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Country report

Non-discrimination

Ireland

2022

including summary

Justice and Consumers

EUROPEAN COMMISSION

Directorate-General for Justice and Consumers
Directorate D — Equality and Union citizenship
Unit D.1 Non-discrimination and Roma coordination

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EUROPEAN COMMISSION

Country report
Non-discrimination

Transposition and implementation at national level of Council Directives 2000/43 and 2000/78

Ireland

Judy Walsh*

Reporting period 1 January 2021 – 31 December 2021

2021 Directorate-General for Justice and Consumers

* The author has gratefully built on the reports written until 2016 by the previous expert Orlagh O'Farrell.

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EXECUTIVE SUMMARY

1. Introduction

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

Ireland's anti-discrimination laws were expanded significantly in the late 1990s. The Employment Equality Act 1998[3] and the Equal Status Act 2000[4] provided for nine discriminatory grounds and established a national equality body, as well as a dedicated forum for hearing anti-discrimination complaints, the Equality Tribunal. From 2008 successive national budgets severely curtailed funding for equality infrastructure. In November 2014, the Irish Human Rights and Equality Commission (IHREC)[5] was established as Ireland's national equality body. The body is equipped with equivalent powers to its predecessor, and its funding position has improved. The Equality Tribunal was subsumed, along with several employment rights bodies, into the Workplace Relations Commission (WRC) in 2015.[6]

Anti-discrimination legislation was amended in 2021 to take account of a Supreme Court judgment. The Supreme Court held that proceedings before the Workplace Relations Commission, the primary forum for determining discrimination complaints, should generally be heard in public to comply with constitutional provisions on the administration of justice.[7] Prior to this change, WRC hearings were held in private and the names of parties to cases were frequently anonymised. From July 2021, hearings have been conducted in public save where 'special circumstances' exist.[8] There were relatively few other developments in case law. In July 2021, the Minister for Children, Equality, Disability, Integration and Youth launched the first comprehensive review of Irish anti-discrimination law since its enactment over two decades ago.[9] The first phase comprised a public consultation process with written submissions elicited by early December 2021. The scope of the envisaged review is wide-ranging. Its overall aim is to examine the functioning of the relevant acts and their effectiveness in combating discrimination and promoting equality. It is not clear at this juncture what form the review will take following the consultation phase.[10]

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1 See http://www.cso.ie/en/census/census2016reports/. The census due to take place in 2021 was postponed because of the COVID-19 pandemic. It will take place in April 2022.
2 There are no official statistics on Roma.
3 Employment Equality Act 1998, 18 June 1998, http://www.irishstatutebook.ie/eli/1998/act/21/enacted/en/print.
4 Equal Status Act 2000, 26 March 2000, http://www.irishstatutebook.ie/eli/2000/act/8/enacted/en/html.
5 Irish Human Rights and Equality Commission Act 2014, 27 July 2014, http://www.irishstatutebook.ie/2014/en/act/pub/0025/print.html.
6 Workplace Relations Act 2015, 20 May 2015, http://www.irishstatutebook.ie/eli/2015/act/16/enacted/en/pdf.
7 Supreme Court, *Zalewski v Adjudication Officer and Ors.* [2021] IESC 24, 6 April 2021, https://www.courts.ie/acc/alfresco/4b94d66e-d29c-45e8-8f91-ad0ff80257a5/2021_IESC_24%20O'Donnell%20J..pdf/pdf#view=fitH.
8 Section 12(a), Workplace Relations (Miscellaneous Provisions) Act 2021, amending Section 25 ESA and Section 67 EEA.
9 See https://www.gov.ie/en/consultation/066b6-review-of-the-equality-acts/.
10 See European Network of Legal Experts in Gender Equality and Non-Discrimination, Flash Report, Ireland, 'Review of equality legislation', https://www.equalitylaw.eu/downloads/5522-ireland-review-of-equality-legislation-114-kb.

2. Main legislation

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

Irish anti-discrimination legislation consists of the Employment Equality Acts 1998-2021, which govern employment and occupation, and the Equal Status Acts 2000-2018, which cover goods, services, housing/accommodation and education. The Pensions Acts 1990-2018[12] apply to occupational pension schemes. Each law covers the grounds of gender, age, race, religion, family status,[13] disability, civil status, sexual orientation and membership of the Traveller community. A further 'housing assistance' ground was added to the Equal Status Acts in 2015 to prohibit discrimination in providing rental accommodation to people who receive social protection benefits such as housing assistance payments.[14]

Other laws also contain provisions prohibiting discrimination: the Unfair Dismissals Acts 1977-2015,[15] the Prohibition of Incitement to Hatred Act 1989,[16] which criminalises hate speech, and the Intoxicating Liquor Act 2003,[17] Section 19 of which provides for the enforcement of discrimination law in the context of premises licensed for the sale of alcohol.

Irish anti-discrimination legislation goes beyond the EU equality directives, in that the personal scope of the Equal Status Acts 2000-2018 prohibits discrimination not just on grounds of race and gender, but also on the grounds of age, civil status, disability, family status, religion, sexual orientation, membership of the Traveller community and receipt of housing assistance. Nationality-based discrimination is also expressly prohibited under the 'race' ground. The definition of disability is broader than in EU law, and reasonable accommodation on that ground must be provided to people accessing goods and services. There is a substantial body of case law on all discriminatory grounds, the bulk of which comprises decisions of the WRC (formerly the Equality Tribunal) and the Labour Court.[18] Studies suggest that under-reporting of discrimination and failure to take action in response to perceived discrimination are significant problems.[19]

Ireland has ratified the main Council of Europe human rights instruments, including the Revised European Social Charter, but not Protocol 12 to the European Convention on Human Rights. It has also ratified most of the primary United Nations instruments, with ratification of the UN Convention on the Rights of Persons with Disabilities in 2018. Ireland is a dualist state, meaning that for international law to be enforceable in the Irish legal system, it must be transposed by means of legislation into the national legal order. The

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

12 Pensions Act 1990, 24 July 1990, http://www.irishstatutebook.ie/eli/1990/act/25/enacted/en/print.html, amended by Section 22 of the Social Welfare (Miscellaneous Provisions) Act 2004, http://www.irishstatutebook.ie/eli/2004/act/9/section/22/enacted/en/html#sec22; Section 27 of the Social Welfare, Pensions and Civil Registration Act 2018, http://www.irishstatutebook.ie/eli/2018/act/37/section/27/enacted/en/html#sec27.

13 The family status ground covers people in defined relationships of dependency, such as parents of children and carers of persons with disabilities (Section 2(1) ESA). It would include same-sex families, but it is not apparent from the case law whether any such families have invoked the ground.

14 Equality (Miscellaneous Provisions) Act 2015, 10 December 2015, http://www.irishstatutebook.ie/eli/2015/act/43/enacted/en/pdf.

15 Unfair Dismissals Acts 1997-2015, 6 April 1997, http://www.lawreform.ie/_fileupload/RevisedActs/WithAnnotations/HTML/EN_ACT_1977_0010.htm.

16 Prohibition of Incitement to Hatred Act 1989, 29 November 1989, http://www.irishstatutebook.ie/eli/1989/act/19/enacted/en/html.

17 Intoxicating Liquor Act 2003, 14 July 2003, http://www.irishstatutebook.ie/eli/2003/act/31/enacted/en/print#sec19.

18 The determinations of both bodies are published at https://www.workplacerelations.ie/en/.

19 See, for example, Equality and Rights Alliance (2013), *Access to Justice and Under-Reporting of Discrimination and Human Rights Abuses*; McGinnity, F., Grotti, R., Kenny, O., and Russell, H. (2017), *Who experiences discrimination in Ireland? Evidence from the CSO Equality Modules*, Dublin, ESRI, https://www.ihrec.ie/app/uploads/2017/11/Who-experiences-discrimination-in-Ireland-Report.pdf.

main international convention that has been transposed into Irish law is the European Convention on Human Rights, which was incorporated by means of the European Convention on Human Rights Act 2003.[20]

3. Main principles and definitions

Direct discrimination is defined in the anti-discrimination laws as treating one person less favourably than another person is treated, has been treated or would be treated in a similar situation on any of the discriminatory grounds. This prohibition includes discrimination by association, and discrimination on a discriminatory ground that exists, existed but no longer exists, may exist in the future, or is imputed to the person concerned. Indirect discrimination is defined as occurring where an apparently neutral provision would put a person covered by one of the discriminatory grounds at a particular disadvantage compared with other persons. This differential impact may be permitted where it can be objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary. Harassment is defined as any unwanted conduct related to a discriminatory ground, which has the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person. This conduct can include acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material. Victimisation covers any person who claims discrimination, instigates proceedings, supports a complainant, acts as a comparator or a witness to an incident that has given rise to a complaint, opposes discrimination by lawful means or gives notice of an intention to do any of the above, and who, as a result, suffers dismissal or adverse treatment. Instructions to discriminate are expressly prohibited under the Employment Equality Acts and are covered to an extent under the Equal Status Acts by the prohibition of the procurement of discrimination.

The Employment Equality Acts 1998-2021 provide that, where a person who has a disability can perform the duties of the post with or without the assistance of 'appropriate measures', they will be deemed competent under the Acts. The employer has an obligation to take appropriate measures to enable a person with a disability to have access to employment, to participate or advance in employment and to undergo training unless such measures would impose a disproportionate burden on the employer. To determine what amounts to a disproportionate burden, account must be taken of the costs of the measure in question, the scale and financial resources of the employer, and the possibility of obtaining public funding or other assistance. Under the Equal Status Acts 2000-2018, a provider of goods or services must do all that is reasonable to accommodate the needs of a person with a disability by providing special treatment or facilities without which it would be impossible or unduly difficult for the person to avail themselves of the goods or services in question. This duty is subject to a nominal cost ceiling, which varies according to the scale of the organisation and the resources available to it.

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

[20] European Convention on Human Rights Act 2003, 30 June 2003, http://www.irishstatutebook.ie/eli/2003/act/20/enacted/en/print.html.

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

Multiple discrimination is not explicitly prohibited.

4. Material scope

The Employment Equality Acts 1998-2021 apply to the field of employment and vocational training and do not distinguish between public and private sector employees. Discrimination is prohibited in access to employment, conditions of employment (including pay), training and experience for or in relation to employment, promotion, re-grading or classification of posts, and advertisements. Employment agencies and agency workers are also covered.

The Equal Status Acts 2000-2018 prohibit discrimination in relation to goods and services supplied by the private and public sectors, including education and housing/accommodation. Social protection and social advantages are not explicitly mentioned but are covered according to case law.[21] The main compliance issue relates to a provision that exempts any action required by law from scrutiny.[22]

5. Enforcing the law

Complaints under the Employment Equality Acts 1998-2021, the Equal Status Acts 2000-2018 and the Pensions Acts 1990-2018 may be brought before the Workplace Relations Commission (WRC). The WRC assumes an investigative role in the hearing of complaints, complainants may represent themselves, and costs may not be awarded against either party. No fees are payable and WRC proceedings are relatively informal. The option of mediation is available. A mediated settlement agreed by the parties is legally binding and its terms can be enforced at the Circuit Court. WRC employment determinations may be appealed to the Labour Court, while equal status appeals are heard by the Circuit Court. Labour Court and Circuit Court determinations can be appealed on a point of law to the High Court.

Claims are brought before the relevant body by way of application using online forms. Equal Status Acts complaints are subject to an additional requirement: the service provider must be notified in writing of the incident and of the complainant's intention to seek redress. Hearings before the WRC are held in public, save in 'special circumstances'. The decisions of the WRC are available for public inspection, since they are published on its website. Due to the COVID-19 pandemic, considerably fewer WRC hearings were conducted in 2020 than in 2019, leading to a 46 % decrease in the number of decisions delivered.[23] At the time of writing, data for 2021 was not available.

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21 On social protection, see, for example, Equality Tribunal, *McQuaid v Department of Social Protection*, DEC-S2014-015, 2 October 2014, https://www.workplacerelations.ie/en/Cases/2014/October/DEC-S2014-015.html. Re social advantages, see, for example, Equality Tribunal, *Thompson v Iarnród Éireann*, DEC-S2009-015, 2 March 2009, https://www.workplacerelations.ie/en/Cases/2009/March/DEC-S2009-015-Full-Case-Report.html. Chapter 3.2.6 discusses ambiguity in the case law on social advantages.

22 Section 14(1)*(a)*(i), http://www.irishstatutebook.ie/eli/2000/act/8/enacted/en/print#sec14.

23 Workplace Relations Commission (2021), *Annual Report 2020*, p. 22, https://www.workplacerelations.ie/en/publications_forms/corporate_matters/annual_reports_reviews/annual-report-2020.pdf.

Complaints about discrimination involving licensed premises (i.e. pubs etc.) are heard by the District Court, rather than the WRC. The major impact of this change, effected in 2003, has been increased costs and procedural complexity for complainants. Members of the Traveller community have been particularly affected, according to the European Commission against Racism and Intolerance (Chapter 6.1(b)).

Organisations may represent an individual complainant at the WRC and the Labour Court if authorised to do so by the complainant, but not before the Circuit Court or the High Court. Trade unions regularly represent their members. Organisations are not permitted to bring a complaint, with the exception of the Irish Human Rights and Equality Commission (IHREC). IHREC enjoys legal standing to bring complaints to the WRC relating to patterns of discrimination, discriminatory advertising or the contents of a collective agreement. It can also provide an individual complainant with legal representation and/or legal advice. IHREC granted legal assistance to 77 new applicants in 2020. Of these applications, 22 were for legal advice only, with the remaining 55 applicants also receiving legal representation. At the beginning of 2020, the Commission was providing legal advice and representation to 53 individuals, and legal advice only to a further 86 people (see Chapter 7). Data for 2021 was not available at the time of writing.

The legislation provides for a shift in the burden of proof in non-discrimination cases where the facts established suggest that there is a prima facie case of discrimination. The use of statistics is permitted, but is not required, in order to raise a prima facie case.

The Employment Equality Acts 1998-2021 provide for a broad range of remedies: compensation, orders for employers to take specific courses of action, reinstatement and re-engagement. All employment contracts are deemed to have an equality clause, which transforms any provisions of the contract that would otherwise give rise to unlawful discrimination. All discriminatory provisions in collective agreements are deemed null and void, and it is not possible to contract out of the terms of the equality legislation. There are maximum limits on financial awards. In the context of employment, those limits are a maximum of two years' pay, and EUR 13 000 where the complainant was not an employee of the respondent, with equal pay arrears going back three years. Compensation up to a ceiling of EUR 15 000, is provided for under the Equal Status Acts 2000-2018. Service providers can also be directed to take specific courses of action. Under both sets of Acts, the financial sanctions are much lighter than those provided for in the case of gender discrimination. This suggests that the sanctions available for the non-gender grounds may not be effective, proportionate or dissuasive. Injunctive relief is not available before the Workplace Relations Commission or the Labour Court; such action may only be taken by the ordinary courts.

A binding 3 % quota applies to the employment of persons with disabilities in the civil and public service. The Government has undertaken to progressively increase the statutory target towards 6 % by 2024.[24] The Higher Education Authority oversees a range of measures that provide support to distinct categories of students covered by the discriminatory grounds, including mature students and students with disabilities.[25] Additional English language support is provided to migrant children in schools.

IHREC is the primary vehicle through which dialogue and consultation with NGOs and the social partners takes place. It is equipped with a range of relevant statutory powers and

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

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

functions, including the power to establish advisory committees and to draft codes of practice.

6. Equality bodies

The Equality Authority was merged with the Irish Human Rights Commission to form the Irish Human Rights and Equality Commission (IHREC).[26] IHREC, which was established on 1 November 2014, is an independent body mandated to work towards the elimination of discrimination, promote equality of opportunity, provide information to the public on anti-discrimination law, and review various legislative enactments including the primary anti-discrimination laws. It fulfils these functions by, *inter alia*, conducting research, raising awareness, reviewing legislation and drafting statutory codes of practice. Two codes of practice drafted by IHREC were awaiting ministerial approval as at the end of December 2021. The first is on equal pay and the second is a revised code on sexual harassment and harassment (on the nine discrimination grounds) at work. IHREC has the power to instigate litigation in its own name and to assist litigants. It is authorised to conduct inquiries and to carry out equality reviews and equality audits. IHREC issued several invitations to conduct equality audits in 2019, following equality reviews undertaken the previous year. The audits are aimed at securing the cessation of less favourable treatment on the race ground in access to homeless and social housing services, the extension of the practice of non-supervision of urine samples to addiction treatment services nationwide, and the provision of interpreting services for people accessing primary healthcare. The Commission's 2020 annual report notes that discriminatory practices had been discontinued in most instances, while some dialogue between it and public bodies was ongoing.[27] The Commission has the full range of competences set out under Article 13 of the Racial Equality Directive. The Department of Children, Equality, Disability, Integration and Youth, under the direction of the minister, funds IHREC, which reports to the Oireachtas (the Irish Parliament).

7. Key issues

Section 42 of the Irish Human Rights and Equality Commission Act 2014 places a positive duty on public bodies to have due regard to human rights and equality in carrying out their functions. IHREC assists public bodies to comply with the positive duty; it has produced guidance and is empowered to draw up codes of practice.

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

[26] Irish Human Rights and Equality Commission Act 2014, 27 July 2014, http://www.irishstatutebook.ie/2014/en/act/pub/0025/print.html.
[27] IHREC (2021), *Annual Report 2021*, pp. 42-45.

INTRODUCTION

The national legal system

The basic law of Ireland is the Constitution, Bunreacht na hÉireann, of 1937. It establishes the State and its institutions, sets out the fundamental principles guiding the governance of the State and contains an entrenched bill of rights.[28] The Constitution takes precedence over all other sources of law, subject to Article 29.4.6°, which ensures that nothing in the Constitution can invalidate laws enacted, acts done or measures adopted by the State where these are necessitated by membership of the EU. Article 15.4 prohibits the Oireachtas (Parliament) from enacting laws that conflict with the Constitution, including its human rights guarantees, while Article 34.3.2° vests in the High Court, Court of Appeal and Supreme Court the express power of judicial review of legislation.

The Constitution provides that the sole law-making body in the State is the Oireachtas.[29] Legislation must be passed by both houses of the Oireachtas and is then signed into law by the President. Legislation is the most significant source of non-discrimination measures.

Ireland is a dualist state; ratification of an international treaty does not automatically result in its provisions becoming part of the internal legal system.[30] In order to become enforceable under domestic law, a treaty must be incorporated either through an Act of the Oireachtas or by an amendment to the Constitution. The European Convention on Human Rights Act 2003 gave further effect to the provisions of the Convention under Irish law.[31] It places obligations on organs of the State to comply with the Convention and provides remedies for individuals whose rights have been infringed.

List of main legislation transposing and implementing the directives

Employment Equality Acts 1998-2021[32]
Grounds covered: age, civil status, disability, family status, gender, race, religion, sexual orientation and membership of the Traveller community
Material scope: Employment (including occupation and vocational training)

Equal Status Acts 2000-2018[33]
Grounds covered: age, civil status, disability, family status, gender, race, religion, sexual orientation, membership of the Traveller community and receipt of housing assistance.
Material scope: Access to goods and services, housing/accommodation, education, registered clubs

Pensions Acts 1990-2018[34]
Grounds covered: age, civil status, disability, family status, gender, race, religion, sexual orientation and membership of the Traveller community
Material scope: Occupational pensions, occupational benefit schemes

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28 Constitution of Ireland, 29 December 1937, http://www.irishstatutebook.ie/eli/cons/en/html.
29 Ireland has a bicameral system, which means that there are two houses of the Oireachtas. The lower house is Dáil Éireann and the upper house is Seanad Éireann (the Senate). Legislative powers are granted to the two houses by virtue of Article 15.2 of the Constitution.
30 Oireachtas Library and Research Service (2016), *International human rights law: operation and impact*, https://www.oireachtas.ie/parliament/media/housesoftheoireachtas/libraryresearch/spotlights/20160609_intlHR_spotlight_095201.pdf.
31 European Convention on Human Rights Act 2003, 30 June 2003, http://www.irishstatutebook.ie/eli/2003/act/20/enacted/en/print.html.
32 Employment Equality Acts 1998-2021, http://revisedacts.lawreform.ie/eli/1998/act/21/revised/en/html.
33 Equal Status Acts 2000-2018, http://revisedacts.lawreform.ie/eli/2000/act/8/revised/en/html.
34 Pensions Act 1990, 24 July 1990, http://www.irishstatutebook.ie/eli/1990/act/25/enacted/en/print.html; amended by Section 22 of the Social Welfare (Miscellaneous Provisions) Act 2004, 25 March 2004, http://www.irishstatutebook.ie/eli/2004/act/9/section/22/enacted/en/html#sec22.

Irish Human Rights and Equality Commission Act 2014[35]
Grounds covered: age, civil status, disability, family status, gender, race, religion, sexual orientation, membership of the Traveller community and receipt of housing assistance
Material scope: Establishment of Irish Human Rights and Equality Commission as national equality body; powers and functions of IHREC

Workplace Relations Act 2015[36]
Grounds covered: age, civil status, disability, family status, gender, race, religion, sexual orientation, membership of the Traveller community and receipt of housing assistance
Material scope: Establishment of Workplace Relations Commission (WRC) as primary forum for hearing anti-discrimination complaints; powers and functions of WRC

[35] Irish Human Rights and Equality Commission Act 2014, 27 July 2014, http://www.irishstatutebook.ie/eli/2014/act/25/enacted/en/html.
[36] Workplace Relations Act 2015, 20 May 2015, http://www.irishstatutebook.ie/eli/2015/act/16/enacted/en/print.html.

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

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

General clause

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

The grounds covered implicitly by this provision include sex/gender, race, language, religious or political opinions, age, marital status, pedigree, and disability.[37]

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

Specific clauses

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

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

These provisions are directly applicable.

These provisions cannot be enforced against private individuals (although they can be enforced against the State). Although the matter requires further judicial interpretation, it seems that the general equality clause cannot be enforced against private actors.[38] Article 44.2.3° cannot be enforced against private actors.[39] The other two provisions listed above explicitly apply only to state activities.

[37] Supreme Court, *Murphy v Ireland and Others* [2014] IESC 19, at paras. 34-35; *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321; *An Blascaod Mór Teoranta v Commissioners of Public Works* [2000] 1 IR 6; *MD v Ireland* [2012] IESC 12; *DX v Buttimer* [2012] IEHC 175; *Fleming v Ireland* [2013] IESC 19.

[38] High Court, *Equality Authority v Portmarnock Golf Club* [2005] IEHC 235, http://www.bailii.org/ie/cases/IEHC/2005/H235.html: O'Higgins J. found that 'the equality guarantee does not impose obligations on citizens in their private relations'. The constitutional issue was not dealt with on appeal. See further: Hogan, G., Whyte, G., Kenny, D., and Walsh, R. (2018), *Kelly: The Irish Constitution*, 5th edition, Dublin, Bloomsbury, at pp. 1572-1573.

[39] Supreme Court, *McGrath and O'Ruairc v The Trustees of Maynooth College* [1979] ILRM 166.

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

The following grounds of discrimination are explicitly prohibited in the main legislation transposing and implementing the two EU anti-discrimination directives (as listed in the Introduction above): age, civil status, disability, family status, gender, race, religion, sexual orientation, membership of the Traveller community and receipt of housing assistance.[40] It appears that, while religious beliefs are covered, the provisions do not adequately prohibit discrimination on the grounds of religion *or* belief.

2.1.1 Definition of the grounds of unlawful discrimination within the directives

a) Racial or ethnic origin

The race ground under both the Employment Equality Acts (EEA) and the Equal Status Acts (ESA) covers people who are of different 'race, colour, nationality or ethnic or national origin'.[41] None of these concepts are defined.

According to case law, 'national origin' is 'acquired by a person at the time of birth and connects that person with one or more groups of people who can be described as a "nation"'.[42] 'Nationality' is in effect equated with citizenship.[43]

Racial origin

Case law has not considered the meaning of 'race' as such.[44]

Ethnic origin

Under EEA and ESA, the race ground prohibits discrimination against people who are *inter alia* of a different 'ethnic or national origin'. According to the High Court, 'ethnic origin' under ESA will usually refer to an immutable characteristic over which an individual has no

[40] With effect from 1 January 2016, 'housing assistance' may be invoked as a discriminatory ground but only in the context of accommodation, which is covered by the Equal Status Acts. People in receipt of rent supplement, housing assistance payments or other social welfare payments cannot be discriminated against in relation to the provision of accommodation or related services or amenities. Landlords, letting agents and property advertisers are also prohibited from publishing or displaying advertisements which indicate an intention to discriminate on the housing assistance ground: Ireland, Equality (Miscellaneous Provisions) Act 2015, 10 December 2015, http://www.irishstatutebook.ie/eli/2015/act/43/enacted/en/html.

[41] Section 6(2)*(h)* EEA, Section 3(2)*(h)* ESA.

[42] Equality Tribunal, *Curran v The Department of Education & Science*, DEC-E2009-075, 3 September 2009, at Para. 5.5, https://www.workplacerelations.ie/en/Cases/2009/September/DEC-E2009-075-Full-Case-Report.html.

[43] Equality Tribunal, *Sabherwal v ICTS (UK) Ltd.*, DEC-S2008-037, 11 June 2008, https://www.workplacerelations.ie/en/Cases/2008/June/DEC-S2008-037-Full-Case-Report.html; Labour Court, *Kerry County Council v Jurczewski*, EDA1311, 15 May 2013, https://www.workplacerelations.ie/en/Cases/2013/May/EDA1311.html.

[44] The Labour Court conflated the terms 'race', 'racial origin' and 'ethnic origin' in determining that people of the EU Member States could not be regarded en masse as a racial or ethnic group in Labour Court, *Dublin Institute of Technology v Awojuola,* EDA 1335, 23 December 2013, https://www.workplacerelations.ie/en/Cases/2013/December/EDA1335.html. The case involved a challenge to the criteria used to set admission fees for a course of education in a third-level institution. Lower fee rates applied to EU citizens and persons who had been resident in the EU for at least three of the previous five years. The complainant, a Nigerian national, contended that the criteria gave rise to indirect discrimination on the race ground. In relation to the 'colour' aspect of the ground, according to the Labour Court it 'could readily be accepted that substantially more white people are citizens of the EU Member States than black people and that fewer black people than white people meet the residency criteria for the EU rate of fees chargeable by the Respondent.' However, the appropriate pool for comparison was not white and black people in general: 'In order to make out a prima facie case of indirect discrimination it would be necessary for the Complainant to show that a significant imbalance in racial makeup defined by colour exists between those actually charged the EU rate of fees compared to those charged the non-EU rate. No such evidence was adduced, and the Court could not merely assume that such an imbalance exists.'

control, while it has been recognised there are 'instances where an individual belonging to one nationality or ethnic group might elect to adhere to another.'[45] The Court approved of the definition of 'ethnic group' set out by the British House of Lords in *Mandla v Dowell-Lee.*[46] In that case, Lord Fraser found that such a group must regard itself and be regarded by others as a distinct community by virtue of certain characteristics: '(1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition to those two essential characteristics the following characteristics are, in my opinion, relevant: (3) either a common geographical origin, or descent from a small number of common ancestors (4) a common language, not necessarily peculiar to the group (5) a common literature peculiar to the group (6) a common religion different from that of neighbouring groups or from the general community surrounding it (7) being a minority or being an oppressed or a dominant group within a larger community'.[47] Applying this formula, the High Court concluded that, for the purposes of ESA, farmers are an occupational group, not an ethnic group. The complainant could not, therefore, base a discrimination complaint on his status as a member of the farming community.[48]

Membership of the Traveller community is a separate ground. The 'Traveller community' is defined as 'the community of people commonly known and identified (both by themselves and others) as people with a shared history, culture and traditions including, historically a nomadic way of life on the island of Ireland.'[49] On 1 March 2017 the Taoiseach (Prime Minister) announced that the State formally recognised Travellers as an ethnic group.[50] According to the Taoiseach's statement, the policy change would 'create no new individual, constitutional or financial rights'.[51] Nonetheless, this development has affected how existing provisions are *interpreted*. In 2018, the Workplace Relations Commission (the first instance forum for complaints under EEA and ESA) confirmed for the first time that Travellers were covered by the race ground as well as the Traveller community ground under EEA and ESA.[52] The primary ESA case to reach the superior courts on appeal

[45] *Fitzgerald v Minister for Community, Equality and Gaeltacht Affairs* [2011] IEHC 180, at Para. 10, https://www.courts.ie/view/judgments/429f1cfd-c67e-4b94-a4fa-602c5f594887/483b14dc-745f-4087-9876-2f4ba9870209/2011_IEHC_180_1.pdf/pdf.

[46] House of Lords, *Mandla v Dowell Lee* [1983] 2 AC 548, 24 March 1982, http://www.bailii.org/uk/cases/UKHL/1982/7.html.

[47] Per Lord Fraser in *Mandla v Dowell Lee* at p. 562.

[48] *Mandla* was applied by the Equality Tribunal in finding that being a 'Catholic Irish Republican' did not constitute a different ethnicity in the context of the case: *Cregan v Coillte Teoranta*, DEC-E2016-086, 3 June 2016, https://www.workplacerelations.ie/en/Cases/2016/June/DEC-E2016-086.html.

[49] Section 2(1) EEA, Section 2(1) ESA.

[50] See https://www.oireachtas.ie/en/debates/debate/dail/2017-03-01/.

[51] The High Court considered the legal status of the policy change in a 2017 case. Justice Eagar held that the Taoiseach's statement had 'no legal effect' and declined an application to amend the reliefs sought in a judicial review application to include, *inter alia*, discrimination on the basis of ethnicity. The applicant Traveller family had sought a series of orders directing the respondent county council to fulfil the duties imposed on it under statute to provide accommodation. According to the Court, while it has been open to the applicants to ground their application on ethnic bias, they did not take that opportunity when applying for leave to apply for judicial review; the amendments sought would amount to an entirely different case to that which had been made by the applicants to date: *Mongans v Clare County Council* [2017] IEHC 709, 27 October 2017, https://www.courts.ie/view/judgments/d491a87c-1b12-4e0f-a68c-fb259ee203d5/b1329117-c47c-407a-b75c-cac9aa2cded2/2017_IEHC_709_1.pdf/pdf.

[52] Several of these cases reference the 2017 recognition of Traveller ethnicity: Workplace Relations Commission, *O'Donoghue v The Minister for Social Protection*, DEC-S2018-014, 5 June 2018, https://www.workplacerelations.ie/en/Cases/2018/June/DEC-S2018-014.html; Workplace Relations Commission, *Sherlock and 8 others v Environmental Health Services*, DEC-S2018-017, 14 September 2018, https://www.workplacerelations.ie/en/Cases/2018/September/DEC-S2018-017.html; Workplace Relations Commission, *Mr. & Mrs. S & their children v Clare County Council & Department of Social Protection*, DEC-S2018-029, 12 December 2018, https://www.workplacerelations.ie/en/Cases/2018/December/DEC-S2018-029.html. See also Workplace Relations Commission, *Michael and Anne O'Donoghue and their children v Clare County Council*, DEC-S2018-002, 27 February 2018, https://www.workplacerelations.ie/en/Cases/2018/February/DEC-S2018-002.html.

proceeded exclusively as a Traveller-ground case.[53] The Court omitted to consider the application of the Racial Equality Directive, even though the amicus submission of the Equality Authority argued that the Directive should be deployed in interpreting the ESA provisions on indirect discrimination as applying to the Traveller ground.[54] It should now be clear that the Directive is applicable in all cases involving Travellers and falling within its material scope.

b) Religion or belief

Under ESA and EEA, the 'religion ground' applies as between people where 'one has a different religious belief from the other, or that one has a religious belief and the other has not'.[55] 'Religious belief' is defined as 'religious background or outlook'.[56] Religious background has been interpreted as affording protection to members of 'a specific faith', while the term 'outlook' covers 'specific attitudes which go with a religious belief'.[57] Being a 'spiritual guide' does not fall within the ground, since it is not specific to a particular faith, or to a set of religious beliefs.[58]

While Irish forums have yet to consider the definition of religion set out in the *Achbita* case,[59] the Labour Court has determined that protection extends to manifestations of beliefs relating to religious teaching or observance. In an employment context, however, the right to engage in the practice or manifestation of religion could not be exercised 'in a way that is disruptive of the business of the employer or constitutes an interference with the legitimate interests of the employer.'[60]

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.

The Labour Court appears to accept that humanist beliefs may be covered, but apparently as constituting a lack of religious belief similar to atheism[61] and not because humanism could be considered a 'religious belief'.[62] In a 2016 decision, the WRC rejected the complaint of an individual who was not permitted to wear a colander on his head for the purposes of a photograph when he was making an application to renew his driver's licence.[63] The complainant argued that the action was discriminatory, as wearing such an item was a feature of his religious beliefs as a 'Pastafarian', and the respondent's guidelines

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53 Supreme Court, *Stokes v Christian Brothers High School* [2015] IESC 13, 24 February 2015, https://www.courts.ie/view/judgments/7c76c785-7af6-49db-9478-be182b899693/4b1b534e-7778-4a7d-b01f-bddb28538e09/2015_IESC_13_2.pdf/pdf.

54 See https://www.ihrec.ie/app/uploads/download/pdf/mary_stokes_v_christian_brothers_high_school_clonmel_ors__13_dec_2012_.pdf.

55 Section 6(2)*(e)* EEA; Section 3(2)*(e)* ESA.

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

57 Equality Tribunal, *A Teacher v A National School*, DEC-E2014-097, 30 December 2014, https://www.workplacerelations.ie/en/Cases/2014/December/DEC-E2014-097.html.

58 Workplace Relations Commission, *Jones v CPL PLC t/a CPL Recruitment Agency*, ADJ-00010354, 8 June 2018, https://www.workplacerelations.ie/en/cases/2014/december/dec-e2014-097.html.

59 Court of Justice of the European Union, judgment of 14 March 2017, *Achbita v G4S Secure Solutions NV*, C-157/15, http://curia.europa.eu/juris/liste.jsf?num=C-157/15.

60 Labour Court, *Tipperary County Council v McAteer*, EDA 3/2015, 30 January 2015, https://www.workplacerelations.ie/en/Cases/2015/January/EDA153.html.

61 A complaint of direct discrimination comprising less favourable treatment between an atheist pupil and Roman Catholic students at a school was upheld in: Workplace Relations Commission, *A Student v A School,* ADJ-00023650, 24 April 2020, https://www.workplacerelations.ie/en/cases/2020/april/adj-00023650.html.

62 Labour Court, *Department of Defence v Barrett*, EET081, 20 May 2008, https://www.workplacerelations.ie/en/Cases/2008/May/EET081.html.

63 Workplace Relations Commission, *Mulryan v Road Safety Authority*, DEC-S2016-018, 9 March 2016, https://www.workplacerelations.ie/en/Cases/2016/March/DEC-S2016-018.html, applied in Workplace Relations Commission, *Hamill v Dublin City Council*, ADJ-00011817, 31 October 2018, https://www.workplacerelations.ie/en/Cases/2019/October/ADJ-00011817.html.

permitted individuals to wear head coverings for religious reasons. Having reviewed the definitions of religion and philosophical belief developed in case law under the UK Equality Act 2010, the WRC determined that the belief system in question did not constitute a 'religious belief' for the purposes of ESA. In reaching that conclusion the WRC referred to the fact that Pastafarianism uses 'satire as an effective tool of communication' and to the 'occasional and selective nature' of the complainant's use of the colander. While the precise basis for the finding is not clear, the WRC's reference to a definition of philosophical belief suggests that it may be prepared to interpret the provision broadly.

c) Disability

Under EEA and ESA, the disability ground applies where 'one is a person with a disability and the other either is not or is a person with a different disability.'[64] Disability is defined as:

> '(a) the total or partial absence of a person's bodily or mental functions, including the absence of a part of a person's body;
> (b) the presence in the body of organisms causing, or likely to cause, chronic disease or illness;
> (c) the malfunction, malformation or disfigurement of a part of a person's body;
> (d) a condition or malfunction which results in a person learning differently from a person without the condition or malfunction; or
> (e) a condition, illness or disease which affects a person's thought processes, perception of reality, emotions or judgment or which results in disturbed behaviour.'[65]

The ground covers those that have a disability at present, a history of disability, may have a disability in the future, or are imputed a disability.[66] Direct discrimination based primarily on a previous disability was established in a 2019 case.[67] The complainant had been on sick leave due to depression for approximately 16 months. She was certified fit to return to normal duties by her doctor and psychiatrist and did not seek reasonable accommodation. The complainant argued that she was treated less favourably following her return to work because of her previous disability. Specifically, she argued that, because of her history of mental illness, she had been placed on reduced working hours, assigned 'menial tasks', subjected to surreptitious monitoring of her work, placed on four weeks of leave and denied training opportunities. The WRC agreed that this treatment had occurred and was 'directly related' to the complainant's disability, without elaborating precisely on how the complainant was covered by the disability ground. The respondent was directed to pay EUR 25 000 in compensation. Discrimination as between persons with different disabilities was established in a 2021 ESA case.[68] The complainant, who used an ostomy bag, was treated less favourably than persons with mobility impairments in being questioned about her disability by security staff when trying to access bathrooms reserved for persons with disabilities. In 2018, the Labour Court held that the ground operates asymmetrically, so that persons without disabilities do not have *locus standi* to bring a disability-ground complaint.[69]

The definition of disability does not fully accord with the concept adopted by the Court of Justice of the European Union (CJEU) in *HK Danmark (Ring and Skouboe Werge)*,[70] in that

[64] Section 28(1)*(f)* EEA; Section 3(2)*(g)* ESA.
[65] Section 2(1) EEA; Section 2(1) ESA.
[66] Section 2(1) EEA; Section 3(1)*(a)* ESA.
[67] Workplace Relations Commission, *An Employee v An Employer*, DEC-E2018-026, 3 January 2019, https://www.workplacerelations.ie/en/Cases/2018/December/DEC-E2018-026.html.
[68] Workplace Relations Commission, *Davy v MCD Productions*, ADJ-00024784, 10 February 2021, https://www.workplacerelations.ie/en/cases/2021/february/adj-00024784.html.
[69] Labour Court, *Navan Education Centre v Lydon*, EDA 1848, 11 December 2018, https://www.workplacerelations.ie/en/Cases/2018/December/EDA1848.html. This decision is discussed in Chapter 5(a).
[70] Joined Cases C-335/11 and C-337/11.

it does not explicitly refer to barriers that may hinder the full and effective participation of a person in professional life on an equal basis with others. In practice, however, when applying the duty to reasonably accommodate, adjudicators require employers to comprehensively consider how work practices and the general employment environment might be adjusted so as to eliminate barriers to participation in employment.[71] The Irish definition does not require a condition to last a long time in order to qualify as a disability,[72] nor does it make the distinction between disability and illness.[73] In 2019, however, the Labour Court issued a determination which appears to endorse the more restrictive understanding of disability developed by the CJEU in the sense that a limitation arising from an illness must be long term. The Court found that a relatively short illness does not amount to a disability that hinders 'the full and effective participation of the person concerned in professional life on an equal basis with other workers'.[74] Its decision omitted to consider the 'minimum requirements' and non-retrogression principles set out in Directive 2000/78. It remains to be seen how the law will develop.

A 2018 case established that infertility was a disability for the purposes of EEA, as it could be said to result from a 'malfunction … of a part of a person's body' as set out under Section 2(1)*(c)*.[75] The respondent in a 2019 complaint disputed the designation of fibromyalgia as a 'disability'.[76] In light of the medical evidence presented by both parties, the WRC concluded that the complainant's fibromyalgia constituted 'a condition, illness or disease which affects a person's thought processes, perception of reality, emotions or judgment or which results in disturbed behaviour', under Section 2(1)*(e)* EEA. The manifestations of the condition included excessive fatigue, difficulty coping and concentrating, mood variation and generalised muscle pain. They were long-term, had a significant impact on the complainant, and hindered her full and effective participation in the workplace on an equal basis with others. Thus, the condition amounted to a disability in line with *HK Danmark*, as well as Irish law. Stress caused by the illness of a relative or loved one is not 'an abnormality or malfunction', according to the Labour Court. It is 'a normal human condition' and cannot be classified as a disability.[77]

d) Age

The age ground is defined as referring to people of different ages,[78] but in employment applies only in relation to persons above the maximum age at which a person is statutorily obliged to attend school.[79] In access to goods and services it does not apply to persons aged under 18.[80]

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71 Supreme Court, *Nano Nagle School v Daly* [2019] IESC 63, 31 July 2019, https://www.courts.ie/view/judgments/404f4f32-284e-44d1-ab93-91aadc4e4d09/c26bcc73-99ab-4fa5-9d71-b35590fd120f/2019_IESC_63_2.pdf/pdf.

72 See, for example, Labour Court, *Cregg Labour Solutions v Cahill*, EDA1634, 1 December 2016, http://www.workplacerelations.ie/en/Cases/2016/December/EDA1634.html.

73 A person who has recovered from an illness and returns to employment following sick leave will not automatically have a disability as defined under EEA; such a finding rests on the facts. See Workplace Relations Commission, *An Employee v A Cleaning Company*, DEC-E2017-065, 4 September 2017, https://www.workplacerelations.ie/en/Cases/2017/September/DEC-E2017-065.html; Workplace Relations Commission, *Sales Assistant v Retailer*, 25 February 2020, ADJ-00019501, https://www.workplacerelations.ie/en/cases/2020/february/adj-00019501.html.

74 Labour Court, *Houses of the Oireachtas v Hickey,* EDA1918, 11 June 2019, https://www.workplacerelations.ie/en/cases/2019/june/eda1918.html.

75 Workplace Relations Commission, *A Quality Control Assistant v A Grocery Retailer*, ADJ-00005772, 20 March 2018, https://www.workplacerelations.ie/en/cases/2018/march/adj-00005772.html.

76 Workplace Relations Commission, *Costello v Allied Irish Bank plc*, DEC-E2019-007, 13 September 2019, https://www.workplacerelations.ie/en/cases/2019/september/dec-e2019-007.html.

77 Labour Court, *Health Service Executive North West v Killoran*, EDA1830, 30 April 2018, https://www.workplacerelations.ie/en/cases/2018/april/eda1830.html.

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

79 Section 6(3)*(a)* EEA.

80 Section 3(3)*(a)* ESA.

e) Sexual orientation

Sexual orientation is defined as 'heterosexual, homosexual or bisexual orientation', without further elaboration.[81] Case law has not explored the meaning of those terms. Gay and lesbian people have pursued the vast majority of complaints on the ground under both ESA and EEA, with one case referred by a man on the 'bisexual orientation' aspect of the ground.[82]

2.1.2 Multiple discrimination

In Ireland, multiple discrimination is not prohibited by law.

However, complaints may be referred on more than one ground. The legislation specifies that complaints lodged on several grounds must be investigated as a single case but that a decision must be made on each of the claims.[83] In practice, adjudicators deal with the grounds in turn, requiring a case to be established separately on each ground.[84] Even where a complaint succeeds on several discriminatory grounds the applicable compensation limits apply.

In Ireland, the following case law deals with multiple discrimination.

In a limited number of cases, the first instance forum for hearing discrimination law complaints has tacitly recognised multiple discrimination. In an equal pay case, *O'Brien v ComputerScope Limited*,[85] the issues of age and gender were treated together, perhaps because the actual comparators were both of a different gender and a different age to the complainant. In other cases, it was determined that discrimination on one ground was 'compounded' by discrimination on another ground; the role of the two grounds concerned is differentiated in the decisions.[86] *Lindberg v Press Photographers Association of Ireland*[87] is notable for a finding that direct discrimination arose from a *combination* of the race and gender grounds. In the more recent case of *Parris v Trinity College Dublin*[88] the Equality Tribunal accepted in principle that a prima facie case of indirect discrimination could arise from a combination of discriminatory grounds. However, on a request for a preliminary ruling, the CJEU determined that, where a national rule does not constitute discrimination either on the ground of sexual orientation or on the ground of age taken in isolation, there is 'no new category of discrimination resulting from the combination of more than one of those grounds'.[89]

The approach to multiple discrimination adopted in the Tribunal decisions set out above is exceptional and is arguably unlikely to be developed further absent legislative amendment.

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

82 Equality Tribunal, *A Complainant v A Fast Food Franchise*, DEC-S2008-036, 11 June 2008, https://www.workplacerelations.ie/en/cases/2008/june/dec-s2008-036-full-case-report.html.

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

84 In *Superquinn v Freeman* (DEE0211, 14 November 2002) the Labour Court overturned an Equality Tribunal finding apparently on the basis that the first instance body had failed to require the complainant to establish a prima facie case of discrimination on each ground separately: https://www.workplacerelations.ie/en/Cases/2002/November/DEE0211.html.

85 Equality Tribunal, DEC-E2006-030, 1 August 2006, https://www.workplacerelations.ie/en/cases/2006/august/dec-e2006-030-full-case-report.html.

86 Equality Tribunal, *Luzak v Sales Placement Ltd*, DEC-E2011-010, 24 January 2011, https://www.workplacerelations.ie/en/Cases/2011/January/DEC-E2011-010-Full-Case-Report.html; Equality Tribunal, *McDermott v Connacht Gold Cooperative Society Ltd*, DEC-E2011-147, 4 August 2011, https://www.workplacerelations.ie/en/Cases/2011/August/DEC-E2011-147-Full-Case-Report.html.

87 Equality Tribunal, DEC-S2011-041, 5 October 2011, https://www.workplacerelations.ie/en/Cases/2011/October/DEC-S2011-041-Full-Case-Report.html.

88 DEC-P2013-004, 16 December 2013, https://www.workplacerelations.ie/en/Cases/2013/December/DEC-P2013-004.html.

89 Judgment of 24 December 2016, *Parris v Trinity College Dublin and others*, [2016] EUECJ C-443/15, at Para. 80, http://www.bailii.org/eu/cases/EUECJ/2016/C44315.html.

IHREC's submission to the ongoing review of Ireland's anti-discrimination laws calls for an explicit prohibition on intersectional discrimination.[90]

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

In Ireland, discrimination based on a perception or assumption of a person's characteristics is prohibited in national law.

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

> '6(1) For the purposes of this Act and without prejudice to its provisions relating to discrimination occurring in particular circumstances, discrimination shall be taken to occur where -(*a*) a person is treated less favourably than another person is, has been or would be treated in a comparable situation on any of the grounds specified in *subsection (2)* (in this Act referred to as the "discriminatory grounds") which … (iv) is imputed to the person concerned.'

A decision under EEA found that an employee who had been treated less favourably because of her body mass had been subjected to disability discrimination by assumption.[91] The Equality Tribunal did not make a finding as to whether obesity of itself is a disability. Irish law thereby recognises that obesity may be a basis for a disability discrimination complaint, albeit in a different manner from the CJEU judgment in *FOA (Kaltoft) v Billund*.[92]

Section 3(1)*(a)*(iv) ESA states:

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

An Irish citizen born in Indonesia lodged a successful race-ground complaint concerning correspondence issued by the Department of Social Protection.[93] She was sent a series of letters seeking proof of her nationality in the context of accessing child benefit payments. The respondent acknowledged that such correspondence was issued to non-Irish nationals as an anti-fraud measure. The WRC found that the Department's practice was a clear form of direct discrimination in contravention of ESA and that the complainant had been subjected to less favourable treatment based on an assumption as to her race (nationality). An order for EUR 3 000 in compensation was made, and the respondent was directed to review its fraud detection practices for the child benefit scheme to ensure compliance with ESA.[94]

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[90] Irish Human Rights and Equality Commission (2021), *Submission on the Review of the Equality Acts*, pp. 27-31, https://www.ihrec.ie/app/uploads/2022/01/IHREC-Submission-on-the-Review-of-the-Equality-Acts.pdf.

[91] Equality Tribunal, *A Health Service Employee v Health Service Executive*, DEC-E2006-013, 10 April 2006, https://www.workplacerelations.ie/en/Cases/2006/April/DEC-E2006-013-Full-Case-Report.html: the complainant was unlawfully denied access to a post when the respondent imputed a disability to her.

[92] [2014] CJEU Case C-354/13.

[93] Workplace Relations Commission, *Smith v Department of Social Protection*, DEC-S2015-014, 20 October 2015, https://www.workplacerelations.ie/en/Cases/2015/October/DEC-S2015-014.html.

[94] See also Workplace Relations Commission, *Roche v JD Sports*, ADJ-00011879, 31 July 2018, https://www.workplacerelations.ie/en/Cases/2018/July/ADJ-00011879.html: a direct discrimination complaint against a shop, which entailed imputation of a Traveller community identity, was upheld.

b) Discrimination by association

In Ireland, discrimination based on association with persons with particular characteristics is prohibited in national law.

Section 6(1)*(b)* EEA provides:

> '6(1) For the purposes of this Act and without prejudice to its provisions relating to discrimination occurring in particular circumstances, discrimination shall be taken to occur where …
> (*b*) a person who is associated with another person
> (i) is treated, by virtue of that association, less favourably than a person who is not so associated is, has been or would be treated in a comparable situation, and
> (ii) similar treatment of that other person on any of the discriminatory grounds would … constitute discrimination.'

Discrimination by association on the ground of sexual orientation was established in a 2015 case.[95] The complainant, a teacher, was discriminated against when a school principal made insulting comments about her son's sexual orientation. A separate complaint of harassment on the religion ground was also sustained. The WRC awarded the complainant EUR 3 000 in compensation for the breaches of EEA and also directed the respondent to arrange training for the school's board of management and all staff on employment policies, particularly in relation to equality, discrimination and harassment.

Section 3(1)*(b)* ESA states:

> '3(1) For the purposes of this Act, discrimination shall be taken to occur …
> (*b*) where a person who is associated with another person
> (i) is treated, by virtue of that association, less favourably than a person who is not so associated is, has been or would be treated in a comparable situation, and
> (ii) similar treatment of that other person on any of the discriminatory grounds would … constitute discrimination.'

Several complaints of discrimination by association have been established under ESA, many on the Traveller community ground. For example, in *Battles v The Killarney Heights Hotel* the complainant, a Traveller, and her husband, a settled person, had been discriminated against when refused service in a hotel. Mr Battles' claim was that of discrimination by association under Section 3(1)*(b)*.[96] Discrimination by association on the victimisation ground has occurred in a number of cases, such as *O'Brien v Dunnes Stores, Tralee.*[97] A man was refused access to a store some weeks after his brother had been asked

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

[96] Equality Tribunal, DEC-S2004-143/144, 11 October 2004, https://www.workplacerelations.ie/en/Cases/2004/October/DEC-S2004-143-144-Full-Case-Report.html. See also Equality Tribunal, *Sweeney v The Ship Inn, Sligo*, DEC-S2002-032, 30 April 2002, https://www.workplacerelations.ie/en/cases/2002/april/dec-s2002-032.html; *Dooley and Boyne v The Grand Hotel*, DEC-S2002-015/016, 8 March 2002, https://www.workplacerelations.ie/en/cases/2002/march/dec-s2002-015_dec-s2002-016.html; *Feighery v MacMathuna's Pub*, DEC-S2003-051, 4 June 2003, https://www.workplacerelations.ie/en/cases/2003/june/dec-2003-051-full-case-report.html; *Kiernan v The Newbury Hotel,* DEC-S2006-080, 17 November 2006, https://www.workplacerelations.ie/en/cases/2006/november/dec-s2006-080-full-case-report.html; *McDonagh v O'Keeffe, Ocean View Park*, DEC-S2005-161/164, 28 October 2005, https://www.workplacerelations.ie/en/cases/2005/october/dec-s2005-161-164-full-case-report.html (all of which were successful claims of discrimination by association on the Traveller community ground).

[97] Equality Tribunal, *O'Brien v Dunnes Stores, Tralee,* DEC-S2007-038, 30 March 2007, https://www.workplacerelations.ie/en/Cases/2007/March/DEC-S2007-038-Full-Case-Report.html. See also Equality Tribunal, *Palmer v Connacht Hospitality (Group) Ltd. aka Connacht Accommodation Ltd t/a Active*

to leave while he was shopping there. The brother had notified the respondent in writing that he intended to lodge a discrimination complaint. When the complainant tried to enter the shop, he was denied access by a security guard who told him that it was because his brother 'was taking a case to the court'. By suggesting that he was going to refer a complaint, the man's brother was covered by the victimisation ground. The victimisation ground protects people from adverse treatment for using or indicating an intention to use ESA. In being denied access a few weeks later, the complainant was therefore treated less favourably by virtue of his association with someone covered by a discriminatory ground.

National law is in line with the judgment in Case C-303/06, *Coleman v Attridge Law and Steve Law.*[98] In that case, the CJEU determined that protection from direct discrimination and harassment under Directive 2000/78 is not limited solely to persons possessing the protected characteristic in question. Thus, the mother of a child with a disability could claim that an employer treated her less favourably and engaged in harassment because of her child's disability.[99] To date, a few WRC decisions have referred to Case C-83/14, *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminastsia*, but since none pertained to indirect discrimination by association, it remains to be seen whether domestic law is aligned with that judgment.[100]

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

a) Prohibition and definition of direct discrimination

In Ireland, direct discrimination is prohibited in national law. It is defined under both EEA and ESA as occurring where a person is treated less favourably than another person is, has been or would be treated in a comparable situation on any of the discriminatory grounds, which exists, existed but no longer exists, or may exist in the future.[101]

As in previous years, several complaints of direct discrimination were upheld in 2021.

Examples of EEA cases include:

Age ground: access to employment;[102] conditions of employment;[103] discriminatory dismissal.[104]

Fitness Leisure Club at the Connacht Hotel, DEC-S2015-009, 29 June 2015, https://www.workplacerelations.ie/en/Cases/2015/June/DEC-S2015-009.html.

98 Case C-303/06, *Coleman v Attridge Law and Steve Law*, 17 July 2008, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62006CJ0303.

99 *Coleman* has been applied by adjudicators in several cases, including Workplace Relations Commission, *A Former Employee v A Financial Services Company*, DEC-E2016-107, 19 July 2016, https://www.workplacerelations.ie/en/Cases/2016/July/DEC-E2016-107.html; Labour Court, *A Worker v Two Respondents*, EDA1129, 22 November 2011, https://www.workplacerelations.ie/en/Cases/2011/November/EDA1129.html.

100 Workplace Relations Commission, *A Nurse v A Hospital,* ADJ-00008073, 23 April 2018, https://www.workplacerelations.ie/en/Cases/2018/April/ADJ-00008073.html; *A Tenant v A Letting Agency,* ADJ-00006003, 12 April 2017, https://www.workplacerelations.ie/en/Cases/2017/April/ADJ-00006003.html; *An Asylum Seeker v A Statutory Body*, ADJ-00020743, 28 January 2020, https://www.workplacerelations.ie/en/cases/2020/january/adj-00020743.html; *Kearney v Workplace Relations Commission*, ADJ-00031944, 17 December 2021, https://www.workplacerelations.ie/en/cases/2021/december/adj-00031944.html.

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

102 See, for example, Workplace Relations Commission, *Matthews v Department of Health,* ADJ-00025554, 2 March 2021, https://www.workplacerelations.ie/en/cases/2021/march/adj-00025554.html: complaint upheld due to lack of feedback and transparency in shortlisting process combined with data demonstrating that candidates aged 50-65 had a significantly lower chance of being shortlisted.

103 See, for example, Workplace Relations Commission, *Employee v Golf Club*, ADJ-00024960, 12 April 2021, https://www.workplacerelations.ie/en/cases/2021/april/adj-00024960.html: unlike younger colleagues, the 85-year old complainant asked to undergo medical assessment and his working hours were reduced.

104 See, for example, Workplace Relations Commission, *A Complainant v A Respondent*, ADJ-00025772, 10 September 2021, https://www.workplacerelations.ie/en/cases/2021/september/adj-00025772.html: a

Disability ground: conditions of employment;[105] discriminatory dismissal.[106]

Race ground: discriminatory dismissal.[107]

A complaint on the sexual orientation ground failed absent evidence to support assertions about less favourable treatment, which had been conveyed to the complainant by colleagues.[108] While a few religion-ground complaints were also heard by the WRC, none was upheld.[109]

In contrast to previous years, in 2021 there were very few direct discrimination complaints under ESA on the Traveller community ground. The factors behind this change are unclear. In the author's assessment it may be partly due to the overall decline in WRC determinations associated with the pandemic (Chapter 6.1(c)). One of the three complaints on the ground was upheld but subsequently quashed on judicial review.[110] The case will be re-heard by the WRC. Another complaint was dismissed for failure to comply with the notification requirement,[111] while a further one concerned a licensed premises and was dismissed because such complaints must be referred to the District Court[112] (these procedural issues are considered in Chapter 6.1(b)).

Irish law recognises that direct discrimination may arise from a failure to afford different treatment to persons who are differently situated.[113] To date, all cases appear to be on the race ground and concern migrant workers.[114] 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[115] 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.'[116] In one such decision the Director of the

worker was dismissed for failing to meet sales targets in circumstances where a colleague who was 30 years younger was assigned clients, enabling him to meet his targets.

105 See, for example, Workplace Relations Commission, *Fleming v Reddilift Limited*, ADJ-00026846, 9 July 2021, https://www.workplacerelations.ie/en/cases/2021/adj-00026846.html: a series of actions was taken by an employer aimed at dissuading a worker with a disability from continuing in employment, e.g. the employer sought to recover sick pay and removed the complainant's phone and internet access.

106 See, for example, Workplace Relations Commission, *An Employee v An Employer*, ADJ-00019658, 21 April 2021, https://www.workplacerelations.ie/en/cases/2021/april/adj-00019658.html: dismissal of employee while on stress-related sick leave.

107 Workplace Relations Commission, *Baskakoviene v Milne Foods Limited*, ADJ-00030753, 9 November 2021, https://www.workplacerelations.ie/en/cases/2021/november/adj-00030753.html: the complainant, a Lithuanian national, was dismissed when one of the respondent's factories closed whereas three Irish national comparators were retained and moved to another site.

108 Workplace Relations Commission, *Head of Finance & Operations v Consultancy Company*, ADJ-00033360, 13 October 2021, https://www.workplacerelations.ie/en/cases/2021/october/adj-00033360.html. The complainant alleged that he was called a 'big, loud gay' by the respondent and that co-workers were asked to 'spy' on him.

109 See, for example, Workplace Relations Commission, *Mousli v N3 Results Ireland Limited*, ADJ-00027009, 26 August 2021, https://www.workplacerelations.ie/en/cases/2021/august/adj-00027009.html.

110 Workplace Relations Commission, *A Prospective Customer v A Hotel/Wedding Venue*, ADJ-00026881, 6 January 2021 (the text of the determination was not available on the WRC's website at the time of writing).

111 Workplace Relations Commission, *A Hotel Client v A Hotel Group*, ADJ-00026218, 26 April 2021, https://www.workplacerelations.ie/en/cases/2021/april/adj-00026218.html.

112 Workplace Relations Commission, *Pratt v The Half Door Bar and Restaurant Limited*, ADJ-00026369, 6 October 2021, https://www.workplacerelations.ie/en/cases/2021/october/adj-00026369.html.

113 The primary decision on this matter is that of the Labour Court in *Campbell Catering v Rasaq* [2004] ELR 15, applying *Finanzamt Köln-Altstadt v Roland Schumacker,* Case C-279/93, [1995] ECR 1-225. In a 2017 decision, the Labour Court addressed similar issues as giving rise to both direct and indirect discrimination: *Boxmore Plastics v Zimareva*, EDA 1732, 30 November 2017, https://www.workplacerelations.ie/en/Cases/2017/November/EDA1732.html.

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

115 Equality Tribunal, *Five Complainants v Hannon's Poultry Export Ltd.*, DEC–E2006–050, 18 October 2006, https://www.workplacerelations.ie/en/Cases/2006/October/DEC-E2006-050-Full-Case-Report.html.

116 Workplace Relations Commission, *Kostrzewski v C&F Automotive Ltd t/a Iralco*, DEC-E2015-167, 30 December 2015, at Para. 4.4, https://www.workplacerelations.ie/en/Cases/2015/December/DEC-E2015-

Equality Tribunal described the case law as establishing a 'duty of care to foreign employees.'[117] 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 (see Chapter 2.6). However, it does give rise to obligations, in a very limited number of cases, such as might be expected under a reasonable accommodation duty.

b) Justification of direct discrimination

The law does not permit justification of direct discrimination, save with respect to specific provisions on the age ground concerning retirement ages, fixed-term contracts and maximum recruitment ages (see Chapter 4.6).

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

a) Prohibition and definition of indirect discrimination

In Ireland, indirect discrimination is prohibited in national law. It is defined.

Indirect discrimination is defined as occurring where an apparently neutral provision would put a person belonging to a protected group at a particular disadvantage compared with other employees of their employer, or where an apparently neutral provision would put a person belonging to a protected group at a particular disadvantage compared with other persons.[118]

As in previous years, relatively few EEA indirect discrimination complaints on the five grounds were determined in 2021. None was upheld. For instance, a complaint on the age ground was unsuccessful before the Labour Court.[119] The complainants had argued that a 10 % reduction in the pay of new entrants to the teaching profession in 2011 constituted indirect discrimination on the grounds of age. The case was initially referred to the WRC in 2016 and resulted in a preliminary reference to the CJEU.[120] In 2019, the CJEU determined that the reduced pay scales were not based on a criterion inextricably or indirectly linked to the age of the teachers because, irrespective of the year of recruitment, both the teachers recruited after 1 January 2011 and those recruited before that date were on average 25 years of age or under.[121] When the case reverted to the Labour Court it found that there was no discrimination on the age ground, applying the principles set out by the CJEU in *Horgan and Keegan v Minister for Education and Skills.*

One complaint of indirect discrimination on the race ground was referred under ESA in 2021. It concerned an application for a driving licence on the part of an asylum seeker. The substance of the complaint was not determined, however, because it was referred outside the prescribed six-month time limit.[122]

167.html. See also *A Fund Accounting Supervisor v A Fund Management Company*, ADJ-00010660, 8 October 2018, https://www.workplacerelations.ie/en/Cases/2018/October/ADJ-00010660.html.

[117] Equality Tribunal, *Mikoliuniene v Halcyon Contract Cleaners Ltd.*, DEC-E2015-036, 26 June 2015, https://www.workplacerelations.ie/en/cases/2015/june/dec-e2015-036.html.

[118] Sections 31 and 22 EEA; Section 3(1)*(c)* ESA.

[119] Labour Court, *Department of Education and Skills and others v Horgan and Keegan*, EDA2121, 13 July 2021, https://www.workplacerelations.ie/en/cases/2021/july/eda2121.html.

[120] The Labour Court referred the case to the CJEU on appeal from the WRC's decision in *Horgan and Keegan v Department of Education and Skills and others*, DEC-E2016-041, 4 March 2016, https://www.workplacerelations.ie/en/cases/2016/march/dec-e2016-041.html.

[121] Case C-154/18, *Horgan and Keegan v Minister for Education and Skills*, 14 February 2019, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62018CJ0154.

[122] Workplace Relations Commission, *Learner driver permit applicant v Driver licensing authority*, ADJ-00029006, 2 November 2021, https://www.workplacerelations.ie/en/cases/2021/september/adj-00029006.html.

b) Justification test for indirect discrimination

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

2.3.1 Statistical evidence

a) Legal framework

In Ireland, there is legislation regulating the collection of personal data.
Under Section 2(1) of the Data Protection Acts 1988-2018, 'special categories of personal data' means:

> '(a) personal data revealing—
> (i) the racial or ethnic origin of the data subject,
> (ii) the political opinions or the religious or philosophical beliefs of the data subject, or
> (iii) whether the data subject is a member of a trade union,
> (b) genetic data,
> (c) biometric data for the purposes of uniquely identifying an individual,
> (d) data concerning health, or
> (e) personal data concerning an individual's sex life or sexual orientation.'[123]

The processing of such data is prohibited unless the data subject has given their explicit consent before processing begins or the processing is authorised by law, for example, to protect the interests of a data subject, to comply with employment legislation or for reasons of public interest. Personal data relating to criminal convictions and offences may only be processed under the control of an official authority. The Data Protection Commission was established in 2018 as the State's data protection authority for the purposes of the General Data Protection Regulation.[124]

In Ireland, statistical evidence may be admitted under national law in order to establish indirect discrimination and to design positive action measures on all five grounds, under Sections 19(4)*(c)* and 22(1A) EEA and Section 3(3A) ESA. It is admissible as evidence in court. Statistical data do not appear to be used in any coherent manner to design positive action measures, with the exception of measures relating to the disability ground in employment[125] and in order to address disadvantage in access to third-level education.[126] According to IHREC, the lack of relevant data is an impediment to evidence-based action on equality in the workplace.[127]

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[123] Data Protection Act 1988, 13 July 1998; Ireland, Data Protection (Amendment) Act 2003, 10 April 2003. Data Protection Act 2018, 24 May 2018. Revised text available at: http://revisedacts.lawreform.ie/eli/2018/act/7/revised/en/html.

[124] Part 2, Data Protection Act 2018, 24 May 2018, http://www.irishstatutebook.ie/eli/2018/act/7/enacted/en/html.

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

[126] Higher Education Authority (2015), *National Plan for Equity of Access to Higher Education 2015–2019*, http://hea.ie/assets/uploads/2017/04/national_plan_for_equity_of_access_to_higher_education_2015-2019_single_page_version_01.pdf. A progress review extended the plan until December 2021: see Higher Education Authority (2018), *Progress Review of the National Access Plan and Priorities to 2021*, https://hea.ie/assets/uploads/2019/01/HEA-Progress-Review-2021-NAP.pdf.

[127] See https://www.ihrec.ie/guides-and-tools/human-rights-and-equality-for-employers/building-a-culture-of-human-rights-and-equality-in-the-workplace/.

b) Practice

In Ireland, statistical evidence is used in practice in order to establish indirect discrimination. There is no reluctance to use statistical data as evidence in court.[128] Census data was adduced in a successful 2018 EEA case, for example.[129] Statistics held by the Adoption Authority on the national origins of adopted children was used in a case on the race ground concerning school admission policies under ESA.[130]

In a 2002 decision, the Labour Court emphasised that its procedures are intended to facilitate parties whether legally represented or not, and that it would be alien to the ethos of the Court to oblige parties to undertake the inconvenience and expense involved in producing elaborate statistical evidence to prove matters which are obvious to the members of the Court by drawing on their own knowledge and experience.[131] Adjudicators have consistently adopted this approach, relying on matters within their specialist expertise to ease the evidential burden associated with indirect discrimination complaints.[132]

The Labour Court emphasises that statistics are not decisive in themselves, but are one factor that may be taken into account in determining whether a measure is indirectly discriminatory.[133]

In a 2015 judgment the Supreme Court considered the interpretation of indirect discrimination under ESA for the first time, and held that statistical analysis is required in order to establish that a person belonging to a protected group is at a 'particular disadvantage' compared with others.[134] The *Stokes* case was taken on the Traveller community ground and the Court made no reference to EU law on the burden of proof. To date, the judgment has not impacted on decisions issued by the first instance forum for discrimination complaints.[135] The Equality Tribunal applied the *Stokes* judgment in a 2015

[128] The Labour Court has noted that statistics 'are frequently used as an evidential tool in seeking to establish a prima facie case of indirect discrimination': *The Nationalist & Leinster Times Ltd v Ashmore,* EDA133, 21 January 2013, https://www.workplacerelations.ie/en/Cases/2013/January/EDA133.html.

[129] Workplace Relations Commission, *A Nurse v A Hospital,* ADJ-00008073, 23 April 2018, https://www.workplacerelations.ie/en/Cases/2018/April/ADJ-00008073.html. On appeal, the Labour Court determined that the correct pool of comparison was not used at first instance, and hence that the census data which concerned the population at large was not sufficient to raise a presumption that the impugned criterion placed nurses in the complainant's age group at a particular disadvantage: *Health Service Executive v Fitzgerald,* EDA1915, 22 May 2019, https://www.workplacerelations.ie/en/cases/2019/may/eda1915.html.

[130] Workplace Relations Commission, *Ms A (on behalf of her daughter B) v A Girls Secondary School*, DEC-S2015-001, 6 February 2015, https://www.workplacerelations.ie/en/cases/2015/february/dec-s2015-001.html.

[131] Labour Court, *NBK Designs Ltd. v Inoue* [2003] ELR 98, 25 November 2002, https://www.workplacerelations.ie/en/Cases/2002/November/EED0212.html. *Inoue* was applied in an ESA case for the first time in Equality Tribunal, *McDonagh v Navan Hire Ltd*., DEC-S2004-017, 6 February 2004, https://www.workplacerelations.ie/en/cases/2004/february/dec-s2004-017-full-case-report.html.

[132] See, for example, Equality Tribunal, *Mr A v Department of Social Protection*, DEC-S2013-010, 11 October 2013, https://www.workplacerelations.ie/en/Cases/2013/October/DEC-S2013-010.html; Labour Court, *Tipperary County Council v McAteer*, EDA 3/2015, 30 January 2015, https://www.workplacerelations.ie/en/Cases/2015/January/EDA153.html; Workplace Relations Commission, *An Employee v An Employer*, DEC-E2016-080, May 2016, https://www.workplacerelations.ie/en/Cases/2016/June/DEC-E2016-080.html; *A Nurse v A Hospital,* ADJ-00008073, 23 April 2018, https://www.workplacerelations.ie/en/Cases/2018/April/ADJ-00008073.html; *Complainant v Respondent*, ADJ-00008685, 22 May 2018, https://www.workplacerelations.ie/en/Cases/2018/May/ADJ-00008685.html.

[133] Labour Court, *The Nationalist & Leinster Times Ltd v Ashmore,* EDA133, 21 January 2013, https://www.workplacerelations.ie/en/Cases/2013/January/EDA133.html.

[134] Supreme Court, *Stokes v Christian Brothers High School, Clonmel*, [2015] IESC 13, 24 February 2015, https://www.courts.ie/view/judgments/7c76c785-7af6-49db-9478-be182b899693/4b1b534e-7778-4a7d-b01f-bddb28538e09/2015_IESC_13_2.pdf/pdf.

[135] In a 2021 disability-ground case the WRC noted the divergence between the approach adopted in *Stokes* and that of the CJEU. It considered that the CJEU jurisprudence should be applied in all complaints with an EU law dimension: Workplace Relations Commission, *Kearney v Workplace Relations Commission*, ADJ-00031944, 17 December 2021, https://www.workplacerelations.ie/en/cases/2021/december/adj-00031944.html.

case, which challenged a criterion that allocated school places according to the date of application from those living in the school's catchment area.[136] The complainant, a British national who had migrated to Ireland in 2002, claimed that the provision was indirectly discriminatory on the race ground. He maintained that the school's policy was intrinsically liable to disadvantage the children of migrants, since they would move into the catchment area of the school at a later date than indigenous children. The Director of the Equality Tribunal noted that the absence of statistical evidence was 'not necessarily fatal' to the complainant's case, which appears to be a less stringent evidential burden than that applied in *Stokes*.[137] Nevertheless, the Tribunal was 'unwilling, in the absence of hard evidence on the demographics of the catchment and movements into it in the relevant time period, to assume that non-Irish children are put at a particular disadvantage.' The decision illustrates the significant obstacles to be overcome by complainants in some indirect discrimination cases and the need for greater access to equality data.

The Equality (Miscellaneous Provisions) Act 2015 effected a slight change to the wording of the national indirect discrimination provisions that may militate against a shift towards 'requiring' statistical evidence.[138] Formerly, ESA, EEA and the Pensions Acts applied to a provision that 'puts' a person at a particular disadvantage. In line with the wording of the directives, the definitions now refer to provisions that 'would put' persons at a particular disadvantage compared with other persons.[139]

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

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

Section 14(A) EEA prohibits harassment in employment on grounds of gender, age, race, religion, family status, disability, civil status, sexual orientation and membership of the Traveller community. Section 11 ESA prohibits harassment on the same grounds in access to goods and services. Under both statutes, harassment is defined as any unwanted conduct related to any discriminatory ground which has the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person.[140] This conduct can include acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material.

[136] Equality Tribunal, *A Father on behalf of his son v A second level school*, DEC-S2015-008, 26 June 2015, https://www.workplacerelations.ie/en/Cases/2015/June/DEC-S2015-008.html.

[137] In a 2018 case, statistical analysis was referred to as a form of evidence that could be used to establish a prima facie case of indirect discrimination, but implicitly not required as such: Workplace Relations Commission, *O'Donoghue v The Minister for Social Protection*, DEC-S2018-014, 5 June 2018, https://www.workplacerelations.ie/en/cases/2018/june/dec-s2018-014.html.

[138] Ireland, Equality (Miscellaneous Provisions) Act 2015, 10 December 2015, http://www.irishstatutebook.ie/eli/2015/act/43/enacted/en/print.html. The 2015 Act effected a number of changes to Irish anti-discrimination law, many of which sought to align national law with the requirements of the EU anti-discrimination directives. It amended EEA by introducing an objective justification requirement for both mandatory retirement ages and offers of fixed-term contracts to persons over the compulsory retirement age (see Chapter 4.6). The religious ethos exception provided for under Section 37 EEA was altered substantially (see Chapter 4.2). Individuals may now lodge EEA complaints about discriminatory advertising; formerly, such cases could be taken solely by IHREC. The Commission retains exclusive jurisdiction with respect to discriminatory advertising under ESA – see Workplace Relations Commission, *Alamazani v Daft Media Limited*, ADJ-00006704, 23 February 2018, https://www.workplacerelations.ie/en/Cases/2018/February/ADJ-00006704.html. Further, a new housing assistance ground was included under ESA, enabling persons in receipt of various social protection payments to challenge discrimination in the context of accommodation provision.

[139] Section 3(1)*(c)* ESA; Sections 19(4)*(a)* and 22(1)*(a)* EEA; Section 68 Pensions Act 1990-2018.

[140] Section 14A(7)*(a)* EEA, Section 11(5)*(a)* ESA.

Various forms of communication have been the subject of successful harassment complaints under ESA and EEA, including 'spoken words',[141] text messages,[142] a drawing[143] and graffiti.[144] A complainant does not need to demonstrate that she or he falls under one of the discriminatory grounds, since it is sufficient that the impugned conduct is 'related to' a ground.[145] Thus, in *Kane v Eirjet Ltd*,[146] a woman without disability and her son with a disability were both subjected to harassment when airline staff dealt with them in an offensive manner. In a 2020 case, a landlord who made racist comments about the type of tenants he sought harassed the complainant even though the remarks did not relate to her.[147]

One complaint of harassment on the race ground under ESA was upheld in 2021.[148] The complainant ordered a beverage at a café. Instead of writing her name on the cup, as was the usual practice, an employee drew an image depicting 'slanty eyes'. The WRC found that this conduct amounted to harassment, notwithstanding no intention to harass. EUR 12 000 in compensation was awarded (see case summary in Chapter 12.2).

Under EEA, there was a successful complaint of harassment on the race ground in 2021, comprising extreme racist verbal abuse perpetrated by another employee. The Nigerian complainant was awarded EUR 30 000 compensation (summarised in Chapter 12.2).[149]

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

b) Scope of liability for harassment

In Ireland, where harassment is perpetrated by an employee, the employer is liable.

Section 14A EEA provides:

> '14A(1) For the purposes of this Act, where
> (a) an employee (in this section referred to as ''the victim'') is harassed or sexually harassed either at a place where the employee is employed (in this section referred to as ''the workplace'') or otherwise in the course of his or her employment by a person who is
> (i) employed at that place or by the same employer, (ii) the victim's employer, or

[141] See, for example, Workplace Relations Commission, *Muresan v G&C Power Limited t/a Dominos Waterford*, DEC-E2017-040, 31 May 2017, https://www.workplacerelations.ie/en/Cases/2017/May/DEC-E2017-040.html; Workplace Relations Commission, *Nkikita v Fleming*, ADJ-00020830, 4 December 2019, https://www.workplacerelations.ie/en/cases/2019/december/adj-00020830.html.

[142] See, for example, Equality Tribunal, *Merriman v O'Flaherty's Ltd. t/a Reads Print Design and Photocopying Bureau*, DEC-S2011-049, 8 November 2011, https://www.workplacerelations.ie/en/Cases/2011/November/DEC-S2011-049-Full-Case-Report.html. The Equality Tribunal found that the use of the letters "xxx" in text messages sent in the context of a commercial dispute was intended to 'undermine the complainant (and his masculinity) on the basis of his sexual orientation' (Para. 5.6).

[143] Workplace Relations Commission, *Foley v Atercin Liffey Unlimited T/A Starbucks Tallaght,* ADJ-00028487, 5 January 2021, https://www.workplacerelations.ie/en/cases/2021/january/adj-00028487.html.

[144] See, for example, Workplace Relations Commission, *Magat v Component Distributors (CD Ireland) Limited*, ADJ-00016752, 30 April 2019, https://www.workplacerelations.ie/en/cases/2019/may/adj-00016752.html.

[145] Irish law is in line with the interpretation of harassment adopted by the CJEU in Case C-303/06, *Coleman v Attridge Law and Steve Law*, 17 July 2018, Para. 58.

[146] Equality Tribunal, DEC-S2008-026, 18 April 2008, https://www.workplacerelations.ie/en/Cases/2008/April/DEC-S2008-026-Full-Case-Report.html.

[147] Workplace Relations Commission, *Tenant v Landlord*, ADJ-00021417, 7 July 2020, https://www.workplacerelations.ie/en/cases/2020/july/adj-00021417.html.

[148] Workplace Relations Commission, *Foley v Atercin Liffey Unlimited T/A Starbucks Tallaght,* ADJ-00028487, 5 January 2021, https://www.workplacerelations.ie/en/cases/2021/january/adj-00028487.html.

[149] Labour Court, *CPL Solutions Limited T/A Flexsource v Kings Oluebube*, EDA2134, 4 October 2021, https://www.workplacerelations.ie/en/cases/2021/october/eda2134.html.

(iii) a client, customer, or other business contact of the victim's employer and the circumstances of the harassment are such that the employer ought reasonably to have taken steps to prevent it, or

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

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

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

(II) it could reasonably be anticipated that he or she would be so treated,

the harassment or sexual harassment constitutes discrimination by the victim's employer in relation to the victim's conditions of employment.'

In a 2016 decision, the Labour Court reaffirmed that the provision applies to conduct that occurs outside the workplace.[150] Moreover, there is no requirement to show that the *perpetrator* was acting in the course, or within the scope, of their employment. The proper test is whether the victim experienced harassment in the course of their employment. The conduct in issue included an abusive message posted by an employee on social media, which was directed at the complainant in his capacity as a worker representative. Consequently, Section 14A of the Acts applied and the employer was responsible. However, the employer was entitled to avail of the statutory defence set out under Section 14A(2). The defence applies where the employer can show that it took reasonably practicable steps to prevent harassment. Employers must demonstrate, at a minimum, that an anti-harassment policy was in place before the harassment occurred and that the policy was effectively communicated to all employees. Additionally, managers should receive appropriate training.[151] In the instant case, such an approach had been adopted, an investigation was undertaken, and a disciplinary sanction was imposed.

In a 2020 decision the WRC held that the respondent's reaction to a harassment complaint, while not ideal, was adequate to avail of the defence.[152] Its findings were reversed on appeal by the Labour Court, however.[153] The Nigerian complainant was subjected to extreme racist abuse by a team leader on two occasions. When notified of the second incident, the respondent encouraged the complainant to proceed with a formal complaint, it investigated the complaint, apologised to the complainant, elicited an apology from the perpetrator, and informed the complainant that a sanction had been applied. The perpetrator was issued with a final written warning and was obliged to undertake training. The Labour Court found that the respondent's harassment policy and its application were flawed. The policy comprised a brief statement in an employee handbook which was supplied electronically to staff. It alluded to informal and formal procedures for dealing with harassment and bullying complaints but did not set those procedures. The investigation was conducted in an ad hoc manner and without regard to any documented processes. The complainant was not provided with any terms of reference or timeline, and he was not afforded the opportunity to participate in the investigation or provided with a written account of the outcome. Moreover, the Court was satisfied that the respondent did not take adequate steps to reverse the effect of the harassment experienced by the complainant, such as arranging counselling or referring the worker to the respondent's employee assistance programme. Consequently, the employer was liable for the harassment and was directed to pay the complainant EUR 30 000 in compensation.

[150] Labour Court, *Dublin Bus v McCamley*, EDA 164, 18 February 2016, https://www.workplacerelations.ie/en/Cases/2016/February/EDA164.html; see further: Ireland, S.I. No. 208/2012 - Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2012, http://www.irishstatutebook.ie/eli/2012/si/208/made/en/print.

[151] See further: Labour Court, *A Store v A Worker,* EDA 163, 28 January 2016, https://www.workplacerelations.ie/en/Cases/2016/January/EDA163.html.

[152] Workplace Relations Commission, *Kings Oluebube v CPL Solutions Ltd T/A Flexsource Recruitment*, ADJ-00024254, 30 June 2020, https://www.workplacerelations.ie/en/cases/2020/june/adj-00024254.html.

[153] Labour Court, *CPL Solutions Limited T/A Flexsource v Kings Oluebube*, EDA2134, 4 October 2021, https://www.workplacerelations.ie/en/cases/2021/october/eda2134.html.

Liability for the conduct of an employer's client was established in the 2017 case of *Rusu v Senture Security Ltd*.[154] The complainant, a Romanian national, was employed as a security guard and was assigned work at a hotel that had contracted with the respondent to provide security services. The owner of the hotel approached the complainant one evening and said, 'All Romanians are thieves and liars.' When the complainant reported this incident, Senture Security instructed him to desist from work at the premises and advised him that it would find another suitable work location. However, it subsequently failed to redeploy the complainant. The employer could not rely on the defence under Section 14A(2) since it failed to take any steps to prevent or remedy the harassment.

Service providers, such as landlords, schools and hospitals, are liable for harassment that occurs in the provision of the service concerned. Under the vicarious liability principle set out under Section 42 ESA, service providers are legally responsible for the discriminatory actions of their employees and agents. Liability was imposed on the respondent landlord for the conduct of his son in a 2019 race-ground harassment case.[155] The son lived in the adjoining house and was the respondent's agent because he acted as a contact point between the landlord and the tenant whom he subjected to racist verbal abuse. Section 11(2) ESA further obliges service providers also to protect people from harassment or sexual harassment committed by a third party, subject to a defence. This would include liability for harassment perpetrated by other tenants, clients or customers, for example. A statutory defence would be available if the service provider took such steps as were reasonably practicable to prevent harassment (Section 11(3)). A landlord was found liable for disparaging remarks about a tenant's mental health and financial circumstances in a 2021 case.[156] The comments were made by the landlord's mother while visiting the premises. The complainant was awarded EUR 2 000 for the effects of the harassment on the disability and housing assistance grounds.

Equality legislation does not provide for liability on the part of the individual harasser. There is no specific liability for trade unions or professional associations other than as employers or service providers.[157]

2.5 Instructions to discriminate (Article 2(4))

a) Prohibition of instructions to discriminate

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

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

Section 14 EEA provides that a person who 'procures or attempts to procure' another person to engage in discrimination or victimisation shall be guilty of an offence. This criminal offence, which would cover at least some forms of instruction, is actionable in the

[154] Workplace Relations Commission, DEC-E2017-056, 24 July 2017, https://www.workplacerelations.ie/en/Cases/2017/July/DEC-E2017-056.html.
[155] Workplace Relations Commission, *A Tenant v A Landlord*, ADJ-00013893, 5 March 2019, https://www.workplacerelations.ie/en/Cases/2019/March/ADJ-00013893.html.
[156] Workplace Relations Commission, *A Tenant v A Landlord*, ADJ-00029231, 31 March 2021, https://www.workplacerelations.ie/en/cases/2021/march/adj-00029231.html.
[157] Trade unions are not subject to the reasonable accommodation duty under EEA in relation to their members: see Workplace Relations Commission, *McNamee v Irish Municipal Public and Civil Trade Union Impact Trade Union / FORSA Trade Union*, ADJ-00012244, 24 April 2019, https://www.workplacerelations.ie/en/cases/2019/april/adj-00012244.html. Such a complaint should be lodged instead under ESA.

District Court. Proceedings may be instituted by the Workplace Relations Commission or by IHREC.[158]

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

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

b) Scope of liability for instructions to discriminate

In Ireland, the instructor is liable.

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

Employers and service providers (e.g., landlords, schools and hospitals) are liable for discrimination, including by instruction, perpetrated by employees. The legislation specifies that anything done by a person in the course of his or her employment shall be treated as done also by that person's employer, whether or not it was done with the employer's knowledge or approval.[159] Consequently, an employer could be held liable for an instruction to discriminate issued by a manager, for example. An employer can evade liability by proving that it took such steps as were reasonably practicable to prevent the employee (a) from doing that act, or (b) from doing in the course of his or her employment acts of that description.[160]

The provisions on vicarious liability for agents make it clear that persons cannot discriminate through an intermediary. Both ESA and EEA specify that: 'Anything done by a person as agent for another person, with the authority (whether express or implied and whether precedent or subsequent) of that other person shall, in any proceedings brought under this Act, be treated for the purposes of this Act as done also by that other person.'[161] Where a principal directs or instructs an agent to engage in prohibited conduct, both parties can potentially be found liable. However, since the provisions that outlaw discrimination under EEA are addressed to employers, the respondent (and hence liable person) will generally be the employer.[162] In one case, the Labour Court held that, where a prospective employer is instructed by another not to employ a particular person, and that instruction is tainted with discrimination, liability cannot be avoided by pleading that the instruction

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

[159] Section 15(1) EEA, Section 42(1) ESA.

[160] Section 15(3) EEA, Section 42(3) ESA.

[161] Section 15(2) EEA, Section 42(2) ESA.

[162] The WRC accepted that an equal pay case could proceed against the Department of Education and Skills even though it was not the complainant teachers' employer, since the Department was responsible for setting teachers' remuneration: *Horgan and Keegan v Department of Education and Skills and others*, DEC-E2016-041, 4 March 2016, https://www.workplacerelations.ie/en/Cases/2016/March/DEC-E2016-041.html.

was accepted without question. The Court found that, under the terms of Section 8 of the Act, which provides that an employer shall not discriminate against an employee or prospective employee and that a provider of agency work shall not discriminate against an agency worker, both the agency and the instructing company could potentially be held liable as 'concurrent wrongdoers'.[163]

Under ESA, service providers have been found liable for implementing discriminatory policies set by other entities such as insurance underwriters, tour operators and landlords. Some of the impugned measures have taken the form of instructions to discriminate, such as a landlord's explicit direction to a letting agent not to accept tenants in receipt of rent allowance,[164] and an insurance company's instruction not to provide persons with epilepsy access to certain cosmetic treatments.[165] Liability may be imposed on a person for the offences of procuring or attempting to procure discrimination (Section 14 EEA; Section 13 ESA). In the absence of case law, the parameters of these provisions are unclear.

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

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

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

Section 16(3)*(a)* EEA provides that 'a person who has a disability is fully competent to undertake, and fully capable of undertaking, any duties if the person would be so fully competent and capable on reasonable accommodation (in this subsection referred to as 'appropriate measures') being provided by the person's employer.'[166] Section 16(3)*(b)* specifies:

> 'The employer shall take appropriate measures, where needed in a particular case, to enable a person who has a disability
> (i) to have access to employment,
> (ii) to participate or advance in employment, or
> (iii) to undergo training,
> unless the measures would impose a disproportionate burden on the employer.'
>
> 'Appropriate measures' are defined under Section 16(4):
>
> '(a) … effective and practical measures, where needed in a particular case, to adapt the employer's place of business to the disability concerned,
> (b) without prejudice to the generality of paragraph (a), includes the adaptation of premises and equipment, patterns of working time, distribution of tasks or the provision of training or integration resources, but
> (c) does not include any treatment, facility or thing that the person might ordinarily or reasonably provide for himself or herself.'

Section 16(3)*(c)* provides that, in determining whether the measures would impose a disproportionate burden, account shall be taken of the financial and other costs entailed,

[163] Labour Court, *A Worker v Two Respondents*, EDA1129, 22 November 2011, https://www.workplacerelations.ie/en/Cases/2011/November/EDA1129.html.
[164] Workplace Relations Commission, *A Service User v A Letting Agency*, ADJ-00004073, 20 March 2017, https://www.workplacerelations.ie/en/Cases/2017/March/ADJ-00004073.html.
[165] Equality Tribunal, *Forde v The Body Clinic*, DEC-S2007-085, 28 November 2007, https://www.workplacerelations.ie/en/Cases/2007/November/DEC-S2007-085-Full-Case-Report.html.
[166] Case law has established that the obligation on employers to provide reasonable accommodation applies to potential employees: Equality Tribunal, *Harrington v East Coast Area Health Board*, DEC-E2002-001, 23 January 2002, https://www.workplacerelations.ie/en/cases/2002/january/dec-e2002-0011.html.

the scale and financial resources of the employer's business, and the possibility of obtaining public funding or other assistance.

Section 16 does not refer to the term 'essential functions' used in Recital 17 of the preamble to the Employment Equality Directive. Reference is made instead to the 'duties' attached to a position.

b) Case law

Decisions emphasise that the duty to provide reasonable accommodation is a proactive one, which requires employers to undertake a two-stage inquiry.[167] They must carry out a full assessment of the employee's needs and then consider the measures necessary to accommodate them, which may include adapting working patterns[168] or relieving an employee of certain tasks.[169]

In a 2018 judgment, the Court of Appeal held that, where an employee cannot undertake the essential functions of a position, there is no obligation on an employer to consider the redistribution of tasks.[170] This judgment was at variance with some prior case law, which determined that a decision as to whether an employee was fully competent and capable could only be formed following a process in which the employer considered all available options in consultation with the employee.[171] On appeal, the Supreme Court held that employers are obliged to consider the redistribution of duties. It noted that the legislative provision does not refer to the 'essential' functions or duties of a post. Consequently, employers are obliged to consider the redistribution of any duties or tasks, even where they pertain to the essential functions of a job. However, the employer's obligations are not unlimited. The key test is whether any redistribution of duties or tasks would impose a 'disproportionate burden'. The Supreme Court noted that, where a redistribution of duties or tasks would effectively create a different job entirely, this would almost inevitably impose a disproportionate burden on an employer.[172] The Court also found that it is not mandatory to consult with the employee concerned, but it would be prudent for employers to do so.[173]

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[167] See, for example, Labour Court, *Dunnes Stores v Doyle Guidera*, EDA1838, 30 July 2018, https://www.workplacerelations.ie/en/Cases/2018/July/EDA1838.html; Workplace Relations Commission, *A Solicitor v A Legal Service*, ADJ-00011821, 7 September 2018, https://www.workplacerelations.ie/en/cases/2018/september/adj-00011821.html.

[168] Workplace Relations Commission, *Complainant v Respondent*, ADJ-00009293, 13 April 2018, https://www.workplacerelations.ie/en/Cases/2018/April/ADJ-00009293.html.

[169] See, for example, Workplace Relations Commission, *An Employee v A Multi-National Retailer*, DEC E2016 021, 28 January 2016, https://www.workplacerelations.ie/en/Cases/2016/January/DEC-E2016-021.html; Workplace Relations Commission, *Ms A v A Retail Business*, DEC-E2017-078, 5 October 2017, https://www.workplacerelations.ie/en/Cases/2017/October/DEC-E2017-078%20.html. This approach was affirmed by the Supreme Court in *Nano Nagle School v Daly* [2019] IESC 63, 31 July 2019, https://www.courts.ie/acc/alfresco/77ed9bc6-3c69-482e-9390-a73c341a3192/2019_IESC_63_1.pdf/pdf#view=fitH.

[170] Court of Appeal, *Nano Nagle School v Daly*, [2018] IECA 11, 31 January 2018, https://www.courts.ie/acc/alfresco/5b98f4b9-367b-4e18-a383-3603ab85eb5f/2018_IECA_11_1.pdf/pdf#view=fitH, applied by the Labour Court in *Excellence Limited v Herzyk*, EDA1815, 23 February 2018, https://www.workplacerelations.ie/en/Cases/2018/February/EDA1815.html.

[171] See, for example, the High Court judgment in the following case, which endorsed the Labour Court's reasoning: *Nano Nagle School v Daly* [2015] IEHC 785, 11 December 2015, https://www.courts.ie/acc/alfresco/ce0d2534-7b79-41f6-b8f6-9905e0730ed3/2015_IEHC_785_1.pdf/pdf#view=fitH; see also Labour Court, *Occipital Ltd v Hayes*, EDA184, 10 January 2018, https://www.workplacerelations.ie/en/Cases/2018/January/EDA184.html.

[172] In 2021, two Labour Court decisions found that accommodating the complainants would entail creating entirely new jobs and in both instances impose a disproportionate burden on the employer: Labour Court, *Irish Horse Racing Regulatory Board v Murphy*, EDA211, 28 January 2021, https://www.workplacerelations.ie/en/cases/2021/january/eda211.html; Labour Court, *An Employer v A Worker*, EDA216, 31 March 2021, https://www.workplacerelations.ie/en/cases/2021/march/eda216.html.

[173] Supreme Court, *Nano Nagle School v Daly* [2019] IESC 63, 31 July 2019, https://www.courts.ie/acc/alfresco/77ed9bc6-3c69-482e-9390-a73c341a3192/2019_IESC_63_1.pdf/pdf#view=fitH.

Adjudicators routinely have regard to the scale and financial resources of employers' businesses in assessing the extent of the duty. In one case, for example, the respondent estimated the cost of providing a disabled toilet in the store where the complainant worked at EUR 22 000. The Labour Court found that, since the respondent was a large multi-national company, expenditure of EUR 22 000 'could not by any standard be regarded as imposing a disproportionate burden in vindicating the complainant's right to work on the same basis as others'.[174] In *Costello v Allied Irish Bank plc*, the WRC found that the respondent had failed to provide reasonable accommodation because it did not adequately consider providing an employee with reduced working hours for an extended period.[175] Such a measure would not have imposed a disproportionate burden on the respondent, being a large retail bank, and given the nature of the complainant's role as an advisor in a call centre. In a 2020 case, the Labour Court found that an employer is not obliged to maintain an employee's previous level of earnings where they are working reduced hours because of a reasonable accommodation measure.[176]

c) Definition of disability and non-discrimination protection

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

d) Failure to meet the duty of reasonable accommodation for persons with disabilities

In Ireland, failure to meet the duty of reasonable accommodation in employment for persons with disabilities is recognised as a form of discrimination. Although Irish legislation does not define denial of reasonable accommodation as discrimination, case law has established that it is a free-standing form of discrimination. This interpretive approach has been adopted in a line of cases dating to 2006[177] and is aimed at securing compliance with Directive 2000/78/EC.[178]

If an employee would be fully competent and capable of undertaking the duties attached to a position if reasonable accommodation was provided, an employer that fails to provide such reasonable accommodation discriminates.[179]

Failure to provide reasonable accommodation is a *sui generis* form of discrimination. The full range of sanctions for discrimination is applicable, including awards of compensation.

The burden of proof is reversed.[180]

As regards justification, Section 16(1) EEA offers employers a defence in stating that nothing in the Act requires any person to recruit or promote an individual, retain an individual or provide training or experience if the individual will not undertake the required duties or will not accept the conditions under which those duties are required to be

[174] Labour Court, *A Multinational Employer v A Worker*, EDA1435, 10 November 2014, https://www.workplacerelations.ie/en/Cases/2014/November/EDA1435.html.

[175] Workplace Relations Commission, *Costello v Allied Irish Bank plc*, DEC-E2019-007, 13 September 2019, https://www.workplacerelations.ie/en/cases/2019/september/dec-e2019-007.html.

[176] Labour Court, *Health Service Executive v Hannigan*, EDA2013, 14 September 2020, https://www.workplacerelations.ie/en/cases/2020/september/eda2013.html.

[177] Equality Tribunal, *O'Sullivan v Siemens Business Services Ltd*, DEC-E2006-058, 22 November 2006, https://www.workplacerelations.ie/en/cases/2006/november/dec-e2006-058-full-case-report.html; *A Complainant v An Employer*, DEC-E2008-068, 30 December 2008, https://www.workplacerelations.ie/en/cases/2008/december/dec-e2008-068-full-case-report.html.

[178] Bolger, M., Bruton, C., and Kimber, C. (2012) *Employment Equality Law*, Dublin, Thomson Reuters, pp. 366-367. Prior to its amendment under the Equality Act 2004, the duty did not give rise to a free-standing cause of action. It functioned rather to negate reliance on the defence provided for under Section 16(1): Labour Court, *An Employer v A Worker (Mr O) Number 1,* EDA0419, 5 January 2005, https://www.workplacerelations.ie/en/cases/2005/january/eda0419.html.

[179] Section 16(1) and (3) EEA.

[180] Equality Tribunal, DEC-E2007-03, *O'Keeffe v Walsh t/a By Pass Stores,* https://www.workplacerelations.ie/en/Cases/2007/June/DEC-E2007-033-Full-Case-Report.html.

performed, or is not (or no longer) fully competent and available to undertake, and fully capable of undertaking the duties attached to that position.[181] However, Section 16(3)*(a)* tempers the defence by clarifying that a person who has a disability is fully competent to undertake, and fully capable of undertaking, any duties if the person would be so fully competent and capable upon reasonable accommodation being provided by the person's employer. It is an occupational requirement that those employed in the police, prison service or any emergency service are fully competent, available and capable of undertaking the range of functions associated with such positions so that the operational capacity of the services concerned may be preserved.[182] This provision reflects the wording of Recital 18 to Directive 2000/78 and was considered by the High Court in a 2020 case concerning a prison officer.[183] The Court overturned a Labour Court finding that the occupational requirement operates as a complete defence to a claim of discrimination under Section 16.[184] Rather, the occupational requirement should be considered in conjunction with the overarching obligation to provide reasonable accommodation.

e) Duties to provide reasonable accommodation in areas other than employment for persons with disabilities

In Ireland, there is a legal duty to provide reasonable accommodation for persons with disabilities outside the area of employment.

Section 4 ESA provides:

> '(1) For the purposes of this Act discrimination includes a refusal or failure by the provider of a service to do all that is reasonable to accommodate the needs of a person with a disability by providing special treatment or facilities, if without such special treatment or facilities it would be impossible or unduly difficult for the person to avail himself or herself of the service.
> (2) A refusal or failure to provide the special treatment or facilities to which subsection (1) refers shall not be deemed reasonable unless such provision would give rise to a cost, other than a nominal cost, to the provider of the service in question.'

The 'special treatment or facilities' which the goods or service provider must provide are not defined. Owing to a Supreme Court judgment, the duty is subject to a nominal cost threshold, which is less onerous than the 'disproportionate burden' standard applicable under EEA.[185]

A service provider must 'do all that is reasonable' in providing treatment or facilities, meaning that it must address a range of options. However, the term 'reasonable' also limits the duty, in that a service provider is not expected to undertake very burdensome measures.[186] In other words, restrictions are placed on the obligation both by the term 'reasonable' and by the nominal cost ceiling. The extent of a service provider's duties depends on its scale and resources, and on whether grants are available.[187] In that regard, adjudicators tend to adopt a more stringent approach to the duties of public bodies such

[181] See, for example, Workplace Relations Commission, *Support and Counselling Project Worker v A Charity*, ADJ-00018058, 25 July 2019, https://www.workplacerelations.ie/en/cases/2019/july/adj-00018058.html.
[182] Section 37(3) EEA.
[183] High Court, *Cunningham v Irish Prison Service*, [2020] IEHC 282, 9 June 2020, https://www.courts.ie/acc/alfresco/e0053771-9ff3-47a4-9c73-329f29ff5da6/2020_IEHC_282.pdf/pdf#view=fitH.
[184] Labour Court, *Irish Prison Service v A Prison Officer*, EDA1837, 17 July 2018, https://www.workplacerelations.ie/en/cases/2018/july/eda1837.html.
[185] Article 26 of the Constitution and the Employment Equality Bill 1996*, Re* [1997] 2 IR 321, 15 May 1997.
[186] Workplace Relations Commission, *A Service User v A Forum*, DEC-S2016-023, 18 April 2016, https://www.workplacerelations.ie/en/Cases/2016/April/DEC-S2016-023.html.
[187] See, for example, Equality Tribunal, *A Complainant v Marks and Spencer PLC*, DEC-S2009-005, 22 January 2009, at Para. 5.6, https://www.workplacerelations.ie/en/Cases/2009/January/DEC-S2009-005-Full-Case-Report.html.

as housing authorities. *A Complainant v A Local Authority*[188] addressed grant aid to fund an extension to a house to meet the needs of an autistic boy. The nominal cost defence could not avail the respondent because it provided no evidence as to how much the extension would cost, and any such work would only amount to a small proportion of the overall housing budget funded by Government. In a 2017 case, the WRC found that a requirement to give 24 hours' notice to guarantee access to an accessible bus did not contravene the reasonable accommodation duty. Given the factors involved in ensuring wheelchair access (staff training, adaptation of vehicles and ground infrastructure), the notice requirement was reasonable and tempered by the nominal cost threshold.[189] Similarly, in a 2018 decision the WRC determined that the prison authorities had undertaken adequate measures to facilitate visits by the complainant's son with a disability, such as by providing meeting rooms that were cleaned in advance. Moreover, it found that providing an escort for the complainant from the main prison to a separate unit for the purpose of visits, would constitute more than a nominal cost. According to the respondent, facilitating each such visit would involve recalling three officers on 'additional hours' for eight hours, but it did not provide a figure.[190]

Very few cases have failed solely on the nominal cost issue. The two main examples concern educational establishments. *Mrs A (on behalf of her son, B) v A Childcare Facility*[191] concerned the admission of the complainant's child (B) to a crèche. The complainant was informed that a place would not be available unless the boy was accompanied by a full-time personal assistant, a requirement which the respondent maintained was necessary due to a combination of factors. The respondent referred to its obligations concerning child–staff ratios under childcare regulations and to the fact that, due to a disability, B was unable to physically move on his own without assistance. Government funding was available to provide five hours of assistance per week for the child, so the respondent could only accommodate B by employing another childcare worker. The Equality Tribunal accepted that the costs involved went beyond what was required under Section 4 ESA. Hiring an additional staff member in a private crèche that catered for some 30 children would have amounted to more than a nominal cost in an organisation of that size. In *Regan v Old Bawn Community School,*[192] the Tribunal found that the provision of sign language interpretation facilities by a community college would have exceeded the nominal cost ceiling. The respondent was instructed by the Department of Education to run its part-time adult education programmes on a self-financing basis. For the year 2007/2008 a surplus of EUR 119.39 was generated from the entire adult education programme. Provision of a sign language interpreting service would have cost between EUR 1 300 and EUR 1 700. The equality officer accepted that evidence in finding that the school did not breach the provisions of Section 4.

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

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

However, building on EU law principles, case law on direct discrimination in Ireland has established a modest form of reasonable accommodation in practice (see Chapter 2.2(a)).

[188] Equality Tribunal, DEC-S2007-049, 1 May 2007, https://www.workplacerelations.ie/en/Cases/2007/May/DEC-S2007-049-Full-Case-Report.html; see also Equality Tribunal, *Ms D (a tenant) v A Local Authority*, DEC-S2007-057, 29 June 2007, https://www.workplacerelations.ie/en/Cases/2007/June/DEC-S2007-057-Full-Case-Report.html.

[189] Workplace Relations Commission, *O'Doherty v Bus Éireann*, DEC-S2017-016, 13 April 2017, https://www.workplacerelations.ie/en/Cases/2017/April/DEC-S2017-016.html.

[190] Workplace Relations Commission, *A Complainant on behalf of his son v Irish Prison Service*, DEC-S2018-010, 19 April 2018, https://www.workplacerelations.ie/en/Cases/2018/March/DEC-S2018-010.html.

[191] Equality Tribunal, *Mrs A (on behalf of her son, B) v A Childcare Facility*, DEC-S2009-041, 29 June 2009, https://www.workplacerelations.ie/en/Cases/2009/June/DEC-S2009-041-Full-Case-Report.html.

[192] Equality Tribunal, *Regan v Old Bawn Community School*, DEC-S2010-043, 31 August 2010, https://www.workplacerelations.ie/en/Cases/2010/August/DEC-S2010-043-Full-Case-Report.html.

This development stems from the principle that direct discrimination may arise from a failure to afford different treatment to persons who are differently situated. To date, all cases have been on the race ground and have concerned 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. The duty to modify employment practices is not, however, applicable to all migrant workers. Decisions have emphasised that the particular employee/s must essentially be in a 'potentially vulnerable position'.[193] In assessing whether migrant workers are in that position, adjudicators make reference to their capacity to understand the English language, their knowledge of employment rights and their ability to access support from families and other social networks.[194]

[193] Equality Tribunal, *Francis v Bus Átha Cliath*, DEC-E2006-046, 26 September 2006, at Para. 4.14, https://www.workplacerelations.ie/en/cases/2006/september/dec-e2006-046-full-case-report.html.

[194] See, for example, Equality Tribunal, *Zaniewsha v Templemichael Enterprises Limited*, DEC-E2011-166, 7 September 2011, https://www.workplacerelations.ie/en/cases/2011/september/dec-e2011-166-full-case-report.html; Equality Tribunal, *Mikoliuniene v Halcyon Contract Cleaners Ltd.*, DEC-E2015-036, 26 June 2015, https://www.workplacerelations.ie/en/cases/2015/june/dec-e2015-036.html; Workplace Relations Commission, *Gegeckiene v Bradbury*, DEC-E2016-009, 21 January 2016, https://www.workplacerelations.ie/en/cases/2016/january/dec-e2016-009.html; Labour Court, *Horan Eco Services Limited v Smigelskiene*, EDA2117, 13 May 2021, https://www.workplacerelations.ie/en/cases/2021/may/eda2117.html.

3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

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

In Ireland, there are no residence or citizenship/nationality requirements for protection under the relevant national laws transposing the directives.

However, although EEA contains no express provision concerning employees who work outside the state, the Labour Court has found that an employee must habitually carry out their work in the jurisdiction to avail of its protection.[195] No such restrictions have been applied in the field of goods and services, which is governed by ESA.[196]

Non-EU/EEA nationals working without an employment permit cannot invoke EEA, since their contract of employment will be void by reason of illegality.[197] Such persons are not, therefore, afforded protection from discrimination in employment. Persons with an irregular migration status should be able to invoke ESA, since their status will not generally be material in accessing goods or services. The matter has not been considered in case law, however.

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

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

a) Protection against discrimination

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

ESA and EEA do not specify which persons can avail of protection. However, an Equality Tribunal decision issued in 2008 made it clear that a legal person cannot avail of ESA to claim protection against discrimination.[198] The complainant in that case was an

[195] Labour Court, *A Retail Company v A Worker*, DEE 4/2001, 5 September 2001, https://www.workplacerelations.ie/en/Cases/2001/September/EED014.html.

[196] See, for example, Workplace Relations Commission, *Couzens and others v Ryanair DAC*, DEC-S2018-021, 22 November 2018, https://www.workplacerelations.ie/en/Cases/2018/November/DEC-S2018-021.html.

[197] An EEA complaint taken by an undocumented worker was upheld in Equality Tribunal, *A Domestic Worker v An Employer,* DEC-E2011-117, 16 June 2011, https://www.workplacerelations.ie/en/Cases/2011/June/DEC-E2011-117-Full-Case-Report.html. However, the High Court subsequently ruled that non-EU/EEA nationals who do not have an employment permit, contrary to the Employment Permits Act 2003, have no legal standing to rely on employment legislation since their 'contract of employment' would be void by reason of illegality: *Hussein v Labour Court* [2012] IEHC 364, http://www.bailii.org/ie/cases/IEHC/2012/H364.html. The decision was reversed on appeal on technical grounds. Section 4 of the Employment Permits (Amendment) Act 2014 modified the impact of the High Court judgment somewhat. It permits a civil claim for compensation against the employer, notwithstanding the illegality of the contract, where it can be proved that the worker took all reasonable steps to comply with the requirement to have an employment permit: http://www.irishstatutebook.ie/eli/2014/act/26/section/4/enacted/en/html. A 2019 Labour Court determination suggested that undocumented workers may not seek redress under employment rights legislation more generally: *TA Hotels Limited t/a Lynams Hotel v Khoosye*, RPD1916, 4 December 2019, https://www.workplacerelations.ie/en/cases/2019/december/rpd1916.html. That case was applied in a 2021 decision which assessed complaints under multiple laws including EEA. The WRC found that a worker whose student visa had expired was not entitled to advance an EEA claim: Workplace Relations Commission, *Retail Employee v Service Station*, ADJ-00027527, 6 October 2021, https://www.workplacerelations.ie/en/cases/2021/october/adj-00027527.html. See also Compton, A. and Clayton, N. (2019), 'Employment Redress and Non-EEA Nationals', Irish Employment *Law Journal*, Vol 16, No. 4, pp. 127-130.

[198] Equality Tribunal, *Gloria (Ireland's Lesbian & Gay Choir) v Cork International Choral Festival Ltd.*, DEC-S2008-078, 28 October 2008, https://www.workplacerelations.ie/en/Cases/2008/October/DEC-S2008-

unincorporated body of persons in the form of a choir called 'Gloria (Ireland's Lesbian and Gay Choir)'. It referred a claim of direct discrimination on the sexual orientation ground when the respondent removed the description of Gloria as Ireland's gay and lesbian choir from promotional material for a choral festival. Having considered several provisions in detail and various principles of interpretation, the equality officer concluded:

> 'Whilst the term 'person' is usually interpreted broadly to include corporate and unincorporated bodies, I am satisfied that a contrary intention is evident from the Equal Status Acts given the manner in which the discriminatory grounds are set out and the particular definition of 'person' as contained in the Acts. I am therefore of the view that the legislative intent in this regard was to protect individuals and not bodies from discrimination.'[199]

He reasoned that a body could not be of a particular gender, marital status, sexual orientation, religion and so on. In the context of identifying potential *respondents* under the Act, 'person' is defined in Section 2(1) as including 'an organisation, public body or other entity'. The Tribunal concluded that the Oireachtas thus intended that the wider definition of person should not apply to complainants. The net effect of the decision is that only natural persons can act as complainants under ESA. The same principles should apply to EEA, since the discriminatory grounds are set out in the same manner under both laws.[200] Members of an association could pursue a complaint under EEA or ESA, but it appears they would have to establish that they were discriminated against as individuals.[201]

b) Liability for discrimination

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

Section 8(1) EEA prohibits discrimination by both employers and employment agencies, which manifestly includes legal persons. Most of the discrimination prohibitions are explicitly directed at the employer.[202] There is no provision for complaints against the person(s) who actually engaged in the impugned conduct, subject to a couple of exceptions: Section 14 imposes liability on the person responsible for procuring or attempting to procure discrimination, and Section 10 imposes liability on the person who displays or publishes discriminatory advertising.

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

078-Full-Case-Report.html; applied in Workplace Relations Commission, *Cork Deaf Club v Office of Public Works*, DEC-S2017-039, 10 November 2017, https://www.workplacerelations.ie/en/Cases/2017/November/DEC-S2017-039.html, and in Workplace Relations Commission, *Health Worker v Health Services Provider*, ADJ-00005333, 29 November 2017, https://www.workplacerelations.ie/en/Cases/2017/November/ADJ-00005333.html.

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

200 The core provision on protection from discrimination under EEA, Section 8(1), provides that 'an employer shall not discriminate against an employee or prospective employee and a provider of agency work shall not discriminate against an agency worker.' Section 2(1) defines an employee as 'a person' who works or has worked under a contract of employment and includes a member or former member of a regulatory body. That section also specifies that a contract of employment is one in which 'an individual agrees … personally to execute any work or service.'

201 Under Irish law, the general position is that an unincorporated association lacks a legal personality and so cannot be the subject of legal proceedings. Such bodies may, however, be conferred with the capacity to sue and be sued by legislation: Supreme Court, *Sandymount and Merrion Residents Association v An Bord Pleanála* [2013] IESC 51, 27 November 2013, https://www.courts.ie/view/judgments/802fc87d-4d99-4487-bde6-3caea034534e/6e83798d-ac2d-40c0-98ae-e68b069a708b/2013_IESC_51_1.pdf/pdf. In that case, the Supreme Court held that Section 50(A) of the Planning and Development Act 2000 conferred legal standing on unincorporated bodies to bring judicial review proceedings.

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

Natural persons and a 'body corporate' are liable to be prosecuted for offences under both equality laws.[203]

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

a) Protection against discrimination

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

Section 2(3) EEA indicates that private and public sector employees are protected by the Act, and this is reflected in case law. An exemption applies in relation to access to employment in another person's home for the provision of personal services, where the services affect private or family life.[204] This may not conform to the provisions of the anti-discrimination directives. An exemption in relation to discrimination on the age or disability grounds applies with respect to employment in the Defence Forces.[205]

People accessing goods and services from either private or public sector bodies may avail of protection against discrimination under ESA.[206] Section 6(2)*(d)* ESA exempts 'the provision of accommodation by a person in a part (other than a separate and self-contained part) of the person's home', even where the property is available for rent by members of the public.[207] It is not clear whether this provision complies with the Racial Equality Directive.

b) Liability for discrimination

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

Section 2(1) ESA expressly states that the persons who must not discriminate in the supply of goods and services include legal persons such as organisations, public bodies or other entities. Furthermore, the scope of EEA clearly covers the private and public sectors. The discrimination prohibitions are directed at 'employers',[208] and Section 2(3) clarifies which entity constitutes the 'employer' for particular public sector employees.

3.2 Material scope

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

In Ireland, national legislation prohibits discrimination in relation to conditions for access to employment, self-employment or occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the

[203] Section 44(2) ESA; Sections 100(5) and (6) EEA.
[204] Section 2(1) EEA.
[205] Section 37(5) EEA. See further Chapter 4.3.
[206] Section 2(1). See further Chapter 3.2.8.
[207] The first cases to consider that exemption were heard in 2018: Workplace Relations Commission, *Bushe v Jarvis*, ADJ-00014453, 6 September 2018, https://www.workplacerelations.ie/en/Cases/2018/September/ADJ-00014453.html (since the respondent was seeking to rent a room in his home, the WRC did not have jurisdiction to hear the discrimination complaint in accordance with Section 6(2)*(d)*; Workplace Relations Commission, *A Tenant v A Landlord*, ADJ-00015004, 5 December 2018, https://www.workplacerelations.ie/en/Cases/2018/December/ADJ-00015004.html (the rental unit was self-contained and therefore the exemption was inapplicable).
[208] The core provision on protection from discrimination, Section 8(1) EEA, provides that 'an employer shall not discriminate against an employee or prospective employee and a provider of agency work shall not discriminate against an agency worker.'

professional hierarchy, for the five grounds, and in both private and public sectors, as described in the directives.[209]

The Equality Act 2004 amended the Employment Equality Act 1998 to extend the definition of 'contract of employment' to include those whereby 'an individual agrees with another person personally to execute any work or service for that person'.[210] According to the authors of the main book on Irish employment equality law: 'Thus the scope of protection is wider than the traditional approach of employment law which limits protection to a person employed pursuant to a contract of employment, and is wide enough to cover self-employed persons as is required by the Race and Framework Directives.'[211] In a 2019 case, the Labour Court affirmed that EEA must be interpreted as covering self-employed persons to ensure conformity with the directives.[212]

Section 8 EEA provides that an employer shall not discriminate against an employee or prospective employee, and that a provider of agency work shall not discriminate against an agency worker in relation to, *inter alia*, access to employment, promotion or re-grading, and classification of posts.[213]

In 2018, two female academics succeeded in age-ground complaints with respect to promotion. One of cases entailed an internal competition for appointment as a university's Dean of Teaching and Learning.[214] The complainant was 55 years of age at the time and the successful candidate was 15 years younger. A prima facie case was made, given the 'greater proximity' of the complainant's qualifications and experience to the job specification, and her 'comparable if not superior qualifications'. The respondent failed to rebut the presumption that age was a factor in the selection process, due to, *inter alia*, a lack of transparency in how the selection panel had evaluated the candidates. The complainant was awarded EUR 35 000 in compensation, the equivalent of six months' salary. The second case involved a paper-based promotion process for the position of Senior Lecturer.[215] The WRC concluded that age was a factor in the respondent's decision, in light of various pieces of evidence, including the relative achievements of the complainant and a comparator who was 20 years younger, as well as data on the age profiles of successful and unsuccessful candidates. The WRC ordered that the complainant be retrospectively promoted and awarded EUR 30 000 in compensation.

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

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[209] Section 8 EEA applies to employers and providers of agency work. Section 11 applies to employment agencies, other than in their capacity as employers. Section 13 covers organisations of workers or of employers, trade or professional organisations, and bodies that control entry to or the carrying on of a profession, vocation, or occupation. Section 13A prohibits discrimination in respect of business partnerships.

[210] Section 2(1) EEA.

[211] Bolger, M., Bruton C. and Kimber, C. (2012), *Employment Equality Law*, Dublin, Thomson Reuters, p. 92.

[212] *Wall, O'Shea and Kavanagh, Veterinary Partnership t/a Moyne Veterinary Clinic v Nowacki*, EDA198, 4 April 2019, https://www.workplacerelations.ie/en/cases/2019/april/eda198.html.

[213] See http://revisedacts.lawreform.ie/eli/1998/act/21/section/8/revised/en/html. Section 8(5)(c) EEA was inserted by the Equality (Miscellaneous Provisions) Act 2015. It provides: 'an employer shall be taken to discriminate against an employee or prospective employee in relation to access to employment if the employer discriminates against the employee or prospective employee— … (c) by publishing or displaying, or causing to be published or displayed, an advertisement which contravenes section 10(1) in so far as such advertisement relates to access to employment.' Notwithstanding this development, a complaint about discriminatory advertising on the age ground was dismissed, because the adjudication officer concluded that the complainant did not have locus standi: Workplace Relations Commission, *Carolan v Abrivia Recruitment*, ADJ-00013092, 5 March 2019, https://www.workplacerelatioreportns.ie/en/cases/2019/march/adj-00013092.html. In the author's assessment, this finding does not reflect the intention of the legislature.

[214] Workplace Relations Commission, *Lecturer v University*, ADJ-00003593, 7 November 2018, https://www.workplacerelations.ie/en/cases/2018/november/adj-00003593.html.

[215] Workplace Relations Commission, *Cleary v University College Dublin*, DEC-E2018-009, 26 March 2018, https://www.workplacerelations.ie/en/cases/2018/march/dec-e2018-009.html.

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

In Ireland, national legislation prohibits discrimination in working conditions, including pay and dismissals,[216] for all five grounds and for both private and public employment.

Section 8 EEA provides that an employer shall not discriminate against an employee or prospective employee, and that a provider of agency work shall not discriminate against an agency worker, in relation to, *inter alia*, conditions of employment, terms of employment, working conditions, opportunities or facilities for employment counselling, training and work experience, overtime, shift work, short time, transfers, lay-offs, redundancies, dismissals and disciplinary measures.[217]

Section 29 EEA sets out the entitlement to equal remuneration,[218] while Section 7 defines 'like work' for the purposes of equal pay.[219] There were no successful equal pay cases across the five grounds in 2021.[220] In 2020, a race-ground complaint was upheld.[221] The complainant, a Russian national, was replaced by an Irish colleague while she was on maternity leave. The respondent accepted that the comparator was engaged in 'like work' and yet was paid EUR 15 000 more than the complainant. It argued that the disparity in remuneration was unrelated to the race ground; a higher salary was required to attract a suitable person on a temporary basis and the comparator was better qualified than the complainant. The WRC found that the respondent offered no evidence to support those contentions and could not rely on 'mere assertions' to rebut the presumption of discrimination established because employees of a different nationality were undertaking 'like work'. It awarded EUR 9 500 in compensation and instructed the respondent to increase the complainant's annual salary to EUR 45 000.

The definition of remuneration in Section 2(1) EEA specifically excludes pension rights – meaning a pension or any other benefits flowing from an occupational pension scheme – from its ambit. Instead, Parts VII[222] and VIIA[223] of the Pensions Acts 1990-2018 implement the principle of equal treatment with respect to occupational pensions. The Pensions Acts cover the same nine grounds as EEA: race, religious belief, gender, age, sexual orientation, civil status, family status, disability, and membership of the Traveller community. The legislation prohibits direct and indirect discrimination, discriminatory instructions and procurement to discriminate, as well as victimisation, in respect of occupational benefit schemes, occupational benefits and occupational pensions. Key exceptions include those

[216] Employees who are dismissed for putative discriminatory reasons may opt instead to pursue an unfair dismissals complaint under the Unfair Dismissals Acts 1997-2015: Ireland, Unfair Dismissals Act 1997, 6 April 1977; Ireland, Unfair Dismissals (Amendment) Act 1993, 14 July 1993. Revised text available at: http://revisedacts.lawreform.ie/eli/1977/act/10/revised/en/html. Under Section 6(2) of that legislation, 'the dismissal of an employee shall be deemed … to be an unfair dismissal if it results wholly or mainly from one or more of the following: … (b) the religious or political opinions of the employee … (e) the race, colour or sexual orientation of the employee, *(ee)* the age of the employee, (*eee*) the employee's membership of the travelling community'.

[217] See http://revisedacts.lawreform.ie/eli/1998/act/21/section/8/revised/en/html.

[218] See http://revisedacts.lawreform.ie/eli/1998/act/21/section/29/revised/en/html.

[219] See http://revisedacts.lawreform.ie/eli/1998/act/21/section/7/revised/en/html.

[220] See, for example, Workplace Relations Commission, *A Complainant v A Respondent*, ADJ-00026783, 13 January 2021, https://www.workplacerelations.ie/en/cases/2021/january/adj-00026783.html: the complainant was not engaged in 'like work' with comparators of a different age and gender; Labour Court, *Lynn v O'Reilly*, EDA217, 6 April 2021, https://www.workplacerelations.ie/en/cases/2021/april/eda217.html: the difference in pay between the complainant and a younger comparator was due to factors other than age, specifically market forces (applying CJEU, Case C-127/92, *Enderby v Frenchay Health Authority*, 27 October 1993).

[221] Workplace Relations Commission, *HR Administrator v A Hotel Group*, ADJ-00024962, 8 July 2020, https://www.workplacerelations.ie/en/cases/2020/july/adj-00024962.html.

[222] Inserted by Section 22 of the Social Welfare (Miscellaneous Provisions) Act 2004, 25 March 2004, http://www.irishstatutebook.ie/eli/2004/act/9/section/22/enacted/en/html#sec22.

[223] Inserted by Section 27 of the Social Welfare, Pensions and Civil Registration Act 2018, http://www.irishstatutebook.ie/eli/2018/act/37/section/27/enacted/en/html#sec27.

that provide for different treatment on the grounds of age[224] and disability to take account of a lesser amount of work undertaken by virtue of a disability and to provide for more favourable treatment where early retirement arises from a disability.[225]

Many of the cases to date concern the gender and civil status grounds, but in one case a complainant who had been denied admittance to an occupational pension scheme succeeded in his claim of discrimination on grounds of race, and the company was ordered to register him in the scheme and to pay the contributions due.[226] A discrimination complaint on the age, civil status and sexual orientation grounds was the subject of a reference to the CJEU in *Parris v Trinity College Dublin*.[227] Mr Parris argued that the pension scheme operated by his employer was discriminatory, as it provided that an employee's partner would only be entitled to a survivor's pension in cases where the employee had married or entered a civil partnership before reaching the age of 60. National law prohibited the complainant from marrying and did not enable him to enter a civil partnership prior to his 60th birthday. It was, therefore, impossible for him to comply with the so-called survivor's rule in the pension scheme. Three questions were referred to the CJEU: whether the survivor rule was directly or indirectly discriminatory under Directive 2000/78/EC (1) on the ground of sexual orientation, (2) on the ground of age, or (3) if neither age nor sexual orientation applied in isolation, because of the combined effect of both. Each question was answered in the negative, leaving Parris and others in his position without a remedy under either domestic or EU law.[228] The Pensions Acts were amended in 2018 to rectify the situation. Part VIIA[229] provides that, if a member of an occupational pension scheme was in a committed relationship with a same-sex partner at the time they reached the age or date of retirement set out in the scheme rules and then married that partner within three years of the enactment of the Marriage Act 2015, they are deemed eligible for a survivor pension.

No relevant complaints under the Pensions Acts were determined in 2021.

Section 35 EEA is a cause of concern as it permits employers to pay employees with disabilities different rates of pay if they are restricted in their capacity to do the same amount of work or to work for the same amount of hours as a person who does not have a disability. This section contains only one limitation, which is that the employee should not be remunerated at a rate below the level required by the National Minimum Wage Act 2000.[230] There is nothing to suggest that the work should be remunerated at a proportionate level to that of an employee without a disability. This may not comply with the directive.

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

In Ireland, national legislation prohibits discrimination in vocational training outside the employment relationship, such as adult lifelong learning courses or vocational training provided by technical schools or universities. Discrimination in these areas is prohibited on

[224] Section 72(1) Pensions Acts 1990-2018.
[225] Section 73 Pensions Acts 1990-2018.
[226] Equality Tribunal, DEC-P2011-007, *Czyzycki v Fegan,* 22 December 2011, https://www.workplacerelations.ie/en/Cases/2011/December/DEC-P2011-007-Full-Case-Report.html.
[227] Equality Tribunal, *Parris v Trinity College Dublin and others*, DEC-P2013-004, 16 December 2013, https://www.workplacerelations.ie/en/Cases/2013/December/DEC-P2013-004.html; Court of Justice of the European Union, Judgment of 24 December 2016, *Parris v Trinity College Dublin and others*, [2016] EUECJ C-443/15, http://www.bailii.org/eu/cases/EUECJ/2016/C44315.html.
[228] *Parris v Trinity College Dublin and others*, [2016] EUECJ C-443/15.
[229] Inserted by Section 27 of the Social Welfare, Pensions and Civil Registration Act 2018, http://www.irishstatutebook.ie/eli/2018/act/37/section/27/enacted/en/html#sec27.
[230] National Minimum Wage Act 2000, 31 March 2000, http://www.irishstatutebook.ie/eli/2000/act/5/enacted/en/html.

nine grounds: age, civil status, disability, family status, gender, race, religious belief, sexual orientation and membership of the Traveller community.

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

This provision is further reinforced by Section 12, which prohibits discrimination in vocational training on the nine discriminatory grounds. It is not permissible to discriminate in the provision of vocational training in relation to the terms on which the course or facility is offered, by refusing or omitting to afford access to any such course or facility, or in the manner in which any such course or facility is provided.[231]

Vocational training is defined, in Section 12(2), as:

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

Courses that are exclusively concerned with training for an occupational activity are thus covered by EEA.[232] According to the Labour Court,[233] the definition may not align with the meaning of vocational training adopted by the CJEU in cases such as Case C-293/83, *Gravier v City of Liege*[234] and Case C-24/86, *Blaizot v University of Liege*.[235] It noted, however, that both judgments concerned the free movement principle in Regulation 1612/68 and it could not be assumed that a 'similarly expansive interpretation' of the term would be taken for the purpose of Directive 2000/43/EC. Other education and training courses are subject instead to the anti-discrimination provisions of the Equal Status Acts 2000-2018.[236] Cumulatively, the provisions of both EEA and ESA cover the vocational programmes and work experience referred to under Article 3(1)(b). The complainant in a 2021 case referred complaints under both laws.[237] His EEA complaint failed as he was working on the respondent's farm in a voluntary capacity and was not pursuing vocational training. However, the ESA complaint was upheld. The respondent directly discriminated against the complainant on the disability ground in terminating his work experience and ceasing to provide housing when it became aware of his HIV positive status. However, the narrow definition of vocational training under EEA may give rise to a compliance issue, since the duty to provide reasonable accommodation on the disability ground under ESA is less extensive than that required under Directive 2000/78.

An exception concerning the religion ground may raise compliance issues. Subsections 3-5 of Section 12 empower the relevant Minister, with the consent of the Minister for Children, Equality, Disability, Integration and Youth, to make an order reserving places on

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[231] Section 12(1) EEA.

[232] Training to become a member of the volunteer Garda Reserve was not covered by Section 12 EEA since the Garda Reserve is not an occupational activity: High Court, *An Garda Síochána v Oberoi* [2013] IEHC 267, 30 May 2013, https://www.courts.ie/view/judgments/1a3c1031-5412-4583-8f39-8d6b1f9fc895/5485ff03-67f4-4dbc-ac3c-cb20420a4552/2013_IEHC_267_1.pdf/pdf. A Masters in Social Science degree programme that comprised 50 % academic and 50 % practical work was not vocational training according to the Equality Tribunal 'as it was not exclusively concerned with perfecting the knowledge or technical capacity to carry out an occupational activity': *Kelly v University College Dublin*, DEC-S2006–076, November 2006, https://www.workplacerelations.ie/en/Cases/2006/November/DEC-S2006-076-Full-Case-Report.html.

[233] *Dublin Institute of Technology v Awojuola,* EDA 1335, 23 December 2013, https://www.workplacerelations.ie/en/Cases/2013/December/EDA1335.html.

[234] [1985] E.C.R. 593.

[235] [1988] E.C.R. 379.

[236] Section 7 ESA. See Chapter 3.2.7 for more on this provision.

[237] Workplace Relations Commission, *Trainee v Organic Farm*, ADJ-00025701, 26 November 2021, https://www.workplacerelations.ie/en/cases/2021/november/adj-00025701.html.

programmes of training for nurses and primary school teachers to persons of a certain religion. The exemption may be applied for by an educational or training body '[f]or the purposes of ensuring the availability of nurses to hospitals and teachers to primary schools which are under the direction or control of a body established for religious purposes or whose objectives include the provision of services in an environment which promotes certain religious values, and in order to maintain the religious ethos of the hospitals or primary schools.'[238] Pursuant to that section, the Employment Equality Act 1998 (Section 12) (Reservation of vocational training places) Order 2018 (S.I. No. 260 of 2018) permits Dublin City University to reserve 32 places in its Bachelor of Education degree programme for students who are members of the Church of Ireland or who belong to the broad Protestant tradition.[239] This provision may be too broad to comply with the terms of Article 4(2), since there is no requirement to demonstrate that the group of prospective teachers' religious beliefs constitute a genuine, legitimate and justified occupational requirement.

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

In Ireland, national legislation prohibits discrimination in relation to membership of and involvement in workers' or employers' organisations, as formulated in the directives for all five grounds and for both private and public employment.

Section 13(1) EEA prohibits discrimination on all five grounds in relation to organisations of workers or of employers, trade or professional organisations, and bodies that control entry to or the carrying on of a profession, vocation or occupation. This provision relates both to membership of the body in question and to any benefits provided by that body, with the exception of pension rights, which fall instead under the ambit of Parts VII and VIIA of the Pensions Acts 1990-2018. Section 13(2) EEA outlaws discriminatory advertising by such bodies. Section 13A prohibits discrimination in respect of business partnerships.

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

In Ireland, national legislation prohibits discrimination in social protection, including social security and healthcare, as formulated in the Racial Equality Directive.

Discrimination in this area is prohibited on all EU grounds as well as on the grounds of civil status, family status and membership of the Traveller community (which overlaps with the race ground).[240]

Under Section 5(1) ESA: 'A person shall not discriminate in disposing of goods to the public generally or a section of the public or in providing a service, whether the disposal or provision is for consideration or otherwise and whether the service provided can be availed of only by a section of the public.' 'Service' means a service or facility of any nature, which is available to the public generally or a section of the public (Section 2(1)). The legislation does not refer specifically to social protection, healthcare or social security.[241] However, the first instance forum, the Equality Tribunal (now the Workplace Relations Commission) interpreted the definition of 'service' to include social protection from the outset.[242] For

[238] Section 12(4) EEA.
[239] See http://www.irishstatutebook.ie/eli/2018/si/260/made/en/print#.
[240] Section 3(2) ESA.
[241] Discrimination in the context of social housing provision is prohibited under Section 6 ESA. See Chapter 3.2.9.
[242] The foundational case is: Equality Tribunal, *Donovan v Donnellan,* DEC-S2001-011, 17 October 2001, https://www.workplacerelations.ie/en/cases/2001/october/dec-s2001-011.html; Applied, for example, in

example, cases have upheld discrimination in relation to social welfare payments such as rent supplement[243] and have established that allowances for persons with disabilities are 'services'.[244] Healthcare is also covered.[245]

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

> 'Nothing in this Act shall be construed as prohibiting—
> (a) the taking of any action that is required by or under—
> (i) any enactment or order of a court.'

The word 'enactment' is not defined in ESA. It covers Acts of the Oireachtas and statutory instruments.[246] Precedents established that Government department circulars and other administrative rules were not enactments and so were amenable to challenge under ESA.[247] However, in a 2021 judgment the High Court held that the exemption encompasses guidance notes that a public body devised to process applications for driving licences.[248] The guidance notes are referred to, but do not form part of the applicable statutory instrument. The judgment suggests that policy or guidance adopted by a public body which is expressly derived from legislation may be covered by the exemption. It remains to be seen how the judgment will impact on WRC decisions.

Where some element of discretion exists in relation to the granting of a benefit, other good or service, the statutory exemption is inapplicable, since it relates only to discriminatory treatment *required* by law.[249] However, where the putative discriminatory treatment is required by law, Section 14(1)*(a)*(i) operates to remove the measure from the ambit of ESA. Several challenges to social protection provisions have failed on that basis.[250] In 2016, for example, the WRC determined that it did not have jurisdiction to assess a discrimination

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Equality Tribunal, *McQuaid v Department of Social Protection*, DEC-S2014-015, 2 October 2014, https://www.workplacerelations.ie/en/Cases/2014/October/DEC-S2014-015.html.

243 Equality Tribunal, *Mr A v Department of Social Protection*, DEC-S2013-010, 11 October 2013, https://www.workplacerelations.ie/en/Cases/2013/October/DEC-S2013-010.html.

244 Equality Tribunal, *Mrs X (on behalf of her daughter, Ms Y) v The Minister for Social and Family Affairs*, DEC-S2009-039, 10 June 2009, at paras. 5.1-5.2, https://www.workplacerelations.ie/en/Cases/2009/June/DEC-S2009-039-Full-Case-Report.html.

245 See, for example, Workplace Relations Commission, *A Potential Patient v A Medical Centre*, ADJ-00019028, 19 June 2019, https://www.workplacerelations.ie/en/cases/2019/june/adj-00019028.html. A person detained in a mental health institution can avail of the ESA to contest the nature of the facilities provided there: Equality Tribunal, *A Patient v Health Service Provider and A Hospital*, DEC-S2010-053, 1 December 2010, https://www.workplacerelations.ie/en/Cases/2010/December/DEC-S2010-053-Full-Case-Report.html.

246 Secondary legislation is covered by the term 'enactment' in Section 14(1)(*a*)(i). Following the entry into force of the Equal Status Act 2000, Section 2(1) of the Interpretation Act 2005 defined 'enactment' to mean 'an Act or statutory instrument or any portion of an Act or statutory instrument'. The Interpretation Act was applied by the Equality Tribunal in finding that tax regulations were enactments and so were immune from challenge under the ESA: *Dowd v Minister for Finance*, DEC-S2011-061, 15 November 2011, https://www.workplacerelations.ie/en/Cases/2011/December/DEC-S2011-061-Full-Case-Report.html.

247 See, for example, Circuit Court Dublin, *Health Service Executive v Quigley* (Linnane J., unreported, 26 April 2010).

248 High Court, *A.B. v Road Safety Authority*, [2021] IEHC 217, 25 March 2021, https://www.courts.ie/view/judgments/a6f51761-a591-46b8-8d2c-299e8fb6f7df/d56b90ba-36a4-4962-b964-8370efca557a/2021_IEHC_217.pdf/pdf. The judgment was the culmination of an appeal from the WRC's decision in *An Asylum Seeker v A Statutory Body*, ADJ-00020743, 28 January 2020, https://www.workplacerelations.ie/en/cases/2020/january/adj-00020743.html.

249 Equality Tribunal, *Mr A v Department of Social Protection*, DEC-S2013-010, 11 October 2013, https://www.workplacerelations.ie/en/Cases/2013/October/DEC-S2013-010.html.

250 In Equality Tribunal, *A Complainant v Department of Social and Family Affairs,* DEC-S2008-013, 19 February 2008, https://www.workplacerelations.ie/en/Cases/2008/February/DEC-S2008-013-Full-Case-Report.html, the equality officer found that the ESA could not be used to challenge the method of calculating Pay Related Social Insurance (PRSI) contributions for the purposes of the Old Age (Contributory) Pension [now called the State Pension (Contributory)]. The scheme in question is governed by statute: Section 108 of the Social Welfare Consolidation Act 2005 (as amended by Section 8 of the Social Welfare Law Reform and Pensions Act 2006). See also Equality Tribunal, *A Complainant v Department of Social Protection,* DEC-S2011-053, 18 November 2011, https://www.workplacerelations.ie/en/Cases/2011/November/DEC-S2011-053-Full-Case-Report.html.

complaint about eligibility for a medical card because the criteria are set out in legislation.[251]

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

Judicial interpretation will be crucial in determining whether Ireland is in compliance with Directive 2000/43/EC. Pending such interpretation, it is not possible to say definitively whether Ireland is in compliance with the Racial Equality Directive.[252]

a) Article 3(3) exception (Directive 2000/78)

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

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

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

The term 'social advantage' is not expressly referred to under ESA. Section 2(1) defines 'service' as including 'facilities for (i) banking, insurance, grants, loans, credit or financing, (ii) entertainment, recreation or refreshment, (iii) cultural activities, or (iv) transport or travel'. Case law establishes that 'service'[253] encompasses a broad category of benefits provided by public and private actors such as free travel passes on public transport,[254] maintenance grants for third-level students[255] and sports scholarships.[256] However, a Circuit Court judgment concerning an ex gratia payment scheme set up by the Irish Government to compensate people affected by the liberalisation of the taxi industry has cast some doubt on the applicability of anti-discrimination law to social advantages provided by the public sector.[257] The Court found that 'the Tribunal had no jurisdiction to entertain the complaint because to do so was "in effect, to purport to review a decision of the Government, which … falls outside the scope of the powers conferred on it by the 2000 Act"'.[258] Furthermore, discrimination complaints concerning social advantages may fail because they are covered by the exemption for treatment required by law under Section 14(1)*(a)* (see Chapter 3.2.5).[259] It is not clear, therefore, whether national law complies fully with the Racial Equality Directive.

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[251] Workplace Relations Commission, *Donaghy v Department of Health*, DEC-S2016-024, 19 April 2016, https://www.workplacerelations.ie/en/Cases/2016/April/DEC-S2016-024.html.

[252] See Walsh, J. (2019), 'Primacy of national law over EU law? The application of the Irish Equal Status Act', *European Equality Law Review* 2019(2), pp. 35-48.

[253] These cases were referred under Section 5 ESA, which prohibits discrimination in the context of providing goods or services to members of the public. The grounds covered are all those provided for under Section 3(2), that is, gender, age, race, religion, family status, disability, civil status, sexual orientation and membership of the Traveller community.

[254] Equality Tribunal, *Thompson v Iarnród Éireann*, DEC-S2009-015, 2 March 2009, https://www.workplacerelations.ie/en/Cases/2009/March/DEC-S2009-015-Full-Case-Report.html.

[255] Equality Tribunal, *Two Complainants v Department of Education and Science*, DEC-S2003-042/043, 28 May 2003, https://www.workplacerelations.ie/en/Cases/2003/May/DEC-S2003-042-043_Full_Case_Report.html.

[256] Equality Tribunal, *MacMahon v Department of Physical Education and Sport, University College Cork,* DEC-S2009-014, 2 March 2009, https://www.workplacerelations.ie/en/Cases/2009/March/DEC-S2009-014-Full-Case-Report.html.

[257] Circuit Court, *Pobal v Hoey*, unreported judgment, 14 April 2011.

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

[259] For instance, several complaints about potentially discriminatory tax credit provisions fell outside the ambit of ESA because of the Section 14(1)*(a)* exemption, e.g. Equality Tribunal, *Dowd v Gilvarry and HSE West*, DEC-S2011-060, 15 December 2011, https://www.workplacerelations.ie/en/cases/2011/december/dec-s2011-060-full-case-report.html.

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

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

Section 7 ESA covers educational establishments. 'Educational establishment' is broadly defined, covering pre-school services through to higher-level institutions, whether or not they are supported by public funds. Public and private establishments providing educational services are therefore covered. Discrimination on nine grounds is prohibited in respect of admission to the terms or conditions of admission of a person as a student to the establishment; the access of a student to any course, facility or benefit provided by the establishment; any other term or condition of participation in the establishment by a student; or the expulsion of a student from the establishment or any other sanction against the student. The grounds covered are gender, age, race, religion, family status, disability, civil status, sexual orientation and membership of the Traveller community.[260]

Section 7 only refers to students or prospective students. However, other people, such as parents of pupils, can refer cases against schools or other educational establishments under Section 5 (provided they are accessing a service, good or facility).[261] The Department of Education is not an 'educational establishment' but may be regarded as providing goods and services under Section 5, as may other entities involved in providing facilities or setting policies in the area of education.[262]

Case law has dealt with the accommodation of students with disabilities[263] and broader questions of access across all levels of the education system.[264] In a 2015 race-ground case, a criterion in a school admissions policy contravened the indirect discrimination prohibition. The criterion accorded priority to prospective students based on their date of application. The complainant, as an adopted child of Chinese national and ethnic origins, was not in the same position to submit her application as early applicants of Irish national origins who were not adopted. Her mother was unable to apply for a place close to the complainant's birth date due to the fact that the adoption process was not concluded until the complainant was 16 months old. Evidence was presented to the effect that 82 % of non-family adoptions involved children of a non-Irish national origin and that such adoptions took between six and 24 months to complete. The Tribunal found that the provision put the complainant and foreign adopted children generally at a particular disadvantage compared with Irish-born children.[265] It concluded that, while the admission

[260] Section 3(2) ESA. Section 29 of the Education Act 1998 provides for a general complaints mechanism in relation to enrolment, suspension or exclusion of students from schools: Ireland, Education Act 1998, 23 December 1998, http://www.irishstatutebook.ie/eli/1998/act/51/section/29/enacted/en/html.

[261] See, for example, Equality Tribunal, *A Separated Father v A Community School*, DEC-S2010-049, 5 November 2010, https://www.workplacerelations.ie/en/Cases/2010/November/DEC-S2010-049-Full-Case-Report.html: access to students' records was a service provided to parents having regard to both ESA and the Education Act 1998.

[262] See, for example, Equality Tribunal, *Two Named Complainants v Minister for Education and Science*, DEC-S2006-077, 3 November 2006, https://www.workplacerelations.ie/en/Cases/2006/November/DEC-S2006-077-Full-Case-Report.html, and Workplace Relations Commission, *A Mother on behalf of her Son v Department of Education & Skills/State Examinations Commission*, DEC-S2016-040, 9 June 2016, https://www.workplacerelations.ie/en/Cases/2016/June/DEC-S2016-040.html.

[263] See for example, Workplace Relations Commission, *A mother on behalf of her son v The Board of Management of a National School*, DEC-S2016-048, 18 July 2016, https://www.workplacerelations.ie/en/Cases/2016/July/DEC-S2016-048.html (failure to permit assistance dog to accompany student to school contravened reasonable accommodation duty).

[264] See, for example, Equality Tribunal, *Mr X and Ms Y (on behalf of their daughter Z) v A Boys National School*, DEC-S2009-017, 13 March 2009, https://www.workplacerelations.ie/en/Cases/2009/March/DEC-S2009-017-Full-Case-Report.html (gender ground); *Faulkner v St Ita's & St Joseph's School, Tralee*, DEC-S2006-037, 24 June 2006, https://www.workplacerelations.ie/en/Cases/2006/May/DEC-S2006-037-Full-Case-Report.html (Traveller community ground); and *Lyamina v The Department of Education and Science,* DEC-S2009-016, 6 March 2009, https://www.workplacerelations.ie/en/Cases/2009/March/DEC-S2009-016-Full-Case-Report.html (race ground).

[265] Equality Tribunal, *Ms. A (on behalf of her daughter, B) v A Girls Secondary School*, DEC-S2015-001, 6 February 2015, https://www.workplacerelations.ie/en/Cases/2015/February/DEC-S2015-001.html.

criterion pursued the legitimate aim of operating a fair and reasonable admissions policy, the respondent did not establish that the provision was necessary to achieve that aim.

There was no case law on the race or Traveller community grounds in 2021.

Discrimination in access to schools has raised compliance issues in the past. In a high-profile case, the Supreme Court overturned an earlier decision of the Equality Tribunal and ruled that a school admission policy that prioritised former pupils' children did not constitute indirect discrimination against Travellers.[266] It determined that the evidence presented by the complainant did not demonstrate that the school's policy placed Travellers in a situation of particular disadvantage. In effect, the Court held that statistical evidence was *required* in order to establish a prima facie case; it did not consider EU law in assessing the ESA prohibition of indirect discrimination. In its amicus curiae submission, the Equality Authority argued that the indirect discrimination test should conform to that of the Racial Equality Directive.[267] The Supreme Court, however, applied a test formulated with reference to the provisions of the domestic statute (ESA) and did not consider whether Travellers constitute an ethnic group for the purposes of EU law.

School admissions criteria are liable to place migrant children at a particular disadvantage, given that many of them will have not been resident in the country for equivalent periods of time to their Irish national counterparts. For instance, preferences for applicants with parents or other relatives who attended the school (as in *Stokes*) or a requirement that one has been resident in the local area for a certain period[268] could have an exclusionary effect on migrants.

Discrimination in accessing schools has been the subject of extensive debate over the past decade in particular. International human rights bodies[269] and IHREC[270] had recommended amending ESA, and in 2017 the Government undertook a consultation process on the role of religion in school admissions.[271] A significant number of NGOs campaigned on the question of school admission policies, providing impetus to the reform of the legal framework effected in 2018.[272] Several changes aimed at addressing discrimination in accessing schools were enacted under the Education (Admission to Schools) Act 2018.[273]

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[266] Supreme Court, *Stokes v Christian Brothers' High School Clonmel*, [2015] IESC 13, 24 February 2015, https://www.courts.ie/view/judgments/7c76c785-7af6-49db-9478-be182b899693/4b1b534e-7778-4a7d-b01f-bddb28538e09/2015_IESC_13_2.pdf/pdf.

[267] See https://www.ihrec.ie/download/pdf/mary_stokes_v_christian_brothers_high_school_clonmel_ors__13_dec_2012_.pdf.

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

[269] See, for example, UN Committee on the Rights of the Child (2016), *Concluding observations on the combined third and fourth periodic reports of Ireland*, 29 January 2016, CRC/C/IRL/CO/3-4, at Para. 64(a), http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsvOufvUWRUJlLHiLHKqpXZxUGOtzQF0l%2B37QzAKosbh7yc40d4J3IynFaWf0Egu6J99RK6Y%2FTHjpged5r1H3f3KQIiFieFkoeAPALAwKpbZz; UN Committee on the Elimination of Racial Discrimination (2011), *Concluding observations of the Committee on the Elimination of Racial Discrimination: Ireland*, CERD/C/IRL/CO/3-4, at Para. 26, http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsl%2fyrM1B9TT0oGmEKg0FjIGMDN9GaDxXjccJrXyrYl%2f%2fcNOv7wnHIb0L7jDoxEB0Xhj6wo%2f5mWhBPgF7MFyODF2Qj0zgpRtrVm9esS4KT3%2ft.

[270] Irish Human Rights and Equality Commission (2016), *Observations on the Education (Admission to Schools) Bill 2016*, https://www.ihrec.ie/app/uploads/2016/11/Observations-on-Education-Admission-to-Schools-Bill-2016.pdf.

[271] See further: https://www.education.ie/en/Parents/Information/School-Enrolment/Role-of-Religion-in-School-Admissions.html.

[272] See, for example, the submissions elicited by the Department of Education and Skills, published at https://www.education.ie/en/Parents/Information/School-Enrolment/submissions-from-patrons-organisations-and-representative-groups/.

[273] Section 9, Education (Admission to Schools) Act 2018, 18 July 2018, http://www.irishstatutebook.ie/eli/2018/act/14/enacted/en/html, inserting Part X of the Education Act

The 2018 Act effected a reform which should improve the situation encountered in *Stokes.* Oversubscribed schools are now not permitted to allocate more than 25 % of places to the children of past pupils. The Act further provides for the phasing out of school waiting lists, which should ensure that children who move to a new area are not disadvantaged in the future.

The 2018 Act also amended Section 7 ESA, so that primary schools can no longer use religion as a selection criterion, in most cases.[274] This change in the law still allows schools of minority religions to give preference to a student who seeks admission to a school providing religious instruction or education consistent with his or her minority religious beliefs, but only where the school is oversubscribed. Prior to this reform, denominational schools were permitted to distinguish between prospective students on the basis of their religious background. They were also entitled to refuse admission to a child who was not of that denomination where it was essential to maintain the ethos of the school.[275]

In recent years, several NGOs raised concerns about the use of reduced timetables (reduced school hours) in relation to vulnerable pupils, including children with disabilities, as well as Traveller and Roma children.[276] The matter was considered by a parliamentary committee in 2019.[277] Guidelines for schools were published in 2021, which came into effect on 1 January 2022.[278] The guidelines aim to ensure that this practice is limited to only those circumstances where it is absolutely necessary. Parental consent is required and schools are obliged to notify a statutory agency, Tusla Education Support Service, when a reduced timetable is proposed. This will allow the use of reduced timetables to be monitored and the extent of their use to be ascertained.

School closures and the transition to online learning for significant periods across 2020 and 2021, due to the COVID-19 pandemic, had a particularly adverse impact on children with disabilities.[279] The Ombudsman for Children (OCO) also highlighted the disproportionate effect on children living in inadequate living conditions, including Traveller and Roma children.[280] The Government adopted several ameliorative measures. However, NGOs have argued that additional supports are required to 'counter regressions experienced during the pandemic'.[281] The OCO has called, *inter alia*, for a comprehensive assessment of the mitigating measures taken with a view to developing further responses.[282] Allied to this,

1998, 23 December 1998, http://www.irishstatutebook.ie/eli/1998/act/51/enacted/en/print.html. Part X also obliges schools to prepare and publish an admissions policy which stipulates, *inter alia*, that the school does not discriminate on the nine grounds provided for under ESA.

274 Section 11, Education (Admission to Schools) Act 2018.

275 The exemption was successfully invoked by a school in Equality Tribunal, *Ms A (on behalf of her son X, A Minor) v A Secondary School*, DEC-S2014-010, 12 August 2014, https://www.workplacerelations.ie/en/Cases/2014/August/DEC-S2014-010.html. A secondary school could not avail of the exemption in a 2020 case because it was multi-denominational. It discriminated on the religion ground in giving preferential treatment in its admission policy to Church of Ireland students. The school was ordered to cease the discriminatory practice and to enrol the complainant, a Catholic: Workplace Relations Commission, *Student v Community School*, ADJ-00027446, 19 November 2020, https://www.workplacerelations.ie/en/cases/2020/november/adj-00027446.html.

276 Children's Rights Alliance (2021), *Report Card 2020*, pp. 56-69, https://www.childrensrights.ie/sites/default/files/Report-Card-23-Feb-2021.pdf.

277 Houses of the Oireachtas, Joint Committee on Education and Skills (2019), *Interim Report on the Committee's Examination on the Current Use of Reduced Timetables*, https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_education_and_skills/reports/2019/2019-07-04_interim-report-on-the-committee-s-examination-on-the-current-use-of-reduced-timetables_en.pdf.

278 Government of Ireland (2021), *Guidelines for schools on recording and notification of the use of Reduced School days*, https://www.gov.ie/en/circular/f49bd-0047-2021/.

279 Children's Rights Alliance (2021), *Report Card 2020*, p. 83; O'Mahony, C. (2021), *Annual Report of the Special Rapporteur on Child Protection 2021*, https://www.gov.ie/en/publication/2d30f-annual-report-of-the-special-rapporteur-on-child-protection-2021/.

280 Ombudsman for Children's Office (2022), *The Impact of School Closures on Children's Rights in Ireland*, https://www.oco.ie/app/uploads/2022/01/CRIA-FullReport.pdf.

281 Children's Rights Alliance (2021), *Report Card 2020*, p. 83.

282 Ombudsman for Children's Office (2022), *The Impact of School Closures on Children's Rights in Ireland*, p. 35.

NGOs continue to seek the commencement of the provisions in the Education for Persons with Special Educational Needs Act 2004 that provide for individual education plans and an appeals mechanism.[283] In December 2021, the Government announced a review of the 2004 Act.[284] It is envisaged that the review will be completed by early 2023 and will be based on a consultation process with stakeholders.[285]

a) Trends and patterns regarding Roma pupils

In Ireland, limited data is available as to whether there are specific legal or societal trends and/or patterns in education regarding Roma pupils, such as segregation. The Department of Education's *Report and Recommendations for a Traveller Education Strategy* (2006)[286] led to the desegregation of education for Traveller pupils. One of the two remaining Traveller-only schools closed in 2019.[287]

There is no case law to date on discrimination against Roma pupils. Members of the Irish Traveller community have referred several cases against schools.[288]

A *National Roma Needs Assessment* was published in 2018.[289] It suggests that Roma pupils' participation in education is affected by high levels of poverty and poor accommodation. Segregation was not reported as an issue, save that 'due to lack of literacy and language skills many older children are placed in classes with younger peers.'[290] The report calls for further research on the experiences of Roma children in education. The Irish education system has yet to develop a culturally appropriate response to specific issues relating to Roma. No reference is made to Roma in the main policy document, the *Intercultural Education Strategy 2010 – 2015*.[291]

Training in the area of intercultural education is not compulsory for qualified teachers, and there remains an absence of curriculum-linked resources that explore Traveller and Roma language and culture.[292] In 2018, a private members' bill was introduced to the Irish Parliament that aims to formally include Traveller culture and history in the school curriculum.[293] At the end of 2021, the bill had reached Committee Stage before Dáil Éireann (the lower house of the Oireachtas). In response to that initiative, the Minister for

283 Children's Rights Alliance (2021), *Report Card 2020*, p. 75.
284 See https://www.gov.ie/en/press-release/69020-minister-josepha-madigan-launches-review-of-the-education-for-persons-with-special-educational-needs-epsen-act-2004/.
285 See https://www.oireachtas.ie/en/debates/question/2022-02-01/457/#pq_457.
286 See https://www.education.ie/en/Publications/Policy-Reports/des_recom_traveller_educ_strategy.pdf.
287 See Pavee Point (2019), *Civil Society Monitoring Report on Implementation of the National Roma Integration Strategy in Ireland: Assessing the progress in four key policy areas of the strategy*, https://cps.ceu.edu/sites/cps.ceu.edu/files/attachment/basicpage/3034/rcm-civil-society-monitoring-report-2-ireland-2018-eprint-fin-2.pdf.
288 See, for example, Workplace Relations Commission, *A Complainant on behalf of her son v Board of Management of A Primary School*, ADJ-00008562, 23 May 2018, https://www.workplacerelations.ie/en/Cases/2018/May/ADJ-00008562.html; Equality Tribunal, *Mrs K (on behalf of her son) v A Primary School,* DEC-S2011-003, 18 January 2011, https://www.workplacerelations.ie/en/Cases/2011/January/DEC-S2011-003-Full-Case-Report.html; *A Mother (on behalf of her son) v A School and the Department of Education and Skills*, DEC-S2010-056, 7 December 2010, https://www.workplacerelations.ie/en/Cases/2010/December/DEC-S2010-056-Full-case-report.html; *Two Complainants (a mother and her son) v A Primary School*, DEC-S2006-028, 6 April 2006, https://www.workplacerelations.ie/en/Cases/2006/April/DEC-S2006-028-Full-Case-Report.html; *Faulkner v St Ita's & St Joseph's School, Tralee*, DEC-S2006-037, 24 June 2006, https://www.workplacerelations.ie/en/Cases/2006/May/DEC-S2006-037-Full-Case-Report.html.
289 Pavee Point and Department of Justice and Equality (2018), *Roma in Ireland: A National Needs Assessment,* Dublin, Pavee Point, https://www.paveepoint.ie/wp-content/uploads/2015/04/RNA-PDF.pdf.
290 Pavee Point and Department of Justice and Equality (2018), *Roma in Ireland: A National Needs Assessment,* p. 113.
291 Department of Education and Skills and Office of the Minister for Integration (2010), *Intercultural Education Strategy, 2010–2015*, https://www.gov.ie/en/publication/75ade-intercultural-education-strategy/.
292 Pavee Point Traveller and Roma Centre (2015), *Convention on the Rights of the Child Shadow Report*, https://www.paveepoint.ie/wp-content/uploads/2015/04/Pavee-Point-Shadow-Report-for-UNCRC-on-Traveller-and-Roma-Children.pdf.
293 Traveller Culture and History in Education Bill 2018, https://www.oireachtas.ie/en/bills/bill/2018/71/.

Education and Skills requested the National Council for Curriculum and Assessment (NCCA) to conduct an audit of Traveller culture and history in the current school curriculum. The audit, which incorporated consultation with Traveller representative groups, was published in 2019.[294]

Researchers have criticised the failure to address racism in school curricula more generally.[295] A large quantitative study canvassing the attitudes of 4 970 Irish national post-primary students concluded that the 'levels of reported negativity towards Irish Travellers are disturbing and need to be urgently addressed by our education system.'[296] National data suggests that migrant and Traveller children are more likely to experience bullying in school.[297] Anti-bullying procedures, published in 2013, include a template for schools to record incidents.[298] 'However the completion of this template is not compulsory and there does not appear to be any intention to inspect these reports as part of the whole school evaluation process. This makes it all but impossible for the State to monitor in any real way the incident of identity-based bullying in schools.'[299] The *National Traveller and Roma Inclusion Strategy 2017–2021*, published in June 2017, contains commitments to review the effectiveness of the anti-bullying guidelines and teacher education.[300] However, this has not been undertaken to date. In August 2021, a parliamentary committee called for immediate action on that front.[301]

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

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

Section 5(1) ESA provides:

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

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294 NCCA (2019), *Traveller culture and history in the curriculum: a curriculum audit*, https://ncca.ie/media/4613/travellerculturehistory.pdf.

295 See, for example, Bryan, A. (2012), '"You've got to teach people that racism is wrong and then they won't be racist": Curricular representations and young people's understandings of "race" and racism', *Journal of Curriculum Studies*, 44(5), pp. 599-629, http://doras.dcu.ie/21468/1/10_SCAN.pdf; Kitching, K., and Curtin, A. (2012), *Addressing the concept and evidence of institutional racism in Irish education*, Cork, School of Education, University College Cork; Institute for Social Sciences in the 21st Century, https://cora.ucc.ie/handle/10468/816; Moloney, C., and O'Toole, B. (2018), '"Windows and mirrors" or "closed doors"? Representations of diversity in early years textbooks', *Irish Teachers' Journal* 6(1), pp. 55-72, https://www.into.ie/app/uploads/2019/07/IrishTeachersJournal2018.pdf.

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

297 Department of Children and Youth Affairs (2016), *State of the Nation's Children: Ireland 2016*, Dublin, Government Publications, https://www.dcya.gov.ie/documents/stateofthenationschildren/20170302SOTNCReport2016.pdf.

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

299 Pavee Point Traveller and Roma Centre (2015), *Convention on the Rights of the Child Shadow Report*, at p. 19, https://www.paveepoint.ie/wp-content/uploads/2015/04/Pavee-Point-Shadow-Report-for-UNCRC-on-Traveller-and-Roma-Children.pdf.

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

301 Houses of the Oireachtas (2021), Joint Committee on Education, Further and Higher Education, Research, Innovation and Science, *School Bullying and the Impact on Mental Health*, https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_education_further_and_higher_education_research_innovation_and_science/submissions/2021/2021-08-23_report-on-school-bullying-and-the-impact-on-mental-health_en.pdf.

The discriminatory grounds are those of gender, age, race, religion, family status, disability, civil status, sexual orientation and membership of the Traveller community (Section 3(2)).

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

Section 2(1) defines 'service' as

> 'a service or facility of any nature which is available to the public generally or a section of the public, and without prejudice to the generality of the foregoing, includes—
> (a) access to and the use of any place,
> (b) facilities for—
> (i) banking, insurance, grants, loans, credit or financing,
> (ii) entertainment, recreation or refreshment,
> (iii) cultural activities, or
> (iv) transport or travel,
> (c) a service or facility provided by a club (whether or not it is a club holding a certificate of registration under the Registration of Clubs Acts, 1904 to 1999) which is available to the public generally or a section of the public, whether on payment or without payment, and
> (d) a professional or trade service,
> but does not include pension rights (within the meaning of the Employment Equality Act 1998) or a service or facility in relation to which that Act applies.'

The services listed above are not exhaustive, and case law has established that the definition covers, *inter alia*, maintenance grants payable to students,[302] visits of family members to prisons[303] and the conduct of quasi-judicial proceedings.[304] In a 2020 decision, the WRC found that religious services or sacraments are not services for the purposes of Section 2(1) ESA.[305] It reasoned that, had the Oireachtas intended to include such ceremonies, it would have done so expressly. Otherwise, it would be unlawful for churches to refuse to marry divorced people or same-gender couples. Complaints of direct discrimination on the Traveller community, race and gender grounds pertaining to the exclusion of Traveller women from a Catholic communion mass were, therefore, dismissed.

Failure to adapt the provision of goods or services to meet the needs of a person with a disability is a form of discrimination.[306]

a) Distinction between goods and services available publicly or privately

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

[302] Equality Tribunal, *Two Complainants v Department of Education and Science*, DEC-S2003-042/043, 28 May 2003, https://www.workplacerelations.ie/en/cases/2003/may/dec-s2003-042-043_full_case_report.html.
[303] Workplace Relations Commission, *A Complainant on behalf of his son v Irish Prison Service*, DEC-S2018-010, 19 April 2018, https://www.workplacerelations.ie/en/Cases/2018/March/DEC-S2018-010.html.
[304] Workplace Relations Commission, *McDevitt v The Labour Relations Commission*, *now the Workplace Relations Commission*, DEC–S2018–030, 12 December 2018, https://www.workplacerelations.ie/en/Cases/2018/December/DEC–S2018–030.html.
[305] Workplace Relations Commission, *Sherlock v Bishop Martin Drennan*, ADJ-00009750, 12 August 2020, https://www.workplacerelations.ie/en/cases/2020/august/adj-00009750.html. This was one of eight interrelated complaints concerning the same incident, all of which were dismissed.
[306] Section 4, ESA.

The discrimination prohibition applies where goods or services are supplied to 'the public generally' or to 'a section of the public'.[307] Case law has established that members of private associations, such as trade unions,[308] clubs[309] and political parties,[310] constitute a 'section of the public' for the purposes of ESA.

However, distinct provisions govern registered clubs, which are bodies that have applied for or hold a certificate of registration under the Registration of Clubs Acts 1904–1999.[311] Registration enables clubs to sell alcohol to members and certain visitors. Clubs that do not hold a liquor licence are governed instead by the general prohibition on discrimination set out under Section 5 ESA. Sections 8 to 10 ESA apply exclusively to registered clubs. These provisions only relate to matters concerning membership of clubs, and cases must be taken before the District Court.[312] Clubs which have the principal purpose of catering for the needs of persons who are members of the Traveller community or people of a particular gender, sexual orientation, religious belief (or persons of no religious belief), family status, civil status, age, disability or nationality or ethnic or national origin can restrict membership to people from those groups (Section 9). The 'race' and 'colour' aspects of the race ground are not exempt. Further, the Traveller community exception is asymmetrical. It remains to be seen whether these provisions comply with the Racial Equality Directive. Recital 17 envisages the establishment of 'organisations of persons of a particular racial or ethnic origin where their main object is the promotion of the special needs of those persons' as positive action measures. However, the Irish Superior Courts have not taken account of disadvantage or substantive equality of opportunity principles in construing relevant provisions of ESA. The High Court interpreted Section 9 of that Act as permitting male-only membership in golf clubs, holding that the principal purpose of such clubs is to cater for the needs of men.[313] The Supreme Court upheld the decision on 4 November 2009.[314]

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

In Ireland, national legislation prohibits discrimination in the area of housing as formulated in the Racial Equality Directive.

Section 6(1) ESA prohibits discrimination in disposing of any estate or interest in premises, in terminating any tenancy or other interest in premises, or in the provision of accommodation and related services and amenities. The grounds of gender, age, race, religion, family status, disability, civil status, sexual orientation and membership of the Traveller community are covered (Section 3(2)). The Equality (Miscellaneous Provisions) Act 2015 introduced 'housing assistance' as a new ground to protect against discrimination in the accommodation context.[315] As of 1 January 2016, people in receipt of housing assistance, rent supplement or other social welfare payments cannot be discriminated against in relation to the provision of accommodation and related services and amenities. Over the past five years, cases concerning private sector housing have been referred almost exclusively on the housing assistance ground. One complaint on the race, gender

[307] Section 5(1) and Section 2(1), ESA.
[308] See, for example, Workplace Relations Commission, *A Civil Servant v A Trade Union*, ADJ-00019795, 16 August 2019, https://www.workplacerelations.ie/en/cases/2019/august/adj-00019795.html.
[309] See, for example, Workplace Relations Commission, *A Men's Shed Member v A Men's Shed*, ADJ-00006688, 30 January 2018, https://www.workplacerelations.ie/en/cases/2018/january/adj-00006688.html.
[310] Equality Tribunal, *Egan v Young Fine Gael*, DEC-S2011-001, 5 January 2011, https://www.workplacerelations.ie/en/cases/2011/january/dec-s2011-001-full-case-report.html.
[311] Registration of Clubs (Ireland) Act 1904, 15 August 1904, http://www.irishstatutebook.ie/eli/1904/act/9/enacted/en/print.html.
[312] Applied in Workplace Relations Commission, *A Member v A Golf Club*, ADJ-00010091, 9 August 2018, https://www.workplacerelations.ie/en/cases/2018/august/adj-00010091.html.
[313] High Court, *Equality Authority v Portmarnock Golf Club* [2005] IEHC 235, 10 June 2005, http://www.bailii.org/ie/cases/IEHC/2005/H235.html.
[314] Supreme Court, *Equality Authority v Portmarnock Golf Club* [2009] IESC 73, 4 November 2009, http://www.bailii.org/ie/cases/IESC/2009/S73.html.
[315] See http://www.irishstatutebook.ie/eli/2015/act/43/enacted/en/print.html.

and age grounds was determined in 2021. It was not upheld. An offer of accommodation was withdrawn because the complainant had not supplied the documentation sought by the landlord.[316]

A few complaints on the Traveller community ground have been referred against private landlords and estate agents since the enactment of ESA.[317] However, the bulk of cases on that ground pertain to public housing authorities. One such complaint was upheld in 2020, in which a housing authority declined a Traveller man's application for social housing.[318] The complainant was treated less favourably than a settled person would have been treated. The respondent's decision was based on an unsubstantiated allegation of anti-social behaviour, and the complainant was not afforded the opportunity to contest it. Attempts to challenge putative discriminatory treatment enshrined in law have failed because of the Section 14(1)*(a)*(i) exemption (discussed in Chapter 3.2.5).[319]

Several exceptions apply to the prohibition of discrimination in the area of housing.

For example, the prohibition of discrimination does not apply to accommodation that is provided in a person's home, 'or where the provision of accommodation affects the person's private or family life or that of any other person residing in the home.'[320]

Section 6(5) permits the reservation of housing for use by particular categories of people, for example a home for persons with disabilities or a retirement or nursing home for older people.

Housing authorities may treat people differently in respect of accommodation on the basis of their family size, family status, civil status, disability, age or membership of the Traveller community, in accordance with Section 6(6) ESA. The Circuit Court has clarified that this exception cannot result in less favourable treatment in the provision of housing.[321]

Section 6(7) allows the Minister to apply differential treatment in housing provision to persons on the basis of their nationality, gender, family size, family status, civil status, disability, age or membership of the Traveller community.[322] Any such difference in treatment is not permitted to amount to a derogation from the obligations of the State under EU law. There has been no case law on the provision to date.

Available data, in the form of experience of perceived discrimination, suggests that black non-Irish nationals are a high-risk group for encountering discriminatory practices in

[316] Workplace Relations Commission, *Parker v Berg*, ADJ-00029021, 15 October 2021, https://www.workplacerelations.ie/en/cases/2021/october/adj-00029021.html.

[317] See, for example, Equality Tribunal, *Cash v Murphy Property & Finance Ltd*., DEC-S2011-031, 29 September 2011, https://www.workplacerelations.ie/en/cases/2011/july/dec-s2011-031-full-case-report.html; Equality Tribunal, *Carthy v Brennan*, DEC-S2011-045, 24 October 2011, https://www.workplacerelations.ie/en/cases/2011/october/dec-s2011-045-full-case-report.html; Equality Tribunal, *Maughan v Grattan Lodge Management Company*, DEC-S2012-015, 3 May 2012, https://www.workplacerelations.ie/en/cases/2012/may/dec-s2012-015-full-case-report.html.

[318] Workplace Relations Commission, *McCarthy v Cork City Council*, ADJ-00018849, 2 July 2020, https://www.workplacerelations.ie/en/cases/2020/july/adj-00018849.html.

[319] Workplace Relations Commission*, O'Donoghue v Clare County Council*, DEC-S2018-002, 27 February 2018, https://www.workplacerelations.ie/en/cases/2018/february/dec-s2018-002.html; *A Member of the Travelling Community v A County Council*, ADJ-00008050, 26 April 2018, https://www.workplacerelations.ie/en/cases/2018/april/adj-00008050.html.

[320] Section 6(2)*(d)* ESA. The first cases to consider that exemption were heard in 2018: Workplace Relations Commission, *Bushe v Jarvis*, ADJ-00014453, 6 September 2018, https://www.workplacerelations.ie/en/Cases/2018/September/ADJ-00014453.html (since the respondent was seeking to rent a room in his home, the WRC did not have jurisdiction to hear the discrimination complaint in accordance with Section 6(2)*(d)*); *A Tenant v A Landlord*, ADJ-00015004, 5 December 2018, https://www.workplacerelations.ie/en/cases/2018/december/adj-00015004.html (the rental unit was self-contained and therefore the exemption was inapplicable).

[321] Circuit Court Dublin, *Dublin City Council v Deans* (Hunt J., unreported, 15 April 2008), at p. 29.

[322] No reference is made in this section to the grounds of race or sexual orientation.

accessing accommodation,[323] while a 2014 survey based on 400 interviews conducted with landlords found that 95 % of the landlords who responded would rent to non-Irish nationals.[324]

a) Trends and patterns regarding housing segregation for Roma

In Ireland, there is limited data concerning trends and/or patterns of housing segregation and discrimination against the Roma.

A *National Roma Needs Assessment*, commissioned by the Department of Justice and Equality, was published in 2018.[325] According to the report, an estimated 4 000 to 5 000 Roma people live in Ireland. Approximately 20 % of the Irish Roma community are 'completely marginalised from services and supports. They are living in extreme poverty, in sub-standard accommodation', and 60 % of respondents reported experiences of consistent poverty, including not always having enough fuel, food or heat. Furthermore, 93 % of respondents reported experiencing discrimination in accessing housing. Among the other major issues identified were severe overcrowding; poor-quality accommodation; a lack of security of tenure; homelessness; and a lack of access to social housing and housing-related social protection payments.

A report on *Discrimination and Inequality in Housing in Ireland* was published by the Irish Human Rights and Equality Commission and the Economic and Social Research Institute in 2018.[326] It examines inequality and discrimination while searching for housing; whether certain groups experience poorer housing conditions; and the prevalence of homelessness across different groups. The groups considered correspond to the ESA discriminatory grounds, with the exception of sexual orientation, because of a lack of data. According to the report, Travellers experience the highest risk of homelessness, making up 9 % of the homeless population even though Travellers comprise just 1 % of the overall population. Travellers also experience the highest levels of discrimination. They are almost 10 times as likely to report discrimination in access to housing as the white Irish population.

The findings of a small-scale study on *Experiences of Travellers in the Private Rented Sector*, published in 2017, suggest that Travellers experience discrimination at the hands of landlords and settled neighbours.[327] Landlords believed that discrimination had diminished in recent years due to compliance with legislation. However, a 2014 survey conducted on behalf of the Residential Tenancies Board, based on 400 telephone interviews conducted with landlords, found that 82 % of those landlords who responded were unwilling to rent property to members of the Travelling community.[328]

The European Committee of Social Rights upheld a complaint against Ireland in 2015, finding that a shortfall in sufficient accommodation for Travellers, as well as inadequate site conditions, violated Article 16 of the European Social Charter.[329] Underlying factors

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

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

[325] Pavee Point and Department of Justice and Equality (2018), *Roma in Ireland: A National Needs Assessment,* Dublin, Pavee Point, https://www.paveepoint.ie/wp-content/uploads/2015/04/RNA-PDF.pdf.

[326] Grotti, R., Russell, H., Fahey, E. and Maître, B. (2018), *Discrimination and Inequality in Housing in Ireland*, https://www.ihrec.ie/app/uploads/2018/06/Discrimination-and-Inequality-in-Housing-in-Ireland..pdf.

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

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

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

include a disinvestment in Traveller accommodation since 2008, coupled with the failure of local authorities to access available funds. The Housing (Traveller Accommodation) Act 1998 obliges each local authority to prepare, adopt and implement a five-year rolling accommodation programme to meet the existing and projected accommodation needs of Travellers in their areas.[330] Between 2008 and 2018, just 66 % of the capital budget allocated by the Government was drawn down by local authorities.[331] In its June 2019 report, the European Commission against Racism and Intolerance stated that it was 'shocked' that this pattern of underspending continues 'while many Travellers continue to live in squalor and deprivation'.[332] It recommended that Ireland impose sanctions on local authorities for failure to spend funding or transferring responsibility to a central housing commission. The national budget for 2021 allocated EUR 15.5 million to Traveller-specific accommodation, an increase of EUR 1.5 million on the previous year.[333] All of the funding was accessed by local authorities in 2020 and 2021, in a break from the pattern for previous years.[334] Instead of being allocated a fixed budget, the authorities drew down funds on a case-by-case basis from the general allocation. IHREC welcomed this development but noted that almost one third of the new accommodation units provided for Travellers in 2020 were COVID-19 mobile units for self-isolation purposes, 'rather than secure and adequate housing that will meet the accommodation needs of Traveller families in the medium to long term'.[335]

The Oireachtas Committee on Housing and Homelessness issued several recommendations in 2016, including a ban on evictions where alternative accommodation is unavailable and a mechanism for enforcing local authorities' duties under the 1998 Act.[336] In 2016, the UN Committee on the Rights of the Child called for increased funding for accommodation facilities that address the needs of Traveller and Roma children and their families and the amendment or repeal of legislation that criminalises nomadism.[337]

To date, the Government has not implemented the bulk of those recommendations. There are no plans to reform the laws that enable evictions. However, an expert group was established in 2018 to conduct a review of the 1998 Act, following a commitment set out under the *National Traveller and Roma Inclusion Strategy 2017–2021*.[338] Its report was published in July 2019 and sets out 32 recommendations, including proposals aimed at addressing the collection of data on and systems for identifying accommodation needs, the planning system, resources and delivery capacity, and governance arrangements.[339] It identifies a need for active and ongoing monitoring of the planning and provision of

[330] Ireland, Housing (Traveller Accommodation) Act 1998, 13 July 1998, http://www.irishstatutebook.ie/eli/1998/act/33/enacted/en/html.

[331] Joyce, D., Norton, C. and Norris, M. (2019), *Traveller Accommodation Expert Review*, p. 38, https://www.housing.gov.ie/sites/default/files/publications/files/2019_july_expert_review_group_traveller_accommodation-final_reportrt_00.pdf.

[332] European Commission against Racism and Intolerance (2019), *ECRI report on Ireland (fifth monitoring cycle)* CRI(2019)18, Para. 67.

[333] Minister of State at the Department of Housing, Planning, Community and Local Government, Damien English TD, Joint Committee on Housing, Planning and Local Government debate, 5 December 2019, https://www.oireachtas.ie/en/debates/debate/joint_committee_on_housing_planning_and_local_government/2019-12-05/5/.

[334] See https://www.oireachtas.ie/en/debates/question/2022-01-19/505/.

[335] Irish Human Rights and Equality Commission (2021), *Submission to the Joint Committee on Key Issues affecting the Traveller Community*, pp. 8-9, https://www.ihrec.ie/app/uploads/2021/03/Submission-to-the-Joint-Committee-on-Key-Issues-affecting-the-Traveller-Community-FINAL.pdf.

[336] Houses of the Oireachtas (2016), *Report of the Committee on Housing and Homelessness*, http://www.oireachtas.ie/parliament/media/committees/32housingandhomelessness/Final-Report-.pdf.

[337] UN Committee on the Rights of the Child (2016), *Concluding observations on the combined third and fourth periodic reports of Ireland*, 29 January 2016, CRC/C/IRL/CO/3-4, at Para. 17, http://www.refworld.org/docid/56c17f574.html.

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

[339] Joyce, D., Norton, C. and Norris, M. (2019), *Traveller Accommodation Expert Review*, https://www.housing.gov.ie/sites/default/files/publications/files/2019_july_expert_review_group_traveller_accommodation-final_reportrt_00.pdf.

Traveller accommodation and intervention when these functions are not being adequately performed. To that end, it recommends that the National Traveller Accommodation Consultative Committee (NTACC) be equipped with additional powers and resources and should be retitled as the National Traveller Accommodation Authority. The report further calls for reform of the law on trespass and evictions, referencing violations of the European Social Charter.[340]

The Department of Housing, Planning and Local Government (DHPLG) is consulting with the NTACC on the Expert Review Group's proposals and has established subject matter working groups within the Department to progress the recommendations. A programme board was established in December 2020 with responsibility for overseeing implementation of the recommendations. The Department's work plan for 2021 addressed 18 of the Review Group's recommendations.[341]

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

[341] Houses of the Oireachtas (2021), *Joint Committee on Key Issues affecting the Traveller Community*, pp. 76-77, https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_key_issues_affecting_the_traveller_community/reports/2021/2021-12-01_final-report-of-the-joint-committee-on-key-issues-affecting-the-traveller-community_en.pdf.

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

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

Under Section 37(2) EEA:

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

To date, this provision has been considered in only a limited number of cases, and so its ambit is as yet unclear.[342] In a case concerning access to employment, the Equality Tribunal found that meeting a prescribed hearing standard could constitute a genuine and determining occupational requirement for bus drivers. However, the standard set by the respondent was particularly onerous and was not applied internationally. Moreover, compliance with that standard was not monitored in relation to its existing workforce, so the respondent could not demonstrate that the requirement was objectively justified.[343] The exception has also featured in age-ground case law concerning compulsory retirement, although the decisions largely rested on analyses of the provision that permits employers to set retirement ages (Section 34(4) EEA). The main precedent is *Saunders v CHC Ireland Ltd.*, in which a retirement age of 55 for a category of emergency services personnel (helicopter winch operators) was justified under Section 37(2) and Section 34(4).[344] Applying the *Wolf* judgment, the adjudicator accepted that the possession of a high physical capacity was a genuine and determining occupational requirement for the role and that this standard of capacity diminishes with age.[345]

Under Section 5(2)*(i)* ESA, the prohibition of discrimination in disposing of goods or in providing a service does not apply in the case of 'differences in the treatment of persons on the gender, age or disability ground or on the ground of race, reasonably required for reasons of authenticity, aesthetics, tradition or custom in connection with a dramatic performance or other entertainment.' To date there is no case law on this exception. It would presumably allow the selection of a person of a particular ethnicity, for example, to play a role where being of that ethnicity was reasonably required.

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[342] A parallel provision that applies to the gender ground only, Section 25 EEA, has been applied in a number of cases. See, for example, Equality Tribunal, *A Prospective Employee v A Company*, DEC-E2015-101, 7 October 2015, https://www.workplacerelations.ie/en/Cases/2015/October/DEC-E2015-101.html.

[343] Equality Tribunal, *Corbett v Bus Eireann*, DEC-E2011-184, 26 September 2011, https://www.workplacerelations.ie/en/cases/2011/september/dec-e2011-184-full-case-report.html.

[344] Equality Tribunal, DEC-E2011-142, 19 July 2011, https://www.workplacerelations.ie/en/Cases/2011/July/DEC-E2011-142-Full-Case-Report.html. See also Equality Tribunal, *McPhilips v Monaghan County Council*, DEC-E2011-257, 22 November 2011, https://www.workplacerelations.ie/en/Cases/2011/December/DEC-E2011-257-Full-Case-Report.html; Labour Court, *Transdev Light Rail Limited v Chrzanowski*, EDA1632, 29 November 2016, https://www.workplacerelations.ie/en/Cases/2016/November/EDA1632.html; Workplace Relations Commission, *A Worker v A Healthcare Provider*, ADJ-00003418, 20 January 2017, https://www.workplacerelations.ie/en/Cases/2017/January/ADJ-00003418.html.

[345] European Court of Justice, Judgment of 12 January 2010, *Wolf v Stadt Frankfurt Am Main*, C-229/08, http://curia.europa.eu/juris/liste.jsf?num=C-229/08.

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

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

Section 37(1) EEA provides:

> 'Subject to *subsections (1A)* and *(1B)*, a religious, educational or medical institution which is under the direction or control of a body established for religious purposes or whose objectives include the provision of services in an environment which promotes certain religious values shall not be taken to discriminate against a person … if—
> (*a*) it gives more favourable treatment, on the religion ground, to an employee or a prospective employee over that person where it is reasonable to do so in order to maintain the religious ethos of the institution, or
> (*b*) it takes action which is reasonably necessary to prevent an employee or a prospective employee from undermining the religious ethos of the institution.'[346]

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

> '(1A) Where an educational or medical institution referred to in *subsection (1)* is maintained, in whole or in part, by monies provided by the Oireachtas more favourable treatment on the religion ground referred to in *paragraph (a)* of that subsection shall be taken to be discrimination unless —
> (a) that treatment does not constitute discrimination on any of the other discriminatory grounds, and
> (b) by reason of the nature of the institution' s activities or the context in which the activities are being carried out, the religion or belief of the employee or prospective employee constitutes a genuine, legitimate and justified occupational requirement having regard to the institution' s ethos.
> (1B) Where an educational or medical institution referred to *subsection (1)* is maintained, in whole or in part, by monies provided by the Oireachtas, action of the type referred to in *paragraph (b)* of that subsection shall be taken to be discrimination unless by reason of the nature of the employment concerned or the context in which it is carried out —
> (a) the action is objectively justified by the institution's aim of preventing the undermining of the religious ethos of the institution, and
> (b) the means of achieving that aim are appropriate and necessary.
> (1C) An action referred to in *subsection (1B)* shall not be objectively justified in accordance with *paragraph (a)* of that subsection, or appropriate and necessary in accordance with *paragraph (b)* of that subsection, unless the action of the institution is —
> (a) rationally and strictly related to the institution's religious ethos,
> (b) a response to conduct of the employee or prospective employee undermining the religious ethos of the institution rather than a response to that employee's, or prospective employee' s, gender, civil status, family status, sexual orientation, age, disability, race or membership of the Traveller community, and
> (c) proportionate to the conduct of the employee or prospective employee, as the case may be, having due regard to —
> (i) any other action the employer may take in the circumstances,
> (ii) the consequences of that action for that employee or prospective employee,
> (iii) the employee's or prospective employee's right to privacy, and

[346] See http://revisedacts.lawreform.ie/eli/1998/act/21/revised/en/html#SEC37. See also Workplace Relations Commission, *Hogan v The Young Women's Christian Association*, DEC-E2015-151, December 2015, https://www.workplacerelations.ie/en/cases/2015/december/dec-e2015-151.html.

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

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

The previous provision, although never fully tested in legal proceedings (see below), was controversial at the national level. Teachers' unions opposed the exemption from the outset arguing, in particular, that it would impact on lesbian, gay and bisexual staff.[347] Those concerns were reinforced by a small-scale research study, which found that the exemption caused considered anxiety on the part of such teachers and affected their ability to 'come out' at work.[348] The Equality Authority and the Irish Human Rights Commission had also called for its amendment.[349]

4.3 Armed forces and other specific occupations (Article 3(4) and Recitals 18 and 19, Directive 2000/78)

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

Section 37(5) EEA provides that the prohibition of discrimination on the age and disability grounds does not apply in relation to employment in the Defence Forces.[350] In Ireland, the scope of the exception is not limited to safeguarding the combat effectiveness of the armed forces. In Ireland, the scope of the exception extends to other non-combat staff, such as civilians employed in administrative positions in the army.[351]

The exception was applied in a 2021 case.[352] The complainant's application for the role of radio and radar technician in the Irish Naval Service was not processed because an upper age limit of 27 years applied, and the complainant was 47 years old. The WRC found that Section 37(5) afforded the respondent a 'complete exemption' from the prohibition of age discrimination.

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

[347] See, for example, various submissions of the Irish National Teachers' Organisation: https://www.into.ie/about/our-structure/associated-groups/into-lgbt-teachers-group/.

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

[349] See, for example, IHREC (2014), *IHREC Designate Report on Ireland's 4th Periodic Review by the UN Human Rights Committee on the ICCPR*, https://www.ihrec.ie/app/uploads/download/pdf/20140616113130.pdf.

[350] According to the High Court, the exemption covers access to employment and conditions of employment. The provision, therefore, exempts use of an age restriction in respect of persons seeking to join the Defence Forces: *Smyth v Minister for Justice, Equality and Defence & ors*. [2013] IEHC 110, 1 February 2013, https://www.courts.ie/view/judgments/14bdec9a-c0b6-46c5-9347-96173411d521/b8b069d7-0e28-4a47-b34c-08176b7f4881/2013_IEHC_110_1.pdf/pdf.

[351] The text of Section 37(5) refers to 'employment in the Defence Forces' and does not differentiate between categories of staff. A civilian employed by a representative body for members of the Defence Forces referred a successful age discrimination complaint in 2017. Although the respondent body was established under the law that regulates the Defence Forces, it appears to have been treated as a distinct entity and not considered part of the Defence Forces by the WRC. There is no reference to Section 37(5) in the decision: *Devereux v Permanent Defence Force Other Ranks Representative Association*, ADJ-00007926, 17 November 2017, https://www.workplacerelations.ie/en/Cases/2017/November/%20ADJ-00007926.html.

[352] Workplace Relations Commission, *Irwin v Irish Defence Forces Naval Service*, ADJ-00031786, 17 August 2021, https://www.workplacerelations.ie/en/cases/2021/august/adj-00031786.html.

are fully competent, available and capable of undertaking the range of functions associated with such positions so that the operational capacity of the services concerned may be preserved. Although not directed at employees with disabilities, 'the clear implication on reading the section is that it is'.[353] This provision reflects the wording of Recital 18 Directive 2000/78 and was considered by the Labour Court in a 2018 case concerning a prison officer.[354] The court found that subsection (3) exempted the listed occupations from the duty to provide reasonable accommodation under Section 16 EEA. However, the High Court overturned that finding on appeal.[355] It held that the occupational requirement does not relieve an employer of its obligation to consider whether an employee could be retained with the provision of reasonable accommodation. The High Court noted that the only fact agreed between the parties was that Mr Cunningham was no longer able to undertake control and restraint duties. The complainant maintained that posts were available within the prison service which did not require officers to carry out such duties. The High Court found that the hearing before the Labour Court was 'unsatisfactory and unfair' because the complainant was not afforded the opportunity to advance such arguments and contest the respondent's assertions as to the operational capacity of the prison service. The State withdrew an appeal against the High Court's findings and a re-hearing of the case is pending before the Labour Court.[356]

4.4 Nationality discrimination (Article 3(2))

a) Discrimination on the ground of nationality

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

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

Section 12(7) EEA allows for different treatment on the basis of nationality in relation to admission or attendance fees and in relation to the allocation of places at any vocational or training course between nationals of other countries and citizens of Ireland, Swiss and EEA nationals, or nationals of another Member State of the European Union. This exception would appear to comply with the provisions of Racial Equality Directive 3(2).

Section 17(2) EEA provides that, in relation to discrimination on the basis of nationality, nothing in the Act shall render unlawful any action taken in accordance with the Employment Permits Acts 2003-2006.[357]

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

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

[353] Per Bolger, M., Bruton C. and Kimber, C. (2012), *Employment Equality Law*, Dublin, Thomson Reuters, at p. 373.
[354] Labour Court, *Irish Prison Service v A Prison Officer*, EDA1837, 17 July 2018, https://www.workplacerelations.ie/en/cases/2018/july/eda1837.html.
[355] High Court, *Cunningham v Irish Prison Service*, [2020] IEHC 282, 9 June 2020, https://www.courts.ie/acc/alfresco/e0053771-9ff3-47a4-9c73-329f29ff5da6/2020_IEHC_282.pdf/pdf#view=fitH.
[356] See https://www.ihrec.ie/prison-service-withdraws-appeal-on-significant-disability-rights-case/.
[357] Employment Permits Act 2003, 10 April 2003, http://www.irishstatutebook.ie/eli/2003/act/7/enacted/en/html; Employment Permits Act 2006, 23 June 2006, http://www.irishstatutebook.ie/eli/2006/act/16/enacted/en/index.html.

requirements.[358] This exception falls within the provisions contained in the Racial Equality Directive.

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

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

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

In Ireland, nationality (as in citizenship) is explicitly mentioned as a protected ground in national anti-discrimination law.[359]

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

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

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

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

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

Under Section 33 EEA, it is permissible to adopt positive action measures aimed at protecting the health and safety at work of persons with a disability, or at safeguarding or promoting the integration of such persons into the working environment.

There are no specific exemptions in relation to any of the other protected grounds, but issues such as dress codes are currently dictated by the policy of the individual employer. For example, employers who operate manufacturing processes that require a clean-room environment generally impose very strict regulations in respect of attire. Case law suggests that adjudicators will scrutinise dress codes for discriminatory impacts. In one case, a male retail worker was dismissed for not wearing a face mask after he refused to shave off his beard. The Labour Court found that the requirement to wear a face mask or remove facial hair was not motivated by considerations of hygiene or food safety. The dress code operated in a way that restricted the complainant's freedom to determine his own appearance to a significantly greater degree than it did in the case of women. As a consequence, the dismissal was discriminatory on the gender ground.[360]

[358] Immigration Act 2004, 13 February 2004, http://www.irishstatutebook.ie/eli/2004/act/1/enacted/en/index.html.

[359] 'Nationality' was equated with 'citizenship' in Equality Tribunal, *Sabherwal v ICTS (UK) Ltd*., DEC-S2008-037, 11 June 2008, https://www.workplacerelations.ie/en/Cases/2008/June/DEC-S2008-037-Full-Case-Report.html.

[360] Labour Court, *Dunnes Stores v O'Byrne*, EED0314, 28 October 2003, https://www.workplacerelations.ie/en/Cases/2003/October/EED0314.html.

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

4.6.1 Direct discrimination

a) Exceptions to the prohibition of direct discrimination on grounds of age

In Ireland, national law provides for specific exceptions for direct discrimination on the ground of age.

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

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

b) Justification of direct discrimination on the ground of age

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

The Equality (Miscellaneous Provisions) Act 2015 amended the statutory provisions on retirement ages and fixed-term contracts to explicitly provide that such measures must be objectively justified. In essence, the 2015 Act codified principles set out in case law, which had sought to align domestic law with the requirements of Directive 2000/78.[361] The test is now compliant with EU law.

c) Permitted differences of treatment based on age

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

Section 34(5) EEA permits employers to set a maximum age for recruitment which takes account of the cost or period of time involved in training a recruit to a standard at which the recruit will be effective in the job concerned and of the need for a reasonable period of time prior to retirement age during which the recruit will be effective in that job. It is availed of by the armed forces and by the police service (see further Chapter 4.6.3). Under Section 12(7) EEA, third-level educational institutions may treat people differently on the basis of age in allocating places on vocational training courses to mature students.

d) Fixing of ages for admission to occupational pension schemes

In Ireland, national law allows occupational pension schemes to fix ages for admission to the scheme, taking up the opportunity provided by Article 6(2).

[361] In *Donnellan v The Minister for Justice, Equality and Law Reform* [2008] IEHC 467, 25 July 2008, http://www.bailii.org/ie/cases/IEHC/2008/H467.html, the High Court noted that 'national measures relating to retirement ages are not excluded from consideration under Directive 2000/78/EC. Any discrimination with regards to age must, as put by that Directive, serve a legitimate aim or purpose, and the means taken to achieve that purpose be appropriate and should go no further than is necessary' [Para. 126]. *Donnellan* was routinely cited by adjudicators prior to the changes effected by the 2015 Act in requiring objective justification of retirement ages. See further: Equality Tribunal, *O'Mahony v Southwest Doctors On Call Ltd.*, DEC-E2014-031, 14 May 2014, https://www.workplacerelations.ie/en/Cases/2014/May/DEC-E2014-031.html.

Section 72(1) of the Pensions Acts 1990-2018, provides:

> 'It shall not constitute a breach of the principle of equal pension treatment on the age ground for a scheme to—
> (*a*) fix age or qualifying service, or a combination of both, as a condition or criterion for admission to the scheme,
> (*b*) fix different ages or qualifying service, or a combination of both, as conditions or criteria for admission to the scheme for employees or groups or categories of employees,
> (*c*) fix age or qualifying service, or a combination of both, as a condition or criterion for entitlement to benefits under the scheme,
> (*d*) fix different ages or qualifying service, or a combination of both, as conditions or criteria for entitlement to benefits under the scheme for employees or groups or categories of employees,
> (*e*) (i) fix age or qualifying service, or a combination of both, as a condition or criterion in relation to the accrual of rights under a defined benefit scheme or in relation to the level of contributions to a defined contribution scheme, or
> (ii) fix different ages or qualifying service, or a combination of both, as conditions or criteria in relation to the accrual of rights under a defined benefit scheme or in relation to the level of contributions to a defined contribution scheme for employees or groups or categories of employees,
> where, in the context of the relevant employment, to do so is appropriate and necessary by reference to a legitimate objective of the employer, including legitimate employment policy, labour market and vocational training objectives,
> (*f*) use criteria as to age in actuarial calculations:
> Provided that this does not result in a breach of the principle of equal pension treatment on the gender ground.'[362]

Section 34(3) EEA provides that it does not amount to discrimination on the age ground for an employer to fix ages for admission to an occupational benefits scheme or for entitlement to benefits under it; to fix different ages for all employees or a category of employees; to use, in the context of such a scheme, age criteria in actuarial calculations; or to provide different rates for severance payment for different employees, these rates being based on or taking into account the period between the age of an employee on leaving employment and his or her compulsory retirement age – provided that none of these measures constitute discrimination on the gender ground. Occupational benefit schemes are defined as schemes which provide benefits to employees or categories of employees on their becoming 'ill, incapacitated or redundant but does not include any occupational pension scheme providing for pensions, gratuities or other allowances payable on retirement or death.'[363]

4.6.2 Special conditions for younger or older workers

In Ireland, there are no special conditions set by law for older and/or younger workers in order to promote their vocational integration.

4.6.3 Minimum and maximum age requirements

In Ireland, there are exceptions permitting minimum and maximum age requirements in relation to access to employment and training.

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[362] Applied, for example, in Equality Tribunal, *Charlton v Bus Éireann*, DEC-P2011-004, 16 November 2011, http://www.workplacerelations.ie/en/Cases/2011/November/DEC-P2011-004-Full-Case-Report.html; *Kelly v Iarnród Éireann*, DEC-P2013-001, 11 November 2013, https://www.workplacerelations.ie:443/en/Cases/2013/November/DEC-P2013-001.html; *Grey v Local Government Computer Services Board*, DEC-P2010-004, 26 August 2010, https://www.workplacerelations.ie:443/en/Cases/2010/August/DEC-P2010-004-Full-Case-Report.html.

[363] Section 34(3A) EEA.

The Protection of Young Persons (Employment) Act 1996 in effect prohibits the employment of children aged under 14, while imposing various restrictions and conditions on the employment of children (aged 14-15) and young persons (aged 16-18).[364]

Under Section 6(3)*(b)* EEA, an employer may set a minimum recruitment age not exceeding 18 years.

Section 34(5) EEA provides that it does not constitute discrimination on the age ground to set, in relation to any job, a maximum age for recruitment which takes account of –

> '(*a*) any cost or period of time involved in training a recruit to a standard at which the recruit will be effective in that job, and
> (*b*) the need for there to be a reasonable period of time prior to retirement age during which the recruit will be effective in that job.'

In practice, it seems the exception is primarily used to set maximum age requirements for recruitment to posts in the police[365] and armed forces.[366] Age limits include the following:

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

This exception was considered for the first time in two 2020 WRC decisions, which were issued following protracted legal proceedings.[367] The complainants sought to join the Garda Síochána (police force) in 2005 and 2007. Their applications were not considered because secondary legislation set 35 as the upper age limit for entry as a trainee. The WRC upheld the complaints. The respondent did not supply evidence of the costs associated with the training programme in place at the relevant time. For that reason, the WRC found that the Garda Commissioner could not avail of the exception provided for under Section 34(5). Both complainants were awarded the maximum compensation. An appeal of the WRC's decision will be heard by the Labour Court in 2022.[368] In reply to a parliamentary question, the Minister for Justice announced that an expert review group had been established to examine the recruitment age, amongst other matters, and that it would report to the Garda Commissioner in 2021.[369] The review group's report was under consideration by the Commissioner at the time of writing.[370]

4.6.4 Retirement

a) State pension age

In Ireland, there is no state pension age at which individuals must begin to collect their state pensions, but they can be collected from 66.

[364] Protection of Young Persons (Employment) Act 1996, 26 June 1996, http://www.irishstatutebook.ie/eli/1996/act/16/enacted/en/html.
[365] S.I. No. 470/2013, Garda Síochána (Admission and Appointments) Regulations 2013, http://www.irishstatutebook.ie/eli/2013/si/470/made/en/print.
[366] Age limits for recruitment to the Defence Forces are also covered by Section 37(5) EEA.
[367] Workplace Relations Commission, *Boyle v Commissioner of An Garda Síochána and The Minister for Justice Equality and Law Reform*, DEC-E2020-003, 5 October 2020, https://www.workplacerelations.ie/en/cases/2020/october/dec-e2020-003.html; *Fitzpatrick v Commissioner of An Garda Síochána and The Minister for Justice Equality and Law Reform*, DEC-E2020-002, 5 October 2020, https://www.workplacerelations.ie/en/cases/2020/october/dec-e2020-002.html.
[368] McCarthaigh, S. (2022), 'An Garda Síochána to appeal ruling that found age limit for new recruits is discriminatory', *Irish Examiner*, 16 February 2022, https://www.irishexaminer.com/news/courtandcrime/arid-40809498.html.
[369] See https://www.oireachtas.ie/en/debates/question/2020-10-20/532/.
[370] McCarthaigh, S. (2022), 'An Garda Síochána to appeal ruling that found age limit for new recruits is discriminatory', *Irish Examiner*, 16 February 2022, https://www.irishexaminer.com/news/courtandcrime/arid-40809498.html.

If an individual wishes to work beyond the state pension age, the pension can be deferred. An individual can collect a pension and still work.

The State Pension (Contributory) is paid to people from the age of 66 who may have adequate social insurance contributions. It is not means-tested, and it is possible for people to derive income from other sources while in receipt of the pension. The pension is subject to tax. Persons aged 66 and over who do not qualify for the contributory pension are entitled to the means-tested State Pension (Non-Contributory), which is also subject to tax.[371] The state pension age applies equally to men and women.

The Government established the Commission on Pensions in 2020 to inform an ongoing review of state pensions policy. The Commission was charged with examining, *inter alia*, qualifying age, contribution rates and eligibility for state pensions.[372] The Commission on Pensions published its report in October 2021.[373] It recommended, *inter alia*, an incremental increase in the qualifying age by three months each year commencing in 2028, reaching 67 in 2031, with further increases of three months every second year reaching 68 in 2039. The proposals were under consideration by the Government at the time of writing.

b) Occupational pension schemes

In Ireland, there is no standard age when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements.

This is subject to the individual contract, and deferral of pension is also subject to the terms of the employment contract.

c) State imposed mandatory retirement ages

In Ireland, there is no state-imposed mandatory retirement age(s) in private employment. There is a statutory retirement age for some public servants, which is dependent on the date of recruitment. For people who joined the public service before 1 April 2004, the retirement age was raised from 65 to 70 in December 2018.[374] Those who took up posts since 1 January 2013 must also retire at 70.[375] Public servants recruited between April 2004 and December 2012 have no compulsory retirement age. A civil servant who was required to retire at 65 successfully challenged the application of a retirement age set out in law.[376] The complainant was recruited before 1 April 2004 and became 65 before the retirement age was raised for civil servants in 2018. The WRC disapplied the legal provision in question and found that the respondent had failed to justify the retirement age (see case summary in Chapter 12.2).

Distinct compulsory retirement ages are set for members of An Garda Síochána (the police), the Defence Force, firefighters and prison officers.[377] Several challenges to regulations establishing the compulsory retirement age for Gardaí serving at the ranks of

[371] See https://www.welfare.ie/en/Pages/a-retired-or-an-older-person.aspx.
[372] See https://www.gov.ie/en/campaigns/f9ae8-pensions-commission/.
[373] Commission on Pensions (2021), *Report of the Commission on Pensions*, http://www.gov.ie/PensionsCommissionReport/.
[374] Public Service Superannuation (Age of Retirement) Act 2018, 26 December 2018, http://www.irishstatutebook.ie/eli/2018/act/39/enacted/en/html.
[375] See further: Department of Public Expenditure and Reform (2017), *Review of Barriers to Extended Participation in Public Service Workforce*, http://www.per.gov.ie/wp-content/uploads/Report-of-Review-re-Compulsory-Retirement-Age-in-Public-Service-Nov-2017.pdf.
[376] Workplace Relations Commission, *Geraghty v The Office of the Revenue Commissioners*, ADJ-00000031, 4 November 2021, https://www.workplacerelations.ie/en/cases/2021/november/adj-00000031.html.
[377] The WRC has confirmed that civilian employees within the Defence Forces' representative association are not subject to the mandatory retirement age: *Devereux v Permanent Defence Force Other Ranks Representative Association*, ADJ-00007926, 17 November 2017, https://www.workplacerelations.ie/en/Cases/2017/November/%20ADJ-00007926.html.

chief superintendent[378] and superintendent[379] were determined in 2020. In each instance the complaints failed. Imposing mandatory retirement ages was an appropriate and necessary means of achieving the aims of succession planning and ensuring motivation and dynamism within the police force. The measures were proportionate because the Garda Commissioner could extend an individual's employment, and the complainants were entitled to a full pension on attaining 30 years' service.

d) Retirement ages imposed by employers

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

Section 34(4) EEA permits employers to fix different ages for the retirement of employees, whether their retirement is voluntary or compulsory, within the terms of the contract of employment, provided that (a) it is objectively and reasonably justified by a legitimate aim, and (b) the means of achieving that aim are appropriate and necessary.[380] In its 2021 report, the Commission on Pensions recommends aligning retirement ages in employment contracts with the state pension age, by introducing legislation that permits but does not compel an employee to stay in employment until reaching that age.[381]

The objective justification requirement was expressly provided for under the Equality (Miscellaneous) Provisions Act 2015.[382] Prior to its enactment, case law was inconsistent on the application of the requirement. This was in part attributable to a High Court judgment, which found that the Equality Tribunal (now the WRC) could not issue a ruling that sought to align domestic law with EU law where to do so would contravene the express terms of a national legal provision.[383] Pursuant to a 2018 CJEU judgment, the WRC now has the authority to disapply national law where it conflicts with EU law.[384]

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[378] Workplace Relations Commission, *Gordon v Garda Commissioner and The Minister for Justice and Equality*, DEC-E2020-004, 7 October 2020, https://www.workplacerelations.ie/en/cases/2020/october/dec-e2020-004.html; *Murphy v Garda Commissioner and The Minister for Justice and Equality*, DEC-E2020-006, 7 October 2020, https://www.workplacerelations.ie/en/cases/2020/october/dec-e2020-006.html; *Duggan v Garda Commissioner and The Minister for Justice and Equality*, DEC-E2020-005, 7 October 2020, https://www.workplacerelations.ie/en/cases/2020/october/dec-e2020-005.html.

[379] Workplace Relations Commission, *McKenna v Garda Commissioner & Minister for Justice & Equality,* DEC-S2020-008, 15 October 2020, https://www.workplacerelations.ie/en/cases/2020/october/dec-s2020-008.html; *Brislane v Garda Commissioner & Minister for Justice & Equality*, DEC-E2020-007, 20 October 2020, https://www.workplacerelations.ie/en/cases/2020/october/dec-e2020-007.html.

[380] In 2019, several cases succeeded in which the employer had either not set or consistently applied a retirement age: Workplace Relations Commission, *A Secretary v A Solicitor's Firm*, ADJ-00016645, 18 January 2019, https://www.workplacerelations.ie/en/cases/2019/january/adj-00016645.html; Labour Court, *Louth County Council v Clarke*, EDA1916, 29 May 2019, https://www.workplacerelations.ie/en/cases/2019/may/eda1916.html; Workplace Relations Commission, *Fox v Tedcastles Aviation Fuels Limited*, ADJ-00016441, 16 September 2019, https://www.workplacerelations.ie/en/cases/2019/september/adj-00016441.html; Workplace Relations Commission, *McLoughlin v Shannon Transport & Warehousing Company t/a STL Logistic*, ADJ-00018810, 10 October 2019, https://www.workplacerelations.ie/en/cases/2019/october/adj-00018810.html; Workplace Relations Commission, *Dempsey v The West of Ireland Alzheimer's Society*, ADJ-00014857, 15 October 2019, https://www.workplacerelations.ie/en/cases/2019/october/adj-00014857.html. With respect to 2020, see Workplace Relations Commission, *A Cleaner v A Cleaning Company*, ADJ-00026820, 10 December 2020, https://www.workplacerelations.ie/en/cases/2019/december/adj-00026820.html.

[381] Commission on Pensions (2021), *Report of the Commission on Pensions*, http://www.gov.ie/PensionsCommissionReport/.

[382] See http://www.irishstatutebook.ie/eli/2015/act/43/section/10/enacted/en/html#sec10.

[383] High Court, *Minister for Justice, Equality and Law Reform and anor. v Director of the Equality Tribunal and ors.* [2009] IEHC 72, 17 February 2009, https://www.courts.ie/view/judgments/2eea181d-6091-4ebc-ba7f-9dbb41eafa87/6250fdc5-915b-4952-aff9-209077eb7336/2009_IEHC_72_1.pdf/pdf. Applied, for example, in Equality Tribunal, *Goss v Ryanair,* DEC-E2015-138, December 2014, https://www.workplacerelations.ie/en/Cases/2015/December/DEC-E2015-138.html.

[384] Judgment of 4 December 2018, *Minister for Justice and Equality v Workplace Relations Commission*, C-378/17, http://curia.europa.eu/juris/document/document.jsf?text=&docid=208381&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=152514.

A Code of Practice on Longer Working was adopted in December 2017.[385] Reflecting the explicit requirement set out under Section 34(4) EEA, as well as decisions of the Equality Tribunal that pre-date the legislative change, the Code advises employers that any mandatory retirement age must be capable of objective justification both by the existence of a legitimate aim and by evidence that the means of achieving that aim is appropriate and necessary.[386] It sets out the following examples of what may constitute a legitimate aim:

- intergenerational fairness (allowing younger workers to progress);[387]
- motivation and dynamism through the increased prospect of promotion;
- health and safety (generally in more safety-critical occupations);[388]
- creation of a balanced age structure in the workforce;[389]
- personal and professional dignity (avoiding capability issues with older employees);[390]
- succession planning.

Case law has established that reducing financial costs is not in and of itself a legitimate aim.[391] Several complaints involving the application of mandatory retirement ages were upheld in 2021. In one such case a nurse who was compelled to retire, without any engagement by her employer on the matter, was awarded the maximum possible compensation.[392] An employer could not objectively justify the termination of an employee's contract with reference to capability issues when a review of the complainant's performance had commended her dependability.[393] In a similar vein, a compulsory retirement age was not justified since the purported physically demanding nature of the role was first raised by the respondent when it rejected an appeal of the retirement decision.[394]

e) Employment rights applicable to all workers irrespective of age

The law on protection against dismissal and other laws protecting employment rights apply to all workers irrespective of age, even if they remain in employment after attaining pensionable age or any other age. To be covered by the Unfair Dismissals Acts 1977-2015,[395] employees must not have reached the normal retirement age for 'employees

[385] S.I. No. 600/2017 - Industrial Relations Act 1990 (Code of Practice on Longer Working) (Declaration) Order 2017, 20 December 2017, http://www.irishstatutebook.ie/eli/2017/si/600/made/en/print.

[386] The primary precedent on objective justification prior to the change effected under the 2015 Act is Equality Tribunal, *Doyle v ESB International*, DEC-E2012-086, 27 June 2012, https://www.workplacerelations.ie/en/cases/2012/june/dec-e2012-086-full-case-report.html.

[387] See, for example, Workplace Relations Commission, *O'Dowd v Franciscan Province of Ireland*, ADJ-00024869, 8 May 2020, https://www.workplacerelations.ie/en/cases/2020/may/%20adj-00024869.html.

[388] See, for example, Labour Court, *Transdev Light Rail Limited v Chrzanowski*, EDA1632, 29 November 2016, https://www.workplacerelations.ie/en/Cases/2016/November/EDA1632.html. Applied in Workplace Relations Commission, *Marine Pilot v Port Company*, ADJ-00004560, 5 February 2019, https://www.workplacerelations.ie/en/cases/2019/february/adj-00004560.html.

[389] See, for example, Workplace Relations Commission, *A General Operative v A Manufacturer*, ADJ-00019975, 24 April 2020, https://www.workplacerelations.ie/en/cases/2020/april/adj-00019975.html.

[390] See, for example, Labour Court, *Pat O'Donnell & Company v O'Keeffe*, EDA2133, 28 September 2021, https://www.workplacerelations.ie/en/cases/2021/september/eda2133.html.

[391] See, for example, Workplace Relations Commission, *Devereux v Permanent Defence Force Other Ranks Representative Association*, ADJ-00007926, 17 November 2017, https://www.workplacerelations.ie/en/Cases/2017/November/%20ADJ-00007926.html.

[392] Workplace Relations Commission, *A Senior Staff Nurse v A Nursing Home (In Liquidation),* ADJ-00027325, 20 August 2021, https://www.workplacerelations.ie/en/cases/2021/august/adj-00027325.html.

[393] Workplace Relations Commission, *Bouse v The Wild Goose Studio (Kinsale) Ltd*, ADJ-00030978, 8 September 2021, https://www.workplacerelations.ie/en/cases/2021/september/adj-00030978.html.

[394] Workplace Relations Commission, *Kenny v Bord Na Mona Plc*, ADJ-00027832, 1 October 2021, https://www.workplacerelations.ie/en/cases/2021/october/adj-00027832.html.

[395] Unfair Dismissals Act 1997, 6 April 1977; Unfair Dismissals (Amendment) Act 1993, 14 July 1993. Revised text available at: https://www.lawreform.ie/_fileupload/RevisedActs/WithAnnotations/HTML/EN_ACT_1977_0010.htm.

of the same employer in similar employment.'[396] It is, however, possible for an employee to contest their dismissal in the form of compulsory retirement under the legislation by, for example, establishing that the employer did not have a normal retirement age in place or that it was inconsistently applied.[397] Employees contesting age-based discrimination (or discrimination on any other ground) may avail of their rights under EEA, which are not subject to an upper age limit.

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

f) Compliance of national law with CJEU case law

In Ireland, national legislation is in line with the CJEU case law on age regarding mandatory retirement.[398]

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

4.6.5 Redundancy

a) Age and seniority taken into account for redundancy selection

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

Section 8(6)*(c)* EEA provides that employers will discriminate on any of the nine grounds, including age, if they do not afford employees the same treatment in relation to redundancies.[399]

b) Age taken into account for redundancy compensation

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

The Redundancy Payments Acts 1967-2014 provide for a minimum entitlement to a redundancy payment for employees who have a set period of service with the employer.[400] In order to qualify for a payment, employees must be aged over 16 and have worked continuously for the employer for at least 104 weeks while over the age of 16. There is no upper age limit.

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396 Section 2(1)*(b)*, Unfair Dismissals Acts 1977-2015; applied in Labour Court, *McLoughlin v Minister for Jobs, Enterprise and Innovation*, UD/18/1, 12 July 2018, https://www.workplacerelations.ie/en/cases/2018/july/udd1842.html. Under the Equality Act 2004, the automatic exclusion of employees over the statutory retirement age under the redundancy payments legislation (i.e. 66 years or over) from being able to bring an unfair dismissal claim was removed.

397 See, for example, Labour Court, *Longford County Council v Neilon*, UDD1950, 2 September 2019, https://www.workplacerelations.ie/en/cases/2019/september/udd1950.html. An unfair dismissal complaint was upheld since the employer could not establish that a normal retirement age existed within the organisation.

398 The WRC frequently relies on the principles developed by the CJEU in salient judgments such as Case C-411-05, *Palacios de la Villa v Cortefiel Servicios SA*, 16 October 2007, and Case C-144/04, *Mangold v Helm*, 22 November 2005.

399 Applied, for example, in Equality Tribunal, *O'Farrell v Mercury Engineering,* DEC-E2012-096, 24 July 2012, https://www.workplacerelations.ie/en/Cases/2012/July/DEC-E2012-096-Full-Case-Report.html. Selection for redundancy on the basis of age may also constitute unfair dismissal under Section 6(3) of the Unfair Dismissals Acts 1997-2015.

400 Redundancy Payment Act 1967, 18 December 1967, http://www.irishstatutebook.ie/eli/1967/act/21/enacted/en/html. A revised text is available at: https://revisedacts.lawreform.ie/eli/1967/act/21/revised/en/html.

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

The Labour Court interpreted the exception in a 2013 case.[401] The complainants had been employed for periods ranging from 16 to 25 years and were offered redundancy terms that provided for a payment of five weeks' pay per year of service, in addition to statutory redundancy payments. However, employees who were close to retirement age would receive either the terms of the agreed package or the amount of salary that they would have earned had they remained in employment until the normal retirement age of 65, whichever was the lesser. Each complainant would receive less than the amount paid to younger workers. According to the Court, Directive 2000/78 provided that Member States, as opposed to individual employers, could provide for differences in treatment on grounds of age where those differences could be objectively justified by a legitimate aim. The Court found that the Oireachtas had made express provision for differences in treatment based on age in respect of severance payments through Section 34(3)*(d)*. It stated that 'the underlying rationale for this provision is that workers close to retirement are in a substantially different position than those who have longer periods in which they could have expected to remain in the active labour force and that, as a matter of social and labour market policy, this difference can be legitimately reflected in constructing redundancy packages ... Against this backdrop, it appears that the Oireachtas considered it reasonably and objectively justifiable, within the meaning of Article 6(1) of the Directive, to provide for the differences in treatment allowed for by s.34(3)(d) of the Act.' The Labour Court found that the method of calculating the redundancy packages was permitted under EEA. Its decision was distinguished in a 2017 case that upheld a complaint of indirect discrimination on the ground of age with respect to redundancy compensation.[402] The impugned provision (a cap limiting payment to 1.25 times an employee's salary) was not saved by Section 34(3)(d), since it was not directly linked to proximity to retirement. Application of the cap resulted in the two complainants receiving proportionately less compensation per year of service compared with younger workers (years of service being inextricably linked with age). The WRC found that the established disadvantage was not objectively justified. While the respondent's aim was legitimate – ensuring an equitable distribution amongst the respondent's workforce – it did not provide any evidence at the time of applying the provision that it had considered whether there were other less discriminatory ways of achieving the aim.

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

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

Sections 16(5) and (6) EEA state that an employer is not required to recruit, retain or promote a person if they are aware, on the basis of a criminal conviction or other reliable information, that the individual engages or has a propensity to engage in any form of

[401] Labour Court, *Hospira v Roper,* EDA 1315, 29 April 2013, https://www.workplacerelations.ie/en/Cases/2013/April/EDA1315.html.

[402] Workplace Relations Commission, *2 Named Complainants v A Catering Company*, DEC-E2017-054, 18 July 2017, https://www.workplacerelations.ie/en/Cases/2017/July/DEC-E2017-054.html.

unlawful sexual activity, particularly where the employment involves access to minors or other vulnerable persons.

4.8 Any other exceptions

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

Under Section 36(1-2) EEA, it is permissible to impose requirements in relation to residence, citizenship and proficiency in the Irish language for the following public service jobs: office holders in the service of the State, including the police service (Garda Síochána), Defence Forces, civil servants, officers of local authorities, harbour authorities, health boards and vocational education committees. While such requirements are permitted, not all of these positions impose such restrictions. The police service has removed the requirement for proficiency in the Irish language, requiring only proficiency in two languages at least one of which is Irish or English, and employment is open to EU and EEA nationals, Swiss nationals, refugees under the Refugee Act 1996,[403] or to persons with one year's continuous legal residence in the state and a total legal residence amounting to four years in the preceding eight years (the asylum process does not count towards the qualifying five-year period).[404] It is also permissible under the Act to require Irish-language proficiency from teachers in both primary and post-primary schools.[405] Finally, Section 36 permits the imposition of certain educational requirements for certain posts,[406] professions, occupations or vocations.[407]

Under Section 35(1) EEA it is not discriminatory to pay a person with disability a lesser rate of remuneration if their output is less than that of a person without disability. It provides:

> 'Nothing in this Part or *Part II* shall make it unlawful for an employer to provide, for an employee with a disability, a particular rate of remuneration for work of a particular description if, by reason of the disability, the amount of that work done by the employee during a particular period is less than the amount of similar work done, or which could reasonably be expected to be done, during that period by an employee without the disability.'

The rate of pay cannot fall below the statutory minimum wage.[408] To date, there is no case law illustrating how the exception might apply in practice. In a parliamentary debate on the provision, the Minister maintained that its purpose was to encourage employers to hire more persons with disabilities.[409] The provision seems to contravene the framework directive, which does not provide for any such exemption.

ESA's principal and most problematic exception is contained in Section 14(1)*(a)*(i), which provides that nothing in the Act can be construed as prohibiting the taking of any action required by any enactment or order of a court, any measure adopted by the European Union or any international convention.[410]

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[403] Refugee Act 1996, 26 June 1996, http://www.irishstatutebook.ie/eli/1996/act/17/enacted/en/html.
[404] S.I. No. 470/2013, Garda Síochána (Admission and Appointments) Regulations 2013, http://www.irishstatutebook.ie/eli/2013/si/470/made/en/print.
[405] Section 36(3) EEA.
[406] Section 36(4) EEA. See Labour Court, *Health Service Executive v Fitzgerald*, EDA1915, 22 May 2019, https://www.workplacerelations.ie/en/cases/2019/may/eda1915.html.
[407] Section 36(5) EEA.
[408] Section 35(4) EEA.
[409] Dáil Éireann debate, Equality Bill 2004 [Seanad]: Report and Final Stages, 1 July 2004, https://www.oireachtas.ie/en/debates/debate/dail/2004-07-01/11/.
[410] See Walsh, J. (2019), 'Primacy of national law over EU law? The application of the Irish Equal Status Act', *European Equality Law Review* 2019(2), pp. 35-48.

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

- Differences in treatment are permitted in relation to 'annuities, pensions, insurance policies' or other matters related to the assessment of risk. The difference in treatment should relate to actuarial or statistical data or other relevant underwriting or commercial factor and should be reasonable.[411]
- Difference in the treatment of persons on the religion ground in relation to goods or services provided for a religious purpose.[412]
- Difference in treatment of persons on the gender, age or disability ground or on the basis of nationality or national origin in the organisation of sporting events.[413]
- Having an age requirement for persons to be either an adoptive or foster parent.[414]
- Differences 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.[415]

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

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

Section 16 ESA permits the imposition or maintenance of preferential fee charges in respect of goods or services being offered for persons with children, married couples, persons in a specific age group or persons with a disability. The section also permits different treatment where a person is treated differently solely in the exercise of a clinical judgment in connection with the diagnosis of illness or his or her medical treatment or is incapable of entering into an enforceable contract or of giving an informed consent and for that reason the treatment is reasonable in the particular case.[416]

Section 15(1) ESA stipulates that a person who provides goods or services is not required to deal with a customer in circumstances which would lead a reasonable individual having the responsibility, knowledge and experience of the person to the belief, on grounds other than discriminatory grounds, that to deal with the customer would produce a substantial risk of criminal or disorderly conduct or behaviour or damage to property at or in the vicinity of the place in which the goods or services or the premises or accommodation are located.[417]

Actions taken in good faith by owners of licensed premises for the purpose of complying with the Licensing Acts do not constitute discrimination (Section 15(2) ESA). Case law

411 Section 5(2)*(d)* ESA.
412 Section 5(2)*(e)* ESA.
413 Section 5(2)*(f)* ESA.
414 Section 5(2)*(j)* ESA.
415 Section 5(2)*(l)* ESA. This is an especially vague exception, which to date has been substantively considered in just two cases on the family status ground: Equality Tribunal, *Shanahan v One Pico Restaurant*, DEC-S2003-056, 30 June 2003, https://www.workplacerelations.ie/en/Cases/2003/June/DEC-S2003-056-Full-Case-Report.html, and *Travers and Maunsell v Ball Alley House*, DEC-S2003-109/110, 12 September 2003, https://www.workplacerelations.ie/en/cases/2003/september/dec-s2003-109-110_full_case_report.html. The respondents sought to invoke the exception to justify the exclusion of parents with infants from a restaurant and pub respectively. On the facts, the Tribunal found that the services in question could not be considered as suitable only for the needs of persons without children.
416 Section 16(2)*(a)* and *(b)* ESA.
417 Applied, for example, in Workplace Relations Commission, *McDonagh and Stokes v City Cinemas Limited*, DEC-S2017-024, 21 July 2017, https://www.workplacerelations.ie/en/Cases/2017/July/DEC-S2017-024.html: the denial of access to the cinema was not due to the complainants' membership of the Traveller community but resulted from 'their threatening and abusive behaviour on the night previous to the incident'.

establishes that 'in good faith' means that the actions must be done honestly and without prejudice.[418] In *Conroy v Costello*, the Equality Officer stated that in 'order to take an action in good faith it has to be free from any discriminatory motivation.'[419] Any action taken should be for the sole purpose of ensuring compliance with the provisions of the Licensing Acts.[420]

[418] Equality Tribunal, *Delaney v The Harp Bar,* DEC-S2002-53/56, 31 May 2002, https://www.workplacerelations.ie/en/Cases/2002/May/DEC-S2002-053-056.html.
[419] Equality Tribunal, *Conroy v Costello*, DEC-S2001-014, November 2001, https://www.workplacerelations.ie/en/Cases/2001/November/DEC-S2001-014.html.
[420] Equality Tribunal, *Mongan and Ors v The Waterside Hotel,* DEC-S2003-008/014, 25 February 2003, https://www.workplacerelations.ie/en/Cases/2003/February/DEC-S2003-008-014_Full_Case_Report.html.

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

a) Scope for positive action measures

In Ireland, positive action is permitted in national law in respect of age, civil status, disability, family status, gender, race, religion, sexual orientation and membership of the Traveller community.

Section 33 EEA provides that nothing in the Act 'shall render unlawful measures that are maintained or adopted with a view to ensuring full equality in practice between employees'.[421] It then provides that such measures are ones that 'prevent or compensate for disadvantages linked to any of the discriminatory grounds'; 'protect the health or safety at work of persons with a disability' or 'create or maintain facilities for safeguarding or promoting the integration of such persons into the working environment'. There is no explicit requirement of necessity or of proportionality.

Section 35 EEA provides for 'special provisions related to persons with disabilities'. It stipulates, in Section 35(2), that nothing in EEA shall make it unlawful:

> 'For an employer or any other person to provide, for a person with a disability, special treatment or facilities where the provision of that treatment or those facilities—
> (a) enables or assists that person to undertake vocational training, to take part in a selection process or to work, or
> (b) provides that person with a training or working environment suited to the disability, or
> (c) otherwise assists that person in relation to vocational training or work.'

In accordance with Section 35(3), a person without a disability or with a different disability 'shall not be entitled' to such special treatment or facilities.

The provisions were considered for the first time in *Lydon v Navan Education Centre*.[422] The complainant asserted that he had been subject to less favourable treatment on the disability ground in the course of an appointments process. Certain staff employed by the respondent on a secondment basis were advised that they would have to reapply for their jobs and that there would be a reduced number of posts available. One of the three candidates for two available posts became seriously ill immediately prior to the scheduled interviews. Having interviewed the complainant and another candidate, the respondent delayed the recruitment process to enable the ill colleague to attend an interview. When there was no indication of when she would recover, the respondent deemed the ill colleague to be appointed. It informed the complainant that he had ranked second at interview and that the first-ranked candidate would be appointed to the remaining post.

The respondent argued that its decision to appoint the ill colleague without an interview amounted to positive action as provided for under Section 33. The adjudication officer found that the respondent's actions did not fall within the ambit of that section, since it was not aimed at ensuring 'full equality in practice'. Full equality might have been achieved by, for example, adopting an alternative means of assessing all of the candidates without recourse to interviews. He found rather that the employer's actions were saved by Section 35(2). Notwithstanding the fact that the comparator was not assessed in any way, 'Section 35 appears to give an employer wide latitude in giving a disabled employee special treatment or facilities; it states "nothing in this Part … shall make it unlawful etc." The language of the provision covers special treatment and facilities and does not exclude the actions taken by the respondent in this case. The actions taken by the respondent enabled the comparator to work. While this disadvantaged the complainant, it was permissible

[421] Positive action on the gender ground is provided for separately under Section 24 EEA.
[422] Workplace Relations Commission, DEC-E2018-003, 26 January 2018, https://www.workplacerelations.ie/en/Cases/2018/January/DEC-E2018-003%20.html.

special treatment within the scope of the Employment Equality Act' (Para. 4.12). On appeal, the Labour Court did not consider the ambit of the positive action provisions, since it held that the disability ground operates asymmetrically. As a person without a disability, the complainant did not have *locus standi* to bring a disability-ground complaint under EEA.[423]

Several ESA provisions permit positive action. Section 14(1)*(b)* ESA provides that nothing in the Act shall prohibit preferential treatment or the taking of positive measures that are bona fide intended to:

- (i) promote equality of opportunity for persons who are, in relation to other persons, disadvantaged or likely to be unable to avail themselves of the same opportunities as those other persons; or
- (ii) to cater for the special needs of persons, or category of persons, who, because of their circumstances, may require facilities, arrangements, services or assistance not required by persons who do not have those special needs.

In a 2018 case, a parent argued that a school transport scheme was discriminatory on the ground of religion.[424] While children who wished to attend a minority religious ethos school were entitled to access the scheme without restriction, children seeking to attend a Catholic ethos school were subject to eligibility criteria based on the distance between their place of residence and the nearest education centre. The WRC assessed whether this acknowledged preferential treatment fell within the parameters of Section 14(1)*(b)*(i), as contended by the respondent. It noted that the applicable test was not whether the treatment was 'reasonable or appropriate or excessively favourable'; rather, it had to be established that there was a bona fide intention to promote equality of opportunity for persons who were disadvantaged or less likely to be able to avail of the opportunity to attend education through the ethos of minority religions compared with persons not in that category. According to the adjudication officer, the respondent provided 'compelling evidence' to that effect. It argued that the measure was necessary to maintain adequate numbers of pupils in minority ethos schools, which would otherwise be at risk of becoming unviable. There were, for instance, only 23 schools in the state providing post-primary education through the Church of Ireland ethos, compared with 343 Catholic ethos schools. In light of such evidence, the WRC was satisfied that the preferential treatment was based on a bona fide intention to promote equality of opportunity for disadvantaged persons within the meaning of Section 14(1)*(b)*(i).

Section 14(1)*(b)*(ii) was applied to rebut a prima facie case of discrimination in a 2019 case.[425] A man referred a complaint of gender-ground discrimination because he was not permitted to use the female-only area at a fitness club. The respondent argued that it reserved a space for the exclusive use of females for two reasons. Firstly, it enabled Muslim female members to exercise without wearing their headscarves. Secondly, it allayed health and safety concerns in respect of older women, who had experienced difficulty in using the main gym because many items of equipment had been left by males after use with extremely heavy weights attached. Citing section 14(1)*(b)*, the adjudication officer was satisfied that the respondent provided objective reasons justifying its decision to provide a female-only area, 'based on the very specific needs of a category of persons who would not otherwise be able to participate.'

Section 5(2)(*h*) allows differences in treatment in relation to services that are provided for the principal purpose of promoting the special interests of people in a 'category of persons'.

[423] Labour Court, *Navan Education Centre v Lydon*, EDA 1848, 11 December 2018, https://www.workplacerelations.ie/en/Cases/2018/December/EDA1848.html.
[424] Workplace Relations Commission, *A Parent v Department of Education and Skills*, ADJ-00009625, 9 July 2018, https://www.workplacerelations.ie/en/cases/2018/july/adj-00009625.html.
[425] Workplace Relations Commission, *Hogan v Westwood Health Club*, ADJ-00020951, 23 September 2019, https://www.workplacerelations.ie/en/cases/2019/september/adj-00020951.html.

Any difference in treatment of people in that category must be reasonably necessary to promote their special interests and must be undertaken in a bona fide manner. The term 'category' is not defined, but it seems to be used throughout ESA to denote a sub-group of people falling under one of the discriminatory grounds, for example persons with a particular disability or of a specific nationality or age. The Equality Tribunal has noted that the meaning of Section 5(2)(*h*) is ambiguous, and commented: 'On the basis that the treatment must flow from the promotion of the special interests of persons in the category … this sub-section of the Equal Status Act, 2000 will normally, if not always, relate to the justification of more favourable treatment of a particular category of persons'.[426] In *Keane v World Travel Centre*,[427] a company that offered reduced fares on flights only to Filipino nationals could not justify its policy under Section 5(2)*(h)*. World Travel Centre maintained that it was engaging in 'positive discrimination'. The Equality Officer disagreed and found that it did not meet any of 'the strict and comprehensive criteria required by Section 5(2)(h)' (at Para. 5.5). The sole purpose of the special offer was to gain a commercial advantage over competitors and not to advance the special interests of the Filipino community. By contrast, a competition for entrepreneurs was designed to promote the interests of people in the 18-35 age bracket in a bona fide manner, and so could avail of the exception in excluding persons above that age from eligibility.[428]

Section 6(6) ESA permits different treatment by housing authorities and voluntary housing associations in the provision of accommodation on the basis of family size, family status, civil status, disability, age or membership of the Traveller community (race and ethnicity are not mentioned in this section). Section 16(1) ESA also permits preferential fee charges in respect of goods and services for persons with a disability or in specific age groups.

b) Quotas in employment for persons with disabilities

In Ireland, national law provides for a quota for the employment of persons with disabilities.

The attainment of a 3 % quota for the employment of persons with disabilities in the civil and public service is a long-standing Government policy. Under Section 47(4) of the Disability Act 2005, public bodies are obliged to meet that target, 'unless there is good reason to the contrary for not doing so.'[429] The National Disability Authority monitors the implementation of this process, but there are no sanctions for not achieving it. The target was met in 2011 and has been slightly exceeded since then.[430] The Government has undertaken to progressively increase the statutory target towards 6 % by 2024.[431]

[426] Equality Tribunal, *Shanahan v One Pico Restaurant*, DEC-S2003-056, 30 June 2003, at Para. 7.2, https://www.workplacerelations.ie/en/Cases/2003/June/DEC-S2003-056-Full-Case-Report.html.

[427] Equality Tribunal, DEC-S2011-035, 15 August 2011, https://www.workplacerelations.ie/en/Cases/2011/August/DEC-S2011-035-Full-Case-Report.html.

[428] Workplace Relations Commission, *Savage v Fingal County Council*, ADJ-00024062, 29 March 2021, https://www.workplacerelations.ie/en/cases/2021/march/adj-00024062.html.

[429] Disability Act 2005, 8 July 2005, http://www.irishstatutebook.ie/eli/2005/act/14/enacted/en/print.html.

[430] See further: https://nda.ie/publications/employment/employment-of-people-with-disabilities-in-the-public-service/reports-on-compliance-with-public-sector-jobs-target/2020-report-on-compliance-with-part-5-of-the-disability-act-2005-.html.

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

6 REMEDIES AND ENFORCEMENT

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

a) Available procedures for enforcing the principle of equal treatment

In Ireland, the following procedures exist for enforcing the principle of equal treatment:

The Workplace Relations Commission (WRC) is the primary first instance forum for complaints under EEA, ESA and the Pensions Acts.[432] It operates as a quasi-judicial body. The Director of the WRC assigns an adjudication officer to investigate complaints received. Complainants may represent themselves, costs may not be awarded against either party, and the procedure is relatively informal. Provided both parties consent, complaints may be referred instead to the WRC's mediation service.[433] Mediation is held in private and agreements reached are not published.

The Labour Court may hear appeals in EEA and Pensions Acts cases, while ESA appeals are heard by the Circuit Court. Appeals entail a re-hearing of all matters of fact and law.[434] The Labour Court is a quasi-judicial statutory tribunal, which, following the enactment of the Workplace Relations Act 2015, became the only appellate tribunal in employment rights disputes. The Circuit Court is a court of local and limited jurisdiction.

Following a CJEU ruling issued in December 2018, the WRC and the Labour Court now have jurisdiction to interpret and apply EU law principles that conflict with domestic law.[435] To date, the WRC has disapplied national law in three cases concerning age discrimination. Two complainants successfully argued that they had been discriminated against when their applications to join An Garda Síochána (the police force) were not processed because of their age.[436] Legislation set 35 as the upper age limit for entry into the force as a trainee. An appeal of the WRC's decision will be heard by the Labour Court in 2022.[437] In 2021, the WRC found that a mandatory retirement age for civil servants, also set out in law, gave rise to direct discrimination (see case summary in Chapter 12.2).[438]

In relation to access to goods and services, the Intoxicating Liquor Act 2003 transferred jurisdiction for cases alleging discrimination 'on or at the point of entry to, licensed premises' to the District Court, a court of local and limited jurisdiction with jurisdiction over a range of criminal and civil matters.[439]

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[432] The WRC assumed the functions of the Equality Tribunal on 1 October 2015 under the terms of the Workplace Relations Act 2015: Ireland, Workplace Relations Act 2015, 20 May 2015, http://www.irishstatutebook.ie/eli/2015/act/16/enacted/en/print.html.

[433] Section 39 Workplace Relations Act 2015; Section 78 EEA; Section 24 ESA.

[434] Affirmed by the Labour Court in *Public Appointments Service v Flynn*, EDA1637, 7 December 2016, https://www.workplacerelations.ie/en/Cases/2016/December/EDA1637.html.

[435] Judgment of 4 December 2018, *Minister for Justice and Equality v Workplace Relations Commission*, C-378/17, http://curia.europa.eu/juris/document/document.jsf?text=&docid=208381&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=152514.

[436] Workplace Relations Commission, *Boyle v Commissioner of An Garda Síochána and The Minister for Justice Equality and Law Reform*, DEC-E2020-003, 5 October 2020, https://www.workplacerelations.ie/en/cases/2020/october/dec-e2020-003.html; *Fitzpatrick v Commissioner of An Garda Síochána and The Minister for Justice Equality and Law Reform*, DEC-E2020-002, 5 October 2020, https://www.workplacerelations.ie/en/cases/2020/october/dec-e2020-002.html.

[437] McCarthaigh, S. (2022), 'An Garda Síochána to appeal ruling that found age limit for new recruits is discriminatory', *Irish Times*, 16 February 2022, https://www.irishexaminer.com/news/courtandcrime/arid-40809498.html.

[438] Workplace Relations Commission, *Geraghty v The Office of the Revenue Commissioners*, ADJ-00000031, 4 November 2021, https://www.workplacerelations.ie/en/cases/2021/november/adj-00000031.html.

[439] Intoxicating Liquor Act 2003, 14 July 2003, http://www.irishstatutebook.ie/eli/2003/act/31/section/19/enacted/en/html#sec19.

Determinations of the WRC and Labour Court, as well as mediated settlements, are legally binding.[440] In the event of non-compliance, the complainant may bring enforcement proceedings.[441] IHREC may provide assistance in the enforcement procedures.[442]

The procedures apply to employment in the private and public sectors, subject to two exceptions. Members of the Defence Forces must address complaints about discrimination in employment to the authorities before accessing the WRC.[443] Complaints of discrimination in recruitment by the holder of a public service recruitment licence, An Garda Síochána (the police service) or the Defence Forces must first be referred to the recruitment authority concerned.[444]

Discrimination claims are brought before the WRC by way of application using an online form.[445] No fees are payable. The Director of the WRC is required to publish decisions under ESA and EEA 'on the internet in such form and in such manner' as they consider appropriate.[446] Pursuant to that requirement, the decisions of both the WRC and Labour Court are available for public inspection, as they are published on the WRC website.[447]

Following a Supreme Court judgment, EEA and ESA were amended in 2021 to provide that WRC investigations shall be held in public, unless 'special circumstances' exist.[448] Prior to this change, WRC hearings were conducted in private and adjudication officers frequently exercised their discretion to anonymise one or both parties to a case. The Supreme Court held that WRC proceedings should generally be heard in public to comply with constitutional provisions on the administration of justice.[449] The WRC has published a guidance note, which underlines that the parties to a case may request that the proceedings be conducted in private or that names be anonymised in the published decision, due to the existence of 'special circumstances'.[450] However, the final decision will rest with the adjudication officer. The note provides an illustrative list of such circumstances, which include cases involving a minor, a disability or medical condition that a party does not want to be revealed, sexual harassment or other 'sensitive issues', or cases where a real risk of harm might result from publicity. Because the new provision came into effect at the end of July 2021,[451] its impact cannot yet be fully assessed. The Minister for Enterprise, Trade and Employment is obliged to commence a review of the operation of the amendment by the end of July 2022, and subsequently to report to the Oireachtas.[452]

Both District Court and Circuit Court cases are heard in public; it is exceptionally rare for decisions of either court to be published.

Further avenues of redress for discrimination are provided for under other legislative provisions. For instance, complaints of dismissal due to discrimination may instead be brought under the Unfair Dismissals Acts 1977-2015. Under those Acts, the dismissal of an employee is deemed to be an unfair dismissal if it results wholly or mainly from the

[440] Section 91(2) EEA.
[441] Section 31 ESA; Section 91 EEA.
[442] Section 40 IHRECA.
[443] Sections 77(9)-(10) and 104 EEA.
[444] Section 77(7)-(8) EEA.
[445] See https://www.workplacerelations.ie/en/Complaints_Disputes/Refer_a_Dispute_Make_a_Complaint/.
[446] Section 89(1) EEA; Section 30(1) ESA.
See https://www.workplacerelations.ie/en/search/?advance=true.
[448] Section 12(a), Workplace Relations (Miscellaneous Provisions) Act 2021, amending Section 25 ESA and Section 67 EEA.
[449] Supreme Court, *Zalewski v Adjudication Officer and Ors.* [2021] IESC 24, 6 April 2021, https://www.courts.ie/acc/alfresco/4b94d66e-d29c-45e8-8f91-ad0ff80257a5/2021_IESC_24%20O'Donnell%20J..pdf/pdf#view=fitH.
[450] Workplace Relations Commission (2021), *WRC Guidance on Workplace Relations (Miscellaneous Provisions) Act 2021*, https://www.workplacerelations.ie/en/complaints_disputes/adjudication/workplace-relations-miscellaneous-provisions-act-2021/.
[451] Workplace Relations (Miscellaneous Provisions) Act 2021 (Commencement) Order 2021 (S.I. No. 397 of 2021).
[452] Section 13, Workplace Relations (Miscellaneous Provisions) Act 2021.

employee's age, race, colour or sexual orientation, religious or political opinions, or membership of the Travelling community.[453] The WRC is also the first instance forum under that legislation.

Discrimination encountered in the course of accessing many public services can be directed to the Office of the Ombudsman,[454] which oversees an administrative process that examines complaints about decisions, refusals to take action and procedures of public bodies.[455] Bodies within the remit of the Ombudsman include Government departments and offices, local authorities, the Health Service Executive (HSE), voluntary hospitals and voluntary agencies that provide services on behalf of the HSE, and third-level colleges and universities. The Ombudsman can examine a complaint about an action taken by one of those bodies if someone has been adversely affected and the action was taken without proper authority, if the action was taken on irrelevant grounds, if it was the result of negligence or carelessness, if it was based on incorrect or incomplete information, if it was improperly discriminatory, if it was based on an undesirable administrative practice, or if it was otherwise contrary to fair or sound administration.[456] The complaints process is conciliatory in nature and no fees are payable. Many complaints are resolved informally and do not result in a written report; an investigation report is drawn up and published in respect of some complaints that are especially complex or have broad implications for public policy. Following an investigation, the Ombudsman may make a general recommendation to the body concerned. Recommendations issued are not legally binding, however. Where it appears to the Ombudsman that the response to a recommendation is not satisfactory, they may make a special report on the matter to the Oireachtas.[457] Two such reports were issued on compliance with provisions of ESA.[458] In 2021, the Ombudsman published a report criticising the Government's failure to act on its earlier findings.[459]

b) Barriers and other deterrents faced by litigants seeking redress

EEA, ESA and the Pensions Acts impose a restrictive six-month time limit for bringing complaints to the appropriate body.[460] Additionally, ESA requires a complainant to initiate a complaint by notifying the respondent in writing, within two months of the date of the occurrence of the incident (or the date of the last occurrence if relevant), of the nature of the allegation *and* of their intention to seek redress under ESA.[461] The notification period may be extended for a further two months if the WRC is satisfied that reasonable cause prevented the complainant from sending the notification within the normal time period.[462] 'Exceptionally', the notification requirement may be disapplied.[463]

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[453] Section 6(2) Unfair Dismissals Acts 1977-2015.
[454] Ombudsman Act 1980, 14 July 1980, http://www.irishstatutebook.ie/eli/1980/act/26/enacted/en/html.
[455] See generally: https://www.ombudsman.ie/.
[456] Section 4(2), Ombudsman Act 1980.
[457] Section 6(7), Ombudsman Act 1980.
[458] The reports can be viewed at: https://www.ombudsman.ie/publications/reports/too-old-to-be-equal-a-fol/index.xml; https://www.ombudsman.ie/publications/reports/motorised-transport-grant/Motorised-Transport-Grant-Report-to-Dail-and-Seanad.pdf.
[459] Office of the Ombudsman (2021), *Grounded: Unequal access for people with disabilities to personal transport schemes*, https://www.ombudsman.ie/publications/reports/grounded-unequal-access-f/Grounded-Mobilty-Report-2021.pdf.
[460] In two 2019 cases, the Labour Court underlined that the pursuit of an internal grievance does not stop the time limit running: *Pfizer Pharmaceuticals Ireland Ltd. v Whelan*, EDA1924, 12 July 2019, https://www.workplacerelations.ie/en/cases/2019/july/eda1924.html; *Beaumont Hospital v Kaunda*, EDA1930, 3 September 2019, https://www.workplacerelations.ie/en/cases/2019/september/eda1930.html.
[461] Section 21(2) ESA.
[462] Section 21(3)*(a)*(i) ESA. See, for example, Workplace Relations Commission, *Keenan v Topaz Energy Limited*, ADJ-00011225, 20 July 2018, https://www.workplacerelations.ie/en/Cases/2018/July/ADJ-00011225.html (notification period extended to four months because delay was due to administrative error on part of solicitor).
[463] Section 21(3) ESA. To the author's knowledge, this has only occurred on two occasions: Workplace Relations Commission, *A Citizen v An Insurance Company*, ADJ-00019822, 18 December 2019, https://www.workplacerelations.ie/en/cases/2019/december/adj-00019822.html; Workplace Relations Commission, *A Service User v A Charity*, ADJ-00026209, 14 April 2021,

This presents difficulties for complainants, as evidenced by the fact that a substantial number of complaints are dismissed annually at hearing stage for failure to comply with the notification requirement.[464] For instance, complaints of harassment on the gender and sexual orientation grounds were dismissed in two 2020 cases because the notices were served one day late.[465] No data is available about complaints that were not pursued when prospective complainants became aware of the notification requirement.

Complaints of discrimination occurring 'on or at the point of entry to, licensed premises' must be brought to the District Court instead of the WRC. The major impact of this amendment is the cost implications for complainants as well as the complexity of the legal proceedings.[466] Under the WRC system it is possible to represent oneself, and costs cannot be awarded against either complainant or respondent; this is not the case at the District Court. Moreover, the system generates confusion in practice; several complaints have been, and continue to be, lodged before the incorrect forum. Over the period from 2016 to 2019, the WRC dismissed 12 complaints since it did not have jurisdiction to hear the cases.[467] Parts of two complaints could not be determined for the same reason in 2020.[468] A case on the Traveller community ground was dismissed in 2021 because the incident took place at a restaurant and bar.[469]

Licensed premises include, most obviously, pubs, but also off-licences, hotels and many restaurants. Considerable uncertainty as to which premises, or parts of premises, are covered has emerged in Equality Tribunal and subsequently WRC decisions. A 2011 case exemplifies the difficulties faced by complainants.[470] Two men argued that their gym membership was terminated when it was discovered that they were members of the Traveller community. During the Tribunal's investigation of the complaint, however, it emerged that the respondent publican's licence covered an extensive area including the gym. As a result, the gym was a licensed premise, and so the case could not proceed before the Tribunal. A 2018 decision established that the off-licence section of a supermarket falls under the jurisdiction of the District Court.[471]

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https://www.workplacerelations.ie/en/cases/2021/april/adj-00026209.html. The notification requirement was disapplied in relation to some aspects of the complaint in another 2019 decision: Workplace Relations Commission, *O'Donohue v Rowlands*, ADJ-00009960, 4 January 2019, https://www.workplacerelations.ie/en/Cases/2019/January/ADJ-00009960.html.

464 With respect to 2021, see, for example, the following decisions of the Workplace Relations Commission: *Landowner v County Council*, 9 March 2021, ADJ-00024701, https://www.workplacerelations.ie/en/cases/2021/march/adj-00024701.html; *A Hotel Client v A Hotel Group*, ADJ-00026218, 26 April 2021, https://www.workplacerelations.ie/en/cases/2021/april/adj-00026218.html; *Klos v Unalex Ltd t/a Abrakebabra Carlow*, ADJ-00031767, 3 August 2021, https://www.workplacerelations.ie/en/cases/2021/august/adj-00031767.html; *O'Driscoll v Cork University Maternity Hospital*, ADJ-00031924, 15 September 2021, https://www.workplacerelations.ie/en/cases/2021/september/adj-00031924.html; *A Parent v A Therapist*, ADJ-00033461, 1 October 2021, https://www.workplacerelations.ie/en/cases/2021/october/adj-00033461.html.

465 Workplace Relations Commission, *Ward v Ballsbridge Hotel*, ADJ-00024426, 20 October 2020, https://www.workplacerelations.ie/en/cases/2020/october/adj-00024426.html; Workplace Relations Commission, *Kennedy v The Ballsbridge Hotel*, ADJ-00024423, 20 October 2020, https://www.workplacerelations.ie/en/cases/2020/october/adj-00024423.html.

466 Fennelly, D. (2012), *Selected Issues in Irish Equality Case Law 2008 – 2011*, at pp. 106-7, https://www.ihrec.ie/download/pdf/20150602161702.pdf.

467 See the country reports for 2019 and 2020, available at: https://op.europa.eu/s/nWgq and https://op.europa.eu/s/oybK.

468 Workplace Relations Commission, *A Member of the Travelling Community v A Limited Company*, ADJ-00023718, 15 September 2020, https://www.workplacerelations.ie/en/cases/2020/september/adj-00023718.html; Workplace Relations Commission, *A Member of the Travelling Community v A Limited Company*, ADJ-00023714, 15 September 2020, https://www.workplacerelations.ie/en/cases/2020/september/adj-00023714.html.

469 Workplace Relations Commission, *Pratt v The Half Door Bar and Restaurant Limited*, ADJ-00026369, 6 October 2021, https://www.workplacerelations.ie/en/cases/2021/october/adj-00026369.html.

470 Equality Tribunal, *Dunne v Planet Health Club*, DEC-S2011-018, 27 April 2011, https://www.workplacerelations.ie/en/cases/2011/april/dec-s2011-018-full-case-report.html.

471 Workplace Relations Commission, *Mongan v Donal & Martha Duffy Limited t/a SuperValu Edgeworthstown*, DEC-S2017-044, 23 November 2017, https://www.workplacerelations.ie/en/cases/2017/november/dec-s2017-044.html.

In its 2016 report on Ireland, the European Commission against Racism and Intolerance (ECRI) considered that Ireland had only 'partially implemented' its recommendation on ensuring that 'there is an independent authority (other than the courts) competent to deal with cases of discrimination in the provision of goods and services'. It noted that, because of Section 19, 'a substantial number of pertinent cases' are excluded from the WRC's mandate. Significantly, it further observed 'that in particular members of the Traveller Community are often affected by discrimination in the provision of goods and services in licensed premises.'[472] ECRI's most recent report, issued in June 2019, reiterated these points.[473] According to the Commission, conferring jurisdiction on the District Court 'may be a barrier to access to justice for the most disadvantaged community in Ireland; members of the Traveller community are frequently refused admission to licensed premises and have no alternative to seeking redress in a District Court, which is less accessible than the WRC and more costly, making it prohibitive.'[474] It recommended that 'the authorities should … streamline procedures so that all discrimination cases, on all grounds and in all areas, are dealt with by the Workplace Relations Commission.'[475]

While there is no potential for awards of costs against either party in the WRC, this is not the position regarding proceedings before the District Court or the Circuit Court.[476]

There is no provision under the legislation for a body (other than IHREC) to instigate complaints, which limits the potential of the equality legislation.

c) Number of discrimination cases brought to justice

In Ireland, statistics on the number of cases related to discrimination brought to justice are available.

The WRC's annual report, which covers a broad employment rights mandate in addition to ESA, EEA and the Pensions Acts, provides overall figures for the number of 'Complaint Applications' it receives (the cases referred to it) and further breaks this down into the number of 'Specific Complaints' lodged (separate legislative breaches asserted within each complaint application).[477] Of the 18 969 specific complaints received by the WRC across its entire mandate in 2020, 1 331 concerned anti-discrimination law.[478] In the 2020 annual report, figures are provided for the number of complaints referred under EEA and ESA, and these are further divided into the grounds cited in those complaints. 305 ESA complaints were referred, relating to 452 discriminatory grounds. The grounds specified in those complaints were age (31), civil status (23), disability (91), family status (23), gender (45), membership of the Traveller community (51), race (76), religion (30), sexual orientation (21), and receipt of housing assistance (61). In 2019, referrals under ESA declined by 26 % compared with the previous year. This trend continued in 2020, with a 30 % reduction on the 2019 figures. In its 2019 annual report the WRC noted that the 'reasons behind this decline are unclear', and that an awareness-raising campaign was planned for 2020.[479] The campaign was put on hold because of the pandemic and was identified as a

[472] European Commission against Racism and Intolerance (ECRI) (2016), *ECRI conclusions on the implementation of the recommendations in respect of Ireland subject to interim follow-up,* CRI (2016)4, at p. 5, http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Ireland/IRL-IFU-IV-2016-004-ENG.pdf.

[473] European Commission against Racism and Intolerance (2019), *ECRI report on Ireland (fifth monitoring cycle)*, CRI(2019)18, https://rm.coe.int/fifth-report-on-ireland/168094c575.

[474] European Commission against Racism and Intolerance (2019), *ECRI report on Ireland (fifth monitoring cycle)*, CRI(2019)18, at Para. 13.

[475] European Commission against Racism and Intolerance (2019), *ECRI report on Ireland (fifth monitoring cycle)*, CRI(2019)18, at Para. 17.

[476] Appeals from the Labour Court, gender-ground cases and applications for enforcement orders may be heard in the Circuit Court.

[477] Workplace Relations Commission (2021), *Annual Report 2020*, https://www.workplacerelations.ie/en/publications_forms/corporate_matters/annual_reports_reviews/annual-report-2020.pdf. Reports for previous years are available at: https://www.workplacerelations.ie/en/publications_forms/corporate_matters/annual_reports_reviews/.

[478] Data for 2021 was not available at the time this report was drafted.

[479] Workplace Relations Commission (2020), *Annual Report 2019*, p. 24.

priority for 2021.[480] The 1 260 grounds indicated in the 939 complaints under EEA were age (206), civil status (39), disability (290), family status (187), gender (278), membership of the Traveller community (6), race (210), religion (19), and sexual orientation (25). EEA referrals declined by 27 % in 2020 (compared with an 11 % decrease in 2019), with a 54 % drop in age-ground complaints, a 61 % decline in referrals on the religion ground, and race-ground complaints falling by 15 %.[481] The reasons for these patterns are as yet unclear. In 2020, there were 18 referrals under the Pensions Acts. Data was not provided for the grounds in question.

A total of 242 EEA and 97 ESA adjudication decisions were issued by the WRC in 2020. [482] Due to the COVID-19 pandemic, considerably fewer hearings were conducted in 2020 than in 2019, leading to a 46 % decrease in the number of decisions delivered.[483] Annual reports are published on the WRC's website and are therefore available to the public.

d) Registration of national court decisions on discrimination cases

In Ireland, court decisions on discrimination are not registered as such by national courts.

The Courts Service of Ireland registers and publishes the number of cases processed by the courts each year, but does not provide figures for discrimination cases.[484] Many judgments of the superior courts (the High Court, the Court of Appeal and the Supreme Court) are published online.[485] Judgments of the District Court and Circuit Court are not available to the public.

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

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

In Ireland, associations, organisations and trade unions are entitled to act on behalf of victims of discrimination.

Organisations, trade unions or associations may represent complainants before the WRC and the Labour Court (as may any person authorised by the complainant).[486] Only qualified lawyers have the right to represent litigants before the civil courts.[487] Advocates such as officials from trade unions, organisations or associations may provide limited assistance to lay litigants with the permission of the court.[488] No organisation apart from IHREC may commence own-name proceedings on behalf of victims of discrimination.

b) Engaging in proceedings in support of victims of discrimination (joining existing proceedings)

In Ireland, associations, organisations and trade unions may apply to act in support of victims of discrimination.

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480 Workplace Relations Commission (2021), *Annual Report 2020*, p. 34.
481 Workplace Relations Commission (2021), *Annual Report 2020*, p. 23.
482 Workplace Relations Commission (2021), *Review of WRC Decisions and Recommendations January-December 2020*, p. 8, https://www.workplacerelations.ie/en/complaints_disputes/adjudication/review-of-wrc-adjudication-decisions-recommendations/wrc-report-review-of-wrc-adjudication-decisions-and-recommendations-jan-dec-2020-.pdf.
483 Workplace Relations Commission (2021), *Annual Report 2020*, p. 22.
484 See https://www.courts.ie/annual-report.
485 A case law database is maintained by the Courts Service. See https://www.courts.ie/judgments.
486 Section 77(11) EEA and Section 25A ESA.
487 See, for example, Ireland, Order 6 of the District Court Rules, S.I. No. 93/1997 - District Court Rules, 1997, 1 May 1997, http://www.irishstatutebook.ie/eli/1997/si/93/made/en/print.
488 See further the High Court judgment in *Tougher v Tougher's Oil Distributors Ltd.* [2014] IEHC 254, 15 May 2014, http://www.courts.ie/Judgments.nsf/0/9534874F89674BB780257CE00051F8F8.

In the course of an investigation, if the Director General of the WRC considers it appropriate, they may 'hear persons appearing to the Director to be interested'.[489] Consequently, interested third parties may be authorised to participate in proceedings by making submissions on relevant matters. To date, this has occurred very rarely. Representatives of the Irish Traveller Movement (a human rights organisation), for example, have provided expert testimony for complainants on the difficulties experienced by Travellers in gaining access to services and on other matters.[490] In a reasonable accommodation case, the Equality Tribunal heard expert evidence on the structure of Irish sign language and the need for suitably qualified interpreters.[491]

There is no equivalent provision that would enable associations to join proceedings before the ordinary courts. Intervention in an amicus curiae capacity is theoretically possible[492] but has not occurred to date in an equality law case.

c) Actio popularis

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

Civil society organisations, such as the Equality and Rights Alliance, have long sought the extension of standing under EEA and ESA to NGOs and trade unions.[493] The matter has not been considered by Parliament, however.

In the fields of constitutional law and judicial review, courts have developed the general principles on legal standing significantly over the past decades. However, just one case to date recognises an organisation's right to bring an *actio popularis*.[494] In *Digital Rights Ireland Ltd. v Minister for Communications*,[495] the High Court held that an NGO that had incorporated as a limited company had *locus standi* to assert its own rights and also to bring an *actio popularis* in challenging legislation on data retention that could potentially affect the entire population. Standing was granted on the basis, *inter alia,* that 'it would be an effective way to bring the action – individual owners of mobile phones would be unlikely to litigate the matter'. In a 2020 judgment, the Supreme Court declined to grant an environmental NGO legal standing to challenge a statutory plan aimed at addressing climate change.[496] It considered that constitutional actions by parties whose personal rights are not directly impacted can only be brought in exceptional circumstances where refusing standing would make the enforcement of important rights either impossible or excessively difficult.

[489] Section 25(1) ESA; Section 79(1) EEA.
[490] See, for example, Equality Tribunal, *Reilly v The Licensee, the Foxhunter Pub, Lucan, Dublin*, DEC-S2003-026, 17 April 2003, https://www.workplacerelations.ie/en/cases/2003/april/dec-s2003-026-full-case-report.html; Equality Tribunal, *Sweeney v Saehan Media Ireland Ltd*., DEC-E2003-017, 1 May 2003, https://www.workplacerelations.ie/en/cases/2003/may/dec-e2003-017_full_case_report.html.
[491] Equality Tribunal, *Regan v Old Bawn Community School*, DEC-S2010-043, 31 August 2010, https://www.workplacerelations.ie/en/cases/2003/may/dec-e2003-017_full_case_report.html.
[492] Courts have an inherent jurisdiction to permit such intervention. See further: Whyte, G. (2015), *Social Inclusion and the Legal System: Public Interest Law in Ireland*, Dublin, Institute of Public Administration, pp. 158-165.
[493] See, for example, Crowley, N. (2011), *A Roadmap to a Strengthened Equality and Human Rights Infrastructure in Ireland*, Dublin, Equality and Rights Alliance.
[494] See further: Whyte, G. (2015), *Social Inclusion and the Legal System: Public Interest Law in Ireland*, Dublin, Institute of Public Administration, pp. 121-152.
[495] High Court, *Digital Rights Ireland Ltd. v Minister for Communications* [2010] IEHC 221, 5 May 2010, https://www.courts.ie/view/judgments/08a2f2b3-7bc4-473c-a9f1-0caf8fec4ece/b7006a06-93ad-4cc6-bb38-709edb184d8f/2010_IEHC_221_1.pdf/pdf, at Para. 91.
[496] Supreme Court, *Friends of the Irish Environment v Ireland*, [2020] IESC 49, 31 July 2020, https://www.courts.ie/view/judgments/681b8633-3f57-41b5-9362-8cbc8e7d9215/981c098a-462b-4a9a-9941-5d601903c9af/2020_IESC_49.pdf/pdf.

d) Class action

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

When the WRC receives multiple complaints under either EEA or ESA arising from the same event, it may convene a meeting with the parties prior to the hearing with a view to investigating the claims as a single grouped case.[497] This practice is adopted as a matter of administrative convenience and is not a class action.[498] In a grouped case, each person involved must refer a complaint, and a decision is issued in respect of every complaint.[499]

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

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

Section 85(A)(1) EEA provides: 'Where in any proceedings facts are established by or on behalf of a complainant from which it may be presumed that there has been discrimination in relation to him or her, it is for the respondent to prove the contrary.' An identical provision governs cases under ESA.[500] This also applies to cases brought by IHREC.[501]

The EEA provision expressly includes proceedings relating to indirect discrimination, victimisation and harassment, but not reasonable accommodation. However, in practice, adjudicators shift the burden of proof once a prima facie case has been established.[502]

The Labour Court has held that a requirement to be competent in a particular language is prima facie indirectly discriminatory on grounds of race, as it is likely to place persons whose native language is other than the required language at a disadvantage relative to persons whose native language is the required language.[503]

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

In Ireland, there are legal measures of protection against victimisation.

Section 74(2) EEA prohibits victimisation, which is deemed to occur where a person is dismissed or any other adverse treatment occurs because they have undertaken any of the following activities: they have made a complaint of discrimination, they have been a complainant in proceedings,[504] they are an employee who has represented or otherwise supported a complainant, they have been a comparator in an equality action, they have been a witness in proceedings under EEA or ESA, they have opposed a discriminatory act

[497] See, for example, Equality Tribunal, *McCann, Collins and 31 others v Eircom Ltd*., DEC-S2003-076/108, 12 September 2003, https://www.workplacerelations.ie/en/Cases/2003/September/DEC-S2003-076-108_Full_Case_Report.html; *Johnson and sixty-five others v Tesco Ireland Limited*, DEC-E2001-024, 10 August 2001, https://www.workplacerelations.ie/en/Cases/2001/August/DEC-E2001-024.html.

[498] The High Court ruled out use of class actions in the employment case of *Verbatim Ltd. v Duffy and others* [1994] ELR 159.

[499] See, for example, Equality Tribunal, *58 Named Complainants v Goode Concrete Limited*, DEC-E2008-020, 30 April 2008, https://www.workplacerelations.ie/en/cases/2008/april/dec-e2008-020-full-case-report.html.

[500] Section 38(A)(1) ESA.

[501] Section 85(A)(3) EEA; Section 38(A)(2) ESA.

[502] See, for example, Labour Court, *Public Appointments Service v Flynn*, EDA1637, 7 December 2016, https://www.workplacerelations.ie/en/Cases/2016/December/EDA1637.html.

[503] Labour Court, *Noonan Services Ltd. v A Worker*, EDA1126, 29 July 2011, https://www.workplacerelations.ie/en/Cases/2011/July/EDA1126.html; *Aer Lingus v Kacmarek, Turczyk and Wilczkiew*, EDA1712, 8 May 2017, https://www.workplacerelations.ie/en/Cases/2017/May/EDA1712.html.

[504] The 'proceedings' referenced under Section 74(2)(b) must be EEA proceedings: Bolger, M., Bruton C. and Kimber, C. (2012), *Employment Equality Law*, Dublin, Thomson Reuters, at p. 699. See, for example, *A Complainant v A Meat Factory*, ADJ-00003910, 18 May 2017, https://www.workplacerelations.ie/en/cases/2017/may/adj-00003910_.html.

by lawful means, or they have stated an intention to take any of the preceding actions. Protection from victimisation applies even after the employment relationship has ended.[505]

Victimisation complaints may only be referred against the complainant's employer. In *Association of Secondary Teachers, Ireland v Dunbar*, the Labour Court determined that on the 'plain and ordinary meaning' of Section 74(2), it applies only to dismissal or other adverse treatment of an employee by his or her employer.[506] The complainant, therefore, had no cause of action against a trade union.

Complaints of victimisation must be brought within 6 months of the most recent occurrence of the act.[507] This may be extended to a maximum of 12 months in certain circumstances.[508] The form of redress available is the same as that for discrimination claims, being a compensation award or an order that the employer take a specified course of action.[509] Adjudicators consistently reiterate that victimisation is a serious matter, and successful cases tend to result in significant compensation awards.[510]

In two instances, victimisation may amount to a criminal offence: where a person procures or attempts to procure another person to do anything that constitutes victimisation,[511] or where an employee is dismissed in circumstances amounting to victimisation.[512]

Victimisation is also prohibited under ESA. As with EEA, protection extends to people other than the complainant. Section 3(2)*(j)* applies where a person has in good faith applied for redress under the Act, has been a witness, has given evidence in criminal proceedings under the Act, has opposed by lawful means discriminatory acts, or has given notice of an intention to take any of the preceding actions.[513]

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

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

Section 82 EEA provides for a broad range of remedies that are equally applicable with respect to private and public employment: compensation awards, orders for employers to take specific courses of action, an order for equal treatment in whatever respect is relevant to the case, and reinstatement or re-engagement.

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505 Workplace Relations Commission, *Complainant v Respondent*, ADJ-00022596, 23 March 2020, https://www.workplacerelations.ie/en/cases/2020/march/adj-00022596.html; applying Case C-185/97, *Coote v Granada Hospitality Ltd*. ECLI:EU:C:1998:424, 22 September 1998.

506 Labour Court, EDA2811, 25 August 2011, https://www.workplacerelations.ie/en/cases/2011/august/eda1128.html.

507 Section 77(5) EEA.

508 Section 77(6)*(a)* EEA.

509 Section 82 EEA.

510 Compensation of EUR 25 000 was awarded to a complainant who was dismissed when she made a complaint under EEA in Labour Court, *Couverture Limited v Wozniczka*, EDA 182, 11 January 2018, https://www.workplacerelations.ie/en/Cases/2018/January/EDA182.html. Victimisation that occurred as a reaction to a previous complaint to the Equality Tribunal attracted a EUR 48 750 award in Workplace Relations Commission, *Higgins v Permanent TSB Plc*, DEC-E2016-037, 25 February 2016, https://www.workplacerelations.ie/en/Cases/2016/February/DEC-E2016-037.html. In a 2021 case, EUR 27 500 was awarded to a university employee who did not pass her probation and so was dismissed following an informal harassment complaint: Workplace Relations Commission, *O'Reilly v Dublin City University*, ADJ-00020428, 10 May 2021, https://www.workplacerelations.ie/en/cases/2021/may/adj-00020428.html.

511 Section 14 EEA.

512 Section 98 EEA.

513 See, for example, Equality Tribunal, *Salmon v Para Equestrian Ireland*, DEC-S2004-002, 9 January 2004, https://www.workplacerelations.ie/en/cases/2004/january/dec-2004-002-full-case-report.html; Workplace Relations Commission, *Baikoua v O'Brien and Durham*, ADJ-00026767, 3 July 2020, https://www.workplacerelations.ie/en/cases/2020/july/adj-00026767.html.

In the area of goods and services, Section 27 ESA provides for the remedies of compensation and orders that a certain course of action be followed. A successful discrimination case taken against licensed premises before the District Court may attract a compensation award. The judge may also order the licensee to take 'a course of action' and has an additional power, not enjoyed by the WRC, to make an order for temporary closure of the premises.[514]

A limited range of criminal sanctions can be imposed under EEA and ESA: where a person procures another to do anything that could be considered victimisation or discrimination,[515] where victimisation amounts to dismissal,[516] or in a range of circumstances concerning obstruction of the Workplace Relations Commission or of IHREC in conducting inquiries.[517]

b) Compensation – maximum and average amounts

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.[518] Where the complainant was not an employee (in the case of a discriminatory interview, for example) the maximum award is EUR 13 000.[519] 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.[520] There is no provision for the payment of interest.[521]

The maximum award payable under ESA is linked to monetary limits on the jurisdiction of the District Court and is currently set at EUR 15 000.[522] In a 2019 race-ground case, the maximum amount was awarded because of the 'serious and ongoing nature of the abuse and harassment' directed at a tenant.[523] The maximum amount was also awarded in a 2021 case on the Traveller community ground. The respondent hotel disengaged with the complainant about booking a wedding function when it became aware of her Traveller ethnicity, and the WRC considered that the remedy should dissuade such conduct.[524] The decision was, however, quashed in judicial review proceedings and the case will be re-heard by the WRC.[525]

A successful discrimination case taken against licensed premises before the District Court may attract a maximum award of EUR 15 000.[526]

[514] Section 19(3), Intoxicating Liquor Act 2003. Where an order has been made under Subsection (3), any person may make an objection, related to the prohibited conduct concerned, to the renewal of the licence: Intoxicating Liquor Act 2003, Section 19(10).
[515] Section 14 EEA; Section 13 ESA.
[516] Section 98 EEA.
[517] See, for example, Section 60(3) EEA; Section 37(1) ESA.
[518] Section 82(4) EEA. The maximum permissible awards were granted in two 2021 cases concerning mandatory retirement: Workplace Relations Commission, *Geraghty v The Office of the Revenue Commissioners*, ADJ-00000031, 4 November 2021, https://www.workplacerelations.ie/en/cases/2021/november/adj-00000031.html; *A Senior Staff Nurse v A Nursing Home (In Liquidation),* ADJ-00027325, 20 August 2021, https://www.workplacerelations.ie/en/cases/2021/august/adj-00027325.html.
[519] Section 82(4)*(b)* EEA.
[520] Section 82(1)*(a)* EEA.
[521] Interest may be awarded only in gender-ground cases as provided for under Section 82(5) EEA; applied in Equality Tribunal, *O'Brien v Persian Properties*, DEC-E2012-010, 6 February 2012, https://www.workplacerelations.ie/en/Cases/2012/February/DEC-E2012-010-Full-Case-Report.html.
[522] Section 27(2) ESA.
[523] Workplace Relations Commission, *Nkikita v Fleming*, ADJ-00020830, 4 December 2019, https://www.workplacerelations.ie/en/cases/2019/december/adj-00020830.html.
[524] Workplace Relations Commission, *A Prospective Customer v A Hotel/Wedding Venue*, ADJ-00026881, 6 January 2021, (text of decision unavailable in the WRC database at the time of writing).
[525] The text of the judgment in the judicial review proceedings was not available at the time of writing.
[526] Section 19(4), Intoxicating Liquor Act 2003.

The WRC published data on compensation awards under EEA and ESA for the first time in 2021.[527] It records that in 2020 the average award under ESA was EUR 5 373, and EUR 19 754 for EEA cases.

c) Assessment of the sanctions

The primary compliance issue pertains to the compensation ceilings. Claims under the gender ground are treated exceptionally; they can be taken directly to the Circuit Court and can attract higher compensation awards, since no monetary limit is applicable. It is questionable whether the remedies available in the context of non-gender-ground discrimination could generally be described as 'effective, proportionate and dissuasive' sanctions. As noted above, a cap of EUR 13 000 applies at the access or recruitment stage. The ceiling of EUR 15 000 under ESA may be inadequate for particularly egregious violations of the law in situations such as discriminatory denial of access to education.[528] 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.[529]

IHREC is the only independent body permitted to instigate litigation under ESA and EEA,[530] but compensation orders may not be made in its favour.[531] This arguably raises a compliance issue, since the CJEU has found that national rules on sanctions implementing the Racial Equality Directive must be effective, proportionate and dissuasive, even where there is no identifiable victim.[532]

It seems that the offence provisions of the two sets of acts have never been invoked.

Equality laws also provide for non-financial sanctions, which bolster their effectiveness since the remedy can be tailored to the particular circumstances of the complaint and can also generate significant effects beyond the immediate case.[533] Adjudicators have used this power to order persons to take a specified course of action[534] as a means of ensuring that respondents in ESA cases create an equal opportunities policy,[535] retrain staff[536] and revise discriminatory policies.[537] Employers have been directed to put in place pathways for

[527] Workplace Relations Commission (2021), *Review of WRC Decisions and Recommendations January-December 2020*, https://www.workplacerelations.ie/en/complaints_disputes/adjudication/review-of-wrc-adjudication-decisions-recommendations/wrc-report-review-of-wrc-adjudication-decisions-and-recommendations-jan-dec-2020-.pdf.

[528] In a 2017 case concerning the housing assistance ground, the adjudication officer commented as follows: 'I am constrained by the maximum award of EUR 15 000 which by virtue of Section 27(2) is fixed at the maximum District Court civil jurisdiction, and in my view does not reflect the seriousness of the discrimination': Workplace Relations Commission, *Tenant C v A Landlord*, ADJ-00004705, 9 August 2017, https://www.workplacerelations.ie/en/Cases/2017/August/ADJ-00004705.html.

[529] Section 27(3) ESA; Section 82(6)*(a)* EEA.

[530] Section 85 EEA; Section 23 ESA.

[531] Section 82(6) EEA; 27(4) ESA.

[532] Judgment of 10 July 2008, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, C-54/07, [2008] ECR 1-1587.

[533] Fennelly, D. (2012), *Selected Issues in Irish Equality Case Law 2008 – 2011*, at pp. 27-29, https://www.ihrec.ie/download/pdf/20150602161702.pdf.

[534] Section 82(1)*(e)* EEA; Section 27(1)*(b)* ESA.

[535] See, for example, Workplace Relations Commission, *Trainee Organic Farmer v Organic Farming Training Association*, ADJ-00025708, 26 November 2021, https://www.workplacerelations.ie/en/cases/2021/november/adj-00025708.html.

[536] See, for example, Workplace Relations Commission, *Biryukov v Tarpey Maloney Properties*, ADJ-00030652, 26 November 2021, https://www.workplacerelations.ie/en/cases/2021/november/adj-00030652.html.

[537] See, for example, Workplace Relations Commission, *McCarthy v Cork City Council*, ADJ-00018849, 2 July 2020, https://www.workplacerelations.ie/en/cases/2020/july/adj-00018849.html; Workplace Relations Commission, *Employee v Employer*, ADJ-00031761, 13 September 2021, https://www.workplacerelations.ie/en/cases/2021/september/adj-00031761.html.

discrimination complaints,[538] to revise staff handbooks and training[539] and to review recruitment[540] and other employment procedures.[541]

[538] Workplace Relations Commission, *A University Lecturer v A University*, ADJ-00002790, 21 August 2018, https://www.workplacerelations.ie/en/cases/2018/august/adj-00002790.html.

[539] See, for example, Workplace Relations Commission, Sales Advisor/ Mechanic/ Department Manager v DIY/Electrical Retailer, ADJ-00013899, 30 May 2019, https://www.workplacerelations.ie/en/cases/2019/may/adj-00013899.html; Workplace Relations Commission, *O'Shea v Health Services Executive*, ADJ-00024740, 16 August 2021, https://www.workplacerelations.ie/en/cases/2021/august/adj-00024740.html.

[540] See, for example, Workplace Relations Commission, *A Candidate v An Electrical Firm*, ADJ-00019652, 23 April 2020, https://www.workplacerelations.ie/en/cases/2020/april/adj-00019652.html; Workplace Relations Commission, *Matthews v Department of Health,* ADJ-00025554, 2 March 2021, https://www.workplacerelations.ie/en/cases/2021/march/adj-00025554.html.

[541] See, for example, Workplace Relations Commission, *A Station Officer v A Public Body*, ADJ-00017854, 16 April 2020, https://www.workplacerelations.ie/en/cases/2020/april/adj-00017854.html; Workplace Relations Commission, *Customer Services Assistant v A Supplies Company*, ADJ-00023466, 30 April 2020, https://www.workplacerelations.ie/en/cases/2020/april/adj-00023466.html.

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

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

The Irish Human Rights and Equality Commission (IHREC) is Ireland's designated body for the promotion of equal treatment irrespective of racial or ethnic origin. Its mandate also extends to the other discriminatory grounds set out under domestic anti-discrimination law: age, civil status, disability, family status, gender, housing assistance, religion and sexual orientation.

IHREC was established on 1 November 2014, replacing the Equality Authority as the country's specialised equality body and the Irish Human Rights Commission as Ireland's national human rights institution (NHRI).[542]

Another national body, the Office of the Ombudsman,[543] oversees an administrative process that examines complaints about decisions, refusals to act and the procedures of public bodies.[544] Its remit includes discrimination in access to many public services (see Chapter 6.1).

b) Political, economic and social context of the designated body

The political, economic and social context in which IHREC operates has been relatively positive since its establishment in November 2014. There is evidence of recent political support for the Commission: the Minister for Justice and Equality acknowledged the 'important work' of the body in sanctioning increased funding to provide for the appointment of additional staff in 2017,[545] and the Government supported legislation that confers an additional enforcement function on the Commission with respect to reporting on the gender pay gap.[546] This compares favourably with the experience of its predecessor equality body, the Equality Authority. The Authority's budget was drastically cut in Budget 2009 from approximately EUR 5.9 million to EUR 3.3 million, which represented a 43 % reduction. The Equality Authority's capacity to carry out the full range of its functions was severely compromised as a result.[547]

The Commission's budget for 2021 was EUR 6.93 million, representing an increase of 4 % from the previous year.[548] Its budget will increase by a further 9 % in 2022.[549] This will bring IHREC's funding into alignment with what the combined budgets for the Equality Authority and the Irish Human Rights Commission were in 2007, prior to a series of cuts

[542] Sections 9 and 44, Irish Human Rights and Equality Commission Act 2014, 27 July 2014, http://www.irishstatutebook.ie/eli/2014/act/25/enacted/en/html; Irish Human Rights and Equality Commission Act 2014 (Establishment Day) Order 2014 (S.I. No. 450 of 2014), http://www.irishstatutebook.ie/eli/2014/si/450/made/en/print.

[543] Ombudsman Act 1980, 14 July 1980, http://www.irishstatutebook.ie/eli/1980/act/26/enacted/en/html.

[544] See generally: https://www.ombudsman.ie/.

[545] Select Committee on Justice and Equality, Vote 25 - Irish Human Rights and Equality Commission (Revised), 12 April 2017, http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/committeetakes/JUS2017041200002.

[546] Gender Pay Gap Information Act 2021, https://www.irishstatutebook.ie/eli/2021/act/20/enacted/en/print.html.

[547] Free Legal Advice Centres (2014), *Our Voice, Our Rights: A Parallel Report in response to Ireland's Third Report under the International Covenant on Economic, Social and Cultural Rights*, pp. 19-22, https://www.ourvoiceourrights.ie/download/pdf/our_voice_our_rights.pdf; Harvey, B. and Walsh, K. (2009), *Downgrading Equality and Human Rights: Assessing the Impact*, Dublin, Equality and Rights Alliance.

[548] Government of Ireland (2020), *2020 Revised Estimates for Public Services,* https://www.gov.ie/en/collection/e20037-revised-estimates/.

[549] Government of Ireland (2021), *Revised Estimates for Public Services 2022*, https://www.gov.ie/en/collection/e20037-revised-estimates/#2022.

(EUR 5 459 million for the Equality Authority and EUR 2.342 million for the Irish Human Rights Commission).

c) Institutional architecture

In Ireland, the designated body forms part of a body with multiple mandates. IHREC has a dual status as Ireland's national human rights institution and equality body. It is also the body designated for the purposes of Directive 2014/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers.[550] The Commission is charged with protecting and promoting human rights and equality, encouraging the development of a culture of respect for human rights, equality and intercultural understanding, promoting understanding and awareness of the importance of human rights and equality, encouraging good practice in intercultural relations, promoting tolerance and acceptance of diversity and respect for the freedom and dignity of each person, and working towards the elimination of human rights abuses, discrimination and prohibited conduct.[551]

The human rights and equality functions of the body are integrated. In other words, the equality and non-discrimination mandate is not structured separately within the body, nor is a percentage of staff resources and budget dedicated to the equality mandate. Along with the director, staff assigned to each of the Commission's sections (legal, strategic engagement, policy and research and corporate services) work across the body's mandate.[552]

d) Status of the designated body – general independence

i) Status of the body

IHREC was established as a body corporate with perpetual succession under the Irish Human Rights and Equality Commission Act 2014.[553] It was re-accredited as an A status national human rights institution in 2021.[554]

Sections 12 and 13 IHRECA provide for membership and appointment of the Commission. The Minister for Children, Equality, Disability, Integration and Youth agrees with the Public Appointments Service the selection criteria and process to be implemented in respect of filling vacancies. The Service puts in place an independent selection panel with prescribed relevant experience and including one nominee of the Director of the European Union Agency for Fundamental Rights. Following an open competition, the panel recommends people for appointment. The legislation specifies that the 'Government shall accept that recommendation' save in defined 'exceptional circumstances'[555] and that the members shall be appointed by the President on the advice of Government, following a resolution of the Oireachtas. While the appointments process contains checks and balances that secure its independence from Government, greater transparency could perhaps be secured by according the Oireachtas an oversight role in the appointment of the selection panel.

In terms of qualifying criteria for membership of IHRECA, the Public Appointments Service and the Government must have regard to the need to ensure that the members 'broadly reflect the nature of Irish society' and possess knowledge of or experience in matters connected with human rights and matters connected with persons or classes of persons

[550] Section 10(2)*(i)* IHRECA.
[551] Section 10(1) IHRECA, http://www.irishstatutebook.ie/2014/en/act/pub/0025/sec0010.html - sec10.
[552] IHREC (2020), *Annual Report 2019*, pp. 76-77, https://www.ihrec.ie/app/uploads/2020/07/IHREC-Annual-Report-2019-English-version.pdf.
[553] Section 9 IHRECA, http://www.irishstatutebook.ie/2014/en/act/pub/0025/print.html - sec9.
[554] International Coordinating Committee of National Human Rights Institutions (2021), *Report and Recommendations of the Virtual Session of the Sub-Committee on Accreditation (SCA), 14-24 June 2021*, https://ganhri.org/wp-content/uploads/2021/08/EN-SCA-Report-June-2021.pdf.
[555] Section 13(11)-(12) IHRECA.

who are disadvantaged by reference to the discriminatory grounds.[556] There must be gender balance in the composition of the 12 to 15 members. Members serve a term of three or five years. One of the members acts as the Chief Commissioner and chairs Commission meetings, which must take place at least every three months.[557]

The Commission's annual grant is a sum that the Minister for Children, Equality, Disability, Integration and Youth, after consultation with the Commission, considers to be reasonably sufficient for the Commission for the performance of its functions.[558] Concerns about this provision were raised by the Sub-Committee on Accreditation of the UN's Global Alliance of National Human Rights Institutions (GANHRI), which pointed out that 'the Minister for Justice and Equality has significant discretion over the allocation of funds to the IHREC, and that this has the potential to impact on its effectiveness and independence.'[559]

The Commission appoints its own staff with the consent of the Minister for Children, Equality, Disability, Integration and Youth, as approved by the Minister for Public Expenditure and Reform.[560] They may also be seconded from other bodies at the Commission's discretion. Staff are civil servants of the State, a status which requires independence from Government. The Director of the Commission manages its administration and is accountable to Parliament for financial and other operational matters.[561] The Director holds office under a written contract of service, the terms of which, including its duration, are determined by the Commission with the approval of the Minister for Children, Equality, Disability, Integration and Youth. As of 31 December 2020, the Commission had 62 staff.[562]

The Commission is accountable to Parliament; it must lay its strategy statement[563] and annual report[564] before the Oireachtas. The Director is accountable to the parliamentary Committee of Public Accounts for financial transactions and effective use of resources[565] and may be requested to account for administrative matters before other Oireachtas committees.[566]

ii) Independence of the body

Legislation stipulates that the Commission shall be independent in the performance of its functions.[567] In the author's assessment, the Commission's functions are exercised in an independent manner in practice. However, as noted above, the role of the Minister for Justice and Equality in setting the Commission's budget was identified by GANHRI as potentially impacting on its independence. Submissions concerning the establishment of IHREC suggested that its budget could be attached to a more 'neutral' department, such as the Department of the Taoiseach.[568] The transfer of responsibility for IHREC's budget in 2020 to a department without a justice remit may have alleviated concerns about its

[556] Section 13(13) IHRECA.
[557] Section 16 IHRECA.
[558] Section 26 IHRECA, http://www.irishstatutebook.ie/2014/en/act/pub/0025/print.html - sec26.
[559] International Coordinating Committee of National Human Rights Institutions (2015), *Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA) Geneva, 16-20 November 2015*, p. 10, https://ganhri.org/wp-content/uploads/2019/11/SCA-FINAL-REPORT-NOVEMBER-2015-English.pdf.
[560] Section 24 IHRECA, http://www.irishstatutebook.ie/eli/2014/act/25/section/24/enacted/en/html#sec24.
[561] Sections 20-23 IHRECA.
[562] IHREC (2021), *Annual Report 2020*, Appendix 4, https://www.ihrec.ie/app/uploads/2021/07/IHREC_2020_AR_English_FA_pages.pdf.
[563] Section 25 IHRECA, http://www.irishstatutebook.ie/eli/2014/act/25/section/25/enacted/en/html#sec25.
[564] Section 28 IHRECA, http://www.irishstatutebook.ie/eli/2014/act/25/section/28/enacted/en/html#sec28.
[565] Section 22 IHRECA, http://www.irishstatutebook.ie/eli/2014/act/25/section/22/enacted/en/html#sec22.
[566] Section 23 IHRECA, http://www.irishstatutebook.ie/eli/2014/act/25/section/23/enacted/en/html#sec23.
[567] Section 9(2) IHRECA, http://www.irishstatutebook.ie/2014/en/act/pub/0025/print.html - sec9.
[568] See further: Pegram, T. (2013), *Bridging the Divide: The Merger of the Irish Equality Authority and Human Rights Commission*, https://www.tcd.ie/policy-institute/assets/pdf/Studies_Policy_29_web.pdf.

independence since the issue did not feature in the 2021 reaccreditation process.[569] The process for appointing Commission members could also be rendered more transparent by, for instance, according the Oireachtas an oversight role in the appointment of the selection panel. In re-accrediting IHREC as an 'A status' NHRI, GANHRI made several recommendations about the appointments process, including that applications be assessed on the basis of pre-determined and objective criteria.[570]

e) Grounds covered by the designated body

IHREC has a mandate to deal with the following grounds under Irish anti-discrimination law: gender, age, race, religion, family status, disability, civil status, sexual orientation, membership of the Traveller community and receipt of housing assistance. It does not prioritise any of the grounds as such. No information is in the public domain as to how the Commission ensures that adequate and appropriate expertise and attention is given to each ground. Staff work across all of the grounds and the human rights mandate in each of the Commission's functional divisions (see Chapter 7(c)). The Commission's *Strategy Statement 2019-2021* adopts a holistic approach to the grounds, save that it refers specifically to 'combatting racism' and monitoring compliance with the UN Convention on the Rights of Persons with Disabilities as two priority areas.[571] In the author's assessment, each ground is accorded an appropriate level of attention by the Commission. It has addressed the intersection between grounds in various submissions and has called for the introduction of a provision on multiple discrimination under anti-discrimination law.[572]

f) Competences of the designated body – and their independent exercise

i) Independent assistance to victims

IHREC has the competence to provide independent assistance to victims.[573] It does so in two primary ways: by providing general information on anti-discrimination law and through the provision of legal assistance in a limited number of cases.

IHREC is required to 'provide information to the public' on the Employment Equality Acts 1998-2021 (EEA), the Equal Status Acts 2000-2018 (ESA) and Section 19 of the Intoxicating Liquor Act 2003.[574] On its website, IHREC provides an accessible overview of those laws that are aimed at the general public as well as organisations and businesses.[575] It published detailed guides to EEA and ESA in 2015, which were updated in 2020.[576] The Commission also operates a public information service that individuals may use to obtain information on their rights to protection against discrimination.[577] It processed 947 such queries from members of the public in 2020.[578]

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569 International Coordinating Committee of National Human Rights Institutions (2021), *Report and Recommendations of the Virtual Session of the Sub-Committee on Accreditation (SCA), 14-24 June 2021*.

570 International Coordinating Committee of National Human Rights Institutions, *Report and Recommendations of the Virtual Session of the Sub-Committee on Accreditation (SCA), 14-24 June 2021*.

571 IHREC (2019), *Strategy Statement 2019-2021*, https://www.ihrec.ie/app/uploads/2019/02/Final-Strategy-Statement-ENG-VERSION.pdf.

572 See, for example, IHREC (2019), *Ireland and the Convention on the Elimination of Racial Discrimination: Submission to the United Nations Committee on the Elimination of Racial Discrimination on Ireland's Combined 5th to 9th Report*, https://www.ihrec.ie/app/uploads/2019/11/IHREC_CERD_UN_Submission_Oct_19.pdf.

573 Sections 10(2)*(f)* and 40 IHRECA. See further: https://www.ihrec.ie/our-work/legal-activity/legal-assistance/.

574 Sections 10(2)*(a)* and 30 IHRECA: http://www.irishstatutebook.ie/eli/2014/act/25/section/10/enacted/en/html#sec10; http://www.irishstatutebook.ie/eli/2014/act/25/enacted/en/print.

575 See https://www.ihrec.ie/guides-and-tools/.

576 See https://www.ihrec.ie/documents/a-guide-the-employment-equality-acts/; https://www.ihrec.ie/documents/a-guide-to-the-equal-status-acts/.

577 See further: https://www.ihrec.ie/your-rights/.

578 IHREC (2021), *Annual Report 2020*, Appendix 8. Data for 2021 was not available at the time of writing.

Legal assistance can take the form of the provision (or arranging for the provision) of legal advice to the applicant, the provision (or arranging for the provision) of legal representation to the applicant or the provision of such other assistance to the applicant as the Commission deems appropriate in the circumstances.[579] Such assistance is available, *inter alia*, for references of discrimination complaints under ESA, EEA and Section 19 of the Intoxicating Liquor Act 2003, as well as for appellate or enforcement[580] proceedings under those statutes. IHREC granted legal assistance to 77 new applicants in 2020.[581] 22 applications were refused and 18 were withdrawn. 22 of the new applicants were granted assistance for legal advice only, with the remaining 55 also receiving legal representation. At the beginning of 2020, the Commission was providing legal advice and representation to 53 individuals, and legal advice only to a further 86 people. 26 legal assistance files pertaining to anti-discrimination law were closed in 2020.[582] Seven of these comprised legal advice only, and 19 involved legal representation.

In the author's assessment, decisions on granting legal assistance are exercised in an independent manner in practice. Safeguards include the publication of the applicable criteria, the provision of a reasoned decision to applicants in writing, and the delegation of decision-making to the Head of Legal, who is a civil servant of the State. The Commission published revised guidelines for deciding on applications for assistance in 2017.[583] Section 40(4) IHRECA underpins the guidelines; it stipulates that the Commission may grant assistance on the following criteria: '(a) the matter to which the proceedings concerned relate raises a question of principle; (b) it would be unreasonable to expect the person to deal with the matter to which the proceedings concerned relate without assistance because of its complexity or for any other reason; (c) there are other special circumstances which make it appropriate for the Commission to grant such assistance.' It has delegated the function of deciding on applications for assistance to staff; the Head of Legal decides whether to grant assistance, subject to an appeal to the Director.[584]

IHREC provides limited information to the public on how this function is exercised. Its annual reports set out the number of open case files, providing basic information on the legislative base involved and the applicable discriminatory grounds. The latest annual report records that IHREC represented 19 individuals whose cases were concluded in 2020.[585] Brief accounts of case outcomes are set out in the annual reports and are publicised in the Commission's press releases.[586] It is evident from these accounts that IHREC has supported multiple significant cases, such as proceedings before the CJEU on the Workplace Relations Commission's jurisdiction,[587] and before the Supreme Court on

[579] Section 40(10) IHRECA.

[580] In a number of cases, the WRC has issued orders directing the respondent to report to the Commission on compliance within a given timeframe, underlining that IHREC could thereafter commence enforcement proceedings with the complainant's consent: Equality Tribunal, *Sheehy Skeffington v National University of Ireland, Galway*, DEC-E2014-078, 13 November 2014, https://www.workplacerelations.ie/en/Cases/2014/November/DEC-E2014-078.html; Equality Tribunal, *Clavin v Marks and Spencers Ireland Ltd*., DEC-S2015-055, 28 July 2015, https://www.workplacerelations.ie/en/Cases/2015/July/DEC-E2015-055.html; Workplace Relations Commission, *A mother (on behalf of her son) v The Board of Management of a National School*, DEC-S2016-048, 18 July 2016, https://www.workplacerelations.ie/en/Cases/2016/July/DEC-S2016-048.html.

[581] Data for 2021 was not available at the time of writing.

[582] IHREC (2021), *Annual Report 2020*, p.16.

[583] IHREC (2017), *Guidelines on Applications for Legal Assistance,* https://www.ihrec.ie/app/uploads/2017/06/Guidelines-on-applications-for-legal-assistance-April-2017-3.pdf.

[584] Under Section 10(6) IHRECA, the Commission may authorise its staff to perform any of its functions.

[585] IHREC (2021)*, Annual Report 2020*, pp. 18-21.

[586] See https://www.ihrec.ie/category/press-releases/.

[587] The Commission represented two of the original complainants in the CJEU judgment of 4 December 2018, *Minister for Justice and Equality and The Commissioner of the Garda Síochána v Workplace Relations Commission,* C-378/17, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62017CJ0378. See further: https://www.ihrec.ie/eu-court-of-justice-issues-landmark-equality-law-ruling/.

reasonable accommodation for students sitting state examinations.[588] In 2020, it provided legal representation to the appellant in *Cunningham v Irish Prison Service*, which addressed the relationship between the duty to provide reasonable accommodation and an occupational requirement.[589] Across 2020-21, IHREC provided legal representation to a complainant before the WRC, and in an appeal to the Circuit Court and then the High Court.[590] The complaint was one of several supported by IHREC concerning discrimination on the nationality element of the race ground in accessing driving licences.[591] While the litigation falls outside the personal scope of the Racial Equality Directive, the High Court judgment is potentially significant more generally for all ESA cases because it adopted a very broad understanding of the exemption under Section 14 ESA for measures required by law (see Chapter 3.2.5). Following the High Court finding, the Commission called on the Government to amend the impugned rules, which act as obstacle to the realisation of asylum seekers' right to work.[592] The High Court's interpretation of the exemption is likely to feature in the ongoing review of Irish equality law.[593]

In contrast to the Equality Authority, the Commission does not provide information on overarching patterns as to the reasons for either declining or deciding to grant assistance.[594] It is thus unclear what has informed the Commission's strategic approach – perhaps research findings suggesting that discrimination in a given area is endemic and persistent over time, for instance. Nor it is clear at this juncture whether IHREC supports a 'critical mass of cases', as recommended by the Council of Europe's Commissioner for Human Rights.[595] Without such data it is difficult to appraise the effectiveness of IHREC's work, and the Commission risks reinforcing concerns that its approach to legal assistance is more restrictive or less well-resourced than that of the Equality Authority. The Equality Authority's legal assistance work was widely regarded as being effective in driving compliance with anti-discrimination law, and its depletion was of major concern to civil society organisations when the body was merged with the Irish Human Rights Commission.[596]

[588] IHREC provided legal representation before the Supreme Court to a woman who challenged the Department of Education's policy of annotating the examination transcripts of students who had been granted a spelling and grammar waiver. The Court found that the practice did not amount to disability-ground discrimination: Supreme Court, *Cahill v Minister for Education and Science* [2017] IESC 29, 24 May 2017, http://www.courts.ie/Judgments.nsf/bce24a8184816f1580256ef30048ca50/37599fdc9c7e6c3c8025812b00421aa8?OpenDocument; see further: https://www.ihrec.ie/supreme-court-clarifies-duties-towards-students-disability-discrimination-case/.

[589] High Court, *Cunningham v Irish Prison Service*, [2020] IEHC 282, 9 June 2020, https://www.courts.ie/acc/alfresco/e0053771-9ff3-47a4-9c73-329f29ff5da6/2020_IEHC_282.pdf/pdf#view=fitH.

[590] Workplace Relations Commission, *An Asylum Seeker v A Statutory Body*, ADJ-00020743, 28 January 2020, https://www.workplacerelations.ie/en/cases/2020/january/adj-00020743.html; Circuit Court, *Road Safety Authority v AB*, [2020] IECC 3, 30 July 2020, https://www.courts.ie/acc/alfresco/603467f2-2d6b-4aad-969e-44ecfc67b8df/2020_IECC_3.pdf/pdf#view=fitH; High Court, *AB v Road Safety Authority*, [2021] IEHC 217, 25 March 2021, https://www.courts.ie/view/judgments/a6f51761-a591-46b8-8d2c-299e8fb6f7df/d56b90ba-36a4-4962-b964-8370efca557a/2021_IEHC_217.pdf/pdf.

[591] See also: Workplace Relations Commission, *Rehman v Road Safety Authority*, ADJ-00021365, 8 October 2019, https://www.workplacerelations.ie/en/cases/2019/october/%20%20adj-00021365.html; Workplace Relations Commission, *An Asylum Seeker v A Government Agency*, ADJ-00017832, 20 November 2019, https://www.workplacerelations.ie/en/cases/2019/november/adj-00017832.html.

[592] See https://www.ihrec.ie/high-court-decision-against-asylum-seeker-builds-pressure-on-government-for-driver-licence-solution/.

[593] See https://www.gov.ie/en/consultation/066b6-review-of-the-equality-acts/.

[594] Individual applicants who are refused legal assistance are informed of the reasons in writing: IHREC (2017), *Guidelines on Applications for Legal Assistance,* Para. 27.

[595] Commissioner for Human Rights (2011), *Opinion of the Commissioner for Human Rights on National Structures for Promoting Equality*, CommDH(2011)2, at p. 21, https://rm.coe.int/16806da939.

[596] See further: Pegram, T. (2013), *Bridging the Divide: The Merger of the Irish Equality Authority and Human Rights Commission*, https://www.tcd.ie/policy-institute/assets/pdf/Studies_Policy_29_web.pdf; Free Legal Advice Centres (2014), *Our Voice, Our Rights: A Parallel Report in response to Ireland's Third Report under the International Covenant on Economic, Social and Cultural Rights*, at pp. 19-22, https://www.ourvoiceourrights.ie/download/pdf/our_voice_our_rights.pdf.

ii) Independent surveys and reports

IHREC has the competence to conduct independent surveys and publish independent reports. It is empowered to undertake, sponsor, commission or provide financial or other assistance for research[597] and to prepare and publish, in such manner as it sees fit, reports including research reports.[598]

In the author's assessment this competence is effectively exercised in an independent manner in practice. The research reports produced are almost exclusively commissioned by IHREC and so carried out by independent actors. Many positions advanced within the reports are critical of the status quo.[599] Carrying on the work of the Equality Authority, the Commission published a significant report in 2017, which analyses data on the experience of inequality derived from the equality module of the 2014 Quarterly National Household Survey, carried out by the Central Statistics Office.[600] IHREC further built on that data in 2018 by co-producing reports with the Economic and Social Research Institute (ESRI), on *Ethnicity and Nationality in the Irish Labour Market,*[601] *Disability and Discrimination in Ireland*[602] and *Discrimination and Inequality in Housing in Ireland*.[603] A 2019 report maps and analyses data on attitudes to equality and human rights derived from 125 European surveys conducted between 2000 and 2018.[604] In 2020, the ESRI and IHREC published the findings of a list experiment, which used a survey of 1 600 individuals to identify the effects of social desirability bias.[605] An online survey about human rights and equality issues was conducted in 2021 with a nationally representative sample of 1 201 individuals.[606] Relevant findings include strong support for the introduction of an additional ground to prohibit discrimination based on socioeconomic status. The Commission has also sponsored several research projects conducted by universities and by civil society bodies through its human rights and equality grants scheme (see further Chapter 7(f)(iv)).

iii) Recommendations

IHREC has the competence to make recommendations on discrimination issues. Statutory provisions empower the Commission to keep under review the adequacy and effectiveness of equality law and practice in the state;[607] examine any legislative proposal and report its

[597] Section 10(2)(j) IHRECA.
[598] Section 10(2)(p) IHRECA.
[599] See, for example, commissioned research on the use of emergency powers during the pandemic: Casey, C., Doyle, O., Kenny, D., and Lyons, D. (2021), *Ireland's Emergency Powers During the COVID-19 Pandemic*, https://www.ihrec.ie/app/uploads/2021/02/Irelands-Emergency-Powers-During-the-Covid-19-Pandemic-25022021.pdf.
[600] McGinnity, F., Grotti, R., Kenny, O. and Russell, H. (2017), *Who experiences discrimination in Ireland?: Evidence from the QNHS Equality Modules*, available at: https://www.ihrec.ie/documents/who-experiences-discrimination-in-ireland-evidence-from-the-qnhs-equality-modules/.
[601] McGinnity, F., Grotti, R., Groake, S. and Coughlan, S. (2018), *Ethnicity and Nationality in the Irish Labour Market,* https://www.ihrec.ie/app/uploads/2018/12/Ethnicity-and-Nationality-in-the-labout-market-20122018.pdf.
[602] Banks, J., Grotti, R., Fahey, E. and Watson, D. (2018), *Disability and Discrimination in Ireland*, https://www.ihrec.ie/app/uploads/2018/09/Disability-and-Discrimination.pdf.
[603] Grotti, R., Russell, H., Fahey, E. and Maître, B. (2018), *Discrimination and Inequality in Housing in Ireland*, https://www.ihrec.ie/app/uploads/2018/06/Discrimination-and-Inequality-in-Housing-in-Ireland..pdf.
[604] Fahey, E., O'Brien, D., Russell, H. and McGinnity, F. (2019), *European Survey Data on Attitudes to Equality and Human Rights: Technical Paper*, https://www.ihrec.ie/app/uploads/2019/12/IHREC-Technical-Report-FINAL-amended-Jan-2020.pdf.
[605] McGinnity, F., Creighton, M. and Fahey, E. (2020), *Hidden Versus Revealed Attitudes: A List Experiment on Support for Minorities in Ireland*, https://www.ihrec.ie/app/uploads/2020/07/Hidden-Vs-Revealed-Attitudes-Report-IHREC-ESRI-July-2020-1.pdf. 'Social desirability bias' refers to research participants' tendency to provide responses that underreport socially undesirable attitudes and behaviours.
[606] IHREC (2021), *IHREC Annual Poll 2021 Survey Results*, https://www.ihrec.ie/app/uploads/2021/12/IHREC-Amarach-Research-Survey-2021-29122021.pdf.
[607] Sections 10(2)(b) and 30 IHRECA: http://www.irishstatutebook.ie/eli/2014/act/25/section/10/enacted/en/html#sec10; http://www.irishstatutebook.ie/eli/2014/act/25/section/30/enacted/en/html#sec30.

views on any implications for equality;[608] and make recommendations to the Government on measures which should be taken to strengthen, protect and uphold equality in the state.[609] These powers may be exercised on the Commission's own initiative or triggered by Government ministers.

IHREC has deployed its function to keep under review the adequacy and effectiveness of equality law and practice, through various channels including in submissions made to international treaty monitoring bodies. In December 2021, it submitted a comprehensive analysis of Irish anti-discrimination law to the Government's consultation on the first review of the legal framework since its enactment.[610]

In the author's assessment, this competence is effectively exercised in an independent manner in practice. Many of the recommendations put forward by the Commission to date have been openly critical of Government. Written submissions draw on an extensive range of sources, including empirical studies and international best practice. IHREC has examined numerous legislative proposals since its establishment in November 2014; four of these pertain to discrimination law.[611] It is difficult to assess the impact of its discrimination law submissions since, at the conclusion of 2021, three of the legislative proposals had yet to be fully debated before Parliament. The Commission's submission on the Education (Admission to Schools) Bill 2016[612] highlighted its conformity with the Racial Equality Directive.[613] Two of the Commission's observations concern the Disability (Miscellaneous Provisions) Bill 2016, which purports to amend Irish law to secure compliance with the UNCRPD and to add a gender identity and expression ground to anti-discrimination law more generally.[614] The other legislative observation, issued in December 2017, welcomes the publication of a private member's bill that seeks to add 'disadvantaged socio-economic status' as a ground under national discrimination law.[615]

To date, the Commission has largely exercised its powers in a reactive manner. It has not conducted a review of the principal anti-discrimination statutes. However, in 2019 it began consultations for the purpose of conducting a review of section 19 of the Intoxicating Liquor Act 2003.[616] That review will be published in 2022.

iv) Other competences

IHREC is empowered to prepare draft codes of practice in furtherance of, *inter alia*, the elimination of discrimination and the promotion of equality of opportunity.[617] If the Minister approves a code of practice, it becomes admissible in evidence in legal proceedings. In

608 Section 10(2)(c) IHRECA: http://www.irishstatutebook.ie/eli/2014/act/25/section/10/enacted/en/html#sec10.
609 Section 10(2)(d) IHRECA: http://www.irishstatutebook.ie/eli/2014/act/25/section/10/enacted/en/html#sec10.
610 See European Network of Legal Experts in Gender Equality and Non-Discrimination, Flash Report, Ireland, 'National equality body publishes submission to review of equality legislation', https://www.equalitylaw.eu/downloads/5566-ireland-national-equality-body-publishes-submission-to-review-of-equality-legislation-79-kb.
611 The Commission's legislative observations are available at: https://www.ihrec.ie/legislative-observations/.
612 https://www.oireachtas.ie/viewdoc.asp?DocID=33318&&CatID=59.
613 IHREC (2016), *Observations on the Education (Admission to Schools) Bill 2016*, at p. 5, https://www.ihrec.ie/app/uploads/2016/11/Observations-on-Education-Admission-to-Schools-Bill-2016.pdf.
614 See https://www.oireachtas.ie/viewdoc.asp?DocID=34322; IHREC (2016), *Observations on the General Scheme of the Equality /Disability (Miscellaneous Provisions) Bill*, https://www.ihrec.ie/app/uploads/2016/11/Observations-on-the-General-Scheme-Equality-Disability-Miscellaneous-Provisions-Bill.pdf; IHREC (2017), *Supplementary Observations on the Disability (Miscellaneous Provisions) Bill 2016*, https://www.ihrec.ie/app/uploads/2017/01/Supplementary-Observations-on-Disability-Miscellaneous-Provisions-Bill-2016.pdf.
615 IHREC (2017), *Observations on the Equality (Miscellaneous Provisions) Bill 2017,* https://www.ihrec.ie/documents/observations-equality-miscellaneous-provisions-bill-2017/.
616 Under section 30(5) IHRECA, the Commission 'shall consult such persons, groups and organisations … as it considers appropriate' for the purposes of assisting it in carrying out a review of legislation. See http://www.irishstatutebook.ie/eli/2014/act/25/section/30/enacted/en/html#sec30.
617 Section 31 IHRECA, http://www.irishstatutebook.ie/eli/2014/act/25/enacted/en/print#sec31.

2018, IHREC consulted with stakeholders on a draft code of practice on equal pay, which was referred to the Minister for his approval.[618] As at the end of December 2021, the code of practice was under consideration, as was a revised version of the Code of Practice on Sexual Harassment and Harassment at Work.[619]

IHREC may conduct equality reviews and prepare equality action plans or invite others to do so.[620] An equality review comprises an audit of the level of equal opportunity within an organisation or organisations and an examination of its/their practices, procedures and other relevant factors (including the working environment).[621] An equality action plan is a programme of actions to be implemented to further the promotion of equality of opportunity.[622] A review or plan may relate to equality of opportunity generally or to a particular aspect of discrimination. This is a valuable mechanism in securing compliance with equality law that was employed for the first time in 2018.[623] Following the 2018 reviews, IHREC issued six requests to prepare and implement equality action plans aimed at securing the cessation of less favourable treatment on the race ground in access to homeless and social housing services, the extension of the practice of non-supervision of urine samples to addiction treatment services nationwide, and the provision of interpreting services for people accessing primary healthcare. The Commission's 2020 annual report notes that, as a consequence of the reviews and action plans, discriminatory practices had been discontinued in most instances, while some dialogue between it and public bodies was ongoing.[624] In 2019, the Commission requested all 31 local authorities to undertake an equality review on the provision of Traveller-specific accommodation.[625] The outcome of those reviews was outlined in the Commission's 2020 annual report.[626] All local authorities have been issued with recommendations and each has been requested to report back to the Commission on actions taken or intended actions. In 2019, the Commission requested two retail banks to conduct equality reviews in relation to the provision of bank accounts to refugees and asylum seekers.[627] All retail banks agreed in May 2021 to accept State-issued documents, thus enabling asylum seekers and refugees to open bank accounts.[628] In a press release it noted that this work 'has proceeded alongside the Commission providing legal support for a number of legal challenges against account refusals by other banks'.[629]

The Commission oversees the implementation of the positive duty placed on public bodies under Section 42 of the Irish Human Rights and Equality Commission Act 2014. In exercising their functions, public bodies must have due regard to the need to: '(a) eliminate discrimination, (b) promote equality of opportunity and treatment of its staff and the persons to whom it provides services, and (c) protect the human rights of its members, staff and the persons to whom it provides services'.[630] IHREC is charged with assisting public bodies to comply with the positive duty, which may include producing guidelines and

[618] IHREC (2019), *Annual Report 2018*, p. 30.
[619] IHREC (2021), *Annual Report 2020*, p. 45. A code of practice concerning sexual harassment and harassment at work was produced by the Equality Authority and is referred to extensively in legal proceedings: Ireland, S.I. No. 208/2012 - Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2012, http://www.irishstatutebook.ie/eli/2012/si/208/made/en/print.
[620] Section 32 IHRECA, http://www.irishstatutebook.ie/eli/2014/act/25/enacted/en/print#sec32.
[621] Section 29 IHRECA, http://www.irishstatutebook.ie/eli/2014/act/25/enacted/en/print#sec29.
[622] Section 29 IHRECA.
[623] IHREC (2019), *Annual Report 2018*, pp. 27-29.
[624] IHREC (2021), *Annual Report 2020*, pp. 42-45.
[625] See https://www.ihrec.ie/human-rights-and-equality-commission-launches-national-review-into-council-traveller-accommodation-provision/.
[626] IHREC (2021), *Annual Report 2021*, pp. 42-45. An account of each review is available here: https://www.ihrec.ie/our-work/equality-review.
[627] IHREC (2020), *Annual Report 2019*, pp. 44-45.
[628] See further IHREC's press releases: https://www.ihrec.ie/commission-welcomes-bank-account-access-for-asylum-seekers-from-all-high-street-banks/; https://www.ihrec.ie/access-to-bank-accounts-confirmed-for-asylum-seekers/.
[629] See https://www.ihrec.ie/commission-welcomes-bank-account-access-for-asylum-seekers-from-all-high-street-banks/.
[630] Section 42(1) IHRECA, http://www.irishstatutebook.ie/eli/2014/act/25/enacted/en/print#sec42.

preparing codes of practice.[631] It published guidelines in 2019,[632] informed by a range of pilot measures conducted in previous years.[633] In 2020, IHREC issued guidance on the duty and COVID-19.[634] Where the Commission considers that there has been evidence of a failure by a public body to perform its functions in a manner consistent with the duty and that it is appropriate in all the circumstances to do so, it may invite the public body to carry out a review or draw up an action plan, or both. The review or action plan may relate to equality of opportunity or human rights generally, or to a particular aspect of human rights or discrimination.[635] The body must accept the Commission's invitation to trigger the review/action plan. There are no powers to compel engagement or ultimately to secure compliance with an action plan, however. The Commission may – and, if requested by the Minister, must – carry out a review of the operation of duty.[636]

Section 42(11) of IHRECA 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)'. The provision suggests that failure to comply with the duty is not actionable, directly at least, outside of the circumstances outlined above. In an interesting development, IHREC has used its amicus curiae power in an ongoing case to argue that Section 42 imposes a duty on a local authority to conduct a proportionality assessment of the human rights impact of an eviction order directed at a Traveller family.[637] The case is currently before the Supreme Court on appeal from the Court of Appeal.[638] The Supreme Court's judgment should be issued in 2022. If the Court agrees with IHREC's submissions, the duty's impact will be enhanced, as a breach of duty may be pleaded in tandem with other causes of action taken against public bodies.

IHREC is conferred with a number of statutory powers with respect to awareness raising, training and education. It is empowered to undertake, sponsor, commission or provide financial or other assistance for educational activities[639] and to provide or assist in the provision of education and training on equality issues.[640] Further, whether of its own volition or at the request of the Minister, it may undertake, sponsor, commission, or provide financial or other assistance for programmes of activities and projects to promote the integration of migrants and other minorities, equality (including gender equality) and respect for diversity and cultural difference.[641] The human rights and equality grants scheme, initiated in 2016, is one of the vehicles through which the Commission exercises these interrelated functions. In all, 28 organisations were awarded a total of EUR 350 000 in funding for projects under the Commission's 2021 scheme, which address the rights of persons with disabilities, racism, and social and economic rights.[642] In 2016, the Commission established a Professional Diploma in Human Rights and Equality, which was developed in collaboration with the Institute of Public Administration.[643] IHREC has also sought to increase awareness of equality issues in schools. The main tool for this is a

631 Sections 10(2)(n) and 42(3)-(4) IHRECA.
632 IHREC (2019), *Implementing the Public Sector Equality and Human Rights Duty*, https://www.ihrec.ie/app/uploads/2019/03/IHREC_Public_Sector_Duty_Final_Eng_WEB.pdf.
633 See further: https://www.ihrec.ie/our-work/public-sector-duty/.
634 IHREC (2020), *Guidance Note – COVID-19 and the Public Sector Equality and Human Rights Duty*, https://www.ihrec.ie/documents/guidance-note-covid-19-and-the-public-sector-equality-and-human-rights-duty/.
635 Section 42(5)-(6) IHRECA.
636 Section 42(7)-(10) IHRECA.
637 The Commission's submission is available here: https://www.ihrec.ie/documents/bernard-mcdonagh-and-helen-mcdonagh-v-clare-county-council/
638 Court of Appeal, *Clare County Council v McDonagh*, [2020] IECA 307, 12 November 2020, https://www.courts.ie/view/judgments/92aa609d-1377-4292-8dac-590fdc4f040b/285ff0e1-5913-487e-9a23-da892f674865/2020_IECA_307_Whelan%20J.pdf/pdf; see further: https://www.irishexaminer.com/news/courtandcrime/arid-40705007.html.
639 Section 10(2)(j) IHRECA.
640 Section 10(2)(k) IHRECA.
641 Section 10(2)(l), IHRECA.
642 See further: https://www.ihrec.ie/our-work/human-rights-and-equality-grants-scheme-2021-22/.
643 See further: https://www.ihrec.ie/inaugural-human-rights-equality-professional-diploma-underpins-role-public-sector-duty/.

training manual designed to provide teachers with equality-based teaching resources for use across the curriculum to encourage pupils to take action on equality, human rights and social justice issues in the classroom, at school or within their wider community.[644] In 2018, the Commission published guidelines on retirement and fixed-term contracts aimed at employers and employees.[645]

Section 35 IHRECA equips IHREC with the power to conduct inquiries.[646] The threshold is relatively high: The Commission may conduct an inquiry if it considers that —

> '(a) there is, in any body (whether public or otherwise) institution, sector of society, or geographical area, evidence of—
> (i) a serious violation of human rights or equality of treatment obligations in respect of a person or a class of persons, or
> (ii) a systemic failure to comply with human rights or equality of treatment obligations,
> and
> (b) the matter is of grave public concern, and
> (c) it is in the circumstances necessary and appropriate so to do.'[647]

IHRECA sets out in detail the procedures that must be followed prior to and during an inquiry. At the conclusion of an inquiry, the Commission must prepare a report containing the facts it has established and its recommendations. The report is furnished to the Minister for Justice and Equality, and its findings are subsequently published.[648] This power has not been deployed to date. IHREC took decisions with respect to 23 requests to conduct an inquiry in 2015 and 2016, declining each one. According to its 2016 annual report, the 'majority of requests did not meet the threshold for intervention by the Irish Human Rights and Equality Commission as set out in section 35'.[649] In 2016, the Commission adopted a resolution on requests for inquiries, which underscores that only the Minister has the statutory right to seek an inquiry and that it will not in general conduct an assessment of the merits or otherwise of requests that it conduct an inquiry made by persons other than the Minister.[650] IHREC's most recent annual report, which covers 2020, does not reference the inquiry power. Its strategy statement, issued in February 2019, included use of the power as one of the Commission's objectives for 2019-2021, although that did not materialise.[651]

The Commission is empowered to consult with such national, European Union or international bodies or agencies having a knowledge or expertise in the field of human rights or equality as it sees fit.[652]

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644 See further: IHREC (2016), *Annual Report 2015*, p. 38.
645 IHREC (2018), *Retirement and Fixed Term Contracts: Guidelines*, https://www.ihrec.ie/app/uploads/2018/04/Retirement-and-Fixed-Term-Contracts-Guidelines.pdf. These guidelines were used by the Workplace Relations Commission in two 2020 decisions: *McGrath v Focus Ireland*, ADJ-00018823, 19 May 2020, https://www.workplacerelations.ie/en/cases/2020/may/adj-00018823.html; *A Civil Servant v A Government Department*, ADJ-00021965, 22 May 2020, https://www.workplacerelations.ie/en/cases/2020/may/adj-00021965.html.
646 See http://www.irishstatutebook.ie/eli/2014/act/25/enacted/en/print#sec35.
647 Section 35(1) IHRECA.
648 Schedule 2, IHRECA, http://www.irishstatutebook.ie/eli/2014/act/25/enacted/en/print.
649 IHREC (2017), *Annual Report 2016*, p. 16. Inclusion Ireland, a national rights-based advocacy organisation that works to promote the rights of persons with an intellectual disability, has criticised IHREC's failure to conduct an inquiry into the ongoing institutionalisation of thousands of persons with an intellectual disability, as well as the process by which the Commission dealt with its request for an inquiry. See Inclusion Ireland (2018), *Deinstitutionalisation in Ireland; a failure to act*, http://www.inclusionireland.ie/sites/default/files/attach/basic-page/1655/deinstitutionalisation-ireland-failure-act.pdf.
650 See https://www.ihrec.ie/app/uploads/2016/12/IHREC-Policy-on-Requests-for-Inquiries.pdf.
651 IHREC (2019), *Strategy Statement 2019-2021*, https://www.ihrec.ie/app/uploads/2019/02/Final-Strategy-Statement-ENG-VERSION.pdf.
652 Section 10(2)(h) IHRECA.

Finally, a residual provision under IHRECA provides that the Commission shall have all such powers as are necessary or expedient for the performance of its functions.[653] IHREC has invoked that provision in issuing resolutions on its approach to its statutory functions.[654]

g) Legal standing of the designated body

IHREC has legal standing to:

- bring discrimination complaints on behalf of identified victims to court;
- bring discrimination complaints on behalf of non-identified victims to court;
- bring discrimination complaints *ex officio* to court;
- intervene in legal cases concerning discrimination, for example as amicus curiae.

Section 85 EEA empowers IHREC to refer certain cases to the WRC, which are dealt with as if they had been referred by an individual complainant. IHREC may instigate complaints with respect to discriminatory advertising or the procurement of victimisation or discrimination (Section 85(d)-(f)). In such cases, there may be no actual victim. IHREC is also empowered, under Section 85(a)-(c), to refer a complaint to the WRC where it appears to the Commission:

- that discrimination or victimisation is being generally practised against persons or that an employer has applied or operated discriminatory rules or instructions;
- that discrimination or victimisation has occurred in relation to a particular person who has not made a reference to the WRC and that it is not reasonable to expect that person to make such a reference;
- that there is a failure to comply with an equal remuneration term or an equality clause either generally in a business or in relation to a particular person who has not made a reference and it is not reasonable to expect them to make such a reference.

Under Section 86 EEA, IHREC may refer a collective agreement to the WRC where it is considered that any provision of the agreement is discriminatory. The legislation does not specify whether the consent of persons affected by the purported discrimination must be obtained by IHREC.

Similar provisions enable IHREC to refer cases under ESA to the WRC (Section 23 ESA). IHREC may also apply to the District Court for a determination as to whether a club is a discriminating club under Section 8(3) ESA.

To date, the Commission has referred two cases to the WRC. Both involve discriminatory advertising complaints taken against companies under Section 23 ESA on the housing assistance, family status and age grounds. One case was settled prior to hearing,[655] and the other resulted in a successful determination before the WRC in 2019.[656]

Section 100(3) EEA and Section 41(1) ESA empower IHREC to institute summary proceedings for an offence under any provision of that legislation. It seems that this power has not been deployed to date.

Section 41(1) IHRECA empowers the Commission to 'institute proceedings in any court of competent jurisdiction for the purpose of obtaining relief of a declaratory or other nature in respect of any matter concerning the human rights of any person or class of persons.' Declarations of unconstitutionality are expressly envisaged under Section 42(2). The

[653] Section 10(5) IHRECA, http://www.irishstatutebook.ie/eli/2014/act/25/section/10/enacted/en/html#sec10.
[654] See, for example, https://www.ihrec.ie/app/uploads/2016/12/IHREC-Policy-on-Requests-for-Inquiries.pdf.
[655] IHREC (2018), *Annual Report 2017*, p. 41.
[656] Workplace Relations Commission, *Irish Human Rights and Equality Commission v Daft Media Limited t/a Daft.ie*, ADJ-00005960, 6 August 2019, https://www.workplacerelations.ie/en/cases/2019/august/adj-00005960.html.

reference to relief of another nature should allow a court to award a range of remedies such as damages and injunctions, depending on the legal basis of the proceedings. 'Human rights' are defined for this purpose as those guaranteed under the Irish Constitution, the European Convention on Human Rights Act 2003 or under 'any agreement, treaty or convention to which the State is a party and which has been given the force of law in the State' (Section 29 IHRECA). This definition should be broad enough to enable IHREC to litigate on compliance with EU equality provisions. However, because Section 41 has not been invoked to date, its parameters are unclear. In particular, it remains to be seen whether the reference to a 'class of persons' enables IHREC to bring an *actio popularis* or whether a court will require identifiable victims. A provision in the Heads of Bill had clarified that it would not 'be necessary for the Commission to name or identify the class of persons individually and a class of persons shall be constituted by more than one person in relation to whom the same relief is sought.'[657] However, this provision was omitted from the legislation passed by the Oireachtas.

IHREC can intervene in legal cases concerning discrimination, but its express power to apply for liberty to appear as amicus curiae is confined to proceedings before the Superior Courts (the High Court, the Supreme Court and the Court of Appeal).[658] The vast bulk of discrimination cases are litigated at the Workplace Relations Commission and the Labour Court, while several significant cases come before courts of local and limited jurisdiction. The express power to intervene in those forums would, therefore, be useful and would enable IHREC to contribute to the development of discrimination law principles without having to instigate or fund litigation. In 2006, the Supreme Court held that the Equality Authority had an implied power to apply to court to act as amicus in proceedings relating to its statutory functions.[659] It would seem, therefore, that IHREC could seek to assert a similar power with respect to legal proceedings before any tribunal or court. With respect to WRC proceedings, IHREC may be able to intervene by way of a generic provision under Irish anti-discrimination law, which stipulates that, in the course of an investigation, if the Director of the WRC considers it appropriate, they may 'hear persons appearing to the Director to be interested'.[660] The provision has been used, albeit rarely, to introduce third party expert testimony in first instance discrimination law proceedings, but it seems that it has never been invoked by IHREC or by its predecessor equality body.[661] In order to ensure that the provision could be activated by IHREC in practice, a procedure for notifying it of discrimination law proceedings should be put in place.[662]

Drawing on its express statutory power, IHREC has acted as amicus curiae before the Superior Courts in numerous cases since its establishment.[663] Liberty to appear is at the discretion of the court. IHREC published revised guidelines on the exercise of its amicus curiae function in 2016.[664] The bulk of the Commission's amicus curiae work falls under

[657] Department of Justice (2012), *Heads of Irish Human Rights and Equality Commission Bill 2012*, p. 57, http://www.justice.ie/en/JELR/20120605HeadsOfIHRECBill.pdf/Files/20120605HeadsOfIHRECBill.pdf.

[658] Under Section 10(2)(e) IHRECA, IHREC may apply to the High Court or the Supreme Court for liberty to appear before that court as amicus curiae in proceedings that involve or are concerned with the human rights or equality rights of any person. IHREC may also apply to the Court of Appeal for liberty to appear before it as amicus curiae: Section 44(1) IHRECA transferred the power set out under Section 8(h) of the Human Rights Commission Act 2000 to IHREC.

[658] See https://www.ihrec.ie/app/uploads/2016/12/IHREC-Amicus-Curiae-Guidelines.pdf.

[659] Supreme Court, *Doherty v South Dublin County Council* [2006] IESC 57, 31 October 2006, https://www.courts.ie/view/judgments/0e8d99bb-88ec-4965-ae93-4a3e6dfeede2/4b289e62-2b63-4d97-9d0d-a4776c3a4b77/2006_IESC_57_1.pdf/pdf.

[660] Section 25(1) ESA; Section 79(1) EEA. It should also be noted that, under IHRECA, the Commission 'shall have all such powers as are necessary or expedient for the performance of its functions': Section 10(5) IHRECA, http://www.irishstatutebook.ie/eli/2014/act/25/section/10/enacted/en/html#sec10.

[661] See further: Walsh, J. (2012), *Equal Status Acts 2000-2011: Discrimination in the Provision of Goods and Services*, Dublin, Blackhall Press, Chapter 10.4.

[662] IHREC is given notice of proceedings in which a declaration of incompatibility is sought pursuant to Section 6 of the European Convention on Human Rights Acts 2003 and 2014, http://www.irishstatutebook.ie/eli/2003/act/20/section/6/enacted/en/html.

[663] See further: https://www.ihrec.ie/our-work/legal-activity/amicus-curiae-power/.

[664] See https://www.ihrec.ie/app/uploads/2016/12/IHREC-Amicus-Curiae-Guidelines.pdf.

the rubric of its human rights mandate. Over 2018 and 2019, it intervened in one case concerning discrimination, *Daly v Nano Nagle School*, in which the Court of Appeal and the Supreme Court assessed the parameters of the duty to provide reasonable accommodation to employees with disabilities.[665]
It is difficult to appraise the Commission's exercise of its competence to initiate litigation at this juncture. Several of its powers in this regard have yet to be invoked, and the Commission has not publicly explained why this is the case. Notably, IHREC exercised two sets of other statutory powers for the first time in 2018 (pertaining to equality reviews and codes of practice). It may well be that increased use of litigation powers will follow as the Commission has moved out of its development phase and concluded its third cycle of strategic planning in 2021.

h) Quasi-judicial competences

IHREC is not a quasi-judicial institution.

i) Registration by the body of complaints and decisions

IHREC does not register the number of complaints of discrimination made, nor decisions (by ground, field, type of discrimination, etc.). The Commission does not process discrimination complaints. Complaints are referred to a quasi-judicial tribunal, the Workplace Relations Commission (see Chapter 6.1). IHREC reports on complaints and decisions in which it has acted. These data are published in its annual report and are available to the public; the Commission's annual reports are available on its website.

j) Roma and Travellers

IHREC does not treat Roma and Travellers as a priority issue.[666] To date, the Commission has adopted a holistic approach to the discriminatory grounds.

[665] Court of Appeal, *Nano Nagle School v Daly*, [2018] IECA 11, 31 January 2018, https://www.courts.ie/acc/alfresco/5b98f4b9-367b-4e18-a383-3603ab85eb5f/2018_IECA_11_1.pdf/pdf#view=fitH; Supreme Court, *Nano Nagle School v Daly* [2019] IESC 63, 31 July 2019, https://www.courts.ie/view/judgments/404f4f32-284e-44d1-ab93-91aadc4e4d09/c26bcc73-99ab-4fa5-9d71-b35590fd120f/2019_IESC_63_2.pdf/pdf. The Commission's submissions are available at: https://www.ihrec.ie/documents/marie-daly-v-nano-nagle-school/.

[666] IHREC (2019), *Strategy Statement 2019-2021*.

8 IMPLEMENTATION ISSUES

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

The Irish Human Rights and Equality Commission is the primary vehicle through which Ireland implements non-discrimination law. IHREC has several statutory powers and functions pertaining to dissemination of information about legal protection against discrimination and relating to dialogue between the social partners and with NGOs.

a) Dissemination of legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)

IHREC is required to 'provide information to the public' and to keep under review the effectiveness of the working of the Employment Equality Acts 1998-2021, the Equal Status Acts 2000-2018, and Section 19 of the Intoxicating Liquor Act 2003.[667] On its website, IHREC provides an accessible overview of those laws aimed at the general public[668] as well as organisations and businesses.[669] It published updated versions of detailed guides to EEA and ESA in 2020.[670] Its predecessor equality body, the Equality Authority, did not have a statutory duty to provide information to the public on Section 19, which relates to discrimination in licensed premises. The Commission provides some basic information on the operation of discrimination law in that context but gives little information on the operation of the District Court.[671] It remains to be seen whether IHREC will further develop its information function in that regard.

The Commission also operates a public information service that individuals may avail of to obtain information on their rights to protection against discrimination.[672] It processed 947 such queries in 2020, 610 of which concerned ESA, with 9 relating to discrimination in licensed premises and the remaining 328 queries pertaining to EEA.[673]

b) Measures to encourage dialogue with NGOs with a view to promoting the principle of equal treatment (Article 12 Directive 2000/43 and Article 14 Directive 2000/78)

IHREC fosters dialogue with NGOs in implementing its mandate, which is underpinned by several statutory provisions that direct or enable the Commission to consult with 'relevant agencies and civil society'. An overarching obligation to engage with stakeholders is set out under Section 18(1) IHRECA, which provides:

> 'The Commission shall, for the purpose of establishing and maintaining effective co-operation with representatives of relevant agencies and civil society—
> (a) appoint such and so many advisory committees as it thinks fit to assist and advise it on matters relating to its functions, and
> (b) support, establish or participate in such networks, public consultation processes or public forums, as it sees appropriate.'[674]

The Government frequently establishes consultation mechanisms to receive input from civil society organisations on major law reform initiatives in the field of equality. Consultations are principally conducted by the Department of Children, Equality, Disability, Integration

[667] Section 30 IHRECA: http://www.irishstatutebook.ie/eli/2014/act/25/enacted/en/print#sec30.
[668] See https://www.ihrec.ie/your-rights/.
[669] See https://www.ihrec.ie/guides-and-tools/.
[670] See https://www.ihrec.ie/app/uploads/2020/10/IHREC-Employment-Rights-Leaflet-2019-WEB.pdf; https://www.ihrec.ie/app/uploads/2020/10/IHREC-Equal-Status-Rights-Leaflet-WEB.pdf.
[671] See https://www.ihrec.ie/your-rights/i-have-an-issue-with-a-service/i-have-an-issue-about-a-pub-nightclub-or-other-place-which-sells-alcohol/.
[672] See https://www.ihrec.ie/your-rights/.
[673] IHREC (2021), *Annual Report 2020*, Appendix 8.
[674] See http://www.irishstatutebook.ie/eli/2014/act/25/section/18/enacted/en/html.

and Youth, which assumed the equality functions of the former Department of Justice and Equality in October 2020.[675] In July 2021, the Minister for Children, Equality, Disability, Integration and Youth launched the first comprehensive review of Irish anti-discrimination law since its enactment over two decades ago.[676] The first phase comprised a public consultation process with written submissions elicited by early December 2021. The scope of the envisaged review is wide-ranging. Its overall aim is to examine the functioning of EEA and ESA, and their effectiveness in combating discrimination and promoting equality. It is not clear at this juncture what form the review will take following the consultation phase.[677]

c) Measures to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice and workforce monitoring (Article 11 Directive 2000/43 and Article 13 Directive 2000/78)

Pursuant to Section 18 IHRECA, the Commission established an advisory committee comprising social partners in 2017.[678] The Worker and Employer Advisory Committee comprises representatives nominated by the Irish Congress of Trade Unions (ICTU) and by the Irish Business and Employers' Confederation (IBEC), as well as Commission members. It advises IHREC on equality and human rights issues in the workplace and in service provision. The Committee met three times in 2020 to consider matters such as the impact of COVID-19 and the implementation of the public sector equality and human rights duty.[679]

IHREC is empowered to prepare codes of practice in furtherance of the elimination of discrimination and the promotion of equality of opportunity (see further Chapter 7(f)(iv)). In drafting codes of practice, IHREC is mandated to consult with such other persons or bodies as it considers appropriate.[680] To date, the only approved code of practice produced by an Irish equality body is that concerning sexual harassment and harassment at work.[681] It was generated after consultation with IBEC, ICTU and other relevant organisations representing equality interests. IHREC updated this code in 2019. It and a draft code of practice on equal pay await ministerial approval (see Chapter 7(f)(iv)).

d) Addressing the situation of Roma and Travellers

A revised *National Traveller and Roma Inclusion Strategy* (NTRIS) was published in 2017.[682] Monitoring is led by the Department of Children, Equality, Disability, Integration and Youth. A steering committee, which is chaired by the Minister for Children, Equality, Disability, Integration and Youth, meets quarterly to report on the implementation of the strategy. This committee comprises officials from relevant Government departments, as well as Traveller and Roma civil society organisations. An independent review of NTRIS, which was to be conducted in 2021, will inform the preparation of a successor strategy.[683]

[675] See https://www.gov.ie/en/organisation/department-of-children-equality-disability-integration-and-youth/?referrer=http://www.gov.ie/dcediy/.
[676] See https://www.gov.ie/en/consultation/066b6-review-of-the-equality-acts/.
[677] See European Network of Legal Experts in Gender Equality and Non-Discrimination, Flash Report, Ireland, 'Review of equality legislation', https://www.equalitylaw.eu/downloads/5522-ireland-review-of-equality-legislation-114-kb.
[678] See https://www.ihrec.ie/worker-employer-advisory-committee-hold-inaugural-meeting/.
[679] IHREC (2021), *Annual Report 2020*, p. 49. Details of the Worker and Employer Advisory Committee's activities in 2021 were not available at the time of writing.
[680] Section 31 IHRECA, http://www.irishstatutebook.ie/eli/2014/act/25/section/18/enacted/en/html.
[681] S.I. No. 208/2012 - Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2012: http://www.irishstatutebook.ie/eli/2012/si/208/made/en/print.
[682] Department of Justice and Equality (2017), *National Traveller and Roma Inclusion Strategy 2017 – 2021*, http://www.justice.ie/en/JELR/National%20Traveller%20and%20Roma%20Inclusion%20Strategy,%202017-2021.pdf/Files/National%20Traveller%20and%20Roma%20Inclusion%20Strategy,%202017-2021.pdf.
[683] See https://www.oireachtas.ie/en/debates/question/2021-05-25/444/?highlight%5B0%5D=ntris&highlight%5B1%5D=ntris&highlight%5B2%5D=ntris.

The second Civil Society Monitoring Report was published in 2019.[684] It focuses on the domains of employment, education, accommodation, and health. According to the report, there has been no tangible improvement in the situation and experience of Roma and Travellers, while accommodation circumstances have deteriorated within the wider context of a national housing crisis. It underscores that the Strategy lacks a rigorous monitoring and evaluation framework. These concerns are shared by the UN Committee on the Elimination of Racial Discrimination. In December 2019, it called on the Government to fully implement the NTRIS 'including by developing concrete actions plans with clear targets, indicators, outcomes, time frames and a budget line for the implementation and putting in place a mechanism to coordinate and monitor the implementation.'[685] The most recent Civil Society Monitoring Report, published in 2020, underscores the urgent need to adopt a National Traveller Health Action Plan in line with action 73 of the NTRIS.[686] Consultation was undertaken in 2018, and a draft plan has been produced, but the final version is yet to be published. In 2021, a parliamentary committee called for the plan to be published as a matter of urgency.[687] An action plan aimed at increasing Traveller participation in higher education was launched in November 2019.[688]

8.2 Measures to ensure compliance with the principle of equal treatment (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

a) Compliance of national legislation (Articles 14(a) and 16(a))

In general, Ireland has taken the necessary measures to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished (Article 14(a) of Directive 2000/43 and Article 16(a) of Directive 2000/78).

This has largely occurred in the process of transposing the directives and amending legislation subsequently to align domestic law with the directives. No provision of Irish anti-discrimination law has the effect of striking out or disapplying primary or secondary legislation. However, IHREC is obliged to keep the effectiveness of anti-discrimination law under review and, whenever it thinks necessary, to make proposals to the Minister for amending that legislation (see further Chapter 7(f)(iii)).[689]

b) Compliance of other rules/clauses (Articles 14(b) and 16(b))

Under Section 30 EEA, all employment contracts are deemed to have an equality clause that transforms any provisions of the contracts that would otherwise give rise to unlawful discrimination.[690] All discriminatory provisions in collective agreements are deemed null

[684] Pavee Point Traveller and Roma Centre (2019), *Civil Society Monitoring Report on Implementation of the National Roma Integration Strategy in Ireland: Assessing the progress in four key policy areas of the strategy*, https://cps.ceu.edu/sites/cps.ceu.edu/files/attachment/basicpage/3034/rcm-civil-society-monitoring-report-2-ireland-2018-eprint-fin-2.pdf.

[685] Committee on the Elimination of Racial Discrimination (2019), *Concluding observations on the combined fifth to ninth reports of Ireland*, CERD/C/IRL/CO/5-9, Para. 32.

[686] Pavee Point Traveller and Roma Centre (2020), *Civil Society Monitoring Report on Implementation of the National Roma Integration Strategy in Ireland: Identifying blind spots in Traveller and Roma inclusion policy*, https://www.paveepoint.ie/wp-content/uploads/2015/04/RCM-Y3-C3-Ireland-final-15Jan2020-1.pdf.

[687] Houses of the Oireachtas (2021), *Joint Committee on Key Issues affecting the Traveller Community*, https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_key_issues_affecting_the_traveller_community/reports/2021/2021-12-01_final-report-of-the-joint-committee-on-key-issues-affecting-the-traveller-community_en.pdf.

[688] Government of Ireland (2019), *Action Plan for Increasing Traveller Participation in Higher Education 2019-2021*, https://assets.gov.ie/41923/f4cd00e21a4346bc97671a72ab41f12f.pdf.

[689] Sections 10(2)(b) and 30 IHRECA: http://www.irishstatutebook.ie/eli/2014/act/25/section/10/enacted/en/html#sec10; http://www.irishstatutebook.ie/eli/2014/act/25/section/30/enacted/en/html#sec30.

[690] With respect to occupational pensions and benefit schemes, the equivalent provision is Section 81 of the Pensions Acts 1990-2018.

and void; it is not possible to contract out of the terms of the equality legislation.[691] IHREC or a person who is affected by a collective agreement may refer it to the WRC.[692]

While it is the case that discriminatory clauses are not valid, the reality is that this fact may only be established through litigation. Where an adjudicator determines that the clause in question is contrary to the legislation, that part of the collective agreement or contract cannot be enforced and must be modified.[693]

IHREC may conduct equality reviews and prepare equality action plans. This is a valuable mechanism in securing compliance with EEA and ESA, which was employed by IHREC for the first time in 2018.[694]

[691] Section 9 EEA.
[692] Sections 86-87 EEA.
[693] See, for example, Workplace Relations Commission, *A Customer Assistant v A Grocery Retailer*, ADJ-00005316, 21 July 2017, https://www.workplacerelations.ie/en/Cases/2017/July/%20ADJ-00005316.html.
[694] See further Chapter 7(f)(iv).

9 COORDINATION AT NATIONAL LEVEL

The Department of Children, Equality, Disability, Integration and Youth coordinates issues regarding anti-discrimination on the grounds covered by this report. The International Protection, Integration and Equality Division of that Department is responsible for developing and promoting policy on equality and coordinates the strategies referred to below.[695]

There is currently no national action plan or strategy against racism or discrimination. The *National Action Plan against Racism 2005-2008*[696] has not been renewed since its expiry, contrary to the recommendations of several international human rights bodies.[697] There are, however, several national plans that deal with discrete groups who experience discrimination, such as the *Migrant Integration Strategy 2017-2020*,[698] the *National Traveller and Roma Inclusion Strategy 2017–2021,*[699] the *National Disability Inclusion Strategy 2017 – 2021,*[700] and the *National LGBTI+ Inclusion Strategy 2019 – 2021*.[701]

The Government formed in 2020 committed to producing a national action plan against racism, and to developing an updated migrant integration strategy.[702] An independent Anti-Racism Committee was established in June 2020.[703] It is charged with reviewing current evidence and practice on anti-racism and with making recommendations to the Government on how best to strengthen its approach to tackling racism, including by drawing up a draft national action plan against racism.[704] The Committee's interim report was transmitted to the Minister in November 2020, and was published in April 2021.[705] The Committee sought submissions from the public on the areas that should be covered in the action plan (the consultation was open from April to July 2021).[706] A draft plan was due to be submitted to the Government by the end of 2021.[707]

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695 See https://whodoeswhat.gov.ie/division/children/Eq_Int/.

696 Department of Justice, Equality and Law Reform (2008), *Planning for Diversity: The National Action Plan Against Racism 2005-2008*, http://www.justice.ie/en/JELR/NPARen.pdf/Files/NPARen.pdf.

697 For example, European Commission against Racism and Intolerance (2019), *ECRI report on Ireland (fifth monitoring cycle)*, CRI(2019)18; Committee of Ministers (2019), *Resolution CM/ResCMN(2019)14 on the implementation of the Framework Convention for the Protection of National Minorities by Ireland*; Committee on the Elimination of Racial Discrimination (2019), *Concluding observations on the combined fifth to ninth reports of Ireland*, CERD/C/IRL/CO/5-9.

698 Department of Justice and Equality (2017), *The Migrant Integration Strategy – A Blueprint for the Future*, http://www.justice.ie/en/JELR/Migrant_Integration_Strategy_English.pdf/Files/Migrant_Integration_Strategy_English.pdf. Due to end in December 2020, the strategy has been extended to December 2021. See https://www.gov.ie/en/publication/983af-migrant-integration-strategy/.

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

700 Department of Justice and Equality (2017), *National Disability Inclusion Strategy 2017 – 2021*, http://www.justice.ie/en/JELR/dept-justice-ndi-inclusion-stratgey-booklet.pdf/Files/dept-justice-ndi-inclusion-stratgey-booklet.pdf.

701 Government of Ireland (2019), *National LGBTI+ Inclusion Strategy 2019 – 2021*, http://www.justice.ie/en/JELR/LGBTI+Inclusion_Strategy_2019-2021.pdf/Files/LGBTI+Inclusion_Strategy_2019-2021.pdf.

702 Department of the Taoiseach (2020), *Programme for Government – Our Shared Future*, p. 87, https://www.gov.ie/en/publication/7e05d-programme-for-government-our-shared-future/.

703 Department of Justice and Equality (2020), *Action Plan Against Racism for Ireland to be drawn up by new independent Anti-Racism Committee*, https://www.gov.ie/en/press-release/6bedb-action-plan-against-racism-for-ireland-to-be-drawn-up-by-new-independent-anti-racism-committee/.

704 See https://www.gov.ie/en/publication/7006f-approved-terms-of-reference-of-the-anti-racism-committee/.

705 Anti-Racism Committee (2020), *Interim Report to the Minister for Children, Equality, Disability, Integration and Youth*, https://www.gov.ie/pdf/?file=https://assets.gov.ie/132151/ed3f39e2-4aa1-4991-aa06-52beae8310db.pdf#page=null.

706 See https://www.gov.ie/en/consultation/017c9-towards-a-national-action-plan-against-racism-for-ireland-public-consultation-2021/.

707 See https://www.gov.ie/en/press-release/c9325-minister-ogorman-publishes-interim-report-of-independent-anti-racism-committee-and-welcomes-the-launch-of-the-committees-public-consultation/.

10 CURRENT BEST PRACTICES

- Section 42 of the Irish Human Rights and Equality Commission Act 2014 introduced a positive duty on public bodies to have due regard to human rights and equality in exercising their functions. IHREC is charged with assisting public bodies to comply with the duty, and to that end has produced guidelines and other resources for duty bearers.[708]

- IHREC operates a human rights and equality grants scheme, which provides opportunities for funded research, education and training projects to be conducted by civil society organisations.[709]

- The WRC and the Labour Court have interpreted the prohibition of direct discrimination on the race ground as requiring different treatment to take account of linguistic and cultural barriers experienced by potentially vulnerable migrant workers.[710]

- No fees are payable by complainants before the first instance forum for discrimination law cases under ESA and EEA.[711]

- The availability of non-financial sanctions as redress under EEA and ESA enables remedies to have an impact beyond the parties to the case, since they may entail changes to respondents' practices and procedures.[712]

No best practices were identified in relation to the use of artificial intelligence.

[708] See further Chapter 7(f)(iv).
[709] See further Chapter 7(f)(iv).
[710] See Chapter 2.6(f): Duties to provide reasonable accommodation in respect of other grounds.
[711] See Chapter 6.1(a): Available procedures for enforcing the principle of equal treatment.
[712] See Chapter 6.5: Sanctions and remedies.

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives at the national level

Both acts:

- In a 2015 judgment, the Supreme Court considered the interpretation of indirect discrimination under ESA for the first time and held that statistical analysis is required in order to establish that a person belonging to a protected group is at a 'particular disadvantage' compared with others.[713] This evidential requirement appears to be more restrictive than the provisions on the burden of proof provided for in the directives.[714] (Article 8, Directive 2000/43; Article 10, Directive 2000/78)
- The setting of maximum levels of compensation and the failure to provide for the payment of interest mean that the acts are arguably not in compliance with the directives.[715] (Article 15, Directive 2000/43; Article 17, Directive 2000/78)

Employment Equality Acts 1998-2021

- The provisions of the acts may not adequately prohibit discrimination on the grounds of religion *or* belief, since only religious beliefs appear to be covered.[716] (Articles 1 and 2, Directive 2000/78)
- '[P]ersons employed in another person's home for the provision of personal services' are excluded from protection against discrimination in regard to access to employment.[717] (Article 3, Directive 2000/43; Article 3, Directive 2000/78)
- The definition of 'vocational training' may be too restrictive.[718] (Article 3, Directive 2000/43; Article 3, Directive 2000/78)
- It is not discriminatory to pay a person with disabilities a lesser rate of remuneration.[719] (Articles 2 and 3, Directive 2000/78)

Equal Status Acts 2000-2018

- It is not certain that the scope of ESA fully covers social protection and social advantages.[720] (Article 3, Directive 2000/43)
- Putative discriminatory treatment required by law cannot be challenged under ESA.[721] (Article 3, Directive 2000/43)
  ESA complaints must be instigated within two months of the discriminatory act by sending a written notification to the alleged discriminator. A substantial number of cases are dismissed annually for failure to comply with that requirement, raising potential compliance issues with the Racial Equality Directive provisions on defence of rights.[722] (Article 7, Directive 2000/43)
- The transfer of jurisdiction regarding discrimination in access to premises licensed for the sale of alcohol from the Equality Tribunal to the District Court under the Intoxicating Liquor Act 2003 raises issues of compliance with the non-regression provisions of Article 15 of the Racial Equality Directive, due to the prohibitive cost and relative complexity of court proceedings.[723]

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[713] Supreme Court, *Stokes v Christian Brothers High School, Clonmel*, [2015] IESC 13, 24 February 2015, https://www.courts.ie/view/judgments/7c76c785-7af6-49db-9478-be182b899693/4b1b534e-7778-4a7d-b01f-bddb28538e09/2015_IESC_13_2.pdf/pdf.
[714] See Chapter 3.2.7: Education; 3.2.1: Statistical evidence.
[715] See Chapter 6.5: Sanctions and remedies.
[716] See Chapter 2.1.1: Definitions.
[717] See Chapter 3.2.1: Material scope, Conditions for access to employment.
[718] See Chapter 3.2.3: Access to vocational training.
[719] See Chapter 4.8: Any other exceptions.
[720] See Chapter 3.2.5: Social Protection.
[721] See Chapter 3.2.5: Social Protection.
[722] See Chapter 6.1(b): Remedies and Enforcement, Barriers and other deterrents faced by litigants seeking redress.
[723] See Chapter 6.1(b): Barriers and other deterrents faced by litigants seeking redress.

- Where a registered club is set up to cater for the needs of members of a particular group, it can exclude persons who do not fall under the relevant ground from membership.[724] (Article 3, Directive 2000/43)

11.2 Other issues of concern

It appears that persons with irregular or undocumented migration status are not afforded protection against discrimination under EEA.[725]

The National Action Plan Against Racism, which had provided strategic direction to combating racism and to promoting a more inclusive, intercultural society in Ireland, was not renewed.[726] A committee was, however, established in 2020 to produce a new draft plan, which should be published in 2022.

Research on people's experiences of discrimination suggests that high levels of discrimination are experienced by certain sectors of Irish society. For instance, it was reported that Travellers were over 22 times more likely to encounter discrimination in access to private services than those who identified as 'White Irish'. Skin colour, rather than nationality, appears to increase the likelihood of adverse treatment in the workplace and in accessing services, with black respondents reporting significantly higher levels of discrimination than their white counterparts of any nationality. Persons with disabilities are twice as likely as persons without disabilities to experience discrimination in all domains. These data were drawn from the responses of 15 000 adults collected for the equality module of the 2014 Quarterly National Household Survey, carried out by the Central Statistics Office. Survey participants were asked whether, in the previous two years, they had experienced discrimination in the workplace, while seeking work or in accessing services from public or private sector providers.[727]

A *National Roma Needs Assessment*, commissioned by the Department of Justice and Equality, was published in 2018.[728] The report was based on qualitative data derived from interviews with 108 Roma respondents, eight focus groups involving Roma representatives from a wide range of civil society organisations and statutory agencies, and 30 in-depth interviews with policymakers, practitioners, service providers and civil society representatives working with Roma. It found that members of the Roma community face high levels of discrimination, marginalisation, extreme poverty and social exclusion. Discrimination was a core issue in the research:

> 'Respondents reported feeling discriminated against at both an institutional and individual level. The highest rates of perceived discrimination were reported in accessing accommodation (93 %) and social protection (84.3 %). 81.1 % of respondents also reported experiencing racism and verbal abuse in public spaces with women being identified as particularly vulnerable. A high rate of respondents (77.5 %) said that they were stopped by the Gardaí for ID checks; focus group discussions uncovered a fear of and lack of trust in the Gardaí.'[729]

[724] See Chapter 3.2.8: Access to and supply of goods and services.
[725] See Chapter 3.1.1: EU and Non-EU Nationals.
[726] See Chapter 9.
[727] McGinnity, F., Grotti, R., Kenny, O. and Russell, H. (2017), *Who experiences discrimination in Ireland? Evidence from the CSO Equality Modules*, Dublin, ESRI, https://www.ihrec.ie/app/uploads/2017/11/Who-experiences-discrimination-in-Ireland-Report.pdf.
[728] Pavee Point and Department of Justice and Equality (2018), *Roma in Ireland: A National Needs Assessment,* Dublin, Pavee Point, https://www.paveepoint.ie/wp-content/uploads/2015/04/RNA-PDF.pdf.
[729] Pavee Point and Department of Justice and Equality (2018), *Roma in Ireland: A National Needs Assessment*, pp. 12-13.

No issues of concern were identified in relation to the use of artificial intelligence. However, in the absence of case law, it is unclear whether the domestic legal framework can address discrimination that arises from the application of algorithms.[730]

[730] There are concerns, for example, about access to the evidence required to establish a prima facie case of indirect discrimination, how the burden of proof would be applied, and how objective justification would be interpreted in this context. See Foale, N. (2020), 'Back to the Future: How Well Equipped is Irish Employment Equality Law to Adapt to Artificial Intelligence?', *Trinity College Law Review*, vol. 23, pp. 170-198.

12 LATEST DEVELOPMENTS IN 2021

12.1 Legislative amendments

The EEA[731] and ESA[732] provisions on investigations of complaints were amended to take account of a Supreme Court judgment to the effect that WRC hearings should be conducted in public.[733]

12.2 Case law

Relevant discrimination ground: Age
Name of the court: Workplace Relations Commission
Date of decision: 4 November 2021
Name of the parties: *Geraghty v The Office of the Revenue Commissioners*
Reference number: ADJ-00000031
Link: https://www.workplacerelations.ie/en/cases/2021/november/adj-00000031.html
Brief summary: This case concerned a clerical officer who had been employed by the Irish civil service. As her retirement date approached, she informed the respondent that she wished to work past 65. However, she was told that her retirement age was fixed by law. The complainant referred a case of direct discrimination on the age ground to the Workplace Relations Commission (WRC) in 2015, but the proceedings were stayed pending the outcome of a preliminary reference to the CJEU. The CJEU was asked to determine whether the WRC, as a quasi-judicial tribunal tasked with giving effect to EU law, had the authority to disapply Irish legislation that conflicts with EU law. In 2018, the CJEU held that the WRC was so empowered, and consequently the case could proceed.[734]

The complainant argued that the mandatory retirement age of 65, provided for under Section 8 of the Civil Service Regulations Act 1956, contravened the Employment Equality Acts 1998-2021. Irish law sets retirement ages for some public servants, which is dependent on the date of recruitment. For people who joined the public service before 1 April 2004, as the complainant had, the retirement age was raised from 65 to 70 in December 2018.[735] However, the complainant became 65 before that change came into effect. Ms Geraghty pointed out that numerous colleagues who carried out similar duties were permitted to continue their employment until the age of 70.

The WRC disapplied the legal provision in question and found that the respondent had failed to justify the retirement age. It rejected the respondent's argument, which relied on C-154/18, *Horgan and Keegan v Minister for Education and Skills,* that the complainant was not in a comparable position to other civil servants at her grade due to differences in recruitment dates. The WRC concluded that it was 'hard to see and drawing on the reasoning in EUCJ cases such as Petersen v Berufungsausschuss C341/08 and also quoted in the Fuchs C159/10 case, how being pre-2004 or post 2004 negates the basic equality provisions of the Directive.' Arguments advanced by the respondent were not sufficient to reach the high standard of proof needed to objectively justify the distinction in how it treated Ms Geraghty compared to other colleagues. Maintaining intergenerational fairness, manpower planning and allowing for promotion of younger staff were legitimate aims.

However, the complainant had worked in a junior civil service role, so allowing her to continue working could not be regarded as denying promotional opportunities to others.

[731] Section 79 EEA.
[732] Section 25 ESA.
[733] Supreme Court, *Zalewski v Adjudication Officer and Ors.* [2021] IESC 24, 6 April 2021, https://www.courts.ie/acc/alfresco/4b94d66e-d29c-45e8-8f91-ad0ff80257a5/2021_IESC_24%20O'Donnell%20J..pdf/pdf#view=fitH.
[734] Judgment of 4 December 2018, C-378/17, *Minister for Justice and Equality and The Commissioner of the Garda Síochána v Workplace Relations Commission.*
[735] Public Service Superannuation (Age of Retirement) Act 2018, 26 December 2018, http://www.irishstatutebook.ie/eli/2018/act/39/enacted/en/html.

While fixed retirement ages could advance workforce planning, insufficient regard was had to the individual circumstances of the complainant. The complainant had sought only to work until 70 years of age, in line with immediate colleagues, and compulsory retirement at age 65 had caused her considerable financial hardship.

The complainant was awarded compensation of EUR 82 000 (the maximum award possible of 104 weeks remuneration).

Relevant discrimination ground: Disability
Name of the court: Labour Court
Date of decision: 14 October 2021
Name of the parties: *United Parcel Service of Ireland Ltd v Roberts*
Reference number: EDA2136
Link: https://www.workplacerelations.ie/en/cases/2021/october/eda2136.html
Brief summary: The complainant worked for the employer from 1986 until his dismissal in 2019. His role as a senior manager involved extensive travel in Ireland and abroad. Due to a mental health condition, he was unable to travel to the extent required. Following periods of sick leave, the complainant sought to return to work. He was assessed as medically fit to resume employment subject to him not being required to engage in travel and other adjustments to his responsibilities. The respondent advised the complainant that no other suitable roles were available and subsequently informed the complainant that he was being dismissed due to incapability.

The Labour Court considered whether the respondent was complying with the reasonable accommodation duty set out under Section 16 EEA. It applied the principles set out by the Supreme Court in a 2019 case.[736] That case established that an employer is not obliged to find another distinct and separate job for an employee with a disability. However, there is a requirement to explore alternative modes of accommodation to establish if the position held by the worker is capable of adaptation.

The Court found that the respondent had not undertaken an assessment to establish whether the complainant's role could be done without the requirement for travel, which would allow him to return to the role. There was an apparent assumption that it was not possible. The Court noted that the evidence before it was that there had been periods in the past during which travel was curtailed for budgetary reasons, and indeed during the pandemic, and that it had still been possible to do the job in those circumstances. It further observed that if the employer 'was concerned about the long-term viability of attempting to have the job performed without this level of international travel, it was open to them to trial such an approach on a time limited basis. Had they done so, either it would have proved that such an approach was viable or, alternatively, it would have provided them with the basis to argue to the Court that it had proven not to be viable.' Consequently, the respondent has failed to afford the complainant reasonable accommodation and he was discriminatorily dismissed. The complainant was awarded EUR 75 000 in compensation.

Relevant discrimination ground: Race
Name of the court: Labour Court
Date of decision: 4 October 2021
Name of the parties: *CPL Solutions Limited T/A Flexsource v Kings Oluebube*
Reference number: EDA2134
Link: https://www.workplacerelations.ie/en/cases/2021/october/eda2134.html
Brief summary: The Labour Court overturned a decision issued by the WRC in 2020, which had found that an employer was not liable for harassment on the race ground.[737]

[736] Supreme Court, *Nano Nagle School v Daly* [2019] IESC 63, 31 July 2019, https://www.courts.ie/acc/alfresco/77ed9bc6-3c69-482e-9390-a73c341a3192/2019_IESC_63_1.pdf/pdf#view=fitH.
[737] Workplace Relations Commission, *Kings Oluebube v CPL Solutions Ltd T/A Flexsource Recruitment*, ADJ-00024254, 30 June 2020, https://www.workplacerelations.ie/en/cases/2020/june/adj-00024254.html.

The Nigerian complainant was subjected to extreme racist abuse by a team leader on two occasions. When notified of the second incident, the respondent encouraged the complainant to proceed with a formal complaint. The respondent investigated the complaint, apologised to the complainant, elicited an apology from the perpetrator, and informed the complainant that a sanction had been applied. The perpetrator was issued with a final written warning and was obliged to undertake training.

At first instance the WRC held that the respondent's approach, while not ideal, was adequate to avail of the defence provided for under Section 14A(2) EEA. The Labour Court underlined that an employer must demonstrate that it has taken adequate steps both to prevent harassment and to reverse its effects. To satisfy the first requirement, 'a respondent should be able to demonstrate that it has a comprehensive anti-harassment policy (including an appropriate investigation procedure) in place, has provided appropriate training to staff and, in particular, has trained managers in relation to accepting and investigating complaints of alleged harassment.' The second requirement entails actions such as the provision of counselling or other supports to an employee who has experienced harassment and the provision of further training to employees and managers, as appropriate.

In the Court's assessment, the respondent did not fulfil either requirement. Its harassment policy comprised a brief statement in an employee handbook which was supplied electronically to staff. The policy alluded to informal and formal procedures for dealing with harassment and bullying complaints but did not delineate those procedures. The investigation was conducted in an ad hoc manner and without regard to any documented procedure. The complainant was not provided with terms of reference or a timeline, and he was not afforded the opportunity to participate in the investigation or provided with a written account of the outcome. Moreover, the Court was satisfied that the respondent did not take adequate steps to reverse the effect of the harassment experienced by the complainant, such as arranging counselling or referring the worker to the respondent's employee assistance programme. Consequently, the employer was liable for the harassment and was directed to pay the complainant EUR 30 000 in compensation.

Relevant discrimination ground: Race
Name of the court: Workplace Relations Commission
Date of decision: 5 January 2021
Name of the parties: *Foley v Atercin Liffey Unlimited T/A Starbucks Tallaght*
Reference number: ADJ-00028487
Link: https://www.workplacerelations.ie/en/cases/2021/january/adj-00028487.html
Brief summary: This case concerned harassment on the race ground. The complainant ordered a beverage at a café. Instead of writing her name on the cup, as was the usual practice, an employee drew an image of a smile and 'slanty eyes'. The complainant is of Thai and Irish ethnic origin and argued that the image had a 'racial connotation'.

The adjudication officer accepted that the employee regretted their conduct and did not intend to humiliate the complainant or make her feel uncomfortable. However, an intention to harass was not necessary to establish liability and it was clear that the drawing had a degrading and humiliating effect on the complainant. The WRC rejected the respondent's contention that the incident had been 'benign' because CCTV footage showed the complainant and staff member had smiled at one another when the image was being drawn. He accepted the complainant's testimony that she was shocked and embarrassed by the interaction.

The respondent sought to argue that it was not vicariously liable for its employee's conduct because it had taken 'reasonably practicable' steps to prevent harassment, in accordance with Section 11(3) ESA. The WRC found that the respondent was not entitled to rely on the statutory defence. While customer service training and a harassment policy was in place, the WRC was not satisfied that the respondent had provided sufficient information

to staff about how drawings and pictures might be perceived by clients. The respondent was directed to pay EUR 12 000 in compensation.

ANNEX 1: MAIN TRANSPOSITION AND ANTI-DISCRIMINATION LEGISLATION

Country: **Ireland**
Date: **1 January 2022**

Title of the law: Employment Equality Acts 1998-2021 Abbreviation: EEA Date of adoption: 18.06.1998 Latest relevant amendment: 10.12.2015 Entry into force: 18.10.1999 Web link: http://revisedacts.lawreform.ie/eli/1998/act/21/revised/en/html. Grounds covered: age, civil status, disability, family status, gender, race, religion, sexual orientation, Traveller community Civil law Material scope: public employment, private employment, vocational education Principal content: prohibitions of direct and indirect discrimination, harassment, and victimisation; provision of reasonable accommodation on disability ground
Title of the law: Equal Status Acts 2000-2018 Abbreviation: ESA Date of adoption: 26.4.2000 Latest relevant amendment: 18.07.2018 Entry into force: 10.12.2015 Web link: http://revisedacts.lawreform.ie/eli/2000/act/8/revised/en/html. Grounds covered: age, civil status, disability, family status, gender, race, religion, sexual orientation, Traveller community, housing assistance Civil law Material scope: access to goods or services (including housing), social protection, social advantages, education Principal content: prohibitions of direct and indirect discrimination, harassment, and victimisation; provision of reasonable accommodation on disability ground
Title of the law: Pensions Acts 1990-2018 Abbreviation: PA Date of adoption: 24.07.1990 Latest relevant amendment: 24.12.2018 Entry into force: 21.12.1990 Web link: http://www.irishstatutebook.ie/eli/1990/act/25/enacted/en/print.html; http://www.irishstatutebook.ie/eli/2004/act/9/section/22/enacted/en/html#sec22; http://www.irishstatutebook.ie/eli/2018/act/37/enacted/en/pdf. Grounds covered: age, civil status, disability, family status, gender, race, religion, sexual orientation, Traveller community Civil law Material scope: Pensions including occupational pensions Principal content: Prohibitions of direct and indirect discrimination in relation to occupational pensions
Title of the law: Irish Human Rights and Equality Commission Act 2014 Abbreviation: IHRECA Date of adoption: 27.07.2014 Latest relevant amendment: N/a Entry into force: 08.10.2014 Web link: http://www.irishstatutebook.ie/eli/2014/act/25/enacted/en/html Grounds covered: age, civil status, disability, family status, gender, race, religion, sexual orientation, Traveller community, housing assistance Civil law Material scope: All fields covered by the equality directives Principal content: Establishment of Irish Human Rights and Equality Commission (IHREC) as national equality body; powers and functions of IHREC; positive equality and human rights duty of public sector bodies

Title of the law: Workplace Relations Act 2015
Abbreviation: WRA
Date of adoption: 20.05.2015
Latest relevant amendment: 22.07.2021
Entry into force: 01.08.2015
Web link: http://www.irishstatutebook.ie/eli/2015/act/16/enacted/en/print.html.
Grounds covered: age, civil status, disability, family status, gender, race, religion, sexual orientation, Traveller community, housing assistance
Administrative law
Material scope: All fields covered by the equality directives bar discrimination on or at point of entry to licensed premises
Principal content: Establishment of Workplace Relations Commission (WRC) as primary forum for hearing anti-discrimination complaints; powers and functions of WRC

ANNEX 2: INTERNATIONAL INSTRUMENTS

Country: Ireland
Date: 1 January 2022

Instrument	Date of signature	Date of ratification	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	04.11.1950	25.02.1953	No	Yes	Yes, in an interpretative sense, under the European Convention on Human Rights Act 2003
Protocol 12, ECHR	04.11.2000		No	No	No
Revised European Social Charter	04.11.2000	04.11.2000	Article 8(3), Article 21, Article 31(1), (2) and (3).	Yes (international NGOs only)	No
International Covenant on Civil and Political Rights	01.10.1973	08.12.1989	Article 10(2)	Yes	No
Framework Convention for the Protection of National Minorities	01.02.1995	07.05.1999	No	N/A	No
International Covenant on Economic, Social and Cultural Rights	01.10.1973	08.12.1989	A reservation applies with respect to article 2(2). In order to promote use of the Irish language knowledge of Irish may be required or given favourable consideration for certain occupations.	No	No

Instrument	Date of signature	Date of ratification	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
Convention on the Elimination of All Forms of Racial Discrimination	21.03.1968	29.12.2000	No	Yes	No
ILO Convention No. 111 on Discrimination	Signed (no dates available)	22.04.1999	No	No	No
Convention on the Rights of the Child	30.09.1990	28.09.1992	No	Yes	No
Convention on the Rights of Persons with Disabilities	30.03.2007	20.03.2018	Articles 12, 14, 27(1)	No	No

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