.

3.1.5.1. Exemptions to the EU Gender Equality Directives

Any exemptions in the Equality Acts must comply with EU law. The relevant EU Equality Directives mandate some exemptions to the prohibition on gender discrimination in employment, and allow for limited exemptions to the prohibition on gender discrimination in access to goods and services.

Article 14(5) of the Recast Directive provides that: "*Member States may provide, as regards access to employment including the training leading thereto, that a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate*".

Article 4(5) of the Gender Goods and Services Directive provides that the Directive "*shall not preclude differences in treatment, if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary*". Recital 16 to that Directive provides:

> "Differences in treatment may be accepted only if they are justified by a legitimate aim. A legitimate aim may, for example, be the protection of

victims of sex-related violence (in cases such as the establishment of single-sex shelters), reasons of privacy and decency (in cases such as the provision of accommodation by a person in a part of that person's home), the promotion of gender equality or of the interests of men or women (for example single-sex voluntary bodies), the freedom of association (in cases of membership of single-sex private clubs), and the organisation of sporting activities (for example single-sex sports events). Any limitation should nevertheless be appropriate and necessary in accordance with the criteria derived from case law of the Court of Justice of the European Communities."

The European Commission's Report on the application of the Gender Goods and Services Directive notes the following in relation to article 4(5):

> "As an exception to the principle of equal treatment, the derogation must be construed narrowly. It would appear to cover only situations in which the goods and services are available exclusively or primarily to members of one sex without providing for a possibility to offer goods and services to the general public."[139]

3.1.5.2. Exemptions to the Prohibition on Gender Discrimination in the Employment Equality Acts

Section 25 of the EEA provides:

> "(1) A difference of treatment which is based on a characteristic related to the gender ground in respect of access to employment in a particular post shall not constitute discrimination under this Part or Part II where, by reason of the particular occupational activities concerned or of the context in which they are carried out —
>
> (a) the characteristic constitutes a genuine and determining occupational requirement for the post, and

[139] European Commission (2015), *Report on the application of Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services*. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52015DC0190&from=EN

(b) the objective is legitimate and the requirement proportionate.

(2) In subsection (1) the reference to employment includes a reference to any training leading to it."

Section 27(1) of the EEA provides for further specific exemptions in relation to An Garda Síochána and the Irish Prison Service in order to allow for the "*assignment of a man or, as the case may require, a woman to a particular post where this is essential*" for a number of reasons. Section 27(1) also provides that the Acts do not prevent "*the application of one criterion as to height for men and another for women, if the criteria chosen are such that the proportion of women in the State likely to meet the criterion for women is approximately the same as the proportion of men in the State likely to meet the criterion for men*". Finally, section 27(2) allows for Positive Action in respect of promoting gender equality in recruitment for both bodies.

3.1.5.3. Exemptions to the Prohibition on Gender Discrimination in the Equal Status Acts

Section 5(2) of the ESA provides that the prohibition on discrimination in the provision of services does not apply in relation to:

"(c) differences in the treatment of persons on the gender ground in relation to services of an aesthetic, cosmetic or similar nature, where the services require physical contact between the service provider and the recipient…

(f) differences in the treatment of persons on the gender, age or disability ground or on the basis of nationality or national origin in relation to the provision or organisation of a sporting facility or sporting 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,

(g) differences in the treatment of persons on the gender ground where embarrassment or infringement of privacy can reasonably be expected to result from the presence of a person of another gender…

(*i*) differences in the treatment of persons on the gender, age or disability ground or on the ground of race, reasonably required for reasons of authenticity, aesthetics, tradition or custom in connection with a dramatic performance or other entertainment…"

Section 5(2)(l) also provides for a further general exemption in relation to "*differences, not otherwise specifically provided for in this section, in the treatment of persons in respect of the disposal of goods, or the provision of a service, which can reasonably be regarded as goods or a service suitable only to the needs of certain persons*".

Section 5(2)(h) also provides an exemption (which could be construed as a general Positive Action provision) in respect of "*differences in the treatment of persons in a category of persons in respect of services that are provided for the principal purpose of promoting, for a* bona fide *purpose and in a* bona fide *manner, the special interests of persons in that category to the extent that the differences in treatment are reasonably necessary to promote those special interests*".

Section 6(2)(e) provides an exemption in relation to "*the provision of accommodation to persons of one gender where embarrassment or infringement of privacy can reasonably be expected to result from the presence of a person of another gender*". Section 6(2)(d) in relation provides that "*the provision of accommodation by a person in a part (other than a separate and self-contained part) of the person's home, or where the provision of the accommodation affects the person's private or family life or that of any other person residing in the home*".

Section 7(3) provides that the prohibition of discrimination does not apply to primary schools, secondary schools and "*institution[s] established for the purpose of providing training to ministers of religion*" who admit students of only one gender. Section 7(4)(a) provides for a further exemption "*in respect of differences in the treatment of students on the gender, age or disability ground in relation to the provision or organisation of sporting facilities or sporting events, to the extent that the differences are reasonably necessary having regard to the nature of the facilities or events*".

Section 9(1) provides that "*a club shall not be considered to be a discriminating club*" where "*its principal purpose is to cater only for the needs of… persons of a particular gender*", or if it "*confines access to a membership benefit or privilege to members within the category of a particular gender or age, where... (i) it is not practicable for*

members outside the category to enjoy the benefit or privilege at the same time as members within the category, and (ii) arrangements have been made by the club which offer the same or a reasonably equivalent benefit or privilege both to members within the category and to members outside the category…". Section 9(2) also contains a general Positive Action provision in respect of clubs relating to the composition of their board or management committees, as well as measures to promote "*more equal involvement in club matters*".

3.1.5.4. Ensuring the Exemptions to the Gender Ground are Clear, Specific, Proportionate, Necessary & Compliant with EU Law

While there are limited exemptions to the EEA, there are multiple exemptions to the prohibition on gender discrimination in the ESA, some of which are set out in broad and general terms. In terms of clarity and accessibility of the legislation, these exemptions (many of which overlap with each other) need to be re-examined. Similarly, while some of the exemptions discussed above may be construed as Positive Action provisions, they are not clearly described as such and do not set out clear aims. The Equality Authority previously noted that, while section 5(2)(h) of the ESA may be a Positive Action provision, its wording means that "*it is difficult to give a precise analysis of the ambit of this provision*".

It should be noted that there has been very limited case law in relation to the exemptions save for the *Portmarnock Golf Club* case.[140] In some instances, the exemptions have never been invoked before the statutory tribunal. This alone indicates that the Review should examine whether certain exemptions remain (or were ever) necessary.

Where the exemptions have been considered by the Equality Tribunal or the Workplace Relations Commission, the interpretation applied by those tribunals has reflected the principles set out in EU law. Article 4(5) of the Gender Goods and Services Directive permits (but does not mandate) exemptions to the prohibition on gender discrimination insofar as any difference in treatment is "*justified by a legitimate aim and the means of achieving that aim are appropriate and necessary*". EU law

[140] IESC 73

requires that any exemptions to the prohibition on discrimination must be "*construed narrowly*".[141] In *Firma Feryn NV*[142] the CJEU found that the prejudices of customers, or potential customers, cannot justify discrimination.[143]

There have been two cases in relation to the exemption set out in section 5(2)(g) of the ESA ("*differences in the treatment of persons on the gender ground where embarrassment or infringement of privacy can reasonably be expected to result from the presence of a person of another gender*"). Both cases concerned men who sought to attend shops specialising in bridal-wear with their fiancés. In *McMahon v Bridal Heaven*[144], the Equality Tribunal rejected the contention that section 5(2)(g) permitted a blanket "no men" policy in terms of access to the shop, in circumstances where such a policy was not necessary to prevent embarrassment to other customers. Further, the Equality Officer did not accept a "*statement based on 'knowing the market' as a valid argument*" in support of such a policy.[145] By contrast, in *Blaney v The Bridal Studio*[146]*,* the Equality Tribunal held that the shop could avail of the exemption in section 5(2)(g) where they enforced a more nuanced policy of excluding persons from the shop where their presence would cause embarrassment to others (rather than a general exclusion policy). The Equality Officer was "*particularly persuaded in this from the fact that they exercised the exemption in a non-discriminatory manner in applying it for the benefit of male customers as well as female customers*".[147]

Similar issues arise in relation to the exemption provided for at section 5(2)(c) of the ESA ("*differences in the treatment of persons on the gender ground in relation to services of an aesthetic, cosmetic or similar nature, where the services require physical contact between the service provider and the recipient*"). This exemption is, again, framed in a broad and general way. The European Commission's Report on the

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[141] European Commission (2015), Report on the application of Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52015DC0190&from=EN

[142][142] Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV, C-54/07

[143] [Case C54/07],

[144] [DEC-S2008-015]

[145] Ibid.

[146] [DEC-S2008-032]

[147] *Blaney v The Bridal Studio* DEC-S2008-032. Available at: https://www.workplacerelations.ie/en/cases/2008/may/dec-s2008-032-full-case-report.html#_ftn1

application of the Gender Goods and Services Directive notes that "*gender-based differentiation in the pricing of hairdressers' services is also a frequent practice*" and that, in other European jurisdictions "*differences in prices have been the subject of court ruling to assess the necessity and proportionality on a case-by-case basis*". However, Judy Walsh notes such challenges may not be possible in Ireland in light of the wording of section 5(2)(c) of the ESA:

> "[A]cross Europe several challenges have been successfully mounted to, for example, differential pricing by hairdressers along gender lines… It is not clear whether the exception provided for under the ESA would cover that type of practice. The provision simply refers to 'differences in treatment' in relation to services. But it seems that prices would be included…"[148]

Section 5(2)(c) of the ESA was considered by the Equality Tribunal[149] in two cases, and it has been considered once by the WRC[150]. In both cases before the Equality Tribunal, the Equality Officer found that barber shops had been permitted to refuse service to women on the basis of section 5(2)(c). In both cases, the respondent barber shops had adduced evidence that their lease agreements did not permit them to cut women's hair (on the basis that such services were offered in other outlets in the shopping centres where they were located). Whether such justifications (which were accepted by the Equality Tribunal) comply with the Gender Goods and Services Directive is unclear.

In *McLoughlin v Paula Smith Charlies Barbers*[151], the WRC did not accept that a barber could invoke section 5(2)(c) of the ESA in order to refuse service to a transgender man. The outcome in that case is clearly consistent with the requirements of EU law (which prohibits discrimination against transgender people, albeit to a limited degree, and which requires any exemption to the requirement to provide equal treatment to be justified by a legitimate aim).

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[148] Judy Walsh, *Equal Status Acts 2000-2011: Discrimination in the Provision of Goods and Services* (Lonsdale Law Publishing, 2013) p 57.

[149] See: *Carroll v Short Cuts* DEC-S/2015/007, *Carroll v Gruaig Barbers* DEC-S/2015/005.

[150] *McLoughlin v Paula Smith Charlies Barbers* [ADJ-00011948]. In that case the WRC did not accept that a barber could invoke section 5(2)(c) of the Equal Status Acts in order to refuse service to a transgender man.

[151] [ADJ-00011948]

Judy Walsh also notes criticism of the broad nature of the exemption provided for at 5(2)(f) of the ESA ("*differences in the treatment of persons on the gender, age or disability ground or on the basis of nationality or national origin in relation to the provision or organisation of a sporting facility or sporting 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*"):

> "In relation to the gender ground, Bolger and Kimber… argue that the exception is broad and unsophisticated. They call for a more nuanced approach, which factors in differences in physical strength between men and women and allows younger boys and girls to play and compete with each other."[152]

The analysis of the existing exemptions to the prohibition on gender discrimination, as well as the outcomes in discrimination complaints where those exemptions were invoked, suggest that the Review must, at the very least, determine whether any exemptions are necessary and constructed as narrowly as possible, and clarify that overly broad and/or discriminatory exclusion policies are not permitted. As well as ensuring compliance with EU law, such an approach would also ensure that the legislation is clear and accessible.

In line with the recommendation to expand the gender ground to encompass gender expression, gender identity and sex characteristics, it will also be necessary to assess the extent to which any exemptions to the gender ground impact these groups. In this regard, the approach of the Workplace Relations Commission in *McLoughlin v Paula Smith Charlies Barbers* is instructive. In line with the general principle, any exemptions which apply to those who enjoy the protection of an expanded gender ground must be constructed as narrowly as possible, and clearly prohibit overly broad and/or discriminatory exclusion policies. As with all protected grounds, there may be limited circumstances where exemptions apply in respect of people of differing gender identity, gender expression and sex characteristics. However, any such exemptions must be justified by a legitimate aim and the means to achieve such aims must be proportionate, appropriate and necessary. As noted above, the CJEU has clarified in

[152] Judy Walsh, *Equal Status Acts 2000-2011: Discrimination in the Provision of Goods and Services* (Lonsdale Law Publishing, 2013) p66.

CGKR v Firma Feryn NV that the prejudices of customers, or potential customers, cannot justify discrimination. In similar terms, the *European Network of Legal Experts in Gender Equality and Non-Discrimination* have expressed concerns at any attempt to *"[accept] feelings of discomfort among the dominant majority as justifications to restrict access to important areas of daily life, such as work, public toilets, sports, etc. for groups of people who are already more vulnerable and marginalized*".

3.2. General Exemptions

In addition to the specific exemptions noted above, both the ESA and EEA contain general exemptions which apply across all grounds. These exemptions are discussed below.

3.2.1. Restrictive Definition of Vocational Training

Section 12(2) of the EEA provides that "*'vocational training' means any system of instruction which enables a person being instructed to acquire, maintain, bring up to date or perfect the knowledge or technical capacity required for the carrying on of an occupational activity and which may be considered as exclusively concerned with training for such*".

As a result, the EEA only applies to persons engaging in a course exclusively concerned with training for an occupational activity. People doing other course are covered by the prohibition of discrimination under the ESA. As a result, those people are only entitled to reasonable accommodation in more limited circumstances, and may be entitled to a lower level of redress in respect of any discrimination claim taken in respect of their vocational training. This raises concerns as to whether the definition of "vocational training" in the EEA complies with the Framework Equality Directive.[153]

[153] Judy Walsh (2020), *Country Report: Non Discrimination, Ireland 2020*. European Commission Directorate-General for Justice and Consumers. Available at: https://www.equalitylaw.eu/country/ireland

3.2.2. Definition of Employee - People Working in other People's Homes

The Definition of Employee (section 2 of the EEA) contains an exemption as to who is considered an "employee". As a result, "*so far as regards access to employment*", the Acts do not apply to "*a person employed in another person's home for the provision of personal services for persons residing in that home where the services affect the private or family life of those persons*". The result is that people who do domestic or childcare work may not be fully protected against discrimination.

The Irish Human Rights Commission previously noted that "*neither the Race Directive nor the Framework Employment Directive permits exemptions to the application of the binding elements of the Directives in relation to employment in a private household*".[154]

3.2.3. Educational Attainment Exemption

Section 36(4) of the EEA allows employers to require employees to have specified educational, technical or professional qualifications. Notably, there is no obligation on employers to provide an objective justification for such qualification requirements. As a result, this provision may permit indirect discrimination on a number of potential grounds.

3.2.4. Discriminating Clubs

Section 8 of the ESA contains specific provisions in relation to "discriminating clubs". However, these provisions are subject to broad exemptions in section 9 of the Acts. The Supreme Court's interpretation of section 9 in *Equality Authority v Portmarnock Golf Club & Ors*[155] appears to permit discrimination against protected disadvantaged groups which can hardly have been the intention behind the ESA. The Court held that section 9 permitted male-only membership golf clubs, holding that the principal purpose of such clubs was to cater for the needs of men. The minority view expressed by Denham was to the effect that in order to come within the exemption at section 9(1),

[154] Irish Human Rights Commission (2004), Observations on the Equality Bill 2004. Available at: https://www.ihrec.ie/documents/observations-on-the-equality-bill-2004/

[155] [2009] IESC 73

there should be a logical connection between the objects of the club and the category of person to whom membership is limited.

The majority interpretation of the exemption set out in the judgment raises issues of compliance with the Gender Goods and Services Directive and the Race Directive. Article 4(5) of the Gender Goods and Services Directive provides for an exemption where the provision of goods and services to one gender is justified by a legitimate aim and the means of achieving that aim are appropriate and proportionate. Recital 16 lists examples including freedom of association such as by membership of single sex private clubs. In this regard, Portmarnock Golf Club permitted women to play golf at the club and so may not come within what was envisaged in Recital 16. The Race Directive does not make any reference to freedom of association or private clubs. Recital 17 allows for the maintenance or adoption of measures intended to prevent or compensate for disadvantage suffered by a group of persons of a particular racial or ethnic origin, and such measures may permit 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.

The judgment in the *Portmarnock* case raises deeper questions about the extent to which section 9(1) of the ESA is effective in combatting discrimination or compensating for disadvantage.

3.2.5. Nursing Homes, Retirement Homes, Assisted-Living Facilities, Emergency Accommodation and Refuges

Section 6(5) of the ESA contains a general exemption in relation to the provision of numerous forms of accommodation:

> "Where any premises or accommodation are reserved for the use of persons in a particular category of persons for a religious purpose or as a refuge, nursing home, retirement home, home for persons with a disability or hostel for homeless persons or for a similar purpose, a refusal to dispose of the premises or provide the accommodation to a person who is not in that category does not, for that reason alone, constitute discrimination."

The *European Network of Legal Experts in Gender Equality and Non-Discrimination* have commented on the broad nature of this exemption:

> "The [Irish] equality legislation allows for exceptions for nursing homes, refuges (e.g.., women's refuges), hostels, houses for religious purposes (for nuns and priests for example), hostels for homeless people, retirement homes or homes for people with disabilities. Denying accommodation to individuals who are perceived to fall outside the target group is not considered to be discrimination."

The report later notes that section 6(5) may serve to "accommodate discriminatory attitudes relying on age or ethnicity".[156]

3.3. The Scope of the Equal Status Acts concerning State Activity

The scope of the ESA expressly extends to the provision of services, which are defined broadly enough to include healthcare and social welfare. Section 6 applies to the provision of accommodation. Despite these express provisions, a combination of the interpretation of the definition of "services", and the interpretation given to a number of exemptions under the ESA, removes large amounts of State activity, including in key areas such as housing, healthcare and social welfare, from the scope of the prohibition of discrimination.

3.3.1. Exemption for the Functions of Public Bodies

The definition of "services" in section 2 of the ESA is broad enough to include services provided by public bodies like healthcare and social welfare. However, the definition does not explicitly extend to the performance of the general functions of public bodies, which are not regarded as constituting services within the meaning of the Acts. The case of *Donovan v Garda Donnellan*[157] drew a distinction between State functions and services accessible to the public. As a result, it is unclear to what extent the ESA apply to public authorities performing public functions which may not come within the definition of "services" but which may nonetheless have a great impact on lives. For example, areas like immigration, citizenship, taxation, and the prison service. It has

[156] European Network of Legal Experts in Gender Equality and Non-Discrimination (2018) *Trans and intersex equality rights in Europe– a comparative analysis*. Available at: https://www.equalitylaw.eu/downloads/4739-trans-and-intersex-equality-rights-in-europe-a-comparative-analysis-pdf-732-kb

[157] [DEC-S2001-011]

been established that the “controlling functions” of An Garda Síochána, including the investigation and prosecution of crimes, do not come within the scope of the ESA.

The ESA implements the Race Directive and the Gender Goods and Services Directive, the text of each of which does not distinguish between services and functions.

3.3.2. Exemption for Discriminatory Legislation

Section 14(1)(a) of the ESA excludes from challenge “*the taking of any action that is required by or under—(i) any enactment*”.

This exemption is very broad in its scope and is very problematic as, in effect, it excludes any action that is brought about as a consequence of a provision in any legislation. In this way, it significantly limits the scope of the anti-discrimination provisions, particularly insofar as it applies to public bodies. The Equality Authority noted that the exemption limited the contribution it could make in relation to discrimination by public bodies and consistently called for its amendment.

By way of example of the exemptions effect, the social welfare code was amended to provide lower rates of Jobseeker’s Allowance for people under 25. This change would have been in breach of the ESA save for the fact that, because it was brought about by way of legislation, it is covered by the exemption in section 14(1)(a).

The exemption also means that successful challenges under the ESA can be reversed by bringing in another law. This occurred after a member of a gay couple challenged the refusal of a travel pass (under the non-statutory Free Travel Scheme) to his cohabiting partner. The action taken against the Department of Social and Family affairs was settled. The Department accepted that the decisions amounted to unlawful discrimination on the sexual orientation ground in contravention of the ESA. Statutory social welfare schemes were immune to challenge, because of the exemption for any measures required by law, but as an administrative scheme the Free Travel Scheme was not exempt. Following the settlement, the Oireachtas amended the principal social welfare statute so that the pre-existing definition of “spouse” or “qualified adult”, which encompassed only married and opposite sex cohabiting couples, would also apply to

some administrative schemes.[158] The amendment was designed to ensure that for the purposes of those schemes same sex couples would essentially be treated as single persons as a matter of law and thus covered by the exemption in section 14(1)(a).

"Enactment" was not defined in the Equal Status Act 2000. Originally, it was thought that its definition did not extend to statutory instruments. However, enactment was subsequently defined in the Interpretation Act 2005 to include "an Act or a statutory instrument or any portion of an Act or statutory instrument". This had the effect of broadening the scope of the exemption further.

In practical terms, this means that any legislation, statutory instrument, or the provision of any legislation or statutory instrument (which has a very broad meaning), which discriminates on one of the nine grounds or which has a disproportionately negative impact on certain groups falls outside the scope of the ESA and cannot be challenged under the Equality Acts.

Until recently, it was thought that it was still possible to challenge discriminatory policy and administrative schemes. However, on foot of a recent High Court judgment in *AB v Road Safety Authority*[159], the exemption has been interpreted to extend beyond legislation and statutory instruments, to the principles and policies arising from the statutory framework. The interpretation of section 14 in that decision has enlarged the scope of the exemptions in section 14 to a worrying extent, and implies that any policy or guidance adopted by a public body which is derived from a piece of legislation is exempted from challenge under the ESA. This interpretation, if correct, would render the exemption extraordinarily wide.

In the context of discrimination on the grounds of race and gender, the provisions of the Race Directive and the Gender Goods and Services Directive are relevant. Neither Directive envisages any blanket exemption for discriminatory measures required by law. In fact, they are to the opposite effect. Article 14 of the Race Directive requires Member States to take the necessary measures to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished. There is an equivalent provision in the Gender Goods and Services

[158] Section 19 of the Social Welfare (Miscellaneous Provision)s Act 2004

[159] [2021] IEHC 217

Directive, article 13 of which provides that "*any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished*".

Thus, insofar as it applies to the grounds of race and gender, section 14(1) cannot be reconciled with the State's obligations under EU law.[160]

3.3.3. Exemption for Immigration and Asylum Matters including Direct Provision

Section 14(1)(aa) of the ESA contains another broad exemption to the ESA, which means it does not apply to certain actions by public authorities "in relation to a non-national". In a recent article, Murphy and Fennelly note that this exemption appears to have been inserted "*to ensure that asylum and immigration applications, and the non-statutory direct provision system for international protection applicants, would not be open to challenge under the Equal Status Act*". They comment that:

> "At its most benign, this provision creates very significant uncertainty about the extent to which third-country nationals may rely on the protection of the legislation against public authorities. At its worst, this provision serves to shield public authorities from complaints of race discrimination by third-country nationals, including applicants for international protection…
>
> In short, the amendment to Irish law…significantly impedes the ability of non-nationals to challenge discriminatory conduct on the part of public authorities and, in this way, creates a material risk that domestic law is inconsistent with the State's obligations under CERD. Having regard to the breadth of this exception, the lack of practice in this regard since 2004 – in particular, the dearth of cases of race discrimination against public authorities – is itself a concern that migrants are unwilling to challenge discriminatory practices."[161]

[160] A challenge to the Criminal Trespass legislation was due to heard by the Equality Tribunal in 2008. The Equality Authority and the Irish Human Rights Commission raised compliance with the Race Directive, and the breath of the exemption in section 14 would have been tested if the elements of case concerning the criminal trespass law had not been settled.

[161] David Fennelly and Clíodhna Murphy (2021), *Racial Discrimination and Nationality and Migration Exceptions: Reconciling CERD and the Race Equality Directive*, Netherlands Quarterly of Human Rights (1/21). Available at: https://journals.sagepub.com/doi/full/10.1177/09240519211055648

3.3.4. Effect of the Exemptions to the Equal Status Acts concerning State Activity

These exemptions to the scope of the ESA often leave persons who are a member of a "protected group" under the Equality Acts unable to challenge discrimination by public bodies and in relation to access to essential State services. Walsh notes that the "reach [of the ESA] into areas like education, healthcare and housing is uncertain".[162] Such broad exemptions are particularly difficult to justify in light of the recognition of a public sector human rights and equality duty in section 42 of the Irish Human Rights and Equality Commission Act 2014.

Combatting discrimination in these areas is vital to tackling socio-economic disadvantage and to upholding socio-economic rights.

For example, FLAC has previously highlighted the discriminatory effect of the so-called "criminal trespass" legislation on Travellers. Other groups have highlighted the discriminatory effects (for Travellers and other groups) of the law in relation to school-admission policies. FLAC has also expressed concern at instances of institutional discrimination against Travellers by local authorities and An Garda Síochána. However, these matters cannot currently be challenged under national equality law.

The EEA contains no equivalent to section 14(1)(a) and this has not proven problematic. Instead, section 17 of the EEA lists a small number of Acts, and sections of Acts, that are exempted.

In 2019, the UN Committee on the Elimination of Racial Discrimination (UNCERD) highlighted a range of deficiencies in the "*legislative framework for the elimination of racial discrimination*", including:

- "The unclear definition of "services" in section 5 of the Equal Status Acts, which may exclude the provision of services provided by public authorities such as the police, the prison service and the immigration service"

[162] Judy Walsh, *Equal Status Acts 2000-2011: Discrimination in the Provision of Goods and Services* (Lonsdale Law Publishing, 2013) p50.

- "Preclusion of complaints against legislative provisions in Section 14 of the Equal Status Acts" [163]

The UN Committee on the Elimination of Discrimination against Women (UNCEDAW) have also called on Ireland to "*ensure that an effective remedy is available for discrimination that has a legislative basis*".[164]

RECOMMENDATIONS

FLAC recommends that:

3.1. Any exemptions to the prohibition of discrimination in the Equality Acts must comply with EU law and be necessary, specific, clear, relevant and proportionate. All exemptions to the EEA and ESA should be reviewed to ensure this, as well as to ensure the legislation as a whole is accessible and clear.

3.2. The ESA should be amended to allow for discrimination complaints on the age ground by people under the age of 18.

3.3. The exemption at section 35(1) of the EEA (which provides that it is not discriminatory to pay a person with a disability a lesser rate of pay if their output is less than that of a person without a disability) should be repealed.

3.4. The Religious Ethos exemptions to the ESA and EEA should be amended to ensure that they are constructed as narrowly as possible and in order to ensure compliance with EU law.

3.5. The Nationality exemption in relation to Education Grants at section 7 of the ESA should be removed.

3.6. The Review must ensure that any exemptions to the prohibition on gender discrimination in the Equality Acts are necessary and are constructed as narrowly as

[163] UN Committee on the Elimination of Racism (2019), *Concluding observations on the combined fifth to ninth reports of Ireland*. Geneva: OHCHR. Available at: https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/IRL/INT_CERD_COC_IRL_40806_E.pdf

[164] UN Committee on the Elimination of Discrimination against Women (2017*), Concluding observations on the combined sixth and seventh periodic reports of Ireland*, Geneva: OHCHR. Available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fIRL%2fCO%2f6-7&Lang=en

possible, and clearly prohibit overly broad and/or discriminatory exclusion policies (against women, men, transgender people, non-binary people and intersex people).

3.7. The definition of “vocational training” at section 12(2) of the EEA should be expanded to ensure compliance with EU law.

3.8. The definition of “employee” at section 2 of the EEA must be amended to remove the exemption concerning discrimination in access to employment for people employed in another person’s home.

3.9. The exemption at section 36(4) of the EEA which allows employers to require employees to have specified educational, technical or professional qualifications should be amended to provide for an objective justification requirement.

3.10. Section 9 of the ESA (the exemptions to the “discriminating clubs” provisions) should be reviewed to ensure compliance with EU law. Section 9 should be amended to clarify that “principal purpose” refers to the activities of the club, and to narrow the definition of “needs”. The Review should also consider reframing section 9 of the ESA as a positive action measure with clear aims and objectives, intended to prevent or compensate for disadvantages suffered by groups who come within the discriminatory grounds.

3.11. The exemption in relation to certain forms of accommodation at section 6(5) of the ESA should be reviewed to ensure it is not overly broad.

3.12. The definition of “services” should be amended to expressly include the general functions of public bodies.

3.13. Section 14 of the ESA should be deleted and replaced by a remedy for discriminatory legislation and its effects, which applies across all grounds.

3.14. The exemption at section 14(1)(aa) of the ESA should be amended to allow for discrimination complaints concerning Direct Provision. The exemption should be reviewed to ensure that it is constructed as narrowly as possible.

4. Combatting all Forms of Discrimination & Promoting Equality through the Equality Acts

The Equality Acts prohibit several forms of discriminatory conduct, including direct and indirect discrimination, discrimination by association, sexual harassment and harassment, and victimisation. The legislation also prohibits discriminatory advertising. Both Acts also contain obligations to provide reasonable accommodation for people with disabilities although the obligations differ in both Acts. The Equality Acts also contains multiple positive action provisions which allow for measures to promote equality or to cater for the special needs of persons. However, there are significant issues concerning the provisions of Acts aimed at promoting equality and prohibiting discrimination. It is not always clear what conduct is prohibited and how someone who is subject to that conduct may prove that they have been the victim of discrimination. Similarly, issues arise in relation to the nature of the positive action which is permitted under the Acts.

4.1. Structure, Clarity and Accessibility of the provisions of the Equality Acts which Prohibit Discrimination

The Equality Authority noted that the structure of the Equality Acts is "awkward, opaque and inaccessible", and expressed a preference for single, clear definitions of key concepts which apply across all grounds.[165] As will be discussed in further detail below, key concepts within the equality legislation (for example direct discrimination, indirect discrimination and positive action) are subject to numerous differing definitions (even within a single piece of legislation in some cases), or not defined at all. The result is that even legal experts and practitioners struggle to navigate and comprehend certain aspects of the legislation.

The legislation should be drafted so that there is one clear, accessible definition of each key concept wherever possible. At present, the various types of prohibited conduct are scattered throughout the Acts. Each form of prohibited conduct should be clearly named, defined and explained at the beginning of the Equality Acts.

[165] Equality Authority (2002), *Overview of the Employment Equality Act 1998 and the Equal Status Act 2000.*

It is also necessary to clarify how a victim of prohibited conduct may prove that they have been subject to unlawful discrimination. In this regard, it is necessary to re-examine how and where the Acts provide for matters such as the comparators in equality cases, and the burden of proof. The burden of proof provisions (section 85A) of the EEA are contained in Part 7 of that legislation ("Other Remedies and Enforcement"), while the same provisions of the ESA (section 38A) are set out in Part 3 ("Enforcement") of those Acts.

The comparator provisions of the Acts need to be re-examined in order to provide for claims relating to intersectional or multiple discrimination. The comparator provisions should also clearly set out where the Acts prohibit discrimination *as between* members of protected groups, and where the use of hypothetical comparators is permitted.

The approach adopted in Chapter 2 (Prohibited Conduct) of the UK Equality Act 2010,[166] and in section 5 of the Maltese Equality Bill 2019[167] may be particularly instructive in this regard in terms of structure and clarity of the legislation.

4.2. Codes of Practice

IHREC has a significant power under section 31 of the Irish Human Rights and Equality Commission Act 2014 to produce Codes of Practice in relation to the promotion of equality and the elimination of discrimination in the fields in which the Acts apply. These Codes of Practice provide guidance on the application of the core concepts of the Equality Acts and, if approved by the Minister, are admissible in evidence in discrimination cases.[168] These Codes of Practice require the approval of the Minister for Children, Equality, Disability, Integration and Youth before they can be admissible in proceedings.

There are currently three Codes of Practice awaiting the approval of the Minister, including one concerning Harassment and Sexual Harassment in Employment, one concerning equal pay, and one concerning the rights of families at inquests. The ongoing delays in approving new Codes of Practice have not been explained.

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[166] Available at: https://www.legislation.gov.uk/ukpga/2010/15/contents

[167] Available at: https://parlament.mt/media/101105/3-bill-96-equality-bill.pdf

[168] Section 31(5) of the IHREC Act 2014

The Review of the Equality Acts should examine other mechanisms for the approval of Codes of Practice (such as approval by IHREC)

4.3. Direct & Indirect Discrimination

Direct and Indirect discrimination are core concepts of national and European equality law. However, direct discrimination is not named in the Equality Acts and there are several definitions of Indirect Discrimination contained in the EEA.[169]

There are also specific concerns around the burden of proof in cases of indirect discrimination which arise from the decision of the Supreme Court in *Stokes v Christian Brothers High School.*[170] That case related to a school-admission policy which was challenged on the basis that it constituted indirect discrimination against a perspective student who was a member of the Traveller community. The Supreme Court stated that, in order to prove a case of indirect discrimination, statistical analysis is required in order to establish that a person belonging to a protected group is at a "particular disadvantage" compared with others. According to Cousins, there is no similar requirement under EU law:

> "EU law clearly envisages that statistics are not the only way in which a case of disproportionate impact can be made out... EU law emphasises that statistical evidence is just one means of proof and highlights the importance of not compromising the achievement of the objective pursued by EU equality law and thus depriving it of its effectiveness".[171]

The burden of proof for indirect discrimination cases should be clearly provided for in the Acts in a manner that accords with EU law, and the legislation should make it clear that statistical evidence is not required in all indirect discrimination cases. This is particularly important in circumstances where there is a dearth of publicly available

[169] At sections 19(4), 22 and 31.

[170] 2015] IESC13

[171] Mel Cousins (2015), *Education and the Equal Status Acts - Stokes -v- Christian Brothers High School Clonmel*, Dublin University Law Journal. Available at: https://works.bepress.com/mel_cousins/86/

statistical information relating to the treatment of persons on the grounds protected under the Equality Acts.

4.4. Victimisation

Both Acts contain “victimisation” provisions, which provide protection for people who have made discrimination claims from retaliation from the respondent to their claim. The protection against victimisation upholds the effectiveness of the legislation and it is therefore considered one of the most important provisions in the Equality Acts.

However, the ESA and the EEA contain very different definitions of “victimisation”. In the ESA, victimisation is defined a “ground”. This is confusing and creates a comparator requirement which has no basis in EU law.

In the EEA victimisation is correctly defined as a statutory tort, rather than a protected ground. However, there are numerous provisions relating to victimisation scattered throughout the Acts, and the definition of “victimisation” (section 74(2)) is contained in the “Interpretation” section of Part 7 of the Acts (“Remedies and Enforcement”), making it difficult to identify and apply.

Victimisation should be defined clearly and consistently in both Acts, in a manner which is accessible and fully accords with EU law.

4.5. Harassment & Sexual Harassment

Both Acts prohibit harassment and sexual harassment. However, the ESA does not clearly provide that harassment and sexual harassment are forms of discrimination. This is required by EU law in relation to the ground of race and the gender ground, and would assist in ensuring clarity in the legislation.

A Code of Practice drafted by IHREC concerning Harassment and Sexual Harassment in Employment is awaiting Ministerial approval and should be expedited. A Code of Practice in relation to Harassment and Sexual Harassment in Goods and Services should also be introduced.

4.6. Equal Pay

Section 29 of the EEA creates an entitlement to equal pay. However, issues around access to information and satisfying the Burden of Proof make claims for equal pay very difficult. The EEA does not allow a person making an equal pay claim to use a "hypothetical comparator"; instead, they must identify another specific person doing like work for greater pay. This is extremely difficult in many cases and impossible in some cases. This creates significant difficulties in areas of work which are highly gender segregated, including for example in the caring professions.

The *European Network of Legal Experts in Gender Equality and Non-Discrimination* report on "The Enforcement of the Principle of Equal Pay" contains extremely helpful comparative analysis and guidance in relation to European best practice for equal pay legislation.[172] That report notes that: "*In a number of [European] states a comparator is not required, which opens up opportunities for easier enforcement*":

> "The French Court of Cassation, for example, has held that 'the existence of discrimination does not necessarily imply a comparison with other workers.' Spanish courts resolve equal pay cases by analysing the identity of functions or their equal value, without considering the possibility of introducing the concept of (a hypothetical) comparator, even if the law does not seem to exclude this possibility. Also, the Norwegian expert indicated that a comparator is not required in national equal pay law. However, a comparator is allegedly very often referred to, although this may be a hypothetical comparator. The expert explicitly stated that this may be regarded as a necessity since the Norwegian employment market is highly gender segregated. If it were a requirement that there should always be a comparator of the opposite sex, it would be almost impossible to bring an equal pay claim."

The report notes that allowing for hypothetical comparators has the effect of "*opening the door for victims of pay discrimination in highly sex-segregated labour markets*".

[172] European Network of Legal Experts in Gender Equality and Non-Discrimination (2017), *The enforcement of the principle of equal pay for equal work or work of equal value*. Available at: https://www.equalitylaw.eu/downloads/4466-the-enforcement-of-the-principle-of-equal-pay-for-equal-work-or-work-of-equal-value-pdf-840-kb

Access to information is another key barrier to the success of equal pay cases. Although the Gender Pay Gap Information Act 2021 has been enacted, it has not yet been commenced in full. Further, it only applies to some employers and only creates an obligation to provide information by reference to the gender ground. This can be contrasted with the more far-reaching requirements in other European jurisdictions highlighted by the *European Network of Legal Experts in Gender Equality and Non-Discrimination*:

> "A number of national experts have referred to legal initiatives that focus on pay transparency. There is, for example, the… Finnish measure of pay mapping, and also the two-yearly Italian obligation for public and private companies from all sectors with more than 100 employees to draw up reports on the workers' situation (including pay). Analogously, the Lithuanian expert has referred to the new Lithuanian Labour Code of 2017, which makes a significant move in the direction of more transparency in wage systems by introducing several obligations for employers to make available wage related information to the employees, the works council and the trade unions. Also, in Germany and the United Kingdom, an act on pay transparency is pending. The EELN's report on pay transparency has confirmed that more publicly available information regarding wages is key in the fight against pay discrimination…"

Finally, the availability of more pay information raises the possibility of enforcement of the equal pay provisions of the EEA through means other than the individual complaints model. The *European Network of Legal Experts in Gender Equality and Non-Discrimination* notes that: *"[C]lass actions, or related proceedings, are already possible in Hungary, Italy, the Netherlands and Poland. In France a bill is currently pending on this subject. It is to be expected that the possibility for a victim of sex-based pay discrimination to join a class action has a substantial and positive impact on the national enforcement of the equal pay principle*."

The recommendations in the subsequent sections of this submission in relation to Equality Data, Representative Actions, and the enforcement and own-name proceedings powers of IHREC should be considered in light of their potential to enhance the equal pay provisions of the EEA.

4.7. Reasonable Accommodation

Both Acts also contain obligations to provide reasonable accommodation for people with disabilities. However, these obligations differ between the ESA and the EEA.

Section 4 of the ESA imposes a very minimal obligation on service providers, schools and other educational establishments, and providers of accommodation to provide reasonable accommodation for people with disabilities. This was introduced as a response to the concerns by the drafters, who were anxious to ensure compliance with the requirements set by the Supreme Court in their consideration of previous proposed pieces of equality legislation (wherein the reasonable accommodation provisions were found to be unconstitutional).[173]

The obligation to provide Reasonable Accommodation is only imposed on those providing goods or services where, without the accommodation, it would be impossible or unduly difficult for a person with disabilities to avail of the goods and services. The minimal obligation is removed when the provision of the accommodation would cost more than a nominal cost.

The Reasonable Accommodation provisions of the ESA should be reconsidered in light of the UN Convention on the Rights of Persons with Disabilities which has been ratified by Ireland and the EU. The UNCRPD contains much more robust provisions than are currently provided for in Irish law – and it does not provide for a lesser obligation on providers of goods and services. An obligation to provide reasonable accommodation, except where it would impose a disproportionate burden (as provided for in UNCRPD), should be incorporated into the ESA, and the unclear "nominal cost" exemption should be removed.

Section 16(3) of the EEA places a much heavier onus on employers to provide reasonable accommodation to enable a person with a disability: to have access to employment; to participate or advance in employment; to undertake training. This is unless the accommodation would impose a disproportionate burden on the employer.

The Equality Authority previously highlighted that the EEA does not clearly set out that a failure to provide reasonable accommodation is, of itself, unlawful discrimination.

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[173] *Re Article 26 of the Constitution and the Employment Equality Bill 1996* [1997] 2 IR 321.

Re Article 26 of the Constitution and the Equal Status Bill 1997 [1997] 2 IR 387.

The Equality Authority recommended that the Acts should clearly prohibit a failure to provide reasonable accommodation as a "free-standing" from of unlawful discrimination: "*to ensure that an effective remedy is provided for the failure to provide reasonable accommodation and to ensure clarity, consistency and coherence the definition of discrimination in the EEA be amended [to] include a refusal or failure by an employer or prospective employer to do all that is reasonable to accommodate the needs of a person with a disability*".[174] The decision of the Supreme Court in *Daly v Nano Nagle School*[175] noted the reasonable accommodation provisions of the EEA are not a freestanding duty.

Buckley and Quinlivan note that the UNCRPD could provide the basis for a complete transformation on the Reasonable Accommodation provisions in the Equality Acts. For example, they note the guidance provided in the UNCRPD on what constitutes a "disproportionate burden" in the context of reasonable accommodation.[176]

They also note the guidance provided on the practical meaning of the Reasonable Accommodation section of the UNCRPD provided by the UN Committee on the Rights of Persons with Disabilities. The Committee has recognised that reasonable accommodation is an essential part of the duty not to discriminate against people with disabilities, and the guidance of the Committee supports making a failure to provide reasonable accommodation, of itself, a form of prohibited conduct. The Committee also states that "Reasonable accommodation requires the duty bearer to enter into dialogue with the individual with a disability [in relation to the accommodation required]".

The implementation of these recommendations is particularly important in light of the Supreme Court judgment in *Daly v Nano Nagle School*. In that landmark decision, the Supreme Court clarified that reasonable accommodation can involve a redistribution of any task or duty in a job, as long as this was not disproportionate in the context of the employment in question. The Supreme Court also set out an expectation of consultation with employees on reasonable accommodation. The judgment states that, while not mandatory, "*a wise employer will provide meaningful participation*" not

[174] Equality Authority (2002), Overview of the Employment Equality Act 1998 and the Equal Status Act 2000.

[175] *Daly v Nano Nagle School* [2019] 3 IR 369.

[176] Lucy-Ann Buckley, Shivaun Quinlivan (2021), Reasonable Accommodation in Irish Law: An Incomplete Transformation, Legal Studies (Volume 41, Issue 1), pages 19-38.

only with the person seeking reasonable accommodation but also with other employees in relation to the role.

Many of these matters could be clarified by a Code of Practice in relation to Reasonable Accommodation.

Finally, the duty to provide reasonable accommodation applies only to the disability ground. However, "*Irish law recognises that direct discrimination may arise from a failure to afford different treatment to persons who are differently situated*":

> "To date, all cases appear to be on the race ground and concern migrant workers. 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 nationals 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.' In one such decision the Director of the Equality Tribunal described the case law as establishing a 'duty of care to foreign employees.'109 This 'duty' stems from the prohibition of direct discrimination and is entirely separate from the legal provision on reasonable accommodation, which only applies to the disability ground. However, it does give rise to obligations, in a very limited number of cases, such as might be expected under a reasonable accommodation duty."[177]

In line with this line of case law, and developments in other European jurisdictions, the Review should consider extending the duty to provide reasonable accommodation to the other discriminatory grounds.

[177] Judy Walsh (2020), *Country Report: Non Discrimination, Ireland 2020*. European Commission Directorate-General for Justice and Consumers. Available at: https://www.equalitylaw.eu/country/ireland

4.8. Positive Action

The positive action provisions are a key element of the Equality Acts. The Acts allow for positive action to promote equality or to cater for the special needs of persons. Positive action is "*a crucial element of the legislative framework, which should operate to safeguard measures that treat people differently in order to advance equality of opportunity*".[178]

The EU Fundamental Rights Agency has highlighted the importance of positive action provisions: "*The use of 'positive action' measures… could have several advantages. Firstly, it has the potential to address those issues giving rise to disadvantages experienced by minority groups as a whole such as a lack of formally certified qualifications resulting from difficulties in accessing the education system, or poor health resulting from the quality and location of housing. Secondly, it may obviate the need to have recourse to dispute settlement mechanisms by eliminating discrimination, and pre-empting the need to engage in complaints procedures*". They also note that:

> "It is important that measures to prevent discrimination and promote equality operate in conjunction with dispute settlement procedures. Dispute settlement mechanisms are essentially reactive, in that they are put in motion in order to address specific incidents, and the remedies awarded are often confined in their impact to the participants in the particular case. While they may provoke broader changes in legislation or practice, dispute settlement mechanisms are not adapted to this purpose. Where the difficulties faced by particular minorities relate to a number of interlocking social and economic factors, litigation alone may not provide an adequate solution."[179]

However, there are signification issues with the existing positive action provisions in the Equality Acts. In some instances, it is impossible to distinguish potential positive action provisions from exemptions and exceptions to the Equality Acts. Walsh has

[178] Judy Walsh (2019) *Primacy of National Law over EU Law? The Application of the Irish Equal Status Act*. European Equality Law Review (Issue 2, 2019) at p.44.

[179] European Union Agency for Fundamental Rights (2012) *The Racial Equality Directive: Application and Challenges*, Luxembourg: FRA.

highlighted the need to "*[delineate] with greater precision the contours of positive action provisions".*[180]

The analysis of the Equality Authority in their 2002 report ("Overview of the Employment Equality Act 1998 and the Equal Status Act 2000") is particularly instructive in terms of identifying the positive action provisions in the legislation, and where exemptions could be reframed as positive action provisions. In that report, the Equality Authority noted that:

- The provisions on positive action in relation to employment are ambiguous and do not clearly and explicitly allow positive action in recruitment on all grounds.
- In some instances, it is not clear who the measures are aimed at, or what they aim to achieve.

The Equality Authority recommended:

- Positive action should be allowed as a general exception with a single definition for all grounds and all sectors.
- There should be one coherent aim for positive action, namely the achievement of full equality in practice.
- The provisions need to be clear as to their scope and the various activities that they cover.

Having regard to the extent of discrimination experienced by Travellers and Roma, FLAC is of the view that positive action measures should be required in public sector employment and service provision where significant imbalances in equality of outcomes are identified.

[180] Judy Walsh (2019) *Primacy of National Law over EU Law? The Application of the Irish Equal Status Act*. European Equality Law Review (Issue 2, 2019) at p.44..

4.9. Racial Profiling

Irish law contains no explicit prohibition against racial profiling by An Garda Síochána and other law enforcement officers.

IHREC has noted that:

> "There are negative attitudes amongst Garda members towards minority ethnic groups, as well as reports of racial profiling in the use of stop and search powers, including reports from young minority ethnic people. Discrimination does not explicitly constitute a breach of discipline within the Garda Síochána (Discipline) Regulations 2007. Concerns have been raised about the ability of the Garda Síochána Ombudsman Commission to effectively address and investigate complaints of racial profiling y Garda members."[181]

GSOC may only investigate individual complaints rather than systemic issues. As a result, there is no complaint specific mechanism available to those who consider that they have been subject to racial profiling. As has been noted above, the functions of An Garda Síochána may not be challenged as discrimination under the Equality Acts.

In 2019, the Committee on the Rights of Persons with Disabilities stated that:

> "The Committee is concerned about the reportedly high incidence of racial profiling by the Gardaí (the police) targeted at people of African descent, Travellers and Roma and the disproportionately high representation of these ethnic minority groups in the prison system. It is also concerned about the absence of legislation proscribing racial profiling, the absence of independent complaint mechanisms dealing with racial profiling and the lack of statistics on racial profiling."

[181] IHREC (2021), *Developing a National Action Plan Against Racism – IHREC Submission to the Anti-Racism Committee*. Available at: https://www.ihrec.ie/documents/developing-a-national-action-plan-against-racism-ihrec-submission-to-the-anti-racism-committee/

The Committee recommended that Ireland should "*put in place an independent complaints mechanism to handle racial profiling*".[182]

FLAC has previously called for the introduction of legislative measures that would allow individuals, or groups representing their interests, to make complaints through the Workplace Relations Commission in relation to discrimination, including discriminatory profiling, that would allow for such allegations to be investigated and remedied independently.[183]

4.10 Hate Speech

The Review must examine the role that equality legislation can play in combatting hate speech. Neither the Defamation Act 2009 nor the Incitement to Hatred Act 1989, provide an effective remedy against hate speech. This is a matter which ought to be urgently addressed, not only to ensure Ireland's compliance with its obligations under international law, but to address the root causes of social prejudices (the effects of which the Equality Acts are concerned with combatting).

The definition of "harassment" in the Equality Acts is broad enough to encompass hate speech ("*any form of unwanted conduct related to any of the discriminatory ground*"), however, this particularly nefarious form of discriminatory conduct is not expressly prohibited by the Equality Acts.

The General Scheme of the Criminal Justice (Hate Crime) Bill 2021[184] includes a formula for the prohibition of hate speech which could be mirrored in the Equality Acts (either as a form of harassment or as a standalone form of prohibited conduct). This would extend the prohibition of hate speech to the full ambit of protected groups under the Equality Acts (the General Scheme of the 2021 Bill only applies to four protected groups) in the provision of goods and services and employment.

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[182] UN Committee on the Elimination of Racial Discrimination (2019) *Concluding observations on the combined fifth to ninth reports of Ireland*. Geneva: OHCHR.

[183] FLAC (2021), *Submission to the Independent Anti-Racism Committee's Public Consultation: Towards a National Action Plan against Racism in Ireland*. Available at: https://www.flac.ie/publications/flac-submission-to-the-independent-antiracism-comm/

[184] Available at: https://www.justice.ie/en/JELR/Pages/Criminal_Justice_(Hate_Crime)_Bill_2021

The approach to hate speech in the Maltese Equality Bill 2019[185] (which provides for both a civil and criminal remedy for discriminatory hate speech) may be particularly instructive.

4.11. Structural and Systemic Discrimination

Perhaps one of the greatest challenges for the review of the Equality Acts is how it can contribute to tackling structural and systemic forms of discrimination. Council of Europe guidance explains structural or systemic discrimination in the following terms:

> "Systemic discrimination tends not to be a matter of deliberate action. It is rooted in the way organisations go about their day-to-day business as policymakers, employers, or service providers. It is a product of the systems, structures, and cultures that organisations have developed and implement in their work. Systemic discrimination can operate across the full spectrum of employment, income, education, health, housing, culture, policing, public infrastructure, and beyond."[186]

For several reasons, it may be impossible or extremely difficult for an individual to take a case challenging structural or systemic discrimination. Although instances of structural or systemic discrimination may affect many people, in some cases it may be impossible to identify an individual victim. Equality law must provide for measures which identify systemic and structural forms of discrimination, and which allow them to be challenged. In this regard, the recommendations of this submission in relation to the powers of IHREC, Equality Data, and Representative Actions are particularly relevant.

The EU Equality Directives recognise the weakness of the individual enforcement model in tackling systemic discrimination and require Member States to establish specialised Equality Bodies with specific powers and functions. The Commission recommendation on the standards for Equality Bodies recommends that:

> "Member States should also take into consideration that independent assistance to victims can include granting equality bodies the possibility to

[185] Available at: https://parlament.mt/media/101105/3-bill-96-equality-bill.pdf

[186] See: https://www.coe.int/en/web/interculturalcities/systemic-discrimination

engage or assist in litigation, in order to address structural and systematic discrimination in cases selected by the bodies themselves because of their abundance, their seriousness or their need for legal clarification. Such litigation could take place either in the body's own name or in the name of the victims or organisations representing the victims, in accordance with national procedural law"[187]

4.12. Artificial Intelligence & Algorithmic Discrimination

The National Artificial Intelligence Strategy, "AI – Here for Good", defines "artificial intelligence" as "*machine-based systems, with varying levels of autonomy, that can, for a given set of human-defined objectives, make predictions, recommendations or decisions using data*".[188] That strategy acknowledges the "potential for discrimination and bias" in AI systems:

> "There is a risk that AI systems could lead to unfair discrimination and unequal treatment. The risk of discrimination can arise in many ways, for instance biased training data, biased design of algorithms, or biased use of AI systems.
>
> AI-based systems have the potential to exacerbate existing structural inequities and marginalisation of vulnerable groups…
>
> The effects of decision-making and profiling by unfairly biased and discriminatory AI-based systems can be far-reaching. Public administrations around the world are experimenting with the use of algorithmic decision-making and predictive analytics in high-stakes areas such as policing, housing assistance, healthcare and eligibility for social benefits."[189]

That strategy document also notes that issues around "transparency and accountability" are another potential risk of AI systems:

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[187] Commission Recommendation 22/6/2018

[188] Department of Enterprise Trade and Employment (2021), *AI - Here for Good: National Artificial Intelligence Strategy for Ireland*. Available at: https://enterprise.gov.ie/en/Publications/National-AI-Strategy.html

[189] Ibid at p.21.

> "Transparency in the use of AI systems is critical for building public trust. The opaque nature of many AI algorithms may also obscure the reasoning behind AI-based decisions and can cause problems from the perspective of explainability and accountability. It is therefore important to ensure that information about how AI systems make consequential decisions is public and understandable."[190]

The challenges algorithmic discrimination poses to the European anti-discrimination framework have been the subject of academic commentary,[191] as well as reports from Equinet[192] and the European Commission.[193]

However, in "EU non-discrimination law in the era of artificial intelligence: Mapping the challenges of algorithmic discrimination", Xenidis and Senden note that algorithmic discrimination may engage the "*two main conceptual tools contained in EU non-discrimination law: direct discrimination and indirect discrimination*" as provided for in the EU Equality Directives:

> "Direct discrimination is defined in EU law as a situation in which "one person is treated less favourably than another is, has been or would be treated in a comparable situation". In the context of algorithms, direct discrimination captures situations where models are not neutral in relation to a protected ground. If any element of an algorithmic rule or code is not neutral towards a protected ground, the result will fall under the concept of direct discrimination. This can be the case, for instance, when a protected ground is directly inputted in an algorithmic model as a relevant variable and treated as a negative factor.
>
> One of the strengths of EU non-discrimination law in this context is the irrelevance of intent. This feature of EU non-discrimination law separates

[190] ibid at p.22.

[191] Raphaële Xenidis (2020), *Tuning EU equality law to algorithmic discrimination: Three pathways to resilience*, Maastricht Journal of European and Comparative Law Vol. 27(6) 736–758. Available at: https://journals.sagepub.com/doi/full/10.1177/1023263X20982173

[192] Equinet (2020), Regulating for An Equal AI: A New Role for Equality Bodies. Available at: https://equineteurope.org/2020/equinet-report-regulating-for-an-equal-ai-a-new-role-for-equality-bodies/

[193] European Commission, Directorate-General for Justice and Consumers (2021), *Algorithmic discrimination in Europe: Challenges and opportunities for gender equality and non-discrimination law*. Available at: https://op.europa.eu/en/publication-detail/-/publication/082f1dbc-821d-11eb-9ac9-01aa75ed71a1

> the debate from US legal analyses of discrimination, where the notions of 'motive' and 'intent' are central to a finding of so-called 'disparate treatment'. Whether a protected ground was treated differently as a result of intention or not does not matter in EU law, which potentially allows the concept of direct discrimination to capture a broad range of situations where protected grounds would be used as relevant variables by an algorithmic model even though it was not the programmers' intention to discriminate…
>
> Two elements of the concept of indirect discrimination make it particularly relevant to algorithmic discrimination. First, on the surface the treatment of protected groups is neutral. This allows capturing a wide array of situations in which algorithms do not operate on the basis of protected groups directly, and even situations where algorithms were made explicitly blind to these groups so that they are not picked as relevant variables. Indirect discrimination seems fit to capture a large spectrum of apparently neutral but indeed discriminatory algorithmic outputs, for instance situations in which training data is biased towards certain groups (under- or over-inclusion), the phenomenon of 'redundant encoding' through which structural discrimination is reproduced by algorithmic models, as well as proxy discrimination in which variables which correlate with a protected ground are used as relevant features or labels in an algorithm."[194]

Algorithmic discrimination may constitute direct or indirect discrimination as defined under EU law). However, serious difficulties arise in relation to identifying and proving instances of algorithmic discrimination. In a joint opinion, Robin Allen QC and Dee Masters note the difficulty in satisfying the burden of proof in cases concerning algorithmic discrimination where the so-called "black box problem" arises (where a

[194] Raphaële Xenidis and Linda Senden, 'EU non-discrimination law in the era of artificial intelligence: Mapping the challenges of algorithmic discrimination' in Ulf Bernitz et al (eds), *General Principles of EU law and the EU Digital Order* (Kluwer Law International, 2020). Available at: https://cadmus.eui.eu/bitstream/handle/1814/65845/Pre-print%20version%20Chapter%20Xenidis_Senden.pdf?sequence=2&isAllowed=y

lack of transparency means that how an algorithm operates is not or cannot be known).[195]

Issues also arise in relation to legal standing in algorithmic discrimination cases. As with other forms of systemic discrimination, it may be impossible, or extremely difficult for an individual to take a case challenging algorithmic discrimination, or to identify a specific victim (although many may clearly exist).

These issues can only be addressed through a series of interlocking measures, including:

- Specific measure in relation to Equality Data, including enhanced powers for IHREC;
- The introduction of specific legislation regulating the use of artificial intelligence technologies, including automated decision-making, in the public and private sectors;
- The amendment of the Equality Acts to provide for representative actions;
- The amendment of the definition of "services" in the ESA to include the functions of public bodies (to ensure that the use of algorithmic intelligence systems by public bodies falls within the scope of the prohibition of discrimination) and
- The introduction of a power for the Workplace Relations Commission to relax the rules in relation to standing and the burden of proof in cases concerning algorithmic discrimination. In particular, to allow the WRC to reverse the onus of proof in cases where it would be impossible for the complainant to establish a *prima facie* case of algorithmic discrimination i.e. to require respondents to prove that an algorithm is not discriminatory.

Several of these matters will be discussed in greater detail in the subsequent sections of this submission.

[195] Robin Allen QC and Dee Masters (2019), *In the matter of Automated Data Processing in Government Decision Making*. Available at: https://www.cloisters.com/wp-content/uploads/2019/10/Open-opinion-pdf-version-1.pdf

RECOMMENDATIONS

FLAC recommends that:

4.1. The Equality Acts should be amended to include one clear, accessible definition of each key concept relating to the promotion of equality and prohibition of discrimination wherever possible. In provisions concerning the prohibition of discrimination, the burden of proof should be clear and, where relevant, the comparator requirement should be as flexible and clear as possible.

4.2. The Review should examine other mechanisms for the approval of Codes of Practice (such as approval by IHREC), which would avoid delays in their coming into effect. The approval of the Code of Practice concerning Harassment and Sexual Harassment in Employment must be expedited. A Code of Practice in relation to Harassment and Sexual Harassment in Goods and Services and a Code of Practice in relation to Reasonable Accommodation (in employment and goods and services) should be introduced.

4.3. The burden of proof for indirect discrimination cases should be clearly provided for in the Equality Acts (in a manner that accords with EU law), and the legislation should state that statistical evidence is not required in all indirect discrimination cases.

4.4. Victimisation should be defined clearly and consistently in the Equality Acts, in a manner which is accessible, clear, and accords with EU law.

4.5. The ESA should clearly provide that harassment and sexual harassment are forms of discrimination.

4.6. The EEA should be amended to provide for a hypothetical comparator in Equal Pay cases.

4.7. Robust Pay Information legislation (which applies across all grounds and to all employers) should be introduced.

4.8. An obligation to provide reasonable accommodation, except where it would impose a disproportionate burden (as provided for in UNCRPD), should be incorporated into the ESA and the unclear “nominal cost” exemption should be removed.

4.9. The EEA should set out that a failure to provide reasonable accommodation is, of itself, unlawful discrimination.

4.10. The Review should examine the introduction of a duty to provide reasonable accommodation across all grounds.

4.11. Positive action should be allowed as a general exception with a single definition for all grounds and all sectors. There should be one coherent aim for positive action, namely the achievement of full equality in practice. The provisions need to be clear as to their scope and the various activities that they cover. Having regard to the extent of discrimination experienced by Travellers and Roma, FLAC is of the view that positive action measures should be required in public sector employment and service provision where significant imbalances in equality of outcomes are identified.

4.12. The ESA should be amended to provide a mechanism for complaints in relation to racial profiling by individuals, or groups representing their interests, that would allow for such allegations to be investigated and remedied independently.

4.13. The Review should examine the introduction of a prohibition on hate speech into the Equality Acts, either as a form of harassment or as a standalone form of prohibited conduct.

4.14. The Review must introduce the measures to combat structural, systemic and algorithmic discrimination. This must include: Specific measure in relation to Equality Data, including enhanced powers for IHREC; The introduction of specific legislation regulating the use of artificial intelligence technologies, including automated decision-making in the public and private sectors; The amendment of the Equality Acts to provide for representative actions; The amendment of the definition of “services” in the ESA to include the functions of public bodies (to ensure that the use of algorithmic intelligence systems by public bodies falls within the scope of the prohibition of discrimination); the introduction of a power for the Workplace Relations Commission to relax the rules in relation to standing and the burden of proof in cases concerning algorithmic discrimination.

5. Procedural Barriers to Prosecuting Discrimination Complaints under the Equality Acts

The Equality Acts contains several provisions in relation to the procedures and jurisdiction for discrimination complaints.

These procedures must comply with the EU Equality Directives and EU principles for testing the adequacy of national remedies. National procedural measures cannot be less favourable than those relating to a similar action of a domestic nature. Procedural measures cannot render virtually impossible or excessively difficult the exercise of rights conferred by EU law.[196] The principles of adequacy, equivalence and effectiveness are discussed in further detail below, as well as in the subsequent sections of this submission.

5.1. Notification Requirement for complaints under the Equal Status Acts

Before a complaint can be lodged under the ESA, section 21(2) of that legislation requires a complainant to notify the respondent of their intention to make a complaint. This notification must be made within two months of the alleged incident of discrimination. An analysis undertaken by FLAC of all published WRC decisions on ESA complaints between 2015 and 2019 shows that the number of complaints which were unsuccessful on the basis of a failure to comply with the notification requirement is increasing year on year.

Further research undertaken by FLAC underlined that the notification requirement is unique to complaints under the ESA. The WRC deals with complaints under several pieces of legislation, none of which have a comparable notification requirement. The requirement is similarly out of step with discrimination complaint mechanisms in other EU jurisdictions. The Irish Human Rights Commission observed:

> "Under general principles of fair process, the operation of what is essentially a statute of limitation of such a short period can act as a significant obstacle to potential complainants under the act. In the view of the Commission there appears to be no justification for such an exceptionally short period in which

[196] The principles of equivalence and effectiveness. See: Levez, Case-C -326/96 [1998] ECR1-7835

claims can be made. The two-month written notification period is significantly out of line with equivalent periods in other areas of law."[197]

There may be benefits of the notification requirement in some cases in terms of access to information and bringing about an early resolution of proceedings. However, in many cases, the requirement will only serve to place a further barrier to redress in the way of a victim of discrimination and the justification for the mandatory nature of the notification requirement is unclear.

The notification requirement has no basis in the EU Equality Directives and, in the case of race and gender complaints, is likely to be contrary to the principle of equivalence and effectiveness and the right to an effective remedy under EU law.

The notification requirement represents an arbitrary administrative barrier to the prosecution of discrimination complaints. There is no equivalent provision in the EEA or other employment legislation and it makes exercising anti-discrimination rights excessively difficult.

5.2. Time Limits for making Discrimination Complaints

The Equality Acts set a six-month time limit for making discrimination complaints. The time limits may be extended up to 12 months where there is reasonable cause.

This time limit is restrictive and may present particular problems when an employee is pregnant or on maternity leave. The six-month time limit makes no allowances for attempts to resolve issues through internal procedures or invoking grievance procedures. It is not of benefit to either the employer or employee for a complaint to be initiated whilst a grievance procedure or internal procedure is ongoing. However, a claimant may have no choice but to do so due to the time limits. The Labour Court has decided that the same strict time limit applies even where an employee is delayed in making their complaint because they are using an internal grievance procedure.[198]

[197] Irish Human Rights Commission (2004), *Observations on the Equality Bill 2004*. Available at: https://www.ihrec.ie/documents/observations-on-the-equality-bill-2004/

[198] Judy Walsh (2020), *Country Report: Non Discrimination, Ireland 2020*. European Commission Directorate-General for Justice and Consumers. Available at: https://www.equalitylaw.eu/country/ireland

5.3. Original Jurisdiction for Discrimination Complaints

While most discrimination complaints are heard by the Workplace Relations Commission at the first instance, the Equality Acts provide that certain complaints may be heard by the Circuit Court and some must be made to the District Court.

Section 8(3) of the ESA provides that applications in relation to discriminating clubs must be made to the District Court. The justification for this fragmentation of the jurisdiction of the WRC to hear complaints under the ESA is unclear.

Similarly, complaints in relation to discrimination "on or at the point of entry" to a licenced premises must be made to the District Court (this is discussed in further detail in section 5.4 below).

Complaints on the gender ground under the Equality Acts may be made to the Circuit Court at first instance, where greater amounts in compensation may be awarded. This exception was specifically introduced in an attempt to ensure compliance with EU law. However, as discussed in further detail in section 6, compliance with EU law in relation to redress for complaints on the gender ground should be affected by removing the caps on compensation which currently apply in the WRC.

In 2002, the Equality Authority recommended "*that consideration should be given to forum consolidation*" and that "*claims under the ESA should be heard by the same fora*".[199] Almost 20 years on, the case for such a reform is even stronger.

5.4. Discrimination on or at the point of entry to Licenced Premises

Section 19 of the Intoxicating Liquor Act 2003 provides that where person considers that they have been discriminated against on or at the point of entry to a licensed premises, they must apply to the District Court (rather than the WRC) for redress.

Prior to the commencement of section 19 of the 2003 Act on 29 September 2003, all cases of discrimination in the provision of goods and services, including that which occurred on or at the point of entry to licensed premises, were determined by the Equality Tribunal. Many of the early equality complaints related to discrimination in access to licensed premises, particularly for members of the Traveller Community.

[199] Equality Authority (2002), *Overview of the Employment Equality Act 1998 and the Equal Status Act 2000.*

The creation of a separate jurisdiction for licensed premises cases arose not out of the concerns of the victims of discrimination. Rather, it was principally the result of complaints from a category of respondent, and following "*pressure exerted by vintners' organisations*" the jurisdiction of the Equality Tribunal was removed.[200] From then on, cases alleging discrimination "on or at the point of entry to" licensed premises were required to be taken in the District Court.

5.4.1. Effects of the Transfer of Jurisdiction to the District Court

The consequences of the introduction of section 19 of the 2003 Act were stark. Academic research indicates that the carving out of a separate jurisdiction for the District Court to hear discrimination cases arising out of incidents on or at the point of entry to licensed premises resulted in a significant reduction in the number of such cases being taken.[201] This is reflective of the relative difficulty and expense in bringing a case in the District Court compared to the Equality Tribunal (or its successor the WRC) rather than a reduction in acts of discrimination. Indeed, despite the reduction in the number of cases taken, research by the Economic and Social Research Institute (ESRI) in 2017 found that Travellers remain 38 times more likely to suffer discrimination in accessing pubs than the white Irish population.[202]

The cultural segregation highlighted by the ESRI's report is something which FLAC, through the Traveller Legal Service (TLS), encounters in its casework. The exclusion of Travellers from pubs, restaurants and hotels, deprives them of the opportunity to celebrate life's important events, such as births, christenings, birthdays and weddings in the same manner as the wider population.

Of particular relevance to the work of the TLS is that the transfer of jurisdiction has had a disproportionate impact on Travellers, as prior to the introduction of section 19 of the 2003 Act the majority of cases of discrimination on licensed premises were taken by Travellers.

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[200] Judy Walsh, Equal Status Acts 2000-2011: Discrimination in the Provision of Goods and Services (Lonsdale Law Publishing, 2013), p. 11.

[201] Ibid.

[202] McGinnity, F., Grotti, R., Kenny, O. and Russell H. (2017) Who experiences discrimination in Ireland? Evidence from the QNHS Equality Modules. Dublin: ESRI/The Irish Human Rights and Equality Commission.

Accordingly, the isolating of discrimination cases concerning licensed premises has resulted in an equality deficit whereby complaints of discrimination have decreased even though the discrimination itself has not.

5.4.1.1. International and European Union Law Considerations

Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) requires State parties to prohibit and eliminate racial discrimination in all of its forms and to guarantee the right of everyone without distinction as to race, colour or ethnic origin, to equality before the law, in the enjoyment of the following rights: *"(a) The right to equal treatment before the Tribunals and all other organs administering justice*". State parties are obliged pursuant to Article 6 of ICERD to assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunal and other State institutions, against all acts of racial discrimination which violate their human rights and fundamental freedoms, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

In its consideration of the State's compliance with ICERD, the UNCERD noted its concern about the discriminatory refusal of entry to licensed premises such as bars, public houses and hotels experienced mainly by Travellers and Roma. UNCERD noted that Travellers and Roma may be hindered in the enjoyment of their rights under Articles 5 and 6 of ICERD by being required to engage with the complex court processes that pertain to the District Court. UNCERD recommended that the necessary steps are taken to ensure that discrimination in licensed premises is covered by the ESA and complaints thereon are dealt with by the Workplace Relations Commission with a view to enhancing the accessibility of minority groups to effective remedies.[203]

As noted above, article 7 of the Racial Equality Directive obliges EU Member States to ensure that judicial and/or administrative procedures are available to victims of racial discrimination to enforce their right to equal treatment. The principle of

[203] UN Committee on the Elimination of Racism (2019), *Concluding observations on the combined fifth to ninth reports of Ireland*. Geneva: OHCHR. Available at: https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/IRL/INT_CERD_COC_IRL_40806_E.pdf

equivalence and effectives which are set out above also apply to the issue of jurisdiction. In *Levez*, the CJEU thought it appropriate to consider issues such as cost, delay, the simplicity of the actions, in order to determine whether the principle of equivalence had been complied with when comparing an action before a County Court and an Industrial Tribunal.[204] As is detailed more fully below, the District Court, by comparison to the WRC, requires complainants to engage with a significantly costlier and more complicated process to challenge discrimination. This offends the principles of equivalence and effectiveness enshrined in EU law

In relation to the promotion of equality and the elimination of discrimination, the European Commission has stated that "*real change often requires a critical mass of cases*".[205] The European Commission's guidelines for Equality Bodies, such as IHREC, suggest that promoting the achievement of a critical mass of casework under each protected ground should be amongst such body's aims.

The comparative lack of equality cases heard in the District Court militates against the possibility of a critical mass of cases developing, as per the recommendation of the European Commission.

5.4.1.2. Expertise of Equality Tribunal

A further significant consequence of substituting the District Court for the Equality Tribunal in licensed premises discrimination cases was that expertise in hearing these cases was effectively lost. Equality Officers in the Equality Tribunal received specific training in equality law. By comparison, District Court judges' remit is significantly wider than the hearing of equality cases.

Unlike the Equality Tribunal and now the WRC, District Court cases do not generally result in the production of written judgments.[206] Accordingly, there is little by way of record or precedent in respect of those few cases that are taken under the 2003 Act.

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[204] (Case C- 326/96) *Levez* [1998] ECR1 -7835)

[205] European Commission DG-JUST (2015) *Know Your Rights: Protection From Discrimination*. Available at: https://op.europa.eu/en/publication-detail/-/publication/5a511c88-b218-47b5-9f3e-4709d650e28b

[206] Although section 19(5) of the 2003 Act allows for a party to request a "statement of reasons" for a decision these do not appear to be published.

It is also the case that District Court procedures vary according to the district in question, unlike the Equality Tribunal and now the WRC, which have standardised procedures.

The 2003 Act therefore deprived complainants of access to a forum with specific training and expertise in equality law and with a developing jurisprudence in its application.

5.4.1.3. Absence of Statistical Data

The Equality Tribunal and, since its assumption of jurisdiction for ESA cases, the WRC, published statistical data showing the number of ESA complaints received in a given year. The data is further subdivided to indicate the relevant discriminatory grounds on which cases were taken. The Courts Service does not, as a matter of course, publish data in relation to proceedings under section 19 of the 2003 Act. As a consequence, it is more difficult to obtain an immediate picture of the level of discrimination in relation to licensed premises.

5.4.2. Adversarial Nature of District Court Proceedings

District Court proceedings are predicated entirely on adversarial principles. The parties to proceedings under an adversarial system are principally responsible for establishing relevant facts and law.

The WRC has an inquisitorial role as opposed to a purely adversarial role. This means that the adjudicator assumes some of the burden that falls on the parties in an adversarial case. As a result, a complainant in a District Court case has a greater evidential and legal burden than their equivalent in WRC proceedings.

5.4.2.1. Commencing Proceedings

A complaint of discrimination in the provision of goods and services, other than one which relates to licensed premises, can be brought in the WRC. Commencing proceedings in the WRC consists of notifying the respondent in writing of the complainant's intention to bring a claim, within two months of the act of discrimination.

While there are specific requirements as to the content of a valid notification, no particular form is prescribed.[207] If no, or no satisfactory, response is received the complainant may submit the complaint to the WRC for investigation within six months of the act of discrimination. The WRC provides a specific form on its website through which a claim under the ESA can be submitted.[208]

By comparison, a complaint of discrimination in relation to licensed premises must be brought in the District Court. As opposed to the WRC, which is a centralised forum with jurisdiction over the entire State, the District Court is a court of local jurisdiction. This requires that a complainant correctly identify the appropriate district in which a claim should be commenced. District Court proceedings must be commenced by way of a specific form prescribed by the Rules of the District Court. Service of the claim must also adhere to the Rules of the District Court.

5.4.2.2. Identifying the Respondent

While it is important in any case to ensure that the respondent is correctly identified and notified, there are significant differences in the processes applicable in the WRC and the District Court for a claim to be validly constituted.

To validly commence a claim in the District Court, the licensee must be identified. In the case of a licensed premises, the licensee may be different from the ostensible entity or individual which operates the premises. For a complainant to be certain that the appropriate entity or individual has been identified, they must carry out a search of the Register of Licences for a fee. A failure to identify the appropriate licensee could result in a claim being dismissed. This step may not be obvious to most complainants.

The WRC, as a quasi-judicial tribunal, does not adhere to the same formalities. The relative informality of the procedures of quasi-judicial tribunals is recognised as a desirable feature of such fora. In the Labour Court decision in *Auto Depot Limited v Vasile Mateiu*,[209] the Labour Court rejected a submission that the erroneous inclusion

[207] The nature of the allegation and the complainant's intention to seek redress under the Equal Status Acts must form part of the notification.

[208] While the WRC form has issues of its own, including being premised on employment law complaints, it is significantly more straightforward than submitting a District Court notice of application.

[209] WTC/19/23

of “Auto Depot Tyres Ltd” instead of “Auto Depot Limited” on the Workplace Relations Commission complaint form should have resulted in the complainant’s claim being refused. At paragraph 31, the Labour Court noted:

> “The Court is further satisfied that this approach is in line with the generally accepted principle that statutory tribunals, such as this Court, should operate with the minimum degree of procedural formality consistent with the requirements of natural justice.”

5.4.2.3. Gathering Evidence and Material Information

Section 21(2)(b) of the ESA allows a complainant to question the respondent in writing so as to obtain material information and the respondent may, if they so wish, reply to any such questions. The importance of this provision to a complainant is found in section 26 of the ESA which provides that an adjudicator may draw inferences from the response, or absence of a response, to the questions posed.

By contrast, the District Court requires parties to seek discovery (for documents and/or by way of interrogatories) to obtain relevant information or evidence held by the respondent to a claim. The discovery process is governed by the Rules of the District Court and may require the complainant to issue a motion on affidavit to obtain relevant documentation. This process is far more complex than the equivalent procedures for complaints heard by the WRC.

5.4.2.4. Financial Burden: Cost and Fees

There is a significant financial burden necessarily associated with bringing a case in the District Court arising out of the fees that a complainant must pay in order to file a claim. In order to commence their claim, a complainant will be required to pay stamp duty amounting to €150 to file a notice of application in a licensing matter. A fee of €35 is also charged for inspections of the Register of Licences. Further fees may be necessary in order to file affidavits and notices of motion (such as motions for discovery).

Additionally, there is a significant potential financial burden as a result of the cost risk to an unsuccessful party. As costs in the District Court “follow the event”, an

unsuccessful party will, in the normal course, be ordered to pay the legal costs of the respondent, which could conceivably consist of solicitor and counsel fees. In practice, costs have been awarded against unsuccessful claimants who have lost District Court discrimination cases on the basis of a technicality.

Commencing a claim in the WRC has no associated fees. Nor does an adjudicator, other than in exceptional circumstances, have a jurisdiction to award costs.

5.4.2.5. Representation

One potential advantage of the District Court process over the WRC is that civil legal aid is notionally available to parties in the District Court. However, all applicants for civil legal aid must still satisfy the financial eligibility criteria under the Civil Legal Aid Act 1995 and accompanying regulations. The applicant must also show that they would be reasonably likely to be successful in the proceedings. However, it does not appear that the Legal Aid Board generally provides representation to parties in section 19 cases. In reply to a Parliamentary Question in November 2018, the then Minister for Justice and Equality, Charlie Flanagan TD stated that legal aid had not been granted for any applications under section 19(2) of the 2003 Act in the preceding three years.

5.4.3. Ambiguities in the Intoxicating Liquor Act 2003

Apart from the difficulties arising out of the adversarial nature of District Court proceedings, section 19 of the 2003 Act suffers from a number of ambiguities on its face, which detract from the certainty of its application and, by extension, add to the potential complexity of a complainant seeking to invoke its provisions. These ambiguities are set out below.

5.4.3.1. Limitation Period

The application of limitation periods is a fundamental feature of Irish law. Limitation periods promote legal certainty, which is an essential principle of the rule of law. However, section 19 of the 2003 Act does not appear to be bound by a limitation

period. While this may be to the advantage of a potential complainant, it also creates uncertainty and complicates the provision of legal advice and representation.

5.4.3.2. Extent of Licensed Premises

Section 2 of the 2003 Act defines a "licensed premises" as a "*premises in respect of which a licence is in force*". "Premises" is undefined in the 2003 Act. It is therefore difficult for a complainant to determine, in the case of mixed-use premises such as hotels or restaurants, whether an act of discrimination occurred "*on or at the point of entry to*" a licensed premises. For example, if an act of discrimination occurred in the lobby of a hotel which also contained a bar, it is not immediately clear whether or not the licence in force for the bar would extend to the hotel lobby. A complainant may be able to inspect the map pertaining to a licensed premises to determine the sections of a premises to which a licence extends, however, such maps are not always available and, where they are, can only be accessed by paying a fee.

Related to the ambiguity around the extent of licensed premises is the question of what constitutes a "licensed premises". While a definition of licensed premises is provided for by section 2 of the 2003 Act, that definition potentially captures a greater number of businesses than was originally intended. For example, was it the intention of the 2003 Act that cases against off-licences (or businesses containing off-licences), which would appear to meet the definition of licensed premises, should be hived off to the District Court. Given the nature of the lobbying efforts that led to the introduction of the 2003 Act, one might argue that off-licences were not the intended beneficiaries of the change. However, the 2003 Act does not resolve this ambiguity. This creates further difficulties for complainants and their advisors in seeking to challenge discrimination.

5.4.3.3. "On or at the point of entry to"

A further ambiguity in the 2003 Act is the limitation of the District Court's jurisdiction to cases of discrimination which occur "*on or at the point of entry to*" licensed premises. In practice this has created interpretative difficulties in cases where discrimination occurred over the phone or through email. While such cases would not appear to have occurred "*on or at the point of entry to*" a licensed premises in a physical sense, it

renders the choice of appropriate forum, as between the District Court and the WRC, a more complex exercise. This is particularly so where a complainant may have had multiple interactions with a venue, some in person and some via telephone or email.

5.4.4. FLAC's Experience

In its work through the JUSTROM Programme and through the TLS, FLAC has received enquiries and referrals of stateable cases of discrimination "on or at the point of entry" to licensed premises. Due, however, to the procedural complexity of such cases (for the reasons outlined above) and the geographically disperse nature of the District Court and the relatively limited resources of the services provided through JUSTROM and the TLS, FLAC has been unable to allocate resources to such cases.

The assistance provided by FLAC has generally consisted in the provision of information in relation to, and assistance with, applying for civil legal aid. However, to FLAC's knowledge, representation was not granted in any cases.

In other cases, FLAC has provided advice and assistance on accessing relevant information to assess a potential claim. This has included assistance in contacting District Court offices to arrange to inspect licences. FLAC has noted that the absence of a centralised system, as pertains to the WRC, increases the complexity of this necessary preliminary research. Its clients and TLS partners have at times struggled to access accurate information on the operating procedures of District Court offices, which vary from district to district. There is a dearth of accessible information available through the Courts Service website, meaning that clients must rely on calling the relevant office and hoping that assistance will be forthcoming.

The 2003 Act successfully stemmed the flow of discrimination cases against licensed premises by erecting significant procedural, practical and legal obstacles for complainants wishing to challenge discriminatory practices. At the same time, levels of discrimination did not diminish. No mass of cases has been taken in respect of licensed premises sufficient to establish a culture of compliance with the Equality Acts. Given the low level of case taken licensed premises must be aware that if they do discriminate there is very little chance that a case will be taken against them. This confluence of outcomes has rightly been the subject of criticism by civil society

organisations, legal professionals, non-governmental organisations and international human rights bodies.

In FLAC's view, the 2003 Act protects a category of respondent to the detriment of access to justice for some of the State's most vulnerable communities who suffer unacceptable discrimination.

5.5. Complaints on the HAP Ground

As discussed in Section 2 of this submission, the ESA was amended in 2016 to prohibit discrimination against people who are in receipt of certain housing assistance payments in the provision of accommodation services ("the HAP ground").[210] The HAP ground creates an important protection against discrimination against tenants in the private rental sector. However, in the five years during which this ground has been in place, some procedural issues (which negatively impact its effectiveness) have emerged.

First, the Private Residential Tenancies Act 2004 has not been amended so as to protect a tenant who has been subject to a discriminatory refusal of HAP from eviction. A tenant who has made a complaint under the ESA against their landlord, may have their tenancy terminated under the 2004 Act for failure to pay rent, although the failure to pay rent may be a direct result of the landlord's failure to facilitate access to HAP or rent supplement.

The second difficulty is that many prospective tenants may be unable to identify a landlord who refuses to consider their expression of interest in a tenancy on the basis that the prospective tenant is in receipt of HAP or rent supplement. Similarly, it may be impossible to obtain the correct address for service of any complaint under the ESA.

[210] The *Equality (Miscellaneous Provisions) Act 2015* was commenced in January 2016.

RECOMMENDATIONS

FLAC recommends that:

5.1. The Notification Requirement under section 21(2) of the ESA should be made optional.

5.2. The time limits for discrimination complaints should run from the date of knowledge of the discrimination, or from the date a grievance procedure or internal procedure in relation to the discrimination ended.

5.3. All complaints and applications under the ESA and EEA should be heard by the Workplace Relations Commission at first instance.

5.4. Section 19 of the Intoxicating Liquor Act 2003 should be repealed and the jurisdiction in respect of complaints of discrimination relating to licensed premises should be transferred to the Workplace Relations Commission.

5.5. The ESA and/or the Private Residential Tenancies Act 2004 should be amended so as to make the existence of an ESA complaint on the HAP ground (or a finding of discrimination against a landlord on foot of such a complaint) a relevant consideration to be taken into account by the Residential Tenancies Board in determining the validity of the Notice of Termination related to arrears of rent.

5.6. The ESA should be amended to include a requirement for landlords advertising tenancies to be identifiable for the purposes of potential complaints under the ESA.

6. Redress

Section 82 of the EEA sets out the remedies available on foot of a successful discrimination complaints. These include orders for compensation to be paid as well as:

- orders for employers who have discriminated to take specific courses of action
- orders for equal treatment in whatever respect is relevant to the case
- orders for reinstatement or re-engagement

Section 27 of the ESA provides for the remedies of compensation and orders that a certain course of action must be followed by a provider of goods and services who has discriminated.

Damages for breaches of EU law have to be effective, have deterrent effect and be adequate in relation to the damage sustained.[211]

6.1. Limits on Financial 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. Where the complainant was not an employee (in the case of a discriminatory interview, for example) the maximum award is €13,000. In unequal pay cases, compensation may be awarded in the form of pay arrears, up to a maximum of three years prior to the referral of the case.

The maximum award under the ESA is €15,000 for cases heard by the WRC or District Court.

Claims under the gender ground are treated exceptionally, they may be taken directly to the Circuit Court and can attract higher compensation awards. This exception was specifically introduced to ensure compliance with EU law. The CJEU had concluded it was contrary to the Equal Treatment Directive for national provisions to lay down an upper limit on the amount of compensation recoverable by a victim of discrimination in

[211] Case 14/83 Von Colson and Kamann v Land Nordrhein- Westfalen [1984] ECR 1891

respect of the loss and damage sustained.[212] It is difficult to understand why this rationale does not apply to claims under the other discriminatory grounds. The differences between the maximum compensation payable between the grounds and the ceiling in the claims before the WRC are likely to be in breach of the EU Equality Directives' requirement for remedies to be effective, proportionate and dissuasive. There is an obvious deterrent effect if there is no limit to the compensation that may be awarded.

While there are no caps on the award the Circuit Court may make in cases on the gender ground, individuals bringing claims to the Circuit Court may face other barriers such as increased costs, particularly if the claim is lost. Very few cases are taken to the Circuit Court, which raises serious doubts as to whether it can be considered an effective remedy under EU law.

As noted above, EU law requires sanctions for discrimination to be effective, proportionate and dissuasive. Judy Walsh has raised concerns as to whether the financial redress provided for in the Equality Acts meets these standards:

> "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 the ESA may be inadequate for particularly egregious violations of the law in situations such as discriminatory denial of access to education. Interest is not payable on compensation awards under ESA or 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."[213]

Both the Equality Authority and Irish Human Rights Commission expressed concern at the effect compensation caps in discrimination cases have on the right to an effective remedy and recommended their removal. The IHRC expressed their concern that "*statutory ceilings on compensation might have the effect of restricting the*

[212] Case C- 271/91 *Marshall V Southhampton* [1993] ECR1

[213] Judy Walsh (2020), *Country Report: Non Discrimination, Ireland 2020*. European Commission Directorate-General for Justice and Consumers. Available at: https://www.equalitylaw.eu/country/ireland

capacity of the Irish courts to keep up to date with evolving European standards on appropriate levels of compensation in discrimination cases".[214]

The Equality Authority noted that it was their experience that *"some employers are aware that they can 'buy off' a discrimination claim involving access to employment for relatively small amounts of money*".[215]

Survey research by the Fundamental Rights Agency shows that Trade Union respondents often referred to the sanctions applied in discrimination cases as being too low to act as a deterrent to employers, who were easily able to absorb the costs. The study noted that *"[sanctions] at such a level as to be easily absorbed by perpetrators, raise questions as to the adequacy of available remedies*".[216]

More recently, IHREC has recommended that the ceiling on compensation under the Equality Acts should be removed. In doing so, the Commission noted that "similar limitations on compensation in other EU Member States have been found to be incompatible with EU law".[217] In *Marshall*, the CJEU considered that it was contrary to the Gender Equal Treatment Directive for national provisions to lay down an upper limit on the amount of compensation recoverable by a victim of discrimination.[218]

The removal of the compensation ceiling is clearly in line with EU law, which requires effective, proportionate and dissuasive sanctions. Although EU law does not cover all grounds currently protected under Irish law, the need for rational and clear legislation would suggest that the ceiling on compensation should be removed across all grounds. This would also avoid any perception of a "hierarchy" of discrimination under national law.

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[214] Irish Human Rights Commission (2004), *Observations on the Equality Bill 2004*. Available at: https://www.ihrec.ie/documents/observations-on-the-equality-bill-2004/

[215] Equality Authority, Embedding Equality in Immigration Policy: Submission on the discussion document of the Department of Justice, Equality and Law Reform on the Immigration and Residence Bill 2006 p.17.

[216] European Union Agency for Fundamental Rights (2012) *The Racial Equality Directive: Application and Challenges*, Luxembourg: FRA.

[217] IHREC (2017), *Submission to the United Nations Committee on the Elimination of Discrimination Against Women on Ireland's combined sixth and seventh periodic reports*. Available at: https://www.ihrec.ie/app/uploads/2017/02/Ireland-and-the-Convention-on-the-Elimation-of-All-Forms-of-Discrimination-Against-Women.pdf#page=37

[218] Case C- 271/91 Marshall v Southhampton [1993] ECR 1 -4376

The far more robust remedies available to the WRC in other matters over which they have jurisdiction is also relevant. For example, the Protected Disclosures Act 2014 allows for awards of compensation of up to 5 years pay. Similarly notable, are the vast fines which the Data Protection Commission may impose in respect of breaches of the GDPR.

6.2. Orders for a Specified Course of Action

As noted above, an order for specified course of action is a remedy under the Equality Acts. These orders may be particularly effective as they can be tailored to the particular circumstances of the case and "*have significant effects beyond the immediate case*".[219] These orders have the potential to have a transformative effect and to prevent potential future acts of discrimination by requiring measures such as equality training or re-examination of policies.

The Circuit Court judgment in *Deans v. Dublin City Council*[220] has created some uncertainty about whether an Adjudicator can make an order for a specified course of action which imposes a general obligation on the Respondent or which goes beyond the facts of a specific case. However, as already noted, EU law requires sanctions in equality law to be effective and dissuasive, which appears to envisage and allow for sanctions be made which goes beyond the circumstances of the particular case.

6.3. Urgent Cases & Injunctions

There is no mechanism for injunctions or interlocutory relief to be granted in discrimination matters. Such orders may be particularly helpful in cases where there is a risk of ongoing harassment or discrimination, or a risk of discriminatory dismissal. In some cases, compensation may not be an effective remedy. For example, in a case about the admission of a child to a school, compensation alone will not suffice as a remedy, but it may be too late to order the admission of the child to the school after the case is heard and decided.

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[219] Judy Walsh, *Equal Status Acts 2000-2011: Discrimination in the Provision of Goods and Services* (Lonsdale Law Publishing, 2013) p351.

[220] (Circuit Court, Hunt J, Unreported, 15 April 2008)

The Equality Authority commented that "*problems in relation to remedies [including the cap on redress] are exacerbated in that there is no provision to apply for any type of interlocutory relief pending the hearing of the claim*". On that basis the Authority recommended that "*the legislation should allow applications for interlocutory relief in cases under the equality legislation*".[221] Similarly, a specific procedure for urgent cases could be adopted by the WRC, to ensure that they are heard in an expedited manner.

6.4. Mediation

Provided both parties consent, discrimination complaints may be referred to the WRC's mediation service prior to being heard by an Adjudication Officer. Mediation is held in private and the agreement is not published. It appears that confidentiality clauses are included in WRC mediation agreements as a matter of routine (even where neither party has requested the insertion of such a clause).

Article 7 of the Race Directive allows Member States to provide for enforcement of obligations under the directive through conciliation or mediation procedures. The Fundamental Rights Agency has stated that mediation processes for discrimination complaints must "*ensure that the victims' interests are adequately protected*":

> "Mediation has the advantage of avoiding the legal costs and delays associated with judicial proceedings as well as the conflict and polarisation that may arise during dispute settlement mechanisms in general. However, it is also essential that the settlements achieved reflect the outcomes available through regular dispute settlement channels and that the interests of the victim are adequately protected."[222]

That research notes that it is "*not possible to have an overview of whether mediation allows for effective, proportionate and dissuasive sanctions across the EU since, for the most part, the results of cases are not made public*".

[221] Equality Authority, *Embedding Equality in Immigration Policy: Submission on the discussion document of the Department of Justice, Equality and Law Reform on the Immigration and Residence Bill 2006,* p.17.

[222] European Union Agency for Fundamental Rights (2012) *The Racial Equality Directive: Application and Challenges*, Luxembourg: FRA.

The Review must also be mindful of the imbalance of power between the parties which may limit the appropriateness of mediation, particularly for serious complaints of discrimination.

6.5. Non-Disclosure Agreements

FLAC has previously expressed its concern at the use of strict confidentiality clauses in the settlement of proceedings against the State, including cases under the Equality Acts. FLAC has dealt with a number of cases where the State body will settle a claim on terms favourable to the client but only on the basis that both the terms and the fact of the settlement are confidential. Both the clients and their legal advisors are bound by such settlement terms and cannot even reveal that a particular case has in fact been settled. The settlement of such claims may be of interest to a wider group of people, other legal advisers and the public in general. There is a significant power and resources imbalance between the parties to these settlements and the issue at stake may be of great importance to the applicants. Strict confidentiality clauses prevent legitimate discussion of action or inaction by the State and also make it more difficult for other victims to obtain supporting evidence for similar complaints. FLAC fails to see how settlement agreements which include a term that the fact of the settlement of proceedings must remain confidential can possibly be in the public interest.

The Employment Equality (Amendment) (Non-Disclosure Agreements) Bill 2021 proposed to prohibit the use of “non-disclosure agreements” in settlement agreements reached on foot of certain complaints under the EEA, except at the request of a relevant employee. The provisions of the Bill do not extend the use of non-disclosure agreements in the settlement of cases under the ESA. FLAC believes that there would be considerable benefit to adopting and extending the measures proposed by the 2021 Bill.

RECOMMENDATIONS

FLAC recommends that:

6.1. The limits on the amount of financial compensation for discrimination complaints heard by the WRC should be removed. This would allow for discrimination complaints on all grounds (including gender) to be heard by the WRC at first instance

6.2. The Equality Acts should be amended to provide that the orders made in all successful cases should act as a deterrent against future acts of discrimination, and to specifically allow for Orders that have an impact beyond the complainant.

6.3. The Equality Acts should be amended to provide for injunctions and interlocutory relief in discrimination matters. The WRC should also adopt a specific procedure for identifying and expediting cases which require an urgent hearing.

6.4. The Equality Acts should be amended to provide for the mandatory anonymised recording of the outcomes in settlement agreements reached in respect of complaints under the Acts.

6.5. The Review should examine prohibiting the use of non-disclosure agreements in all cases under the Equality Acts, save where they are requested by the complainant.

7. Access to Justice

Access to justice is a fundamental human right and is recognised as such under a range of regional and international instruments. While it has no single precise definition, access to justice includes knowledge of and access to the legal system as well as whatever legal services are necessary to achieve a just outcome. Access to justice includes access to legal aid. It also encompasses states' obligations to vindicate and protect human rights and access to fair systems of redress, effective remedies and just outcomes.

The same international and regional instruments to which Ireland is subject and which are concerned with the promotion of equality, are also concerned with the right of access to justice. For example, Article 7 of the Racial Equality Directive obliges EU Member States to ensure that judicial and administrative procedures are available to victims of racial discrimination to enforce their right to equal treatment.[223] Article 14 of the International Covenant on Civil and Political Rights (ICCPR) enshrines the right of fair procedures and states that "*all persons shall be equal before the courts and tribunals*". The right of access to justice is enshrined in Articles 6 and 13 of the European Convention on Human Rights (ECHR) and Article 47 of the EU Charter of Fundamental Rights which guarantee the rights to a fair trial, to an effective remedy and to legal aid to those who lack sufficient resources so far as this is necessary to ensure effective access to justice. Access to justice is also reflected in our constitutional system of justice, where access to the courts is guaranteed.

In the absence of access to justice, people are unable to exercise and vindicate their rights, have their voices heard, challenge discrimination, or hold decision-makers and executive power to account.[224] Unless the right of access to justice is vindicated, the risk of social and economic exclusion is greatly increased. The UN Special Rapporteur on extreme poverty and human rights has noted that groups that suffer from structural discrimination and exclusion are disproportionately represented among the poor, and encounter additional barriers to accessing justice. Research in the area of social

[223] There are similar provisions in Article 9 of the Framework Employment Directive 2000/78/EC, Article 8 of the Gender Good and Services Directive, 2014 /113/EC and Article 17 of the Gender Recast Directive 154/EC.

[224] See United Nations Development Programme website at: http://bit.ly/204OeWJl and European Union Agency for Fundamental Rights and Council of Europe (2016) Handbook on European law relating to access to justice, Luxembourg: FRA and CoE, p.16

exclusion suggests that those who may be considered socially excluded groups within the general population are more likely to suffer justiciable problems (meaning problems for which there is a potential legal remedy within a civil and/or criminal justice framework).[225]

Recent research has demonstrated the connection between legal issues and issues in accessing employment or other problems related to debt, homelessness, and mental and physical health issues. In 2016, the Canadian Forum on Civil Justice's "Survey of Everyday Legal Problems and the Cost of Justice" report made stark findings on the consequences of experiencing legal problems in terms of health and employment.[226] The results of such surveys suggest that the cost of unresolved or prolonged legal issues to public services far outweighs the cost of investing in legal aid and access to justice which may prevent "knock-on" problems from arising.

Knowledge of legal rights, entitlements and services and access to legal information, advice and representation empowers people to enforce their rights, challenge inequalities and discrimination and combat social exclusion.

7.1. Legal Aid

Article 47(3) of the Charter of Fundamental Rights provides that "*Legal aid shall be made available to those who lack sufficient resources in so far as aid is necessary to ensure effective access to justice*".[227] Given that the Equality Acts in large part give effect to the State's obligations under EU law, this provision is of particular relevance.

The right of access to the courts is not absolute and in *Airey v Ireland* the European Court of Human Rights stated that the right of effective access does not imply that states must provide free legal aid for every dispute. However, the ECtHR has insisted

[225] A Buck, NJ Balmer and P Pleasence, 'Social Exclusion and Civil Law: Experience of Civil Justice problems among Vulnerable Groups' (2005) 39 Journal of Social Policy and Administration, 302- 320.

[226] Canadian Forum on Civil Justice (2016), *Everyday Legal Problems and the Cost of Justice in Canada*. Available at: https://www.cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf

[227] Judge Síofra O'Leary, Judge, European Court of Human Rights in a paper delivered on the legacy of *Airey v. Ireland* and the potential of European law in relation to legal aid, at the FLAC conference*, EU Charter and the ECHR: Practice and Potential,* held at the Incorporated Law Society on 18 October 2019

that any limitation applied to the right of access to the courts cannot undermine the very core of the right.

Whether and when Article 6 implies a requirement to provide legal aid will depend, among other factors, on:

- the importance of what is at stake for the applicant, taking into account the vulnerability of the applicant;
- the emotional involvement of the applicant which impedes the degree of objectivity required by advocacy in court;
- the complexity of the relevant law or procedure;
- the need to establish facts through expert evidence and the examination of witnesses;
- the applicant's capacity to represent him or herself effectively.

Ireland's State-funded civil aid scheme is administered by the Legal Aid Board under the provisions of the Civil Legal Aid Act 1995. Its stated purpose under this legislation is "*to make provision for the grant by the State of legal aid and advice to persons of insufficient means in civil cases*".[228] The Legal Aid Board is precluded by law from providing representation before many quasi-judicial tribunals in the absence of Ministerial designation. This includes the Workplace Relations Commission which deals with discrimination complaints under the ESA and EEA.[229] As a result, Legal Aid is generally unavailable in discrimination cases.

There is a concern that the provision of legal aid in discrimination claims may lead to a more adversarial and complex process before the WRC. However, the provisions of the Equality Acts are complex and cases often involve interpretation of EU Law. The CJEU has recently confirmed that a claimant in a discrimination claim can request that the WRC disapply provisions in Irish law that conflict with EU law. Other difficult issues include, for example, the identification of a hypothetical comparator in a direct discrimination claim, proving the various components of indirect discrimination such as the identification of the correct pool of comparators and the concept of "particular

[228] Civil Legal Aid Act, 1995.

[229] Section 27(2)(b), Civil Legal Aid Act 1995

disadvantage", the extent to which statistical evidence is required to prove indirect discrimination, the various elements of the definition of equal pay, the exemptions that apply, and the extent to which the exemptions in section 14 of the ESA apply in cases that come under the remit of the Race Directive.

While employers and businesses can often afford to pay for private legal representation in equality cases before the WRC, persons making complaints often cannot. Where a person alleging discrimination does not have such financial means and is faced with an experienced legal team on the other side, this can give rise to an inequality of arms in practice.

Research undertaken by LLM students in Trinity College Dublin examining "the absence of Legal Aid for Employment Equality cases", found that "*professional legal representation significantly improves the chance of winning an employment equality dispute before the WRC*":

> "It is very difficult to win an employment equality case before the WRC. Of the cases brought before the WRC between the 1st of January 2019 and the 31st of January 2021, complainants lost over 75% of the cases. From January 2018 to the end of January 2021, claimants with professional representation won more than 30% of the cases before the WRC and claimants with union representation won 32.6% of their cases. For those claimants without representation, there was a loss rate of more than 86% before the WRC. Overall, unrepresented claimants had a success rate of less than 14%, indicating that legal representation more than doubles a claimant's chance of success."[230]

Concerns around the absence of legal aid before tribunals such as the WRC are all the more pressing in light of the recent decision of the Supreme Court in *Zalewski v Adjudication Officer & Ors*[231]. In that controversial decision, the Court held that the exercise of powers by WRC Adjudication Officers, while permissible under Article 37 of the Constitution, also constitutes the administration of justice under Article 34. Notably, Mr Justice O'Donnell held that: "*The standard of justice administered under*

[230] Trinity College Dublin LLM Human Rights Law Clinic (2021), *A Report on the Absence of Legal Aid for Employment Equality Cases in Ireland*.

[231] [2021] IESC 24.

Article 37 cannot be lower or less demanding than the justice administered in courts under Article 34".[232]

In 2019, UNCERD expressed its concern "*about the absence of legal aid available for claims of racial discrimination under equality legislation brought before the Workplace Relations Commission, which results in non-equality of arms as respondents are mostly represented by legal counsels*".[233] Thereafter the Committee recommended:

> "…that the State party extend the scope of the Legal Aid Board to the areas of law that are particularly relevant to Traveller and other ethnic minority groups, including by designating the Social Welfare Appeals Office and Workplace Relations Commission as prescribed tribunals under Section 27(2)(b) of the Civil Legal Aid Act 1995."

An Action Plan published by the Department of Justice in February 2021 commits the Department to a review of the civil legal aid scheme in the third quarter of 2021 for the purpose of bringing forward "proposals for reform".[234] However, precise details as to the scope of this review are yet to be released.

7.2. Knowledge of Legal rights, Entitlements and Services

Each year FLAC's Telephone Information Line receives over 12,000 calls from persons seeking basic legal information. Throughout the Covid-19 pandemic, it was impossible for that service to keep up with the level of demand for basic information in relation to legal rights. It has emerged from FLAC's experience and engagement with the Steering Group of the Traveller Legal Service, that there is a lack of awareness of Civil Legal Aid amongst the Traveller community. Similar concerns arise from our experience of the Roma Legal Clinic. Similarly, our experience of both services suggests an understandable distrust of officialdom amongst both groups.

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[232] At paragraph 138 of his judgment,

[233] UN Committee on the Elimination of Racism (2019) *Concluding observations on the combined fifth to ninth reports of Ireland*. Geneva: OHCHR, para. 43.

[234] Department of Justice (2021), *Justice Plan 2021*. Available at: http://www.justice.ie/en/JELR/Department_of_Justice_Action_Plan_2021.pdf/Files/Department_of_Justice_Action_Plan_2021.pdf

Insofar as the Legal Aid Board is concerned, these concerns are exacerbated by failures to provide legal services to groups such as the Traveller community, even where there is no statutory barrier to such services being provided. For example, where a person considers that they have been discriminated against on or at the point of entry to a licensed premises, they must apply to the District Court (rather than the Workplace Relations Commission) for redress. As discussed in Section 5 of this submission, in theory, civil legal aid is available for applications to the District Court for redress under section 19(2) of the Intoxicating Liquor Act 2003. However, all applicants for civil legal aid must still satisfy the financial eligibility criteria under the Civil Legal Aid Act and accompanying regulations. The applicant must also show that they would be reasonably likely to be successful in the proceedings. In reply to a Parliamentary Question in November 2018, the then Minister for Justice and Equality confirmed that legal aid had not been granted for any applications under section 19(2) of the 2003 Act in the preceding three years.

FLAC is currently working with the Legal Aid Board in relation to the improvement of levels of service provision to the Traveller community. It would be important that the Legal Aid Board undertake adequate data collection measures, assessments of unmet legal need and targeted communications campaigns as part of this work in respect of the Traveller community, and this work would also need to include the provision of information in relation to the availability of legal aid in District Court discrimination proceedings.

Research conducted by the Fundamental Rights Agency across the European Union has highlighted that awareness of the national legislative and procedural frameworks giving effect to the prohibition on discrimination appears to be low among minorities. This, in turn, affects the degree to which victims pursue their rights and reduces the frequency with which the prohibition of discrimination is enforced and remedies are obtained.[235]

[235] European Union Agency for Fundamental Rights (2012) *The Racial Equality Directive: Application and Challenges,* Luxembourg: FRA.

7.3. Representative Actions

The role of NGOs is particularly valuable in facilitating access to justice through the enforcement of anti-discrimination law. However, their ability to provide assistance or engage in litigation is dependent upon expertise and resources.

It is relevant to note that Article 7 of the Race Directive[236] obliges EU Member States to ensure that associations, organisations or other legal entities may engage in judicial or administrative proceedings on behalf of, or in support of victims, with the victim's permission.[237] The CJEU clarified in the *Feryn* case that Member States may also adopt more generous rules of legal standing, allowing claims to be brought without the permission of the victim, or even where no identifiable victim exists

The EU's Fundamental Rights Agency (FRA) has stated that one of the ways by which the existing frameworks to combat discrimination on the grounds of race and ethnic origin could be strengthened is to widen access to complaints mechanisms, including by increasing funding for voluntary organisations in a position to assist victims.[238] In relation to the promotion of equality and the elimination of discrimination more generally, the European Commission has stated that "*real change often requires a critical mass of cases*".[239] The Commission's guidelines for Equality Bodies suggest that promoting the achievement of a critical mass of casework under each protected ground should be amongst such body's aims. The FRA research made compelling findings as to the benefits of resourcing civil society organisations to undertake litigation, and relaxing the rules of legal standing to empower such groups to pursue representative actions:

> "The role of such civil society organisations, which may include NGOs, trade unions or equality bodies themselves, is particularly valuable in facilitating the enforcement of discrimination law for several reasons. Firstly, their participation may help to reduce the financial and personal burden on

[236] There are similar provisions in Article 9 of the Framework Employment Directive, 2000/78/EC, Article 17 of the Gender Recast Directive 2006/ 154/EC and Article 8 of the Gender Good and Services Directive.

[237] Directive 2000/43/EC.

[238] European Union Agency for Fundamental Rights (2012) *The Racial Equality Directive: Application and Challenges*, Luxembourg: FRA, p.25.

[239] European Commission DG-JUST (2015) *Know Your Rights: Protection From Discrimination*. Available at: https://op.europa.eu/en/publication-detail/-/publication/5a511c88-b218-47b5-9f3e-4709d650e28b

> individual victims, giving them greater access to justice. Secondly, particularly where the permission of the victim is not required, the ability to enforce the directive is enhanced since, as noted below, members of ethnic minorities are often unaware of their rights or available procedures or unwilling to pursue claims. Thirdly, if claims can be brought even in the absence of an identifiable victim, it allows cases to be chosen on a strategic basis in order to address those practices that result in discrimination against large numbers of individuals… The ability of civil society organisations to provide assistance or engage in litigation is dependent upon expertise and resources… [In] Sweden and the UK, NGO advice centres receive funding or other forms of support from equality bodies. Although civil society organisations appear to play an important role in referring cases to equality bodies and participating in litigation, a lack of human and financial resources constitutes a significant limitation on their capacities, and public funding is mostly sparse or unavailable."

In light of this, FRA recommended that:

> "Consideration could be given to taking measures that widen access to complaints mechanisms, including: broadening the mandate of equality bodies that are not currently competent to act in a quasi-judicial capacity; relaxing the rules on legal standing for NGOs and other civil society organisations; increasing funding for voluntary organisations in a position to assist victims. In light of the fact that victims are often reluctant to bring claims, allowing civil society organisations, including equality bodies, to act of their own motion in bringing claims to court or conducting investigations, without the consent of a victim, or without an identify able victim, could constitute an important step towards facilitating enforcement."

7.4. Dedicated Legal Services

Many of the matters addressed in this submission are informed by FLAC's work over the previous four years in providing dedicated legal services to the Traveller and Roma communities. Access to the Traveller Legal Service functions principally on a referral basis with many of its cases originating with local Traveller groups or advocates. The

Traveller Legal Service – which functions under the auspices of a Steering Group of Traveller organisations – also provides training to Traveller advocates. However, it is only able to deal with a small amount of the significant levels of unmet legal need amongst the Traveller community.

Prior to the onset of the Covid-19 Pandemic, the Roma Legal Clinic operated on the basis of a drop-in clinic where interpretation services were provided by a member of the Roma Community, fluent in English, Romanian and Romani. FLAC sits as a member of the National Roma Network which is made up of local and national Roma organisations, as well as organisations who work with the Roma Community in Ireland. The Roma Legal Clinic is funded by the Department of Children, Equality, Disability, Integration and Youth's National Roma and Traveller Inclusion Strategy until the end of 2021.

In 2020, the majority of FLAC's casework was undertaken on behalf of callers to the Roma Legal Clinic and Traveller Legal Service. More generally, almost one-third of casefiles related to the area of Equality/Anti-Discrimination law.[240]

While these services cannot be viewed as an alternative to a comprehensive system of civil legal aid, they seek to address unmet legal need to the greatest extent as their resources allow, as well as bringing strategic litigation which has the potential to benefit the Roma and Traveller communities as a whole. The services also allow for barriers to justice to be identified and for the accumulation of expertise as to how those issues may be addressed.

FLAC believes that the Traveller Legal Service provides a rights-based model which should be replicated in respect of other groups. For example, FLAC believes that provision should be made for a Roma Legal Service which operates on a similar basis to the Traveller Legal Clinic after the conclusion of the current funding period for the Roma Legal Clinic. Such a model would allow FLAC to support and empower advocates, such as those who sit on the National Roma Network, and to take on strategic cases with the potential to benefit the wider Roma community in Ireland.

However, the provision of such services is contingent on funding and resources. The Traveller Legal Service is staffed by only one full-time solicitor with part time

[240] FLAC (2021), *Remote Justice: FLAC Annual Report 2020*. Available at: https://www.flac.ie/publications/flac-annual-report-2020/

administrative support. While FLAC has secured project funding for both the Traveller Legal Service and Roma Legal Clinic, neither service has any form of long-term funding. This serves as a barrier to the growth and strategic planning of those services.

RECOMMENDATIONS

FLAC recommends that:

7.1. The Equality Acts should be amended to ensure that that representative NGOs are given unambiguous legal standing in appropriate cases to initiate proceedings on behalf of those affected by discrimination.

7.2. The Department of Children, Equality, Disability, Integration and Youth should ensure that NGOs are adequately resourced to carry out advocacy and representation for those affected by discrimination and inequality.

7.3. Bodies such as IHREC, the Citizens Information Board, the Legal Aid Board, and relevant NGOs should be resourced and enabled (and, where relevant, mandated) to provide information and to conduct targeted education and outreach campaigns in relation to equality and non-discrimination matters.

7.4. The Department of Justice and the Legal Aid Board should implement the recommendations of UNCERD and UNCESCR in relation to the provision of civil legal aid. This includes expanding the scope of the civil legal aid scheme to include the provision of legal aid where legal advice and representation is required in quasi-judicial tribunals such as the Workplace Relations Commission. To achieve this, the Minister for Justice should designate the Workplace Relations Commission as a “prescribed” tribunal for the purposes of Section 27(2)(b) of the Civil Legal Aid Act 1995, as recommended by UNCERD.

7.5. The Department of Children, Equality, Disability, Integration and Youth should support the provision of dedicated legal services for marginalized groups, including through the provision of long-term funding for fully resourced dedicated legal services for Travellers and Roma.

8. Equality Data

There is a wealth of research available which highlights the persistence and impact of discrimination and inequality on groups within Irish society. However, there is a dearth of statistical data which specifically relates to protected groups and inequality. State bodies are not mandated to collect disaggregated equality data in performing their functions, despite a clear imperative to do so arising from European Union equality policy.

The benefits of equality data are twofold. Such data assists not only in the enforcement of equality law but also in the formulation of equality policy and in measuring the effectiveness of equality policy.

8.1. The Enforcement of Equality Law

Section 4 of this submission has already outlined the benefits of pay information legislation in the context of enforcing the Equal Pay provision in the EEA. That section also referenced the role of statistical data in proving claims of indirect discrimination. While statistical data should not be required to prove a "particular disadvantage" in such cases, it may be of significant benefit where it is readily available.

Research by the EU's Fundamental Rights Agency (FRA) notes that:

> "In order to prove indirect discrimination, it is necessary to show that a uniform (that is, apparently 'neutral') rule or practice has a disproportionately negative impact on a particular group of persons characterised by, for instance, their racial or ethnic origin. In certain situations, this requires the production of statistical data. For instance, it may be shown that a service provider, who refuses to offer a service in a particular neighbourhood, is in fact committing indirect discrimination on production of evidence that this area is populated predominantly by members of an ethnic minority. Statistical data has been accepted as evidence capable of giving rise to a presumption of discrimination by the CJEU and the European Court of Human Rights and its use is well established in the UK and the Netherlands.

However, this practice remains uncommon in many Member States, since data which might be of assistance is not actually collected…"[241]

The research notes that *"…with regard to data collection, enforcing the prohibition on indirect discrimination is greatly facilitated by the existence of statistics disaggregated by ethnicity and other personal characteristics such as age*".

Collection of such data would also assist in the implementation and enforcement of the Public Sector Equality and Human Rights Duty.

8.2. Equality Policy

The absence of equality data undermines the effectiveness of equality legislation and policy.

FRA notes that "*without collection of ethnically disaggregated data it is difficult to develop policies to prevent discrimination and promote equality. This renders it difficult to identify where problems exist, and also to measure the success or otherwise of measures to combat the latter*":

"One major obstacle to developing proactive policies of social inclusion is the absence of ethnically disaggregated data, which would allow Member States to begin the process of assessing the extent of inequality in different sectors. Although the directive does not explicitly require the collection of such information, Member States are obliged to take steps in this regard under the International Convention on the Elimination of All Forms of Racial Discrimination, to which all the EU Member States are party… The absence of a practice of collecting ethnically disaggregated data may be partly due to fears among some Member States of breaching rules relating to data protection. However, it should be noted that as long as certain safeguards are in place (such as anonymising the data provider), this is actually permissible."[242]

[241] European Union Agency for Fundamental Rights (2012) *The Racial Equality Directive: Application and Challenges,* Luxembourg: FRA.

[242] Ibid.

In the Irish context, the Interim Report of the Independent Anti-Racism Committee noted:

> "It is often difficult to measure the extent to which people from minority ethnic and migrant backgrounds experience differential outcomes from the majority population. This is because institutions do not gather the data that would enable this analysis to be done. Where data is gathered, it is often not used. Arguably constituting a form of institutional racism in itself, this absence of data diminishes our ability to tackle both structural and institutional racism. Ethnic equality monitoring has the potential to address some of these problems. For example, in the context of the pandemic, gathering ethnic equality data would allow for proper monitoring and assessment of any differential impacts of health services and law enforcement measures during the pandemic response."[243]

That report therefore recommended: *"[That] a standardised ethnic identifier be adopted and rolled out across all routine administrative systems, state agencies and surveys. This is in line with CERD Recommendation 6 (December 2019)*."

Statistical data was effectively used by the Independent Expert Review on Traveller Accommodation in support of their findings, particularly in highlighting the need for an "overhaul" of the legislation concerning Traveller accommodation. The Expert Group found from census data that Travellers are more likely to be homeless than the general population, comprising 7.5% of the homeless population in 2016. On the basis of more detailed local data, the Expert Group further found that Traveller homelessness was a much more prevalent issue in particular local authority areas than the census data disclosed. For example, research commissioned by Offaly Traveller Movement in 2016 found that 19.1% of Offaly's homeless population were Travellers despite comprising 1.3% of the overall population.[244]

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[243] Independent Anti-Racism Committee (2021) *Interim Report to the Minister for Children, Equality, Disability, Integration and Youth*. Available at: https://www.gov.ie/pdf/?file=https://assets.gov.ie/132151/ed3f39e2-4aa1-4991-aa06-52beae8310db.pdf#page=null

[244] Department of Housing, Planning and Local Government (2019), *Traveller Accommodation Expert Review*. Available at: https://rebuildingireland.ie/news/minister-english-publishes-the-report-of-the-expert-review-group-on-traveller-accommodation/

IHREC has noted that *"[t]he State does not collect sufficient disaggregated data to allow adequate and regular assessment of the extent to which it is meeting its international obligations*" and has called for the collection of "*comprehensive disaggregated data to ensure that individual rights are respected and to protect individuals against discrimination*". The Commission has also highlighted the need for "*the need for enhanced disaggregated data collection on the operation of policing powers*".[245]

It is important that the collection of such data is fully compliant with data protection law and, insofar as dedicated measures are necessary for the collection and use of information in specific contexts, such measures should be adopted as a matter of priority.

RECOMMENDATION

FLAC recommends that:

8.1. The Irish Human Rights and Equality Commission Act 2014 should be amended to mandate the collection of equality data by public bodies (including local authorities, Government Departments and An Garda Síochána) and IHREC should be given enforcement powers in this regard.

[245] IHREC (2021), *Submission to the Third Universal Periodic Review Cycle for Ireland.* Available at: https://www.ihrec.ie/app/uploads/2021/07/IHREC_UPR_2021_FINAL.pdf

9. The Public Sector Equality & Human Rights Duty

Section 42 of the Irish Human Rights and Equality Commission Act 2014, introduced the Public Sector Equality and Human Rights Duty, providing one of the most important national mechanisms for mainstreaming equality and human rights. It imposes a positive obligation on a broad range of statutory and public bodies to have regard, in the performance of their functions, to the need to eliminate discrimination, promote equality of opportunity and protect the human rights of its members, staff and persons to whom it provides services. This includes Government Departments and local authorities. By doing so, it has the potential to transform the culture of public bodies by mainstreaming equality and human rights in all aspects of their work.

In fulfilling their duties under section 42, public bodies must consider the human rights and equality impact of their policies, delivery of services, budgets, procedures and practices. The Public Sector Duty complements actions which are required under European Union law and international and regional human rights instruments, and requires public bodies to take a proactive approach to combatting discrimination and to mainstreaming equality in all of their functions.

The Public Sector Duty has now been in effect for over seven years. However, there is limited evidence to date of the duty having delivered on its potential to create a shift in culture within public bodies and the delivery of public services. For many public bodies, the process of implementation and engagement with the public sector duty remains at the very early stages and the implications of the duty for the work of those bodies are largely unexplored. While public bodies are afforded flexibility in how they implement the duty, every public body has a statutory obligation under section 42(2) of the 2014 Act to first assess and address the human rights and equality issues relevant to its work in its strategic plan and, secondly, to report on developments and achievements in its annual report.

FLAC has conducted detailed research into the implementation of the public sector duty in the Irish justice system. The forthcoming report explores how the duty is being, and might be, implemented in three organisations: the Courts Service, the Workplace Relations Commission and the Legal Aid Board. These organisations serve as important gateways, and indeed gatekeepers, for people who wish to exercise their rights and to access justice, including under equality law. If these bodies fail to give

effect to the public sector human rights and equality duty, this could serve as a barrier to individuals seeking to access justice in order to defend their rights. Correspondingly, if these bodies give full effect to the duty, it could serve to reduce barriers to access to justice in order to defend their rights.

As well as recommending the adoption of an Equal Treatment Bench Book by Courts and Tribunals in this jurisdiction (as discussed in further detail in section 10 of this submission), FLAC's report makes specific recommendations to the Government, Courts Service, WRC and Legal Aid Board on the implementation of the Public Sector Duty.

9.1. The General Nature of the Duty

The duty imposed on public bodies by section 42(1) of the Irish Human Rights and Equality Commission Act 2014 is quite general in scope, and its implications for each public body will vary. This gives rise to concerns that the implications of the duty are unclear.

It is notable that, in addition to imposing a general equality duty, the UK Equality Act 2010 allows Ministers of the Crown, Welsh Ministers and Scottish Ministers to make regulations imposing more detailed and specific duties on public authorities. As a result, the operation of the public sector equality duty in those jurisdictions encompasses two interlinked elements: the general equality duty and the specific duties.

In England, the specific duties, imposed under the 2017 Regulations, are limited to requiring the listed public authorities:

- to publish information demonstrating compliance with the duty at least once every year which must include information regarding people who share a relevant protected characteristic who are its employees and others affected by its practices and policies;
- to prepare and publish one or more equality objectives to achieve any of the aims referenced in the duty at least every four years and such objectives must be specific and measurable; and

- to publish specified gender-pay information on an annual basis.[246]

In Scotland and Wales, the specific duties are much more detailed and extensive. As in England, there are specific duties to publish information on compliance with the duty, to publish equality objectives or, as described in Scotland, equality outcomes, and to publish gender pay information. However, even these duties are framed in more specific terms than in the case of England. There is also a marked emphasis on transparency and accessibility, with specific requirements to publish and make accessible information on different elements of compliance with the duties.

For example, in Wales, the publication of equality objectives must be accompanied by a statement listing the steps the public authority has taken, or intends to take, to meet each objective and the expected time frame within which this will occur. In the event that a public authority decides not to publish an equality objective in respect of one or more of the protected characteristics, it must give reasons for this decision. There is also a duty to draft a strategic equality plan which must encompass certain information including the steps taken or intended to be taken to fulfil each equality objective along with an indicative timeframe.

Similarly, in Scotland, there is a duty to publish a set of equality outcomes every four years – along with a duty to give reasons in the event that these outcomes do not cover every relevant protected characteristic – and to publish a report on the progress made to achieve these outcomes every two years.

In addition, the Scottish and Welsh Regulations impose a duty to engage with, or involve, people representing the interests of protected groups when undertaking particular activities, such as the consideration and design of equality objectives.

Similarly, while listed authorities in each jurisdiction must publish certain information in relation to the protected characteristics of employees, the scope of this duty varies significantly in terms of the level of detail required. While all jurisdictions require the publication of gender pay information, the Welsh Regulations also require a listed authority to publish an action plan which must include any gender pay equality objective and any policy relating to the need to address the causes of any gender pay difference. The Scottish Regulations impose a duty to publish a statement on equal

[246] Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017 (SI 2017/353) ('English Regulations). This replaced the Equality Act 2010 (Specific Duties) Regulations 2011.

pay every four years which must include, among other information, the authority's policy on equal pay between male and female employees. Uniquely in Wales, listed authorities are required to make arrangements for promoting knowledge and understanding of the general duty as well as the specific duties amongst its employees.

Of particular interest in Scotland and Wales are the important duties to engage in impact assessment of proposed policies and practices (with a duty to publish reports in case of substantial impacts) and to engage in impact monitoring or the review of existing policies and practices. Notably in Scotland, a listed authority must actually take the results of any such assessment into account when developing a policy or practice

The 2010 Act provides that the regulations imposing specific duties may include duties on a public authority in connection with public procurement functions. While no such duty has been imposed in England, the Scottish and Welsh Regulations require listed authorities to have regard to the general duty in the context of public procurement.

In addition, Welsh Ministers must publish reports containing an overview of the progress made by listed authorities towards compliance with the general duty. Such reports must also set out the Welsh Ministers' proposals for coordination by such authorities in order to bring about additional progress towards compliance with the general duty. In a similar vein, the Scottish Ministers must publish proposals for activity to enable a listed authority to better perform the general duty and must publish a report on progress in relation to the activity at least every four years.

While there is some variation between Scotland and Wales, the regulations in both jurisdictions contain significantly more prescriptive requirements than what is mandated under the English legislation. They are also strongly results-oriented. In Wales, listed authorities are required to publish the actions necessary to fulfil their desired objectives as well as an expected timeframe within which this will take place. Listed authorities in Wales must put arrangements in place for monitoring progress and the effectiveness of the steps which they take in this regard. Listed authorities in both Scotland and Wales must also report regularly on the progress which they have made to achieve their objectives and outcomes. In Wales, this information is incorporated into an annual report on compliance. In Scotland, a specific report on this

issue must be produced at least every two years. The specificity of these provisions ensures greater clarity and transparency in how listed authorities implement their legal obligations. This in turn plays an important role in promoting compliance with the duty.

9.2. Enforcement of the Duty

While Section 42 of the 2014 Act does provide certain tools to IHREC for the purpose of ensuring compliance with the public sector duty, those tools are primarily persuasive as opposed to coercive in character. IHREC has exercised its statutory functions under section 42 in promoting the public sector duty and producing guidance for public bodies in relation to its implications. However, IHREC has yet to engage its further statutory powers.

The enforcement of the duty is paramount in ensuring its effectiveness. The High Court in Northern Ireland has described the duties under section 75 of the Northern Ireland Act 1998 as being "*of paramount importance in contemporary Northern Ireland society*" and has described the Equality Commission of Northern Ireland (ECNI) – which plays an important role in the enforcement of section 75– as "*a statutory watchdog to be reckoned with*".[247]

It is notable that ECNI has more robust powers than IHREC in terms of enforcing the public sector duty in Northern Ireland. Under paragraph 1 of Schedule 9 of the 1998 Act, ECNI has a multifaceted role:

- keeping under review the effectiveness of the duties imposed by section 75;
- offering advice to public authorities and others in connection with those duties; and
- carrying out the functions conferred on it by the following provisions of this Schedule.

Among these provisions is the duty imposed on public authorities to prepare an equality scheme which must conform to guidelines issued by ECNI, with the approval of the Secretary of State, and which must be submitted to ECNI, which can then approve it or refer it to the Secretary of State. Where the scheme is referred to the

[247] *Re Worton* [2017] NIQB 131 [15].

Secretary of State, the Secretary of State can either approve it, request the public authority to make a revised scheme, or make a scheme for the public authority.

ECNI is empowered to deal with a complaint in respect of an alleged failure by a public authority to comply with its equality scheme. The complaint must be made in writing by an individual who claims to have been directly affected by the failure. ECNI can either investigate the complaint or provide the complainant with reasons for not investigating. In addition to undertaking investigations on the basis of a complaint made by a directly affected individual, ECNI can itself undertake an investigation where it believes that a public authority may have failed to comply with an equality scheme.

9.3. Justiciability of the Duty

Section 42(11) of the 2014 Act provides that nothing in section 42 "*shall of itself operate to confer a cause of action on any person against a public body in respect of the performance by it of its functions under subsection (1)*". On its face, this provision means that a person cannot rely on section 42 as the basis for a cause of action against a public body and suggests that the duty under section 42 is not intended to be justiciable, at least in a direct manner.

In the UK, section 156 of the 2010 Act provides that a failure in respect of a performance of a duty "*does not confer a cause of action at private law*", this has not prevented reliance on the public sector duty in the context of public law litigation, challenging the decisions of public authorities. Indeed, an important body of case law has developed on the public sector duty, initially under the legacy enactments and now under the 2010 Act. In these cases, the public sector duty has played an important role in effecting change in the policies and practices of public authorities in contexts as diverse as the treatment of people with mental illness who are detained pending deportation, the use of physical restraints on young offenders and the use of bail hostels for women prisoners. The public sector duty has come to be recognised as a ground of judicial review of constitutional significance.[248]

[248] For valuable discussions of this case-law, see Hickman 'Too hot, too cold or just right? The development of the Public Sector Equality Duties in administrative law' (2013) Public Law 325-44; McColgan, 'Litigating the Public Sector Equality Duty: The Story So Far' (2015) 35(3) Oxford Journal of Legal Studies 453.

While the public sector equality duty plays a central role in the formulation of policy of public authorities generally, it also applies to the decisions of public authorities in individual cases. In *Pieretti*, the Court of Appeal of England and Wales rejected the argument that the former public sector duty under section 49A of the Disability Discrimination Act 1995, now replaced by section 149 of the 2010 Act, applied only to the overall formulation of policy by a public authority and not to its decisions in individual cases.[249] In each case where the duty was relevant, there had to be a "*conscious directing of the mind*" on the part of the public body to the specific statutory considerations.[250] This applies across the functions of a public authority which come within the scope of the 2010 Act.[251]

While the duty under the 2010 Act is intended to encourage a culture of compliance rather than litigation, it also has become an important ground for judicial review. Case-law has shed light on the meaning and effect of the duty in practice. In particular, the courts have emphasised that the duty to have "due regard" to the statutory objectives is an onerous and ongoing one.

While section 42(11) may restrict the extent to which reliance may be placed on the duty as a standalone cause of action, it does not necessarily preclude reliance on the public sector duty in public law litigation in appropriate cases.

9.4. A Private Sector Duty

The Equality Acts imposes several obligations on the private sector including the prohibition of discrimination and the duty to provide reasonable accommodation. The Gender Pay Gap Information Act 2021 also imposes certain additional obligations on employers. However, these duties are largely enforced by way of the individual complaints model. The positive action provisions of the Equality Acts enable rather than mandate the introduction of measures to promote equality. The introduction of a private sector equality duty has been largely unexplored. A 2004 report by Colm Ó

[249] *Pieretti v London Borough of Enfield* [2010] EWCA Civ 1104 [26].

[250] *R. (on the application of Meany) v Harlow DC* [2009] EWHC 559 (Admin) [74]; *R. (on the application of Harris) v Haringey LBC* [2010] EWCA Civ 703 [40].

[251] *Barnsley Metropolitan Borough Council v Norton* [2011] EWCA Civ 834 [15]. This case also dealt with the duty under section 49A of the Disability Discrimination Act 1995.

Cinnéide offers an insightful analysis of the potential of such duties, as well as practical guidance as to how they may be implemented:

> "It is evident from the data on gender, race and disability that progress towards equality of opportunity in the private sector has been limited. Positive duties can again have an effective impact in this context. Such private sector duties should not be seen as an alien carry-over from the public sector: in reality, they would mirror precisely in nature, form and content what is generally accepted to be best equal opportunities human resources practice currently in evidence across the private sector.
>
> Contract compliance mechanisms can be used in the context of public procurement and Private Finance Initiatives (PFI)/Public-Private Partnership (PPP) initiatives to require private employers to implement "equality audits" in their workforce. Such mechanisms have been used to great effect in the US, but would require the amendment and clarification of existing law. They are easy to design and could constitute the first step in extending duties to the private sector. This could involve, depending upon the circumstances, the carrying-out of pay audits to identify and eliminate unjustified patterns of pay differentials, suitable assessment and monitoring of training, promotion and recruitment strategies, as well as the introduction of suitable human resources policies as regards work hours and time off. Failure to take the appropriate steps could result in loss of contract. The failure to introduce such duties in PFI contracts thus far has been a significant lost chance, which should not be repeated.
>
> Comparative experience from Northern Ireland, other EU countries, the US and Canada can be drawn upon to design similar duties for the private sector in general, and pay audit and workforce monitoring requirements in particular. As with public sector duties, bureaucratic load and excessive cost imposition need to be avoided to ensure the credibility of the introduction of any positive duties. Scandinavian corporate reporting mechanisms could be used as an initial step, and due caution should be exercised in developing schemes to avoid excessive load.

> Streamlined equality duties requiring companies of a suitable size and scale to take effective steps to implement equality audits may be appropriate. They would also permit employers to design and apply their own policies, subject to a minimal yet effective degree of regulation. They would have the advantage of proving a clear regulatory framework that can guide employers in making sure that they come within the legal requirements of equality law. Positive duties therefore, if appropriately designed, link well with private self-interest, business efficiency and good human resources practice."[252]

The Finnish Non-Discrimination Act (which came into effect in 2015) provides a model which could be replicated in the Irish context. In addition to placing a positive duty on the State, that legislation places specific equality planning and reporting obligations on employers and educational establishments. If the number of employees working for an employer on a regular basis is at least 30, the employer must draw up a plan of the necessary actions to promote equality, by reference to the nature of the activities undertaken by the business and the work undertaken by employees.

RECOMMENDATIONS

FLAC recommends that:

9.1. Section 42 of the Irish Human Rights and Equality Commission Act 2014 should be amended to allow for the introduction of "specific duties" by Government Ministers which apply to specific State Bodies and Government Departments.

9.2. Section 42 of the Irish Human Rights and Equality Commission Act 2014 should be amended to strengthen the enforcement powers available to the Commission, including by empowering the Commission to investigate individual complaints in relation to failures to comply with the duty.

9.3. Section 42(11) of the Irish Human Rights and Equality Commission Act 2014 should be amended to clearly provide that a failure to comply with the duty may, of itself, constitute a cause of action.

9.4. The Review should consider the introduction of a Private Sector Duty.

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[252] Colm O'Cinneide for Equality and Diversity Forum (2004*), Taking Equal Opportunities Seriously: The Extension of Positive Duties to Promote Equality*. Available at: https://www.equallyours.org.uk/wp-content/uploads/2004/02/Taking-equal-opps-inside.pdf

10. Equality Bodies

The dedicated equality bodies which existed when the Equality Acts were introduced, the Equality Tribunal and the Equality Authority, have been subsumed into the Workplace Relations Commission (WRC) and the Irish Human Rights and Equality Commission (IHREC) respectively. These new bodies have assumed the responsibilities of the previous dedicated equality bodies, while also having significant mandates beyond the equality sphere. IHREC has a dual equality and human rights mandate. In addition to hearing equality complaints, the WRC deals with complaints under employment and industrial relations law.

10.1. The Irish Human Rights and Equality Commission

As Ireland's only national Equality Body, equality must be at the centre of each area of IHREC's work. While non-discrimination is a specific field within human rights, equality more generally is a distinct legal and philosophical tradition. There was a concern that the amalgamation of the Equality Authority into IHREC would lead to a reduced focus on equality matters in the equality field (through research, training and engagement with Civil Society and acting as a leading voice in the area).

The Fundamental Rights Agency notes that the effectiveness of Equality Bodies is contingent on the extent of their mandate and the availability of sufficient resources to fulfil that mandate:

> "The range of activities outside the sphere of dispute resolution constitute an important function of equality bodies because of the potential to provide long-term solutions to the promotion of equality by addressing potentially systematic and structural issues, as well as more broadly contributing to public awareness. This is particularly useful in pre-empting litigation by provoking the review of potentially discriminatory policies and practices before they give rise to a dispute. The contribution that these functions can make to realising equality will depend on the mandates of the equality bodies, the degree to which equality bodies have the resources to engage

with different actors and the openness of public and private bodies to the advice offered."[253]

While IHREC is vested with a very significant array of powers, including powers to tackle systemic discrimination, not all of these powers have yet been exercised. If, and insofar as, these powers may not be fully effective, it is important that they are subject to review and that IHREC is sufficiently resourced to fulfil its equality mandate.

Section 7 of this submission noted that the European Commission has stated that "*real change often requires a critical mass of cases*",[254] and the Commission's guidelines for Equality Bodies state they should seek to promote the achievement of a critical mass of casework under each protected ground. Accordingly, IHREC needs to be sufficiently resourced to be able to engage in strategic litigation, but also to take measures to achieve a critical mass of casework under each protected ground, in order to promote a culture of compliance.

IHREC's recent Annual Reports states that 77 applications for legal assistance were approved by IHREC in 2020, of which 22 were offered legal advice only. 15 of the files completed by IHREC in 2020 related to equality matters.[255] This level of assistance poses challenges to the achievement of a culture of compliance with the legislation through a critical mass of cases being taken.

As FRA note: "*The ability of equality bodies to initiate legal action, [and] provide legal representation… requires adequate financial and staffing capacity*".[256]

IHREC provides information through a telephone information line. However, as noted in section 7, the Commission should be mandated and resourced to engage in targeted information campaigns aimed at members of protected groups under the Equality Acts. Such campaigns should provide information as to how rights may be enforced and the assistance which IHREC may provide. Similarly, the Commission should be mandated and resourced to engage with and provide training to other bodies who may provide

[253] European Union Agency for Fundamental Rights (2012) *The Racial Equality Directive: Application and Challenges*, Luxembourg: FRA.

[254] European Commission DG-JUST (2015) *Know Your Rights: Protection From Discrimination*. Available at: https://op.europa.eu/en/publication-detail/-/publication/5a511c88-b218-47b5-9f3e-4709d650e28b

[255] IHREC (2021), *Annual Report 2020*. Available at: https://www.ihrec.ie/documents/annual-report-2020/

[256] European Union Agency for Fundamental Rights (2012) *The Racial Equality Directive: Application and Challenges*, Luxembourg: FRA.

representation before the WRC in equality matters such as Trade Unions and the Citizens Information Board.

Section 4 of this submission discusses the significance of IHREC's powers in terms of combatting pay discrimination, structural and systemic forms of discrimination, and algorithmic discrimination. Section 8 discusses the need for IHREC to be given further powers in relation to equality data. Section 9 discusses the need for enhanced enforcement powers in relation to the Public Sector Duty. Section 3 notes that the Review should consider giving IHREC the power to approve Codes of Practice. Section 1 recommends mandating IHREC to conduct periodic reviews of the Equality Acts.

10.2. The Workplace Relations Commission

Most discrimination complaints are heard by the Workplace Relations Commission (the WRC). The WRC's name may be a source of confusion for people seeking to make discrimination complaints especially under the ESA. In this regard, it is notable that the WRC does not have a separate website in respect if its equality function.

While FLAC recommends that all discrimination cases should be heard by the WRC at first instance, there are significant issues in relation to the WRC's procedures which must be urgently addressed.

The majority of cases before the WRC concern employment law. Unlike the Equality Tribunal, the WRC does not have specific processes for dealing with discrimination complaints. Only one WRC complaint form exists and it is tailored to employment complaints, although it must also be used to submit a complaint under the ESA.[257] In FLAC's experience, WRC forms are difficult, even for practitioners, to locate on the WRC website and to navigate. Similarly, it is difficult to access the database of previous decisions on the WRC website. These matters raise further concerns in

[257] The form contains compulsory fields in relation to employment which are not relevant to complaints under the Equal Status Acts. The Workplace Relations Complaint Form cannot be opened in web browsers and it is unclear that it is necessary to download the form and use PDF software to complete it. It is also unclear that an internet connection is then necessary to submit the form (even though it is not being accessed through an internet browser.

relation to procedural barriers to pursuing claims under the Equality Acts and the "digital divide".

As noted in section 6 of this submission, the WRC does not have clear procedures in relation to cases which require urgent or expedited hearings.

The Fundamental Rights Agency notes that:

> "A further factor acting as an obstacle to bringing a [discrimination] claim appears to be the burdens that may be involved. In this sense the EU-MIDIS study found that overall 21 per cent of respondents who had been discriminated against stated that their reason for not reporting the incident was due, at least in part, to the fact that procedures were too cumbersome or time consuming."[258]

It is notable that the Equality Acts provides that the WRC should "investigate" cases referred to it. An investigative process in discrimination cases should reduce the burden placed on the claimant to make complex legal arguments and their responsibilities in relation to evidence. However, it has been FLAC's experience that in practice, the WRC exercises a more adjudicative rather than investigative function. One specific issue which arises in this regard is the obligation placed on complainants to name the correct respondent in discrimination cases. Where the incorrect respondent is identified in discrimination cases, decisions of the WRC may be unenforceable (even though the tribunal has made a finding that unlawful discrimination has occurred). The WRC should take a pro-active role in ensuring that the complainant has correctly identified the legal entity they wish to complain against.

Following the controversial decision of the Supreme Court in *Zalewski v Adjudication Officer and Ors*, which found that certain sections of the Workplace Relations Commission Act 2015 were unconstitutional, the Government introduced amending legislation, which took effect on 29 July 2021.[259] The Workplace Relations (Miscellaneous Provisions) Act 2021 introduces a number of changes to WRC procedure, including by providing that hearings, except in special circumstances, shall

[258] European Union Agency for Fundamental Rights (2012) *The Racial Equality Directive: Application and Challenges,* Luxembourg: FRA.

[259] [2021] IESC 24

be in public; that decisions, except in special circumstances, will not be anonymised; and that, during a hearing, an adjudicator may take evidence on oath or affirmation.

In addition to heightening concerns around the formal and adversarial nature of WRC proceedings, these reforms also raise a number of specific concerns. Most pressing is the absence of specific procedures to allow a complainant to apply for a hearing to be heard in private before the case is heard in full. WRC Adjudicators do not generally conduct hearings on preliminary matters.

In order to ensure that the WRC is an effective forum for equality disputes, we recommend an independent review of WRC procedures for equality cases.

Finally, as noted in Section 9, FLAC has conducted detailed research into the implementation of the public sector duty in the Irish justice system. The public sector duty has an important role to play in the work of the WRC, including in informing any review of the WRC's procedures in equality cases. In addition, the adoption of an Equal Treatment Bench Book by Courts and Tribunals in this jurisdiction, including the WRC, could assist in ensuring compliance with the public sector duty. In the United Kingdom, the Equal Treatment Bench Book is a valuable resource which enables the public sector duty to be put into practice in the courts. It provides detailed guidance on equal treatment in the courts, across a wide range of topics, including litigants in person, children, young people and vulnerable adults, persons with a physical or mental disability, victims of modern slavery, those facing social exclusion and poverty, as well as litigants falling within the scope of protected grounds such as gender (including transgender persons), sexual orientation and race and religion (including specific sections on anti-Semitism, Islamophobia and multicultural communication). The Bench Book is intended for use by the judiciary but it is also an important reference point for the legal profession and members of the public alike.

RECOMMENDATIONS

FLAC recommends that:

10.1. The Review must examine IHREC's equality mandate, as provided for in the IHREC Act 2014, and consider the introduction of measures to strengthen and clarify this mandate. IHREC must be sufficiently resourced to fulfil its equality mandate.

10.2. IHREC must be adequately resourced to exercise all of its powers under the IHREC Act 2014, including its inquiry powers and its power to take own-name proceedings. Any issues with the ways these powers are defined in the legislation (which may undermine IHREC's ability to exercise the powers) must be dealt with in the context of the Review of the Equality Acts

10.3. IHREC should be mandated and resourced to support a critical mass of casework under each protected ground, in order to promote a culture of compliance.

10.4. IHREC should be mandated and resourced to engage in targeted information campaigns aimed at members of protected groups under the Equality Acts. Such campaigns should provide information as to how rights may be enforced and the assistance which IHREC may provide.

10.5. IHREC should be mandated and resourced to engage with and provide training to other bodies who may provide representation before the WRC in equality matters such as Trade Unions and the Citizens Information Board.

10.6. The WRC must commission an urgent independent review of its procedures in relation to equality cases. That review must examine the accessibility of the WRC website and forms, as well as examining the introduction of a separate equality unit within the WRC for equality matters.

10.7. The WRC must introduce separate complaint forms in respect of complaints under the Equality Acts. These forms must be available in hard copy as well as online, and be equality-proofed and accessible.

10.8. The WRC must introduce specific procedures in relation to hearings that require an urgent or expedited hearing.

10.9. The WRC must introduce procedures which pro-actively ensure that the complainant in discrimination cases has identified the correct respondent.

10.10. The WRC must allow for hearings on preliminary matters in equality cases, including applications for hearings to be heard in private or for decisions to be anonymised.

10.11. The WRC must adopt an Equal Treatment Bench Book.

10.12. The investigative function of the adjudicator in complaints under the Equality Acts needs to be used to ensure that the responsibility for providing all of the evidence and law does not rest solely with the complainant.