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Non-discrimination

Ireland

2017

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Directorate D — Non-discrimination and Roma coordination
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*European Commission
B-1049 Brussels*

Country report

Non-discrimination

Ireland

Orlagh O'Farrell, updated by Judy Walsh

Reporting period 1 January 2016 – 31 December 2016

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EXECUTIVE SUMMARY

1. Introduction

Irish society is quite homogeneous. According to the 2011 census,¹ of a population of 4 588 252, 84% are Roman Catholic, 6% non-religious, 2.8% Church of Ireland (Protestant), 1% Muslim, and the remainder are of various other religions. 85% describe themselves as 'White Irish' and 0.6% as Irish Travellers.² 58 697 people identify as 'Black' or 'Black Irish'. Between 2006 and 2011 'Other White' (non-Irish) rose by almost 43%, largely due to immigration from Eastern European countries. 595 355 people, approximately 13% of the population, recorded having a disability. No census questions were asked as to sexual orientation but 4 042 cohabiting same-sex couples were recorded. Non-Irish nationals consisted of 544 357 (12% of the population), 386 764 of whom are nationals of another EU Member State.

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

Ireland's indigenous ethnic minority, the Travelling community, experiences high levels of relative social deprivation and discrimination. One of the primary debates that took place in 2016 concerned the formal recognition of Traveller ethnicity.⁷ Religious criteria in school admission policies have featured in national debates about equality law over the past few years and in 2016 a bill was published which purports to reform law and practice in this area. IHREC's observations on the draft law suggest changes aimed at securing compliance with inter alia the Racial Equality Directive.⁸

There were no major developments in anti-discrimination principles in the 2016 case law. The Supreme Court affirmed the WRC's investigative approach to hearing complaints.⁹ The Labour Court reaffirmed that the harassment prohibition applies to conduct that occurs outside the workplace.¹⁰ It clarified that 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. A

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

² There are no official statistics on Roma.

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

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

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

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

⁷ Traveller ethnicity was ultimately recognised in March 2017.

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

⁹ Supreme Court, *County Louth VEC v Equality Tribunal* [2016] IESC 40, 13.07.2016, <http://www.courts.ie/Judgments.nsf/597645521f07ac9a80256ef30048ca52/31d63470034282c58025800c0038c8e4?OpenDocument>.

¹⁰ *Dublin Bus v McCamley*, EDA 164, 18.02.2016, <https://www.workplacerelations.ie/en/Cases/2016/February/EDA164.html>.

number of Traveller community ground complaints against private service providers concerned blatant violations of the prohibition on direct discrimination.

2. Main legislation

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

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

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

Irish anti-discrimination legislation goes beyond the EU equality directives, in that the personal scope of the Equal Status Acts 2000-2015 prohibit discrimination in access to goods and services not just on grounds of race and gender but also on the grounds of disability, age, religion, sexual orientation, membership of Traveller community, family status, civil status, and housing assistance. Nationality-based discrimination is also expressly prohibited under the 'race' ground. The definition of disability is broader than in EU law and reasonable accommodation on that ground must be provided to people accessing goods and services. There is a substantial body of case law on all discriminatory grounds, the bulk of which is from the Equality Tribunal (now the WRC) and the Labour Court.¹⁷ Studies suggest that under-reporting of discrimination and failure to take action in response to perceived discrimination are significant problems.¹⁸

Ireland has ratified the main Council of Europe human rights instruments but not Protocol 12 of the European Convention on Human Rights. It has also ratified most of the primary United Nations instruments. Ratification of the UN Convention on the Rights of Persons with Disabilities is expected to occur in 2017 following the enactment of a law, which in its draft form, designates the Irish Human Rights and Equality Commission as the independent

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

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

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

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

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

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

¹⁷ The determinations of both bodies are published here: https://www.workplacerelations.ie/en/Decisions_Determinations/.

¹⁸ See e.g. Equality and Rights Alliance (2013) *Access to Justice and Under-Reporting of Discrimination and Human Rights Abuses*, available at: <http://www.eracampaign.org/uploads/Access%20to%20Justice%20and%20under-reporting%20ERA%20Aug%202013.pdf>; Central Statistics Office (2015) *QNHS Equality Module Quarter 3 2014*, available at: http://pdf.cso.ie/www/pdf/20150902123751_QNHS_Equality_Module_Quarter_3_2014_full.pdf.

mechanism to promote, protect and monitor implementation of the Convention.¹⁹ Ireland is a dualist state, meaning that for international law to be enforceable in the Irish legal system, it must be transposed by means of legislation into the national legal order. The main international convention that has been transposed into Irish law is the European Convention on Human Rights, which was incorporated by means of the European Convention on Human Rights Act 2003.²⁰

3. Main principles and definitions

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

The Employment Equality Acts 1998-2015 provide that where a person who has a disability can perform the duties of the post with or without the assistance of 'appropriate measures' they will be deemed competent under the Act. The employer has an obligation to take appropriate measures to enable a person with a disability to have access to employment, to participate or advance in employment, to undergo training unless such measures would impose a disproportionate burden on the employer. To determine what amounts to a disproportionate burden account must be taken of the costs of the measure in question, the scale and financial resources of the employer in question, the possibility of obtaining public funding or other assistance. The Equal Status Acts 2000-2015 provide that a provider of goods or services must do all that is reasonable to accommodate the needs of a person with a disability by providing special treatment or facilities, without which it would be impossible or unduly difficult for the person to avail of the good or service in question. The duty is subject to a nominal cost ceiling, which varies according to the scale of the organisation and the resources available to it.

The Employment Equality Acts contain a number of exceptions to the principle of non-discrimination, which does not apply to access to employment in another person's home for the provision of personal services. There are exceptions where the characteristic in question is a genuine and determining occupational requirement for the post and the objective is legitimate and the requirement proportionate. There are exceptions relating to the grounds of age and disability in occupational pensions and remuneration in respect of someone with a restricted capacity respectively. There is an exception relating to discrimination in employment for the purposes of maintaining the religious ethos of an

¹⁹ Disability (Miscellaneous Provisions) Bill 2016, <https://www.oireachtas.ie/viewdoc.asp?DocID=34322&&CatID=59>.

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

institution, provided that this is 'legitimate', 'proportionate', and limited so that it could not be used to justify discrimination on another ground. There are also exceptions in respect of certain forms of employment such as the armed forces, the Garda Síochána (police) and the emergency services. With regard to the Equal Status Acts there are a number of exceptions and exemptions to the non-discrimination rule. Differences of treatment are permissible in respect of annuities, pensions and insurance policies where there is actuarial evidence to show that the difference is reasonable. There are exceptions to the non-discrimination norm for the purposes of organising sporting events, for authenticity purposes for a dramatic performance, or other entertainment, or for the provision of services for religious purposes. There is an exception that discrimination in relation to the provision of goods or services is not actionable in circumstances that would lead a reasonable person to believe there is a substantial risk of criminal or disorderly conduct. The Equal Status Acts also contains a number of exceptions in respect of education on the grounds of age, gender, religious ethos and disability.

Multiple discrimination is not explicitly prohibited.

4. Material scope

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

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

5. Enforcing the law

Complaints under the Employment Equality Acts 1998-2015, the Equal Status Acts 2000-2015 and the Pensions Acts 1990-2015 may be brought before the Workplace Relations Commission (WRC). The WRC assumes an investigative role in the hearing of complaints; complainants may represent themselves, costs may not be awarded against either party, and the procedure is informal. The option of mediation is available. A mediated settlement agreed by the parties becomes legally binding and its terms can be enforced at the Circuit Court. The decisions may be appealed; the Labour Court hears the employment appeals, whereas the Circuit Court hears the equal status appeals. Labour Court and Circuit Court determinations can be appealed on a point of law to the High Court.

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

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

Organisations may represent an individual complainant at the WRC and the Labour Court where they are authorised to do so by the complainant, but not before the Circuit Court or the High Court. Trade unions regularly represent their members. Organisations are not

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

permitted to take a complaint, with the exception of the Irish Human Rights and Equality Commission (IHREC). IHREC enjoys legal standing to bring complaints to the WRC relating to patterns of discrimination, discriminatory advertising or the contents of a collective agreement. It can also provide assistance and legal representation to an individual complainant. In 2015 IHREC provided assistance in 45 anti-discrimination law cases.²²

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

The Employment Equality Acts 1998-2015 provide for a broad range of remedies: compensation, orders for employers to take specific courses of action, re-instatement and re-engagement. All employment contracts are deemed to have an equality clause that transforms any provisions of the contract that would otherwise give rise to unlawful discrimination. All discriminatory provisions in collective agreements are deemed null and void and it is not possible to contract out of the terms of the equality legislation. There are maximum limits on financial awards, those limits in the context of employment are a maximum of two years pay, and where the complainant was not in employment then the maximum award is EUR 13 000.

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

A 3% quota applies to the employment of people with disabilities in the civil and public service. The Government has undertaken to progressively increase the statutory target towards 6% by 2024.²³ The Higher Education Authority oversees a range of measures that provide support to distinct categories of students covered by the discriminatory grounds including mature students and students with disabilities.²⁴ Additional English language support is provided to migrant children in schools.

IHREC is the primary vehicle through which dialogue and consultation with NGOs and the social partners takes place. It is equipped with a range of relevant statutory powers and functions. To date the Commission's Policy and Engagement team has undertaken extensive public consultation and collaboration with NGOs and the social partners on various facets of its work. Some of the formal dialogue mechanisms have yet to be invoked. This position should change as the Commission moves out of its establishment phase, which has involved the recruitment of a significant number of new staff.

²² Irish Human Rights and Equality Commission (2016) *Annual Report 2015*, available at: <https://www.ihrec.ie/documents/annual-report-2015/>.

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

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

6. Equality bodies

The Equality Authority was merged with the Irish Human Rights Commission to form the Irish Human Rights and Equality Commission (IHREC).²⁵ IHREC, which was established on 1 November 2014, is an independent body mandated to work towards the elimination of discrimination, promote equality of opportunity, provide information to the public on anti-discrimination law and review various legislative enactments including the primary anti-discrimination laws. It fulfils these functions by means of research and awareness raising, review of the legislation and the drafting of statutory codes of practice. IHREC also has the power to instigate litigation on its own behalf or to assist a litigant. It is authorised to conduct inquiries, and carry out equality reviews. The Department of Justice and Equality, under the direction of the Minister, funds IHREC, which reports to the Irish Parliament.

7. Key issues

The impact of the infrastructural reforms outlined above cannot yet be evaluated. One notable change, which may be rectified over time, is the lack of data on discrimination complaints in the WRC's annual report. The Equality Tribunal produced a detailed account of the cases decided each year disaggregated according to the discriminatory grounds, which was a valuable resource for practitioners and researchers. An interesting innovation is Section 42 of the Irish Human Rights and Equality Commission Act 2014, which introduces a positive duty on public bodies to have due regard to human rights and equality in carrying out their functions. IHREC will assist public bodies to comply with the positive duty; it has produced a preliminary guide and is empowered to draw up codes of practice.

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

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

RÉSUMÉ

1. Introduction

La société irlandaise est assez homogène. Selon le recensement de 2011,²⁶ la population de 4 588 252 habitants comprend 84 % de catholiques romains, 6 % de non-religieux, 2,8 % de membres de l'Église d'Irlande (protestante) et 1 % de Musulmans – le solde comprenant des personnes appartenant à d'autres religions diverses. Selon la même source, 85 % se décrivent comme des «Irlandais de race blanche» et 0,6 % comme des gens du voyage irlandais,²⁷ et 58 697 personnes s'identifient comme étant de race noire ou comme des «Irlandais de race noire». Le pourcentage des «autres blancs» (non-Irlandais) a augmenté de près de 43 % entre 2006 et 2011 en raison principalement de l'immigration en provenance de pays d'Europe de l'Est. Environ 13 % de la population (595 355 personnes) déclarent souffrir d'un handicap. Le recensement ne contenait aucune question concernant l'orientation sexuelle mais fait état de 4 042 couples de même sexe vivant en cohabitation. Les ressortissants étrangers étaient au nombre de 544 357 (12 % de la population), parmi lesquels 386 764 ressortissants d'un autre État membre de l'UE.

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

La minorité ethnique autochtone irlandaise des gens du voyage connaît un niveau relatif élevé de misère sociale et de discrimination, et l'un des débats fondamentaux intervenus en 2016 a porté sur la reconnaissance de l'ethnicité de ce groupe.³² Les critères religieux appliqués dans le cadre des politiques d'inscription scolaire font l'objet depuis quelques années de débats nationaux concernant la législation relative à l'égalité, et un projet de loi publié en 2016 vise à réformer la loi et la pratique dans ce domaine. Les observations de la Commission pour les droits de l'homme et l'égalité à propos du projet de loi suggèrent des modifications destinées à assurer une conformité avec la directive sur l'égalité raciale entre autres.³³

Aucune évolution majeure n'est à signaler dans la jurisprudence de 2016 en ce qui concerne les principes de non-discrimination. La Cour suprême a soutenu l'approche d'enquête de la Commission pour les relations sur le lieu de travail dans le cadre de

²⁶ <http://www.cso.ie/en/census/census2011reports/>.

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

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

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

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

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

³² L'ethnicité du groupe des gens du voyage a finalement été reconnue en mars 2017.

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

l'instruction des plaintes.³⁴ La *Labour Court* (tribunal du travail) a confirmé que l'interdiction de harcèlement s'applique à un comportement survenant en dehors du lieu de travail³⁵ en précisant qu'il n'y a aucune obligation de montrer que l'auteur agit dans l'exercice ou dans le cadre de son emploi. Le critère pertinent consiste à établir si la victime a fait l'objet d'un harcèlement dans l'exercice de son emploi. Plusieurs recours à l'encontre de prestataires de services privés, liés à l'appartenance aux gens du voyage, ont porté sur des violations flagrantes de l'interdiction de discrimination directe.

2. Législation principale

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

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

D'autres lois contiennent également des dispositions interdisant la discrimination, à savoir, les lois sur les licenciements abusifs (1977-2015),³⁹ la loi de 1989 sur l'interdiction de l'incitation à la haine,⁴⁰ qui pénalise les discours haineux, et la loi de 2003 sur les boissons alcoolisées,⁴¹ dont l'article 19 prévoit une mise en application du droit antidiscrimination dans le cadre des établissements titulaires d'une licence de vente d'alcool.

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

³⁴ Cour suprême, *County Louth VEC c. Equality Tribunal* [2016] IESC 40, 13 juillet 2016, <http://www.courts.ie/Judgments.nsf/597645521f07ac9a80256ef30048ca52/31d63470034282c58025800c0038c8e4?OpenDocument>.

³⁵ *Dublin Bus c. McCamley*, EDA 164, 18 février 2016, <https://www.workplacelrelations.ie/en/Cases/2016/February/EDA164.html>.

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

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

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

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

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

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

(aujourd'hui Commission pour les relations sur le lieu de travail) et de la *Labour Court*.⁴² Des études conduisent à penser que le sous-signallement d'actes discriminatoires et l'absence de mesures en réponse à la discrimination perçue constituent des problèmes majeurs.⁴³

L'Irlande a ratifié les principaux instruments du Conseil de l'Europe en matière de droits de l'homme, mais pas le protocole n° 12 à la Convention européenne des droits de l'homme. Elle a également ratifié la plupart des grands instruments des Nations unies. La ratification de la Convention des Nations unies relative aux droits des personnes handicapées devrait intervenir en 2017 à la suite de l'adoption d'une loi qui, dans sa version préliminaire, désigne la Commission irlandaise pour les droits de l'homme et l'égalité comme le mécanisme indépendant en charge de la promotion, de la protection et du suivi de l'application de la Convention.⁴⁴ L'Irlande est un État dualiste, ce qui signifie que pour être exécutoire au niveau du système juridique irlandais, la législation internationale doit être transposée en droit interne par voie législative. La principale convention internationale qui ait été transposée en droit irlandais est la Convention européenne de sauvegarde des droits de l'homme, laquelle y a été incorporée au moyen de l'*European Convention on Human Rights 2003*.⁴⁵

3. Principes généraux et définitions

La discrimination directe est définie dans les lois antidiscrimination comme le fait de traiter une personne de manière moins favorable qu'une autre ne l'est, ne l'a été ou ne le serait en raison de l'un des motifs discriminatoires. Cette interdiction inclut la discrimination par association et la discrimination fondée sur un motif existant, ayant existé mais n'existant plus, pouvant exister dans le futur ou imputé à la personne concernée. La discrimination indirecte est définie comme se produisant lorsqu'une disposition apparemment neutre ferait qu'une personne concernée par l'un des motifs discriminatoires subirait un désavantage particulier par rapport à d'autres personnes. Cette différence d'impact est autorisée lorsqu'elle peut être objectivement justifiée par un but légitime et que les moyens pour atteindre ce but sont appropriés et nécessaires. Le harcèlement est défini comme tout comportement indésirable lié à un motif discriminatoire et ayant pour objet ou pour effet de porter atteinte à la dignité d'une personne et de créer pour elle un environnement intimidant, hostile, dégradant, humiliant ou offensant. Ce comportement peut consister en actes, demandes, mots exprimés, gestes ou production, affichage ou distribution de mots écrits, de dessins ou d'autre matériel. Les rétorsions visent toute situation dans laquelle une personne se déclarant victime de discrimination engage des poursuites ou soutient un plaignant, agit en qualité de comparateur ou comme témoin dans une procédure de plainte, s'oppose à la discrimination par des moyens légaux ou fait part de son intention d'agir de l'une des manières précitées et fait l'objet pour cette raison d'un licenciement ou d'un traitement défavorable. L'injonction de discriminer est expressément interdite par les lois sur l'égalité dans l'emploi et couverte dans une certaine mesure par les lois sur l'égalité des statuts au travers d'une interdiction d'obtenir une discrimination.

Les lois sur l'égalité dans l'emploi (1998-2015) disposent que, lorsqu'une personne atteinte d'un handicap peut s'acquitter des fonctions du poste qu'elle occupe avec ou sans l'aide de «mesures appropriées», elle est considérée comme compétente en vertu de la loi.

⁴² Les décisions des deux instances sont publiées sur:

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

⁴³ Voir notamment Equality and Rights Alliance (2013) *Access to Justice and Under-Reporting of Discrimination and Human Rights Abuses*, disponible sur:

<http://www.eracampaign.org/uploads/Access%20to%20Justice%20and%20Under-reporting%20ERA%20Aug%202013.pdf>; Bureau central de la statistique (2015)

QNHS Equality Module Quarter 3 2014, disponible sur:

http://pdf.cso.ie/www/pdf/20150902123751_QNHS_Equality_Module_Quarter_3_2014_full.pdf.

⁴⁴ Projet de loi sur le handicap (dispositions diverses) 2016,

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

⁴⁵ Irlande, *European Convention on Human Rights 2003*, 30 juin 2003,

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

L'employeur est tenu de prendre des mesures appropriées afin de permettre à une personne souffrant d'un handicap d'avoir accès à l'emploi, de participer à l'emploi ou d'y être promue, et de suivre une formation, à moins que ces mesures imposent une charge disproportionnée à l'employeur. Pour déterminer ce que représente une charge disproportionnée, il convient de tenir compte du coût de la mesure en question, de la taille et des ressources financières de l'employeur concerné, et de la possibilité d'obtenir un financement public ou une autre forme d'assistance. Les lois sur l'égalité des statuts (2000-2015) stipulent qu'un fournisseur de biens et de services doit prendre toutes les mesures raisonnables pour répondre aux besoins d'une personne handicapée en prévoyant un traitement ou un équipement spécial sans lequel il serait impossible ou excessivement difficile pour cette personne de pouvoir disposer des biens et services en question. Le coût nominal de cette obligation est plafonné – son montant maximum variant selon la taille de l'organisation et les ressources dont elle dispose.

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

La discrimination multiple n'est pas explicitement interdite.

4. Champ d'application matériel

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

Les lois sur l'égalité des statuts (2000-2015) interdisent la discrimination en matière de biens et services, y compris dans le domaine de l'enseignement et du logement/de l'hébergement. Elles ne mentionnent pas spécifiquement les services publics, mais ceux-ci

sont couverts en vertu de la jurisprudence. Le principal problème de conformité concerne une disposition prévoyant l'exemption de contrôle de toute action exigée par la loi.⁴⁶

5. Mise en application de la loi

Les recours invoquant les lois sur l'égalité dans l'emploi (1998-2015), les lois sur l'égalité des statuts (2000-2015) et les lois sur les pensions (1990-2015) peuvent être adressés à la Commission pour les relations sur le lieu de travail (WRC). Cette dernière assure un rôle d'investigation dans l'audition des plaintes. Les plaignants peuvent se représenter eux-mêmes, les frais ne peuvent être portés à la charge d'aucune des parties et la procédure est informelle. L'option de la médiation est prévue. Un règlement intervenant au terme d'une médiation est exécutoire pour les parties et le respect de ses clauses peut être imposé par le tribunal itinérant (Circuit Court). Il peut être fait appel des décisions auprès de la juridiction du travail (Labour Court) lorsqu'il s'agit d'emploi et auprès du tribunal itinérant (Circuit Court) lorsqu'il s'agit d'égalité de statut. Il peut être fait appel des décisions de la Labour Court et du Circuit Court sur un point de droit auprès de la High Court.

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

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

Des organisations peuvent représenter un plaignant individuel devant la WRC et la Labour Court pour autant que ledit plaignant les y autorise, mais pas devant la Circuit Court ou la High Court. Il est courant que des syndicats représentent leurs membres. Les organisations ne sont pas autorisées à déposer plainte, à l'exception de l'Irish Human Rights and Equality Commission ou IHREC (Commission irlandaise pour les droits de l'homme et l'égalité), laquelle est habilitée à saisir la WRC à propos de pratiques discriminatoires, de publicités à caractère discriminatoire ou du contenu de conventions collectives. L'IHREC peut également offrir une assistance et une représentation juridique à un plaignant individuel. Elle a apporté son aide en 2015 dans 45 affaires en rapport avec la législation antidiscrimination.⁴⁷

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

Les lois sur l'égalité dans l'emploi (1998-2015) prévoient un large éventail de recours: indemnisation, ordres aux employeurs de prendre des mesures spécifiques, réintégration dans la fonction ou réengagement. Tous les contrats de travail sont censés posséder une clause d'égalité transformant toute disposition du contrat susceptible d'entraîner autrement une discrimination illégale. Toutes les dispositions discriminatoires figurant dans les conventions collectives sont nulles et non avenues, et aucun contrat ne peut être

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

⁴⁷ IHREC (Irish Human Rights and Equality Commission) (2016), *Annual Report 2015*, disponible sur: <https://www.ihrec.ie/documents/annual-report-2015/>.

soustrait à l'application des dispositions de la législation garantissant l'égalité. Les indemnités financières sont plafonnées: dans le cadre de l'emploi, elles représentent deux ans de salaire; en dehors de l'emploi, l'indemnité maximale est fixée à 13 000 euros.

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

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

L'IHREC est la principale interface de dialogue et de consultation avec les ONG et les partenaires sociaux. Elle est dotée d'un large éventail de compétences et de fonctions statutaires. L'équipe «Politique et engagement» de cette Commission a entrepris à ce jour un vaste processus de consultation publique et de collaboration avec des ONG et les partenaires sociaux concernant divers volets de son activité. Quelques-uns des mécanismes formels de dialogue doivent encore être invoqués, mais cette situation pourrait évoluer à l'heure où la Commission achève sa phase de mise en place, laquelle a requis le recrutement d'un nombre important de nouveaux membres de personnel.

6. Organismes de promotion de l'égalité de traitement

L'*Equality Authority* (Autorité pour l'égalité) et l'*Irish Human Rights Commission* (Commission irlandaise des droits de l'homme) ont fusionné et forment désormais l'*Irish Human Rights and Equality Commission* ou IHREC (Commission irlandaise pour les droits de l'homme et l'égalité).⁵⁰ Cette Commission, instituée le 1^{er} novembre 2014, est un organisme indépendant chargé d'œuvrer à l'élimination de la discrimination, à la promotion de l'égalité des chances, à la fourniture au public d'informations sur le droit antidiscrimination et à l'examen de divers textes législatifs, y compris les lois primaires en matière de non-discrimination. Elle remplit cette mission au moyen de travaux de recherche et d'actions de sensibilisation, de l'analyse de la législation et de l'élaboration de codes de pratique statutaires. L'IHREC est également habilitée à intenter des poursuites pour son propre compte ou pour aider l'une des parties. Elle est autorisée à mener des enquêtes et à procéder à des bilans en matière d'égalité. Le ministère de la Justice et de l'égalité, sous la direction du ministre, finance l'IHREC – laquelle rapporte au Parlement irlandais.

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

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

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

7. Points essentiels

Il est trop tôt pour évaluer l'impact des réformes infrastructurelles décrites ci-dessus. Un changement notable, susceptible d'être corrigé au fil du temps, concerne l'absence de données concernant les plaintes pour discrimination dans le rapport annuel de la Commission pour les relations sur le lieu de travail (WRC). L'*Equality Tribunal* (Tribunal pour l'égalité) fournissait un compte-rendu détaillé des affaires (ventilées selon le motif de discrimination) dans lesquelles il s'était prononcé au cours de l'année, ce qui constituait une ressource précieuse pour les praticiens et les chercheurs. Une innovation intéressante figure à l'article 42 de la loi de 2014 sur la Commission irlandaise pour les droits de l'homme et l'égalité, qui introduit pour les organismes publics l'obligation positive de tenir dûment compte des droits de l'homme et de l'égalité dans l'exercice de leurs fonctions. L'IHREC aidera les organismes publics à respecter cette obligation positive; elle a produit un manuel préliminaire et est habilitée à rédiger des codes de pratique.

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

ZUSAMMENFASSUNG

1. Einleitung

Die irische Gesellschaft ist ziemlich homogen. Nach der Volkszählung von 2011⁵¹ sind von den 4 588 252 Einwohnern des Landes 84 % römisch-katholisch, 6 % nicht religiös, 2,8 % Mitglieder der *Church of Ireland* (Protestanten), 1 % Muslime und der Rest Angehörige verschiedener anderer Glaubensrichtungen. 85 % bezeichnen sich selbst als „weiße Iren“, 0,6 % als irische Fahrende (*travellers*).⁵² 58 697 Menschen bezeichnen sich als „Schwarze“ bzw. „schwarze Iren“. Zwischen 2006 und 2011 ist der Anteil der „sonstigen Weißen“ (Nicht-Iren) vor allem aufgrund der Zuwanderung aus osteuropäischen Ländern um fast 43 % gestiegen. 595 355 Menschen, rund 13 % der Bevölkerung, gaben an, eine Behinderung zu haben. In der Volkszählung wurden keine Fragen zur sexuellen Orientierung gestellt, es wurden aber 4042 gleichgeschlechtliche Lebenspartnerschaften verzeichnet. 544 357 Personen (12 % der Bevölkerung) besitzen nicht die irische Staatsbürgerschaft; 386 764 von ihnen sind Staatsbürger anderer EU-Mitgliedstaaten.

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

Irlands indigene ethnische Minderheit, die *Travelling Community* (Gemeinschaft der Fahrenden), leidet unter einem hohen Maß an relativer sozialer Benachteiligung und Diskriminierung. Eine der wichtigsten Debatten, die 2016 stattfanden, betraf die formale Anerkennung der *travellers* als Ethnie.⁵⁷ In der nationalen Debatte über Gleichstellungsrechte ging es in den letzten Jahren unter anderem um religiöse Kriterien in der Aufnahmepolitik von Schulen, und 2016 wurde ein Gesetzentwurf veröffentlicht, der Recht und Praxis in diesem Bereich angeblich reformiert. In ihren Kommentaren zu dem Gesetzentwurf schlägt die IHREC Änderungen vor, die unter anderem darauf abzielen, die Einhaltung der Antirassismusrichtlinie zu gewährleisten.⁵⁸

In der Rechtsprechung von 2016 waren keine wesentlichen Entwicklungen in den Antidiskriminierungsgrundsätzen zu erkennen. Der *Supreme Court* bestätigte die

⁵¹ <http://www.cso.ie/en/census/census2011reports/>.

⁵² Es gibt keine offiziellen Statistiken zu den Roma.

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

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

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

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

⁵⁷ Die *travellers* wurden im März 2017 schließlich als Ethnie anerkannt.

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

Vorgehensweise der WRC bei der Untersuchung von Beschwerden.⁵⁹ Der *Labour Court* bestätigte nochmals, dass das Belästigungsverbot für Situationen gilt, die außerhalb des Arbeitsplatzes liegen.⁶⁰ Er stellte klar, dass es nicht erforderlich sei nachzuweisen, dass der/die Täter/in während oder im Rahmen seiner/ihrer beruflichen Tätigkeit handelte. Das entscheidende Kriterium sei, ob das Opfer während seiner beruflichen Tätigkeit belästigt worden sei. Eine Reihe von Beschwerden wegen Diskriminierung aufgrund der Zugehörigkeit zur Gemeinschaft der Fahrenden richtete sich gegen private Dienstleister, denen eklatante Verstöße gegen das Verbot der unmittelbaren Diskriminierung vorgeworfen wurden.

2. Wichtigste Gesetze

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

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

Auch andere Gesetze enthalten Bestimmungen, die Diskriminierung verbieten, nämlich die *Unfair Dismissals Acts* (Gesetze über rechtswidrige Kündigungen) von 1977 bis 2015,⁶⁴ das *Prohibition of Incitement to Hatred Act* (Gesetz über das Verbot der Aufstachelung zum Hass) von 1989,⁶⁵ das Hassrede unter Strafe stellt, und das *Intoxicating Liquor Act* (Gesetz über alkoholische Getränke) von 2003,⁶⁶ das in Artikel 19 die Anwendbarkeit des Diskriminierungsrechts auf konzessionierte Schankstätten regelt.

Die irische Antidiskriminierungsgesetzgebung geht insofern über die EU-Gleichbehandlungsrichtlinien hinaus, als der persönliche Geltungsbereich der *Equal Status Acts 2000-2015* Diskriminierung beim Zugang zu Gütern und Dienstleistungen nicht nur aufgrund der Rasse und des Geschlechts, sondern auch aufgrund einer Behinderung, des Alters, der Religion, der sexuellen Orientierung, der Zugehörigkeit zur Gemeinschaft der Fahrenden, des familiären Status, des zivilrechtlichen Status und des Bezugs von Wohngeld

⁵⁹ Supreme Court, *County Louth VEC / Equality Tribunal* [2016] IESC 40, 13.07.2016, <http://www.courts.ie/Judgments.nsf/597645521f07ac9a80256ef30048ca52/31d63470034282c58025800c0038c8e4?OpenDocument>.

⁶⁰ *Dublin Bus / McCamley*, EDA 164, 18.02.2016, <https://www.workplacerelations.ie/en/Cases/2016/February/EDA164.html>.

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

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

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

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

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

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

verbietet. Diskriminierung aus Gründen der Staatsangehörigkeit ist im Rahmen des Diskriminierungsgrunds „Rasse“ ebenfalls ausdrücklich verboten. Die Definition des Begriffs „Behinderung“ ist weiter gefasst als im EU-Recht, und für Menschen mit Behinderung müssen beim Zugang zu Gütern und Dienstleistungen angemessene Vorkehrungen getroffen werden. Es gibt eine umfangreiche Rechtsprechung zu allen Diskriminierungsgründen, die größtenteils vom *Equality Tribunal* (nunmehr WRC) und vom *Labour Court* stammt.⁶⁷ Studien lassen vermuten, dass Untererfassung von Diskriminierung und Untätigkeit gegenüber wahrgenommener Diskriminierung große Probleme darstellen.⁶⁸

Irland hat die wichtigsten Menschenrechtsinstrumente des Europarats ratifiziert, mit Ausnahme des 12. Protokolls der Europäischen Menschenrechtskonvention. Es hat auch die meisten grundlegenden Instrumente der Vereinten Nationen ratifiziert. Die Ratifizierung des UN-Übereinkommens über die Rechte von Menschen mit Behinderungen wird voraussichtlich 2017 erfolgen, nach Erlass eines Gesetzes, das in seiner Entwurfsform die Irische Kommission für Menschenrechte und Gleichstellung dazu bestimmt, als unabhängiger Mechanismus die Umsetzung des Übereinkommens zu fördern, zu schützen und zu überwachen.⁶⁹ Irland ist ein dualistischer Staat, was so viel bedeutet, dass internationales Recht im irischen Rechtssystem nur dann angewendet werden kann, wenn es im Zuge der Gesetzgebung in nationales Recht überführt wurde. Das wichtigste internationale Übereinkommen, das in irisches Recht überführt wurde, ist die Europäische Menschenrechtskonvention, die im Zuge des *European Convention on Human Rights Act* (Gesetz über die Europäische Menschenrechtskonvention) von 2003 übernommen wurde.⁷⁰

3. Wichtigste Grundsätze und Begriffe

Unmittelbare Diskriminierung im Sinne der Antidiskriminierungsgesetze liegt vor, wenn eine Person aus einem der Diskriminierungsgründe eine weniger günstige Behandlung erfährt, als eine andere Person erfährt, erfahren hat oder erfahren würde. Das Verbot gilt auch für Diskriminierung durch Assoziierung und für Diskriminierung aufgrund eines Diskriminierungsgrundes, der besteht, früher bestanden hat, womöglich bestehen wird oder der betroffenen Person unterstellt wird. Mittelbare Diskriminierung wird definiert als Situation, in der eine dem Anschein nach neutrale Bestimmung eine Person, die einer geschützten Gruppe angehört, im Vergleich zu anderen Personen in besonderer Weise benachteiligt. Solche unterschiedlichen Auswirkungen können jedoch zulässig sein, wenn sie durch ein rechtmäßiges Ziel sachlich gerechtfertigt und die Mittel zur Erreichung dieses Ziels angemessen und erforderlich sind. Belästigung ist definiert als unerwünschte Verhaltensweisen, die im Zusammenhang mit einem Diskriminierungsgrund stehen und bezwecken oder bewirken, dass die Würde der betreffenden Person verletzt und ein von Einschüchterungen, Anfeindungen, Erniedrigungen, Entwürdigungen oder Beleidigungen gekennzeichnetes Umfeld geschaffen wird. Unter solche Verhaltensweisen fallen Handlungen, Aufforderungen, Aussagen, Gesten oder die Herstellung, Darstellung oder Verbreitung von Texten, Bildern oder sonstigen Materialien. Viktimisierung bezeichnet die Kündigung oder sonstige Benachteiligung von Personen, die wegen Diskriminierung klagen, ein Verfahren anstrengen, eine Klägerpartei unterstützen, in einem Verfahren als Vergleichsperson oder als Zeuge auftreten, auf gesetzlichem Wege Diskriminierung bekämpfen oder ihre Absicht, eine der oben genannten Handlungen vorzunehmen,

⁶⁷ Die Entscheidungen beider Organe werden veröffentlicht unter:

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

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

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

Central Statistics Office (irisches Amt für Statistik), 2015, *QNHS Equality Module Quarter 3 2014*, abrufbar unter:

http://pdf.cso.ie/www/pdf/20150902123751_QNHS_Equality_Module_Quarter_3_2014_full.pdf.

⁶⁹ *Disability (Miscellaneous Provisions) Bill 2016*,

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

⁷⁰ Irland, *European Convention on Human Rights Act 2003*, 30.06.2003,

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

ankündigen. Anweisungen zur Diskriminierung sind nach den *Employment Equality Acts* ausdrücklich verboten und werden in den *Equal Status Acts* in gewissem Maße durch das Verbot des „Bewirkens“ (*procurement*) von Diskriminierung abgedeckt.

Nach den *Employment Equality Acts 1998-2015* gelten Menschen mit Behinderungen als qualifiziert, wenn sie die mit einer Stelle verbundenen Pflichten mit oder ohne Unterstützung durch „geeignete Maßnahmen“ erfüllen können. Der Arbeitgeber ist verpflichtet, geeignete Maßnahmen zu ergreifen, um einem Menschen mit Behinderung den Zugang zur Beschäftigung, die Ausübung eines Berufes, den beruflichen Aufstieg und die Teilnahme an Aus- und Weiterbildungsmaßnahmen zu ermöglichen, es sei denn, diese Maßnahmen würden den Arbeitgeber unverhältnismäßig stark belasten. Bei der Entscheidung, was eine unverhältnismäßig starke Belastung darstellt, müssen die Kosten der fraglichen Maßnahme, die Größe und die finanziellen Mittel des betreffenden Arbeitgebers und die Möglichkeit, öffentliche oder sonstige Hilfen zu erhalten, berücksichtigt werden. Nach den *Equal Status Acts 2000-2015* sind Anbieter von Gütern oder Dienstleistungen verpflichtet, alle angemessenen Maßnahmen zu treffen, um den Bedürfnissen von Personen mit Behinderungen gerecht zu werden, und dazu auch spezielle Verfahren oder Einrichtungen bereitzustellen, ohne die es für die betroffene Person unmöglich oder unverhältnismäßig schwierig wäre, die Güter oder Dienstleistungen in Anspruch zu nehmen. Die Verpflichtung unterliegt einer nominellen Kostenobergrenze, die je nach Größe des Unternehmens und den ihm zur Verfügung stehenden Mitteln variiert.

Die *Employment Equality Acts* enthalten mehrere Ausnahmen vom Grundsatz der Gleichbehandlung, der nicht für den Zugang zu Beschäftigung in privaten Haushalten zur Erbringung persönlicher Dienstleistungen gilt. Ausnahmen sind möglich, wenn das betreffende Merkmal eine wesentliche und entscheidende berufliche Voraussetzung für die Stelle ist und es sich um einen rechtmäßigen Zweck und verhältnismäßige Anforderungen handelt. Ausnahmen bei den Diskriminierungsgründen Alter und Behinderung sind im Bereich der Betriebsrenten bzw. bei der Vergütung von Menschen mit eingeschränkten Fähigkeiten möglich. Es gibt eine Ausnahme vom Verbot der Diskriminierung im Bereich Beschäftigung, wenn diese dem Zweck dient, den religiösen Ethos einer Organisation aufrechtzuerhalten, wobei die Ungleichbehandlung „rechtmäßig“, „verhältnismäßig“ und begrenzt sein muss, sodass sie nicht zur Rechtfertigung anderer Arten von Diskriminierung benutzt werden kann. Weitere Ausnahmen im Bereich Beschäftigung betreffen die Streitkräfte, die Garda Síochána (Polizei) und die Rettungsdienste. Auch die *Equal Status Acts* enthalten Ausnahmen und Beschränkungen des Diskriminierungsverbots. Eine Ungleichbehandlung in Bezug auf Renten, Pensionen und Versicherungspolice ist zulässig, wenn die Ungleichbehandlung aus versicherungsmathematischen Gründen angemessen ist. Weitere Ausnahmen vom Gleichbehandlungsgebot betreffen die Organisation von Sportveranstaltungen, die Authentizität dramatischer Darstellungen oder sonstiger Unterhaltungsereignisse bzw. die Bereitstellung von Dienstleistungen zu religiösen Zwecken. Eine weitere Ausnahme sieht vor, dass Diskriminierung bei der Bereitstellung von Gütern oder Dienstleistungen in Situationen nicht strafbar ist, in denen die hinreichende Gründe für die Annahme vorliegen, dass ein erhebliches Risiko kriminellen oder ordnungswidrigen Verhaltens besteht. Die *Equal Status Acts* lassen außerdem im Bildungswesen bestimmte Ausnahmen aufgrund von Alter, Geschlecht, religiösem Ethos und Behinderung zu.

Mehrfachdiskriminierung ist nicht ausdrücklich verboten.

4. Sachlicher Geltungsbereich

Die *Employment Equality Acts 1998-2015* gelten für die Bereiche Beschäftigung und berufliche Bildung und unterscheiden nicht zwischen privaten und öffentlichen Arbeitgebern. Diskriminierung ist verboten beim Zugang zu Beschäftigung, in Bezug auf die Arbeitsbedingungen (einschließlich der Vergütung), auf Aus- und Weiterbildung für eine bzw. auf Erfahrung in einer beruflichen Tätigkeit, auf Beförderung, auf Einstufung oder

Neueinstufung von Stellen sowie auf Stellenausschreibungen. Arbeitsvermittlungen und Leiharbeiternehmer/innen fallen ebenfalls in ihren Geltungsbereich.

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

5. Rechtsdurchsetzung

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

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

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

Organisationen dürfen Betroffene vor der WRC und dem *Labour Court* vertreten, wenn sie von der jeweiligen Person entsprechend bevollmächtigt sind, jedoch nicht vor dem *Circuit Court* oder dem *High Court*. Gewerkschaften vertreten häufig ihre Mitglieder. Organisationen dürfen nicht im eigenen Namen klagen, mit Ausnahme der *Irish Human Rights and Equality Commission (IHREC)*. Die IHREC kann bei der WRC gegen diskriminierende Strukturen, diskriminierende Werbung oder den Inhalt von Tarifverträgen klagen. Sie kann außerdem Betroffene bei ihrer Klage unterstützen und vertreten. 2015 leistete die IHREC in 45 antidiskriminierungsrechtlichen Fällen Unterstützung.⁷²

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

Die *Employment Equality Acts 1998-2015* sehen diverse Maßnahmen der Wiedergutmachung vor: Entschädigung, Auflagen an die Arbeitgeber, bestimmte

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

⁷² Irish Human Rights and Equality Commission (2016), *Annual Report 2015*, abrufbar unter: <https://www.ihrec.ie/documents/annual-report-2015/>.

Maßnahmen zu treffen, Weiterbeschäftigung bzw. Wiedereinstellung. Alle Beschäftigungsverträge enthalten eine Gleichbehandlungsklausel, mit der sämtliche Bestimmungen des Vertrags aufgehoben werden, die eine rechtswidrige Diskriminierung darstellen. Diskriminierende Bestimmungen in Tarifvereinbarungen sind null und nichtig und es ist nicht möglich, außerhalb der Bestimmungen der Gleichbehandlungsgesetzgebung Verträge abzuschließen. Es gibt Obergrenzen für Entschädigungssummen, die bei arbeitsrechtlichen Fällen zwei Jahresgehälter oder, wenn die Klägerpartei nicht beschäftigt war, 13 000 Euro betragen.

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

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

Die IHREC ist das vorrangige Instrument, über das Dialog und Konsultationen mit NROs und Sozialpartnern stattfinden. Sie ist mit einer Reihe von wichtigen gesetzlichen Befugnissen und Funktionen ausgestattet. Bis heute hat das Kommissionsteam „Policy and Engagement“ mit NROs und Sozialpartnern eine umfangreiche öffentliche Konsultation und Zusammenarbeit über diverse Aspekte der Kommissionsarbeit gepflegt. Einige formelle Dialogmechanismen wurden noch nicht in Anspruch genommen; dies sollte sich aber ändern, sobald die Kommission ihre Gründungsphase hinter sich lässt, die mit der Einstellung einer beträchtlichen Anzahl neuer Mitarbeiterinnen und Mitarbeiter verbunden war.

6. Gleichbehandlungsstellen

Die *Equality Authority* wurde mit der *Irish Human Rights Commission* zur *Irish Human Rights and Equality Commission* (IHREC) zusammengelegt.⁷⁵ Die IHREC, die am 1. November 2014 gegründet wurde, ist eine unabhängige Stelle mit der Aufgabe, Diskriminierung zu bekämpfen, die Chancengleichheit zu fördern, die Öffentlichkeit über das Antidiskriminierungsrecht zu informieren und die Umsetzung verschiedener gesetzlicher Regelungen einschließlich der primären Antidiskriminierungsgesetze zu überwachen. Zur Erfüllung dieser Aufgaben kann sie Forschungsprojekte und Aufklärungskampagnen durchführen, Gesetze überprüfen und gesetzliche Verfahrensregeln ausarbeiten. Die IHREC ist außerdem berechtigt, in eigenem Namen

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

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

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

Klage einzureichen oder Kläger zu unterstützen. Sie kann Untersuchungen und Gleichstellungskontrollen durchführen. Die IHREC wird vom Ministerium für Justiz und Gleichstellung, unter Leitung des Ministers, finanziert und ist gegenüber dem irischen Parlament rechenschaftspflichtig.

7. Schlüsselprobleme

Die Auswirkungen der oben beschriebenen infrastrukturellen Reformen können noch nicht bewertet werden. Eine auffallende Änderung, die mit der Zeit vielleicht korrigiert wird, ist der Mangel an Daten über Diskriminierungsbeschwerden im Jahresbericht der WRC. Das *Equality Tribunal* legte jedes Jahr detaillierte Angaben zu den abgeschlossenen Verfahren, aufgeschlüsselt nach Diskriminierungsgründen, vor, die für Wissenschaftler und Experten aus der Praxis eine wertvolle Quelle darstellten. Eine interessante Neuerung ist Artikel 42 des Gesetzes über die Irische Menschenrechts- und Gleichbehandlungskommission von 2014, der öffentliche Stellen dazu verpflichtet, Menschenrechte und Gleichbehandlung bei der Wahrnehmung ihrer Aufgaben gebührend zu berücksichtigen. Die IHREC wird die öffentlichen Stellen darin unterstützen, dieser Pflicht nachzukommen; sie hat einen vorläufigen Leitfaden erstellt und ist befugt, Verhaltenskodexe zu entwickeln.

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

INTRODUCTION

The national legal system

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

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

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

List of main legislation transposing and implementing the directives

Employment Equality Acts 1998-2015 (EEA)⁸⁰

Date of adoption: 18.06.1998

Latest amendments: 10.12.2015

Entry into force: 18.10.1999

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

Material scope: Employment (including occupation and vocational training)

Equal Status Acts 2000-2015 (ESA)⁸¹

Date of adoption: 26.04.2000

Latest amendments: 10.12.2015

Entry into force: 25.10.2000

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

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

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

⁷⁷ Ireland has a bicameral system, which means that there are two houses of the Oireachtas. The first chamber is Dáil Éireann and the second chamber is Seanad Éireann (Senate). Legislative powers are granted to the two houses by virtue of Article 15.2 of the Constitution.

⁷⁸ Oireachtas Library and Research Service (2016) *International human rights law: operation and impact*, available at: https://www.oireachtas.ie/parliament/media/housesoftheoireachtas/libraryresearch/spotlights/20160609_in_tIHR_spotlight_095201.pdf, accessed 24.02.2017.

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

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

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

Pensions Acts 1990-2015⁸²

Date of adoption: 24.07.1990

Latest amendments: 10.12.2015

Entry into force: 21.12.1990

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

Material scope: Occupational pensions, occupational benefit schemes

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

Date of adoption: 27.07.2014

Entry into force: 01.11.2014

Latest amendments: N/a

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

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

Workplace Relations Act 2015⁸⁴

Date of adoption: 20.05.2015

Entry into force: 01.10.2015

Latest amendments: 08.02.2016

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

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

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

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

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

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

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

General clause

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

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

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

Specific clauses

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

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

These provisions are directly applicable.

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

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

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

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

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

The following grounds of discrimination are explicitly prohibited in national law: gender, age, race, religion, family status, disability, civil status, sexual orientation, membership of the Traveller community, housing assistance.⁸⁸

2.1.1 Definition of the grounds of unlawful discrimination within the directives

Race and ethnic origin:

Race

The race ground under both the ESA and EEA covers people who are of 'different race, colour, nationality or ethnic or national origin'.⁸⁹ None of these concepts are defined. Case law has not considered the meaning of 'race'.

Ethnic origin

Under the 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 the ESA will usually refer to an immutable characteristic over which an individual has no control while recognising there are 'instances where an individual belonging to one nationality or ethnic group might elect to adhere to another'.⁹⁰ The Court approved of the definition of 'ethnic group' set out by the House of Lords in *Mandla v Dowell-Lee*.⁹¹ 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...'⁹² Applying this formula the High Court concluded that for the purposes of the ESA farmers are an occupational group, not an ethnic group. The complainant could not, therefore, base a discrimination complaint on his status as a member of the farming community.⁹³

Membership of the Traveller community is a separate ground. 'Traveller community' is defined as 'the community of people commonly known and identified (both by themselves

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

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

⁹⁰ *Fitzgerald v Minister for Community, Equality and Gaeltacht Affairs* [2011] IEHC 180, at 10, <http://www.courts.ie/Judgments.nsf/0/EC76855E27F339BA802578B1004AC770>.

⁹¹ House of Lords, *Mandla v Dowell Lee* [1983] 2 AC 548, 24.03.1982, <http://www.bailii.org/uk/cases/UKHL/1982/7.html>.

⁹² Per Lord Fraser in *Mandla v Dowell Lee* at p. 562.

⁹³ *Mandla* was applied by the WRC in finding that being a 'Catholic Irish Republican' did not constitute a different ethnicity in the context of the case: *Cregan v Coillte Teoranta*, DEC-E2016-086, 03.06.2016, <https://www.workplacerelations.ie/en/Cases/2016/June/DEC-E2016-086.html>.

and others) as people with a shared history, culture and traditions including, historically a nomadic way of life on the island of Ireland.⁹⁴ Neither legislation nor case law has definitively determined whether members of the Traveller community are a racial or ethnic minority for the purposes of Irish equality law. In several decisions the first instance forum for hearing such complaints found that Travellers could not invoke the race ground either because there was inadequate evidence that they constitute an ethnic group,⁹⁵ or because it was considered that no additional protection would be afforded by advancing a complaint on both grounds.⁹⁶ The Taoiseach (Prime Minister) announced in November 2016 that the government plans to formally recognise Travellers as an ethnic minority in 2017.⁹⁷ This development should ensure that Travellers may pursue complaints under the race ground as well as under the Traveller community ground.

Religion or belief

Under ESA and EEA the 'religion ground' applies as between people where 'one has a different religious belief from the other, or that one has a religious belief and the other has not'.⁹⁸ 'Religious belief' is defined as 'religious background or outlook'.⁹⁹ 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'.¹⁰⁰ National legislation does not refer to philosophical beliefs.

According to the Labour Court¹⁰¹ 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.'

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

The Labour Court appears to accept that humanist beliefs may be covered, but apparently as constituting a lack of religious belief similar to atheism and not because Humanism could be considered a 'religious belief'.¹⁰² In a 2016 decision the WRC rejected the complaint of an individual who was not permitted to wear a colander on his head for the purposes of a photograph when he was making an application to renew his driver's license.¹⁰³ The complainant argued that the action was discriminatory as wearing such an item was a feature of his religious beliefs as a Pastafarian and the respondent's guidelines permitted individuals to wear head coverings for religious reasons. Having reviewed the definitions of religion and philosophical belief developed in case law under the UK Equality Act 2010

⁹⁴ Section 2(1) EEA, Section 2(1) ESA.

⁹⁵ E.g. *Mrs X (on behalf of her son, Mr Y) v A Post-Primary School*, DEC-S2010-009, 02.02.2010, at 4.17, <https://www.workplacerelements.ie/en/Cases/2010/February/DEC-S2010-009-Full-Case-Report.html>; *Mrs K (on behalf of her son) v A Primary School*, DEC-S2011-003, 18.01.2011, at 4.15, <https://www.workplacerelements.ie/en/Cases/2011/January/DEC-S2011-003-Full-Case-Report.html>.

⁹⁶ E.g. *Mrs Z (on behalf of her three children) v A National School*, DEC-S2010-055, at 4.9, <http://www.lrc.ie/en/Cases/2010/December/DEC-S2010-055-Full-Case-Report.html>.

⁹⁷ Leahy, P. (2016) 'Traveller ethnicity recognition to be backed by Taoiseach', *Irish Times*, 23.11.2016: <http://www.irishtimes.com/news/politics/traveller-ethnicity-recognition-to-be-backed-by-taoiseach-1.2879805>.

⁹⁸ Section 6(2)(e) EEA; Section 3(2)(e) ESA.

⁹⁹ Section 2(1) EEA; Section 2(1) ESA.

¹⁰⁰ Equality Tribunal, *A Teacher v A National School*, DEC-E2014-097, 30.12.2014, <https://www.workplacerelements.ie/en/Cases/2014/December/DEC-E2014-097.html>.

¹⁰¹ *Tipperary County Council v McAteer*, EDA 3/2015, 30.01.2015, <https://www.workplacerelements.ie/en/Cases/2015/January/EDA153.html>.

¹⁰² Labour Court, *Department of Defence v Barrett*, EET081, 20.05.2008, <https://www.workplacerelements.ie/en/Cases/2008/May/EET081.html>.

¹⁰³ *Mulryan v Road Safety Authority*, DEC-S2016-018, 09.03.2016, <https://www.workplacerelements.ie/en/Cases/2016/March/DEC-S2016-018.html>.

the WRC determined that the belief system in question did not constitute a 'religious belief' for the purposes of the ESA. In reaching that conclusion the WRC referred to the fact that Pastafarianism uses 'satire as an effective tool of communication' and to the 'occasional and selective nature' of the complainant's use of the colander. While the precise basis for the finding is not clear, the WRC's reference to a definition of philosophical belief suggests that it may be prepared to interpret the provision broadly.

Disability

Under EEA and ESA the disability ground may be availed of where 'one is a person with a disability and the other either is not or is a person with a different disability.'¹⁰⁴ 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.'¹⁰⁵

The definition of disability does not fully accord with the concept adopted by the CJEU in *Skouboe Werge and Ring*¹⁰⁶ in that it does not explicitly refer to barriers that may hinder the full and effective societal participation of a person with disabilities. In practice, however, when applying the duty to reasonably accommodate adjudicators require employers to comprehensively consider how work practices and the general employment environment might be adjusted so as to eliminate barriers to participation in employment.¹⁰⁷ The Irish definition of disability does not require a condition to last a long time in order to qualify as a disability,¹⁰⁸ nor does it make the distinction between disability and sickness/illness. It covers those that have a disability at present, a history of a disability, a future disability or an imputed disability. In accordance with the CJEU judgment in *FOA (Kaltoft) v Billund*¹⁰⁹ 'obesity' is an imputed disability under the EEA.¹¹⁰

Age

The age ground is defined as referring to people of different ages,¹¹¹ but in employment applies only in relation to persons above the maximum age at which a person is statutorily obliged to attend school.¹¹² In access to goods and services it does not apply to persons aged under 18.¹¹³

¹⁰⁴ Section 28(1)(f); Section 3(2)(g) ESA.

¹⁰⁵ Section 2(1) EEA; Section 2(1) ESA.

¹⁰⁶ Joined Cases C-335/11 and C-337/11.

¹⁰⁷ E.g. High Court, *Nano Nagle School v Daly*, [2015] IEHC 785, 11.12.2015, <http://www.courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/86867f31d053511280257f30005c002f?OpenDocument>; Workplace Relations Commission, *Doocey v Colso Fruit Enterprises Ltd.*, DEC-E2016-109, 22.07.2016, <https://www.workplacerelements.ie/en/Cases/2016/July/DEC-E2016-109.html>; applying *Skouboe Werge and Ring*.

¹⁰⁸ See e.g. Labour Court, *Cregg Labour Solutions v Cahill*, EDA1634, 01.12.2016, <http://www.workplacerelements.ie/en/Cases/2016/December/EDA1634.html>.

¹⁰⁹ [2014] CJEU Case C-354/13.

¹¹⁰ *Health Service Employee v The Health Service Executive*, DEC-E2006-013, 10.04.2006, <https://www.workplacerelements.ie/en/Cases/2006/April/DEC-E2006-013-Full-Case-Report.html>.

¹¹¹ Section 6(1)(f) EEA; Section 3(2)(f) ESA.

¹¹² Section 6(3)(a) EEA.

¹¹³ Section 3(3)(a) ESA.

Sexual orientation

This is defined as heterosexual, homosexual or bisexual orientation.¹¹⁴ Gay and lesbian people have pursued the vast majority of complaints on the ground under both ESA and EEA and the definition has not been interpreted as such.

2.1.2 Multiple discrimination

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

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.¹¹⁵ In practice adjudicators deal with each ground in turn, requiring a case to be established separately on each ground.¹¹⁶ Even where a complaint succeeds on several discriminatory grounds the applicable compensation limits apply.

Nonetheless, in a limited number of cases adjudicators have recognised multiple discrimination. In an equal pay case, *O'Brien v ComputerScope Limited*,¹¹⁷ 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.¹¹⁸ *Lindberg v Press Photographers Association of Ireland*¹¹⁹ 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*¹²⁰ 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'.¹²¹

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

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

In Ireland, the following national law (including case law) prohibits discrimination on grounds of gender, age, race, religion, family status, disability, civil status, sexual

¹¹⁴ Section 2(1) EEA; Section 2(1) ESA.

¹¹⁵ Section 79(1)(A) EEA; Section 25(1)(A) ESA.

¹¹⁶ In *Superquinn v Freeman* (DEE0211, 14.11.2002) the Labour Court overturned an Equality Tribunal finding apparently on the basis that the first instance body had failed to require the complainant to establish a prima facie case of discrimination on each ground separately:
<https://www.workplacereleations.ie/en/Cases/2002/November/DEE0211.html>.

¹¹⁷ DEC-E2006-030, 01.08.2006, <http://www.lrc.ie/en/Cases/2006/August/DEC-E2006-030-Full-Case-Report.html>.

¹¹⁸ *Luzak v Sales Placement Ltd*, DEC-E2011-010, 24.01.2011, <https://www.workplacereleations.ie/en/Cases/2011/January/DEC-E2011-010-Full-Case-Report.html>;
McDermott v Connacht Gold Cooperative Society Ltd, DEC-E2011-147, 04.08.2011, <https://www.workplacereleations.ie/en/Cases/2011/August/DEC-E2011-147-Full-Case-Report.html>.

¹¹⁹ Equality Tribunal, DEC-S2011-041, 05.10.2011, <https://www.workplacereleations.ie/en/Cases/2011/October/DEC-S2011-041-Full-Case-Report.html>.

¹²⁰ DEC-P2013-004, 16.12.2013, <https://www.workplacereleations.ie/en/Cases/2013/December/DEC-P2013-004.html>.

¹²¹ *Parris v Trinity College Dublin and others*, [2016] EUECJ C-443/15, 24.12.2016, at 80, <http://www.bailii.org/eu/cases/EUECJ/2016/C44315.html>.

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

Section 6(1)(a)(iv) Employment Equality Acts (EEA):

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

Case law under the EEA has established that people who are treated less favourably because of their body mass are subjected to disability discrimination by assumption.¹²² Irish law thereby recognises that obesity may constitute a disability, albeit in a different manner to the CJEU judgment in *FOA (Kaltoft) v Billund*.¹²³

Section 3(1)(iv) Equal Status Acts (ESA):

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

b) Discrimination by association

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

Section 6(1)(b) EEA:

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

Sexual orientation ground discrimination by association was established in a 2015 case.¹²⁴ The complainant teacher was discriminated against when a school principal made insulting comments about her son's sexual orientation. A separate complaint of harassment on the religion ground was also sustained. The WRC awarded the complainant EUR 3 000 in compensation for the breaches of the EEA and also directed the respondent to arrange training for the school's board of management and all staff on employment policies, particularly in relation to equality, discrimination and harassment.

Section 3(1)(b) ESA:

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

¹²² Equality Tribunal, *A Health Service Employee v Health Service Executive*, DEC-E2006-013, 10.04.2006, <https://www.workplacerelements.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.

¹²³ [2014] CJEU Case C-354/13.

¹²⁴ Workplace Relations Commission, *Marron v Board of Management of St Paul's National School*, DEC-E2015-121, November 2015, <https://www.workplacerelements.ie/en/Cases/2015/November/DEC-E2015-121.html>.

- (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.’

National law is in line with the judgment in Case C-303/06 *Coleman v Attridge Law and Steve Law*.¹²⁵

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

a) Prohibition and definition of direct discrimination

In Ireland, direct discrimination is prohibited in national law. It is defined under both the EEA and the ESA as occurring where a person is treated less favourably than another person is, has been or would be treated in a comparable situation on any of the discriminatory grounds, which exists, existed but no longer exists or may exist in the future.¹²⁶

b) Justification of direct discrimination

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

2.2.1 Situation testing

a) Legal framework

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

There are no procedural or other rules prohibiting the use of situation testing. Situation testing does not occur with any regularity in the Irish context.

Anecdotal evidence suggests that Judges from the Irish superior courts would be hostile to this form of evidence, seeing it as a form of entrapment.¹²⁷ There is therefore a reluctance to use situation testing. Thus it would appear that for the present developments in other jurisdictions are not impacting on the position in Irish courts.

b) Practice

In Ireland, situation testing is not generally used in practice.

A form of situation testing seems to have been used in an interrelated set of Equality Tribunal cases.¹²⁸ The four complainants were members of the Traveller community and were refused entry to seven different licensed premises in the course of one evening. A member of the settled community accompanied them. She had instigated the night out in part with a view to seeing whether Travellers experienced discrimination. The Equality Tribunal noted that she ‘played a significant role in encouraging the complainants to test

¹²⁵ *Coleman* has been applied by adjudicators in several cases including: *A Former Employee v A Financial Services Company*, DEC-E2016-107, WRC, 19.07.2016, <https://www.workplacereleations.ie/en/Cases/2016/July/DEC-E2016-107.html>; *A Worker v Two Respondents*, EDA1129, 22.11.2011, Labour Court, <https://www.workplacereleations.ie/en/Cases/2011/November/EDA1129.html>.

¹²⁶ Section 6(1) EEA; Section 3(1) ESA. Both sections go on to prohibit discrimination by assumption and by association (see Chapter 2.1.3 of this report).

¹²⁷ This issue has yet to be addressed in a court action.

¹²⁸ *Delaney v The Harp Bar*, DEC-S2002-53/56; *Delaney and others v The Kilford Arms*, DEC-S2002-033/036; *Delaney and others v Shems Bar*, DEC-S2002-037/040; *Delaney and others v Biddy Earlys*, DEC-S2002-041/044; *Delaney and others v Quays Bar (River Court Hotel)*, DEC-S2002-045/048; *Delaney and others v Matt the Millars*, DEC-S2002-049/052; *Delaney and others v Paris Texas*, DEC-S2002-057/060.

their rights¹²⁹ but nonetheless upheld the complaint of discrimination. However, it is not known if such evidence would be accepted in the courts.

Situation testing was used in one study commissioned by the Equality Authority in 2009 to investigate discrimination in access to employment on grounds of race or ethnic origin.¹³⁰

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

a) Prohibition and definition of indirect discrimination

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

b) Justification test for indirect discrimination

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

c) Comparison in relation to age discrimination

The justification test is the same.

2.3.1 Statistical evidence

a) Legal framework

In Ireland, there are national rules permitting data collection.

In Ireland, statistical evidence is permitted by national law in order to establish indirect discrimination and design positive action measures on all five grounds: Sections 19(4)(c) and 22(1A) EEA and Section 3(3A) ESA. It is admissible as evidence in court. Statistical data do not appear to be used in any coherent manner to design positive action measures, with the exception of the disability ground in employment¹³¹ and in order to address disadvantage in access to third level education.¹³² According to IHREC the lack of relevant data is an impediment to evidence-based action on equality in the workplace.¹³³

The Data Protection Acts 1988-2003 permit employers, education providers, health authorities and other public bodies to keep records of their workforce in respect of their

¹²⁹ *Delaney and others v Shems Bar*, DEC-S2002-037/040, at 5.4, 31.05.2002, <http://www.lrc.ie/en/Cases/2002/May/DEC-S2002-037-040.html>.

¹³⁰ Equality Authority (2009) *Discrimination in Recruitment: Evidence from a Field Experiment*. Available at: https://www.ihrec.ie/app/uploads/download/pdf/discrimination_in_recruitment.pdf.

¹³¹ Government of Ireland (2015) *Comprehensive Employment Strategy for People with Disabilities 2015-2024*, available at: <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>.

¹³² Higher Education Authority (2015) *National Plan for Equity of Access to Higher Education 2015-2019*, available at: http://hea.ie/assets/uploads/2017/04/national_plan_for_equity_of_access_to_higher_education_2015-2019_single_page_version_01.pdf.

¹³³ <https://www.ihrec.ie/guides-and-tools/human-rights-and-equality-for-employers/building-a-culture-of-human-rights-and-equality-in-the-workplace/>.

ethnic or racial origin, disability, religion or belief or sexual orientation of their workers.¹³⁴ Data relating to these grounds would be classified as sensitive data, and certain criteria apply in the processing of this form of personal data.¹³⁵ The primary purpose of amending the Data Protection Act of 1988 by means of the Data Protection (Amendment) Act 2003 was to give effect to the Provisions of Directive 95/46/EC of the European Parliament and of the Council.¹³⁶ Therefore, European provisions clearly influence the content of the data protection laws. On a national level, there is a periodic census of population whereby data is gathered every five years. The last census took place in 2016. It collected data in respect of nationality, religion, age, marital status and ethnic origin, including membership of the Irish Traveller community. A question on disability was included. While there were no questions that directly address sexual orientation respondents could designate their relationship to other persons in the household as being a same-sex partner. These questions require the individual to self-identify their characteristics. Analyses of that data by the Central Statistics Office will be released over the course of 2017.¹³⁷

b) Practice

In Ireland, statistical evidence in order to establish indirect discrimination is used in practice. There is no reluctance to use statistical data as evidence in court¹³⁸ but there has been a tendency to accept that it is often not necessary to use statistical evidence.

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.¹³⁹ Adjudicators have consistently adopted this approach relying on matters within their specialist expertise to ease the evidential burden associated with indirect discrimination complaints.¹⁴⁰

The Labour Court emphasises that statistics are not decisive in themselves, but one factor that may be taken into account in determining whether a measure is indirectly discriminatory.¹⁴¹

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.¹⁴² The case was taken on the Traveller community ground and the Court made no reference to EU law on the burden of proof. To date the judgment has not impacted on decisions issued by the first instance forum for

¹³⁴ Ireland, Data Protection Act 1988, 13.07.1998; Ireland, Data Protection (Amendment) Act 2003, 10.04.2003. Revised text available at: <http://revisedacts.lawreform.ie/eli/1988/act/25/revised/en/html>.

¹³⁵ Section 2(b) Data Protection Acts 1988-2003.

¹³⁶ Ireland, Data Protection (Amendment) Act 2003, 10.04.2003, <http://www.irishstatutebook.ie/eli/2003/act/6/enacted/en/html>.

¹³⁷ <http://www.cso.ie/en/releasesandpublications/ep/p-cpr/censusofpopulation2016-preliminaryresults/bqn/>.

¹³⁸ The Labour Court has noted that statistics 'are frequently used as an evidential tool in seeking to establish a prima facie case of indirect discrimination': *The Nationalist & Leinster Times Ltd v Ashmore*, EDA133, 21.01.2013, <https://www.workplacerelements.ie/en/Cases/2013/January/EDA133.html>.

¹³⁹ Labour Court, *NBK Designs Ltd. v Inoue* [2003] ELR 98, 25.11.2002, <https://www.workplacerelements.ie/en/Cases/2002/November/EED0212.html>.

¹⁴⁰ E.g. Equality Tribunal, *Mr A v Department of Social Protection*, DEC-S2013-010, 11.10.2013, <https://www.workplacerelements.ie/en/Cases/2013/October/DEC-S2013-010.html>; Workplace Relations Commission, *An Employee v An Employer*, DEC-E2016-080, May 2016, <https://www.workplacerelements.ie/en/Cases/2016/June/DEC-E2016-080.html>.

¹⁴¹ *The Nationalist & Leinster Times Ltd v Ashmore*, EDA133, 21.01.2013, <https://www.workplacerelements.ie/en/Cases/2013/January/EDA133.html>.

¹⁴² Supreme Court, *Stokes v Christian Brothers High School, Clonmel*, [2015] IESC 13, 24.02.2015, <http://www.courts.ie/Judgments.nsf/597645521f07ac9a80256ef30048ca52/a09897a48211897980257df6005a3c31?OpenDocument>.

discrimination complaints.¹⁴³ It remains to be seen whether it will over time. The Equality (Miscellaneous Provisions) Act 2015 effected a slight change to the wording of the national indirect discrimination provisions that may militate against a shift towards 'requiring' statistical evidence.¹⁴⁴ 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.¹⁴⁵

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

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

Section 14(A) EEA prohibits harassment in employment on grounds of gender, age, race, religion, family status, disability, civil status, sexual orientation, and membership of the Traveller community. It is defined as any unwanted conduct related to any discriminatory ground which has the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person.¹⁴⁶ This conduct can include acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material.

An employee in one case was awarded a total of nearly EUR 50 000 for harassment, victimisation and discriminatory dismissal on grounds of sexual orientation.¹⁴⁷ In another case EUR 25 000 was awarded by way of compensation for distress suffered as a result of discrimination and harassment on the race ground.¹⁴⁸

Section 11 ESA prohibits harassment in access to goods and services on grounds of gender, age, race, religion, family status, disability, civil status, sexual orientation, and membership of the Traveller community. It is defined as unwanted conduct related to any discriminatory grounds which has the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person.¹⁴⁹ This conduct can include acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material.

In Ireland, harassment explicitly constitutes a form of discrimination in employment (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

¹⁴³ The primary case in which *Stokes* appeared to affect the evidential burden is discussed in Chapter 3.2.8 - Education.

¹⁴⁴ Ireland, Equality (Miscellaneous Provisions) Act 2015, 10.12.2015, <http://www.irishstatutebook.ie/eli/2015/act/43/enacted/en/print.html>. The 2015 Act effected a number of changes to Irish anti-discrimination law, many of which sought to align national law with the requirements of the EU anti-discrimination directives. It amended the EEA by introducing an objective justification requirement for both mandatory retirement ages and offers of fixed term contracts to persons over the compulsory retirement age (see Chapter 4.7 of this report). The religious ethos exception provided for under Section 37 EEA was altered substantially (see Chapter 4.2 of this report). Individuals may now lodge complaints about discriminatory advertising; formerly such cases could be taken solely by IHREC. Further, a new housing assistance ground was included under the ESA, enabling persons in receipt of various social protection payments to challenge discrimination in the context of accommodation provision.

¹⁴⁵ Section 3(1)(c) ESA; Section 19(4)(a) and Section 22(1)(a) EEA; Section 68 Pensions Act 1990.

¹⁴⁶ Section 14A(7)(a) EEA.

¹⁴⁷ Equality Tribunal, *A Construction Worker v A Construction Company*, DEC-E2008-048, 11.09.2008 <http://www.equalitytribunal.ie/en/Cases/2008/September/DEC-E2008-048-Full-Case-Report.html>.

¹⁴⁸ Equality Tribunal, *Chasi v J & I Security*, DEC-E2011-016, 01.02.2011, <http://www.equalitytribunal.ie/en/Cases/2011/February/DEC-E2011-016-Full-Case-Report.html>.

¹⁴⁹ Section 11 (5)(a) ESA.

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

Section 14A EEA provides:

- '14A(1) For the purposes of this Act, where
- (a) an employee (in this section referred to as "the victim") is harassed or sexually harassed either at a place where the employee is employed (in this section referred to as "the workplace") or otherwise in the course of his or her employment by a person who is
 - (i) employed at that place or by the same employer, (ii) the victim's employer, or
 - (iii) a client, customer, or other business contact of the victim's employer and the circumstances of the harassment are such that the employer ought reasonably to have taken steps to prevent it, or
 - (b) without prejudice to the generality of paragraph (a)
 - (i) such harassment has occurred, and (ii) either
 - (I) the victim is treated differently in the workplace or otherwise in the course of his or her employment by reason of rejecting or accepting the harassment, or
 - (II) it could reasonably be anticipated that he or she would be so treated,the harassment or sexual harassment constitutes discrimination by the victim's employer in relation to the victim's conditions of employment.'

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. In the instant case, such an approach had been adopted, an investigation was undertaken and a disciplinary sanction was imposed.

By contrast, in another 2016 decision the Labour Court found that while the employer had adopted a sexual harassment policy it did not have 'adequate arrangements in place to ensure that the content of, and importance of adherence to, that policy was properly understood by the Managers who were responsible for its implementation.'¹⁵¹

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

¹⁵⁰ *Dublin Bus v McCamley*, EDA 164, 18.02.2016, <https://www.workplacerelements.ie/en/Cases/2016/February/EDA164.html>; See further, S.I. No. 208/2012 - Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2012, <http://www.irishstatutebook.ie/eli/2012/si/208/made/en/print>.

¹⁵¹ *A Store v A Worker*, EDA 163, 28.01.2016, <https://www.workplacerelements.ie/en/Cases/2016/January/EDA163.html>.

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

2.5 Instructions to discriminate (Article 2(4))

a) Prohibition of instructions to discriminate

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

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

In a case the Labour Court held that where a prospective employer is instructed by another not to employ a particular person, and that instruction is tainted with discrimination, liability cannot be avoided by pleading that the instruction was accepted without question. The Court found that under the terms of Section 8 of the Act, which provides that an employer shall not discriminate against an employee or prospective employee and that a provider of agency work shall not discriminate against an agency worker, both the agency and the instructing company could potentially be held liable as 'concurrent wrongdoers'.¹⁵²

Section 14 EEA provides that a person who 'procures or attempts to procure' another person to engage in discrimination or victimisation shall be guilty of an offence. This criminal offence, which would cover at least some forms of instruction, is actionable in the District Court. Proceedings may be instituted by the Workplace Relations Commission or by IHREC.¹⁵³

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

In addition to the procurement offence, the provision on vicarious liability for agents makes it clear that persons cannot discriminate through an intermediary (Section 42(2) ESA). Where a principal directs or instructs an agent to engage in prohibited conduct both parties can be found liable. Although in such cases the instruction must have been carried out.

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.

¹⁵² Labour Court, *A Worker v Two Respondents*, EDA1129, 22.11.2011, <https://www.workplacerelations.ie/en/Cases/2011/November/EDA1129.html>.

¹⁵³ Section 100 EEA. The Supreme Court concluded that the provision in the Employment Equality Bill 1996 was not repugnant to the Constitution. The Court noted that it would have to be proved in the ordinary way that the person in question had an intention to commit the offence: *Article 26 of the Constitution and the Employment Equality Bill 1996, Re* [1997] 2 IR 321 at 369.

Employers and service providers (e.g. landlords, schools, hospitals) are liable for harassment or discrimination, including by instruction, by employees or other persons which is experienced in the workplace, in the course of employment or in the provision of the service (Sections 8, 14 and 15 EEA; Section 42 ESA).

The 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.

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

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

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

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

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

'The employer shall take appropriate measures, where needed in a particular case, to enable a person who has a disability

- (i) to have access to employment,
- (ii) to participate or advance in employment, or
- (iii) to undergo training,

unless the measures would impose a disproportionate burden on the employer.'

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

'(a)...effective and practical measures, where needed in a particular case, to adapt the employer's place of business to the disability concerned,

- (b) without prejudice to the generality of paragraph (a), includes the adaptation of premises and equipment, patterns of working time, distribution of tasks or the provision of training or integration resources, but
- (c) does not include any treatment, facility or thing that the person might ordinarily or reasonably provide for himself or herself.'

Section 16 does not refer to the term 'essential functions' used in Paragraph 17 of the preamble of the Employment Equality Directive. However, in practice courts do incorporate the concept of 'essential functions' into the obligation to reasonably accommodate as confirmed in a 2015 High Court judgment.¹⁵⁴

The requirement to provide reasonable accommodation is a specific cause of action.¹⁵⁵

¹⁵⁴ High Court, *Nano Nagle School v Daly*, [2015] IEHC 785, 11.12.2015, <http://www.courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/86867f31d053511280257f30005c002f?OpenDocument>.

¹⁵⁵ Labour Court, *Wojcik v Sodexo Ireland Ltd*, EDA1517, 23.11.2015, <https://www.workplacelrelations.ie:443/en/Cases/2015/November/EDA1517.html>.

b) Practice

Under Sections 16(3)(b)-(c) EEA the employer must take appropriate measures to enable a person with a disability to have access to employment, participate or advance in employment, or undergo training, unless the measures would impose a disproportionate burden on the employer. In determining whether the measures would impose a disproportionate burden account shall be taken of the financial and other costs entailed, the scale and financial resources of the employer's business, and the possibility of obtaining public funding or other assistance.

Decisions emphasise that the duty is a proactive one, which requires employers to undertake a two-stage inquiry. They must carry out a full assessment of the employee's needs and then consider the measures necessary to accommodate them, which may include relieving an employee of certain tasks.¹⁵⁶ 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 cost of providing a disabled toilet in the store in which the complainant worked was estimated by the respondent as 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'.¹⁵⁷

c) Definition of disability and non-discrimination protection

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

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

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

Section 4 ESA provides:

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

(2) A refusal or failure to provide the special treatment or facilities to which subsection (1) refers shall not be deemed reasonable unless such provision would give rise to a cost, other than a nominal cost, to the provider of the service in question.'

The 'special treatment or facilities' which the goods or service provider must provide are not defined. Owing to a Supreme Court judgment the duty is subject to a nominal cost threshold, which is less onerous than the 'disproportionate burden' standard applicable under the EEA.¹⁵⁸

A service provider must 'do all that is reasonable' in providing treatment or facilities, meaning that it must address a range of options and case law establishes that in order to

¹⁵⁶ See e.g. *An Employee v A Multi-National Retailer*, DEC-E2016-021, 28.01.2016, <https://www.workplacerelations.ie/en/Cases/2016/January/DEC-E2016-021.html>.

¹⁵⁷ Labour Court, *A Multinational Employer v A Worker*, EDA1435, 10.11.2014, <https://www.workplacerelations.ie/en/Cases/2014/November/EDA1435.html>.

¹⁵⁸ *Article 26 of the Constitution and the Employment Equality Bill 1996*, Re [1997] 2 IR 321, 15.05.1997.

comply with its obligations the service provider must engage in a process of consultation with the disabled person. However, the term 'reasonable' also limits the duty, in that a service provider is not expected to undertake very burdensome measures.¹⁵⁹ 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.¹⁶⁰ In that regard, adjudicators tend to adopt a more stringent approach to the duties of public bodies such as housing authorities. *A Complainant v A Local Authority*¹⁶¹ addressed grant aid to fund an extension to a house in order to meet the needs of an autistic boy. The nominal cost defence could not avail the respondent because it provided no evidence as to how much the extension would cost and any such work would only amount to a small proportion of the overall housing budget funded by Government.

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*,¹⁶² concerned the admission of the complainant's child (B) to a crèche. She was informed that a place would not be available unless the boy was accompanied by a full-time personal assistant, a requirement which the respondent maintained was necessary due a combination of factors. The respondent referred to its obligations concerning child-staff ratios under childcare regulations and to the fact that due to a disability B was unable to physically move on his own without assistance. Government funding was available to provide five hours of assistance per week for the child and so the respondent could only accommodate B by employing another childcare worker. The Tribunal accepted that the costs involved went beyond what was required under Section 4. Hiring an additional staff member in a private crèche that catered for some 30 children would have amounted to more than a nominal cost in an organisation of that size. In *Regan v Old Bawn Community School*¹⁶³ the Tribunal found that the provision of sign language interpretation facilities by a community college would also have exceeded the nominal cost ceiling. The respondent claimed that it was instructed by the Department of Education to run all of its part-time adult education programmes on a self-financing basis. For the year 2007/2008 a surplus of EUR 119.39 was generated from the entire adult education programme. Provision of a sign language interpreting service would have cost between EUR 1 300 and EUR 1 700. The equality officer accepted that evidence in finding that the school did not breach Section 4.

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

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

If an employee would be fully competent and capable of undertaking the duties attached to a position on reasonable accommodation, an employer that fails to provide such reasonable accommodation discriminates.¹⁶⁴

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

¹⁵⁹ WRC, *A Service User v A Forum*, DEC-S2016-023, 18.04.2016, <https://www.workplacerelations.ie/en/Cases/2016/April/DEC-S2016-023.html>.

¹⁶⁰ E.g. *A Complainant v Marks and Spencer PLC*, DEC-S2009-005, 22.01.2009, at 5.6, <https://www.workplacerelations.ie/en/Cases/2009/January/DEC-S2009-005-Full-Case-Report.html>.

¹⁶¹ DEC-S2007-049, <https://www.workplacerelations.ie/en/Cases/2007/May/DEC-S2007-049-Full-Case-Report.html>; See also, *Ms D (a tenant) v A Local Authority*, DEC-S2007-057, <https://www.workplacerelations.ie/en/Cases/2007/June/DEC-S2007-057-Full-Case-Report.html>.

¹⁶² Equality Tribunal, *Mrs A (on behalf of her son, B) v A Childcare Facility*, DEC-S2009-041, <https://www.workplacerelations.ie/en/Cases/2009/June/DEC-S2009-041-Full-Case-Report.html>.

¹⁶³ *Regan v Old Bawn Community School*, DEC-S2010-043, <https://www.workplacerelations.ie/en/Cases/2010/August/DEC-S2010-043-Full-Case-Report.html>.

¹⁶⁴ Section 16 (1) and (3) EEA.

The burden of proof is reversed.¹⁶⁵

As regards justification, Section 16(1) EEA offers employers a defence in stating that nothing in the Act requires any person to recruit or promote an individual, retain an individual or provide training or experience if the individual will not undertake the required duties or will not accept the conditions under which those duties are required to be performed, or is not (or no longer) fully competent and available to undertake, and fully capable of undertaking the duties attached to that position. However, EEA Section 16(3)(a) tempers the defence by clarifying that a person who has a disability is fully competent to undertake, and fully capable of undertaking, any duties if the person would be so fully competent and capable on reasonable accommodation being provided by the person's employer.

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

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

However, building on EU law principles, in Ireland case law has established a modest form of reasonable accommodation in practice. This development stems from the principle that direct discrimination may arise from a failure to afford different treatment to persons who are differently situated.¹⁶⁶ To date all cases appear to be on the race ground and concern migrant workers.¹⁶⁷ 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 nationals¹⁶⁸ 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.'¹⁶⁹ In one such decision the Director of the Equality Tribunal described the case law as establishing a 'duty of care to foreign employees.'¹⁷⁰

The duty to modify employment practices is not, however, applicable to all migrant workers. Decisions emphasise that the particular employee/s must essentially be in a 'potentially vulnerable position'.¹⁷¹ 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.¹⁷²

g) Accessibility of services, buildings and infrastructure

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

¹⁶⁵ Equality Tribunal, DEC-E2007-03, *O'Keeffe v Walsh t/a By Pass Stores*, <https://www.workplacereleations.ie/en/Cases/2007/June/DEC-E2007-033-Full-Case-Report.html>.

¹⁶⁶ 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 I-225.

¹⁶⁷ Case law does not distinguish between EU nationals and third country nationals.

¹⁶⁸ Equality Tribunal, *Five Complainants v Hannon's Poultry Export Ltd.*, DEC-E2006-050, <https://www.workplacereleations.ie/en/Cases/2006/October/DEC-E2006-050-Full-Case-Report.html>.

¹⁶⁹ Workplace Relations Commission, *Kostrzewski v C&F Automotive Ltd t/a Iralco*, DEC-E2015-167, at 4.4, <https://www.workplacereleations.ie/en/Cases/2015/December/DEC-E2015-167.html>.

¹⁷⁰ *Mikoliuniene v Halcyon Contract Cleaners Ltd.*, DEC-E2015-036, 26.06.2015, <http://www.lrc.ie/en/Cases/2015/June/DEC-E2015-036.html>.

¹⁷¹ Equality Tribunal, *Francis v Bus Átha Cliath*, DEC-E2006-046, 26.09.2006, at 4.14, <http://www.lrc.ie/en/Cases/2006/September/DEC-E2006-046-Full-Case-Report.html>.

¹⁷² See e.g. *Zaniewsha v Templemichael Enterprises Limited*, DEC-E2011-166, 07.09.2011, <http://www.lrc.ie/en/Cases/2011/September/DEC-E2011-166-Full-Case-Report.html>; *Mikoliuniene v Halcyon Contract Cleaners Ltd.*, DEC-E2015-036, 26.06.2015, <http://www.lrc.ie/en/Cases/2015/June/DEC-E2015-036.html>; *Gegeckiene v Bradbury*, DEC-E-2016-009, 21.01.2016, <http://www.lrc.ie/en/Cases/2016/January/DEC-E2016-009.html>.

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

Part 3 of the Disability Act 2005 sets out the accessibility obligations of public bodies towards people with disabilities.¹⁷³ It does not apply to the private sector.¹⁷⁴ The definition of 'disability' employed is more restrictive than that set out under the ESA and EEA. It refers to 'a substantial reduction in the capacity of the person to carry on a profession, business or occupation in the State or to participate in social or cultural life in the State by reason of an enduring physical, sensory, mental health or intellectual impairment.'¹⁷⁵

Section 26 deals with access to services. It obliges public bodies to integrate, where practical and appropriate, their services for people with disabilities with those provided to other people. Section 27 requires each public body to ensure that the goods or services supplied to it are accessible to people with disabilities unless it would not be practicable or justifiable on cost grounds or would result in an unreasonable delay.¹⁷⁶ The legislation covers a wide range of services and facilities provided by public bodies that are available to the public generally or a particular section of the public. This includes: the use of any place or amenity owned, managed or controlled by a public body; the provision of information or an information resource or a scheme or an allowance or other benefit administered by a public body; any cultural or heritage services provided by such a body; and any service provided by a court or other tribunal. Six government departments are obliged to prepare 'Sectoral Plans' demonstrating how key accessibility issues are to be addressed.¹⁷⁷ Sections 32–40 of the Act supply general guidelines as to the areas that should be dealt with under each plan, specify that an internal complaints system should be established by all six departments, and provide an oversight role for the Ombudsman in relation to implementation of the plans and the related general accessibility measures contained in the remainder of Part 3. Access officers have been appointed in each public body to coordinate these arrangements. In 2006 the National Disability Authority published a *Code of Practice on Accessibility of Public Services and Information Provided by Public Bodies*.¹⁷⁸ The code provides guidance on how public bodies can comply with their statutory duties under the 2005 Act.

Access to the built environment is mainly controlled by Part M of the Building Regulations (2000), entitled 'Access for People with Disabilities'.¹⁷⁹ It does not apply to existing buildings unless they are being altered or refurbished, although under the Disability Act 2005 public areas of public buildings were required to comply with Part M by 2015. The Regulations require all buildings to have wheelchair access and in the event that they trade on more than one floor there must be a wheelchair-accessible lift giving access between the floors. In addition, if stores are providing public toilets they must include at least one wheelchair-accessible toilet. Section 5 of the Building Control Act 2007 effected a modest improvement in providing for a Disability Access Certificate, which requires building control authorities to certify that designs comply with Part M before work commences.

¹⁷³ Ireland, Disability Act 2005, 8.07.2005, <http://www.irishstatutebook.ie/eli/2005/act/14/enacted/en/print.html>.

¹⁷⁴ Under Section 2 of the Disability Act 2005 'public body' includes government departments, local authorities and the Health Service Executive, as well as bodies or organisations (other than the Defence Forces) established by or under any enactment. The last category includes universities and a range of state and semi-state organisations: <http://www.irishstatutebook.ie/eli/2005/act/14/section/2/enacted/en/html#sec2>.

¹⁷⁵ <http://www.irishstatutebook.ie/eli/2005/act/14/section/2/enacted/en/html#sec2>.

¹⁷⁶ <http://www.irishstatutebook.ie/eli/2005/act/14/enacted/en/html> and <http://www.irishstatutebook.ie/2006/en/si/0163.html>.

¹⁷⁷ The six departments are: 1) Communications, Marine and Natural Resources; 2) Enterprise, Trade and Employment; 3) Environment and Local Government; 4) Health and Children; 5) Social and Family Affairs; and 6) Transport. The plans were published in July 2006 and are available for consultation on the website of the National Disability Authority: <http://nda.ie/Disability-overview/Key-Policy-Documents/Sectoral-plans/>.

¹⁷⁸ Available at: <http://nda.ie/Good-practice/Codes-of-Practice/Code-of-Practice-on-Accessibility-of-Public-Services-and-Information-Provided-by-Public-Bodies-/>.

¹⁷⁹ Amended Regulations 2010: <http://www.irishstatutebook.ie/eli/2010/si/513/made/en/print>. Technical Guidance document: <http://www.environ.ie/sites/default/files/migrated-files/en/Publications/DevelopmentandHousing/BuildingStandards/FileDownload,24773,en.pdf>.

Failure to comply with the legislation cannot be relied upon in discrimination cases under the legislation transposing directive 2000/78, the EEA.¹⁸⁰

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

An individual with a disability can make a complaint about any failure by a public body to provide access under Part 3 to an inquiry officer appointed by the body under Section 39. If the complainant is not satisfied with the outcome of their complaint, they can appeal to the Ombudsman as provided under Section 40.¹⁸¹ The Ombudsman has consistently expressed concern about the apparent lack of awareness of the legislation; just five complaints were received in 2016, while four were lodged the previous year.¹⁸²

h) Accessibility of public documents

Section 28 of the Disability Act 2005 deals with the accessibility of information provided by public bodies and their communications systems; again the obligations need only be met where practicable.¹⁸³

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

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

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

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

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

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

¹⁸⁰ It is well established in case law concerning the ESA that the forums for hearing anti-discrimination complaints have no jurisdiction to consider compliance with the Disability Act or other legal measures on accessibility: e.g. *Hennessy v Network Catering/Iarnród Éireann*, DEC-S2009-029, at 4.19-4.21, <https://www.workplacereactions.ie/en/Cases/2009/May/DEC-S2009-029-Full-Case-Report.html>.

¹⁸¹ <https://www.ombudsman.gov.ie/en/About-Us/Legislation/The-Disability-Act/Making-a-complaint-to-the-Ombudsman-under-the-Disability-Act/>.

¹⁸² Office of the Ombudsman (2017) *Annual Report 2016*, available at: https://www.ombudsman.ie/en/Publications/Annual-Reports/2016-Annual-Report/media/ombudsman_annual_report_2016.pdf; Office of the Ombudsman (2016) *Annual Report 2015*, available at: http://www.ombudsman.gov.ie/en/Publications/Annual-Reports/2015-Annual-Report/AnnualReport2015/media/ombudsman_annual_report_2015.pdf.

¹⁸³ <http://www.irishstatutebook.ie/eli/2005/act/14/enacted/en/print#sec28>.

Ombudsman's annual reports suggest there is inadequate awareness of the duty in practice.¹⁸⁴

¹⁸⁴ <http://www.ombudsman.gov.ie/en/Publications/Annual-Reports/>.

3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

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

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

However, although EEA contains no express provision concerning employees who work outside the State, the Labour Court has found that an employee must habitually carry out their work in the jurisdiction to avail of its protection.¹⁸⁵ It is also unclear whether non-EU/EEA nationals working without an employment permit can invoke EEA since their contract of employment will be void by reason of illegality.¹⁸⁶ No such restrictions have been applied in the field of goods and services, which is governed by ESA.

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

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

a) Protection against discrimination

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

ESA and EEA do not specify which persons can avail of protection. However, an Equality Tribunal decision has made it clear that a legal person cannot avail of ESA to claim protection against discrimination.¹⁸⁷ The complainant in the case was an unincorporated body of persons in the form of a choir called 'Gloria (Ireland's Lesbian and Gay Choir)'. It referred a claim of direct discrimination on the sexual orientation ground when the respondent removed the description of Gloria as Ireland's gay and lesbian choir from promotional material for a choral festival. Having considered several provisions in detail and various principles of interpretation, the equality officer concluded:

'Whilst the term 'person' is usually interpreted broadly to include corporate and unincorporated bodies, I am satisfied that a contrary intention is evident from the Equal Status Acts given the manner in which the discriminatory grounds are set out and the particular definition of 'person' as contained in the Acts. I am therefore of the view that the legislative intent in this regard was to protect individuals and not bodies from discrimination.' (5.5)

¹⁸⁵ *A Retail Company v A Worker*, DEE 4/2001, 05.09.2001, <https://www.workplacerelements.ie/en/Cases/2001/September/EED014.html>.

¹⁸⁶ An EEA complaint taken by an undocumented worker was upheld in *A Domestic Worker v An Employer*, DEC-E2011-117, <https://www.workplacerelements.ie/en/Cases/2011/June/DEC-E2011-117-Full-Case-Report.html>. However, subsequently the High Court ruled that non-EU/EEA nationals who do not have an employment permit, contrary to the Employment Permits Act 2003, have no legal standing to rely on employment legislation since their "contract of employment" would be void by reason of illegality: *Hussein v Labour Court* [2012] IEHC 364, <http://www.bailii.org/ie/cases/IEHC/2012/H364.html>. The decision was reversed on appeal on technical grounds. Section 4 of the Employment Permits (Amendment) Act 2014 modified the impact of the High Court judgment somewhat. It permits the Minister for Jobs, Enterprise and Innovation to take a civil claim for compensation against the employer, notwithstanding the illegality of the contract, where it can be proved that the worker took all reasonable steps to comply with the requirement to have an employment permit: <http://www.irishstatutebook.ie/eli/2014/act/26/section/4/enacted/en/html>.

¹⁸⁷ Equality Tribunal, *Gloria (Ireland's Lesbian & Gay Choir) v Cork International Choral Festival Ltd.*, DEC-S2008-078, 28.10.2008, <http://www.lrc.ie/en/Cases/2008/October/DEC-S2008-078-Full-Case-Report.html>.

He reasoned that a body could not be of a particular gender, marital status, sexual orientation, religion and so on. In the context of identifying potential *respondents* under the Act 'person' is defined in Section 2(1) as including 'an organisation, public body or other entity'. The Tribunal concluded that the Oireachtas (Parliament) thus intended that the wider definition of person should not apply to complainants. The net effect of the decision is that only natural persons can act as complainants under the ESA. The same principles should apply to the EEA since the discriminatory grounds are set out in the same manner under both laws. Members of an association could pursue a complaint under EEA or ESA but it appears they would have to establish that they were discriminated against as individuals.¹⁸⁸

b) Liability for discrimination

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

Section 8(1) EEA prohibits discrimination both by employers and employment agencies, i.e. it includes legal persons. Most of the prohibitions contained within the legislation are aimed at the employer¹⁸⁹ and no clear provision is made to enable actions against the person(s) who actually discriminated, subject to a couple of exceptions: Section 14 imposes liability on the person responsible for procuring or attempting to procure discrimination, and Section 10 imposes liability on the person who displays or publishes discriminatory advertising.

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

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

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

a) Protection against discrimination

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

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

This is subject to exceptions: access to employment in another person's home for the provision of personal services where the services affect private or family life;¹⁹⁰ employment in schools or hospitals with a religious ethos;¹⁹¹ employment in Defence Forces, Garda Síochána (police force), or prison service (in relation to discrimination on the age or disability grounds).¹⁹² The exception concerning employment in a person's home appears to go beyond the provisions of the equality directives.

¹⁸⁸ Under Irish law the general position is that an unincorporated association lacks a legal personality and so cannot be the subject of legal proceedings. Such bodies may, however, be conferred with the capacity to sue and be sued by legislation: *Sandymount and Merrion Residents Association v An Bord Pleanála* [2013] IESC 51, 27.11.2013, <http://www.courts.ie/Judgments.nsf/0/E57D6CA0F350359280257C31004816EF>. In that case the Supreme Court held that Section 50(A) of the Planning and Development Act 2000 conferred legal standing on unincorporated bodies to bring judicial review proceedings.

¹⁸⁹ Section 15 EEA imposes vicarious liability on employers and principals for the acts of their employees and agents.

¹⁹⁰ Section 2 EEA.

¹⁹¹ Section 37(1) EEA. See further Chapter 4.2.

¹⁹² Section 37(5) EEA.

b) Liability for discrimination

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

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

3.2 Material scope

3.2.1 Employment, self-employment and occupation

In Ireland, national legislation applies to all sectors of private and public employment, self-employment and occupation, including contract work, self-employment, military service, and holding statutory office, for the five grounds (Sections 2(1), 2(3) and 8 EEA).

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

In Ireland, national legislation prohibits discrimination in the following areas: conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy for the five grounds in both private and public sectors as described in the directives (Section 8 EEA).

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

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

In Ireland, national legislation prohibits discrimination in the following areas: working conditions including pay and dismissals,¹⁹³ for all five grounds and for both private and public employment (Sections 2(1), 7, 8, 29 EEA).

Section 35 EEA is a cause of concern as it permits employers to pay employees with disabilities different rates of pay if they are restricted in their capacity to do the same amount of work, or the same hours as a person who does not have a disability. This section contains only one limitation, which is that the employee should not be remunerated at a rate below the level required by the National Minimum Wage Act 2000.¹⁹⁴ 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.

¹⁹³ Employees who are dismissed for putative discriminatory reasons may opt instead to pursue an unfair dismissals complaint under the Unfair Dismissals Acts 1997-2015: Ireland, Unfair Dismissals Act 1997, 6.04.1977; Ireland, Unfair Dismissals (Amendment) Act 1993, 14.07.1993. Revised text available at: <http://revisedacts.lawreform.ie/eli/1977/act/10/revised/en/html>. Under Section 6(2) of that legislation 'the dismissal of an employee shall be deemed...to be an unfair dismissal if it results wholly or mainly from one or more of the following: [...] (b) the religious or political opinions of the employee... (e) the race, colour or sexual orientation of the employee, (ee) the age of the employee, (eee) the employee's membership of the travelling community'.

¹⁹⁴ Ireland, National Minimum Wage Act 2000, 31.03.2000, <http://www.irishstatutebook.ie/eli/2000/act/5/enacted/en/html>.

3.2.3.1 Occupational pensions constituting part of pay

In Ireland, Part VII of the Pensions Acts 1990-2015 implements the principle of equal treatment with respect to occupational pensions.¹⁹⁵ The definition of remuneration in Section 2(1) EEA specifically excludes pension rights, meaning a pension or any other benefits flowing from an occupational pension scheme, from its ambit.

The Pensions Acts cover the same nine grounds as the EEA: race, religious belief, gender, age, sexual orientation, civil status, family status, disability and membership of the Traveller community. It prohibits direct and indirect discrimination, discriminatory instructions and procurement to discriminate, as well as victimisation, in respect of occupational benefit schemes, occupational benefits and occupational pensions. Key exceptions include those that provide for different treatment on the disability ground to take account of a lesser amount of work undertaken by virtue of a disability and to provide for more favourable treatment where early retirement arises from a disability.¹⁹⁶

Most of the reported cases to date concern the gender and civil status grounds, but in one case a complainant who had been denied admittance to an occupational pension scheme succeeded in his claim of discrimination on grounds of race, and the company was ordered to register him in the scheme and to pay the contributions due.¹⁹⁷ A discrimination complaint on the age, civil status and sexual orientation grounds did not succeed before the Tribunal and was the subject of a reference to the CJEU.¹⁹⁸ It is discussed in Chapter 12.2 of this report.

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

In Ireland, national legislation applies to vocational training outside the employment relationship, such as adult lifelong learning courses or vocational training provided by technical schools or universities. Discrimination in these areas is prohibited under nine grounds: age, civil status, disability, family status, gender, race, religious belief, sexual orientation, and membership of the Traveller community.

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

This provision is further reinforced by Section 12, which prohibits discrimination in vocational training on the nine discriminatory grounds. It is not permissible to discriminate in the provision of vocational training in relation to the terms on which the course or facility is offered, by refusing or omitting to afford access to any such course or facility, or in the manner in which any such course or facility is provided.¹⁹⁹

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

¹⁹⁵ Inserted by section 22 of the Social Welfare (Miscellaneous Provisions) Act 2004, 25.03.2004, <http://www.irishstatutebook.ie/eli/2004/act/9/section/22/enacted/en/html#sec22>.

¹⁹⁶ Section 73, Pensions Acts 1990-2015.

¹⁹⁷ Equality Tribunal, DEC-P2011-007, *Czyzycki v Fegan*, <https://www.workplacerelations.ie/en/Cases/2011/December/DEC-P2011-007-Full-Case-Report.html>.

¹⁹⁸ Equality Tribunal, *Parris v Trinity College Dublin and others*, DEC-P2013-004, 16.12.2013, <https://www.workplacerelations.ie/en/Cases/2013/December/DEC-P2013-004.html>; *Parris v Trinity College Dublin and others*, [2016] EUECJ C-443/15, 24.12.2016, at 80, <http://www.bailii.org/eu/cases/EUECJ/2016/C44315.html>.

¹⁹⁹ Section 12(1) EEA.

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

This definition ensures that where a course is one that is exclusively concerned with training for an occupational activity it is covered by the Act.²⁰⁰ According to the Labour Court²⁰¹ 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*²⁰² and Case C-24/86, *Blaizot v University of Liege*.²⁰³ 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 2000-2015.²⁰⁴ Cumulatively the provisions of both Acts cover the vocational programmes and work experience referred to under Article 3(1)(b). However, the narrow definition of vocational training under the EEA may give rise to a compliance issue since the duty to provide reasonable accommodation on the disability ground under the ESA is less extensive than that required under Directive 2000/78.

An exception concerning the religion ground may raise compliance issues. Subsections 3-5 of Section 12 empower the relevant Minister, with the consent of the Minister for Justice and Equality, to make an order reserving places on programmes of training for nurses and primary school teachers to persons of a certain religion. The exemption may be applied for by an educational or training body '[f]or the purposes of ensuring the availability of nurses to hospitals and teachers to primary schools which are under the direction or control of a body established for religious purposes or whose objectives include the provision of services in an environment which promotes certain religious values, and in order to maintain the religious ethos of the hospitals or primary schools.'²⁰⁵ Pursuant to that section, the Employment Equality Act 1998 (section 12) (Church of Ireland College of Education) Order 2013 (S.I. No. 288 of 2013) reserves 32 places in the College of Education for students who are members of the Church of Ireland or who belong to the broad Protestant tradition.²⁰⁶ This provision may be too broad to comply with the terms of Article 4(2) since there is no requirement to demonstrate that the group of prospective teachers' religious beliefs constitute a genuine, legitimate and justified occupational requirement.

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

In Ireland, national legislation prohibits discrimination in the following areas: membership of, and involvement in workers or employers' organisations as formulated in the directives

²⁰⁰ Training to become a member of the volunteer Garda Reserve was not covered by Section 12 EEA since the Garda Reserve is not an occupational activity: High Court, *An Garda Síochána v Oberoi* [2013] IEHC 267, <http://www.courts.ie/Judgments.nsf/0/53FE83D658C8C00480257B9600322FCD>; A Masters in Social Science degree programme that comprised 50 % academic and 50 % practical work was not vocational training according to the Equality Tribunal 'as it was not exclusively concerned with perfecting the knowledge or technical capacity to carry out an occupational activity': *Kelly v University College Dublin*, DEC-S2006-076, <https://www.workplacerelations.ie/en/Cases/2006/November/DEC-S2006-076-Full-Case-Report.html>.

²⁰¹ *Dublin Institute of Technology v Awojuola*, EDA 1335, 23.12.2013, <https://www.workplacerelations.ie/en/Cases/2013/December/EDA1335.html>.

²⁰² [1985] E.C.R. 593.

²⁰³ [1988] E.C.R. 379.

²⁰⁴ Section 7 ESA. See Chapter 3.2.8 for more on this provision.

²⁰⁵ Section 12(4) EEA.

²⁰⁶ <http://www.irishstatutebook.ie/eli/2013/si/288/made/en/print?q=college+of+education>; see further, O'Kelly, E. (2016) 'Religion, nursing and teacher training - what's the connection?', *RTÉ News*, 24.08.2016, <https://www.rte.ie/news/2016/0822/811138-nursing-teacher-training/>.

for all five grounds and for both private and public employment. This covers trade unions and employers' organisations.

Section 13(1) EEA prohibits discrimination on all five grounds in relation to a body that controls entry to or the carrying on of a profession, vocation or occupation.

This provision relates both to membership of the body in question as well as to any benefits provided by that body, with the exception of pension rights, which fall instead under the ambit of Part VII of the Pensions Acts 1990-2015. Section 13(2) outlaws discriminatory advertising by such bodies. Section 13A prohibits discrimination in respect of business partnerships.

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

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

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

Under Section 5(1) ESA: 'A person shall not discriminate in disposing of goods to the public generally or a section of the public or in providing a service, whether the disposal or provision is for consideration or otherwise and whether the service provided can be availed of only by a section of the public.' 'Service' means a service or facility of any nature which is available to the public generally or a section of the public (Section 2(1)). The legislation does not refer specifically to social protection, healthcare or social security. However, the first instance forum, the Equality Tribunal (now the Workplace Relations Commission) has interpreted the definition of 'service' to include social protection from the outset.²⁰⁷ For example, cases have upheld discrimination in relation to social welfare payments such as rent supplement²⁰⁸ and established that allowances for people with disabilities are 'services'.²⁰⁹ Healthcare is also covered.²¹⁰

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

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

²⁰⁷ The foundational case is: Equality Tribunal, *Donovan v Donnellan* DEC-S2001-011, 17.10.2001 <http://www.equalitytribunal.ie/en/Cases/2001/October/DEC-S2001-011.html>; Applied in e.g. *McQuaid v Department of Social Protection*, DEC-S2014-015, 02.10.2014, <https://www.workplacerelements.ie/en/Cases/2014/October/DEC-S2014-015.html>.

²⁰⁸ Equality Tribunal, *Mr A v Department of Social Protection*, DEC-S2013-010, 11.10.2013, <https://www.workplacerelements.ie/en/Cases/2013/October/DEC-S2013-010.html>.

²⁰⁹ *Mrs X (on behalf of her daughter, Ms Y) v The Minister for Social and Family Affairs*, DEC-S2009-039, 10.06.2009, at 5.1-5.2, <https://www.workplacerelements.ie/en/Cases/2009/June/DEC-S2009-039-Full-Case-Report.html>.

²¹⁰ A person detained in a mental health institution can avail of the ESA to contest the nature of the facilities provided there: *A Patient v Health Service Provider and A Hospital*, DEC-S2010-053, 01.12.2010, <https://www.workplacerelements.ie/en/Cases/2010/December/DEC-S2010-053-Full-Case-Report.html>.

The word 'enactment' is not defined in the ESA. It covers Acts of the Oireachtas and statutory instruments,²¹¹ but not government Department circulars and other administrative rules.²¹² Where some element of discretion exists in relation to the grant of a benefit, other good or service the statutory exemption is inapplicable since it relates only to discriminatory treatment *required* by law.²¹³ However, where the putative discriminatory treatment is required by law Section 14(1)(a) operates to remove the measure from the ambit of the ESA. Several challenges to social protection provisions have failed on that basis.²¹⁴ In 2016, for example, the WRC determined that it did not have jurisdiction to assess a discrimination complaint about eligibility for a medical card because the criteria are set out in legislation.²¹⁵

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

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

3.2.6.1 Article 3.3 exception (Directive 2000/78)

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

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

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

The term 'social advantage' is not expressly referred to under ESA. Section 2(1) defines 'service' as including 'facilities for — (i) banking, insurance, grants, loans, credit or financing, (ii) entertainment, recreation or refreshment, (iii) cultural activities, or (iv) transport or travel...'. Case law establishes that 'service' encompasses a broad category of benefits provided by public and private actors such as free travel passes on public

²¹¹ Secondary legislation is covered by the term 'enactment' in Section 14(1)(a)(i). Following the entry into force of the Equal Status Act 2000 Section 2(1) of the Interpretation Act 2005 defined 'enactment' to mean 'an Act or statutory instrument or any portion of an Act or statutory instrument'. The Interpretation Act was applied by the Equality Tribunal in finding that tax regulations were enactments and so immune from challenge under the ESA: *Dowd v Minister for Finance*, DEC-S2011-061, <https://www.workplacerelements.ie/en/Cases/2011/December/DEC-S2011-061-Full-Case-Report.html>.

²¹² See, for example, *Health Service Executive v Quigley* (Circuit Court Dublin, Linnane J., unreported, 26.04.2010).

²¹³ Equality Tribunal, *Mr A v Department of Social Protection*, DEC-S2013-010, 11.10.2013, <https://www.workplacerelements.ie/en/Cases/2013/October/DEC-S2013-010.html>.

²¹⁴ In *A Complainant v Department of Social and Family Affairs*, DEC-S2008-013, 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. The scheme in question is governed by statute: Section 108 of the Social Welfare Consolidation Act 2005 (as amended by Section 8 of the Social Welfare Law Reform and Pensions Act 2006). See also *A Complainant v Department of Social Protection*, DEC-S2011-053.

²¹⁵ *Donaghy v Department of Health*, DEC-S2016-024, 19.04.2016, <https://www.workplacerelements.ie/en/Cases/2016/April/DEC-S2016-024.html>.

transport,²¹⁶ maintenance grants for third level students,²¹⁷ and sports scholarships.²¹⁸ 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.²¹⁹ 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"'.²²⁰

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

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

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

Section 7 ESA covers educational establishments. 'Educational establishment' is broadly defined covering pre-school services through to higher-level institutions, whether or not they are supported by public funds. Public and private establishments providing educational services are therefore covered. Discrimination on nine grounds is prohibited in respect of: admission to the terms or conditions of admission of a person as a student to the establishment; the access of a student to any course, facility or benefit provided by the establishment; any other term or condition of participation in the establishment by a student, or the expulsion of a student from the establishment or any other sanction against the student. The grounds covered are gender, age, race, religion, family status, disability, civil status, sexual orientation, and membership of the Traveller Community.²²¹

Section 7 only refers to students or prospective students. But other people, such as parents of pupils, can refer cases against schools or other educational establishments under Section 5 (provided they are accessing a service, good or facility).²²² The Department of Education and Skills is not an 'educational establishment' but may be regarded as providing goods and services under Section 5, as may other entities involved in providing facilities or setting policies in the area of education.²²³

Case law has dealt with the accommodation of disabled students and broader questions of access across all levels of the education system.²²⁴ In a 2015 race ground case a school admissions policy contravened the indirect discrimination prohibition since the priority accorded prospective students based on date of application put foreign adopted children

²¹⁶ Equality Tribunal, *Thompson v Iarnród Éireann*, DEC-S2009-015, 02.03.2009, <https://www.workplacerelations.ie/en/Cases/2009/March/DEC-S2009-015-Full-Case-Report.html>.

²¹⁷ Equality Tribunal, *Two Complainants v Department of Education and Science*, DEC-S2003-042/043, 28.05.2003, <https://www.workplacerelations.ie/en/Cases/2003/May/DEC-S2003-042-043-Full-Case-Report.html>.

²¹⁸ Equality Tribunal, *MacMahon v Department of Physical Education and Sport, University College Cork*, DEC-S2009-014, 02.03.2009, <https://www.workplacerelations.ie/en/Cases/2009/March/DEC-S2009-014-Full-Case-Report.html>.

²¹⁹ Circuit Court, *Pobal v Hoey*, unreported judgment, 14.04.2011.

²²⁰ Fennelly, D. (2012) *Selected Issues in Irish Equality Case Law 2008 – 2011*, at p.91, available at: <https://www.ihrec.ie/download/pdf/20150602161702.pdf>.

²²¹ Section 29 of the Education Act 1998 provides for a general complaints mechanism in relation to enrolment, suspension or exclusion of students from schools: Ireland, Education Act 1998, 23.12.1998, <http://www.irishstatutebook.ie/eli/1998/act/51/section/29/enacted/en/html>.

²²² See, for example, *A Separated Father v A Community School*, DEC-S2010-049: access to students' records was a service provided to parents having regard to both the ESA and the Education Act 1998.

²²³ For example, *Two Named Complainants v Minister for Education and Science*, DEC-S2006-077 and *Lyamina v The Department of Education and Science*, DEC-S2009-016.

²²⁴ See, for example, *Mr X and Ms Y (on behalf of their daughter Z) v A Boys National School*, DEC-S2009-017 (gender ground); *Mrs A (on behalf of her son, B) v A Childcare Facility*, DEC-S2009-041 (disability ground); *Faulkner v St Ita's & St Joseph's School, Tralee*, DEC-S2006-037 (Traveller community ground); and *Lyamina v The Department of Education and Science*, DEC-S2009-016 (race ground).

at a particular disadvantage compared with Irish born children in the custody of their parents.²²⁵

The primary compliance issue concerns access to schools. In a high-profile case, the Supreme Court overturned an earlier decision of the Equality Tribunal and ruled that a school admission policy that prioritised former pupils' children did not constitute indirect discrimination against Travellers.²²⁶ It determined that the evidence presented by the complainant did not demonstrate that the school's policy placed Travellers in a situation of particular disadvantage. In effect the Court held that statistical evidence was *required* to establish a prima facie case; it did not consider EU law in assessing the ESA prohibition on indirect discrimination. In its amicus curiae submission the Equality Authority argued that the indirect discrimination test should conform to that of the Racial Equality Directive.²²⁷ The Supreme Court, however, applied a test formulated with reference to the provisions of the domestic statute (ESA) and did not consider whether Travellers constitute an ethnic group for the purposes of EU law.

School admissions criteria are also liable to place migrant children at a particular disadvantage given that many of them will have not been resident in the country for equivalent periods of time to their Irish national counterparts. For instance, preferences for applicants with parents or other relatives who attended the school (as in *Stokes*) or a requirement that one has been resident in the local area for a certain period²²⁸ could have an exclusionary effect on migrants.

The Equality Tribunal applied the *Stokes* judgment in a 2015 case, which challenged a criterion that allocated school places according to the date of application from those living in the school's catchment area.²²⁹ The complainant, a British national who had migrated to Ireland in 2002, claimed that the provision was indirectly discriminatory on the race ground. He maintained that the school's policy was intrinsically liable to disadvantage the children of migrants, since they would move into the catchment area of the school at a later date than indigenous children. The Director of the Equality Tribunal noted that the absence of statistical evidence was 'not necessarily fatal' to the complainant's case, which appears to be a less stringent evidential burden than that applied in *Stokes*. Nevertheless, the Tribunal was 'unwilling, in the absence of hard evidence on the demographics of the catchment and movements into it in the relevant time period, to assume that non-Irish children are put at a particular disadvantage.' The decision illustrates the significant obstacles to be overcome by complainants in some indirect discrimination cases and the need for greater access to equality data.

A religious ethos exception also raises compliance concerns. Denominational schools are permitted to distinguish between prospective students on the basis of their religious background. They are also entitled to refuse admission to a child who is not of that denomination where it is essential to maintain the ethos of the school.²³⁰ Religion and

²²⁵ *Ms. A (on behalf of her daughter, B) v A Girls Secondary School*, DEC-S2015-001, 06.02.2015, <https://www.workplacerelations.ie/en/Cases/2015/February/DEC-S2015-001.html>.

²²⁶ Supreme Court, *Stokes v Christian Brothers' High School Clonmel*, [2015] IESC 13, 24.02.2015, <http://www.courts.ie/Judgments.nsf/597645521f07ac9a80256ef30048ca52/a09897a48211897980257df6005a3c31?OpenDocument>.

²²⁷ https://www.ihrec.ie/download/pdf/mary_stokes_v_christian_brothers_high_school_clonmel_ors_13_dec_2012.pdf.

²²⁸ Data suggests that migrant children are adversely affected by criteria that favour settlement in the area Darmody, M., McGinnity, F. and Kingston, G. (2016) 'The Experiences of Migrant Children in Ireland' in Williams, J., Nixon, E., Smyth, E. and Watson, D. (eds.), *Cherishing All the Children Equally? Children in Ireland 100 Years on from the Easter Rising*, pp. 175-193, at p. 181, Available at: <https://www.esri.ie/pubs/CB201609.pdf>.

²²⁹ *A Father on behalf of his son v A second level school*, DEC-S2015-008, 26.06.2015, <https://www.workplacerelations.ie/en/Cases/2015/June/DEC-S2015-008.html>.

²³⁰ Section 7(3)(c) ESA. This position is reinforced by Section 15(2)(b) of the Education Act 1998 which requires the school management board to uphold the 'characteristic spirit' of the school as established by its 'cultural educational, moral, religious, social, linguistic and spiritual values and traditions'. Boards must also

ethnicity are closely intertwined for some groups such as Sikhs and Jews. And so a decision to refuse admission to, for example, a Jewish child could amount to direct discrimination on both the race and religion grounds. With respect to migrants the provision could give rise to indirect discrimination on the race ground. The 2011 Census found that 89.8% of Irish nationals were Roman Catholics compared with 52% of nationals of all other countries resident in Ireland.²³¹ The exemption was the subject of extensive media commentary in August and September of 2007, when a large number of migrant children could not secure primary school places in Balbriggan, Co. Dublin. An 'emergency school' was opened by Educate Together, a non-denominational education provider, to accommodate the children who could not access any local Catholic schools as they did not possess the required Catholic baptismal certificate.²³²

Several international human rights bodies have called on the Government to revise the legislative exception, especially in light of the dominance of Catholic schools in education provision at primary level.²³³ In July 2016 the Education (Admission to Schools) Bill 2016 was published.²³⁴ According to IHREC the Bill doesn't adequately address the religious ethos exception in light of inter alia the Racial Equality Directive.²³⁵ A Government consultation process on those elements of the draft legislation is currently underway.²³⁶

The Directive does not cover difference of treatment based on nationality (Article 3(2)). ESA provides for such difference in treatment in the education field as between EU citizens, Swiss or EEA nationals, and nationals of other countries. Different treatment is permissible with respect to fees or allocation of places for vocational or training courses, adult, continuing or further education or attendance at a university or other third-level institution (Section 12(7) EEA; Section 7(3)(d) ESA). Section 7(5)(b) ESA further allows different treatment on the basis of nationality in the provision of educational grants. The latter exception was introduced in 2004 overturning an Equality Tribunal finding that confining eligibility for grants to EU nationals would amount to unlawful discrimination.²³⁷ The Irish Human Rights Commission objected to the change arguing that it would be likely to have a 'serious detrimental effect' on access to education, which in turn would impact on employment prospects and wider economic, social and cultural rights.²³⁸ While these exceptions constitute barriers for migrants seeking access to education they would appear to comply with the Racial Equality Directive.

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

²³¹ <http://www.cso.ie/en/census/census2011reports/census2011profile6migrationanddiversity-aprofileofdiversityinireland/>.

²³² Boland, R. (2007) 'Faith before Fairness' *Irish Times*. 08.09.2007, <http://www.irishtimes.com/news/faith-before-fairness-1.960595>; Irish Times (2007) 'Catholic schools say enrolment policy not illegal', *Irish Times*, 28.09.2007, <http://www.irishtimes.com/news/catholic-schools-say-enrolment-policy-not-illegal-1.967071>.

²³³ See e.g. UN Committee on the Rights of the Child (2016) *Concluding observations on the combined third and fourth periodic reports of Ireland*, at 64(a), 29.01.2016, CRC/C/IRL/CO/3-4, available at: <http://www.refworld.org/docid/56c17f574.html>; UN Committee on Elimination of Racial Discrimination (2011) *Concluding observation of the Committee on the Elimination of Racial Discrimination: Ireland*, CERD/C/IRL/CO/3-4, at 26, available at: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhs!%2fyrM1B9TT0oGmEKq0FjIGMDN9GaDxXiccJrXyrYl%2f%2fcNov7wnHIB0L7jDoxEBOXhj6wo%2f5mWhBPqF7MFyODF2Qj0zqpRtrVm9esS4KT3%2ft>.

²³⁴ <https://www.oireachtas.ie/viewdoc.asp?DocID=33318&&CatID=59>.

²³⁵ Irish Human Rights and Equality Commission (2016) *Observations on the Education (Admission to Schools) Bill 2016*, at p.5, available at <https://www.ihrec.ie/app/uploads/2016/11/Observations-on-Education-Admission-to-Schools-Bill-2016.pdf>.

²³⁶ <http://www.education.ie/en/Parents/Information/School-Enrolment/Role-of-Religion-in-School-Admissions.html>.

²³⁷ Equality Tribunal, *Two Complainants v Department of Education and Science*, DEC-S2003-042/043, 28.05.2003, https://www.workplacerelations.ie/en/Cases/2003/May/DEC-S2003-042-043_Full_Case_Report.html.

²³⁸ Irish Human Rights Commission (2004) *Observations on the Equality Bill*, Dublin, IHRC, pp.8-9, available at: <https://www.ihrec.ie/documents/observations-on-the-equality-bill-2004/>.

The *Intercultural Education Strategy 2010 – 2015* is the primary policy that aims to address discrimination against migrants in the education system (see further Chapter 3.2.8.b). It was developed by the Department of Education and Skills and the Office of the Minister for Integration, aiming to ensure that:

- all students experience an education that 'respects the diversity of values, belief, languages and traditions in Irish society and is conducted in a spirit of partnership';
- all education providers are assisted with ensuring that inclusion and integration within an intercultural learning environment.²³⁹

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

a) Pupils with disabilities

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

The legislative approach favours inclusive education, that is, education within an inclusive environment with children who do not have special educational needs.²⁴⁰ The National Council for Special Education (NCSE) was established in 2003 to improve the delivery of education services to persons with special educational needs arising from disabilities with particular emphasis on children.²⁴¹ However, insufficient national funding is allocated to provide the necessary support/accommodations to enable disabled children to participate in mainstream education. This is exemplified by the fact that the Education for Persons with Special Educational Needs Act 2004 has not yet been fully commenced. Further, according to the NCSE, the method used to allocate teaching resources since it is contingent on a medical diagnosis results in delays and disadvantages pupils who cannot afford to have their needs assessed. It has welcomed reforms to the system to be implemented in 2017.²⁴² International human rights bodies have raised concerns about the inadequacy of educational supports, an incoherent approach to reasonable accommodation for state examinations, and the over-concentration of pupils with disabilities in schools that are designated as disadvantaged.²⁴³

b) Trends and patterns regarding Roma pupils

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

²³⁹ Department of Education and Skills and Office of the Minister for Integration (2010) *Intercultural Education Strategy, 2010–2015*, available at: https://www.education.ie/en/Schools-Colleges/Information/Intercultural-Education-Strategy/mig_intercultural_education_strategy.pdf.

²⁴⁰ Section 2 of the Education for Persons with Special Educational Needs Act 2004 establishes in law the principle of inclusive education for students with special educational needs: Ireland, Education for Persons with Special Educational Needs Act 2004, 19.07.2004, <http://www.irishstatutebook.ie/eli/2004/act/30/enacted/en/html>.

²⁴¹ See generally: <http://ncse.ie/>.

²⁴² National Council for Special Education (2017) 'NCSE welcomes a better and more equitable way of allocating teaching resources for special needs', 18.01.2017, available at: <http://ncse.ie/wp-content/uploads/2017/01/NCSE-Press-Release-18th-January-2017final-for-web.pdf>.

²⁴³ UN Committee on the Rights of the Child (2016) *Concluding observations on the combined third and fourth periodic reports of Ireland*, at 48, 29.01.2016, CRC/C/IRL/CO/3-4, available at: <http://www.refworld.org/docid/56c17f574.html>; UN Committee on Economic, Social and Cultural Rights (2015) *Concluding observations on the third periodic report of Ireland* E/C.12/IRL/CO/3, 08.07.2015, at 31-32, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/150/67/PDF/G1515067.pdf?OpenElement>.

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*.²⁴⁴

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.²⁴⁵ Researchers have criticised the failure to address racism in school curricula more generally.²⁴⁶ 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.'²⁴⁷ National data suggests that migrant and Traveller children are more likely to experience bullying in school.²⁴⁸ Anti-bullying procedures were published in 2013, which include a template for schools to record incidents.²⁴⁹ '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.'²⁵⁰

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

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

Section 5(1) ESA provides:

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

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

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

In *Two Complainants v. Department of Education and Science*²⁵¹ the Equality Officer considered what was covered by the definition of service provision. This related to the provision of maintenance grants payable to adults on further education courses. The then

²⁴⁴ Department of Education and Skills and Office of the Minister for Integration (2010) *Intercultural Education Strategy, 2010–2015*, available at: https://www.education.ie/en/Schools-Colleges/Information/Intercultural-Education-Strategy/miq_intercultural_education_strategy.pdf.

²⁴⁵ Pavee Point Traveller and Roma Centre (2015) *Convention on the Rights of the Child Shadow Report*, available at: <http://www.paveepoint.ie/convention-on-the-rights-of-the-child-shadow-report/>.

²⁴⁶ See e.g. Bryan, A. (2012) 'You've got to teach people that racism is wrong and then they won't be racist': Curricular representations and young people's understandings of 'race' and racism', *Journal of Curriculum Studies*, 44(5), 599-629, available at: http://doras.dcu.ie/21468/1/10_SCAN.pdf; Kitching, K., and Curtin, A. (2012) *Addressing the concept and evidence of institutional racism in Irish education*. Cork, School of Education, University College Cork; Institute for Social Sciences in the 21st Century, available at: <https://cora.ucc.ie/handle/10468/816>.

²⁴⁷ Tormey, R., and Gleeson, J. (2012) 'Irish post-primary students' attitudes towards ethnic minorities' *Irish Educational Studies*, 31(2), 157-173, at 170.

²⁴⁸ Department of Children and Youth Affairs (2012) *State of the Nation's Children: Ireland 2012*. Dublin: Government Publications, available at: <http://www.dcy.gov.ie/documents/research/StateoftheNationsChildren2012.pdf>.

²⁴⁹ See further: <http://www.education.ie/en/Schools-Colleges/Information/Bullying/Anti-Bullying-Procedures-in-Schools.html>.

²⁵⁰ Pavee Point Traveller and Roma Centre (2015) *Convention on the Rights of the Child Shadow Report*, at p.19, available at: <http://www.paveepoint.ie/convention-on-the-rights-of-the-child-shadow-report/>.

²⁵¹ Equality Tribunal, DEC-S2003-042/043, 28.05.2003, http://www.equalitytribunal.ie/en/Cases/2003/May/DEC-S2003-042-043_Full_Case_Report.html.

non-statutory rules provided that these grants were only available to EU nationals or persons with official refugee status. The Department had refused the complainants' applications for the grants. The question before the Tribunal was whether a maintenance grant was covered by the Act. Section 2(1) of the Act defines a service as 'a service or facility of any nature which is available to the public generally or a section of the public.' The Equality Officer held that a maintenance grant was a 'facility' covered by the Act.

3.2.9.1 Distinction between goods and services available publicly or privately

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

However, distinct provisions govern registered clubs, which are bodies that have applied for or hold a certificate of registration under the Registration of Clubs Acts 1904–1999.²⁵² Registration enables clubs to sell alcohol to members and certain visitors. Clubs that do not hold a liquor licence are governed instead by the general prohibition on discrimination set out under Section 5 ESA. Sections 8 to 10 ESA apply exclusively to registered clubs. The provisions only relate to matters concerning membership of clubs and cases must be taken before the District Court. Clubs which have the principal purpose of catering for the needs of persons who are members of the Traveller community or people of a particular gender, sexual orientation, religious belief (or persons of no religious belief), family status, civil status, age, disability, or nationality or ethnic or national origin can restrict membership to people from those groups (Section 9). The 'race' and 'colour' aspects of the race ground are not exempt. Further, the Traveller community exception is asymmetrical. It remains to be seen whether these provisions comply with the Racial Equality Directive. Recital 17 envisages the establishment of 'organisations of persons of a particular racial or ethnic origin where their main object is the promotion of the special needs of those persons' as positive action measures. However, the Irish Superior Courts have not taken account of disadvantage or substantive equality of opportunity principles in construing relevant provisions of the ESA. The High Court interpreted Section 9 of that Act as permitting male-only membership in golf clubs, holding that the principal purpose of such clubs is to cater for the needs of men.²⁵³ The Supreme Court upheld the decision on 4 November 2009.²⁵⁴

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

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

Section 6(1) ESA prohibits discrimination in disposing of any estate or interest in premises, in terminating any tenancy or other interest in premises, or in the provision of accommodation and related services and amenities. Gender, age, race, religion, family status, disability, civil status, sexual orientation, and membership of the Traveller community are covered. The Equality (Miscellaneous Provisions) Act 2015 introduced 'housing assistance' as a new ground to protect against discrimination in the accommodation context.²⁵⁵ As of 1 January 2016, people in receipt of housing assistance, rent supplement or other social welfare payments cannot be discriminated against in relation to the provision of accommodation and related service and amenities.

There are several exceptions.

²⁵² Ireland, Registration of Clubs (Ireland) Act 1904, 15.08.1904, <http://www.irishstatutebook.ie/eli/1904/act/9/enacted/en/print.html>.

²⁵³ *Equality Authority v Portmarnock Golf Club*, [2005] IEHC 235, 10.06.2005, <http://www.bailii.org/ie/cases/IEHC/2005/H235.html>.

²⁵⁴ *Equality Authority v Portmarnock Golf Club*, [2009] IESC 73, 04.11.2009, <http://www.bailii.org/ie/cases/IESC/2009/S73.html>.

²⁵⁵ <http://www.irishstatutebook.ie/eli/2015/act/43/enacted/en/print.html>.

For example, the prohibition on discrimination does not apply to accommodation that is provided in a person's home, 'or where the provision of accommodation affects the person's private or family life or that of any other person residing in the home.'²⁵⁶ Section 6(5) permits reservation of housing for use by particular categories of people such as a home for people with disabilities, or as a retirement or nursing home for older people.

Housing authorities may provide different treatment in respect of housing accommodation to persons based on family size, family status, civil status, disability, age or membership of the Traveller community (Section 6(6) ESA). The Circuit Court has clarified that this exception cannot result in less favourable treatment in the provision of housing.²⁵⁷

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.²⁵⁸ Any such difference in treatment is not permitted to amount to a derogation from the obligations of the State under EU law. There is no case law on the provision to date. This nationality aspect of the exception coupled with the exemption for measures required by law (Section 14(1)(a)) means that migrants are unable to challenge many forms of potential discrimination in public sector housing using ESA. For instance, eligibility for social housing and some forms of housing assistance payments are contingent on one's residence status in the State.²⁵⁹

There is no major anti-discrimination case law in the field of housing involving migrants. Available data, in the form of experience of perceived discrimination, suggests that non-Irish nationals are a high-risk group for encountering discriminatory practices in accessing accommodation.²⁶⁰ There is an identified need for further research in this area²⁶¹ and no major policies that address discrimination against migrants in accommodation provision.

3.2.10.1 Trends and patterns regarding housing segregation for Roma

There is no specific information about patterns of segregation affecting the Roma Community in Ireland because of the absence of relevant Government data.²⁶² An estimated 3 000 to 5 000 Roma people live in Ireland.²⁶³ According to a civil society organisation, many Roma families and children are living in extremely poor and often dangerous living conditions without access to basic facilities.²⁶⁴ The UN Committee on Economic, Social and Cultural Rights has recommended the State address the lack of culturally appropriate accommodation provided to Roma and Travellers.²⁶⁵ Pavee Point Traveller and Roma Centre reports that many issues concerning patterns of segregation that are known to affect the Traveller Community also affect the Roma Community. Major issues common issues 'include discrimination in accessing accommodation, racism, lack of

²⁵⁶ Section 6(2)(d) ESA.

²⁵⁷ *Dublin City Council v Deans* (Circuit Court Dublin, Hunt J., unreported, 15.04.2008), at p. 29.

²⁵⁸ No reference is made in this section to the ground of race or sexual orientation.

²⁵⁹ See generally: <http://www.integration.ie/website/omi/omiwebv6.nsf/page/infoformigrants-Housing-LocalAuthority-SocialHousing-en>.

²⁶⁰ Russell, H., McGinnity, F., Quinn, E., & O'Riain, R. K. (2010) 'The experience of discrimination in Ireland: Evidence from self-report data' in Bond, L., F. McGinnity, and H. Russell (eds.) *Making equality count: Irish and international research measuring equality and discrimination*, 20-47.

²⁶¹ Barrett, A., McGinnity, F., and Quinn, E. (eds.) (2017) *Annual Monitoring Report on Integration 2016*, Dublin, ESRI, p. 57, available at: <https://www.esri.ie/publications/monitoring-report-on-integration-2016/>.

²⁶² Pavee Point Traveller and Roma Centre (2016) *Policy and practice in ethnic data collection and monitoring*, available at: http://www.paveepoint.ie/wp-content/uploads/2016/04/Counting-Us-In-A4_WEB.pdf.

²⁶³ Irish Human Rights and Equality Commission (2015) *Ireland and the International Covenant on Economic, Social and Cultural Rights*, p. 43, available at: https://www.ihrec.ie/download/pdf/ihrec_report_ireland_and_the_international_covenant_on_economic_social_and_cultural_rights.pdf.

²⁶⁴ Pavee Point Traveller and Roma Centre (2016) *Presentation to the Oireachtas Committee on Housing and Homelessness*, 19.05.2016, available at: http://www.paveepoint.ie/wp-content/uploads/2015/04/PP-Final-Traveller-Accommodation-Presentation-to-Oireachtas_RF-4.pdf.

²⁶⁵ UN Committee on Economic, Social and Cultural Rights (2015) *Concluding observations on the third periodic report of Ireland E/C.12/IRL/CO/3*, 08.07.2015, at 26-17, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/150/67/PDF/G1515067.pdf?OpenElement>.

access to social housing and rent allowance, a lack of security of tenure and substandard conditions.²⁶⁶

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.²⁶⁷ Underlying factors include a disinvestment in Traveller accommodation since 2008 coupled with the failure of local authorities to access available funds. The Housing (Traveller Accommodation) Act 1998 obliges each local authority to prepare, adopt and implement a five-year rolling accommodation programme to meet the existing and projected accommodation needs of Travellers in their areas.²⁶⁸ All local authorities have adopted Traveller Accommodation Programs for the period 2014-2018. Capital funding of EUR 9 million will be provided for Traveller-specific accommodation in 2017, an increase of 64% on the 2016 allocation. However, this amount falls far short of the EUR 40 million provided in 2008. In October 2016, local authorities had spent just EUR 1.6 million of the EUR 5.5 million annual allocated government funding for Traveller accommodation.²⁶⁹ The situation is exacerbated by both the enabling legal provisions and the practice of evictions, in violation of the European Social Charter.²⁷⁰

An Oireachtas Committee on Housing and Homelessness issued several recommendations in 2016 including a ban on evictions where alternative accommodation is unavailable and a mechanism for enforcing local authorities' duties under the 1998 Act.²⁷¹ In 2016 the UN Committee on the Rights of the Child called for increased funding for housing facilities that address the needs of Traveller and Roma children and their families and the amendment or repeal of legislation that criminalises nomadism.²⁷² It remains to be seen whether the Government will address these recommendations.

²⁶⁶ Pavee Point Traveller and Roma Centre (2016) *Presentation to the Oireachtas Committee on Housing and Homelessness*, 19.05.2016, at p. 8, available at: http://www.paveepoint.ie/wp-content/uploads/2015/04/PP-Final-Traveller-Accommodation-Presentation-to-Oireachtas_RF-4.pdf

²⁶⁷ European Committee of Social Rights (2016) *European Roma Rights Centre (ERRC) v Ireland, Complaint No. 100/2013*, available at <http://hudoc.esc.coe.int/eng/?i=cc-100-2013-dmerits-en>.

²⁶⁸ Ireland, Housing (Traveller Accommodation) Act 1998, 13.07.1998, <http://www.irishstatutebook.ie/eli/1998/act/33/enacted/en/html>.

²⁶⁹ Dáil Éireann Debate, Vol. 926 No. 1, Question No. 264, 31758/16, 25.10.2016, <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2016102500067?opendocument#WRL05900>.

²⁷⁰ European Committee of Social Rights (2016) *European Roma Rights Centre (ERRC) v Ireland, Complaint No. 100/2013*, available at <http://hudoc.esc.coe.int/eng/?i=cc-100-2013-dmerits-en>.

²⁷¹ Houses of the Oireachtas (2016) *Report of the Committee on Housing and Homelessness*, available at: <http://www.oireachtas.ie/parliament/media/committees/32housingandhomelessness/Final-Report-.pdf>.

²⁷² UN Committee on the Rights of the Child (2016) *Concluding observations on the combined third and fourth periodic reports of Ireland*, 29.01.2016, CRC/C/IRL/CO/3-4, at 17, available at: <http://www.refworld.org/docid/56c17f574.html>.

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.'

This provision has yet to be considered in case law.

Under Section 5(2)(i) ESA the prohibition on discrimination in disposing of goods or in providing a service does not apply in the case of 'differences in the treatment of persons on the gender, age or disability ground or on the ground of race, reasonably required for reasons of authenticity, aesthetics, tradition or custom in connection with a dramatic performance or other entertainment.'

To date there is no case law on this exception. It would presumably allow the selection of a person of a particular ethnicity, for example, to play a role where being of that ethnicity was reasonably required.

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

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

Section 37(1) EEA provides:

'Subject to *subsections (1A) and (1B)*, a religious, educational or medical institution which is under the direction or control of a body established for religious purposes or whose objectives include the provision of services in an environment 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.'²⁷³

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

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

²⁷³ <http://revisedacts.lawreform.ie/eli/1998/act/21/revised/en/html#SEC37>.

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

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

The previous provision, although never fully tested in legal proceedings (see below) was controversial at the national level. Teachers' unions opposed the exemption from the outset arguing, in particular, that it would impact lesbian, gay and bisexual staff.²⁷⁴ Those concerns were reinforced by a small-scale research study, which found that the exemption caused considered anxiety on the part of such teachers affecting their ability to 'come out' at work.²⁷⁵ The Equality Authority and the Irish Human Rights Commission had also called for its amendment.²⁷⁶

The former provision was considered in one case in which a primary school discriminated against a teacher on the grounds of religion and age in respect of promotion to the position

²⁷⁴ See e.g. various submissions of the Irish National Teachers' Organisation: <http://www.into.ie/lgbt/NewsArchive/Section371/>.

²⁷⁵ Walsh, J., Conlon, C., Fitzpatrick, B., and Hansson, U. (2007) *Enabling lesbian, gay and bisexual individuals to access their rights under equality law*, Dublin, Equality Authority, pp. 61-63, available at: https://www.ihrec.ie/download/pdf/enabling_lesbian_gay_and_bisexual_individuals_to_access_their_rights_under_equality_law.pdf.

²⁷⁶ See e.g. IHREC (2014) *IHREC Designate Report on Ireland's 4th Periodic Review by the UN Human Rights Committee on the ICCPR*, available at: <https://www.ihrec.ie/app/uploads/download/pdf/20140616113130.pdf>.

of principal.²⁷⁷ In the course of an interview the complainant had been questioned about her views on religious patronage of schools and pluralism in education. The Labour Court found that the questioning amounted to discrimination on the religion ground. The Court rejected the respondent's contention that Section 37 allowed the interview panel to do so without infringing the principle of equal treatment on grounds of religion. Noting that Section 37 must be interpreted and applied in conformity with Directive 2000/78/EC and 'ascribed a narrow ambit' as an exception to the general prohibition of discrimination it reasoned as follows:

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

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

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

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

Section 37(5) EEA provides that the prohibition on discrimination on the age and disability grounds does not apply in relation to employment in the armed forces.²⁷⁸

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 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'.²⁷⁹ This provision reflects the wording of Recital 18 and was applied by the Labour Court in a case concerning a prison officer.²⁸⁰ It was accepted that the complainant was unable to carry out the full range of duties attached to his post because of a medical condition called 'benign essential hypertension'. The respondent did not breach its duty to provide reasonable accommodation under Section 16 when it declined to provide the officer with alternative employment outside of any contact with prisoners:

²⁷⁷ *A National School v A Worker*, EDA1515, 05.10.2015, <http://www.lrc.ie/en/Cases/2015/October/EDA1515.html>; on appeal from the Equality Tribunal's decision in, *A Teacher and A National School*, DEC-E2014-097, 30.12.2014, <http://www.workplacerelations.ie/en/Cases/2014/December/DEC-E2014-097.html>. Prior to its enactment, the Supreme Court found that the religious ethos exemption was compatible with the Irish Constitution in *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321.

²⁷⁸ The High Court has confirmed that the provision exempts use of an age restriction in respect of persons seeking to join the Defence Forces: *Smyth v Minister for Justice Equality & Defence & ors*, [2013] IEHC 110, 02.01.2013.

²⁷⁹ Per Bolger, M., Bruton, C., and Kimber, C. (2012) *Employment Equality Law*, Dublin, Thomson Reuters, p. 373.

²⁸⁰ *Department of Justice, Equality and Law Reform v Kavanagh*, EDA1120, 14.06.2011, <https://www.workplacerelations.ie/en/Cases/2011/June/EDA1120.html>.

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

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

4.4 Nationality discrimination (Article 3(2))

a) Discrimination on the ground of nationality

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

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

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

Section 17(2) EEA provides that in relation to discrimination on the basis of nationality, nothing in the Act shall render unlawful any action taken in accordance with the Employment Permits Acts 2003-2006.²⁸¹

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 requirements.²⁸² This exception comes within the provisions contained in the Racial Equality Directive.

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

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

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

²⁸¹ Ireland, Employment Permits Act 2003, 10.04.2003, <http://www.irishstatutebook.ie/eli/2003/act/7/enacted/en/html>; Ireland, Employment Permits Act 2006, 23.06.2006, <http://www.irishstatutebook.ie/eli/2006/act/16/enacted/en/index.html>.

²⁸² Ireland, Immigration Act 2004, 13.02.2004, <http://www.irishstatutebook.ie/eli/2004/act/1/enacted/en/index.html>.

In Ireland, nationality (as in citizenship) is explicitly mentioned as a protected ground in national anti-discrimination law.²⁸³

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

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

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

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

a) Benefits for married employees

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

The Marriage Act 2015 removed the bar on marriage between persons of the same sex.²⁸⁴ Prior to its enactment partners of the same sex could only enter into a civil partnership under the terms of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.²⁸⁵

Section 34(1) EEA provides an exception from the ban on discrimination where an employer provides a benefit to an employee in respect of events related to members of the employee's family, a benefit to or in respect of a person as a member of an employee's family, or a benefit to an employee on or by reference to an event occasioning a change in the civil status of the employee. Under Section 2(1) EEA:

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

Case law has established that it is not unlawful for an employer to provide a benefit (the payment of allowances in respect of children) to a person as a member of an employee's family which includes certain persons whilst at the same time excluding others (children of a cohabiting partner) who are not included in the definition of 'member of the family' in Section 2(1) of the Act.²⁸⁶

b) Benefits for employees with opposite-sex partners

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

However, the *Parris* case illustrates that the unequal treatment of opposite-sex partners prior to the introduction of civil partnership and then marriage may have a continuing

²⁸³ 'Nationality' was equated with 'citizenship' in *Sabherwal v ICTS (UK) Ltd.*, DEC-S2008-037, <https://www.workplacerelations.ie/en/Cases/2008/June/DEC-S2008-037-Full-Case-Report.html>.

²⁸⁴ Ireland, Marriage Act 2015, 29.10.2015, <http://www.irishstatutebook.ie/eli/2015/act/35/enacted/en/html>.

²⁸⁵ Ireland, Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, 19.07.2010, <http://www.irishstatutebook.ie/eli/2010/act/24/enacted/en/html>.

²⁸⁶ *McGrane v Department of Finance*, DEC-E2005-011, 25.02.2005, https://www.workplacerelations.ie/en/Cases/2005/February/DEC-E2005-011_Full_Case_Report.html.

impact.²⁸⁷ Parris argued that the pension scheme operated by his employer was discriminatory as it provided that an employee's partner would only be entitled to a survivor's pension where the employee had married or entered a civil partnership before reaching the age of 60. National law prevented the complainant from entering a civil partnership or marrying prior to his 60th birthday. It was, therefore, impossible for him to comply with the so-called survivor's rule in the pension scheme. His complaint before the Equality Tribunal did not succeed. The Equality Officer concluded that complainant had established indirect discrimination on the combined grounds of sexual orientation, civil status, and age:

'I am satisfied that the complainant has established that the impact of the introduction of civil partnership only in 2011, combined with the limit placed upon his ability to regularise his civil status as a homosexual in an ongoing relationship prior to that point, when further combined with the difference in treatment based on age carried out in relation to this pension scheme renders the complainant at a particular disadvantage in relation to, for example, a heterosexual man of a similar age who would have had the opportunity to regularise a heterosexual relationship at a younger age.'²⁸⁸

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

On appeal the Labour Court referred three questions to the CJEU: whether the survivor rule was directly or indirectly discriminatory under Directive 2000/78/EC on grounds of: (1) sexual orientation, (2) age, or (3) if neither age nor sexual orientation in isolation, the combined effect of both. As discussed further in Chapter 12.2, each question was answered in the negative, leaving Dr Parris and others in his position, without a remedy under either domestic or EU law.

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

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

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

There are no specific exemptions in relation to any of the other protected grounds, but issues such as dress codes are currently dictated by the policy of the individual employer. For example, employers who operate manufacturing processes that require a clean room environment generally impose very strict regulations in respect of attire. Case law suggests that adjudicators will scrutinise dress codes for discriminatory impacts. In one case a male retail worker was dismissed for not wearing a facemask after he refused to shave off his beard. The Labour Court found that the requirement to wear a facemask or remove facial hair was not motivated by considerations of hygiene or food safety. The dress code operated in a way that restricted the complainant's freedom to determine his own appearance to a significantly greater degree than it did in the case of women. As a consequence the dismissal was discriminatory on the gender ground.²⁸⁹

²⁸⁷ Equality Tribunal, *Parris v Trinity College Dublin and others*, DEC-P2013-004, 16.12.2013, <https://www.workplacerelations.ie/en/Cases/2013/December/DEC-P2013-004.html>; *Parris v Trinity College Dublin and others*, [2016] EUECJ C-443/15, 24.12.2016, at 80, <http://www.bailii.org/eu/cases/EUECJ/2016/C44315.html>.

²⁸⁸ *Parris v Trinity College Dublin and others*, DEC-P2013-004, at 4.15.

²⁸⁹ Labour Court, *Dunnes Stores v O'Byrne*, EED0314, 28.10.2003, <https://www.workplacerelations.ie/en/Cases/2003/October/EED0314.html>.

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

4.7.1 Direct discrimination

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

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

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

a) Justification of direct discrimination on the ground of age

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

The Equality (Miscellaneous Provisions) Act 2015 amended the statutory provisions on retirement ages and fixed term contracts to explicitly provide that such measures must be objectively justified. In essence the 2015 Act codified principles set out in case law, which had sought to align domestic law with the requirements of Directive 2000/78.²⁹⁰ The test is now compliant with EU law.

b) Permitted differences of treatment based on age

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

Section 34(5) EEA permits employers to set a maximum age for recruitment which takes account of the cost or period of time involved in training a recruit to a standard at which the recruit will be effective in that job, and the need for there to be a reasonable period of time prior to retirement age during which the recruit will be effective in that job. There is no case law interpreting this exception. It is availed of by the armed forces and by the police service (see further Chapter 4.7.3).

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

In Ireland, national law allows occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits, taking up the possibility provided for by Article 6(2).²⁹¹

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

²⁹⁰ In *Donnellan v The Minister for Justice, Equality and Law Reform* [2008] IEHC 467 the High Court held that: '[N]ational measures relating to retirement ages are not excluded from consideration under [the Framework Directive]. Any discrimination with regards to age must, as put by that Directive serve a legitimate aim or purpose and the means taken to achieve that purpose be appropriate...' *Donnellan* was routinely cited by adjudicators prior to the changes effected by the 2015 Act in requiring objective justification of retirement ages. See further, *O'Mahony v Southwest Doctors On Call Ltd.*, DEC-E2014-031, 14.05.2014, <https://www.workplacerelements.ie/en/Cases/2014/May/DEC-E2014-031.html>.

²⁹¹ Section 72(1) Pensions Acts 1990-2015. Applied in *Charlton v Bus Éireann*, DEC-P2011-004, 16.11.2011, <http://www.workplacerelements.ie/en/Cases/2011/November/DEC-P2011-004-Full-Case-Report.html>.

entitlement to benefits under it; to fix different ages for all employees or a category of employees; to use, in the context of such a scheme, age criteria in actuarial calculations; to provide different rates for severance payment for different employees these rates being based on or taking into account the period between the age of an employee on leaving employment and his or her compulsory retirement age – provided that none of these measures constitute discrimination on the gender ground. Occupational benefit schemes are defined as schemes which provide for benefits to employees or categories of employees on their becoming 'ill, incapacitated or redundant but does not include any occupational pension scheme providing for pensions, gratuities or other allowances payable on retirement or death.'²⁹²

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

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

The Protection of Young Persons (Employment) Act 1996²⁹³ limits the employment of young persons (young persons are over 16 but not yet 18). In general the Act prohibits the employment of children, that is, persons under 16 years of age (Section 3). However, children over the age of 14 may be employed to undertake light work: during the school holidays, provided there is a minimum three weeks break from work during the summer; part-time during the school term (over 15 years old only, and for a maximum of 8 hours in the week); as part of an approved work experience or education programme where the work is not harmful to their safety, health or development (Section 3). Where licensed by the Minister for Enterprise and Employment children may also be employed in cultural, artistic, sports or advertising work which does not interfere with their attendance at school, vocational guidance or training programmes or capacity to benefit from the instruction received.

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

A second provision aimed at protecting young workers is the Safety, Health and Welfare at Work (Children and Young Persons) Regulations 1998.²⁹⁴ Under these regulations an employer must carry out a risk assessment, assessing the risks to the child or young person by the type of employment required. This assessment should consider the safety and health of the child or young person and consideration should also be given to their physical and mental growth. Where the assessment shows that the employment could cause harm to the child or young person then they may not be employed in that employment. Where the assessment shows a risk to the mental and physical growth of the child then the employer must make health surveillance available to them. Parents or guardians should be informed of the outcome of the assessments, and the precautions and preventative measures being put in place to protect the child or young person.

EEA prohibits discrimination on the grounds of age for everyone above 16, but employers are still allowed to set minimum recruitment ages of 18.

²⁹² Section 34(3A) EEA.

²⁹³ Ireland, Protection of Young Persons (Employment) Act 1996, 26.06.1996, <http://www.irishstatutebook.ie/eli/1996/act/16/enacted/en/html>.

²⁹⁴ Ireland, Safety, Health and Welfare at Work (Children and Young Persons) Regulations 1998, 18.12.1998, <http://www.irishstatutebook.ie/eli/1998/si/504/made/en/print#>.

EEA protects persons with caring responsibilities by prohibiting discrimination on the family status ground (Section 6(2)(c)). This covers a parent or a person in loco parentis to a person who has yet to attain the age of 18. It also applies to a parent or resident primary carer to a person who has a disability of such a nature as to give rise to the need for care or support on a continuing, regular or frequent basis (covering some but not all carers because of the residence requirement). All of the protections granted by EEA are provided for those with a family status as defined by the Act.

The Carer's Leave Act 2001 entitles employees to unpaid leave to provide full time care for a dependant.²⁹⁵ The maximum leave entitlement is 104 weeks and the minimum is 13 weeks. Carer's Benefit is payable for up to 104 weeks for a carer who takes leave from work under the Act.

4.7.3 Minimum and maximum age requirements

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

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

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

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

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

There is no case law addressing the parameters of this exception.²⁹⁶ In practice it seems the exception is primarily used to set maximum age requirements for recruitment to posts in the police²⁹⁷ and armed forces.²⁹⁸ Age limits include the following:

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

²⁹⁵ Ireland, Carer's Leave Act 2001, 2.07.2001, <http://www.irishstatutebook.ie/eli/2001/act/19/enacted/en/html>.

²⁹⁶ A complaint that sought to challenge the maximum age for entry to training in the police service was referred to the Equality Tribunal in 2006. The hearing did not proceed because the respondent successfully challenged the Tribunal's jurisdiction to investigate the claim on the basis that the contested provision was set down in a statutory instrument: High Court, *Minister for Justice, Equality and Law Reform and anor. v Director of the Equality Tribunal and ors.* [2009] IEHC 72, 17.02.2009, <http://www.courts.ie/Judgments.nsf/0/56ED2DFBACF3ABA28025757600581C87>. The case is discussed at 8.2.b.

²⁹⁷ Ireland, S.I. No. 470/2013 Garda Síochána (Admission and Appointments) Regulations 2013, <http://www.irishstatutebook.ie/eli/2013/si/470/made/en/print>.

²⁹⁸ Age limits for recruitment to the Defence Forces are also covered by Section 37(5) EEA.

4.7.4 Retirement

a) State pension age

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

If the person wishes to work longer, their pension can be deferred.

An individual can collect a pension and still work.

The State Pension (Contributory) is paid to people from the age of 66 who made have adequate social insurance contributions. It is not means-tested and persons can derive income from other sources while in receipt of the pension. The pension is subject to tax. Persons aged 66 and over who do not qualify for the contributory pension are entitled to the means-tested State Pension (Non-Contributory). It is also subject to tax.²⁹⁹ The state pension age applies equally to men and women.

The qualifying age for both forms of pension will rise to 67 in 2021 and 68 in 2028.³⁰⁰

b) Occupational pension schemes

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

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

c) State imposed mandatory retirement ages

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

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

d) Retirement ages imposed by employers

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

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

The objective justification requirement was expressly provided for under the Equality (Miscellaneous) Provisions Act 2015.³⁰¹ The amendment is welcome since prior to its enactment case law was inconsistent on the application of the requirement. This was in part attributable to a High Court judgment, which found that the Equality Tribunal (now

²⁹⁹ <https://www.welfare.ie/en/Pages/a-retired-or-an-older-person.aspx>.

³⁰⁰ Section 7, Social Welfare and Pensions Act 2011,
<http://www.irishstatutebook.ie/eli/2011/act/9/section/7/enacted/en/html#sec7>.

³⁰¹ <http://www.irishstatutebook.ie/eli/2015/act/43/section/10/enacted/en/html#sec10>.

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.³⁰²

A decision of the Equality Tribunal that pre-dates the legislative change provided guidelines as to what will be considered satisfactory objective justifications for imposing a retirement age.³⁰³ Examples of objective and proportionate grounds justifying compulsory retirement are:

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

e) Employment rights applicable to all workers irrespective of age

To be covered by the Unfair Dismissals Acts 1977-2015³⁰⁴ employees must not have reached the normal retirement age for 'employees of the same employer in similar employment.'³⁰⁵ 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.³⁰⁶ Employees contesting age-based discrimination (or discrimination on any other ground) may avail of their rights under EEA, which are not subject to an upper age limit.

f) Compliance of national law with CJEU case law

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

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

4.7.5 Redundancy

a) Age and seniority taken into account for redundancy selection

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

³⁰² High Court, *Minister for Justice, Equality and Law Reform and anor. v Director of the Equality Tribunal and ors.* [2009] IEHC 72, 17.02.2009, <http://www.courts.ie/Judgments.nsf/0/56ED2DFBACF3ABA28025757600581C87>.

Applied in e.g. *Goss v Ryanair*, DEC-E2015-138, December 2014, <https://www.workplacerelements.ie/en/Cases/2015/December/DEC-E2015-138.html>.

³⁰³ *Doyle v ESB International*, DEC-E2012-086, <http://www.equalitytribunal.ie/en/Cases/2012/June/DEC-E2012-086-Full-Case-Report.html>.

³⁰⁴ Ireland, Unfair Dismissals Act 1977, 06.04.1977; Ireland, Unfair Dismissals (Amendment) Act 1993, 14.07.1993. Revised text available at: <http://revisedacts.lawreform.ie/eli/1977/act/10/revised/en/html>.

³⁰⁵ Section 2(1)(b), Unfair Dismissals Acts 1977-2015. Under the Equality Act 2004 the automatic exclusion of employees over the statutory retirement age under the Redundancy Payments legislation (i.e. 66 years or over) from bringing an unfair dismissal claim was removed.

³⁰⁶ See e.g. *Flynn v Se Quirk Limited*, UD295/2015, May 2016, http://www.lrc.ie/en/Cases/2016/May/UD295_2015.html, in which the Employment Appeals Tribunal upheld a complaint of unfair dismissal based on the employee's age since the 'claimant did not have a written contact of employment and there was no written or verbal agreement or understanding between the parties as to retirement age'.

Section 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.³⁰⁷

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.³⁰⁸ In order to qualify for a payment, employees must be aged over 16 and have worked continuously for the employer for at least 104 weeks over the age of 16. There is no upper age limit.

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

The Labour Court interpreted the exception in a 2013 case.³⁰⁹ The complainants had been employed for periods ranging from 16-25 years and were offered redundancy terms that provided for a payment of five weeks pay per year of service in addition to statutory redundancy payments. However, employees who were close to retirement age would receive either the terms of the agreed package or the amount of salary that they would have earned had they remained in employment until the normal retirement age of 65, whichever was the lesser. Each complainant would receive less than the amount paid to younger workers. According to the Court, Directive 2000/78 provides that Member States, as opposed to individual employers, can provide for differences in treatment on grounds of age where those differences can be objectively justified by a legitimate aim. The Court found that the Oireachtas had made express provision for differences in treatment based on age in respect of severance payments through Section 34(3)(d). It stated that 'the 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 reasonable and objectively justifiable, within the meaning of Article 6(1) of the Directive, to provide for the differences in treatment allowed for by s.34(3)(d) of the Act.' The Labour Court found that the method of calculating the redundancy packages was permitted under the EEA.

³⁰⁷ Applied in e.g. *O'Farrell v Mercury Engineering*, DEC-E2012-096, 24.07.2012, <https://www.workplacereleations.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.

³⁰⁸ Ireland, Redundancy Payment Act 1967. 18.12.1967, <http://www.irishstatutebook.ie/eli/1967/act/21/enacted/en/html>. A revised text is available here: <http://revisedacts.lawreform.ie/eli/1967/act/21/revised/en/html>.

³⁰⁹ *Hospira v Roper*, EDA 1315, 29.04.2013, <https://www.workplacereleations.ie/en/Cases/2013/April/EDA1315.html>.

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

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

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

4.9 Any other exceptions

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

Under Section 36 EEA it is permissible to impose requirements in relation to residence, citizenship and proficiency in the Irish language, for the following public service jobs: officer holders in the service of the state, including the police service (Garda Síochána), Defence Forces, civil servants, officers of local authorities, harbour authorities, health boards or vocational education committees. While such requirements are permitted, not all of these positions impose such restrictions. The police service has removed the requirement for proficiency in the Irish language, requiring only proficiency in two languages at least one of which is Irish or English, and employment is open to EU and EEA nationals, nationals from Switzerland, refugees under the Refugee Act 1996;³¹⁰ or persons with one year's continuous legal residence in the state, and a total legal residence amounting to four years in the preceding eight years (the asylum process does not count towards the qualifying five year period).³¹¹ It is also permissible under the Act to require Irish-language proficiency from teachers in both primary and post primary schools. Finally, this section permits the imposition of certain educational requirements for certain posts, professions, or vocations.

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

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

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

- Differences in treatment are permitted in relation to 'annuities, pensions, insurance policies' or other matters related to the assessment of risk. The difference in treatment should relate to actuarial or statistical data or other relevant underwriting or commercial factor and should be reasonable.³¹²
- Difference in the treatment of persons on the religion ground in relation to goods or services provided for a religious purpose.³¹³

³¹⁰ Ireland, Refugee Act 1996, 26.06.1996, <http://www.irishstatutebook.ie/eli/1996/act/17/enacted/en/html>.

³¹¹ Ireland, S.I. No. 470/2013 Garda Síochána (Admission and Appointments) Regulations 2013, <http://www.irishstatutebook.ie/eli/2013/si/470/made/en/print>.

³¹² Section 5(2)(d) ESA.

³¹³ Section 5(2)(e) ESA.

- 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.³¹⁴
- Having an age requirement for persons to be either an adoptive or foster parent.³¹⁵
- Differences in the treatment not otherwise specifically provided for in the treatment, which can reasonably be regarded as goods or a service suitable only to the needs of certain persons.³¹⁶

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

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

Section 16 ESA permits the imposition or maintenance of preferential fee charges in respect of goods or services being offered in respect of persons with children, married couples, persons in a specific age group, or persons with a disability. The section also permits different treatment where a person is treated differently solely in the exercise of a clinical judgment in connection with the diagnosis of illness or his or her medical treatment, or is incapable of entering into an enforceable contract or of giving an informed consent and for that reason the treatment is reasonable in the particular case.³¹⁷

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

Actions taken in good faith by owners of licensed premises for the purpose of complying with the Licensing Acts do not constitute discrimination (Section 15(2) ESA). Case law establishes that 'in good faith' means that the actions must be done honestly and without prejudice.³¹⁸ 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.'³¹⁹ Any action taken should be for the sole purpose of ensuring compliance with the provisions of the Licensing Acts.³²⁰

³¹⁴ Section 5(2)(f) ESA.

³¹⁵ Section 5(2)(k) ESA.

³¹⁶ Section 5(2)(j) ESA.

³¹⁷ Section 16(2)(a) and (b) ESA.

³¹⁸ Equality Tribunal, *Delaney v The Harp Bar*, DEC-S2002-53/56, 31.05.2002, <https://www.workplacerelements.ie/en/Cases/2002/May/DEC-S2002-053-056.html>.

³¹⁹ Equality Tribunal, *Conroy v Costello*, DEC-S2001-014, November 2001, <https://www.workplacerelements.ie/en/Cases/2001/November/DEC-S2001-014.html>.

³²⁰ Equality Tribunal, *Mongan and Ors v The Waterside Hotel*, DEC-S2003-008/014, 25.02.2003, https://www.workplacerelements.ie/en/Cases/2003/February/DEC-S2003-008-014_Full_Case_Report.html.

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

a) Scope for positive action measures

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

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

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

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

A compensation scheme for disabled taxi drivers came within the terms of Section 14(b) since it was based on evidence that such persons experienced particular financial hardship when the industry was liberalised.³²¹

Section 5(2)(h) allows differences in treatment in relation to services that are provided for the principal purpose of promoting the special interests of people in a 'category of persons'. Any difference in treatment of people in that category must be reasonably necessary to promote their special interests and be undertaken in a bona fide manner. The term 'category' is not defined, but seems to be used throughout ESA to denote a sub-group of people falling under one of the discriminatory grounds e.g. persons with a particular disability or of a specific nationality or age. The 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'.³²² In *Keane v World Travel Centre*³²³ a company that offered reduced fares on flights only to Filipino nationals could not justify its policy under Section 5(2)(h). World Travel Centre maintained that it was engaging in 'positive discrimination'. The Equality Officer disagreed and found that it did not meet any of 'the strict and comprehensive criteria required by Section 5(2)(h)' (5.5). The sole purpose of the special offer was to gain a commercial advantage over competitors and not to advance the special interests of the Filipino community.

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

³²¹ *McCall v Area Development Management Ltd.*, DEC-S2007-058, <https://www.workplacerelements.ie/en/Cases/2007/July/DEC-S2007-058-Full-Case-Report.html>.

³²² *Shanahan v One Pico Restaurant*, DEC-S2003-056, 30.06.2003, at 7.2, <https://www.workplacerelements.ie/en/Cases/2003/June/DEC-S2003-056-Full-Case-Report.html>.

³²³ Equality Tribunal, DEC-S2011-035, 15.08.2011, <https://www.workplacerelements.ie/en/Cases/2011/August/DEC-S2011-035-Full-Case-Report.html>.

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

b) Main positive action measures in place on national level

A limited range of positive action measures is in place for Ireland's migrant community, which are underpinned by a 2008 government strategy *Migration Nation - Statement on Integration Strategy and Diversity Management*.³²⁴ These include training in English for work, interview skills, living and working in Ireland and information technology, under the Employment of People from Immigrant Communities (EPIC) programme.³²⁵ Under the *Intercultural Education Strategy 2010-2015*³²⁶ English language tuition is provided to migrant children at school. It is primarily delivered through specialised 'English as an Additional Language' teachers. 'Since the academic year 2012/13, assignment of teachers for special needs education and language support has been combined through the General Allocation Model (GAM) and is based on the total number of students in the school. Thus, it is no longer possible to monitor spending on English language tuition in schools. It is also a problem for monitoring the Intercultural Education Strategy, given that spending on EAL is a large part of the financial resources devoted to that strategy.'³²⁷

The Office for the Promotion of Migrant Integration will oversee the implementation of a new Migrant Integration Strategy to be published in 2017.³²⁸

Quotas

The attainment of a 3% quota for the employment of people with disabilities in the civil and public service is a long-standing government policy. The National Disability Authority monitors the implementation of this process but there are no sanctions for not achieving it. The target was met in 2011 and has been slightly exceeded since then.³²⁹ The Government has undertaken to progressively increase the statutory target towards 6% by 2024.³³⁰

Broad social policy measures

The Department of Social Protection administers an extensive number of schemes that are aimed at addressing economic disadvantage linked to the discriminatory grounds, such as household allowances for older people³³¹ and free travel passes.³³²

Preferential treatment narrowly tailored

The Higher Education Authority³³³ oversees a range of measures that provide support to distinct categories of third level students covered by the discriminatory grounds including

³²⁴ See further: <http://www.integration.ie/website/omi/omiwebv6.nsf/page/aboutus-migrationnation-en>.

³²⁵ See further: <http://www.integration.ie/website/omi/omiwebv6.nsf/page/funding-fundforintegration-esfEPIC-en>.

³²⁶ Department of Education and Skills and Office of the Minister for Integration (2010) *Intercultural Education Strategy, 2010-2015*, available at: https://www.education.ie/en/Schools-Colleges/Information/Intercultural-Education-Strategy/mig_intercultural_education_strategy.pdf.

³²⁷ Barrett, A., McGinnity, F., and Quinn, E. (eds.) (2017) *Annual Monitoring Report on Integration 2016*, Dublin, ESRI, p. 42, available at: <https://www.esri.ie/publications/monitoring-report-on-integration-2016/>.

³²⁸ <http://www.integration.ie/website/omi/omiwebv6.nsf/page/index-en>.

³²⁹ <http://nda.ie/Publications/Employment/Employment-of-people-with-disabilities-in-the-public-service/Reports-on-compliance-with-public-sector-jobs-target/2015-Report-on-Compliance-with-Part-5-on-the-Employment-of-People-with-Disabilities-in-the-Public-Sector.html>.

³³⁰ 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>.

³³¹ <https://www.welfare.ie/en/Pages/Household-Benefits.aspx>.

³³² <https://www.welfare.ie/en/Pages/204-Free-Travel.aspx>.

³³³ <http://www.heai.ie/>.

mature students and students with disabilities. Travellers are the only ethnic minority group targeted under the main policy on equality in higher education, the *National Plan for Equity of Access to Higher Education 2015-2019*.³³⁴ The Plan does not address migrants.

³³⁴ See further, Higher Education Authority (2015) *National Plan for Equity of Access to Higher Education 2015–2019*, available at: http://hea.ie/assets/uploads/2017/04/national_plan_for_equity_of_access_to_higher_education_2015-2019_single_page_version_01.pdf.

6 REMEDIES AND ENFORCEMENT

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

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

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

The Workplace Relations Commission (WRC) is the primary first instance forum for complaints under EEA, ESA and Pensions Acts.³³⁵ It operates as a quasi-judicial body. The Director of the WRC assigns an adjudication officer to investigate complaints received. Complainants may represent themselves, costs may not be awarded against either party, and the procedure is informal. Provided both parties consent complaints may be referred instead to the WRC's mediation service.³³⁶ Mediation is held in private and the agreement is not published.

An appeal lies to the Labour Court for EEA and Pensions Acts cases, while ESA appeals are heard by the Circuit Court. Appeals entail a re-hearing of all matters of fact and law.³³⁷ The Labour Court is a quasi-judicial statutory tribunal, which following the enactment of Workplace Relations Act 2015 became the only appellate tribunal in employment rights disputes. The Circuit Court is a court of local and limited jurisdiction.

Gender ground complaints under the EEA and ESA may be referred instead directly to the Circuit Court.³³⁸

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.³³⁹

Determinations of the WRC and Labour Court, as well as mediated settlements, are legally binding.³⁴⁰ In the event of non-compliance, the complainant may bring enforcement proceedings.³⁴¹ IHREC may provide assistance in the enforcement procedures.

The enforcement mechanisms apply equally to most public and private sector employees; there is an exception in respect of members of the Defence Forces, who must address their complaint first to the authorities before they can have access to the WRC.³⁴² Section 77(7) EEA requires certain public sector employees to exhaust internal complaints procedures prior to taking a case to the WRC.

Discrimination claims are brought before the WRC by way of application using online forms.³⁴³ No fees are payable and hearings are conducted in private.³⁴⁴ The Director of the WRC is required to publish decisions under ESA and EEA 'on the internet in such form and

³³⁵ The WRC assumed the functions of the Equality Tribunal on 01.10.2015 under the terms of the Workplace Relations Act 2015: Ireland, Workplace Relations Act 2015, 20.05.2015, <http://www.irishstatutebook.ie/eli/2015/act/16/enacted/en/print.html>.

³³⁶ Section 39 Workplace Relations Act 2015; Section 78 EEA; Section 24 ESA

³³⁷ Affirmed by the Labour Court in *Public Appointments Service v Flynn*, EDA1637, 07.12.2016, <https://www.workplacereactions.ie/en/Cases/2016/December/EDA1637.html>.

³³⁸ Section 21(1A) ESA, Section 77(3) EEA.

³³⁹ Ireland, Intoxicating Liquor Act 2003, 14.07.2003,

<http://www.irishstatutebook.ie/eli/2003/act/31/section/19/enacted/en/html#sec19>.

³⁴⁰ Section 91(2) EEA.

³⁴¹ Section 31 ESA; Section 91 EEA.

³⁴² Sections 77(9) and 104 ESA.

³⁴³ http://www.workplacereactions.ie/en/Complaints_Disputes/Refer_a_Dispute_Make_a_Complaint/.

³⁴⁴ Section 79(2) EEA, Section 25(2) ESA.

in such manner' as they consider appropriate.³⁴⁵ Pursuant to that requirement, the decisions of both the WRC and Labour Court are available for public inspection as they are published on the Workplace Relations Commission website.³⁴⁶ In some instances the parties' identities are concealed in published decisions. This practice stems from the Director's discretion to publish decisions in such form and manner as they consider appropriate, which discretion is delegated to the individual adjudication officers that hear complaints. It is at the officer's discretion whether or to not anonymise one or both parties in a case and it is open to the parties to make representations on the matter to the WRC. Indeed, an *ex tempore* judgment of the High Court suggests that the WRC is *obliged* to elicit the views of the parties.³⁴⁷ The discretion to anonymise is generally exercised in sexual harassment complaints and many of those concerning the disability and sexual orientation grounds, unless the complainant requests otherwise.³⁴⁸ Where the complainant is a child, the names of the parties to the case are also frequently recorded by the use of random initials. Anonymity has been applied in other sensitive cases, such as those involving criminal matters.³⁴⁹ Outside of those situations, however, the WRC might not grant a request that the identities of the parties be concealed.³⁵⁰

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

Further avenues of redress for discrimination are provided for under other legislative provisions. For instance, complaints of dismissal due to discrimination may instead be brought under the Unfair Dismissals Acts 1977-2015. Under those Acts the dismissal of an employee is deemed to be an unfair dismissal if it results wholly or mainly from the employee's age, race, colour or sexual orientation, religious or political opinions, or membership of the Travelling community.³⁵¹ 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,³⁵² which oversees an administrative process that examines complaints about decisions, refusals to take action and procedures of public bodies.³⁵³ Bodies within the remit of the Ombudsman include government departments and offices, local authorities, the Health Service Executive (HSE), voluntary hospitals and voluntary agencies that provide services on behalf of the HSE, and third level colleges and universities. The Ombudsman can examine a complaint about an action taken by one of those bodies if someone has been adversely affected and the action was: taken without proper authority; taken on irrelevant grounds; the result of negligence or carelessness;

³⁴⁵ Section 89(1) EEA; Section 30(1) ESA.

³⁴⁶ https://www.workplacerelations.ie/en/Decisions_Determinations/.

³⁴⁷ The text of the High Court judgment in question is not available: *Sheehan v Director of Equality Tribunal*, unreported, High Court, *ex tempore*, Kearns P., 11.06.2012. According to the authors of the main book on the EEA, the Court 'granted a declaration that the Equality Tribunal is not entitled to unilaterally censor the names of parties and witnesses in a complaint under the Employment Equality Acts': Bolger, M., Bruton C., and Kimber, C. (2012) *Employment Equality Law*, Dublin, Thomson Reuters, p. 750. The High Court judgment is referred to in a few 2013 decisions of the Equality Tribunal; see e.g. *Nayaranasami v Sheldon Park Hotel*, DEC-E2013-199, 30.12.2013, <https://www.workplacerelations.ie/en/Cases/2013/December/DEC-E2013-199.html>.

³⁴⁸ See e.g. *A Sales Representative v A Books Wholesaler*, DEC-E2016-131, <https://www.workplacerelations.ie/en/Cases/2016/September/DEC-E2016-131.html>. The adjudication officer states, at 1.1: 'It is the policy of the Equality Tribunal (now Workplace Relations Commission) to anonymise decisions in the case of disability unless specifically requested by the complainant otherwise.'

³⁴⁹ See e.g. *A Nigerian National v A Financial Institution*, DEC-S2005-114, <https://www.workplacerelations.ie/en/Cases/2005/August/DEC-S2005-114-Full-Case-Report.html>.

³⁵⁰ See e.g. *Lavery v Health Service Executive (Mid-Western Region)*, DEC-E2008-046, at 5.8, <https://www.workplacerelations.ie/en/Cases/2008/September/DEC-E2008-046-Full-Case-Report.html>.

³⁵¹ Section 6(2) Unfair Dismissals Acts 1977-2015.

³⁵² Ireland, Ombudsman Act 1980, 14.07.1980, <http://www.irishstatutebook.ie/eli/1980/act/26/enacted/en/html>.

³⁵³ See generally: <http://ombudsman.gov.ie/en/>.

based on incorrect or incomplete information; improperly discriminatory; based on an undesirable administrative practice; otherwise contrary to fair or sound administration.³⁵⁴

The complaints process is conciliatory in nature and no fees are payable. Many complaints are resolved informally and do result in a written report; an investigation report is drawn up and published in respect of some complaints that are especially complex or have broad implications for public policy. Following an investigation, the Ombudsman may make a general recommendation to the body concerned. Recommendations issued are not legally binding, however. Where it appears to the Ombudsman that the response to a recommendation is not satisfactory they may make a special report on the matter to the Oireachtas.³⁵⁵ Two such reports were issued on compliance with provisions of the ESA.³⁵⁶

b) Barriers and other deterrents faced by litigants seeking redress

Both EEA and ESA impose strict time limits for bringing complaints to the appropriate body. Additionally ESA requires a complainant to initiate his/her complaint by notifying, in writing, the respondent within two months of the date of the occurrence (or the date of the last occurrence if relevant) of the nature of the complaint and the intention to pursue the matter before the WRC.³⁵⁷ This may present difficulties for complainants. For example, a complainant who has been the victim of harassment may be extremely concerned about commencing his/her complaint with an initial notice to the alleged perpetrator of the harassment. There are also very real concerns in respect of people with literacy difficulties, and individuals who may not have an adequate command of the English language. The period for bringing a case 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.³⁵⁸

Complaints of discrimination occurring ‘...on or at the point of entry to, licensed premises’ must be brought to the District Court instead of the WRC. The major impact of this amendment is the cost implications for complainants as well as the complexity of legal proceedings.³⁵⁹ Under the WRC system it is possible to represent oneself and costs cannot be awarded against either complainant or respondent; this is not the case at the District Court. Moreover, it generates confusion in practice; several complaints have been, and continue to be, lodged before the incorrect forum.³⁶⁰ Consequently, the number of cases taken against such service providers has dropped significantly. The European Commission against Racism and Intolerance notes ‘that in particular members of the Traveller Community are often affected by discrimination in the provision of goods and services in licensed premises.’³⁶¹

³⁵⁴ Section 4(2), Ombudsman Act 1980.

³⁵⁵ Section 6(7), Ombudsman Act 1980.

³⁵⁶ The reports can be viewed here: <http://www.ombudsman.ie/en/publications/investigation-reports/government-departments-other-public-bodies/motorised-transport-grant-report-to-dail-and-seanad/>; <http://www.ombudsman.ie/en/Publications/Investigation-Reports/government-departments-other-public-bodies/Too-Old-to-be-Equal---A-Follow-up/>

³⁵⁷ Section 21(2) ESA.

³⁵⁸ Section 21(3) ESA.

³⁵⁹ Fennelly, D. (2012) *Selected Issues in Irish Equality Case Law 2008 – 2011*, at pp. 106-7, available at: <https://www.ihrec.ie/download/pdf/20150602161702.pdf>.

³⁶⁰ In 2016 a Traveller community ground case was dismissed by the WRC since it did not have jurisdiction to hear the case: *A Customer v A Public House*, ADJ 00002246, <https://www.workplacerelations.ie/en/Cases/2016/November/ADJ-00002246%20%20.html>.

³⁶¹ European Commission against Racism and Intolerance (ECRI) (2016) *ECRI conclusions on the implementation of the recommendations in respect of Ireland subject to interim follow-up (adopted on 11 .12.2015)*, CRI (2016)4, at p. 5, available at: <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Ireland/IRL-IFU-IV-2016-004-ENG.pdf>.

While there is no potential for awards of costs against either party in the WRC, this is not the position with regard to appeals in the District Court,³⁶² or the Circuit Court.³⁶³

A further issue relates to concerns about the right to privacy; cases in the WRC are heard in private, whereas hearings in the District and Circuit Court are in public. This may be of particular importance for the grounds of sexual orientation and disability.

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

c) Number of discrimination cases brought to justice

In Ireland, there are no available statistics on the number of cases related to discrimination brought to justice in the civil courts.

The Equality Tribunal, which operated as the primary forum of redress prior to the establishment of the WRC on 1 October 2015, provided extensive details of the cases it determined in its annual reports. The WRC's first annual report (which covered a limited period) did not disaggregate the complaints it processes in that manner.³⁶⁴ The Labour Court provides a breakdown of the number of EEA appeals heard each year, classified according to ground.³⁶⁵ Annual reports are published on the WRC's website and so are available to the public.

d) Registration of discrimination cases by national courts

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

Many judgments of the superior courts (the High Court, the Court of Appeal and the Supreme Court) are published, but are not always. Discrimination cases in the civil courts are not registered as such nor are data generally available to the public.

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

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

In Ireland, associations, organisations, and trade unions are entitled to act on behalf of victims of discrimination, but only in the Workplace Relations Commission (WRC) and Labour Court.

IHREC may act on victims' behalf in the WRC, Labour Court and civil courts.³⁶⁶ Other bodies or associations may act on behalf of a claimant before the WRC and Labour Court,³⁶⁷ but are not entitled to do so in civil courts and may do so only at discretion of those civil courts.³⁶⁸ National law does not distinguish between actions of associations on behalf and in support of victims of discrimination.

b) Engaging in support of victims of discrimination

³⁶² Equal Status cases under the Intoxicating Liquor Act, 2003 go to the District Court at first instance.

³⁶³ Appeals from the Labour Court, gender ground cases and enforcement orders may be heard in the Circuit Court.

³⁶⁴ Workplace Relations Commission (2016) *Annual Report 2015*, available at:

https://www.workplacelrelations.ie/en/Publications_Forms/WRC-Annual-Report-2015-English.pdf.

³⁶⁵ Labour Court (2016) *Annual Report 2015*, available at:

https://www.workplacelrelations.ie/en/Publications_Forms/Labour_Court_Annual_Report_2015.pdf.

³⁶⁶ Section 40(3) and (10), Irish Human Rights and Equality Commission Act 2014,

<http://www.irishstatutebook.ie/eli/2014/act/25/section/40/enacted/en/html>.

³⁶⁷ Section 77 (11) EEA and Section 25A ESA.

³⁶⁸ Court rules: <http://www.courts.ie/rules.nsf/LookupPageLink/index?OpenDocument>.

In Ireland, associations, organisations and trade unions are entitled to act in support of victims of discrimination, but only before the WRC and Labour Court, not before the civil courts.

IHREC may act in support of victims in the WRC, Labour Court, and civil courts.³⁶⁹ Other bodies or associations may act on behalf of a claimant before the Workplace Relations Commission and Labour Court,³⁷⁰ but are not entitled to do so in civil courts and may do so only at discretion of those civil courts.³⁷¹

National law does not distinguish between actions of associations on behalf and in support of victims of discrimination.

c) Actio popularis

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

Civil society organisation such as the Equality and Rights Alliance, have long sought the extension of standing under EEA and ESA to NGOs and trade unions.³⁷² The matter has not been considered by parliament, however.

Under Section 41 IHRECA the Irish Human Rights and Equality Commission is empowered 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.' 'Human rights' for this purpose are defined as those guaranteed under the Irish Constitution, the European Convention on Human Rights Act 2003 or under 'any agreement, treaty or convention to which the State is a party and which has been given the force of law in the State...' (Section 29 IHRECA). This definition should be broad enough to enable IHREC to litigate on compliance with EU equality provisions. However, because Section 41 has not been invoked to date its parameters are unclear. In particular it remains to be seen whether the reference to a 'class of persons' will enable IHREC to bring an *actio popularis* or whether a court will require identifiable victims.

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*.³⁷³ In *Digital Rights Ireland Ltd. v Minister for Communications*³⁷⁴ the High Court held that an NGO, which was incorporated as a limited company, had locus standi to assert its own rights and also to bring an *actio popularis* in challenging legislation on data retention that could potentially affect the entire population. Standing was granted on the basis that *inter alia* 'it would be an effective way to bring the action – individuals owners of mobile phones would be unlikely to litigate the matter'.

d) Class action

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

³⁶⁹ Section 40 IHRECA.

³⁷⁰ Section 77 (11) EEA and Section 25A ESA.

³⁷¹ Court rules: <http://www.courts.ie/rules.nsf/LookupPageLink/index?OpenDocument>.

³⁷² See e.g. Crowley, N. (2011) *A Roadmap to a Strengthened Equality and Human Rights Infrastructure in Ireland*, Dublin, Equality and Rights Alliance, available at: <http://www.eracampaign.org/uploads/ERA%20Roadmap%202011.pdf>.

³⁷³ See further, Whyte, G. (2015) *Social Inclusion and the Legal System: Public Interest Law in Ireland*, Dublin, Institute of Public Administration, pp. 121-152.

³⁷⁴ [2010] IEHC 221, 05.05.2010, at 91.

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.³⁷⁵ This practice is adopted as a matter of administrative convenience and is not a class action.³⁷⁶ In a grouped case each person involved must refer a complaint and a decision is issued in respect of every complaint.³⁷⁷

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

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

Section 85(A)(1) EEA provides: 'Where in any proceedings facts are established by or on behalf of a complainant from which it may be presumed that there has been discrimination in relation to him or her, it is for the respondent to prove the contrary.' An identical provision governs cases under the ESA (Section 38(A)(1)).

This also applies to cases brought by IHREC (Section 85(A)(3) EEA; Section 38(A)(2) ESA).

The EEA provision expressly includes proceedings relating to indirect discrimination, victimisation and harassment, but not reasonable accommodation. However, in practice adjudicators shift the burden of proof once a prima facie case has been established.³⁷⁸

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.³⁷⁹

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

In Ireland, there are legal measures of protection against victimisation.

Section 14 EEA prohibits victimisation, which is deemed to occur where a person is dismissed or any other adverse treatment occurs because they have involved themselves in any of the following activities: made a complaint of discrimination, been involved in proceedings by a complainant, been an employee having represented or otherwise supported a complainant, been a comparator in an equality action, been a witness under either Equality Acts, having opposed by lawful means a discriminatory act, or stated an intention to take any of the preceding activities.³⁸⁰ In two instances victimisation may amount to a criminal offence: where a person procures another to do anything that could be considered victimisation or discrimination³⁸¹ or where the victimisation amounts to dismissal.³⁸² 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

³⁷⁵ See, for example, *McCann, Collins and 31 others v Eircom Ltd.*, DEC-S2003-076/108, https://www.workplacerelements.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. The High Court ruled out use of class actions in the employment case of *Verbatim Ltd. v Duffy and others* [1994] ELR 159.

³⁷⁶ The High Court ruled out use of class actions in the employment case of *Verbatim Ltd. v Duffy and others* [1994] ELR 159.

³⁷⁷ See e.g. *58 Named Complainants v Goode Concrete Limited*, DEC-E2008-020, 30.04.2008, <http://www.lrc.ie/en/Cases/2008/April/DEC-E2008-020-Full-Case-Report.html>.

³⁷⁸ See e.g. Labour Court, *Public Appointments Service v Flynn*, EDA1637, 07.12.2016, <https://www.workplacerelements.ie/en/Cases/2016/December/EDA1637.html>.

³⁷⁹ *Noonan Services Ltd. v A Worker*, EDA1126, 29.07.2011, <https://www.workplacerelements.ie/en/Cases/2011/July/EDA1126.html>.

³⁸⁰ Section 74(2) EEA.

³⁸¹ Section 14 EEA.

³⁸² Section 98 EEA.

action.³⁸³ Adjudicators consistently reiterate that victimisation is a serious matter and successful cases tend to result in significant compensation awards.³⁸⁴

Complaints of victimisation must be brought within six months of the most recent occurrence of the act.³⁸⁵ This may be extended to a maximum of twelve months in certain circumstances.³⁸⁶

Victimisation is also prohibited under the ESA. As with the EEA, protection extends to people other than the complainant. Section 3(2)(j) applies where a person has in good faith applied for redress under the Act, has been a witness, has given evidence in criminal proceedings under the Act, has opposed by lawful means discriminatory acts, or has given notice of an intention to take any of the preceding actions.³⁸⁷

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 re-instatement and re-engagement.

In the area of goods and services, Section 27 ESA provides for the remedies of compensation and orders that a certain course of action be followed.

A limited range of criminal sanctions can be imposed under both Acts: Where a person procures another to do anything that could be considered victimisation or discrimination,³⁸⁸ where victimisation amounts to dismissal,³⁸⁹ or in a range of circumstances concerning obstruction of the Workplace Relations Commission or of IHREC in conducting inquiries.³⁹⁰

b) Ceiling and amount of compensation

There are maximum limits on financial awards by the Workplace Relations Commission and the Labour Court. In the context of employment the limits are a maximum of two years' pay, calculated on the basis of the complainant's weekly pay at the time the case was referred.³⁹¹ Where the complainant was not an employee (in the case of a discriminatory interview, for example) the maximum award is EUR 13 000.³⁹² In unequal pay cases, compensation in the mode of arrears of pay may be awarded, up to a maximum of three years prior to the referral of the case.³⁹³ There is no provision for the payment of interest.

³⁸³ Section 82 EEA.

³⁸⁴ The claimant was awarded two years' salary (EUR 117 362) for victimisation by the Equality Tribunal in *McGinn v St Anthony's BNS*, DEC-E2004-032, <http://www.equalitytribunal.ie/en/Cases/2004/June/DEC-E2004-032-Full-Case-Report.html>; EUR 75 000 (18 months' salary) was awarded in *A Female Teacher v Board of Management of a Secondary School*, DEC-E2012-103, 03.08.2012. Victimisation that occurred as a reaction to a previous complaint to the Tribunal attracted a EUR 48 750 award in *Higgins v Permanent TSB Plc*, DEC-E2016-037, 25.02.2016, <https://www.workplacerelements.ie/en/Cases/2016/February/DEC-E2016-037.html>.

³⁸⁵ Section 77(5) EEA.

³⁸⁶ Section 77(6)(a) EEA.

³⁸⁷ See e.g. *Salmon v Para Equestrian Ireland*, Equality Tribunal, DEC-S2004-002, 09.01.2004, <http://www.equalitytribunal.ie/en/Cases/2004/January/DEC-2004-002-Full-Case-Report.html>.

³⁸⁸ Section 14 EEA.

³⁸⁹ Section 98 EEA.

³⁹⁰ See e.g. Section 60(3) EEA, Section 37(1) ESA.

³⁹¹ Section 82(4) EEA.

³⁹² Section 82(4)(b) EEA.

³⁹³ Section 82(1)(a) EEA.

ESA also has maximum award limits, which are linked to limits set on the jurisdiction of the District Court and currently set at EUR 15 000.³⁹⁴ The Workplace Relations Commission may also order a course of action to be taken where discrimination has been found; this remedy has been used frequently under the Act.³⁹⁵

A successful discrimination case taken against licensed premises before the District Court may attract a maximum award of EUR 15 000. 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.³⁹⁶

c) Assessment of the sanctions

The primary compliance issue pertains to the limits set on compensation. Claims under the gender ground are treated exceptionally; they can be taken directly to the Circuit Court and can attract higher compensation awards since no monetary limit is applicable. It is questionable whether the remedies available in the context of non-gender ground discrimination could generally be described as 'effective, proportionate and dissuasive' sanctions. As noted above, a cap of EUR 13 000 applies at the access or recruitment stage. The ceiling of EUR 15 000 under ESA may be inadequate for particularly egregious violations of the law in situations such as discriminatory denial of access to education. 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.³⁹⁷

IHREC is the only independent body permitted to instigate litigation under the Acts³⁹⁸ but compensation orders may not be made in its favour.³⁹⁹ 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.⁴⁰⁰

It seems that the offence provisions of the Acts have never been invoked.

Equality laws also provide for non-financial sanctions, which bolster their effectiveness since the remedy can be tailored to the particular circumstances and can also generate significant effects beyond the immediate case.⁴⁰¹ Adjudicators have used this power to order persons to take a specified course of action⁴⁰² as a means of ensuring employers create an equal opportunities policy,⁴⁰³ re-train staff,⁴⁰⁴ and review recruitment procedures.⁴⁰⁵

³⁹⁴ Section 27(2) ESA; the limit was raised from EUR 6 348.69 with effect from 04.02.2014 under section 15 of the Courts and Civil Law (Miscellaneous Provisions) Act 2013, 24.07.2013, <http://www.irishstatutebook.ie/eli/2013/act/32/section/15/enacted/en/html#sec15>.

³⁹⁵ Section 27(1)(b) ESA.

³⁹⁶ Section 19(3), Intoxicating Liquor Act 2003. Where an order has been made under Subsection (3) any person may make an objection, related to the prohibited conduct concerned, to the renewal of the licence: Section 19(10) Intoxicating Liquor Act 2003.

³⁹⁷ Section 27(3) ESA; Section 82(6)(a) EEA.

³⁹⁸ Section 85 EEA; Section 82(6)(7) EEA.

³⁹⁹ Section 27(4) ESA.

⁴⁰⁰ *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, Case C-54/07, [2008] ECR I-1587.

⁴⁰¹ Fennelly, D. (2012) *Selected Issues in Irish Equality Case Law 2008 – 2011*, at pp.27-29, available at: <https://www.ihrec.ie/download/pdf/20150602161702.pdf>.

⁴⁰² Section 82(1)(e) EEA; Section 27(1)(b) ESA.

⁴⁰³ See e.g. *Nevin v Plaza Hotel*, DEC-E2001-033, 07.11.2011, <http://www.lrc.ie/en/Cases/2001/November/DEC-E2001-033.html>.

⁴⁰⁴ See e.g. *Marron v Board of Management of St Paul's National School*, DEC-E2015-121, November 2015, <https://www.workplacerelations.ie/en/Cases/2015/November/DEC-E2015-121.html>.

⁴⁰⁵ See e.g. *Equality Authority v Ryanair*, DEC-E2000-014, 29.12.2000, <http://www.lrc.ie/en/Cases/2000/December/DEC-E2000-14.html>.

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

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

The Irish Human Rights and Equality Commission (IHREC) is Ireland's designated body for the promotion of equal treatment irrespective of racial or ethnic origin (including membership of the Traveller Community). Its mandate also extends to the other discriminatory grounds set out under ESA and EEA: age, civil status, disability, family status gender, housing assistance, religion, and sexual orientation. It was established on 1 November 2014.⁴⁰⁶

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

IHREC is an independent statutory body charged with protecting and promoting human rights and equality, encouraging the development of a culture of respect for human rights, equality and intercultural understanding, promoting understanding and awareness of the importance of human rights and equality, encouraging good practice in intercultural relations, promoting tolerance and acceptance of diversity and respect for the freedom and dignity of each person, and working towards the elimination of human rights abuses, discrimination and prohibited conduct by the provision of information to the public, and assisting litigants.⁴⁰⁷

Sections 12-13 IHRECA provide for membership and appointment of the Commission. The legislation specifies that the members shall be appointed by the President on the advice of Government and following a resolution of Oireachtas. The appointments process contains checks and balances that secure its independence from Government. The Minister for Justice agrees with the Public Appointments Service the selection criteria and process to be implemented in respect of the filling of any vacancy. An independent selection panel, including one nominee of the Director of the European Union Agency for Fundamental Rights, is put in place by the Service and the Panel recommends people for appointment following an open competition. There must be gender balance in the composition of the 12-15 members, and the Service, and the Government must have regard to the need to ensure that the members of the Commission come from a background of knowledge of, or experience in, human rights and equality issues relating to any of the nine protected grounds. Members serve a term of three or five years.

The Commission's annual grant is a sum which the Minister for Justice and Equality, after consultation with the Commission, considers to be reasonably sufficient for the Commission in the performance of its functions.⁴⁰⁸ The Commission with the consent of the Minister appoints its own staff, who have the status of civil servant of the state, a status which requires independence from Government. They may also be seconded from other bodies at the Commission's discretion. The Commission is independent in the performance of its functions under the Act.⁴⁰⁹ It must lay its strategy statement and annual report before the Oireachtas (houses of parliament). The Director is separately accountable to the parliamentary public finance committee for financial transactions and effective use of resources.

The legislation stipulates the Commission's independence in general and also states that it has the power to carry out specific functions independently (e.g. reviews, inquiries etc.). It reports to Parliament, which is favourable. On the other hand, there is no full insulation

⁴⁰⁶ Ireland, Irish Human Rights and Equality Commission Act 2014, 27.07.2014, <http://www.irishstatutebook.ie/eli/2014/act/25/enacted/en/html>.

⁴⁰⁷ Section 10 IHRECA, <http://www.irishstatutebook.ie/2014/en/act/pub/0025/sec0010.html> - sec10.

⁴⁰⁸ Section 26 IHRECA, <http://www.irishstatutebook.ie/2014/en/act/pub/0025/print.html> - sec26.

⁴⁰⁹ Section 9 IHRECA, <http://www.irishstatutebook.ie/2014/en/act/pub/0025/print.html> - sec9.

or protection of budgets from ministerial intervention. By contrast, a level of insulation is evident for other state agencies with sensitive functions (for example, the Ombudsman and the Health and Safety Authority).

c) Grounds covered by the designated body/bodies

IHREC has a mandate to deal with the grounds of gender, age, race, religion, family status, disability, civil status, sexual orientation, membership of the Traveller community, and housing assistance. It does not prioritise any of the grounds as such, nor does it treat migrants as a priority issue. The Commission's *Strategy Statement 2016-2018* adopts a holistic approach to the grounds, save that it refers specifically to the UN Convention on the Rights of Persons with Disabilities in the context of ensuring robust implementation of human rights and equality standards.⁴¹⁰ Ireland has not ratified the Convention.

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

IHREC has the competence to provide independent assistance to victims, conduct independent surveys and publish independent reports, and issue independent recommendations on discrimination issues. In my assessment, these competences are effectively exercised in an independent manner, in practice. Many of the policy positions adopted by the Commission to date have been openly critical of Government, as have various submissions to international human rights bodies.

e) Legal standing of the designated body/bodies

In Ireland, the designated body has legal standing to bring discrimination complaints (on behalf of identified victim(s)) or to intervene in legal cases concerning discrimination.

Under Section 10(2)(e) IHRECA the body 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. Liberty to appear is at the discretion of the court.⁴¹¹ IHREC published revised guidelines to the exercise of its *amicus curiae* function in 2016.⁴¹² It has acted as *amicus curiae* in numerous cases since its establishment, including one which examined the application of ESA to a maternity benefit scheme.⁴¹³

Section 41(1) IHRECA empowers the Commission to 'institute proceedings in any court of competent jurisdiction for the purpose of obtaining relief of a declaratory or other nature in respect of any matter concerning the human rights of any person or class of persons.' Declarations of unconstitutionality are expressly envisaged under Section 42(2). The reference to relief of another nature should ensure that a court could award a range of remedies such as damages and injunctions depending on the legal basis of the proceedings. 'Human rights' for this purpose are those guaranteed under the 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). The provision has not been invoked but should enable IHREC to litigate on compliance with EU law (see further Chapter 6.2.c).

Under Section 40 IHRECA the Commission may grant assistance to persons in discrimination proceedings (see further Chapter 7.g). Assistance can take the form of the

⁴¹⁰ Irish Human Rights and Equality Commission (2016) *Strategy Statement 2016-2018*, available at: <https://www.ihrec.ie/download/pdf/strategystatement.pdf>.

⁴¹¹ 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.

⁴¹² <https://www.ihrec.ie/app/uploads/2016/12/IHREC-Amicus-Curiae-Guidelines.pdf>.

⁴¹³ See further: <https://www.ihrec.ie/ihrec-recommends-changes-to-equal-status-acts-following-high-court-decision-on-maternity-benefit-claim/>.

provision, or the arranging for the provision of, legal advice to the applicant; the provision, or the arranging for the provision of, legal representation to the applicant; the provision of such other assistance to the applicant as the Commission deems appropriate in the circumstances (Section 40(10)). The Commission published guidelines for deciding on applications for assistance in 2016.⁴¹⁴

Sections 85-86 EEA confer enforcement powers on IHREC with respect to discrimination proceedings. Section 85 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.

The legislation does not specify whether the consent of persons affected by the purported discrimination must be obtained by IHREC.

Under Section 86 IHREC may refer a collective agreement to the WRC where it is considered that any provision of the agreement is discriminatory.

Similar provisions enable IHREC to refer cases under ESA to the WRC (Section 23 ESA). It may also apply to the District Court for a determination as to whether a club is a discriminating club under Section 8(3) ESA.

To date the Commission's powers to refer cases to the WRC have not been invoked. Its annual report for 2015 notes that over the course of the year the 'Commission's Legal Team engaged in detailed scoping and analysis' of its compliance and enforcement functions 'in order to strategically plan their longer term potential impact.'⁴¹⁵

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.

f) Quasi-judicial competences

In Ireland, the body (IHREC) is not a quasi-judicial institution.

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

In Ireland, the body (IHREC) registers the number of complaints and decisions (by ground, field, type of discrimination, etc.). It only registers those complaints and decisions in which it has acted. These data are published in its annual report and are available to the public.⁴¹⁶

⁴¹⁴ <https://www.ihrec.ie/app/uploads/2017/06/Guidelines-on-applications-for-legal-assistance-April-2017-3.pdf>.

⁴¹⁵ Irish Human Rights and Equality Commission (2016) *Annual Report 2015*, p.5, available at: <https://www.ihrec.ie/documents/annual-report-2015/>.

⁴¹⁶ Irish Human Rights and Equality Commission (2016) *Annual Report 2015*, available at: <https://www.ihrec.ie/documents/annual-report-2015/>.

The Commission's first annual report, which was published in June 2016, covers the period November 2014 to December 2015. IHREC processed 2,173 public queries over that period a substantial proportion of which related to discrimination law: 491 concerned ESA, 459 EEA, 12 the Intoxicating Liquor Act 2003, while 25 related to discriminatory advertising.⁴¹⁷ The breakdown of the grounds for all anti-discrimination legislation queries is as follows: Age 140; Civil Status 25; Disability 264; Family Status 82; Gender 112; Race 140; Religion 40; Sexual Orientation 31; Traveller Community 26; Victimisation 4; no ground stated 266.

45 cases were ongoing in which assistance was granted to members of the public under Section 40 IHRECA. 40 of these were carried over from the casework of IHREC's predecessor bodies, the Equality Authority and the Irish Human Rights Commission. IHREC granted legal assistance in five 'new' cases.⁴¹⁸ 26 of the 45 cases were under ESA, with 15 relating to EEA (the other four cases concerned general human rights protection). The breakdown of the discriminatory grounds is as follows:

- 29 grounds were invoked in the 26 ESA cases (there were three multiple ground cases): Religion 16; Disability 7; Family Status 2; Race 2; Gender 2; Civil Status 1.
- 17 grounds were invoked in the 15 EEA cases (there were two multiple ground cases): Age 8; Gender 4; Sexual Orientation 1; Family Status 1; Religion 1; Disability 1; Race 1.

h) Roma and Travellers

IHREC does not treat Roma and Travellers as a priority issue.⁴¹⁹ As noted above, to date the Commission has adopted a holistic approach to the discriminatory grounds.

⁴¹⁷ 398 queries processed related to other human rights protections and 788 were referred to another information or recourse service.

⁴¹⁸ The Commission received 32 applications for legal assistance under Section 40 in 2015. It decided not to grant legal assistance for 26 applications and a further 29 applications were pending by the end of 2015.

⁴¹⁹ Irish Human Rights and Equality Commission (2016) *Strategy Statement 2016-2018*, available at: <https://www.ihrec.ie/download/pdf/strategystatement.pdf>.

8 IMPLEMENTATION ISSUES

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

The Irish Human Rights and Equality Commission (IHREC) replaced the Equality Authority as Ireland's specialised equality body in November 2014. The 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 as to dialogue between the social partners and with NGOs. To date the Commission's Policy and Engagement team has undertaken extensive public consultation and collaboration with NGOs and the social partners on various facets of its work.⁴²⁰ As outlined below, some of the formal dialogue mechanisms have yet to be invoked. This position should change as the Commission moves out of its establishment phase, which has involved the recruitment of a significant number of new staff.

a) Dissemination of legal protection against discrimination

IHREC is required to 'provide information to the public' and to keep under review the effectiveness of the working of the Employment Equality Acts 1998-2015, the Equal Status Acts 2000-2015 and Section 19 of the Intoxicating Liquor Act 2003.⁴²¹ On its website IHREC provides an accessible overview of those laws aimed at the general public as well as organisations and businesses.⁴²² It published detailed guides to EEA and ESA in 2015.⁴²³ Its predecessor equality body, the Equality Authority, did not have a statutory duty to provide information to the public on Section 19, which relates to discrimination in licensed premises. The Commission provides some basic information on the operation of discrimination law in that context but little information on the operation of the District Court.⁴²⁴ 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.⁴²⁵ It processed 2 173 queries from members of the public between November 2014 and December 2015 (see further Chapter 7.g).

b) Dialogue with NGOs

IHREC's first strategic plan was launched in January 2016, following an extensive consultation process with the general public and with NGOs.⁴²⁶ The Commission has supported several equality mainstreaming initiatives undertaken by civil society organisations.⁴²⁷

Under Section 18(1) IHRECA:

'The Commission shall, for the purpose of establishing and maintaining effective co-operation with representatives of relevant agencies and civil society—

⁴²⁰ Irish Human Rights and Equality Commission (2016) *Annual Report 2015*, available at: <https://www.ihrec.ie/documents/annual-report-2015/>; See further: <https://www.ihrec.ie/our-work/>.

⁴²¹ Section 30 IHRECA: <http://www.irishstatutebook.ie/eli/2014/act/25/enacted/en/print#sec30>.

⁴²² <https://www.ihrec.ie/guides-and-tools/>.

⁴²³ https://www.ihrec.ie/app/uploads/download/pdf/ihrec_equal_status_rights_explained.pdf.

⁴²⁴ <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/>.

⁴²⁵ See <https://www.ihrec.ie/your-rights/can-we-help/>.

⁴²⁶ Irish Human Rights and Equality Commission (2016) *Strategy Statement 2016-2018*, available at: <https://www.ihrec.ie/download/pdf/strategystatement.pdf>.

⁴²⁷ Irish Human Rights and Equality Commission (2016) *Annual Report 2015*, pp. 35-36, available at: <https://www.ihrec.ie/documents/annual-report-2015/>.

- (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.⁴²⁸

The Equality Authority established a number of such committees, in particular to guide large research projects. It appears that IHREC has not deployed this power to date.

c) Promotion of dialogue between social partners

The Irish Congress of Trade Unions (ICTU) has requested the Commission to consider the establishment of an advisory committee, under Section 18 IHRECA, comprising social partners.⁴²⁹

IHREC is empowered to prepare codes of practice in furtherance of the elimination of discrimination and the promotion of equality of opportunity.⁴³⁰ If the Minister approves a code of practice it becomes admissible in evidence in legal proceedings. In drafting codes of practice IHREC is mandated to consult with such other persons or bodies as it considers appropriate. To date the only code of practice produced is that concerning Sexual Harassment and Harassment at Work.⁴³¹ It was produced after consultation with the Irish Business and Employers Confederation (IBEC), ICTU and other relevant organisations representing equality interests.

Together with the Department of Education and Science, the Equality Authority in the past built up partnerships and joint ventures, with the Irish Congress of Trade Unions and IBEC continuing its work in the Equal Opportunities Framework Committee, the Framework Committee and the Work-Life Balance Framework Committee and Anti-Racist Workplace. The Authority also worked with the Department of Enterprise Trade and Employment in seeking to mainstream policy and practice learning from the EQUAL projects. These partnerships included anti-racist training. A number of publications were produced.⁴³² The Irish Congress of Trade Unions also published a pack entitled 'Lesbian, Gay and Bisexual Rights in the Workplace.'⁴³³

d) Addressing the situation of Roma and Travellers

The Traveller and Roma Inclusion Unit within the Department of Justice and Equality coordinates policy in this area and acts as Ireland's National Contact Point under the EU Framework for National Roma Integration Strategies.⁴³⁴ A revised Traveller and Roma inclusion strategy is being established. The final limb of a three-phase consultation process is currently underway. Phase 1 identified key themes for the new strategy, and phase 2 identified and agreed high-level objectives under each agreed theme. The final phase will identify detailed actions to achieve each agreed objective, with timescales, institutional responsibilities and monitoring arrangements.⁴³⁵

⁴²⁸ <http://www.irishstatutebook.ie/eli/2014/act/25/section/18/enacted/en/html#sec18>.

⁴²⁹ http://www.ictu.ie/download/pdf/letter_to_ihrec_may_16.pdf.

⁴³⁰ Section 31 IHRECA, <http://www.irishstatutebook.ie/eli/2014/act/25/enacted/en/print#sec31>.

⁴³¹ 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>.

⁴³² <https://www.ihrec.ie/documents/an-action-strategy-to-support-integrated-workplaces/>.

⁴³³ http://www.ictu.ie/download/pdf/gay_lesbian_leaflet.pdf.

⁴³⁴ <http://www.travellerinclusion.ie/website/TravPolicy/travinclusionweb.nsf/page/index-en>.

⁴³⁵ See further: <http://www.justice.ie/en/JELR/Pages/WP15000120>.

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

a) Mechanisms

IHREC may conduct equality reviews, which comprise equal opportunity audits and examinations of organisations' policies, practices and procedures.⁴³⁶ It has the power to either invite a particular undertaking, group of undertakings or the undertakings making up a particular industry or sector thereof to conduct a review or, in the case of firms with more than 50 employees, instigate a review. An 'undertaking' for these purposes includes 'an activity giving rise to employment, whether or not in the industrial or commercial sector and whether or not with a view to profit' and providers of goods and services regulated by the ESA including educational establishments, accommodation providers and public sectors bodies.⁴³⁷ Depending on the outcome of the review an equality action plan might issue, suggesting or requiring the employer/s or service provider/s concerned to effect changes. An action plan 'means a programme of actions that is prepared by an undertaking or, as the case may be, by the Commission, to be implemented in the undertaking to further the promotion of equality of opportunity therein'.⁴³⁸ The Commission may require an undertaking, which has fifty or more employees, to supply information for the purpose of an equality review or an equality action plan. It may also serve a substantive notice on an undertaking seeking compliance with the terms of an equality action plan.⁴³⁹ This is a potentially valuable mechanism in securing compliance with equality law but it has not been employed by IHREC to date.

Under Section 30 of the Employment Equality Acts 1998-2015 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. All discriminatory provisions in collective agreements are deemed null and void; it is not possible to contract out of the terms of the equality legislation.⁴⁴⁰ IHREC or a person who is affected by a collective agreement may refer it to the WRC.⁴⁴¹

b) Rules contrary to the principle of equality

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

To my knowledge there are no specific laws or regulations in force that are contrary to the directives there are however, a number of provisions of the equality legislation that may not be in compliance with the directives.

The major concern remains Section 14(1)(a) ESA, which provides that nothing in that Act will prohibit any action required under any enactment.⁴⁴² In effect this provision ensures that ESA remains subordinate to other legislation. The Racial Equality Directive does not envisage any blanket exemption for discriminatory measures required by law.

In relation to entitlement to leave in respect of public holidays, the entitlement of an employer under the Organisation of Working Time Act 1997 to substitute a Christian or

⁴³⁶ Section 32 IHRECA, <http://www.irishstatutebook.ie/eli/2014/act/25/enacted/en/print#sec32>.

⁴³⁷ Section 29 IHRECA; Matters concerning members and access to membership of registered clubs are exempt from equality reviews: Section 69(7) EEA.

⁴³⁸ Section 29 IHRECA.

⁴³⁹ Section 33 IHRECA.

⁴⁴⁰ Section 9 EEA.

⁴⁴¹ Sections 86-87 EEA.

⁴⁴² See further Chapter 3.2.6 Social protection.

Roman Catholic Church holiday for a public holiday may be contrary to the principle of equal treatment.⁴⁴³

A further overarching concern relates to the ability of the WRC and the Labour Court to interpret and apply EU law principles that conflict with domestic law. The High Court has found that such bodies cannot issue a ruling that seeks to align domestic law with EU law where to do so would contravene the express terms of a national legal provision.⁴⁴⁴ This arguably undermines access to an 'effective judicial process' as required by the Directives. A procedure is available under Section 90(2) EEA, which enables the Labour Court to refer a question of law for determination by the High Court. However, no such mechanism is available before the WRC as the first instance forum for cases under both ESA and EEA.⁴⁴⁵ Parties to the case may also appeal a finding of the (appellate) Labour Court to the High Court on a point of law under Section 90(1) EEA and of the (appellate) Circuit Court under Section 28 ESA.

⁴⁴³ Ireland, Organisation of Working Time Act 1997, 07.05.1997, <http://www.irishstatutebook.ie/eli/1997/act/20/enacted/en/html?q=Organisation+of+Working+Time+Act&y ears=1997>.

⁴⁴⁴ High Court, *Minister for Justice, Equality and Law Reform and anor. v Director of the Equality Tribunal and ors.* [2009] IEHC 72, 17.02.2009, <http://www.courts.ie/Judgments.nsf/0/56ED2DFBACF3ABA28025757600581C87>.

⁴⁴⁵ Section 79(5A) EEA had provided for such a procedure in respect of EEA cases but it was deleted under Section 83(1)(f) of the Workplace Relations Act 2015: <http://www.irishstatutebook.ie/eli/2015/act/16/enacted/en/print#sec83>.

9 COORDINATION AT NATIONAL LEVEL

The Department of Justice and Equality coordinates issues regarding anti-discrimination on the grounds covered.

Several units under the auspices of the Department are charged with overseeing implementation of given strategies and policies. The Traveller and Roma Inclusion Unit within the Department of Justice and Equality coordinates policy in this area and acts as Ireland's National Contact Point under the EU Framework for National Roma Integration Strategies.⁴⁴⁶ The Department's Office for the Promotion of Migrant Integration will oversee the implementation of a new Migrant Integration Strategy to be published in 2017.⁴⁴⁷

There is currently no action plan or strategy against racism/discrimination. The *National Action Plan against Racism 2005-2008*⁴⁴⁸ has not been renewed since its expiry contrary to the recommendations of several international human rights bodies.⁴⁴⁹

⁴⁴⁶ <http://www.travellerinclusion.ie/website/TravPolicy/travinclusionweb.nsf/page/index-en>.

⁴⁴⁷ <http://www.integration.ie/website/omi/omiwebv6.nsf/page/index-en>.

⁴⁴⁸ Department of Justice, Equality and Law Reform (2008) *Planning for Diversity: The National Action Plan Against Racism 2005-2008*, available at: <http://www.integration.ie/website/omi/omiwebv6.nsf/page/Racism-npar-en>.

⁴⁴⁹ UN Committee on the Rights of the Child (2016) *Concluding observations on the combined third and fourth periodic reports of Ireland*, 29.01.2016, CRC/C/IRL/CO/3-4, available at: <http://www.refworld.org/docid/56c17f574.html>; Council of Europe: European Commission Against Racism and Intolerance (ECRI) (2013) *ECRI Report on Ireland (fourth monitoring cycle)*, Strasbourg: Council of Europe, at 115, available at: <https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Ireland/IRL-CbC-IV-2013-001-ENG.pdf>.

10 CURRENT BEST PRACTICES

- Section 42 of the Irish Human Rights and Equality Commission Act 2014 introduced a positive duty on public bodies to have due regard to human rights and equality in exercising their functions. IHREC will assist public bodies to comply with the positive duty, including by producing guidelines and codes of practice. In 2016 it published a booklet, which outlines the core elements of the duty⁴⁵⁰ and a range of pilot measures are currently underway.
- IHREC launched a campaign to increase awareness of equality issues in schools. The main tool is a training manual designed to provide teachers with equality-based teaching resources for use across the curriculum to encourage pupils to take action on equality, human rights and social justice issues in the classroom, at school or within their wider community.⁴⁵¹
- The WRC and Labour Court have interpreted the prohibition of direct discrimination on the race ground as requiring different treatment to take account of linguistic and cultural barriers experienced by potentially vulnerable migrant workers.⁴⁵²
- No fees are payable by complainants before the first instance forum for discrimination law cases under the ESA and EEA.⁴⁵³
- 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.⁴⁵⁴

⁴⁵⁰ Irish Human Rights and Equality Commission (2016) *The Public Sector Duty*, available at: https://www.ihrec.ie/download/pdf/ihrec_public_duty_booklet.pdf.

⁴⁵¹ See further, Irish Human Rights and Equality Commission (2016) *Annual Report 2015*, p. 38, available at: <https://www.ihrec.ie/documents/annual-report-2015/>.

⁴⁵² See Chapter 2.6.f Duties to provide reasonable accommodation in respect of other grounds.

⁴⁵³ See Chapter 6.1.a Available procedures for enforcing the principle of equal treatment.

⁴⁵⁴ See Chapter 6.5 Sanctions and remedies.

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives (if any)

Both acts:

- In a 2015 judgment the Supreme Court considered the interpretation of indirect discrimination under ESA for the first time, and held that statistical analysis is required in order to establish that a person belonging to a protected group is at a 'particular disadvantage' compared with others.⁴⁵⁵ This appears to be more restrictive than the concept of indirect discrimination in the directives.⁴⁵⁶
- Maximum levels of compensation arguably not in compliance with directives.⁴⁵⁷
- The capacity of the WRC and the Labour Court to interpret and apply EU law is hampered by their limited jurisdiction under Irish law (as interpreted by the High Court).⁴⁵⁸

Employment Equality Acts 1998-2015

- It appears from the wording of the provisions concerning discrimination on the religion ground that the belief in question must be a religious one and so the provisions may not adequately prohibit discrimination on the grounds of religion *or* belief.⁴⁵⁹
- Associations do not have standing in discrimination cases in civil courts.⁴⁶⁰
- Exclusion of 'persons employed in another person's home for the provision of personal services' from protection against discrimination in regard to access to employment.⁴⁶¹
- The definition of 'vocational training' may be too restrictive.⁴⁶²
- It is not discriminatory to pay a disabled person a lesser rate of remuneration.⁴⁶³
- Not all provisions in other statutes containing discriminatory measures have been abolished.⁴⁶⁴

Equal Status Acts 2000-2015

- Complaints must be instigated within two months of the discriminatory act, and a written notification sent to the alleged discriminator.⁴⁶⁵
- Uncertain that the scope of ESA covers fully social protection and social advantages; also anything required to be done under another statute is not in breach of ESA.⁴⁶⁶
- Denominational schools are permitted to distinguish between prospective students on the basis of their religious background raising possible compliance issues with the Racial Equality Directive⁴⁶⁷
- Transfer of jurisdiction regarding discrimination in access to premises licensed for the sale of alcohol from the Equality Tribunal to the District Court under the Intoxicating Liquor Act 2003 raises compliance issues with the non-regression provisions of Article

⁴⁵⁵ *Stokes v Christian Brothers High School, Clonmel*, [2015] IESC 13, 24.02.2015, <http://www.courts.ie/Judgments.nsf/597645521f07ac9a80256ef30048ca52/a09897a48211897980257df6005a3c31?OpenDocument>.

⁴⁵⁶ See 3.2.8 Education; 3.2.1.b Statistical evidence.

⁴⁵⁷ See 6.5 Sanctions and remedies.

⁴⁵⁸ See 8.2.b Compliance.

⁴⁵⁹ See 2.2.1 Definitions.

⁴⁶⁰ See 6.2 Legal Standing and Associations.

⁴⁶¹ See 3.2.2 Material scope, Conditions for access to employment.

⁴⁶² See 3.2.4 Access to vocational training.

⁴⁶³ See 4.9 Any other exceptions.

⁴⁶⁴ See 8.2.b Compliance, Rules contrary to the principle of equality.

⁴⁶⁵ See 6.1.b Remedies and Enforcement, Barriers and other deterrents.

⁴⁶⁶ See 3.2.6 Social Protection.

⁴⁶⁷ See 3.2.8 Education.

15 of the Racial Equality Directive, due to the prohibitive cost and relative complexity of court proceedings.⁴⁶⁸

- Where a registered club is set up to cater for the needs of members of a particular ground it can exclude persons who do not fall under that ground from membership.⁴⁶⁹

11.2 Other issues of concern

Failure to renew the National Action Plan Against Racism, which had provided strategic direction to combating racism and to promoting a more inclusive, intercultural society in Ireland.⁴⁷⁰

Lack of state recognition of Irish Travellers as an ethnic group.

Ireland's workplaces are becoming increasingly tough places for both migrants and minorities, according to research from the Economic and Social Research Institute (ESRI).⁴⁷¹ The study shows that the greater levels of discrimination being seen in Ireland are more attributable to changing attitudes towards minorities rather than the effects of the recent recession. The findings are worrying:

- Non-Irish nationals consistently report higher rates of discrimination than Irish nationals;
- Ethnicity rather than nationality is especially important it seems – Black Africans and EU nationals of minority ethnicity are particularly likely to report greater discrimination when looking for work;
- Most non-white ethnic groups are more likely than White Irish or other White Europeans (UK nationals for example) to report discrimination in Ireland.

The report finds that discrimination between White Irish nationals and 'acceptable, non-ethnic' non-nationals actually decreased between 2004 and 2010, suggesting racial prejudice rather than the recession is responsible for the trends being seen. The study suggests that between 2004 and 2010 Ireland went from being a country with little experience of immigration to one with a great deal of experience, and that employer attitudes have changed towards non-white minorities and Black Africans. Ethnic minorities are thus described as 'particularly vulnerable in the Irish labour market'.

⁴⁶⁸ See 6.1.b Barriers and other deterrents faced by litigants seeking redress.

⁴⁶⁹ See 3.2.9 Access to and supply of goods and services.

⁴⁷⁰ See 9 Coordination at national level.

⁴⁷¹ <https://static.rasset.ie/documents/news/esri-report-discrimination-in-the-labour-market.pdf>.

12 LATEST DEVELOPMENTS IN 2016

12.1 Legislative amendments

A minor change was effected to anti-discrimination legislation under Part 4 of the Credit Guarantee (Amendment) Act 2016.⁴⁷² Section 101 (4A) was inserted in the Employment Equality Acts 1998-2015 to provide that, where an employee refers a complaint concerning dismissal under both the EEA and under Section 7 of the Unfair Dismissals Act 1977, they must elect between one or the other by a prescribed date. If the person fails to elect by this date the discriminatory dismissal complaint will be deemed to have been withdrawn. The 'relevant date' for the purposes of Section 101 (4A) is 42 days from the date of notification to the employee concerned that he or she has to elect between the two complaints.⁴⁷³

12.2 Case law

Age

Name of the court: Workplace Relations Commission

Date of decision: 16 November 2016

Name of the parties: *A Worker v A Transport Employer*

Reference number: ADJ-00002190

Address of the webpage: <http://www.lrc.ie/en/Cases/2016/November/ADJ-00002190.html>

Brief summary: An employer sought to terminate the complainant's employment on her 65th birthday. While no retirement age was provided for under the contract of employment the respondent airport had a well-established practice of compulsorily retiring its employees when they reached 65. It argued that the practice was justified with reference to health and safety concerns given the physically demanding nature of the work carried out by retail staff. It further argued that the retirement age was aimed at ensuring cohesion and that career paths could ensure retention, motivation and dynamism.

The Workplace Relations Commission noted that the Section 34(4) of the Employment Equality Acts was amended in 2015 to secure compliance with Directive 2000/78, putting on a statutory basis the requirement that retirement ages be objectively justified. It did not accept that the provision at issue was objectively justified. While health and safety considerations was a legitimate aim, it did not apply exclusively to older workers; the career progression justification was not convincing since the complainant did not occupy a promotional post; and no compelling rationale was advanced to support the proposition that compulsory retirement at 65 was an appropriate and necessary means of achieving cohesion. In finding the employer had directly discriminated on the age ground the WRC ordered re-instatement of the complainant and awarded EUR4,500 compensation.

Age and Sexual Orientation

Name of the court: Court of Justice of the European Union

Date of decision: 24 November 2016

Name of the parties: *Parris v Trinity College Dublin and others*

Reference number: Case C-443/15

Address of the webpage: <http://www.bailii.org/eu/cases/EUECJ/2016/C44315.html>

Brief summary: Upon a reference from the Irish Labour Court the CJEU considered the legality of a rule in a university pension scheme that denied a survivor's pension to a same-

⁴⁷² Ireland, Credit Guarantee (Amendment) Act 2016, 08.02.2016:

<http://www.irishstatutebook.ie/eli/2016/act/1/enacted/en/print#part4>.

⁴⁷³ S.I. No. 126/2016 - Employment Equality Act 1998 (Withdrawal of Certain Claims) (Relevant Date) Regulations 2016, <http://www.irishstatutebook.ie/eli/2016/si/126/made/en/print>.

sex partner who had entered into a civil partnership after the age of 60. Civil partnership had not been recognised under national law before the employee reached 60. It was, therefore, legally impossible for him to comply with the so-called survivor's rule in the pension scheme. The CJEU was asked whether the survivor rule was directly or indirectly discriminatory under Directive 2000/78/EC on grounds of: (1) sexual orientation, (2) age, or (3) if neither age nor sexual orientation in isolation, the combined effect of both.

Advocate General Kokott had considered the rule to constitute indirect discrimination on the sexual orientation ground. However, the CJEU found no discrimination on this basis. The Court noted that the Directive was without prejudice to national laws on marital status and held that EU law did not require Ireland to provide for marriage or civil partnership for same-sex couples, albeit that once such measures were enacted they must comply with the Directive's non-discrimination provisions. Neither was Ireland required to give retrospective effect to the civil partnership law nor implement transitional provisions for those who had already reached the age of 60 when the Act came into force. No age discrimination occurred because the scheme rule was covered by Article 6(2) of the Directive, which permits the fixing of ages for admission or entitlement to retirement benefits. On the question of discrimination on the combined grounds of age and sexual orientation, the CJEU found that where a national rule creates neither discrimination on the ground of sexual orientation nor age the rule cannot produce discrimination on the basis of the combination of those factors.

Disability

Name of the court: Workplace Relations Commission

Date of decision: 28 January 2016

Name of the parties: *An Employee v A Multi-National Retailer*

Reference number: DEC-E2016-021

Address of the webpage:

<https://www.workplacerelements.ie/en/Cases/2016/January/DEC-E2016-021.html>

Brief summary: The complainant was diagnosed with several medical conditions including Multiple Sclerosis and certified as fit to return to work by her doctor on light duties and in a different area of the respondent's retail store. However, the respondent insisted that the complainant should resume her post in the bakery section. The adjudication officer found that 'the Respondent has fundamentally misinterpreted and misconceived its obligations' to provide reasonable accommodation: 'Even allowing for the small size of the Store, there was quite a degree of latitude to move staff around and alleviate the Complainant from working in the Bakery. [R]easonable accommodation can also involve relieving a disabled employee of the requirement to undertake certain tasks which others doing similar work are expected to perform. At no stage was there any meaningful engagement with the Complainant or her Union Representative in relation to her request for reasonable accommodation. There was no consideration of alternative arrangements including re-rostering or training other Sales Advisors to work in the Bakery.' The WRC directed the respondent to pay EUR 30 000 in compensation, the equivalent of one year's pay, and also directed it to conduct a review of its policies and procedures to ensure that complied with Employment Equality Acts with particular reference to the disability ground.

Name of the court: Labour Court

Date of decision: 31 May 2016

Name of the parties: *St James' Hospital v Love*

Reference number:

Address of the webpage:

<https://www.workplacerelements.ie/en/Cases/2016/May/EDA1612.html>

Brief summary: The Labour Court upheld a finding that an employer failed to provide reasonable accommodation to an employee who worked as a hospital domestic. A medical assessment carried out at the respondent's request concluded that the complainant, who had an intellectual disability and physical impairments, was permanently unfit to carry out

the duties attached to her post. A decision was made to terminate her employment and the complainant was requested to sign a resignation form. The Court concluded that the reasonable accommodation duty was breached because the decision was made without considering whether the complainant was capable of undertaking any other work or of modifying her duties or hours of work to accommodate her disability so as to enable her to continue to participate in the workforce. It also found that the complainant's resignation occurred in circumstances that did not comply with the duty given her intellectual disability. Significantly, the Court increased the compensation awarded by the Workplace Relations Commission at first instance from EUR 17 000 to EUR 25 000. It did so because of the 'profound consequences' of the discrimination for the complainant. 'It is unlikely that she will find it possible to return to the workforce in any capacity'.

Name of the court: Labour Court

Date of decision: 8 September 2016

Name of the parties: *A Meat Company v A Worker*

Reference number: EDA1628

Address of the webpage:

<https://www.workplacerelations.ie/en/Cases/2016/September/EDA1628.html>

Brief summary: The Labour Court upheld a disability discrimination claim brought by a general operative who was on long-term sick leave due to chronic back pain. A medical report furnished by the complainant certified that she was fit to return to work but could not carry out any tasks that required 'heavy lifting or jerky movements'. The employer then referred the complainant to the company doctor who concluded that she was 'unfit to return to work in employment which involves manual handling, lifting, bending, pushing and pulling' and therefore deemed 'her unfit to return to work at this time.' It convened a meeting with the complainant to discuss her future employment and dismissed her within three weeks. The Court found that when it held the meeting the respondent was required to ensure that it was in 'full possession of all the material facts concerning the employee's condition and that the employee is given fair notice that the question of his or her dismissal for incapacity is being considered. The employee must also be allowed an opportunity to influence the employer's decision.' On that basis the Court concluded that the employer did not fulfil its duty to provide reasonable accommodation. Because the employee had not been deemed permanently unfit for work in the medical reports and further inquiries were not made as to whether and when she might be able to resume employment the respondent was not in full possession of the material facts about her condition. Further, the complainant had not been 'informed of the gravity of the matters to be discussed or of the possible or probable consequences that might flow from' the meeting. The Court directed the respondent to pay the complainant EUR 13 500 compensation for the failure to provide reasonable accommodation and discriminatory dismissal on the disability ground.

Name of the court: Workplace Relations Commission

Date of decision: 20 December 2016

Name of the parties: *A Clerical Officer v A County Council*

Reference number: ADJ-00003712

Address of the webpage: <http://www.lrc.ie/en/Cases/2016/December/ADJ-00003712.html>

Brief summary: A public sector employee who had a severe degenerative disease was dismissed from her post on medical grounds. She referred a complaint of failure to provide reasonable accommodation and discriminatory dismissal on the disability ground. While the respondent had undertaken appropriate measures to accommodate the complainant's disability on multiple occasions, a request for assistive technology was declined; since the employee was not afforded an opportunity to participate in determining whether such an accommodation was reasonable the employer failed to discharge its reasonable accommodation duty. Further, the employment relationship was terminated in a discriminatory manner because no alternatives to immediate dismissal on grounds of ill

health was considered or discussed with the complainant. The complainant was awarded EUR 40 000 compensation for the discriminatory treatment.

Race/ ethnic origin (Traveller community ground)

Name of the court: Workplace Relations Commission

Date of decision: 2 November 2016

Name of the parties: *A Member of the Traveller Community v The Chairman and Nominee of a Sporting Club and a Gym*

Reference number: DEC-S2016-065

Address of the webpage:

<https://www.workplacerelations.ie/en/Cases/2016/November/DEC-S2016-065.html>

Brief summary: The complainant was asked to leave a fitness class in the presence of other participants, as was her sister. Both were members of the Traveller community. Renewal of her membership was subsequently declined and when asked the reason for the refusal the respondent said: 'We don't want ye'. The respondent did not reply to the notification sent by the complainant or engage with the WRC proceedings. A complaint of direct discrimination on the membership of the Traveller community ground was upheld. The WRC found: 'The other non-members of the Traveller community who did not have their membership refused provide actual comparators and leave me in no doubt that the Complainant and her sister were excluded from the fitness course owing to their membership of the Traveller community.' According to the adjudication officer the EUR 5 000 compensation award was designed to reflect 'the seriousness of the discrimination imposed and the humiliating effect on the Complainant arising from the very public manner in which she was told to leave the fitness course and which continues to remain with her to this day.'

Race/ ethnic origin

Name of the court: Workplace Relations Commission

Date of decision: 28 September 2016

Name of the parties: *Adam v Angelo Bridal*

Reference number: DEC-S2016-057

Address of the webpage:

<https://www.workplacerelations.ie/en/Cases/2016/September/DEC-S2016-057.html>

Brief summary: A Roma woman and three family members were refused access to a bridal shop when they arrived for a pre-arranged appointment. According to the complainant's evidence, an employee declined to admit them on the basis that they 'were "gypsies", and that she was afraid of them as they looked dangerous.' The same staff member then granted access to two individuals who appeared to be white and Irish in the complainant's presence. She continued to refuse access in the course of a telephone conversation conducted while the complainant was outside. The respondent did not engage with the WRC proceedings. The adjudication officer upheld the direct discrimination complaint finding that it was 'wholly inappropriate' to deny entry 'in such an offensive manner'. 'Arising from the humiliating manner in which entry was refused' the officer had 'no difficulty in finding that this constitutes harassment on the grounds of race.' She directed the respondent to pay the complainant EUR 5 000 in compensation and directed the respondent to 'review its policy and undertake training and/or training of its staff to ensure that they are aware of their legal obligations under the Equality Acts with particular reference to the race ground.'

No entity collected data or provided figures on cases taken in relation to Travellers and Roma in 2016. 12 complaints on the Traveller community ground were determined by the WRC's adjudication service in 2016. 10 concerned direct discrimination in access to goods and services provided by the private sector (8 were upheld). One complaint of discrimination against a Roma person was determined before the same forum (*Adam v Angelo Bridal*; reported on above). It also concerned access to goods and services provided

by a private body and resulted in a EUR 5 000 compensation award with respect to harassment and direct discrimination on the race ground. As illustrated by the examples set out above, many of the facts presented involved flagrant violations of the equal treatment principle, with adjudication officers expressing in strong terms the serious nature and impact of the impugned conduct.

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

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

Country: Ireland
Date: 1 January 2017

Title of legislation (including amending legislation)	Title of the law: Employment Equality Acts 1998-2015 Abbreviation: EEA Date of adoption: 18.06.1998 Latest amendments: 10.12.2015 Entry into force: 18.10.1999 Web link: http://revisedacts.lawreform.ie/eli/1998/act/21/revised/en/html .
	Grounds covered: Gender, age, race, religion, family status, disability, civil status, sexual orientation, membership of the Traveller Community
	Civil/administrative/criminal law: Civil
	Material scope: public employment, private employment, vocational education
	Principal content: prohibition of direct and indirect discrimination, harassment, instruction to discriminate
Title of legislation (including amending legislation)	Title of the law: Equal Status Acts 2000-2015 Abbreviation: ESA Date of adoption: 26.4.2000 Latest amendments: 10.12.2015 Entry into force: 10.12.2015 Web link: http://revisedacts.lawreform.ie/eli/2000/act/8/revised/en/html .
	Grounds covered: Gender, age, race, religion, family status, disability, civil status, sexual orientation, membership of the Traveller Community, housing assistance
	Civil/administrative/criminal law: Civil
	Material scope: access to goods or services (including housing), social protection, social advantages, education.
	Principal content: prohibition of direct and indirect discrimination, harassment, instruction to discriminate
Title of legislation (including amending legislation)	Title of the law: Pensions Acts 1990-2015 Abbreviation: PA Date of adoption: 24.07.1990 Latest amendments: 10.12.2015 Entry into force: 21.12.1990 Web link: http://www.irishstatutebook.ie/eli/1990/act/25/enacted/en/print.html ; http://www.irishstatutebook.ie/eli/2004/act/9/section/22/enacted/en/html#sec22 .
	Grounds covered: Gender, age, race, religion, family status, disability, civil status, sexual orientation, membership of the Traveller Community
	Civil/administrative/criminal law: Civil
	Material scope: Pensions including occupational pensions
	Principal content: Pension provisions and prohibition on discrimination

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Country: Ireland
Date: 1 January 2017

Instrument	Date of signature (if not signed please indicate) Dd/mm/Yyyy	Date of ratification (if not ratified please indicate) Dd/mm/Yyyy	Derogations/reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	04.11.1950	25.02.1953	No	Yes	Yes, in an interpretative sense, as a result of the passage of the European Convention on Human Rights Act 2003
Protocol 12, ECHR	04.11.2000	No	No	No	No
Revised European Social Charter	04.11.2000	04.11.2000	Article 8(3), Article 21, Article 31(1), (2) and (3).	Ratified collective complaints protocol? Yes (international NGOs only)	No
International Covenant on Civil and Political Rights	01.10.1973	08.12.1989	Article 10(2)	Yes	No
Framework Convention for the Protection of National Minorities	01.02.1995	07.05.1999	No	N/A	No
International Covenant on Economic, Social and Cultural Rights	01.10.1973	08.12.1989	A reservation applies with respect to article 2(2). In order to promote use of the Irish language knowledge of Irish may be required or	No	No

Instrument	Date of signature (if not signed please indicate) Dd/mm/Yyyy	Date of ratification (if not ratified please indicate) Dd/mm/Yyyy	Derogations/reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
			given favourable consideration for certain occupations.		
Convention on the Elimination of All Forms of Racial Discrimination	21.03.1968	29.12.2000	No	Yes	No
Convention on the Elimination of Discrimination Against Women	23.12.1985	23.12.1985	Articles 11(1), 13(a); 16(1)(d); 16(1)(f)	Yes	No
ILO Convention No. 111 on Discrimination	Signed (no dates available)	22.04.1999	No	No	No
Convention on the Rights of the Child	30.09.1990	28.09.1992	No	Yes	No
Convention on the Rights of Persons with Disabilities	30.03.2007	No	No	No	No

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