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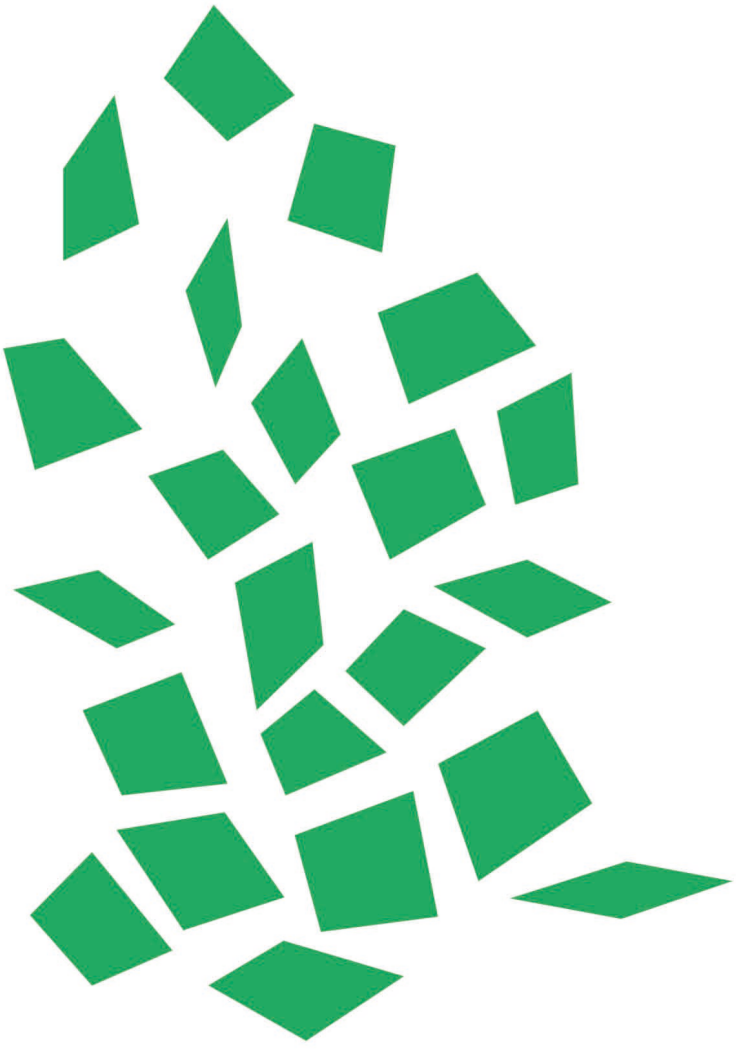
Country report

Non-discrimination



Ireland

2020

including summary

Justice and Consumers

EUROPEAN COMMISSION

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

European Commission
B-1049 Brussels

EUROPEAN COMMISSION

Country report
Non-discrimination

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

Ireland

Judy Walsh*

Reporting period 1 January 2019 – 31 December 2019

2020 Directorate-General for Justice and Consumers

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

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EXECUTIVE SUMMARY

1. Introduction

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

Ireland's anti-discrimination laws were expanded significantly in the late 1990s. The Employment Equality Act 1998[3] and the Equal Status Act 2000[4] provided for nine discriminatory grounds and established a national equality body, as well as a dedicated forum for hearing anti-discrimination complaints, the Equality Tribunal. From 2008 successive national budgets severely curtailed funding for equality infrastructure. In November 2014, the Irish Human Rights and Equality Commission (IHREC)[5] was established as Ireland's national equality body. The body is equipped with equivalent powers to its predecessor, and its funding position has improved. The Equality Tribunal was subsumed, along with several employment rights bodies, into the Workplace Relations Commission (WRC) in 2015.[6] The impact of this change (if any) on discrimination complaints cannot yet be evaluated.

Religious criteria in school admission policies have featured in national debates about equality law over the past few years and, in 2018, legislation was enacted that effected substantial reform, including the effective removal of a child's religion as an admission criterion (see further Chapter 3.2.8). In 2019, the Supreme Court clarified the law on reasonable accommodation of people with disabilities in the workplace.[7] It held that, in discharging the duty, employers are obliged to consider the removal or redistribution of any functions attached to a post, even where these are considered essential. Such measures need not be undertaken where they would impose a disproportionate burden (see further Chapters 2.6 and 12.2). There were no other significant developments in Irish anti-discrimination law.

2. Main legislation

The Irish Constitution enshrines a guarantee of equality before the law with no specified discriminatory grounds. It is invoked relatively infrequently.[8]

Irish anti-discrimination legislation consists of the Employment Equality Acts 1998-2015, which govern employment and occupation, and the Equal Status Acts 2000-2018, which cover goods, services, housing/accommodation and education. The Pensions Acts 1990-

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1 See http://www.cso.ie/en/census/census2016reports/.
2 There are no official statistics on Roma.
3 Employment Equality Act 1998, 18 June 1998, available at: http://www.irishstatutebook.ie/eli/1998/act/21/enacted/en/print.
4 Equal Status Act 2000, 26 March 2000, http://www.irishstatutebook.ie/eli/2000/act/8/enacted/en/html.
5 Irish Human Rights and Equality Commission Act 2014, 27 July 2014, http://www.irishstatutebook.ie/2014/en/act/pub/0025/print.html.
6 Workplace Relations Act 2015, 20 May 2015, http://www.irishstatutebook.ie/eli/2015/act/16/enacted/en/pdf.
7 Supreme Court, *Nano Nagle School v Daly* [2019] IESC 63, 31 July 2019, http://courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/0036387fa70d0e74802584480046ab2b?OpenDocument.
8 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.

2018[9] apply to occupational pension schemes. Each law covers the grounds of gender, age, race, religion, family status,[10] 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.[11]

Other laws also contain provisions prohibiting discrimination: the Unfair Dismissals Acts 1977-2015,[12] the Prohibition of Incitement to Hatred Act 1989,[13] which criminalises hate speech, and the Intoxicating Liquor Act 2003,[14] Section 19 of which provides for the enforcement of discrimination law in the context of premises licensed for the sale of alcohol.

Irish anti-discrimination legislation goes beyond the EU equality directives, in that the personal scope of the Equal Status Acts 2000-2018 prohibits discrimination not just on grounds of race and gender, but also on the grounds of age, civil status, disability, family status, religion, sexual orientation, membership of the Traveller community and receipt of housing assistance. Nationality-based discrimination is also expressly prohibited under the 'race' ground. The definition of disability is broader than in EU law, and reasonable accommodation on that ground must be provided to people accessing goods and services. There is a substantial body of case law on all discriminatory grounds, the bulk of which comprises decisions of the WRC (formerly the Equality Tribunal) and the Labour Court.[15] Studies suggest that under-reporting of discrimination and failure to take action in response to perceived discrimination are significant problems.[16]

Ireland has ratified the main Council of Europe human rights instruments, including the Revised European Social Charter, but not Protocol 12 to the European Convention on Human Rights. It has also ratified most of the primary United Nations instruments, with ratification of the UN Convention on the Rights of Persons with Disabilities in 2018. Ireland is a dualist state, meaning that for international law to be enforceable in the Irish legal system, it must be transposed by means of legislation into the national legal order. The 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.[17]

3. Main principles and definitions

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

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

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

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

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

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

15 The determinations of both bodies are published at: https://www.workplacerelations.ie/en/search/?decisions=1&from=5/8/2019&to=11/8/2019&body=15376&pageNumber=1.

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

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

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

The Employment Equality Acts 1998-2015 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 Acts. The employer has an obligation to take appropriate measures to enable a person with a disability to have access to employment, to participate or advance in employment and to undergo training unless such measures would impose a disproportionate burden on the employer. To determine what amounts to a disproportionate burden, account must be taken of the costs of the measure in question, the scale and financial resources of the employer, and the possibility of obtaining public funding or other assistance. Under the Equal Status Acts 2000-2018, a provider of goods or services must do all that is reasonable to accommodate the needs of a person with a disability by providing special treatment or facilities without which it would be impossible or unduly difficult for the person to avail themselves of the goods or services in question. This duty is subject to a nominal cost ceiling, which varies according to the scale of the organisation and the resources available to it.

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

The Equal Status Acts 2000-2018 prohibit discrimination in relation to goods and services supplied by the private and public sectors, including education and housing/accommodation. Social protection and social advantages are not explicitly mentioned but are covered according to case law. [18] The main compliance issue relates to a provision that exempts any action required by law from scrutiny.[19]

5. Enforcing the law

Complaints under the Employment Equality Acts 1998-2015, the Equal Status Acts 2000-2018 and the Pensions Acts 1990-2018 may be brought before the Workplace Relations Commission (WRC). The WRC assumes an investigative role in the hearing of complaints, complainants may represent themselves, 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 is legally binding and its terms can be enforced at the Circuit Court. WRC employment determinations may be appealed to the Labour Court, while equal status appeals are heard by the Circuit Court. Labour Court and Circuit Court determinations can be appealed on a point of law to the High Court.

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

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

Organisations may represent an individual complainant at the WRC and the Labour Court if authorised to do so by the complainant, but not before the Circuit Court or the High Court. Trade unions regularly represent their members. Organisations are not permitted to bring a complaint, with the exception of the Irish Human Rights and Equality Commission (IHREC). IHREC enjoys legal standing to bring complaints to the WRC relating to patterns of discrimination, discriminatory advertising or the contents of a collective agreement. It can also provide an individual complainant with legal representation and/or legal advice.

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[18] On social protection, see, for example, Equality Tribunal, *McQuaid v Department of Social Protection*, DEC-S2014-015, 2 October 2014, https://www.workplacerelations.ie/en/Cases/2014/October/DEC-S2014-015.html. Re social advantages, see, for example, Equality Tribunal, *Thompson v Iarnród Éireann*, DEC-S2009-015, 2 March 2009, https://www.workplacerelations.ie/en/Cases/2009/March/DEC-S2009-015-Full-Case-Report.html. Chapter 3.2.7 discusses ambiguity in the case law on social advantages.

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

IHREC granted legal assistance to 42 new applicants in 2019. As at the end of December 2019, it was providing legal assistance to 104 individuals, 73 of whom were in receipt of legal advice only, with the remaining 31 also receiving legal representation. Work on 66 client files was completed during 2019.[20]

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

The Employment Equality Acts 1998-2015 provide for a broad range of remedies: compensation, orders for employers to take specific courses of action, reinstatement and re-engagement. All employment contracts are deemed to have an equality clause, which transforms any provisions of the contract that would otherwise give rise to unlawful discrimination. All discriminatory provisions in collective agreements are deemed null and void, and it is not possible to contract out of the terms of the equality legislation. There are maximum limits on financial awards. In the context of employment, those limits are a maximum of two years' pay, and EUR 13 000 where the complainant was not an employee of the respondent, with equal pay arrears going back three years. Compensation up to a ceiling of EUR 15 000, is provided for under the Equal Status Acts 2000-2018. Service providers can also be directed to take specific courses of action. Under both sets of Acts, the financial sanctions are much lighter than those provided for in the case of gender discrimination. This suggests that the sanctions available for the non-gender grounds may not be effective, proportionate or dissuasive. Injunctive relief is not available before the Workplace Relations Commission or the Labour Court; such action may only be taken by the ordinary courts.

A binding 3 % quota applies to the employment of people with disabilities in the civil and public service. The Government has undertaken to progressively increase the statutory target towards 6 % by 2024.[21] 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.[22] Additional English language support is provided to migrant children in schools.

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

6. Equality bodies

The Equality Authority was merged with the Irish Human Rights Commission to form the Irish Human Rights and Equality Commission (IHREC).[23] 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-

[20] Irish Human Rights and Equality Commission (2020), *Annual Report 2019*, p. 16, available at: https://www.ihrec.ie/app/uploads/2020/07/IHREC-Annual-Report-2019-English-version.pdf.

[21] 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.

[22] 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.

[23] Irish Human Rights and Equality Commission Act 2004, 27 July 2014, http://www.irishstatutebook.ie/2014/en/act/pub/0025/print.html.

discrimination laws. It fulfils these functions by, *inter alia*, conducting research, raising awareness, reviewing legislation and drafting statutory codes of practice. Two codes of practice drafted by IHREC was awaiting the approval of the Minister for Justice and Equality as at the end of December 2019. The first is on equal pay and the second is a revised code on sexual harassment and harassment (on the nine discrimination grounds) at work. IHREC has the power to instigate litigation in its own name and to assist litigants. It is authorised to conduct inquiries and to carry out equality reviews and equality audits. IHREC issued several invitations to conduct equality audits in 2019, following equality reviews undertaken the previous year. The audits are aimed at securing the cessation of less favourable treatment on the race ground in access to homeless and social housing services, the extension of the practice of non-supervision of urine samples to addiction treatment services nationwide, and the provision of interpreting services for people accessing primary healthcare. The Commission has the full range of competences set out under Article 13 of the Racial Equality Directive. The Department of Justice and Equality, under the direction of the Minister, funds IHREC, which reports to the Oireachtas (the Irish Parliament).

7. Key issues

One interesting innovation lies in 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. It has collaborated with numerous public sector bodies on pilot initiatives, which informed a guidance document published in 2019.

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

INTRODUCTION

The national legal system

The basic law of Ireland is the Constitution, Bunreacht na hÉireann, of 1937. It establishes the State and its institutions, sets out the fundamental principles guiding the governance of the State and contains an entrenched bill of rights.[24] The Constitution takes precedence over all other sources of law, subject to Article 29.4.6°, which ensures that nothing in the Constitution can invalidate laws enacted, acts done or measures adopted by the State where these are necessitated by membership of the EU. Article 15.4 prohibits the Oireachtas (Parliament) from enacting laws that conflict with the Constitution, including its human rights guarantees, while Article 34.3.2° vests in the High Court, Court of Appeal and Supreme Court the express power of judicial review of legislation.

The Constitution provides that the sole law-making body in the State is the Oireachtas.[25] 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.[26] 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.[27] 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[28]
Grounds covered: age, civil status, disability, family status, gender, race, religion, sexual orientation and membership of the Traveller community
Material scope: Employment (including occupation and vocational training)

Equal Status Acts 2000-2018[29]
Grounds covered: age, civil status, disability, family status, gender, race, religion, sexual orientation, membership of the Traveller community and receipt of housing assistance.
Material scope: Access to goods and services, housing/accommodation, education, registered clubs

Pensions Acts 1990-2018[30]
Grounds covered: age, civil status, disability, family status, gender, race, religion, sexual orientation and membership of the Traveller community
Material scope: Occupational pensions, occupational benefit schemes

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[24] Constitution of Ireland, 29 December 1937, available at: http://www.irishstatutebook.ie/eli/cons/en/html.
[25] Ireland has a bicameral system, which means that there are two houses of the Oireachtas. The lower house is Dáil Éireann and the upper house is Seanad Éireann (the Senate). Legislative powers are granted to the two houses by virtue of Article 15.2 of the Constitution.
[26] 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_intlHR_spotlight_095201.pdf.
[27] European Convention on Human Rights Act 2003, 30 June 2003, http://www.irishstatutebook.ie/eli/2003/act/20/enacted/en/print.html.
[28] Employment Equality Acts 1998-2015, http://revisedacts.lawreform.ie/eli/1998/act/21/revised/en/html.
[29] Equal Status Acts 2000-2018, http://revisedacts.lawreform.ie/eli/2000/act/8/revised/en/html.
[30] Pensions Act 1990, 24 July 1990, http://www.irishstatutebook.ie/eli/1990/act/25/enacted/en/print.html; amended by Section 22 of the Social Welfare (Miscellaneous Provisions) Act 2004, 25 March 2004, http://www.irishstatutebook.ie/eli/2004/act/9/section/22/enacted/en/html#sec22.

Irish Human Rights and Equality Commission Act 2014[31]
Grounds covered: age, civil status, disability, family status, gender, race, religion, sexual orientation, membership of the Traveller community and receipt of housing assistance
Material scope: Establishment of Irish Human Rights and Equality Commission as national equality body; powers and functions of IHREC

Workplace Relations Act 2015[32]
Grounds covered: age, civil status, disability, family status, gender, race, religion, sexual orientation, membership of the Traveller community and receipt of housing assistance
Material scope: Establishment of Workplace Relations Commission (WRC) as primary forum for hearing anti-discrimination complaints; powers and functions of WRC

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

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

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

General clause

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

The grounds covered implicitly by this provision include sex/gender, race, language, religious or political opinions, age, marital status, pedigree and disability.[33]

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

Specific clauses

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

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

These provisions are directly applicable.

These provisions cannot be enforced against private individuals (although they can be enforced against the state). Although the matter requires further judicial interpretation, it seems that the general equality clause cannot be enforced against private actors.[34] Article 44.2.3° cannot be enforced against private actors.[35] The other two provisions listed above explicitly apply only to state activities.

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

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

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

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

The following grounds of discrimination are explicitly prohibited in the **main legislation** transposing and implementing the two EU anti-discrimination directives (as listed in the Introduction above): age, civil status, disability, family status, gender, race, religion, sexual orientation, membership of the Traveller community and receipt of housing assistance.[36] It appears that, while religious beliefs are covered, the provisions do not adequately prohibit discrimination on the grounds of religion *or* belief.

2.1.1 Definition of the grounds of unlawful discrimination within the directives

a) Racial or ethnic origin

The race ground under both the Employment Equality Acts (EEA) and the Equal Status Acts (ESA) covers people who are of different 'race, colour, nationality or ethnic or national origin'.[37] None of these concepts are defined.

According to case law, 'national origin' is 'acquired by a person at the time of birth and connects that person with one or more groups of people who can be described as a "nation"'.[38] 'Nationality' is in effect equated with citizenship.[39]

Racial origin
Case law has not considered the meaning of 'race' as such.[40]

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

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

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

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

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

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

one nationality or ethnic group might elect to adhere to another.'[41] The Court approved of the definition of 'ethnic group' set out by the British House of Lords in *Mandla v Dowell-Lee.*[42] 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'.[43] Applying this formula, the High Court concluded that, for the purposes of ESA, farmers are an occupational group, not an ethnic group. The complainant could not, therefore, base a discrimination complaint on his status as a member of the farming community.[44]

Membership of the Traveller community is a separate ground. The 'Traveller community' is defined as 'the community of people commonly known and identified (both by themselves and others) as people with a shared history, culture and traditions including, historically a nomadic way of life on the island of Ireland.'[45] On 1 March 2017 the Taoiseach (Prime Minister) announced that the state formally recognised Travellers as an ethnic group.[46] According to the Taoiseach's statement, the policy change would 'create no new individual, constitutional or financial rights'.[47] Nonetheless, this development has affected how existing provisions are *interpreted*. In 2018, the Workplace Relations Commission (the first instance forum for complaints under EEA and ESA) confirmed for the first time that Travellers were covered by the race ground as well as the Traveller community ground under EEA and ESA.[48] The primary ESA case to reach the superior courts on appeal proceeded exclusively as a Traveller-ground case.[49] The Court omitted to consider the application of the Racial Equality Directive, even though the amicus submission of the Equality Authority argued that the Directive should be deployed in interpreting the ESA

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

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

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

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

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

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

47 The High Court considered the legal status of the policy change in a 2017 case. Justice Eagar held that the Taoiseach's statement had 'no legal effect' and declined an application to amend the reliefs sought in a judicial review application to include, *inter alia*, discrimination on the basis of ethnicity. The applicant Traveller family had sought a series of orders directing the respondent county council to fulfil the duties imposed on it under statute to provide accommodation. According to the Court, while it has been open to the applicants to ground their application on ethnic bias, they did not take that opportunity when applying for leave to apply for judicial review; the amendments sought would amount to an entirely different case to that which had been made by the applicants to date: *Mongans v Clare County Council* [2017] IEHC 709, 27 October 2017, http://courts.ie/Judgments.nsf/0/BC93B5F638096D63802581E600315575.

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

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

provisions on indirect discrimination as applying to the Traveller ground.[50] It should now be clear that the Directive is applicable in all cases involving Travellers and falling within its material scope.

b) Religion or belief

Under ESA and EEA, the 'religion ground' applies as between people where 'one has a different religious belief from the other, or that one has a religious belief and the other has not'.[51] 'Religious belief' is defined as 'religious background or outlook'.[52] 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'.[53] Being a 'spiritual guide' does not fall within the ground, since it is not specific to a particular faith, or to a set of religious beliefs.[54]

While Irish forums have yet to consider the definition of religion set out in the *Achbita* case,[55] the Labour Court has determined that protection extends to manifestations of beliefs relating to religious teaching or observance. In an employment context, however, the right to engage in the practice or manifestation of religion could not be exercised 'in a way that is disruptive of the business of the employer or constitutes an interference with the legitimate interests of the employer.'[56]

National legislation does not refer to philosophical beliefs. It appears from the wording of the provisions concerning discrimination on the religion ground that the belief in question must be a religious one, and so the provisions do not adequately prohibit discrimination on the grounds of religion *or* belief.

The Labour Court appears to accept that humanist beliefs may be covered, but apparently as constituting a lack of religious belief similar to atheism and not because humanism could be considered a 'religious belief'.[57] In a 2016 decision, the WRC rejected the complaint of an individual who was not permitted to wear a colander on his head for the purposes of a photograph when he was making an application to renew his driver's licence.[58] The complainant argued that the action was discriminatory, as wearing such an item was a feature of his religious beliefs as a 'Pastafarian', and the respondent's guidelines permitted individuals to wear head coverings for religious reasons. Having reviewed the definitions of religion and philosophical belief developed in case law under the UK Equality Act 2010, the WRC determined that the belief system in question did not constitute a 'religious belief' for the purposes of 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.

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

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

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

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

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

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

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

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

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

c) Disability

Under EEA and ESA, the disability ground applies where 'one is a person with a disability and the other either is not or is a person with a different disability.'[59] 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.'[60]

The ground covers those that have a disability at present, a history of disability, may have a disability in the future, or are imputed a disability.[61] Direct discrimination based primarily on a previous disability was established in a 2019 case.[62] The complainant had been on sick leave due to depression for approximately 16 months. She was certified fit to return to normal duties by her doctor and psychiatrist and did not seek reasonable accommodation. The complainant argued that she was treated less favourably following her return to work because of her previous disability. Specifically, she argued that, because of her history of mental illness, she had been placed on reduced working hours, assigned 'menial tasks', subjected to surreptitious monitoring of her work, placed on four weeks of leave and denied training opportunities. The WRC agreed that this treatment had occurred and was 'directly related' to the complainant's disability, without elaborating precisely on how the complainant was covered by the disability ground. The respondent was directed to pay EUR 25 000 in compensation. In 2018, the Labour Court held that the ground operates asymmetrically, so that non-disabled persons do not have *locus standi* to bring a disability-ground complaint.[63]

The definition of disability does not fully accord with the concept adopted by the Court of Justice of the European Union (CJEU) in *HK Danmark (Ring and Skouboe Werge*),[64] 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.[65] The Irish definition does not require a condition to last a long time in order to qualify as a disability,[66] nor does it make the distinction between disability and sickness or illness.[67] In 2019, however, the Labour Court

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59 Section 28(1)*(f)* EEA; Section 3(2)*(g)* ESA.
60 Section 2(1) EEA; Section 2(1) ESA.
61 Section 2(1) EEA; Section 3(1)*(a)* ESA.
62 Workplace Relations Commission, *An Employee v An Employer*, DEC-E2018-026, 3 January 2019, https://www.workplacerelations.ie/en/Cases/2018/December/DEC-E2018-026.html.
63 Labour Court, *Navan Education Centre v Lydon*, EDA 1848, 11 December 2018, https://www.workplacerelations.ie/en/Cases/2018/December/EDA1848.html. This decision is discussed in Chapter 5(a).
64 Joined Cases C-335/11 and C-337/11.
65 Supreme Court, *Nano Nagle School v Daly* [2019] IESC 63, 31 July 2019, http://courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/0036387fa70d0e74802584480046ab2b?OpenDocument.
66 See, for example, Labour Court, *Cregg Labour Solutions v Cahill*, EDA1634, 1 December 2016, http://www.workplacerelations.ie/en/Cases/2016/December/EDA1634.html.
67 A person who has recovered from an illness and returns to employment following sick leave will not automatically have a disability as defined under EEA; such a finding rests on the facts. See Workplace Relations Commission, *An Employee v A Cleaning Company*, DEC-E2017-065, 4 September 2017, https://www.workplacerelations.ie/en/Cases/2017/September/DEC-E2017-065.html.

issued a determination which appears to endorse the more restrictive understanding of disability developed by the CJEU in the sense that a limitation arising from an illness must be long term. The Court found that a relatively short illness does not amount to a disability that hinders 'the full and effective participation of the person concerned in professional life on an equal basis with other workers'.[68] As discussed in Chapter 12.2, the Court omitted to consider the 'minimum requirements' and non-retrogression principles set out in Directive 2000/78. It remains to be seen how the law will develop.

A 2018 case established that infertility was a disability for the purposes of EEA, as it could be said to result from a 'malfunction … of a part of a person's body' as set out under Section 2(1)*(c)*.[69] The respondent in a 2019 complaint disputed the designation of fibromyalgia as a 'disability'.[70] In light of the medical evidence presented by both parties, the WRC concluded that the complainant's fibromyalgia constituted 'a condition, illness or disease which affects a person's thought processes, perception of reality, emotions or judgment or which results in disturbed behaviour', under Section 2(1)*(e)* EEA. The manifestations of the condition included excessive fatigue, difficulty coping and concentrating, mood variation and generalised muscle pain. They were long-term, had a significant impact on the complainant, and hindered her full and effective participation in the workplace on an equal basis with others. Thus, the condition amounted to a disability in line with *HK Danmark*, as well as Irish law. Stress caused by the illness of a relative or loved one is not 'an abnormality or malfunction', according to the Labour Court. It is 'a normal human condition' and cannot be classified as a disability.[71]

d) Age

The age ground is defined as referring to people of different ages,[72] but in employment applies only in relation to persons above the maximum age at which a person is statutorily obliged to attend school.[73] In access to goods and services it does not apply to persons aged under 18.[74]

e) Sexual orientation

Sexual orientation is defined as 'heterosexual, homosexual or bisexual orientation', without further elaboration.[75] Case law has not explored the meaning of those terms. Gay and lesbian people have pursued the vast majority of complaints on the ground under both ESA and EEA, with one case referred by a man on the 'bisexual orientation' aspect of the ground.[76]

2.1.2 Multiple discrimination

In Ireland, multiple discrimination is not prohibited by law.

However, complaints may be referred on more than one ground. The legislation specifies that complaints lodged on several grounds must be investigated as a single case but that

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[68] Labour Court, *Houses of the Oireachtas v Hickey,* EDA1918, 11 June 2019, https://www.workplacerelations.ie/en/cases/2019/june/eda1918.html.
[69] Workplace Relations Commission, *A Quality Control Assistant v A Grocery Retailer*, ADJ-00005772, 20 March 2018, https://www.workplacerelations.ie/en/cases/2018/march/adj-00005772.html.
[70] Workplace Relations Commission, *Costello v Allied Irish Bank plc*, DEC-E2019-007, 13 September 2019, https://www.workplacerelations.ie/en/cases/2019/september/dec-e2019-007.html.
[71] Labour Court, *Health Service Executive North West v Killoran*, EDA1830, 30 April 2018, https://www.workplacerelations.ie/en/cases/2018/april/eda1830.html.
[72] Section 6(1)*(f)* EEA; Section 3(2)*(f)* ESA.
[73] Section 6(3)*(a)* EEA.
[74] Section 3(3)*(a)* ESA.
[75] Section 2(1) EEA; Section 2(1) ESA.
[76] Equality Tribunal, *A Complainant v A Fast Food Franchise*, DEC-S2008-036, 11 June 2008, https://www.workplacerelations.ie/en/cases/2008/june/dec-s2008-036-full-case-report.html.

a decision must be made on each of the claims.[77] In practice, adjudicators deal with the grounds in turn, requiring a case to be established separately on each ground.[78] Even where a complaint succeeds on several discriminatory grounds the applicable compensation limits apply.

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

In a limited number of cases, the first instance forum for hearing discrimination law complaints has tacitly recognised multiple discrimination. In an equal pay case, *O'Brien v ComputerScope Limited,*[79] the issues of age and gender were treated together, perhaps because the actual comparators were both of a different gender and a different age to the complainant. In other cases, it was determined that discrimination on one ground was 'compounded' by discrimination on another ground; the role of the two grounds concerned is differentiated in the decisions.[80] *Lindberg v Press Photographers Association of Ireland*[81] 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*[82] 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'.[83]

The approach to multiple discrimination adopted in the Tribunal decisions set out above is exceptional and is arguably unlikely to be developed further absent legislative amendment. In 2017, Ireland's national equality body noted that, in failing to provide for 'compound discrimination', domestic equality legislation was not in full compliance with the UN Convention on the Elimination of All Forms of Discrimination against Women. It recommended that, 'equality legislation be amended to include a definition of multiple discrimination.'[84] In 2019, the UN Committee on the Elimination of Racial Discrimination recommended that Ireland review ESA and EEA to provide for the explicit prohibition of multiple discrimination.[85] There are no plans to enact such legislation, however.

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

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

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

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

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

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

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

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

84 IHREC (2017), *Submission to the United Nations Committee on the Elimination of Discrimination Against Women on Ireland's Combined Sixth and Seventh Periodic Reports*, at p. 34. Available at: https://www.ihrec.ie/app/uploads/2017/02/Ireland-and-the-Convention-on-the-Elimation-of-All-Forms-of-Discrimination-Against-Women.pdf.

85 Committee on the Elimination of Racial Discrimination (2019), *Concluding observations on the combined fifth to ninth reports of Ireland*, CERD/C/IRL/CO/5-9, para. 12(b), available at: https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/IRL/INT_CERD_COC_IRL_40806_E.pdf.

In Ireland, discrimination based on a perception or assumption of a person's characteristics is prohibited in national law.
Section 6(1)*(a)*(iv) EEA provides:

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

A decision under EEA found that an employee who had been treated less favourably because of her body mass had been subjected to disability discrimination by assumption.[86] The Equality Tribunal did not make a finding as to whether obesity of itself is a disability. Irish law thereby recognises that obesity may be a basis for a disability discrimination complaint, albeit in a different manner from the CJEU judgment in *FOA (Kaltoft) v Billund*.[87]

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

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

An Irish citizen born in Indonesia lodged a successful race-ground complaint concerning correspondence issued by the Department of Social Protection.[88] She was sent a series of letters seeking proof of her nationality in the context of accessing child benefit payments. The respondent acknowledged that such correspondence was issued to non-Irish nationals as an anti-fraud measure. The WRC found that the Department's practice was a clear form of direct discrimination in contravention of ESA and that the complainant had been subjected to less favourable treatment based on an assumption as to her race (nationality). An order for EUR 3 000 in compensation was made, and the respondent was directed to review its fraud detection practices for the child benefit scheme to ensure compliance with ESA.[89]

b) Discrimination by association

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

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

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

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

[87] [2014] CJEU Case C-354/13.

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

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

Discrimination by association on the ground of sexual orientation was established in a 2015 case.[90] The complainant, a teacher, was discriminated against when a school principal made insulting comments about her son's sexual orientation. A separate complaint of harassment on the religion ground was also sustained. The WRC awarded the complainant EUR 3 000 in compensation for the breaches of EEA and also directed the respondent to arrange training for the school's board of management and all staff on employment policies, particularly in relation to equality, discrimination and harassment.

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

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

Several complaints of discrimination by association have been established under ESA, many on the Traveller community ground. For example, in *Battles v The Killarney Heights Hotel* the complainant, a Traveller, and her husband, a settled person, had been discriminated against when refused service in a hotel. Mr Battles' claim was that of discrimination by association under Section 3(1)*(b)*.[91] Discrimination by association on the victimisation ground has occurred in a number of cases, such as *O'Brien v Dunnes Stores, Tralee.*[92] A man was refused access to a store some weeks after his brother had been asked to leave while he was shopping there. The brother had notified the respondent in writing that he intended to lodge a discrimination complaint. When the complainant tried to enter the shop, he was denied access by a security guard who told him that it was because his brother 'was taking a case to the court'. By suggesting that he was going to refer a complaint, the man's brother was covered by the victimisation ground. The victimisation ground protects people from adverse treatment for using or indicating an intention to use ESA. In being denied access a few weeks later, the complainant was therefore treated less favourably by virtue of his association with someone covered by a discriminatory ground.

National law is in line with the judgment in Case C-303/06, *Coleman v Attridge Law and Steve Law.*[93] To date, two WRC decisions have referred to Case C-83/14, *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminastsia*, but since neither case

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

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

[92] Equality Tribunal, *O'Brien v Dunnes Stores, Tralee,* DEC-S2007-038, 30 March 2007, https://www.workplacerelations.ie/en/Cases/2007/March/DEC-S2007-038-Full-Case-Report.html. See also Equality Tribunal, *Palmer v Connacht Hospitality (Group) Ltd. aka Connacht Accommodation Ltd t/a Active Fitness Leisure Club at the Connacht Hotel*, DEC-S2015-009, 29 June 2015, https://www.workplacerelations.ie/en/Cases/2015/June/DEC-S2015-009.html.

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

pertained to indirect discrimination by association, it remains to be seen whether domestic law is aligned with that judgment.[94]

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

a) Prohibition and definition of direct discrimination

In Ireland, direct discrimination is prohibited in national law. It is defined under both EEA and ESA as occurring where a person is treated less favourably than another person is, has been or would be treated in a comparable situation on any of the discriminatory grounds, which exists, existed but no longer exists, or may exist in the future.[95]

As in previous years, several complaints of direct discrimination were upheld in 2019. Examples of EEA cases include:
Age ground: access to employment;[96] discriminatory dismissal[97]
Disability ground: access to employment;[98] conditions of employment;[99] discriminatory dismissal.[100]
While the WRC heard numerous race-ground complaints in 2019, as well as a few on the religion ground[101] and the sexual orientation ground,[102] none was upheld.

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94 Workplace Relations Commission, *A Nurse v A Hospital,* ADJ-00008073, 23 April 2018, https://www.workplacerelations.ie/en/Cases/2018/April/ADJ-00008073.html; *A Tenant v A Letting Agency,* ADJ-00006003, 12 April 2017, https://www.workplacerelations.ie/en/Cases/2017/April/ADJ-00006003.html.

95 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).

96 Workplace Relations Commission, *Owens v Guinness Storehouse Ltd.*, ADJ-00014909, 15 February 2019, https://www.workplacerelations.ie/en/cases/2019/february/adj-00014909.html; Workplace Relations Commission, *Maloney v Ability West Clg*, ADJ-00011207, 8 May 2019, https://www.workplacerelations.ie/en/cases/2019/may/adj-00011207.html.

97 Workplace Relations Commission, *A Secretary v A Solicitor's Firm*, ADJ-00016645, 18 January 2019, https://www.workplacerelations.ie/en/cases/2019/january/adj-00016645.html; Labour Court, *Louth County Council v Clarke*, EDA1916, 29 May 2019, https://www.workplacerelations.ie/en/cases/2019/may/eda1916.html; Workplace Relations Commission, *Sales Advisor/ Mechanic/ Department Manager v DIY/Electrical Retailer*, ADJ-00013899, 30 May 2019, https://www.workplacerelations.ie/en/cases/2019/may/adj-00013899.html; Workplace Relations Commission, *Fox v Tedcastles Aviation Fuels Limited*, ADJ-00016441, 16 September 2019, https://www.workplacerelations.ie/en/cases/2019/september/adj-00016441.html; Workplace Relations Commission, *McLoughlin v Shannon Transport & Warehousing Company t/a STL Logistic*, ADJ-00018810, 10 October 2019, https://www.workplacerelations.ie/en/cases/2019/october/adj-00018810.html; Workplace Relations Commission, *Dempsey v The West of Ireland Alzheimer's Society*, ADJ-00014857, 15 October 2019, https://www.workplacerelations.ie/en/cases/2019/october/adj-00014857.html; Workplace Relations Commission, *Roper v Raidió Teilifís Éireann*, ADJ-00019084, 18 December 2019, https://www.workplacerelations.ie/en/cases/2019/december/adj-00019084.html.

98 Workplace Relations Commission, *Worker v Employer*, ADJ-00018094, 2 May 2019, https://www.workplacerelations.ie/en/cases/2019/may/adj-00018094.html; Workplace Relations Commission, *Qualter v Public Appointments Service*, ADJ-00014631, 25 November 2019, https://www.workplacerelations.ie/en/cases/2019/november/adj-00014631.html; Workplace Relations Commission, *Qualter v Public Appointments Service*, ADJ-00013917, 25 November 2019, https://www.workplacerelations.ie/en/cases/2019/november/adj-00013917.html.

99 Workplace Relations Commission, *An Employee v An Employer*, DEC-E2018-026, 3 January 2019, https://www.workplacerelations.ie/en/Cases/2018/December/DEC-E2018-026.html.

100 Workplace Relations Commission, *Dunne v Sky Handling Partner Limited*, ADJ-00017364, 1 May 2019, https://www.workplacerelations.ie/en/cases/2019/may/adj-00017364.html; Workplace Relations Commission, *A Restaurant Worker v A Restaurant*, 18 September 2019, ADJ-00020817, https://www.workplacerelations.ie/en/cases/2019/december/adj-00020817.html; Workplace Relations Commission, *A Security Guard v A Security Firm*, ADJ-00018217, 9 October 2019, https://www.workplacerelations.ie/en/cases/2019/october/adj-00018217.html; Workplace Relations Commission, *O'Mara v Zac Global Promotions Ltd.*, ADJ-00019367, 11 November 2019, https://www.workplacerelations.ie/en/cases/2019/november/adj-00019367.html.

101 See, for example, Workplace Relations Commission, *Mooney v Yapstone International Limited*, ADJ-00012162, 31 January 2019, https://www.workplacerelations.ie/en/cases/2019/january/adj-00012162.html; Workplace Relations Commission, *Beauty Therapist v Beauty Salon,* ADJ-00004696, 25 November 2019, https://www.workplacerelations.ie/en/cases/2019/november/adj-00004696.html.

102 Workplace Relations Commission, *A Student v An Education and Training Board,* ADJ-00015127, 5 June 2019, https://www.workplacerelations.ie/en/cases/2019/june/adj-00015127%20.html; Workplace Relations Commission, *A Car Hire Administrator v A Car Hire Company*, ADJ-00019677, 25 November 2019,

Under ESA, there were several findings of direct discrimination on the race[103] and Traveller community grounds in 2019.[104]

Irish law recognises that direct discrimination may arise from a failure to afford different treatment to persons who are differently situated.[105] To date, all cases appear to be on the race ground and concern migrant workers.[106] In essence, employers may be obliged to modify certain employment practices to accommodate the needs of individuals who encounter linguistic and cultural difficulties in the workplace. Employers have been obliged to provide translated contracts for foreign nationals[107] 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.'[108] In one such decision the Director of the Equality Tribunal described the case law as establishing a 'duty of care to foreign employees.'[109] This 'duty' stems from the prohibition of direct discrimination and is entirely separate from the legal provision on reasonable accommodation, which only applies to the disability ground (see Chapter 2.6). However, it does give rise to obligations, in a very limited number of cases, such as might be expected under a reasonable accommodation duty.

b) Justification of direct discrimination

The law does not permit justification of direct discrimination, save with respect to specific provisions on the age ground concerning retirement ages, fixed-term contracts and maximum recruitment ages (see Chapter 4.7.1).

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

a) Prohibition and definition of indirect discrimination

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

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

https://www.workplacerelations.ie/en/cases/2019/november/adj-00019677.html; Workplace Relations Commission, *A Manager v A Restaurant*, ADJ-00015191, 29 May 2019, https://www.workplacerelations.ie/en/cases/2019/may/adj-00015191.html (harassment complaint upheld - see Chapter 12.2).

[103] Banking: Workplace Relations Commission, *A Syrian Refugee v A Bank*, ADJ-00013897, 25 March 2019, https://www.workplacerelations.ie/en/Cases/2019/March/ADJ-00013897.html (discussed in Chapter 12.2); Service in a restaurant: Workplace Relations Commission, *Mayank Bhatnagar v Ravi's Kitchen*, ADJ-00019292, 6 August 2019, https://www.workplacerelations.ie/en/cases/2019/august/adj-00019292.html; Rental accommodation: Workplace Relations Commission, *Enners v McCarthy*, ADJ-00020413, 23 September 2019, https://www.workplacerelations.ie/en/cases/2019/september/adj-00020413.html.

[104] The Traveller community ground cases are discussed in Chapter 12.3.

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

[106] Case law does not distinguish between EU nationals and third country nationals.

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

[108] Workplace Relations Commission, *Kostrzewski v C&F Automotive Ltd t/a Iralco*, DEC-E2015-167, 30 December 2015, at para. 4.4, https://www.workplacerelations.ie/en/Cases/2015/December/DEC-E2015-167.html. See also *A Fund Accounting Supervisor v A Fund Management Company*, ADJ-00010660, 8 October 2018, https://www.workplacerelations.ie/en/Cases/2018/October/ADJ-00010660.html.

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

person belonging to a protected group at a particular disadvantage compared with other persons.[110]

As in previous years, relatively few EEA indirect discrimination complaints on the five grounds were determined in 2019. None was upheld, and the Labour Court overturned a finding of indirect discrimination in an age-ground case that had succeeded before the WRC in 2018.[111] The WRC found that requiring applicants for a senior nursing job to hold a postgraduate degree amounted to indirect discrimination. However, on appeal, the Court found that the impugned provision was saved by an exception set out under Section 36(4) EEA, which provides that it is not discriminatory to require the holding of a specified qualification for a particular post where that qualification is a generally accepted one for posts of that description. The case is discussed further in Chapter 12.2.

In 2019, there were two successful complaints of indirect discrimination on the race ground under ESA. The first concerned an application for a driving licence on the part of an asylum seeker.[112] It is discussed in Chapter 12.2. In the other case, a supermarket discriminated against a Polish national when it refused to accept his national identity card as evidence of his age for the purpose of purchasing alcohol.[113]

b) Justification test for indirect discrimination

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

2.3.1 Statistical evidence

a) Legal framework

In Ireland, there is legislation regulating the collection of personal data.

Under Section 2(1) of the Data Protection Acts 1988-2018, 'special categories of personal data' means:

'(a) personal data revealing—
(i) the racial or ethnic origin of the data subject,
(ii) the political opinions or the religious or philosophical beliefs of the data subject, or
(iii) whether the data subject is a member of a trade union,
(b) genetic data,
(c) biometric data for the purposes of uniquely identifying an individual,
(d) data concerning health, or
(e) personal data concerning an individual's sex life or sexual orientation.'[114]

The processing of such data is prohibited unless the data subject has given their explicit consent before processing begins or the processing is authorised by law, for example, to protect the interests of a data subject, to comply with employment legislation or for reasons of public interest. Personal data relating to criminal convictions and offences may

[110] Sections 31 and 22 EEA; Section 3(1)*(c)* ESA.
[111] Labour Court, *Health Service Executive v Fitzgerald*, EDA1915, 22 May 2019, https://www.workplacerelations.ie/en/cases/2019/may/eda1915.html.
[112] Workplace Relations Commission, *An asylum seeker v A Government Agency*, ADJ-00017832, 20 November 2019, https://www.workplacerelations.ie/en/cases/2019/november/adj-00017832%20.html.
[113] Workplace Relations Commission, *Skiba v Tesco Ireland Ltd*, ADJ-00016329, 29 November 2019, https://www.workplacerelations.ie/en/cases/2019/november/adj-00016329.html.
[114] Data Protection Act 1988, 13 July 1998; Ireland, Data Protection (Amendment) Act 2003, 10 April 2003. Data Protection Act 2018, 24 May 2018. Revised text available at: http://revisedacts.lawreform.ie/eli/2018/act/7/revised/en/html.

only be processed under the control of an official authority. The Data Protection Commission was established in 2018 as the state's data protection authority for the purposes of the General Data Protection Regulation.[115]

In Ireland, statistical evidence may be admitted under national law in order to establish indirect discrimination and to design positive action measures on all five grounds, under Sections 19(4)*(c)* and 22(1A) EEA and Section 3(3A) ESA. It is admissible as evidence in court. Statistical data do not appear to be used in any coherent manner to design positive action measures, with the exception of measures relating to the disability ground in employment[116] and in order to address disadvantage in access to third-level education.[117] According to IHREC, the lack of relevant data is an impediment to evidence-based action on equality in the workplace.[118]

b) Practice

In Ireland, statistical evidence is used in practice in order to establish indirect discrimination. There is no reluctance to use statistical data as evidence in court.[119] Census data was adduced in a successful 2018 EEA case, for example.[120] Statistics held by the Adoption Authority on the national origins of adopted children was used in a case on the race ground concerning school admission policies under ESA.[121]

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.[122] Adjudicators have consistently adopted this approach, relying on matters within their specialist expertise to ease the evidential burden associated with indirect discrimination complaints.[123]

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

[116] 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.

[117] 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.

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

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

[120] Workplace Relations Commission, *A Nurse v A Hospital,* ADJ-00008073, 23 April 2018, https://www.workplacerelations.ie/en/Cases/2018/April/ADJ-00008073.html. On appeal, the Labour Court determined that the correct pool of comparison was not used at first instance, and hence that the census data which concerned the population at large was not sufficient to raise a presumption that the impugned criterion placed nurses in the complainant's age group at a particular disadvantage: *Health Service Executive v Fitzgerald,* EDA1915, 22 May 2019, https://www.workplacerelations.ie/en/cases/2019/may/eda1915.html. See discussion of this case in Chapter 12.2.

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

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

[123] See, for example, Equality Tribunal, *Mr A v Department of Social Protection*, DEC-S2013-010, 11 October 2013, https://www.workplacerelations.ie/en/Cases/2013/October/DEC-S2013-010.html; Labour Court, *Tipperary County Council v McAteer*, EDA 3/2015, 30 January 2015,

The Labour Court emphasises that statistics are not decisive in themselves, but are one factor that may be taken into account in determining whether a measure is indirectly discriminatory.[124]

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.[125] The case was taken on the Traveller community ground and the Court made no reference to EU law on the burden of proof. To date, the judgment has not impacted on decisions issued by the first instance forum for discrimination complaints. 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.[126] 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*.[127] Nevertheless, the Tribunal was 'unwilling, in the absence of hard evidence on the demographics of the catchment and movements into it in the relevant time period, to assume that non-Irish children are put at a particular disadvantage.' The decision illustrates the significant obstacles to be overcome by complainants in some indirect discrimination cases and the need for greater access to equality data.

The Equality (Miscellaneous Provisions) Act 2015 effected a slight change to the wording of the national indirect discrimination provisions that may militate against a shift towards 'requiring' statistical evidence.[128] 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.[129]

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https://www.workplacerelations.ie/en/Cases/2015/January/EDA153.html; Workplace Relations Commission, *An Employee v An Employer*, DEC-E2016-080, May 2016, https://www.workplacerelations.ie/en/Cases/2016/June/DEC-E2016-080.html; *A Nurse v A Hospital,* ADJ-00008073, 23 April 2018, https://www.workplacerelations.ie/en/Cases/2018/April/ADJ-00008073.html; *Complainant v Respondent*, ADJ-00008685, 22 May 2018, https://www.workplacerelations.ie/en/Cases/2018/May/ADJ-00008685.html.

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

[125] Supreme Court, *Stokes v Christian Brothers High School, Clonmel*, [2015] IESC 13, 24 February 2015, http://www.courts.ie/Judgments.nsf/597645521f07ac9a80256ef30048ca52/a09897a48211897980257df6005a3c31?OpenDocument.

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

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

[128] Ireland, Equality (Miscellaneous Provisions) Act 2015, 10 December 2015, http://www.irishstatutebook.ie/eli/2015/act/43/enacted/en/print.html. The 2015 Act effected a number of changes to Irish anti-discrimination law, many of which sought to align national law with the requirements of the EU anti-discrimination directives. It amended EEA by introducing an objective justification requirement for both mandatory retirement ages and offers of fixed-term contracts to persons over the compulsory retirement age (see Chapter 4.7). The religious ethos exception provided for under Section 37 EEA was altered substantially (see Chapter 4.2). Individuals may now lodge EEA complaints about discriminatory advertising; formerly, such cases could be taken solely by IHREC. The Commission retains exclusive jurisdiction with respect to discriminatory advertising under ESA – see Workplace Relations Commission, *Alamazani v Daft Media Limited*, ADJ-00006704, 23 February 2018, https://www.workplacerelations.ie/en/Cases/2018/February/ADJ-00006704.html. Further, a new housing assistance ground was included under ESA, enabling persons in receipt of various social protection payments to challenge discrimination in the context of accommodation provision.

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

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

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

Section 14(A) EEA prohibits harassment in employment on grounds of gender, age, race, religion, family status, disability, civil status, sexual orientation and membership of the Traveller community. Section 11 ESA prohibits harassment on the same grounds in access to goods and services. Under both statutes, harassment is defined as any unwanted conduct related to any discriminatory ground which has the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person.[130] This conduct can include acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material.

Various forms of communication have been the subject of successful harassment complaints under ESA and EEA, including 'spoken words',[131] text messages[132] and graffiti.[133] A complainant does not need to demonstrate that she or he falls under one of the discriminatory grounds, since it is sufficient that the impugned conduct is 'related to' a ground. Thus, in *Kane v Eirjet Ltd*,[134] a non-disabled woman and her disabled son were both subjected to harassment when airline staff dealt with them in an offensive manner.

Two complaints of harassment on the race ground, comprising racist verbal abuse of tenants, were upheld in 2019.[135] Under EEA, there were two successful complaints of harassment on the sexual orientation ground,[136] and one on the disability ground.[137]

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

b) Scope of liability for harassment

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

Section 14A EEA provides:

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

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130 Section 14A(7)*(a)* EEA, Section 11(5)*(a)* ESA.

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

132 See, for example, Equality Tribunal, *Merriman v O'Flaherty's Ltd. t/a Reads Print Design and Photocopying Bureau*, DEC-S2011-049, 8 November 2011, https://www.workplacerelations.ie/en/Cases/2011/November/DEC-S2011-049-Full-Case-Report.html.

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

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

135 Workplace Relations Commission, *A Tenant v A Landlord*, ADJ-00013893, 5 March 2019, https://www.workplacerelations.ie/en/Cases/2019/March/ADJ-00013893.html; Workplace Relations Commission, *Nkikita v Fleming*, ADJ-00020830, 4 December 2019, https://www.workplacerelations.ie/en/cases/2019/december/adj-00020830.html.

136 Workplace Relations Commission, *Magat v Component Distributors (CD Ireland) Limited*, ADJ-00016752, 30 April 2019, https://www.workplacerelations.ie/en/cases/2019/may/adj-00016752.html; Workplace Relations Commission, *A Manager v A Restaurant*, ADJ-00015191, 29 May 2019, https://www.workplacerelations.ie/en/cases/2019/may/adj-00015191.html (see Chapter 12.2).

137 Workplace Relations Commission, *A Security Guard v A Security Firm*, ADJ-00018217, 9 October 2019, https://www.workplacerelations.ie/en/cases/2019/october/adj-00018217.html.

(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.[138] 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.[139] In the instant case, such an approach had been adopted, an investigation was undertaken, and a disciplinary sanction was imposed.

An employer could not avail of the defence in a 2019 case because the investigation of a disability-ground harassment complaint was fundamentally flawed. The complainant was not informed that a formal investigation was being conducted or afforded any opportunity to participate in the process. Moreover, the respondent failed to take appropriate remedial action to ensure that the employee would not be exposed to further harassment after he had made a complaint. It was 'totally inexplicable' that no measures were taken to separate the complainant and the perpetrator in the workplace pending the conclusion of the investigation.[140]

Liability for the conduct of an employer's client was established in the 2017 case of *Rusu v Senture Security Ltd*.[141] The complainant, a Romanian national, was employed as a security guard and was assigned work at a hotel that had contracted with the respondent to provide security services. The owner of the hotel approached the complainant one evening and said, 'All Romanians are thieves and liars.' When the complainant reported this incident, Senture Security instructed him to desist from work at the premises and advised him that it would find another suitable work location. However, it subsequently

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

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

[140] Workplace Relations Commission, *A Security Guard v A Security Firm*, ADJ-00018217, 9 October 2019, https://www.workplacerelations.ie/en/cases/2019/october/adj-00018217.html.

[141] Workplace Relations Commission, DEC-E2017-056, 24 July 2017, https://www.workplacerelations.ie/en/Cases/2017/July/DEC-E2017-056.html.

failed to redeploy the complainant. The employer could not rely on the defence under Section 14A(2) since it failed to take any steps to prevent or remedy the harassment.

Service providers, such as landlords, schools and hospitals, are liable for harassment that occurs in the provision of the service concerned. Under the vicarious liability principle set out under Section 42 ESA, service providers are legally responsible for the discriminatory actions of their employees and agents. Liability was imposed on the respondent landlord for the conduct of his son in a 2019 race-ground harassment case.[142] The son lived in the adjoining house and was the respondent's agent because he acted as a contact point between the landlord and the tenant whom he subjected to racist verbal abuse. Section 11(2) ESA further obliges service providers also to protect people from harassment or sexual harassment committed by a third party, subject to a defence. This would include liability for harassment perpetrated by other tenants, clients or customers, for example. A statutory defence would be available if the service provider took such steps as were reasonably practicable to prevent harassment (Section 11(3)).

Equality legislation does not provide for liability on the part of the individual harasser. There is no specific liability for trade unions or professional associations other than as employers or service providers.[143]

2.5 Instructions to discriminate (Article 2(4))

a) Prohibition of instructions to discriminate

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

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

Section 14 EEA provides that a person who 'procures or attempts to procure' another person to engage in discrimination or victimisation shall be guilty of an offence. This criminal offence, which would cover at least some forms of instruction, is actionable in the District Court. Proceedings may be instituted by the Workplace Relations Commission or by IHREC.[144]

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

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[142] Workplace Relations Commission, *A Tenant v A Landlord*, ADJ-00013893, 5 March 2019, https://www.workplacerelations.ie/en/Cases/2019/March/ADJ-00013893.html.

[143] Trade unions are not subject to the reasonable accommodation duty under EEA in relation to their members: see Workplace Relations Commission, *McNamee v Irish Municipal Public and Civil Trade Union Impact Trade Union / FORSA Trade Union*, ADJ-00012244, 24 April 2019, https://www.workplacerelations.ie/en/cases/2019/april/adj-00012244.html. Such a complaint should be lodged instead under ESA.

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

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

b) Scope of liability for instructions to discriminate

In Ireland, the instructor is liable.

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

Employers and service providers (e.g. landlords, schools and hospitals) are liable for discrimination, including by instruction, perpetrated by employees. The legislation specifies that anything done by a person in the course of his or her employment shall be treated as done also by that person's employer, whether or not it was done with the employer's knowledge or approval.[145] Consequently, an employer could be held liable for an instruction to discriminate issued by a manager, for example. An employer can evade liability by proving that it took such steps as were reasonably practicable to prevent the employee (a) from doing that act, or (b) from doing in the course of his or her employment acts of that description.[146]

The provisions on vicarious liability for agents make it clear that persons cannot discriminate through an intermediary. Both ESA and EEA specify that: 'Anything done by a person as agent for another person, with the authority (whether express or implied and whether precedent or subsequent) of that other person shall, in any proceedings brought under this Act, be treated for the purposes of this Act as done also by that other person.'[147] Where a principal directs or instructs an agent to engage in prohibited conduct, both parties can potentially be found liable. However, since the provisions that outlaw discrimination under EEA are addressed to employers, the respondent (and hence liable person) will generally be the employer.[148] In one case, the Labour Court held that, where a prospective employer is instructed by another not to employ a particular person, and that instruction is tainted with discrimination, liability cannot be avoided by pleading that the instruction 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'.[149]

Under ESA, service providers have been found liable for implementing discriminatory policies set by other entities such as insurance underwriters, tour operators and landlords. Some of the impugned measures have taken the form of instructions to discriminate, such as a landlord's explicit direction to a letting agent not to accept tenants in receipt of rent

[145] Section 15(1) EEA, Section 42(1) ESA.
[146] Section 15(3) EEA, Section 42(3) ESA.
[147] Section 15(2) EEA, Section 42(2) ESA.
[148] The WRC accepted that an equal pay case could proceed against the Department of Education and Skills even though it was not the complainant teachers' employer, since the Department was responsible for setting teachers' remuneration: *Horgan and Keegan v Department of Education and Skills and others*, DEC-E2016-041, 4 March 2016, https://www.workplacerelations.ie/en/Cases/2016/March/DEC-E2016-041.html. On appeal, the Labour Court sought a preliminary ruling from the CJEU concerning the parameters of age-ground discrimination under Directive 2000/78/EC. The text of the Labour Court's decision has not been published. In Case C-154/18, *Horgan and Keegan v Minister for Education and Skills* [2019] I.R.L.R. 597, the CJEU ruled that a 10 % reduction in the pay of new entrants to the public service in 2011 did not constitute discrimination on the grounds of age.
[149] Labour Court, *A Worker v Two Respondents*, EDA1129, 22 November 2011, https://www.workplacerelations.ie/en/Cases/2011/November/EDA1129.html.

allowance,[150] and an insurance company's instruction not to provide persons with epilepsy access to certain cosmetic treatments.[151] Liability may be imposed on a person for the offences of procuring or attempting to procure discrimination (Section 14 EEA; Section 13 ESA). In the absence of case law, the parameters of these provisions are unclear.

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

a) Implementation of the duty to provide reasonable accommodation for 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, and it is defined.

Section 16(3)*(a)* EEA provides that 'a person who has a disability is fully competent to undertake, and fully capable of undertaking, any duties if the person would be so fully competent and capable on reasonable accommodation (in this subsection referred to as 'appropriate measures') being provided by the person's employer.'[152] Section 16(3)*(b)* specifies:

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

Section 16(3)*(c)* provides that, in determining whether the measures would impose a disproportionate burden, account shall be taken of the financial and other costs entailed, the scale and financial resources of the employer's business, and the possibility of obtaining public funding or other assistance.

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

Failure to provide reasonable accommodation is a free-standing form of discrimination.[153]

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[150] Workplace Relations Commission, *A Service User v A Letting Agency*, ADJ-00004073, 20 March 2017, https://www.workplacerelations.ie/en/Cases/2017/March/ADJ-00004073.html.

[151] Equality Tribunal, *Forde v The Body Clinic*, DEC-S2007-085, 28 November 2007, https://www.workplacerelations.ie/en/Cases/2007/November/DEC-S2007-085-Full-Case-Report.html.

[152] Case law has established that the obligation on employers to provide reasonable accommodation applies to potential employees: Equality Tribunal, *Harrington v East Coast Area Health Board*, DEC-E2002-001, 23 January 2002, https://www.workplacerelations.ie/en/cases/2002/january/dec-e2002-0011.html.

[153] Labour Court, *Wojcik v Sodexo Ireland Ltd*, EDA1517, 23 November 2015, https://www.workplacerelations.ie:443/en/Cases/2015/November/EDA1517.html.

b) Practice and case law

Decisions emphasise that the duty to provide reasonable accommodation is a proactive one, which requires employers to undertake a two-stage inquiry.[154] They must carry out a full assessment of the employee's needs and then consider the measures necessary to accommodate them, which may include adapting working patterns[155] or relieving an employee of certain tasks.[156] In a 2018 judgment, the Court of Appeal held that, where an employee cannot undertake the essential functions of a position, there is no obligation on an employer to consider the redistribution of tasks.[157] This judgment was at variance with some prior case law, which determined that a decision as to whether an employee was fully competent and capable could only be formed following a process in which the employer considered all available options in consultation with the employee.[158] On appeal, the Supreme Court held that employers are obliged to consider the redistribution of duties. It noted that the legislative provision does not refer to the 'essential' functions or duties of a post. Consequently, employers are obliged to consider the redistribution of any duties or tasks, even where they pertain to the essential functions of a job. However, the employer's obligations are not unlimited. The key test is whether any redistribution of duties or tasks would impose a 'disproportionate burden'. The Supreme Court noted that, where a redistribution of duties or tasks would effectively create a different job entirely, this would almost inevitably impose a disproportionate burden on an employer. The Court also found that it is not mandatory to consult with the employee concerned, but it would be prudent for employers to do so (see discussion in Chapter 12.2).[159]

Adjudicators routinely have regard to the scale and financial resources of employers' businesses in assessing the extent of the duty. In one case, for example, the respondent estimated the cost of providing a disabled toilet in the store where the complainant worked at EUR 22 000. The Labour Court found that, since the respondent was a large multi-national company, expenditure of EUR 22 000 'could not by any standard be regarded as imposing a disproportionate burden in vindicating the complainant's right to work on the same basis as others'.[160] In *Costello v Allied Irish Bank plc*, the WRC found that the respondent had failed to provide reasonable accommodation because it did not adequately consider providing an employee with reduced working hours for an extended period.[161] Such a measure would not have imposed a disproportionate burden on the respondent,

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

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

156 See, for example, Workplace Relations Commission, *An Employee v A Multi-National Retailer*, DEC-E2016-021, 28 January 2016, https://www.workplacerelations.ie/en/Cases/2016/January/DEC-E2016-021.html; Workplace Relations Commission, *Ms A v A Retail Business*, DEC-E2017-078, 5 October 2017, https://www.workplacerelations.ie/en/Cases/2017/October/DEC-E2017-078%20.html. This approach was affirmed by the Supreme Court in *Nano Nagle School v Daly* [2019] IESC 63, 31 July 2019, http://courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/0036387fa70d0e74802584480046ab2b?OpenDocument.

157 Court of Appeal, *Nano Nagle School v Daly*, [2018] IECA 11, 31 January 2018, http://www.courts.ie/Judgments.nsf/0/5E9B7342E6F4BF8D8025822D003BD6A8, applied by the Labour Court in *Excellence Limited v Herzyk*, EDA1815, 23 February 2018, https://www.workplacerelations.ie/en/Cases/2018/February/EDA1815.html.

158 See, for example, the High Court judgment in the following case, which endorsed the Labour Court's reasoning: *Nano Nagle School v Daly* [2015] IEHC 785, 11 December 2015, http://www.courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/86867f31d053511280257f30005c002f?OpenDocument; see also Labour Court, *Occipital Ltd v Hayes*, EDA184, 10 January 2018, https://www.workplacerelations.ie/en/Cases/2018/January/EDA184.html.

159 Supreme Court, *Nano Nagle School v Daly* [2019] IESC 63, 31 July 2019, http://courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/0036387fa70d0e74802584480046ab2b?OpenDocument.

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

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

being a large retail bank, and given the nature of the complainant's role as an advisor in a call centre.

c) Definition of disability and non-discrimination protection

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

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

In Ireland, failure to meet the duty of reasonable accommodation in employment for people with disabilities counts as discrimination.

If an employee would be fully competent and capable of undertaking the duties attached to a position if reasonable accommodation was provided, an employer that fails to provide such reasonable accommodation discriminates.[162]

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

The burden of proof is reversed.[163]

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.[164] However, Section 16(3)*(a)* tempers the defence by clarifying that a person who has a disability is fully competent to undertake, and fully capable of undertaking, any duties if the person would be so fully competent and capable upon reasonable accommodation being provided by the person's employer. It is an occupational requirement that those employed in the police, prison service or any emergency service are fully competent, available and capable of undertaking the range of functions associated with such positions so that the operational capacity of the services concerned may be preserved.[165] This provision reflects the wording of Recital 18 to Directive 2000/78 and was considered by the Labour Court in a 2018 case concerning a prison officer.[166] The Court clarified that the occupational requirement operates as a complete defence to a claim of discrimination under Section 16.

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

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

Section 4 ESA provides:

> '(1) For the purposes of this Act discrimination includes a refusal or failure by the provider of a service to do all that is reasonable to accommodate the needs of a person with a disability by providing special treatment or facilities, if without such

[162] Section 16 (1) and (3) EEA.
[163] Equality Tribunal, DEC-E2007-03, *O'Keeffe v Walsh t/a By Pass Stores,* https://www.workplacerelations.ie/en/Cases/2007/June/DEC-E2007-033-Full-Case-Report.html.
[164] See, for example, Workplace Relations Commission, *Support and Counselling Project Worker v A Charity*, ADJ-00018058, 25 July 2019, https://www.workplacerelations.ie/en/cases/2019/july/adj-00018058.html.
[165] Section 37(3) EEA.
[166] Labour Court, *Irish Prison Service v A Prison Officer*, EDA1837, 17 July 2018, https://www.workplacerelations.ie/en/cases/2018/july/eda1837.html.

special treatment or facilities it would be impossible or unduly difficult for the person to avail himself or herself of the service.

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

The 'special treatment or facilities' which the goods or service provider must provide are not defined. Owing to a Supreme Court judgment, the duty is subject to a nominal cost threshold, which is less onerous than the 'disproportionate burden' standard applicable under EEA.[167]

A service provider must 'do all that is reasonable' in providing treatment or facilities, meaning that it must address a range of options. Case law establishes that, in order to comply with its obligations, the service provider must engage in a process of consultation with the disabled person. However, the term 'reasonable' also limits the duty, in that a service provider is not expected to undertake very burdensome measures.[168] 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.[169] 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*[170] addressed grant aid to fund an extension to a house in order to meet the needs of an autistic boy. The nominal cost defence could not avail the respondent because it provided no evidence as to how much the extension would cost, and any such work would only amount to a small proportion of the overall housing budget funded by Government. In a 2017 case, the WRC found that a requirement to give 24 hours' notice in order to guarantee access to an accessible bus did not contravene the reasonable accommodation duty. Given the factors involved in ensuring wheelchair access (staff training, adaptation of vehicles and ground infrastructure), the notice requirement was reasonable and tempered by the nominal cost threshold.[171] Similarly, in a 2018 decision the WRC determined that the prison authorities had undertaken adequate measures to facilitate visits by the complainant's disabled son, such as by providing meeting rooms that were cleaned in advance. Moreover, it found that providing an escort for the complainant from the main prison to a separate unit for the purpose of visits, would constitute more than a nominal cost. According to the respondent, facilitating each such visit would involve recalling three officers on 'additional hours' for eight hours, but it did not provide a figure.[172]

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*[173] concerned the admission of the complainant's child (B) to a crèche. The complainant was informed that a place would not be available unless the boy was accompanied by a full-

[167] Article 26 of the Constitution and the Employment Equality Bill 1996, *Re* [1997] 2 IR 321, 15 May 1997.
[168] Workplace Relations Commission, *A Service User v A Forum*, DEC-S2016-023, 18 April 2016, https://www.workplacerelations.ie/en/Cases/2016/April/DEC-S2016-023.html.
[169] See, for example, Equality Tribunal, *A Complainant v Marks and Spencer PLC*, DEC-S2009-005, 22 January 2009, at para. 5.6, https://www.workplacerelations.ie/en/Cases/2009/January/DEC-S2009-005-Full-Case-Report.html.
[170] Equality Tribunal, DEC-S2007-049, 1 May 2007, https://www.workplacerelations.ie/en/Cases/2007/May/DEC-S2007-049-Full-Case-Report.html; see also Equality Tribunal, *Ms D (a tenant) v A Local Authority*, DEC-S2007-057, 29 June 2007, https://www.workplacerelations.ie/en/Cases/2007/June/DEC-S2007-057-Full-Case-Report.html.
[171] Workplace Relations Commission, *O'Doherty v Bus Éireann*, DEC-S2017-016, 13 April 2017, https://www.workplacerelations.ie/en/Cases/2017/April/DEC-S2017-016.html.
[172] Workplace Relations Commission, *A Complainant on behalf of his son v Irish Prison Service*, DEC-S2018-010, 19 April 2018, https://www.workplacerelations.ie/en/Cases/2018/March/DEC-S2018-010.html.
[173] Equality Tribunal, *Mrs A (on behalf of her son, B) v A Childcare Facility*, DEC-S2009-041, 29 June 2009, https://www.workplacerelations.ie/en/Cases/2009/June/DEC-S2009-041-Full-Case-Report.html.

time personal assistant, a requirement which the respondent maintained was necessary due to a combination of factors. The respondent referred to its obligations concerning child–staff ratios under childcare regulations and to the fact that, due to a disability, B was unable to physically move on his own without assistance. Government funding was available to provide five hours of assistance per week for the child, so the respondent could only accommodate B by employing another childcare worker. The Equality Tribunal accepted that the costs involved went beyond what was required under Section 4 ESA. Hiring an additional staff member in a private crèche that catered for some 30 children would have amounted to more than a nominal cost in an organisation of that size. In *Regan v Old Bawn Community School,*[174] the Tribunal found that the provision of sign language interpretation facilities by a community college would 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 the provisions of Section 4.

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

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

However, building on EU law principles, case law on direct discrimination in Ireland has established a modest form of reasonable accommodation in practice (see Chapter 2.2(a)). This development stems from the principle that direct discrimination may arise from a failure to afford different treatment to persons who are differently situated. To date, all cases have been on the race ground and have concerned migrant workers. In essence, employers may be obliged to modify certain employment practices to accommodate the needs of individuals who encounter linguistic and cultural difficulties in the workplace. The duty to modify employment practices is not, however, applicable to all migrant workers. Decisions have emphasised that the particular employee/s must essentially be in a 'potentially vulnerable position'.[175] 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.[176]

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

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

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

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 in order to avail of its protection.[177] No such restrictions have been applied in the field of goods and services, which is governed by ESA.[178]

It is unlikely that non-EU/EEA nationals working without an employment permit can invoke EEA, since their contract of employment will be void by reason of illegality.[179] Such persons are not, therefore, afforded protection from discrimination in employment. Persons with an irregular migration status should be able to invoke ESA, since their status will not generally be material in accessing goods or services. The matter has not been considered in case law, however.

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

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

a) Protection against discrimination

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

ESA and EEA do not specify which persons can avail of protection. However, an Equality Tribunal decision issued in 2008 made it clear that a legal person cannot avail of ESA to claim protection against discrimination.[180] The complainant in that case was an

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

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

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

[180] Equality Tribunal, *Gloria (Ireland's Lesbian & Gay Choir) v Cork International Choral Festival Ltd.*, DEC-S2008-078, 28 October 2008, https://www.workplacerelations.ie/en/Cases/2008/October/DEC-S2008-078-Full-Case-Report.html; applied in Workplace Relations Commission, *Cork Deaf Club v Office of Public Works*, DEC-S2017-039, 10 November 2017, https://www.workplacerelations.ie/en/Cases/2017/November/DEC-S2017-039.html, and in Workplace Relations Commission, *Health Worker v Health Services Provider*, ADJ-00005333, 29 November 2017, https://www.workplacerelations.ie/en/Cases/2017/November/ADJ-00005333.html.

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.'[181]

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 ESA. The same principles should apply to 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.[182]

b) Liability for discrimination

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

Section 8(1) EEA prohibits discrimination by both employers and employment agencies, which manifestly includes legal persons. Most of the discrimination prohibitions are explicitly directed at the employer.[183] There is no provision for complaints against the person(s) who actually engaged in the impugned conduct, subject to a couple of exceptions: Section 14 imposes liability on the person responsible for procuring or attempting to procure discrimination, and Section 10 imposes liability on the person who displays or publishes discriminatory advertising.

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

Natural persons and a 'body corporate' are liable to be prosecuted for offences under both equality laws.[184]

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

a) Protection against discrimination

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

[182] Under Irish law, the general position is that an unincorporated association lacks a legal personality and so cannot be the subject of legal proceedings. Such bodies may, however, be conferred with the capacity to sue and be sued by legislation: Supreme Court, *Sandymount and Merrion Residents Association v An Bord Pleanála* [2013] IESC 51, 27 November 2013, 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.

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

[184] Section 44(2) ESA; Sections 100(5) and (6) EEA.

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

Section 2(3) EEA indicates that private and public sector employees are protected by the Act, and this is reflected in case law. An exemption applies in relation to access to employment in another person's home for the provision of personal services, where the services affect private or family life.[185] This may not conform to the provisions of the anti-discrimination directives. An exemption in relation to discrimination on the age or disability grounds applies with respect to employment in the Defence Forces.[186]

People accessing goods and services from either private or public sector bodies may avail of protection against discrimination under ESA.[187] Section 6(2)*(d)* ESA exempts 'the provision of accommodation by a person in a part (other than a separate and self-contained part) of the person's home', even where the property is available for rent by members of the public.[188] It is not clear whether this provision complies with the Racial Equality Directive.

b) Liability for discrimination

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

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

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[189] and occupation, including contract work, military service and holding statutory office, for the five grounds.[190]

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 relation to conditions for access to employment, self-employment or occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the

[185] Section 2(1) EEA.
[186] Section 37(5) EEA. See further Chapter 4.3.
[187] See further Chapter 3.2.9.
[188] The first cases to consider that exemption were heard in 2018: Workplace Relations Commission, *Bushe v Jarvis*, ADJ-00014453, 6 September 2018, https://www.workplacerelations.ie/en/Cases/2018/September/ADJ-00014453.html (since the respondent was seeking to rent a room in his home, the WRC did not have jurisdiction to hear the discrimination complaint in accordance with Section 6(2)*(d)*; Workplace Relations Commission, *A Tenant v A Landlord*, ADJ-00015004, 5 December 2018, https://www.workplacerelations.ie/en/Cases/2018/December/ADJ-00015004.html (the rental unit was self-contained and therefore the exemption was inapplicable).
[189] In a 2019 case, the Labour Court affirmed that EEA must be interpreted as covering self-employed persons to ensure conformity with the directives: *Wall, O'Shea and Kavanagh, Veterinary Partnership t/a Moyne Veterinary Clinic v Nowack*i, EDA198, 4 April 2019, https://www.workplacerelations.ie/en/cases/2019/april/eda198.html. See also Workplace Relations Commission, *Refereeing Official v Sporting Association*, ADJ-00017749, 8 August 2019, https://www.workplacerelations.ie/en/cases/2019/august/adj-00017749.html.
[190] Sections 2(1) and 2(3) EEA set out various interpretive provisions, which define the various entities that are subject to the legislation and specify, *inter alia*, that self-employed persons are covered by the act.

professional hierarchy, for the five grounds, and in both private and public sectors, as described in the directives.[191]

Section 8 EEA provides that an employer shall not discriminate against an employee or prospective employee, and that a provider of agency work shall not discriminate against an agency worker in relation to, *inter alia*, access to employment, promotion or re-grading, and classification of posts.[192]

In 2018, two female academics succeeded in age-ground complaints with respect to promotion. One of cases entailed an internal competition for appointment as a university's Dean of Teaching and Learning.[193] The complainant was 55 years of age at the time and the successful candidate was 15 years younger. A prima facie case was made, given the 'greater proximity' of the complainant's qualifications and experience to the job specification, and her 'comparable if not superior qualifications'. The respondent failed to rebut the presumption that age was a factor in the selection process, due to, *inter alia*, a lack of transparency in how the selection panel had evaluated the candidates. The complainant was awarded EUR 35 000 in compensation, the equivalent of six months' salary. The second case involved a paper-based promotion process for the position of Senior Lecturer.[194] The WRC concluded that age was a factor in the respondent's decision, in light of various pieces of evidence, including the relative achievements of the complainant and a comparator who was 20 years younger, as well as data on the age profiles of successful and unsuccessful candidates. The WRC ordered that the complainant be retrospectively promoted and awarded EUR 30 000 in compensation.

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

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

In Ireland, national legislation prohibits discrimination in working conditions, including pay and dismissals,[195] for all five grounds and for both private and public employment.

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[191] Section 8 EEA applies to employers and providers of agency work. Section 11 applies to employment agencies, other than in their capacity as employers. Section 13(1) covers organisations of workers or of employers, trade or professional organisations, and bodies that control entry to or the carrying on of a profession, vocation or occupation. Section 13A prohibits discrimination in respect of business partnerships.

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

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

[194] Workplace Relations Commission, *Cleary v University College Dublin*, DEC-E2018-009, 26 March 2019, https://www.workplacerelations.ie/en/cases/2018/march/dec-e2018-009.html.

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

Section 8 EEA provides that an employer shall not discriminate against an employee or prospective employee, and that a provider of agency work shall not discriminate against an agency worker, in relation to, *inter alia*, conditions of employment, terms of employment, working conditions, opportunities or facilities for employment counselling, training and work experience, overtime, shift work, short time, transfers, lay-offs, redundancies, dismissals and disciplinary measures.[196]

Section 29 EEA sets out the entitlement to equal remuneration,[197] while Section 7 defines 'like work' for the purposes of equal pay.[198] There were no successful equal pay cases across the five grounds in 2019.[199]

The definition of remuneration in Section 2(1) EEA specifically excludes pension rights – meaning a pension or any other benefits flowing from an occupational pension scheme – from its ambit. Instead, Parts VII[200] and VIIA[201] of the Pensions Acts 1990-2018 implement the principle of equal treatment with respect to occupational pensions. The Pensions Acts cover the same nine grounds as EEA: race, religious belief, gender, age, sexual orientation, civil status, family status, disability, and membership of the Traveller community. The legislation prohibits direct and indirect discrimination, discriminatory instructions and procurement to discriminate, as well as victimisation, in respect of occupational benefit schemes, occupational benefits and occupational pensions. Key exceptions include those that provide for different treatment on the grounds of age[202] and disability to take account of a lesser amount of work undertaken by virtue of a disability and to provide for more favourable treatment where early retirement arises from a disability.[203]

Many of the cases to date concern the gender and civil status grounds, but in one case a complainant who had been denied admittance to an occupational pension scheme succeeded in his claim of discrimination on grounds of race, and the company was ordered to register him in the scheme and to pay the contributions due.[204] A discrimination complaint on the age, civil status and sexual orientation grounds did not succeed before the Equality Tribunal and was the subject of a reference to the CJEU.[205] Mr Parris argued that the pension scheme operated by his employer was discriminatory, as it provided that an employee's partner would only be entitled to a survivor's pension in cases where the employee had married or entered a civil partnership before reaching the age of 60. National law prohibited the complainant from marrying and did not enable him to enter a civil partnership prior to his 60th birthday. It was, therefore, impossible for him to comply with the so-called survivor's rule in the pension scheme. His complaint before the Tribunal did not succeed. The Equality Officer concluded that the complainant had established indirect discrimination on the combined grounds of sexual orientation, civil status and age:

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196 See http://revisedacts.lawreform.ie/eli/1998/act/21/section/8/revised/en/html.
197 See http://revisedacts.lawreform.ie/eli/1998/act/21/section/29/revised/en/html.
198 See http://revisedacts.lawreform.ie/eli/1998/act/21/section/7/revised/en/html.
199 See, for example, Workplace Relations Commission, *Adamczyk v Slaney Foods International Unlimited Co.,* 4 June 2019, ADJ-00017766*,* https://www.workplacerelations.ie/en/cases/2019/june/adj-00017766.html: the difference in pay between the complainant and comparators of a different nationality was due to 'red circling'. 'Red circling' arises where an employee is paid a higher than normal remuneration rate for a valid business reason. It is often designed, as it was in this case, to ensure that someone who is redeployed within a workplace is not subject to a pay cut.
200 Inserted by Section 22 of the Social Welfare (Miscellaneous Provisions) Act 2004, 25 March 2004, http://www.irishstatutebook.ie/eli/2004/act/9/section/22/enacted/en/html#sec22.
201 Inserted by Section 27 of the Social Welfare, Pensions and Civil Registration Act 2018, http://www.irishstatutebook.ie/eli/2018/act/37/section/27/enacted/en/html#sec27.
202 Section 72(1) Pensions Acts 1990-2018.
203 Section 73 Pensions Acts 1990-2018.
204 Equality Tribunal, DEC-P2011-007, *Czyzycki v Fegan,* 22 December 2011, https://www.workplacerelations.ie/en/Cases/2011/December/DEC-P2011-007-Full-Case-Report.html.
205 Equality Tribunal, *Parris v Trinity College Dublin and others*, DEC-P2013-004, 16 December 2013, https://www.workplacerelations.ie/en/Cases/2013/December/DEC-P2013-004.html; Court of Justice of the European Union, Judgment of 24 December 2016, *Parris v Trinity College Dublin and others*, [2016] EUECJ C-443/15, http://www.bailii.org/eu/cases/EUECJ/2016/C44315.html.

> '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.'[206]

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 (1) on the ground of sexual orientation, (2) on the ground of age, or (3) if neither age nor sexual orientation applied in isolation, because of the combined effect of both. Each question was answered in the negative, leaving Dr Parris and others in his position without a remedy under either domestic or EU law.[207] The Pensions Acts were amended in 2018 to rectify the situation. Part VIIA[208] provides that, if a member of an occupational pension scheme was in a committed relationship with a same-sex partner at the time they reached the age or date of retirement set out in the scheme rules and then married that partner within three years of the enactment of the Marriage Act 2015, they are deemed eligible for a survivor pension.

Several complaints under the Pensions Acts were determined in 2019, but the majority were dismissed for failure to refer within the six-month time limit.[209] A complaint of gender and disability discrimination was not upheld. The WRC established that a delay in processing an application for pension benefits was attributable to the complainant's conduct.[210]

Section 35 EEA is a cause of concern as it permits employers to pay employees with disabilities different rates of pay if they are restricted in their capacity to do the same amount of work or to work for the same amount of hours as a person who does not have a disability. This section contains only one limitation, which is that the employee should not be remunerated at a rate below the level required by the National Minimum Wage Act 2000.[211] There is nothing to suggest that the work should be remunerated at a proportionate level to that of an employee without a disability. This may not comply with the directive.

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

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

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[206] *Parris v Trinity College Dublin and others*, DEC-P2013-004, at para. 4.15.
[207] *Parris v Trinity College Dublin and others*, [2016] EUECJ C-443/15.
[208] Inserted by Section 27 of the Social Welfare, Pensions and Civil Registration Act 2018, http://www.irishstatutebook.ie/eli/2018/act/37/section/27/enacted/en/html#sec27.
[209] See, for example, Workplace Relations Commission, *A Retired Employee v A Local Authority*, ADJ-00021259, 13 June 2019, https://www.workplacerelations.ie/en/cases/2019/june/adj-00021259.html.
[210] Workplace Relations Commission, *A Retired Employee v A Local Authority*, ADJ-00021259, 13 June 2019, https://www.workplacerelations.ie/en/cases/2019/june/adj-00021259.html.
[211] National Minimum Wage Act 2000, 31 March 2000, http://www.irishstatutebook.ie/eli/2000/act/5/enacted/en/html.

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.[212]

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

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

Courses that are exclusively concerned with training for an occupational activity are thus covered by EEA.[213] According to the Labour Court,[214] 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*[215] and Case C-24/86, *Blaizot v University of Liege*.[216] It noted, however, that both judgments concerned the free movement principle in Regulation 1612/68 and it could not be assumed that a 'similarly expansive interpretation' of the term would be taken for the purpose of Directive 2000/43/EC. Other education and training courses are subject instead to the anti-discrimination provisions of the Equal Status Acts 2000-2018.[217] Cumulatively, the provisions of both EEA and ESA cover the vocational programmes and work experience referred to under Article 3(1)(b). However, the narrow definition of vocational training under EEA may give rise to a compliance issue, since the duty to provide reasonable accommodation on the disability ground under ESA is less extensive than that required under Directive 2000/78.

An exception concerning the religion ground may raise compliance issues. Subsections 3-5 of Section 12 empower the relevant Minister, with the consent of the Minister for 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.'[218] Pursuant to that section, the Employment Equality Act 1998 (section 12) (Reservation of vocational training places) Order 2018 (S.I. No. 260 of 2018) permits Dublin City University to reserve 32 places in its Bachelor of Education degree programme for students who are members of

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[212] Section 12(1) EEA.

[213] 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, November 2006, https://www.workplacerelations.ie/en/Cases/2006/November/DEC-S2006-076-Full-Case-Report.html.

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

[215] [1985] E.C.R. 593.

[216] [1988] E.C.R. 379.

[217] Section 7 ESA. See Chapter 3.2.8 for more on this provision.

[218] Section 12(4) EEA.

the Church of Ireland or who belong to the broad Protestant tradition.[219] 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 relation to membership of and involvement in workers' or employers' organisations, as formulated in the directives for all five grounds and for both private and public employment.

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

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

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

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

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) interpreted the definition of 'service' to include social protection from the outset.[220] For example, cases have upheld discrimination in relation to social welfare payments such as rent supplement[221] and have established that allowances for people with disabilities are 'services'.[222] Healthcare is also covered.[223]

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[219] See http://www.irishstatutebook.ie/eli/2018/si/260/made/en/print#.

[220] The foundational case is: Equality Tribunal, *Donovan v Donnellan,* DEC-S2001-011, 17 October 2001, https://www.workplacerelations.ie/en/cases/2001/october/dec-s2001-011.html; Applied, for example, in Equality Tribunal, *McQuaid v Department of Social Protection*, DEC-S2014-015, 2 October 2014, https://www.workplacerelations.ie/en/Cases/2014/October/DEC-S2014-015.html.

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

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

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

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

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

The word 'enactment' is not defined in ESA. It covers Acts of the Oireachtas and statutory instruments,[224] but not Government department circulars and other administrative rules.[225] Where some element of discretion exists in relation to the granting of a benefit, other good or service, the statutory exemption is inapplicable, since it relates only to discriminatory treatment *required* by law.[226] However, where the putative discriminatory treatment is required by law, Section 14(1)*(a)*(i) operates to remove the measure from the ambit of ESA. Several challenges to social protection provisions have failed on that basis.[227] 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.[228]

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

Judicial interpretation will be crucial in determining whether Ireland is in compliance with Directive 2000/43/EC. Pending such interpretation, it is not possible to say definitively whether Ireland is in compliance with the Racial Equality Directive.[229]

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

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

3.2.7 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,

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

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

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

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

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

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

(ii) entertainment, recreation or refreshment, (iii) cultural activities, or (iv) transport or travel'. Case law establishes that 'service' encompasses a broad category of benefits provided by public and private actors such as free travel passes on public transport,[230] maintenance grants for third-level students[231] and sports scholarships.[232] However, a Circuit Court judgment concerning an ex gratia payment scheme set up by the Irish Government to compensate people affected by the liberalisation of the taxi industry has cast some doubt on the applicability of anti-discrimination law to social advantages provided by the public sector.[233] 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"'.[234] In light of this judgment, it is not clear whether national law complies fully with the Racial Equality Directive.

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

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

Section 7 ESA covers educational establishments. 'Educational establishment' is broadly defined, covering pre-school services through to higher-level institutions, whether or not they are supported by public funds. Public and private establishments providing educational services are therefore covered. Discrimination on nine grounds is prohibited in respect of admission to the terms or conditions of admission of a person as a student to the establishment; the access of a student to any course, facility or benefit provided by the establishment; any other term or condition of participation in the establishment by a student; or the expulsion of a student from the establishment or any other sanction against the student. The grounds covered are gender, age, race, religion, family status, disability, civil status, sexual orientation and membership of the Traveller community.[235]

Section 7 only refers to students or prospective students. However, other people, such as parents of pupils, can refer cases against schools or other educational establishments under Section 5 (provided they are accessing a service, good or facility).[236] 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.[237]

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

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

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

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

[234] 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.

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

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

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

Case law has dealt with the accommodation of disabled students[238] and broader questions of access across all levels of the education system.[239] In a 2015 race-ground case, a criterion in a school admissions policy contravened the indirect discrimination prohibition. The criterion accorded priority to prospective students based on their date of application. The complainant, as an adopted child of Chinese national and ethnic origins, was not in the same position to submit her application as early applicants of Irish national origins who were not adopted. Her mother was unable to apply for a place close to the complainant's birth date due to the fact that the adoption process was not concluded until the complainant was 16 months old. Evidence was presented to the effect that 82 % of non-family adoptions involved children of a non-Irish national origin and that such adoptions took between six and 24 months to complete. The Tribunal found that the provision put the complainant and foreign adopted children generally at a particular disadvantage compared with Irish-born children.[240] It concluded that, while the admission criterion pursued the legitimate aim of operating a fair and reasonable admissions policy, the respondent did not establish that the provision was necessary to achieve that aim.

There was no case law on the race or Traveller community grounds in 2019.

Discrimination in access to schools has raised compliance issues in the past. In a high-profile case, the Supreme Court overturned an earlier decision of the Equality Tribunal and ruled that a school admission policy that prioritised former pupils' children did not constitute indirect discrimination against Travellers.[241] It determined that the evidence presented by the complainant did not demonstrate that the school's policy placed Travellers in a situation of particular disadvantage. In effect, the Court held that statistical evidence was *required* in order to establish a prima facie case; it did not consider EU law in assessing the ESA prohibition of indirect discrimination. In its amicus curiae submission, the Equality Authority argued that the indirect discrimination test should conform to that of the Racial Equality Directive.[242] The Supreme Court, however, applied a test formulated with reference to the provisions of the domestic statute (ESA) and did not consider whether Travellers constitute an ethnic group for the purposes of EU law.

School admissions criteria are liable to place migrant children at a particular disadvantage, given that many of them will have not been resident in the country for equivalent periods of time to their Irish national counterparts. For instance, preferences for applicants with parents or other relatives who attended the school (as in *Stokes*) or a requirement that one has been resident in the local area for a certain period[243] could have an exclusionary effect on migrants.

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

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

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

[241] Supreme Court, *Stokes v Christian Brothers' High School Clonmel*, [2015] IESC 13, 24 February 2015, http://www.courts.ie/Judgments.nsf/597645521f07ac9a80256ef30048ca52/a09897a482118979802 57df6005a3c31?OpenDocument.

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

[243] 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.

Discrimination in accessing schools has been the subject of extensive debate over the past decade in particular. International human rights bodies[244] and IHREC[245] had recommended amending ESA, and in 2017 the Government undertook a consultation process on the role of religion in school admissions.[246] A significant number of NGOs campaigned on the question of school admission policies, providing impetus to the reform of the legal framework effected in 2018.[247] Several changes aimed at addressing discrimination in accessing schools were enacted under the Education (Admission to Schools) Act 2018.[248]

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

The 2018 Act also amended Section 7 ESA, so that primary schools can no longer use religion as a selection criterion, in most cases.[249] This change in the law still allows schools of minority religions to give preference to a student who seeks admission to a school providing religious instruction or education consistent with his or her minority religious beliefs, but only where the school is oversubscribed. Prior to this reform, denominational schools were permitted to distinguish between prospective students on the basis of their religious background. They were also entitled to refuse admission to a child who was not of that denomination where it was essential to maintain the ethos of the school.[250]

a) Pupils with disabilities

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

The legislative approach favours inclusive education, that is, education of children with disabilities in 'mainstream' schools.[251] The National Council for Special Education (NCSE) was established in 2003 to improve the delivery of education services to persons with

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

[245] 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.

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

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

[248] Section 9, Education (Admission to Schools) Act 2018, 18 July 2018, http://www.irishstatutebook.ie/eli/2018/act/14/enacted/en/html, inserting Part X of the Education Act 1998, 23 December 1998, http://www.irishstatutebook.ie/eli/1998/act/51/enacted/en/print.html. Part X also obliges schools to prepare and publish an admissions policy which stipulates, *inter alia*, that the school does not discriminate on the nine grounds provided for under ESA.

[249] Section 11, Education (Admission to Schools) Act 2018.

[250] The exemption was successfully invoked by a school in Equality Tribunal, *Ms A (on behalf of her son X, A Minor) v A Secondary School*, DEC-S2014-010, 12 August 2014, https://www.workplacerelations.ie/en/Cases/2014/August/DEC-S2014-010.html.

[251] 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 July 2004, http://www.irishstatutebook.ie/eli/2004/act/30/enacted/en/html.

special educational needs arising from disabilities, with particular emphasis on children.[252] However, insufficient national funding has been allocated to provide the necessary support/accommodations to enable disabled children to participate in mainstream education. This is exemplified by the fact that the Education for Persons with Special Educational Needs Act 2004 has not yet been fully commenced. Specifically, the provisions that provide for individual education plans are not in operation. International human rights bodies have raised concerns about the inadequacy of educational support, an incoherent approach to reasonable accommodation for state examinations, and the over-concentration of pupils with disabilities in schools that are designated as disadvantaged.[253]

In this regard, the adoption of a new model for allocating teaching resources in September 2017 was a positive development. Under the previous system, resources were contingent on medical diagnoses, which resulted in delays due to backlogs in the public assessment process, with disadvantaged pupils unable to afford to have their needs assessed privately.[254] The new model allocates funds based on the school's profile and also provides baseline funding for each school.[255] Moreover, expenditure on special education services has increased by over 50 % since 2011, which has been a critical factor in a substantial increase in the number of children with special needs attending mainstream schools. Nevertheless, there are waiting lists for special classes, and a 'significant number of children are being educated at home with the support of home tuition grants because a school place has not been made available.'[256] Section 8 of the Education (Admission to Schools) Act 2018 enables the Minister for Education and Skills, following a process of consultation with the NCSE, the board of management and the patron of a school, to compel that school to make additional provision for the education of children with special educational needs.[257] This provision was activated twice in 2019, directing schools located in Dublin to make additional places available.[258]

The NCSE is developing policy advice for the Minister in relation to special classes and schools, which will be finalised in 2020. This will address, *inter alia*, the implications of ratification of UNCRPD.[259]

b) Trends and patterns regarding Roma pupils

In Ireland, limited data is available as to whether there are specific legal or societal trends and/or patterns in education regarding Roma pupils, such as segregation. The Department of Education's *Report and Recommendations for a Traveller Education Strategy* (2006)[260]

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[252] See generally: http://ncse.ie/.

[253] UN Committee on the Rights of the Child (2016), *Concluding observations on the combined third and fourth periodic reports of Ireland*, at para. 48, 29 January 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, 8 July 2015, at paras. 31-32, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/150/67/PDF/G1515067.pdf?OpenElement.

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

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

[256] Children's Rights Alliance (2020), *Report Card 2019*, at pp. 27-28, https://www.childrensrights.ie/sites/default/files/CRA-Report%20Card%202020-Final.pdf.

[257] Education (Admission to Schools) Act 2018, 18 July 2018, http://www.irishstatutebook.ie/eli/2018/act/14/enacted/en/print#sec8.

[258] See https://www.gov.ie/en/press-release/4296bf-statutory-notices-served-on-six-schools-in-dublin-to-provide-for-add/; https://www.education.ie/en/Press-Events/Press-Releases/2019-press-releases/PR19-11-14-2.html.

[259] Children's Rights Alliance (2020), *Report Card 2019*, at p. 31.

[260] Available at: https://www.education.ie/en/Publications/Policy-Reports/des_recom_traveller_educ_strategy.pdf.

led to the desegregation of education for Traveller pupils. One of the two remaining Traveller-only schools closed in 2019.[261]

There is no case law to date on discrimination against Roma pupils. Members of the Irish Traveller community have referred several cases against schools.[262]

A *National Roma Needs Assessment* was published in 2018.[263] It suggests that Roma pupils' participation in education is affected by high levels of poverty and poor accommodation. Segregation was not reported as an issue, save that 'due to lack of literacy and language skills many older children are placed in classes with younger peers.'[264] The report calls for further research on the experiences of Roma children in education. The Irish education system has yet to develop a culturally appropriate response to specific issues relating to Roma. No reference is made to Roma in the main policy document, the *Intercultural Education Strategy 2010 – 2015*.[265]

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.[266] In 2018, a private members' bill was introduced to the Irish Parliament that aims to formally include Traveller culture and history in the school curriculum.[267] At the end of 2019, the bill had reached Second Stage before Dáil Éireann (the lower House of the Oireachtas). In response to that initiative, the Minister for Education and Skills requested the National Council for Curriculum and Assessment (NCCA) to conduct an audit of Traveller culture and history in the current school curriculum. The audit, which incorporated consultation with Traveller representative groups, was published in 2019.[268]

Researchers have criticised the failure to address racism in school curricula more generally.[269] A large quantitative study canvassing the attitudes of 4 970 Irish national

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[261] See Pavee Point (2019), *Civil Society Monitoring Report on Implementation of the National Roma Integration Strategy in Ireland: Assessing the progress in four key policy areas of the strategy*, available at: https://cps.ceu.edu/sites/cps.ceu.edu/files/attachment/basicpage/3034/rcm-civil-society-monitoring-report-2-ireland-2018-eprint-fin-2.pdf.

[262] See, for example, Workplace Relations Commission, *A Complainant on behalf of her son v Board of Management of A Primary School*, ADJ-00008562, 23 May 2018, https://www.workplacerelations.ie/en/Cases/2018/May/ADJ-00008562.html; Equality Tribunal, *Mrs K (on behalf of her son) v A Primary School,* DEC-S2011-003, 18 January 2011, https://www.workplacerelations.ie/en/Cases/2011/January/DEC-S2011-003-Full-Case-Report.html; *A Mother (on behalf of her son) v A School and the Department of Education and Skills*, DEC-S2010-056, 7 December 2010, https://www.workplacerelations.ie/en/Cases/2010/December/DEC-S2010-056-Full-case-report.html; *Two Complainants (a mother and her son) v A Primary School*, DEC-S2006-028, 6 April 2006, https://www.workplacerelations.ie/en/Cases/2006/April/DEC-S2006-028-Full-Case-Report.html; *Faulkner v St Ita's & St Joseph's School, Tralee*, DEC-S2006-037, 24 June 2006, https://www.workplacerelations.ie/en/Cases/2006/May/DEC-S2006-037-Full-Case-Report.html.

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

[264] Pavee Point and Department of Justice and Equality (2018), *Roma in Ireland: A National Needs Assessment,* p. 113.

[265] 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.

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

[267] Traveller Culture and History in Education Bill 2018, https://www.oireachtas.ie/en/bills/bill/2018/71/.

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

[269] See, for example, Bryan, A. (2012), '"You've got to teach people that racism is wrong and then they won't be racist": Curricular representations and young people's understandings of "race" and racism', *Journal of Curriculum Studies*, 44(5), pp. 599-629, 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; Moloney, C., and O'Toole, B. (2018), '"Windows and

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.'[270] National data suggests that migrant and Traveller children are more likely to experience bullying in school.[271] Anti-bullying procedures, published in 2013, include a template for schools to record incidents.[272] '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.'[273] The *National Traveller and Roma Inclusion Strategy 2017–2021*, published in June 2017, contains commitments to review the effectiveness of the anti-bullying guidelines and teacher education.[274] According to the Children's Rights Alliance, a review of the guidelines has been commissioned and a report is due in May 2020.[275]
In 2018, a number of NGOs raised concerns about the use of reduced timetables (reduced school hours) in relation to vulnerable pupils, including Travellers. The matter was considered by a parliamentary committee in 2019[276] and, in September, the Department of Education and Skills announced that it had prepared draft guidelines on the use of reduced timetables. Consultation with education stakeholders will be undertaken with a view to finalising the guidelines in 2020. The aim of the guidelines will be 'to ensure that the use of reduced timetables is limited solely to those circumstances where it is absolutely necessary'. It is envisaged that schools will be obliged to notify a statutory agency, Tusla Education Support Service, when a reduced timetable is proposed. This will allow the use of reduced timetables to be monitored and the extent of their use to be ascertained.[277]

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

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

Section 5(1) ESA provides:

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

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mirrors" or "closed doors"? Representations of diversity in early years textbooks', *Irish Teachers' Journal* 6(1), pp. 55-72, available at: https://www.into.ie/app/uploads/2019/07/IrishTeachersJournal2018.pdf.

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

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

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

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

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

[275] Children's Rights Alliance (2020), *Report Card 2019*, at p. 130, https://www.childrensrights.ie/sites/default/files/CRA-Report%20Card%202020-Final.pdf.

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

[277] See https://www.education.ie/en/Press-Events/Press-Releases/2019-press-releases/PR19-09-23.html.

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

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

Section 2(1) defines 'service' as 'a service or facility of any nature which is available to the public generally or a section of the public, and without prejudice to the generality of the foregoing, includes—
(a) access to and the use of any place,
(b) facilities for—
    (i) banking, insurance, grants, loans, credit or financing,
    (ii) entertainment, recreation or refreshment,
    (iii) cultural activities, or
    (iv) transport or travel,
(c) a service or facility provided by a club (whether or not it is a club holding a certificate of registration under the Registration of Clubs Acts, 1904 to 1999) which is available to the public generally or a section of the public, whether on payment or without payment, and
(d) a professional or trade service,
but does not include pension rights (within the meaning of the Employment Equality Act 1998) or a service or facility in relation to which that Act applies.'

The services listed above are not exhaustive, and case law has established that the definition covers, *inter alia*, maintenance grants payable to students,[278] visits of family members to prisons[279] and the conduct of quasi-judicial proceedings.[280]

Failure to adapt the provision of goods or services to meet the needs of a person with a disability is a form of discrimination.[281]

a) Distinction between goods and services available publicly or privately

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

The discrimination prohibition applies where goods or services are supplied to 'the public generally' or to 'a section of the public'.[282] Case law has established that members of private associations, such as trade unions,[283] clubs[284] and political parties,[285] constitute a 'section of the public' for the purposes of ESA.

However, distinct provisions govern registered clubs, which are bodies that have applied for or hold a certificate of registration under the Registration of Clubs Acts 1904–1999.[286]

[278] Equality Tribunal, *Two Complainants v Department of Education and Science*, DEC-S2003-042/043, 28 May 2003, https://www.workplacerelations.ie/en/cases/2003/may/dec-s2003-042-043_full_case_report.html.
[279] Workplace Relations Commission, *A Complainant on behalf of his son v Irish Prison Service*, DEC-S2018-010, 19 April 2018, https://www.workplacerelations.ie/en/Cases/2018/March/DEC-S2018-010.html.
[280] Workplace Relations Commission, *McDevitt v The Labour Relations Commission*, *now the Workplace Relations Commission*, DEC–S2018–030, 12 December 2018, https://www.workplacerelations.ie/en/Cases/2018/December/DEC–S2018–030.html.
[281] Section 4, ESA.
[282] Section 5(1) and Section 2(1), ESA.
[283] See, for example, Workplace Relations Commission, *A Civil Servant v A Trade Union*, ADJ-00019795, 16 August 2019, https://www.workplacerelations.ie/en/cases/2019/august/adj-00019795.html.
[284] See, for example, Workplace Relations Commission, *A Men's Shed Member v A Men's Shed*, ADJ-00006688, 30 January 2018, https://www.workplacerelations.ie/en/cases/2018/january/adj-00006688.html.
[285] Equality Tribunal, *Egan v Young Fine Gael*, DEC-S2011-001, 5 January 2011, https://www.workplacerelations.ie/en/cases/2011/january/dec-s2011-001-full-case-report.html.
[286] Registration of Clubs (Ireland) Act 1904, 15 August 1904, http://www.irishstatutebook.ie/eli/1904/act/9/enacted/en/print.html.

Registration enables clubs to sell alcohol to members and certain visitors. Clubs that do not hold a liquor licence are governed instead by the general prohibition on discrimination set out under Section 5 ESA. Sections 8 to 10 ESA apply exclusively to registered clubs. These provisions only relate to matters concerning membership of clubs, and cases must be taken before the District Court.[287] Clubs which have the principal purpose of catering for the needs of persons who are members of the Traveller community or people of a particular gender, sexual orientation, religious belief (or persons of no religious belief), family status, civil status, age, disability or nationality or ethnic or national origin can restrict membership to people from those groups (Section 9). The 'race' and 'colour' aspects of the race ground are not exempt. Further, the Traveller community exception is asymmetrical. It remains to be seen whether these provisions comply with the Racial Equality Directive. Recital 17 envisages the establishment of 'organisations of persons of a particular racial or ethnic origin where their main object is the promotion of the special needs of those persons' as positive action measures. However, the Irish Superior Courts have not taken account of disadvantage or substantive equality of opportunity principles in construing relevant provisions of ESA. The High Court interpreted Section 9 of that Act as permitting male-only membership in golf clubs, holding that the principal purpose of such clubs is to cater for the needs of men.[288] The Supreme Court upheld the decision on 4 November 2009.[289]

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

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

Section 6(1) ESA prohibits discrimination in disposing of any estate or interest in premises, in terminating any tenancy or other interest in premises, or in the provision of accommodation and related services and amenities. The grounds of gender, age, race, religion, family status, disability, civil status, sexual orientation and membership of the Traveller community are covered. The Equality (Miscellaneous Provisions) Act 2015 introduced 'housing assistance' as a new ground to protect against discrimination in the accommodation context.[290] As of 1 January 2016, people in receipt of housing assistance, rent supplement or other social welfare payments cannot be discriminated against in relation to the provision of accommodation and related services and amenities. Over the past three years, cases in the field of housing have been referred almost exclusively on the housing assistance ground. In 2019, there were two successful cases on the housing assistance and race grounds. The first comprised harassment on both grounds in the form of verbal comments by a landlord and their agent, which were directed at a black tenant of American nationality.[291] The second involved direct discrimination on both grounds in circumstances where a landlord continually refused to sign forms that would have enabled a Latvian tenant to apply for housing assistance payment (HAP).[292] The complainant relied on an Irish national comparator, who moved in around the same time and whose HAP application was completed by the respondent. While the respondent provided evidence that it rented properties in the same estate to people of seven different nationalities, none of these appeared to be HAP recipient tenants. On that basis, the WRC concluded that the respondent had not rebutted the inference of discrimination established by the complainant. A race-ground harassment case, involving several instances of racist verbal

[287] Applied in Workplace Relations Commission, *A Member v A Golf Club*, ADJ-00010091, 9 August 2018, https://www.workplacerelations.ie/en/cases/2018/august/adj-00010091.html.
[288] High Court, *Equality Authority v Portmarnock Golf Club* [2005] IEHC 235, 10 June 2005, http://www.bailii.org/ie/cases/IEHC/2005/H235.html.
[289] Supreme Court, *Equality Authority v Portmarnock Golf Club* [2009] IESC 73, 4 November 2009, http://www.bailii.org/ie/cases/IESC/2009/S73.html.
[290] See http://www.irishstatutebook.ie/eli/2015/act/43/enacted/en/print.html.
[291] Workplace Relations Commission, *A Tenant v A Landlord*, ADJ-00013893, 5 March 2019, https://www.workplacerelations.ie/en/cases/2019/march/adj-00013893.html.
[292] Workplace Relations Commission, *Enners v McCarthy*, ADJ-00020413, 23 September 2019, https://www.workplacerelations.ie/en/cases/2019/september/adj-00020413.html.

abuse directed at a black tenant of Congolese national origin by his landlord, attracted the maximum compensation award.[293]

The complainants in a 2018 case lost their home on a halting site as a result of an arson attack.[294] The discrimination complaint pertained to their subsequent dealings with the local authority as to their housing situation. The respondent council advised the family to return to the halting site where their caravan was burned down, which they refused to do because of safety concerns given the previous incident. Instead, the complainants resorted to parking by the side of the road and were issued with notices from the respondent to desist from this. While the adjudication officer expressed considerable sympathy for the complainants, a discrimination complaint could not be made out. The WRC was precluded from investigating the notices to move from the roadside encampments, since these were issued under an enactment and were thus covered by the Section 14(1)*(a)*(i) exemption. In relation to the respondent's offer of accommodation on the same site, it was not established that a homeless non-Traveller family would have been treated more favourably. The complainants had been offered a rudimentary form of accommodation: 'Crime, intimidation and catastrophic events happen in one community as much as in the other and providing appropriate assistance can put great stress on public resources.' An indirect discrimination complaint concerning the council's failure to implement its policies on Traveller accommodation was unsuccessful, since indirect discrimination addresses measures of general application and is 'not engaged when it comes to policies or rules which are designed for a specific minority community.'

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

For example, the prohibition of discrimination does not apply to accommodation that is provided in a person's home, 'or where the provision of accommodation affects the person's private or family life or that of any other person residing in the home.'[295]

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

Housing authorities may treat people differently in respect of accommodation on the basis of their family size, family status, civil status, disability, age or membership of the Traveller community, in accordance with Section 6(6) ESA. The Circuit Court has clarified that this exception cannot result in less favourable treatment in the provision of housing.[296]

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.[297] Any such difference in treatment is not permitted to amount to a derogation from the obligations of the state under EU law. There has been no case law on the provision to date.

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

[293] Workplace Relations Commission, *Nkikita v Fleming*, ADJ-00020830, 4 December 2019, https://www.workplacerelations.ie/en/cases/2019/december/adj-00020830.html.

[294] Workplace Relations Commission*, O'Donoghue v Clare County Council*, DEC-S2018-002, 27 February 2018, https://www.workplacerelations.ie/en/cases/2018/february/dec-s2018-002.html.

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

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

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

accessing accommodation,[298] while a 2014 survey based on 400 interviews conducted with landlords found that 95 % of the landlords who responded would rent to non-Irish nationals.[299]

a) Trends and patterns regarding housing segregation for Roma

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

A *National Roma Needs Assessment*, commissioned by the Department of Justice and Equality, was published in 2018.[300] According to the report, an estimated 4 000 to 5 000 Roma people live in Ireland. Approximately 20 % of the Irish Roma community are 'completely marginalised from services and supports. They are living in extreme poverty, in sub-standard accommodation', and 60 % of respondents reported experiences of consistent poverty, including not always having enough fuel, food or heat. Furthermore, 93 % of respondents reported experiencing discrimination in accessing housing. Among the other major issues identified were severe overcrowding; poor-quality accommodation; a lack of security of tenure; homelessness; and a lack of access to social housing and housing-related social protection payments.

A report on *Discrimination and Inequality in Housing in Ireland* was published by the Irish Human Rights and Equality Commission and the Economic and Social Research Institute in June 2018.[301] It examines inequality and discrimination while searching for housing; whether certain groups experience poorer housing conditions; and the prevalence of homelessness across different groups. The groups considered correspond to the ESA discriminatory grounds, with the exception of sexual orientation, because of a lack of data. According to the report, Travellers experience the highest risk of homelessness, making up 9 % of the homeless population even though Travellers comprise just 1 % of the overall population. Travellers also experience the highest levels of discrimination. They are almost 10 times as likely to report discrimination in access to housing as the white Irish population.

The findings of a small-scale study on *Experiences of Travellers in the Private Rented Sector*, published in 2017, suggest that Travellers experience discrimination at the hands of landlords and settled neighbours.[302] Landlords believed that discrimination had diminished in recent years due to compliance with legislation. However, a 2014 survey conducted on behalf of the Residential Tenancies Board, based on 400 telephone interviews conducted with landlords, found that 82 % of those landlords who responded were unwilling to rent property to members of the Travelling community.[303]

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

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

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

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

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

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

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

site conditions, violated Article 16 of the European Social Charter.[304] 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.[305] Budget 2020 allocated EUR 14.5 million to Traveller-specific accommodation, an increase of EUR 1.5 million on the previous year.[306] Mirroring previous years, in 2018 local authorities drew down just EUR 6.264 million of the EUR 12 million of funding allocated by the Government.[307] There was a modest improvement in 2019, with EUR 8.657 million of the EUR 13 million fund drawn down.[308] In its June 2019 report, the European Commission against Racism and Intolerance stated that it was 'shocked' that this pattern of underspending continues 'while many Travellers continue to live in squalor and deprivation'.[309] It recommended that Ireland impose sanctions on local authorities for failure to spend funding or transferring responsibility to a central housing commission.

The Oireachtas Committee on Housing and Homelessness issued several recommendations in 2016, including a ban on evictions where alternative accommodation is unavailable and a mechanism for enforcing local authorities' duties under the 1998 Act.[310] In 2016, the UN Committee on the Rights of the Child called for increased funding for accommodation facilities that address the needs of Traveller and Roma children and their families and the amendment or repeal of legislation that criminalises nomadism.[311]

To date, the Government has not implemented the bulk of those recommendations. There are no plans to reform the laws that enable evictions. However, an expert group was established in 2018 to conduct a review of the 1998 Act, following a commitment set out under the *National Traveller and Roma Inclusion Strategy 2017–2021*.[312] Its report was published in July 2019 and sets out 32 recommendations, including proposals aimed at addressing the collection of data on and systems for identifying accommodation needs, the planning system, resources and delivery capacity, and governance arrangements.[313] It identifies a need for active and ongoing monitoring of the planning and provision of Traveller accommodation and intervention when these functions are not being adequately performed. To that end, it recommends that the National Traveller Accommodation Consultative Committee (NTACC) be equipped with additional powers and resources and should be retitled as the National Traveller Accommodation Authority. The report further

[304] 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.

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

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

[307] Minister of State at the Department of Housing, Planning, Community and Local Government, Damien English TD, Written Answers, Housing, 28 May 2019, *Dáil Éireann*, https://www.oireachtas.ie/en/debates/question/2019-05-28/504/#pq_504.

[308] Minister of State at the Department of Housing, Planning, Community and Local Government, Damien English TD, Written Answers, Housing, 20 May 2020, *Dáil Éireann*, https://www.oireachtas.ie/en/debates/question/2020-05-20/1327/speech/1538/.

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

[310] 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.

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

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

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

calls for reform of the law on trespass and evictions, referencing violations of the European Social Charter.[314]

The Department of Housing, Planning and Local Government (DHPLG) has commenced a consultation process on the Expert Review Group's proposals and has established subject matter working groups within the Department to consider how best to progress the recommendations.[315] A programme board will be established with responsibility for agreeing which projects to take forward, setting out the scope and timeframe of the projects and overseeing the programme as the projects progress.

[314] 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.

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

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

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

Under Section 37(2) EEA:

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

To date, this provision has been considered in only a limited number of cases, and so its ambit is as yet unclear.[316] In a case concerning access to employment, the Equality Tribunal found that meeting a prescribed hearing standard could constitute a genuine and determining occupational requirement for bus drivers. However, the standard set by the respondent was particularly onerous and was not applied internationally. Moreover, compliance with that standard was not monitored in relation to its existing workforce, so the respondent could not demonstrate that the requirement was objectively justified.[317] The exception has also featured in age-ground case law concerning compulsory retirement, although the decisions largely rested on analyses of the provision that permits employers to set retirement ages (Section 34(4) EEA). The main precedent is *Saunders v CHC Ireland Ltd.*, in which a retirement age of 55 for a category of emergency services personnel (helicopter winch operators) was justified under Section 37(2) and Section 34(4).[318] Applying the *Wolf* judgment, the adjudicator accepted that the possession of a high physical capacity was a genuine and determining occupational requirement for the role and that this standard of capacity diminishes with age.[319]

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

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

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

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

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

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

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

Section 37(1) EEA provides:

> 'Subject to *subsections (1A)* and *(1B)*, a religious, educational or medical institution which is under the direction or control of a body established for religious purposes or whose objectives include the provision of services in an environment which promotes certain religious values shall not be taken to discriminate against a person … if—
> (*a*) it gives more favourable treatment, on the religion ground, to an employee or a prospective employee over that person where it is reasonable to do so in order to maintain the religious ethos of the institution, or
> (*b*) it takes action which is reasonably necessary to prevent an employee or a prospective employee from undermining the religious ethos of the institution.'[320]

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

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

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

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

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

The previous provision, although never fully tested in legal proceedings (see below), was controversial at the national level. Teachers' unions opposed the exemption from the outset arguing, in particular, that it would impact on lesbian, gay and bisexual staff.[321] Those concerns were reinforced by a small-scale research study, which found that the exemption caused considered anxiety on the part of such teachers and affected their ability to 'come out' at work.[322] The Equality Authority and the Irish Human Rights Commission had also called for its amendment.[323]

The former provision was considered in a case in which a primary school discriminated against a teacher on the grounds of religion and age in respect of promotion to the position of principal.[324] 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 ground of religion. 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, the Court 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).

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

[322] 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.

[323] See, for example, 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.

[324] Labour Court, *A National School v A Worker*, EDA1515, 5 October 2015, https://www.workplacerelations.ie/en/Cases/2015/October/EDA1515.html; on appeal from the Equality Tribunal's decision in *A Teacher and A National School*, DEC-E2014-097, 30 December 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.

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 of discrimination on the age and disability grounds does not apply in relation to employment in the armed forces.[325]

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'.[326] This provision reflects the wording of Recital 18 Directive 2000/78 and was considered by the Labour Court in a 2018 case concerning a prison officer.[327] The Court found that subsection (3) exempted the listed occupations from the duty to provide reasonable accommodation under Section 16 EEA.

4.4 Nationality discrimination (Article 3(2))

a) Discrimination on the ground of nationality

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

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

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

Section 17(2) EEA provides that, in relation to discrimination on the basis of nationality, nothing in the Act shall render unlawful any action taken in accordance with the Employment Permits Acts 2003-2006.[328]

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

[325] According to the High Court, the exemption covers access to employment and conditions of employment. The provision, therefore, exempts use of an age restriction in respect of persons seeking to join the Defence Forces: *Smyth v Minister for Justice, Equality and Defence & ors*. [2013] IEHC 110, 2 January 2013, http://www.courts.ie/Judgments.nsf/0/20404CA1028D27C680257B3B003E1EF7.

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

[327] Labour Court, *Irish Prison Service v A Prison Officer*, EDA1837, 17 July 2018, https://www.workplacerelations.ie/en/cases/2018/july/eda1837.html.

[328] Employment Permits Act 2003, 10 April 2003, http://www.irishstatutebook.ie/eli/2003/act/7/enacted/en/html; Employment Permits Act 2006, 23 June 2006, http://www.irishstatutebook.ie/eli/2006/act/16/enacted/en/index.html.

requirements.[329] This exception falls within the provisions contained in the Racial Equality Directive.

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

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

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

In Ireland, nationality (as in citizenship) is explicitly mentioned as a protected ground in national anti-discrimination law.[330]

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

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

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

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

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

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

There are no specific exemptions in relation to any of the other protected grounds, but issues such as dress codes are currently dictated by the policy of the individual employer. For example, employers who operate manufacturing processes that require a clean-room environment generally impose very strict regulations in respect of attire. Case law suggests that adjudicators will scrutinise dress codes for discriminatory impacts. In one case, a male retail worker was dismissed for not wearing a face-mask after he refused to shave off his beard. The Labour Court found that the requirement to wear a face-mask or remove facial hair was not motivated by considerations of hygiene or food safety. The dress code operated in a way that restricted the complainant's freedom to determine his own appearance to a significantly greater degree than it did in the case of women. As a consequence, the dismissal was discriminatory on the gender ground.[331]

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

4.6.1 Direct discrimination

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

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

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

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

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

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

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.[332] 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 the job concerned and of the need for a reasonable period of time prior to retirement age during which the recruit will be effective in that job. 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). Under Section 12(7) EEA, third-level educational institutions may treat people differently on the basis of age in allocating places on vocational training courses to mature students.

c) Fixing of ages for admission or entitlement 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 opportunity provided by Article 6(2).

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

> 'It shall not constitute a breach of the principle of equal pension treatment on the age ground for a scheme to—

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

(*a*) fix age or qualifying service, or a combination of both, as a condition or criterion for admission to the scheme,
(*b*) fix different ages or qualifying service, or a combination of both, as conditions or criteria for admission to the scheme for employees or groups or categories of employees,
(*c*) fix age or qualifying service, or a combination of both, as a condition or criterion for entitlement to benefits under the scheme,
(*d*) fix different ages or qualifying service, or a combination of both, as conditions or criteria for entitlement to benefits under the scheme for employees or groups or categories of employees,
(*e*) (i) fix age or qualifying service, or a combination of both, as a condition or criterion in relation to the accrual of rights under a defined benefit scheme or in relation to the level of contributions to a defined contribution scheme, or
(ii) fix different ages or qualifying service, or a combination of both, as conditions or criteria in relation to the accrual of rights under a defined benefit scheme or in relation to the level of contributions to a defined contribution scheme for employees or groups or categories of employees,
where, in the context of the relevant employment, to do so is appropriate and necessary by reference to a legitimate objective of the employer, including legitimate employment policy, labour market and vocational training objectives,
(*f*) use criteria as to age in actuarial calculations:
Provided that this does not result in a breach of the principle of equal pension treatment on the gender ground.'[333]

Section 34(3) EEA provides that it does not amount to discrimination on the age ground for an employer to fix ages for admission to an occupational benefits scheme or for entitlement to benefits under it; to fix different ages for all employees or a category of employees; to use, in the context of such a scheme, age criteria in actuarial calculations; or to provide different rates for severance payment for different employees, these rates being based on or taking into account the period between the age of an employee on leaving employment and his or her compulsory retirement age – provided that none of these measures constitute discrimination on the gender ground. Occupational benefit schemes are defined as schemes which provide benefits to employees or categories of employees on their becoming 'ill, incapacitated or redundant but does not include any occupational pension scheme providing for pensions, gratuities or other allowances payable on retirement or death.'[334]

4.6.2 Special conditions for young people and older workers

In Ireland, there are special conditions set by law for younger workers in order to promote their vocational integration.

The Protection of Young Persons (Employment) Act 1996[335] limits the employment of young persons (i.e. persons who 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 in the following circumstances: during the school holidays, provided there is a minimum three-week break from work during the summer; part-time during the school term (for those over 15 years old only, and for a maximum of eight hours in the week); or as part of an approved work

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

[334] Section 34(3A) EEA.

[335] Protection of Young Persons (Employment) Act 1996, 26 June 1996, http://www.irishstatutebook.ie/eli/1996/act/16/enacted/en/html.

experience or education programme where the work is not harmful to their safety, health or development (Section 3). Where licensed by the Minister for Business, Enterprise and Innovation, children may also be employed in cultural, artistic, sports or advertising work as long as it does not interfere with their attendance at school, vocational guidance or training programmes or their 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 of wages paid. Before employing a child, the employer must obtain written permission from their parent or guardian (Section 5).

Further special conditions for younger workers are set out in statutory instruments.[336] Under these regulations, an employer must carry out a risk assessment prior to employing or significantly changing the work of a child or young person. Employers are prohibited from employing younger workers if an assessment reveals that the work could expose them to various prescribed harms or is beyond their physical or psychological capacity. Where the assessment reveals a risk to safety or health, or to physical or mental development, the employer must put health monitoring in place and, in the event of the person being assigned to night work, free health and capacity assessments. Parents or guardians should be informed of the outcome of any monitoring or assessments, and of the associated measures put in place to protect the child or young person.

4.6.3 Minimum and maximum age requirements

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

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 (aged 14-15) and young persons (aged 16-18).

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

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

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

[336] Chapter 1 of Part 6 (Regulations 143 to 146) and Schedule 7 to the Safety, Health and Welfare at Work (General Application) Regulations 2007 (S.I. No. 299 of 2007), 1 November 2007, http://www.irishstatutebook.ie/eli/2007/si/299/made/en/print#.

There is no case law addressing the parameters of this exception.[337] In practice, it seems the exception is primarily used to set maximum age requirements for recruitment to posts in the police[338] and armed forces.[339] Age limits include the following:

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

4.6.4 Retirement

a) State pension age

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

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

The State Pension (Contributory) is paid to people from the age of 66 who may have adequate social insurance contributions. It is not means-tested, and it is possible for people to derive income from other sources while in receipt of the pension. The pension is subject to tax. Persons aged 66 and over who do not qualify for the contributory pension are entitled to the means-tested State Pension (Non-Contributory), which is also subject to tax.[340] 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.[341]

b) Occupational pension schemes

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

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

c) State imposed mandatory retirement ages

In Ireland, there is no state-imposed mandatory retirement age(s) in private employment. There is a statutory retirement age for some public servants, which is dependent on the date of recruitment. For people who joined the public service before 1 April 2004, the

[337] 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 February 2009, http://www.courts.ie/Judgments.nsf/0/56ED2DFBACF3ABA28025757600581C87. On appeal, the Supreme Court sought a preliminary ruling from the CJEU, which was issued in December 2018: Judgment of 4 December 2018, C-378/17, *Minister for Justice and Equality and The Commissioner of the Garda Síochána v Workplace Relations Commission*. Following the CJEU ruling, the Government announced that age limit would be reviewed, in line with recommendations issued by the Commission on the Future of Policing. See https://www.oireachtas.ie/en/debates/question/2018-12-13/85/. As at the end of December 2019, the impugned age limits were still in place.

[338] S.I. No. 470/2013, Garda Síochána (Admission and Appointments) Regulations 2013, http://www.irishstatutebook.ie/eli/2013/si/470/made/en/print.

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

[340] See https://www.welfare.ie/en/Pages/a-retired-or-an-older-person.aspx.

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

retirement age was raised from 65 to 70 in December 2018.[342] Those who took up posts since 1 January 2013 must also retire at 70.[343] Public servants recruited between April 2004 and December 2012 have no compulsory retirement age. Distinct compulsory retirement ages are set for members of An Garda Síochána (the police), the Defence Force, firefighters and prison officers.[344]

d) Retirement ages imposed by employers

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

Section 34(4) EEA permits employers to fix different ages for the retirement of employees, whether their retirement is voluntary or compulsory, within the terms of the contract of employment, provided that (a) it is objectively and reasonably justified by a legitimate aim, and (b) the means of achieving that aim are appropriate and necessary.[345]

The objective justification requirement was expressly provided for under the Equality (Miscellaneous) Provisions Act 2015.[346] Prior to its enactment, case law was inconsistent on the application of the requirement. This was in part attributable to a High Court judgment, which found that the Equality Tribunal (now the WRC) could not issue a ruling that sought to align domestic law with EU law where to do so would contravene the express terms of a national legal provision.[347] Pursuant to a 2018 CJEU judgment, the WRC now has the authority to disapply national law where it conflicts with EU law.[348]

A Code of Practice on Longer Working was adopted in December 2017.[349] Reflecting the explicit requirement set out under Section 34(4) EEA, as well as decisions of the Equality Tribunal that pre-date the legislative change, the Code advises employers that any mandatory retirement age must be capable of objective justification both by the existence of a legitimate aim and by evidence that the means of achieving that aim is appropriate

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[342] Public Service Superannuation (Age of Retirement) Act 2018, 26 December 2018, http://www.irishstatutebook.ie/eli/2018/act/39/enacted/en/html.

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

[344] The WRC has confirmed that civilian employees within the Defence Forces are not subject to the mandatory retirement age: *Devereux v Permanent Defence Force Other Ranks Representative Association*, ADJ-00007926, 17 November 2017, https://www.workplacerelations.ie/en/Cases/2017/November/%20ADJ-00007926.html.

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

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

[347] High Court, *Minister for Justice, Equality and Law Reform and anor. v Director of the Equality Tribunal and ors.* [2009] IEHC 72, 17 February 2009, http://www.courts.ie/Judgments.nsf/0/56ED2DFBACF3ABA28025757600581C87. Applied, for example, in Equality Tribunal, *Goss v Ryanair,* DEC-E2015-138, December 2014, https://www.workplacerelations.ie/en/Cases/2015/December/DEC-E2015-138.html.

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

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

and necessary.[350] It sets out the following examples of what may constitute a legitimate aim:

- intergenerational fairness (allowing younger workers to progress);[351]
- motivation and dynamism through the increased prospect of promotion;
- health and safety (generally in more safety-critical occupations);[352]
- creation of a balanced age structure in the workforce;[353]
- personal and professional dignity (avoiding capability issues with older employees);
- succession planning.

Case law has established that reducing financial costs is not in and of itself a legitimate aim.[354]

e) Employment rights applicable to all workers irrespective of age

The law on protection against dismissal and other laws protecting employment rights apply to all workers irrespective of age, even if they remain in employment after attaining pensionable age or any other age. To be covered by the Unfair Dismissals Acts 1977-2015,[355] employees must not have reached the normal retirement age for 'employees of the same employer in similar employment.'[356] 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.[357] Employees contesting age-based discrimination (or discrimination on any other ground) may avail of their rights under EEA, which are not subject to an upper age limit.

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

f) Compliance of national law with CJEU case law

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

Section 34(4) EEA was amended in 2015 to provide that, while employers may set different retirement ages for employees, such a provision must be objectively and reasonably

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

[351] See, for example, Workplace Relations Commission, *Bamford v Citizens Information Phone Service Ltd.*, ADJ-00017442, 6 August 2019, https://www.workplacerelations.ie/en/cases/2019/august/adj-00017442%20adj-00017442.html.

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

[353] See, for example, Workplace Relations Commission, *A Worker v A Healthcare Provider*, ADJ-00003418, 20 January 2017, https://www.workplacerelations.ie/en/Cases/2017/January/ADJ-00003418.html.

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

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

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

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

justified by a legitimate aim, and the means of achieving that aim must be appropriate and necessary.

4.6.5 Redundancy

a) Age and seniority taken into account for redundancy selection

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

Section 8(6)*(c)* EEA provides that employers will discriminate on any of the nine grounds, including age, if they do not afford employees the same treatment in relation to redundancies.[358]

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

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

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

[359] Redundancy Payment Act 1967, 18 December 1967, http://www.irishstatutebook.ie/eli/1967/act/21/enacted/en/html. A revised text is available at: https://www.lawreform.ie/_fileupload/RevisedActs/WithAnnotations/HTML/EN_ACT_1967_0021.htm.

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

have expected to remain in the active labour force and that, as a matter of social and labour market policy, this difference can be legitimately reflected in constructing redundancy packages ... Against this backdrop, it appears that the Oireachtas considered it reasonably and objectively justifiable, within the meaning of Article 6(1) of the Directive, to provide for the differences in treatment allowed for by s.34(3)(d) of the Act.' The Labour Court found that the method of calculating the redundancy packages was permitted under EEA. Its decision was distinguished in a 2017 case that upheld a complaint of indirect discrimination on the ground of age with respect to redundancy compensation.[361] The impugned provision (a cap limiting payment to 1.25 times an employee's salary) was not saved by Section 34(3)(d), since it was not directly linked to proximity to retirement. Application of the cap resulted in the two complainants receiving proportionately less compensation per year of service compared with younger workers (years of service being inextricably linked with age). The WRC found that the established disadvantage was not objectively justified. While the respondent's aim was legitimate – ensuring an equitable distribution amongst the respondent's workforce – it did not provide any evidence at the time of applying the provision that it had considered whether there were other less discriminatory ways of achieving the aim.

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

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

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

4.8 Any other exceptions

In Ireland, other exceptions to the prohibition of discrimination provided in national law are as follows.

Under Section 36(1-2) EEA, it is permissible to impose requirements in relation to residence, citizenship and proficiency in the Irish language for the following public service jobs: office holders in the service of the state, including the police service (Garda Síochána), Defence Forces, civil servants, officers of local authorities, harbour authorities, health boards and vocational education committees. While such requirements are permitted, not all of these positions impose such restrictions. The police service has removed the requirement for proficiency in the Irish language, requiring only proficiency in two languages at least one of which is Irish or English, and employment is open to EU and EEA nationals, Swiss nationals, refugees under the Refugee Act 1996,[362] or to persons with one year's continuous legal residence in the state and a total legal residence amounting to four years in the preceding eight years (the asylum process does not count towards the qualifying five-year period).[363] It is also permissible under the Act to require Irish-language proficiency from teachers in both primary and post-primary schools.[364]

[361] Workplace Relations Commission, *2 Named Complainants v A Catering Company*, DEC-E2017-054, 18 July 2017, https://www.workplacerelations.ie/en/Cases/2017/July/DEC-E2017-054.html.
[362] Refugee Act 1996, 26 June 1996, http://www.irishstatutebook.ie/eli/1996/act/17/enacted/en/html.
[363] S.I. No. 470/2013, Garda Síochána (Admission and Appointments) Regulations 2013, http://www.irishstatutebook.ie/eli/2013/si/470/made/en/print.
[364] Section 36(3) EEA.

Finally, Section 36 permits the imposition of certain educational requirements for certain posts,[365] professions, occupations or vocations.[366]

Under Section 35(1) EEA it is not discriminatory to pay a disabled person a lesser rate of remuneration if their output is less than that of a non-disabled person. It provides:

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

The rate of pay cannot fall below the statutory minimum wage.[367] To date, there is no case law illustrating how the exception might apply in practice. In a parliamentary debate on the provision, the Minister maintained that its purpose was to encourage employers to hire more disabled people.[368] The provision seems to contravene the framework directive, which does not provide for any such exemption.

ESA's principal and most problematic exception is contained in Section 14(1)*(a)*(i), which provides that nothing in the Act can be construed as prohibiting the taking of any action required by any enactment or order of a court, any measure adopted by the European Union or any international convention.[369]

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

- Differences in treatment are permitted in relation to 'annuities, pensions, insurance policies' or other matters related to the assessment of risk. The difference in treatment should relate to actuarial or statistical data or other relevant underwriting or commercial factor and should be reasonable.[370]
- Difference in the treatment of persons on the religion ground in relation to goods or services provided for a religious purpose.[371]
- Difference in treatment of persons on the gender, age or disability ground or on the basis of nationality or national origin in the organisation of sporting events.[372]
- Having an age requirement for persons to be either an adoptive or foster parent.[373]
- Differences in the treatment of persons in respect of the disposal of goods, or the provision of a service, which can reasonably be regarded as goods or a service suitable only to the needs of certain persons.[374]

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[365] Section 36(4) EEA. See Chapter 12.2 on Labour Court, *Health Service Executive v Fitzgerald*, EDA1915, 22 May 2019, https://www.workplacerelations.ie/en/cases/2019/may/eda1915.html.
[366] Section 36(5) EEA.
[367] Section 35(4) EEA.
[368] Dáil Éireann debate, *Equality Bill 2004 [Seanad]: Report and Final Stages*, 1 July 2004, https://www.oireachtas.ie/en/debates/debate/dail/2004-07-01/11/.
[369] See Walsh, J. (2019), 'Primacy of national law over EU law? The application of the Irish Equal Status Act', *European Equality Law Review* 2019(2), pp. 35-48.
[370] Section 5(2)*(d)* ESA.
[371] Section 5(2)*(e)* ESA.
[372] Section 5(2)*(f)* ESA.
[373] Section 5(2)*(j)* ESA.
[374] Section 5(2)*(l)* ESA. This is an especially vague exception, which to date has been substantively considered in just two cases on the family status ground: Equality Tribunal, *Shanahan v One Pico Restaurant*, DEC-S2003-056, 30 June 2003, https://www.workplacerelations.ie/en/Cases/2003/June/DEC-S2003-056-Full-Case-Report.html, and *Travers and Maunsell v Ball Alley House*, DEC-S2003-109/110, 12 September 2003, https://www.workplacerelations.ie/en/cases/2003/september/dec-s2003-109-110_full_case_report.html. The respondents sought to invoke the exception to justify the exclusion of parents with infants from a restaurant and pub respectively. On the facts, the Tribunal found that the services in question could not be considered as suitable only for the needs of people without children.

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

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

Section 16 ESA permits the imposition or maintenance of preferential fee charges in respect of goods or services being offered for persons with children, married couples, persons in a specific age group or persons with a disability. The section also permits different treatment where a person is treated differently solely in the exercise of a clinical judgment in connection with the diagnosis of illness or his or her medical treatment, or is incapable of entering into an enforceable contract or of giving an informed consent and for that reason the treatment is reasonable in the particular case.[375]

Section 15(1) ESA stipulates that a person who provides goods or services is not required to deal with a customer in circumstances which would lead a reasonable individual having the responsibility, knowledge and experience of the person to the belief, on grounds other than discriminatory grounds, that to deal with the customer would produce a substantial risk of criminal or disorderly conduct or behaviour or damage to property at or in the vicinity of the place in which the goods or services or the premises or accommodation are located.[376]

Actions taken in good faith by owners of licensed premises for the purpose of complying with the Licensing Acts do not constitute discrimination (Section 15(2) ESA). Case law establishes that 'in good faith' means that the actions must be done honestly and without prejudice.[377] In *Conroy v Costello*, the Equality Officer stated that in 'order to take an action in good faith it has to be free from any discriminatory motivation.'[378] Any action taken should be for the sole purpose of ensuring compliance with the provisions of the Licensing Acts.[379]

[375] Section 16(2)*(a)* and *(b)* ESA.

[376] Applied, for example, in Workplace Relations Commission, *McDonagh and Stokes v City Cinemas Limited*, DEC-S2017-024, 21 July 2017, https://www.workplacerelations.ie/en/Cases/2017/July/DEC-S2017-024.html: the denial of access to the cinema was not due to the complainants' membership of the Traveller community but resulted from 'their threatening and abusive behaviour on the night previous to the incident'.

[377] Equality Tribunal, *Delaney v The Harp Bar,* DEC-S2002-53/56, 31 May 2002, https://www.workplacerelations.ie/en/Cases/2002/May/DEC-S2002-053-056.html.

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

[379] Equality Tribunal, *Mongan and Ors v The Waterside Hotel,* DEC-S2003-008/014, 25 February 2003, https://www.workplacerelations.ie/en/Cases/2003/February/DEC-S2003-008-014_Full_Case_Report.html.

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

a) Scope for positive action measures

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

Section 33 EEA provides that nothing in the Act shall render unlawful measures that are maintained or adopted with a view to ensuring full equality in practice between employees.[380] 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; or to create or maintain facilities for safeguarding or promoting the integration of such persons into the working environment. Section 35 EEA provides for 'special provisions related to persons with disabilities'. It stipulates, in Section 35(2), that nothing in EEA shall make it unlawful:

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

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

The provisions were considered for the first time in *Lydon v Navan Education Centre*.[381] The complainant asserted that he had been subject to less favourable treatment on the disability ground in the course of an appointments process. Certain staff employed by the respondent on a secondment basis were advised that they would have to reapply for their jobs and that there would be a reduced number of posts available. One of the three candidates for two available posts became seriously ill immediately prior to the scheduled interviews. Having interviewed the complainant and another candidate, the respondent delayed the recruitment process to enable the ill colleague to attend an interview. When there was no indication of when she would recover, the respondent deemed the ill colleague to be appointed. It informed the complainant that he had ranked second at interview and that the first-ranked candidate would be appointed to the remaining post.

The respondent argued that its decision to appoint the ill colleague without an interview amounted to positive action as provided for under Section 33. The adjudication officer found that the respondent's actions did not fall within the ambit of that section, since it was not aimed at ensuring 'full equality in practice'. Full equality might have been achieved by, for example, adopting an alternative means of assessing all of the candidates without recourse to interviews. He found rather, that the employer's actions were saved by Section 35(2). Notwithstanding the fact that the comparator was not assessed in any way, 'section 35 appears to give an employer wide latitude in giving a disabled employee special treatment or facilities; it states "nothing in this Part … shall make it unlawful etc." The language of the provision covers special treatment and facilities and does not exclude the actions taken by the respondent in this case. The actions taken by the respondent enabled the comparator to work. While this disadvantaged the complainant, it was permissible special treatment within the scope of the Employment Equality Act' (para. 4.12). On appeal, the Labour Court did not consider the ambit of the positive action provisions, since

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

it held that the disability ground operates asymmetrically. As a person without a disability, the complainant did not have *locus standi* to bring a disability-ground complaint under EEA.[382]

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

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

In a 2018 case, a parent argued that a school transport scheme was discriminatory on the ground of religion.[383] While children who wished to attend a minority religious ethos school were entitled to access the scheme without restriction, children seeking to attend a Catholic ethos school were subject to eligibility criteria based on the distance between their place of residence and the nearest education centre. The WRC assessed whether this acknowledged preferential treatment fell within the parameters of Section 14(1)*(b)*(i), as contended by the respondent. It noted that the applicable test was not whether the treatment was 'reasonable or appropriate or excessively favourable'; rather, it had to be established that there was a bona fide intention to promote equality of opportunity for persons who were disadvantaged or less likely to be able to avail of the opportunity to attend education through the ethos of minority religions compared with persons not in that category. According to the adjudication officer, the respondent provided 'compelling evidence' to that effect. It argued that the measure was necessary to maintain adequate numbers of pupils in minority ethos schools, which would otherwise be at risk of becoming unviable. There were, for instance, only 23 schools in the state providing post-primary education through the Church of Ireland ethos, compared with 343 Catholic ethos schools. In light of such evidence, the WRC was satisfied that the preferential treatment was based on a bona fide intention to promote equality of opportunity for disadvantaged persons within the meaning of Section 14(1)*(b)*(i).

Section 14(1)*(b)*(ii) was applied to rebut a prima facie case of discrimination in a 2019 case.[384] A man referred a complaint of gender-ground discrimination because he was not permitted to use the female-only area at a fitness club. The respondent argued that it reserved a space for the exclusive use of females for two reasons. Firstly, it enabled Muslim female members to exercise without wearing their headscarves. Secondly, it allayed health and safety concerns in respect of older women, who had experienced difficulty in using the main gym because many items of equipment had been left by males after use with extremely heavy weights attached. Citing section 14(1)*(b)*, the adjudication officer was satisfied that the respondent provided objective reasons justifying its decision to provide a female-only area, 'based on the very specific needs of a category of persons who would not otherwise be able to participate.'

Section 5(2)(*h*) allows differences in treatment in relation to services that are provided for the principal purpose of promoting the special interests of people in a 'category of persons'. Any difference in treatment of people in that category must be reasonably necessary to promote their special interests and must be undertaken in a bona fide manner. The term

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

'category' is not defined, but it seems to be used throughout ESA to denote a sub-group of people falling under one of the discriminatory grounds, for example persons with a particular disability or of a specific nationality or age. The Equality Tribunal has noted that the meaning of Section 5(2)(*h*) is ambiguous, and commented: 'On the basis that the treatment must flow from the promotion of the special interests of persons in the category … this sub-section of the Equal Status Act, 2000 will normally, if not always, relate to the justification of more favourable treatment of a particular category of persons'.[385] In *Keane v World Travel Centre*,[386] a company that offered reduced fares on flights only to Filipino nationals could not justify its policy under Section 5(2)*(h)*. World Travel Centre maintained that it was engaging in 'positive discrimination'. The Equality Officer disagreed and found that it did not meet any of 'the strict and comprehensive criteria required by Section 5(2)(h)' (at para. 5.5). The sole purpose of the special offer was to gain a commercial advantage over competitors and not to advance the special interests of the Filipino community.

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

b) Quotas in employment for people with disabilities

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

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. Under Section 47(4) of the Disability Act 2005, public bodies are obliged to meet that target, 'unless there is good reason to the contrary for not doing so.'[387] 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.[388] The Government has undertaken to progressively increase the statutory target towards 6 % by 2024.[389]

[385] Equality Tribunal, *Shanahan v One Pico Restaurant*, DEC-S2003-056, 30 June 2003, at para. 7.2, https://www.workplacerelations.ie/en/Cases/2003/June/DEC-S2003-056-Full-Case-Report.html.
[386] Equality Tribunal, DEC-S2011-035, 15 August 2011, https://www.workplacerelations.ie/en/Cases/2011/August/DEC-S2011-035-Full-Case-Report.html.
[387] Disability Act 2005, 8 July 2005, http://www.irishstatutebook.ie/eli/2005/act/14/enacted/en/print.html.
[388] See further: http://nda.ie/Publications/Employment/Employment-of-people-with-disabilities-in-the-public-service/Reports-on-compliance-with-public-sector-jobs-target/.
[389] 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.

6 REMEDIES AND ENFORCEMENT

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

a) Available procedures for enforcing the principle of equal treatment

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

The Workplace Relations Commission (WRC) is the primary first instance forum for complaints under EEA, ESA and the Pensions Acts.[390] 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.[391] Mediation is held in private and the agreement is not published.

The Labour Court may hear appeals in EEA and Pensions Acts cases, while ESA appeals are heard by the Circuit Court. Appeals entail a re-hearing of all matters of fact and law.[392] The Labour Court is a quasi-judicial statutory tribunal, which, following the enactment of the Workplace Relations Act 2015, became the only appellate tribunal in employment rights disputes. The Circuit Court is a court of local and limited jurisdiction.

Following a CJEU ruling issued in December 2018, the WRC and the Labour Court now have jurisdiction to interpret and apply EU law principles that conflict with domestic law.[393] The potential impact of this development is not yet apparent.

Gender-ground complaints under EEA and ESA may instead be referred directly to the Circuit Court.[394]

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.[395]

Determinations of the WRC and Labour Court, as well as mediated settlements, are legally binding.[396] In the event of non-compliance, the complainant may bring enforcement proceedings.[397] IHREC may provide assistance in the enforcement procedures.[398]

The procedures apply to employment in the private and public sectors, subject to two exceptions. Members of the Defence Forces must address complaints about discrimination in employment to the authorities before accessing the WRC.[399] Complaints of discrimination in recruitment by the holder of a public service recruitment licence, An Garda Síochána

[390] The WRC assumed the functions of the Equality Tribunal on 1 October 2015 under the terms of the Workplace Relations Act 2015: Ireland, Workplace Relations Act 2015, 20 May 2015, http://www.irishstatutebook.ie/eli/2015/act/16/enacted/en/print.html.
[391] Section 39 Workplace Relations Act 2015; Section 78 EEA; Section 24 ESA.
[392] Affirmed by the Labour Court in *Public Appointments Service v Flynn*, EDA1637, 7 December 2016, https://www.workplacerelations.ie/en/Cases/2016/December/EDA1637.html.
[393] Judgment of 4 December 2018, *Minister for Justice and Equality v Workplace Relations Commission*, C-378/17, http://curia.europa.eu/juris/document/document.jsf?text=&docid=208381&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=152514.
[394] Section 21(1A) ESA; Section 77(3) EEA.
[395] Intoxicating Liquor Act 2003, 14 July 2003, http://www.irishstatutebook.ie/eli/2003/act/31/section/19/enacted/en/html#sec19.
[396] Section 91(2) EEA.
[397] Section 31 ESA; Section 91 EEA.
[398] Section 40 IHRECA.
[399] Sections 77(9)-(10) and 104 EEA.

(the police service) or the Defence Forces must first be referred to the recruitment authority concerned.[400]

Discrimination claims are brought before the WRC by way of application using an online form.[401] No fees are payable and hearings are conducted in private.[402] The Director of the WRC is required to publish decisions under ESA and EEA 'on the internet in such form and in such manner' as they consider appropriate.[403] Pursuant to that requirement, the decisions of both the WRC and Labour Court are available for public inspection, as they are published on the WRC website.[404] In many instances the parties' identities are concealed in published decisions. This practice stems from the Director's discretion to publish decisions in such form and manner as they consider appropriate, which discretion is delegated to the individual adjudication officers who hear complaints.[405] It is at the officer's discretion whether or to not anonymise one or both parties in a case, and it should be open to the parties to make representations on the matter to the WRC.[406] Indeed, an *ex tempore* judgment of the High Court suggests that the WRC is *obliged* to elicit the views of the parties.[407] The discretion to anonymise is generally exercised in sexual harassment complaints and many cases concerning the disability and sexual orientation grounds, unless the complainant requests otherwise.[408] 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

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[400] Section 77(7)-(8) EEA.

[401] See https://www.workplacerelations.ie/en/Complaints_Disputes/Refer_a_Dispute_Make_a_Complaint/.

[402] Section 79(2) EEA; Section 25(2) ESA.

[403] Section 89(1) EEA; Section 30(1) ESA.

[404] See https://www.workplacerelations.ie/en/search/?decisions=1&from=12/8/2019&to=18/8/2019&body=15376&pageNumber=1.

[405] IHREC issued an information note about this issue in April 2017 that led to the discontinuance of a routine practice of anonymising the names of parties to WRC equality law proceedings. The WRC issued a guide to its procedures in October 2015, which specified that all parties and witnesses would be anonymised: Workplace Relations Commission (2015), *Procedures in the Investigation and Adjudication of Employment and Equality Complaints*, available at: http://www.workplacerelations.ie/en/Publications_Forms/Procedures_Employment_and_Equality_Complaints.pdf. Following IHREC's intervention, a further note was published in August 2017, which states that 'parties will be named on the version uploaded to the website unless the Adjudication Officer decides there is a reason to anonymise the parties': WRC (2017), *Guidance Note for a WRC Adjudication Hearing*, available at: http://www.workplacerelations.ie/en/Publications_Forms/Guides_Booklets/Guidance_Note_for_a_WRC_Adjudication_Hearing.pdf.

[406] The WRC did not accede to the respondent's request that names be redacted in Workplace Relations Commission, *Hamill v Dublin City Council*, ADJ-00011817, 31 October 2018, https://www.workplacerelations.ie/en/Cases/2019/October/ADJ-00011817.html. In a 2019 case, 'the complainant did not put forward any compelling reasons' as to why the discretion to anonymise should be exercised: Workplace Relations Commission, *Adeeb Ur Rehman v Road Safety Authority*, ADJ-00021365, 8 October 2019, https://www.workplacerelations.ie/en/cases/2019/october/%20%20adj-00021365.html. In at least two decisions issued in 2018, the complainants' names were anonymised, but not that of the respondent: Workplace Relations Commission, *3 Complainants, Mr. M, Ms. K and G (a minor) v Multiplex Cinemas Limited*, DEC-S2018-012, 15 May 2018, https://www.workplacerelations.ie/en/Cases/2018/May/DEC-S2018-012.html; Workplace Relations Commission, *Complainant v Kildare Sports and Leisure Facilities Limited*, ADJ-00007882, 27 April 2018, https://www.workplacerelations.ie/en/Cases/2018/April/ADJ-00007882.html.

[407] The text of the High Court judgment in question is not available: High Court, *Sheehan v Director of Equality Tribunal*, unreported, ex tempore, Kearns P., 11 June 2012. According to the authors of the main book on EEA, the Court 'granted a declaration that the Equality Tribunal is not entitled to unilaterally censor the names of parties and witnesses in a complaint under the Employment Equality Acts': Bolger, M., Bruton C. and Kimber, C. (2012), *Employment Equality Law*, Dublin, Thomson Reuters, p. 750. The High Court judgment is referred to in a few 2013 decisions of the Equality Tribunal; see, for example, *Nayaranasami v Sheldon Park Hotel*, DEC-E2013-199, 30 December 2013, https://www.workplacerelations.ie/en/Cases/2013/December/DEC-E2013-199.html.

[408] See, for example, Workplace Relations Commission, *A Sales Representative v A Books Wholesaler*, DEC-E2016-131, 20 September 2016, https://www.workplacerelations.ie/en/Cases/2016/September/DEC-E2016-131.html. The adjudication officer states, at para. 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.'

matters.[409] Outside of those situations, however, the precise rationale for concealing names is unclear, since it is often not set out in WRC decisions. IHREC 'is of the view that, where an adjudication officer has found that a respondent has engaged in discrimination, the principle of effectiveness will normally require that the decision of the adjudication officer be published in a manner that identifies the employer or service provider concerned.'[410] It remains to be seen whether EU law principles will affect decisions in future cases.

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.[411] 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,[412] which oversees an administrative process that examines complaints about decisions, refusals to take action and procedures of public bodies.[413] Bodies within the remit of the Ombudsman include Government departments and offices, local authorities, the Health Service Executive (HSE), voluntary hospitals and voluntary agencies that provide services on behalf of the HSE, and third-level colleges and universities. The Ombudsman can examine a complaint about an action taken by one of those bodies if someone has been adversely affected and the action was taken without proper authority, if the action was taken on irrelevant grounds, if it was the result of negligence or carelessness, if it was based on incorrect or incomplete information, if it was improperly discriminatory, if it was based on an undesirable administrative practice, or if it was otherwise contrary to fair or sound administration.[414] 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.[415] Two such reports were issued on compliance with provisions of ESA.[416]

b) Barriers and other deterrents faced by litigants seeking redress

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[409] See, for example, Equality Tribunal, *A Nigerian National v A Financial Institution*, DEC-S2005-114, 19 August 2005, https://www.workplacerelations.ie/en/Cases/2005/August/DEC-S2005-114-Full-Case-Report.html.

[410] Logan, E. (2017), 'Restrictions on identifying the parties involved in disputes do not apply to decisions under the equality legislation', *Law Society of Ireland Gazette*, 111(4), at p. 27, available at: https://www.lawsociety.ie/globalassets/documents/gazette/gazette-2017/may-2017-gazette.pdf.

[411] Section 6(2) Unfair Dismissals Acts 1977-2015.

[412] Ombudsman Act 1980, 14 July 1980, http://www.irishstatutebook.ie/eli/1980/act/26/enacted/en/html.

[413] See generally: https://www.ombudsman.ie/.

[414] Section 4(2), Ombudsman Act 1980.

[415] Section 6(7), Ombudsman Act 1980.

[416] The reports can be viewed at: https://www.ombudsman.ie/publications/reports/too-old-to-be-equal-a-fol/index.xml; https://www.ombudsman.ie/publications/reports/motorised-transport-grant/Motorised-Transport-Grant-Report-to-Dail-and-Seanad.pdf.

EEA, ESA and the Pensions Acts impose a restrictive six-month time limit for bringing complaints to the appropriate body.[417] Additionally, ESA requires a complainant to initiate a complaint by notifying the respondent in writing, within two months of the date of the occurrence of the incident (or the date of the last occurrence if relevant), of the nature of the allegation *and* of their intention to seek redress under ESA.[418] The notification period may be extended for a further two months if the WRC is satisfied that reasonable cause prevented the complainant from sending the notification within the normal time period.[419] 'Exceptionally', the notification requirement may be disapplied.[420]

This presents difficulties for complainants, as evidenced by the fact that a substantial number of complaints are dismissed annually at hearing stage for failure to comply with the notification requirement.[421] No data is available about complaints that were not pursued when prospective complainants became aware of the notification requirement.

Complaints of discrimination occurring 'on or at the point of entry to, licensed premises' must be brought to the District Court instead of the WRC. The major impact of this amendment is the cost implications for complainants as well as the complexity of the legal proceedings.[422] Under the WRC system it is possible to represent oneself, and costs cannot be awarded against either complainant or respondent; this is not the case at the District Court. Moreover, the system generates confusion in practice; several complaints have been, and continue to be, lodged before the incorrect forum. Over the period from 2016 to 2018, 10 complaints on the race and Traveller grounds were dismissed by the WRC, since it did not have jurisdiction to hear the cases.[423] Two complaints could not proceed for the same reason in 2019.[424]

Licensed premises include, most obviously, pubs, but also off-licences, hotels and many restaurants. Considerable uncertainty as to which premises, or parts of premises, are covered has emerged in Equality Tribunal and subsequently WRC decisions. A 2011 case exemplifies the difficulties faced by complainants.[425] Two men argued that their gym membership was terminated when it was discovered that they were members of the

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[417] In two 2019 cases, the Labour Court underlined that the pursuit of an internal grievance does not stop the time limit running: *Pfizer Pharmaceuticals Ireland Ltd. v Whelan*, EDA1924, 12 July 2019, https://www.workplacerelations.ie/en/cases/2019/july/eda1924.html; *Beaumont Hospital v Kaunda*, EDA1930, 3 September 2019, https://www.workplacerelations.ie/en/cases/2019/september/eda1930.html.

[418] Section 21(2) ESA.

[419] Section 21(3)*(a)*(i) ESA. See, for example, Workplace Relations Commission, *Keenan v Topaz Energy Limited*, ADJ-00011225, 20 July 2018, https://www.workplacerelations.ie/en/Cases/2018/July/ADJ-00011225.html (notification period extended to four months because delay was due to administrative error on part of solicitor).

[420] Section 21(3) ESA. To the author's knowledge, this has only occurred on one occasion: Workplace Relations Commission, *A Citizen v An Insurance Company*, ADJ-00019822, 18 December 2019, https://www.workplacerelations.ie/en/cases/2019/december/adj-00019822.html. The notification requirement was disapplied in relation to some aspects of the complaint in another 2019 decision: Workplace Relations Commission, *O'Donohue v Rowlands*, ADJ-00009960, 4 January 2019, https://www.workplacerelations.ie/en/Cases/2019/January/ADJ-00009960.html.

[421] With respect to 2019, see, for example, the following decisions of the Workplace Relations Commission: Failure to notify respondent of intention to seek redress before the WRC; *Ellen Cleary v Dott Treasa Holdings Ltd The Rose Hotel* ADJ-00018262, 3 May 2019, https://www.workplacerelations.ie/en/cases/2019/may/adj-00018262%20.html (one of six claims taken by family members, all of which were dismissed); Notification outside time period: *Adeeb Ur Rehman v Road Safety Authority*, ADJ-00021365, 8 October 2019, https://www.workplacerelations.ie/en/cases/2019/october/%20%20adj-00021365.html; Failure to notify: *Gasiorowska v Daygrove Properties Ltd.,* ADJ-00017107, 13 June 2019, https://www.workplacerelations.ie/en/cases/2019/june/adj-00017107.html.

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

[423] See the country report for 2019, available at: https://op.europa.eu/s/nWgq.

[424] Workplace Relations Commission, *A Customer v A Licensed Premises,* ADJ-00015106, 1 February 2019, https://www.workplacerelations.ie/en/Cases/2019/January/ADJ-00015106.html (disability ground); Workplace Relations Commission*, Deans v Harvest Point Ltd.*, ADJ-00011781, 23 April 2019, https://www.workplacerelations.ie/en/cases/2019/april/adj-00011781.html (multiple grounds).

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

Traveller community. During the Tribunal's investigation of the complaint, however, it emerged that the respondent publican's licence covered an extensive area including the gym. As a result, the gym was a licensed premise, and so the case could not proceed before the Tribunal. A 2018 decision established that the off-licence section of a supermarket falls under the jurisdiction of the District Court.[426]

In its 2016 report on Ireland, the European Commission against Racism and Intolerance (ECRI) considered that Ireland had only 'partially implemented' its recommendation on ensuring that 'there is an independent authority (other than the courts) competent to deal with cases of discrimination in the provision of goods and services'. It noted that, because of Section 19, 'a substantial number of pertinent cases' are excluded from the WRC's mandate. Significantly, it further observed 'that in particular members of the Traveller Community are often affected by discrimination in the provision of goods and services in licensed premises.'[427] ECRI's most recent report, issued in June 2019, reiterated these points.[428] According to the Commission, conferring jurisdiction on the District Court 'may be a barrier to access to justice for the most disadvantaged community in Ireland; members of the Traveller community are frequently refused admission to licensed premises and have no alternative to seeking redress in a District Court, which is less accessible than the WRC and more costly, making it prohibitive.'[429] It recommended that 'the authorities should … streamline procedures so that all discrimination cases, on all grounds and in all areas, are dealt with by the Workplace Relations Commission.'[430]

While there is no potential for awards of costs against either party in the WRC, this is not the position with regard to proceedings before the District Court or the Circuit Court.[431]

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

The WRC's annual report, which covers a broad employment rights mandate in addition to ESA, EEA and the Pensions Acts, provides overall figures for the number of 'Complaint Applications' it receives (the cases referred to it) and further breaks this down into the number of 'Specific Complaints' lodged (separate legislative breaches asserted within each complaint application).[432] Of the 20 939 specific complaints received by the WRC across its

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

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

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

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

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

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

[432] Workplace Relations Commission (2020), *Annual Report 2019*, https://www.workplacerelations.ie/en/publications_forms/corporate_matters/annual_reports_reviews/annua

entire mandate in 2019, 1 827 concerned anti-discrimination law. In the 2019 annual report, figures are provided for the number of complaints referred under EEA and ESA, and these are further divided into the grounds cited in those complaints. 439 ESA complaints were referred, relating to 648 discriminatory grounds. The grounds specified in those complaints were age (62), civil status (5), disability (73), family status (24), gender (89), membership of the Traveller community (97), race (159), religion (36), sexual orientation (12), and receipt of housing assistance (91). Referrals under ESA declined by 26 % compared with 2018. The WRC notes that the 'reasons behind this decline are unclear' and that it will undertake an awareness-raising campaign.[433] The 1 733 grounds indicated in the 1 288 complaints under EEA were age (452), civil status (78), disability (329), family status (184), gender (431), membership of the Traveller community (2), race (183), religion (50) and sexual orientation (24). EEA referrals declined by 11 % in 2019, with a 37 % drop in age-ground complaints, and race-ground complaints falling by 14 %. There was a substantial increase in referrals on the gender (+36 %), civil status (+117 %) and religion (+61 %) grounds, 'although the latter two were from a relatively low base'.[434] The reasons for these patterns are as yet unclear. In 2019, there were 100 referrals under the Pensions Acts. Data was not provided for the grounds in question.

A total of 3 029 adjudication decisions were issued across the WRC's remit in 2019; data is not provided on the proportion of them that pertained to anti-discrimination law. Annual reports are published on the WRC's website and are therefore available to the public.

d) Registration of discrimination cases by national courts

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

The Courts Service of Ireland registers and publishes the number of cases processed by the courts each year, but does not provide figures for discrimination cases.[435] Many judgments of the superior courts (the High Court, the Court of Appeal and the Supreme Court) are published online.[436] Judgments of the District Court and Circuit Court are not available to the public.

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

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

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

Organisations, trade unions or associations may represent complainants before the WRC and the Labour Court (as may any person authorised by the complainant).[437] Only qualified lawyers have the right to represent litigants before the civil courts.[438] Advocates such as officials from trade unions, organisations or associations may provide limited assistance to lay litigants with the permission of the court.[439]

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l-report-2019.pdf. Reports for previous years are available at: https://www.workplacerelations.ie/en/publications_forms/corporate_matters/annual_reports_reviews/.

433 Workplace Relations Commission (2020), *Annual Report 2019*, p. 24.

434 Workplace Relations Commission (2020), *Annual Report 2019*, p. 25.

435 See http://www.courts.ie/courts.ie/library3.nsf/PageCurrentWebLookUpTopNav/STATISTICS?opendocument&l=en.

436 A case law database is maintained by the Courts Service. See: http://www.courts.ie/Judgments.nsf/Webpages/HomePage?OpenDocument.

437 Section 77 (11) EEA and Section 25A ESA.

438 See, for example, Ireland, Order 6 of the District Court Rules, S.I. No. 93/1997 - District Court Rules, 1997, 1 May 1997, http://www.irishstatutebook.ie/eli/1997/si/93/made/en/print.

439 See further the High Court judgment in *Tougher v Tougher's Oil Distributors Ltd.* [2014] IEHC 254, 15 May 2014, http://www.courts.ie/Judgments.nsf/0/9534874F89674BB780257CE00051F8F8.

No organisation apart from IHREC may commence own-name proceedings on behalf of victims of discrimination.

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

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

In the course of an investigation, if the Director General of the WRC considers it appropriate, they may 'hear persons appearing to the Director to be interested'.[440] Consequently, interested third parties may be authorised to participate in proceedings by making submissions on relevant matters. To date, this has occurred very rarely. Representatives of the Irish Traveller Movement (a human rights organisation), for example, have provided expert testimony for complainants on the difficulties experienced by Travellers in gaining access to services and on other matters.[441] In a reasonable accommodation case, the Equality Tribunal heard expert evidence on the structure of Irish sign language and the need for suitably qualified interpreters.[442]

There is no equivalent provision that would enable associations to join proceedings before the ordinary courts. Intervention in an amicus curiae capacity is theoretically possible[443] but has not occurred to date in an equality law case.

c) Actio popularis

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

Civil society organisations, such as the Equality and Rights Alliance, have long sought the extension of standing under EEA and ESA to NGOs and trade unions.[444] The matter has not been considered by Parliament, however.

In the fields of constitutional law and judicial review, courts have developed the general principles on legal standing significantly over the past decades. However, just one case to date recognises an organisation's right to bring an *actio popularis*.[445] In *Digital Rights Ireland Ltd. v Minister for Communications*,[446] the High Court held that an NGO that had incorporated as a limited company had *locus standi* to assert its own rights and also to bring an *actio popularis* in challenging legislation on data retention that could potentially affect the entire population. Standing was granted on the basis, *inter alia,* that 'it would be an effective way to bring the action – individual owners of mobile phones would be unlikely to litigate the matter'.

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[440] Section 25(1) ESA; Section 79(1) EEA.

[441] See, for example, Equality Tribunal, *Reilly v The Licensee, the Foxhunter Pub, Lucan, Dublin*, DEC-S2003-026, 17 April 2003, https://www.workplacerelations.ie/en/cases/2003/april/dec-s2003-026-full-case-report.html; Equality Tribunal, *Sweeney v Saehan Media Ireland Ltd*., DEC-E2003-017, 1 May 2003, https://www.workplacerelations.ie/en/cases/2003/may/dec-e2003-017_full_case_report.html.

[442] Equality Tribunal, *Regan v Old Bawn Community School*, DEC-S2010-043, 31 August 2010, https://www.workplacerelations.ie/en/cases/2003/may/dec-e2003-017_full_case_report.html.

[443] Courts have an inherent jurisdiction to permit such intervention. See further: Whyte, G. (2015), *Social Inclusion and the Legal System: Public Interest Law in Ireland*, Dublin, Institute of Public Administration, pp. 158-165.

[444] See, for example, Crowley, N. (2011), *A Roadmap to a Strengthened Equality and Human Rights Infrastructure in Ireland*, Dublin, Equality and Rights Alliance.

[445] See further: Whyte, G. (2015), *Social Inclusion and the Legal System: Public Interest Law in Ireland*, Dublin, Institute of Public Administration, pp. 121-152.

[446] High Court, *Digital Rights Ireland Ltd. v Minister for Communications* [2010] IEHC 221, 5 May 2010, http://www.courts.ie/Judgments.nsf/0/2182AC025AD64E1C8025777E0035E6E8, at para. 91.

d) Class action

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

When the WRC receives multiple complaints under either EEA or ESA arising from the same event, it may convene a meeting with the parties prior to the hearing with a view to investigating the claims as a single grouped case.[447] This practice is adopted as a matter of administrative convenience and is not a class action.[448] In a grouped case, each person involved must refer a complaint, and a decision is issued in respect of every complaint.[449]

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

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

Section 85(A)(1) EEA provides: 'Where in any proceedings facts are established by or on behalf of a complainant from which it may be presumed that there has been discrimination in relation to him or her, it is for the respondent to prove the contrary.' An identical provision governs cases under ESA.[450] This also applies to cases brought by IHREC.[451]

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.[452]

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.[453]

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

In Ireland, there are legal measures of protection against victimisation.

Section 74(2) EEA prohibits victimisation, which is deemed to occur where a person is dismissed or any other adverse treatment occurs because they have undertaken any of the following activities: they have made a complaint of discrimination, they have been a complainant in proceedings,[454] they are an employee who has represented or otherwise supported a complainant, they have been a comparator in an equality action, they have

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[447] See, for example, Equality Tribunal, *McCann, Collins and 31 others v Eircom Ltd.*, DEC-S2003-076/108, 12 September 2003, https://www.workplacerelations.ie/en/Cases/2003/September/DEC-S2003-076-108_Full_Case_Report.html; *Johnson and sixty-five others v Tesco Ireland Limited*, DEC-E2001-024, 10 August 2001, https://www.workplacerelations.ie/en/Cases/2001/August/DEC-E2001-024.html.

[448] The High Court ruled out use of class actions in the employment case of *Verbatim Ltd. v Duffy and others* [1994] ELR 159.

[449] See, for example, Equality Tribunal, *58 Named Complainants v Goode Concrete Limited*, DEC-E2008-020, 30 April 2008, https://www.workplacerelations.ie/en/cases/2008/april/dec-e2008-020-full-case-report.html.

[450] Section 38(A)(1) ESA.

[451] Section 85(A)(3) EEA; Section 38(A)(2) ESA.

[452] See, for example, Labour Court, *Public Appointments Service v Flynn*, EDA1637, 7 December 2016, https://www.workplacerelations.ie/en/Cases/2016/December/EDA1637.html.

[453] Labour Court, *Noonan Services Ltd. v A Worker*, EDA1126, 29 July 2011, https://www.workplacerelations.ie/en/Cases/2011/July/EDA1126.html; *Aer Lingus v Kacmarek, Turczyk and Wilczkiew*, EDA1712, 8 May 2017, https://www.workplacerelations.ie/en/Cases/2017/May/EDA1712.html.

[454] The 'proceedings' referenced under Section 74(2)(b) must be EEA proceedings: Bolger, M., Bruton C. and Kimber, C. (2012), *Employment Equality Law*, Dublin, Thomson Reuters, at p. 699. See, for example, *A Complainant v A Meat Factory*, ADJ-00003910, 18 May 2017, https://www.workplacerelations.ie/en/cases/2017/may/adj-00003910_.html.

been a witness in proceedings under EEA or ESA, they have opposed a discriminatory act by lawful means, or they have stated an intention to take any of the preceding actions.

Victimisation complaints may only be referred against the complainant's employer. In *Association of Secondary Teachers, Ireland v Dunbar*, the Labour Court determined that on the 'plain and ordinary meaning' of Section 74(2), it applies only to dismissal or other adverse treatment of an employee by his or her employer.[455] The complainant, therefore, had no cause of action against a trade union.

Complaints of victimisation must be brought within 6 months of the most recent occurrence of the act.[456] This may be extended to a maximum of 12 months in certain circumstances.[457] The form of redress available is the same as that for discrimination claims, being a compensation award or an order that the employer take a specified course of action.[458] Adjudicators consistently reiterate that victimisation is a serious matter, and successful cases tend to result in significant compensation awards.[459]

In two instances, victimisation may amount to a criminal offence: where a person procures or attempts to procure another person to do anything that constitutes victimisation,[460] or where an employee is dismissed in circumstances amounting to victimisation.[461]

Victimisation is also prohibited under ESA. As with EEA, protection extends to people other than the complainant. Section 3(2)*(j)* applies where a person has in good faith applied for redress under the Act, has been a witness, has given evidence in criminal proceedings under the Act, has opposed by lawful means discriminatory acts, or has given notice of an intention to take any of the preceding actions.[462] In a 2019 case, the WRC found that the respondent's reaction to the receipt of a notification form amounted to victimisation.[463] Specifically, the respondent did not reply to the request for information but instead instigated a corporate services complaints procedure without consulting the complainant. The respondent was directed to pay EUR 5 000 in compensation and to provide staff training.

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

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

Section 82 EEA provides for a broad range of remedies that are equally applicable with respect to private and public employment: compensation awards, orders for employers to take specific courses of action, an order for equal treatment in whatever respect is relevant to the case, and reinstatement or re-engagement.

In the area of goods and services, Section 27 ESA provides for the remedies of compensation and orders that a certain course of action be followed. A successful

[455] Labour Court, EDA2811, 25 August 2011, https://www.workplacerelations.ie/en/cases/2011/august/eda1128.html.
[456] Section 77(5) EEA.
[457] Section 77(6)*(a)* EEA.
[458] Section 82 EEA.
[459] Compensation of EUR 25 000 was awarded to a complainant who was dismissed when she made a complaint under EEA in Labour Court, *Couverture Limited v Wozniczka*, EDA 182, 11 January 2018, https://www.workplacerelations.ie/en/Cases/2018/January/EDA182.html. Victimisation that occurred as a reaction to a previous complaint to the Equality Tribunal attracted a EUR 48 750 award in Workplace Relations Commission, *Higgins v Permanent TSB Plc*, DEC-E2016-037, 25 February 2016, https://www.workplacerelations.ie/en/Cases/2016/February/DEC-E2016-037.html.
[460] Section 14 EEA.
[461] Section 98 EEA.
[462] See, for example, Equality Tribunal, *Salmon v Para Equestrian Ireland*, DEC-S2004-002, 9 January 2004, https://www.workplacerelations.ie/en/cases/2004/january/dec-2004-002-full-case-report.html.
[463] Workplace Relations Commission, *A Person v An Insurance Company*, ADJ-00010141, 20 February 2019, https://www.workplacerelations.ie/en/cases/2019/february/adj-00010141%20.html.

discrimination case taken against licensed premises before the District Court may attract a compensation award. The judge may also order the licensee to take 'a course of action' and has an additional power, not enjoyed by the WRC, to make an order for temporary closure of the premises.[464]

A limited range of criminal sanctions can be imposed under EEA and ESA: where a person procures another to do anything that could be considered victimisation or discrimination,[465] where victimisation amounts to dismissal,[466] or in a range of circumstances concerning obstruction of the Workplace Relations Commission or of IHREC in conducting inquiries.[467]

b) Compensation – maximum and average amounts

There are maximum limits on financial awards by the Workplace Relations Commission and the Labour Court. In the context of employment, the limits are a maximum of two years' pay, calculated on the basis of the complainant's weekly pay at the time the case was referred.[468] Where the complainant was not an employee (in the case of a discriminatory interview, for example) the maximum award is EUR 13 000.[469] In unequal pay cases, compensation may be awarded in the form of pay arrears, up to a maximum of three years prior to the referral of the case.[470] There is no provision for the payment of interest.[471]

The maximum award payable under ESA is linked to monetary limits on the jurisdiction of the District Court and is currently set at EUR 15 000.[472] In a 2019 race-ground case, the maximum amount was awarded because of the 'serious and ongoing nature of the abuse and harassment' directed at a tenant.[473]

A successful discrimination case taken against licensed premises before the District Court may attract a maximum award of EUR 15 000.[474]

c) Assessment of the sanctions

The primary compliance issue pertains to the compensation ceilings. Claims under the gender ground are treated exceptionally; they can be taken directly to the Circuit Court and can attract higher compensation awards, since no monetary limit is applicable. It is questionable whether the remedies available in the context of non-gender-ground discrimination could generally be described as 'effective, proportionate and dissuasive' sanctions. As noted above, a cap of EUR 13 000 applies at the access or recruitment stage. The ceiling of EUR 15 000 under ESA may be inadequate for particularly egregious violations of the law in situations such as discriminatory denial of access to education.[475] Interest is not payable on compensation awards under ESA or for non-gender-ground EEA

[464] Section 19(3), Intoxicating Liquor Act 2003. Where an order has been made under Subsection (3), any person may make an objection, related to the prohibited conduct concerned, to the renewal of the licence: Intoxicating Liquor Act 2003, Section 19(10).
[465] Section 14 EEA; Section 13 ESA.
[466] Section 98 EEA.
[467] See, for example, Section 60(3) EEA; Section 37(1) ESA.
[468] Section 82(4) EEA.
[469] Section 82(4)*(b)* EEA.
[470] Section 82(1)*(a)* EEA.
[471] Interest may be awarded only in gender-ground cases as provided for under Section 82(5) EEA; applied in Equality Tribunal, *O'Brien v Persian Properties*, DEC-E2012-010, 6 February 2012, https://www.workplacerelations.ie/en/Cases/2012/February/DEC-E2012-010-Full-Case-Report.html.
[472] Section 27(2) ESA.
[473] Workplace Relations Commission, *Nkikita v Fleming*, ADJ-00020830, 4 December 2019, https://www.workplacerelations.ie/en/cases/2019/december/adj-00020830.html.
[474] Section 19(4), Intoxicating Liquor Act 2003.
[475] In a 2017 case concerning the housing assistance ground, the adjudication officer commented as follows: 'I am constrained by the maximum award of € 15 000 which by virtue of Section 27(2) is fixed at the maximum District Court civil jurisdiction, and in my view does not reflect the seriousness of the discrimination': Workplace Relations Commission, *Tenant C v A Landlord*, ADJ-00004705, 9 August 2017, https://www.workplacerelations.ie/en/Cases/2017/August/ADJ-00004705.html.

cases. Moreover, the general compensation limits apply even where a case of discrimination has been made out on several grounds or in cases of established discrimination as well as harassment.[476]

IHREC is the only independent body permitted to instigate litigation under ESA and EEA,[477] but compensation orders may not be made in its favour.[478] 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.[479]

It seems that the offence provisions of the two sets of acts have never been invoked.

Equality laws also provide for non-financial sanctions, which bolster their effectiveness since the remedy can be tailored to the particular circumstances of the case and can also generate significant effects beyond the immediate case.[480] Adjudicators have used this power to order persons to take a specified course of action[481] as a means of ensuring that respondents in ESA cases create an equal opportunities policy,[482] retrain staff[483] and revise discriminatory policies.[484] Employers have been directed to put in place pathways for discrimination complaints,[485] to revise staff handbooks[486] and to review recruitment[487] and other employment procedures.[488]

[476] Section 27(3) ESA; Section 82(6)*(a)* EEA.
[477] Section 85 EEA; Section 23 ESA.
[478] Section 82(6) EEA; 27(4) ESA.
[479] Judgment of 10 July 2008, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, C-54/07, [2008] ECR 1-1587.
[480] 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.
[481] Section 82(1)*(e)* EEA; Section 27(1)*(b)* ESA.
[482] See, for example, Workplace Relations Commission, *A Men's Shed Member v A Men's Shed*, ADJ-00006688, 30 January 2018, https://www.workplacerelations.ie/en/Cases/2018/January/ADJ-00006688.html; Workplace Relations Commission, *Complainant v Respondent*, ADJ-00009293, 13 April 2018, https://www.workplacerelations.ie/en/Cases/2018/April/ADJ-00009293.html.
[483] See, for example, Workplace Relations Commission, *A Person v An Insurance Company*, ADJ-00010141, 20 February 2019, https://www.workplacerelations.ie/en/cases/2019/february/adj-00010141%20.html; *Pusi v McNally & Handy, Estate Agents*, ADJ-00019284, 4 December 2019, https://www.workplacerelations.ie/en/cases/2019/december/adj-00019284.html.
[484] See, for example, Workplace Relations Commission, *A Father v The Board of Management of a Secondary School*, ADJ-00013996, 10 September 2019, https://www.workplacerelations.ie/en/cases/2019/december/adj-00013996.html; *An asylum seeker v A Government Agency*, ADJ-00017832, 20 November 2019, https://www.workplacerelations.ie/en/cases/2019/november/adj-00017832%20.html; *Skiba v Tesco Ireland Ltd*, ADJ-00016329, 29 November 2019, https://www.workplacerelations.ie/en/cases/2019/november/adj-00016329.html.
[485] Workplace Relations Commission, *A University Lecturer v A University*, ADJ-00002790, 21 August 2018, https://www.workplacerelations.ie/en/cases/2018/august/adj-00002790.html.
[486] See, for example, Workplace Relations Commission, *Sales Advisor/ Mechanic/ Department Manager v DIY/Electrical Retailer*, ADJ-00013899, 30 May 2019, https://www.workplacerelations.ie/en/cases/2019/may/adj-00013899.html.
[487] See, for example, Workplace Relations Commission, *A Prospective Employee v A Company,* ADJ-00004761, 12 June 2017, https://www.workplacerelations.ie/en/Cases/2017/June/ADJ-00004761.html.
[488] See, for example, Workplace Relations Commission, *A Nurse v A Hospital,* ADJ-00008073, 23 April 2018, https://www.workplacerelations.ie/en/Cases/2018/April/ADJ-00008073.html.

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

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

The Irish Human Rights and Equality Commission (IHREC) is Ireland's designated body for the promotion of equal treatment irrespective of racial or ethnic origin. Its mandate also extends to the other discriminatory grounds set out under domestic anti-discrimination law: age, civil status, disability, family status, gender, receipt of housing assistance, religion and sexual orientation.

IHREC was established on 1 November 2014, replacing the Equality Authority as the country's specialised equality body and the Irish Human Rights Commission as Ireland's national human rights institution.[489]

b) Political, economic and social context of the designated body

The political, economic and social context in which IHREC operates has been relatively positive since its establishment in November 2014. There is evidence of recent political support for the Commission: the Minister for Justice and Equality acknowledged the 'important work' of the body in sanctioning increased funding to provide for the appointment of additional staff in 2017,[490] and the Government plans to introduce legislation that will confer an additional enforcement function on the Commission with respect to reporting on the gender pay gap.[491] This compares favourably with the experience of its predecessor equality body, the Equality Authority. The Authority's budget was drastically cut in Budget 2009 from approximately EUR 5.9 million to EUR 3.3 million, which represented a 43 % reduction. The Equality Authority's capacity to carry out the full range of its functions was severely compromised as a result.[492]

The Commission's budget for 2019 was EUR 6.75 million, representing an increase of 0.75 % from the previous year.[493] Nonetheless, spending on IHREC remains below what the combined budgets for the Equality Authority and Irish Human Rights Commission were in 2007, prior to a series of cuts (EUR 5.459 million for the Equality Authority and EUR 2.342 million for the Irish Human Rights Commission).

c) Institutional architecture

In Ireland, the designated body forms part of a body with multiple mandates. IHREC has a dual status as Ireland's national human rights institution and equality body. It is also the body designated for the purposes of Directive 2014/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers.[494] The Commission is charged with protecting and promoting human rights and equality, encouraging the development of a culture of respect for human rights, equality

[489] Irish Human Rights and Equality Commission Act 2014, 27 July 2014, http://www.irishstatutebook.ie/eli/2014/act/25/enacted/en/html; Irish Human Rights and Equality Commission Act 2014 (Establishment Day) Order 2014 (S.I. No. 450 of 2014), http://www.irishstatutebook.ie/eli/2014/si/450/made/en/print.

[490] Select Committee on Justice and Equality, Vote 25 - Irish Human Rights and Equality Commission (Revised), 12 April 2017, http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/committeetakes/JUS2017041200002.

[491] Gender Pay Gap Information Bill 2019, https://www.oireachtas.ie/en/bills/bill/2019/30/.

[492] Free Legal Advice Centres (2014), *Our Voice, Our Rights: A Parallel Report in response to Ireland's Third Report under the International Covenant on Economic, Social and Cultural Rights*, pp. 19-22, https://www.ourvoiceourrights.ie/download/pdf/our_voice_our_rights.pdf; Harvey, B. and Walsh, K. (2009), *Downgrading Equality and Human Rights: Assessing the Impact*, Dublin, Equality and Rights Alliance.

[493] Government of Ireland (2019), *2019 Revised Estimates for Public Services,* http://www.per.gov.ie/en/rev/.

[494] Section 10(2)*(i)* IHRECA.

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.[495]

The human rights and equality functions of the body are integrated. In other words, the equality and non-discrimination mandate is not structured separately within the body, nor is a percentage of staff resources and budget dedicated to the equality mandate. Along with the director, staff assigned to each of the Commission's sections (legal, strategic engagement, policy and research and corporate services) work across the body's mandate.[496]

d) Status of the designated body/bodies – general independence

i) Status of the body

IHREC was established as a body corporate with perpetual succession under the Irish Human Rights and Equality Commission Act 2014.[497] It was accredited as an A status national human rights institution in November 2015.[498]

Sections 12 and 13 IHRECA provide for membership and appointment of the Commission. The Minister for Justice agrees with the Public Appointments Service the selection criteria and process to be implemented in respect of filling vacancies. The Service puts in place an independent selection panel with prescribed relevant experience and including one nominee of the Director of the European Union Agency for Fundamental Rights. Following an open competition, the panel recommends people for appointment. The legislation specifies that the 'Government shall accept that recommendation' save in defined 'exceptional circumstances'[499] and that the members shall be appointed by the President on the advice of Government, following a resolution of the Oireachtas (Parliament). While the appointments process contains checks and balances that secure its independence from Government, greater transparency could perhaps be secured by according the Oireachtas an oversight role in the appointment of the selection panel.

In terms of qualifying criteria for membership of IHRECA, the Public Appointments Service and the Government must have regard to the need to ensure that the members 'broadly reflect the nature of Irish society' and possess knowledge of or experience in matters connected with human rights and matters connected with persons or classes of persons who are disadvantaged by reference to the discriminatory grounds.[500] There must be gender balance in the composition of the 12 to 15 members. Members serve a term of three or five years. One of the members acts as the Chief Commissioner and chairs Commission meetings, which must take place at least every three months.[501]

The Commission's annual grant is a sum that the Minister for Justice and Equality, after consultation with the Commission, considers to be reasonably sufficient for the Commission for the performance of its functions.[502] Concerns about this provision were raised by the

[495] Section 10(1) IHRECA, http://www.irishstatutebook.ie/2014/en/act/pub/0025/sec0010.html - sec10.
[496] IHREC (2020), *Annual Report 2019*, pp. 76-77, https://www.ihrec.ie/app/uploads/2020/07/IHREC-Annual-Report-2019-English-version.pdf.
[497] Section 9 IHRECA, http://www.irishstatutebook.ie/2014/en/act/pub/0025/print.html - sec9.
[498] International Coordinating Committee of National Human Rights Institutions (2015), *Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA) Geneva, 16-20 November 2015,* https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA%20FINAL%20REPORT%20-%20NOVEMBER%202015-English.pdf.
[499] Section 13(11)-(12) IHRECA.
[500] Section 13(13) IHRECA.
[501] Section 16 IHRECA.
[502] Section 26 IHRECA, http://www.irishstatutebook.ie/2014/en/act/pub/0025/print.html - sec26.

Sub-Committee on Accreditation of the UN's Global Alliance of National Human Rights Institutions, which pointed out that 'the Minister for Justice and Equality has significant discretion over the allocation of funds to the IHREC, and that this has the potential to impact on its effectiveness and independence.'[503]

The Commission appoints its own staff with the consent of the Minister for Justice and Equality, as approved by the Minister for Public Expenditure and Reform.[504] They may also be seconded from other bodies at the Commission's discretion. Staff are civil servants of the state, a status which requires independence from Government. The Director of the Commission manages its administration and is accountable to Parliament for financial and other operational matters.[505] The Director holds office under a written contract of service, the terms of which, including its duration, are determined by the Commission with the approval of the Minister for Justice and Equality. As at 31 December 2019, the Commission had 58 staff.[506]

The Commission is accountable to Parliament; it must lay its strategy statement[507] and annual report[508] before the Oireachtas. The Director is accountable to the parliamentary Committee of Public Accounts for financial transactions and effective use of resources[509] and may be requested to account for administrative matters before other Oireachtas committees.[510]

ii) Independence of the body

Legislation stipulates that the Commission shall be independent in the performance of its functions.[511] In the author's assessment, the Commission's functions are exercised in an independent manner in practice. However, as noted above, the role of the Minister for Justice and Equality in setting the Commission's budget could potentially impact on its independence. Submissions concerning the establishment of IHREC suggested that its budget could be attached to a more 'neutral' department, such as the Department of the Taoiseach.[512] The process for appointing Commission members could also be rendered more transparent by, for instance, according the Oireachtas an oversight role in the appointment of the selection panel.

e) Grounds covered by the designated body/bodies

IHREC has a mandate to deal with the following grounds under Irish anti-discrimination law: gender, age, race, religion, family status, disability, civil status, sexual orientation, membership of the Traveller community and receipt of housing assistance. It does not prioritise any of the grounds as such. No information is in the public domain as to how the Commission ensures that adequate and appropriate expertise and attention is given to each ground. Staff work across all of the grounds and the human rights mandate in each of the Commission's functional divisions (see Chapter 7(c)). The Commission's *Strategy Statement 2019-2021* adopts a holistic approach to the grounds, save that it refers specifically to 'combatting racism' and monitoring compliance with the UN Convention on

[503] International Coordinating Committee of National Human Rights Institutions (2015), *Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA) Geneva, 16-20 November 2015*, p. 10, https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA%20FINAL%20REPORT%20-%20NOVEMBER%202015-English.pdf.
[504] Section 24 IHRECA, http://www.irishstatutebook.ie/eli/2014/act/25/section/24/enacted/en/html#sec24.
[505] Sections 20-23 IHRECA.
[506] IHREC (2020), *Annual Report 2019*, Appendix 4.
[507] Section 25 IHRECA, http://www.irishstatutebook.ie/eli/2014/act/25/section/25/enacted/en/html#sec25.
[508] Section 28 IHRECA, http://www.irishstatutebook.ie/eli/2014/act/25/section/28/enacted/en/html#sec28.
[509] Section 22 IHRECA, http://www.irishstatutebook.ie/eli/2014/act/25/section/22/enacted/en/html#sec22.
[510] Section 23 IHRECA, http://www.irishstatutebook.ie/eli/2014/act/25/section/23/enacted/en/html#sec23.
[511] Section 9(2) IHRECA, http://www.irishstatutebook.ie/2014/en/act/pub/0025/print.html - sec9.
[512] See further: Pegram, T. (2013), *Bridging the Divide: The Merger of the Irish Equality Authority and Human Rights Commission*, https://www.tcd.ie/policy-institute/assets/pdf/Studies_Policy_29_web.pdf.

the Rights of Persons with Disabilities as two priority areas.[513] In the author's assessment, each ground is accorded an appropriate level of attention by the Commission. It has addressed the intersection between grounds in various submissions and has called for the introduction of a provision on multiple discrimination under anti-discrimination law.[514]

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

i) Independent assistance to victims

IHREC has the competence to provide independent assistance to victims.[515] It does so in two primary ways: by providing general information on anti-discrimination law and through the provision of legal assistance in a limited number of cases.

IHREC is required to 'provide information to the public' on the Employment Equality Acts 1998-2015 (EEA), the Equal Status Acts 2000-2018 (ESA) and Section 19 of the Intoxicating Liquor Act 2003.[516] On its website, IHREC provides an accessible overview of those laws that are aimed at the general public as well as organisations and businesses.[517] It published detailed guides to EEA and ESA in 2015[518] and produced a video on ESA in 2017. The Commission also operates a Public Information Service that individuals may use to obtain information on their rights to protection against discrimination.[519] It processed 1 175 such queries from members of the public in 2019.[520]

Legal assistance can take the form of the provision (or arranging for the provision) of legal advice to the applicant, the provision (or arranging for the provision) of legal representation to the applicant or the provision of such other assistance to the applicant as the Commission deems appropriate in the circumstances.[521] Such assistance is available, *inter alia*, for references of discrimination complaints under ESA, EEA and Section 19 of the Intoxicating Liquor Act 2003, as well as for appellate or enforcement[522] proceedings under those statutes. IHREC granted legal assistance to 42 new applicants in 2019; 21 applications were refused and eight were withdrawn. As at the end of December 2019, it was providing legal assistance to 104 individuals, 73 of whom were in receipt of legal advice only, with the remaining 31 also receiving legal representation.[523]

In the author's assessment, decisions on granting legal assistance are exercised in an independent manner in practice. Safeguards include the publication of the applicable

[513] IHREC (2019), *Strategy Statement 2019-2021*, https://www.ihrec.ie/app/uploads/2019/02/Final-Strategy-Statement-ENG-VERSION.pdf.

[514] See, for example, IHREC (2019), *Ireland and the Convention on the Elimination of Racial Discrimination: Submission to the United Nations Committee on the Elimination of Racial Discrimination on Ireland's Combined 5th to 9th Report*, https://www.ihrec.ie/app/uploads/2019/11/IHREC_CERD_UN_Submission_Oct_19.pdf.

[515] Sections 10(2)*(f)* and 40 IHRECA. See further: https://www.ihrec.ie/our-work/legal-activity/legal-assistance/.

[516] Sections 10(2)*(a)* and 30 IHRECA: http://www.irishstatutebook.ie/eli/2014/act/25/section/10/enacted/en/html#sec10; http://www.irishstatutebook.ie/eli/2014/act/25/enacted/en/print.

[517] See https://www.ihrec.ie/guides-and-tools/.

[518] Available at: https://www.ihrec.ie/documents/ihrec-employment-equality-rights-explained/; https://www.ihrec.ie/documents/ihrec-equal-status-rights-explained/.

[519] See further: https://www.ihrec.ie/your-rights/#.

[520] IHREC (2020), *Annual Report 2019*, Appendix 8.

[521] Section 40(10) IHRECA.

[522] In a number of cases, the WRC has issued orders directing the respondent to report to the Commission on compliance within a given timeframe, underlining that IHREC could thereafter commence enforcement proceedings with the complainant's consent: Equality Tribunal, *Sheehy Skeffington v National University of Ireland, Galway*, DEC-E2014-078, 13 November 2014, https://www.workplacerelations.ie/en/Cases/2014/November/DEC-E2014-078.html; Equality Tribunal, *Clavin v Marks and Spencers Ireland Ltd.*, DEC-S2015-055, 28 July 2015, https://www.workplacerelations.ie/en/Cases/2015/July/DEC-E2015-055.html; Workplace Relations Commission, *A mother (on behalf of her son) v The Board of Management of a National School*, DEC-S2016-048, 18 July 2016, https://www.workplacerelations.ie/en/Cases/2016/July/DEC-S2016-048.html.

[523] IHREC (2020), *Annual Report 2019*, p. 16.

criteria, the provision of a reasoned decision to applicants in writing, and the delegation of decision-making to the Head of Legal, who is a civil servant of the state. The Commission published revised guidelines for deciding on applications for assistance in 2017.[524] Section 40(4) IHRECA underpins the guidelines; it stipulates that the Commission may grant assistance on the following criteria: '(a) the matter to which the proceedings concerned relate raises a question of principle; (b) it would be unreasonable to expect the person to deal with the matter to which the proceedings concerned relate without assistance because of its complexity or for any other reason; (c) there are other special circumstances which make it appropriate for the Commission to grant such assistance.' It has delegated the function of deciding on applications for assistance to staff; the Head of Legal decides whether to grant assistance, subject to an appeal to the Director.[525]

IHREC provides limited information to the public on how this function is exercised. Its annual reports set out the number of open case files, providing basic information on the legislative base involved and the applicable discriminatory grounds. Brief accounts of case outcomes are set out in the annual reports and are publicised in the Commission's press releases.[526] It is evident from these accounts that IHREC has supported multiple significant cases, such as proceedings before the CJEU on the Workplace Relations Commission's jurisdiction,[527] and before the Supreme Court on reasonable accommodation for students sitting state examinations.[528] In 2019, it provided legal representation in 21 cases, which were resolved either through settlements or by way of mediation or investigation before the WRC.[529] It also supported enforcement proceedings before the District Court.[530] However, in contrast to the Equality Authority, the Commission does not provide information on overarching patterns as to the reasons for either declining or deciding to grant assistance.[531] It is thus unclear what has informed the Commission's strategic approach – perhaps research findings suggesting that discrimination in a given area is endemic and persistent over time, for instance. Nor it is clear at this juncture whether IHREC supports a 'critical mass of cases', as recommended by the Council of Europe's Commissioner for Human Rights.[532] Without such data it is difficult to appraise the

[524] IHREC (2017), *Guidelines on Applications for Legal Assistance,* https://www.ihrec.ie/app/uploads/2017/06/Guidelines-on-applications-for-legal-assistance-April-2017-3.pdf.

[525] Under Section 10(6) IHRECA, the Commission may authorise its staff to perform any of its functions.

[526] See https://www.ihrec.ie/category/press-releases/.

[527] The Commission represented two of the original complainants in the CJEU judgment of 4 December 2018, *Minister for Justice and Equality and The Commissioner of the Garda Síochána v Workplace Relations Commission,* C-378/17, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62017CJ0378. See further: https://www.ihrec.ie/eu-court-of-justice-issues-landmark-equality-law-ruling/.

[528] IHREC provided legal representation before the Supreme Court to a woman who challenged the Department of Education's policy of annotating the examination transcripts of students who had been granted a spelling and grammar waiver. The Court found that the practice did not amount to disability-ground discrimination: Supreme Court, *Cahill v Minister for Education and Science* [2017] IESC 29, 24 May 2017, http://www.courts.ie/Judgments.nsf/bce24a8184816f1580256ef30048ca50/37599fdc9c7e6c3c8025812b00421aa8?OpenDocument; see further: https://www.ihrec.ie/supreme-court-clarifies-duties-towards-students-disability-discrimination-case/.

[529] ESA cases: *A Syrian Refugee v A Bank*, ADJ-00013897, 25 March 2019, https://www.workplacerelations.ie/en/Cases/2019/March/ADJ-00013897.html; *Smyth v Vaughan*, ADJ-00018960, 25 June 2019, https://www.workplacerelations.ie/en/cases/2019/june/adj-00018960%20.html; *Rehman v Road Safety Authority*, ADJ-00021365, 8 October 2019, https://www.workplacerelations.ie/en/cases/2019/october/%20%20adj-00021365.html; *An asylum seeker v A Government Agency*, ADJ-00017832, 20 November 2019, https://www.workplacerelations.ie/en/cases/2019/november/adj-00017832%20.html; *A Tenant v A Landlord*, ADJ-00021680, 22 November 2019, https://www.workplacerelations.ie/en/cases/2019/november/adj-%2000021680.html; EEA cases: *Dunne v Sky Handling Partner Limited*, ADJ-00017364, 1 May 2019, https://www.workplacerelations.ie/en/cases/2019/may/adj-00017364.html*; A Clerical Officer v A Public Service Employer*, ADJ-00018924, 2 December 2019, https://www.workplacerelations.ie/en/cases/2019/november/adj-00018924.html.

[530] IHREC (2020), *Annual Report 2019*, pp. 18-21.

[531] Individual applicants who are refused legal assistance are informed of the reasons in writing: IHREC (2017), *Guidelines on Applications for Legal Assistance,* para. 27.

[532] Commissioner for Human Rights (2011), *Opinion of the Commissioner for Human Rights on National Structures for Promoting Equality*, CommDH(2011)2, at p. 21, https://rm.coe.int/16806da939.

effectiveness of IHREC's work, and the Commission risks reinforcing concerns that its approach to legal assistance is more restrictive or less well-resourced than that of the Equality Authority. The Equality Authority's legal assistance work was widely regarded as being effective in driving compliance with anti-discrimination law, and its depletion was of major concern to civil society organisations when the body was merged with the Irish Human Rights Commission.[533]

ii) Independent surveys and reports

IHREC has the competence to conduct independent surveys and publish independent reports. It is empowered to undertake, sponsor, commission or provide financial or other assistance for research[534] and to prepare and publish, in such manner as it sees fit, reports including research reports.[535]

In the author's assessment this competence is effectively exercised in an independent manner in practice. The research reports produced are almost exclusively commissioned by IHREC and so carried out by independent actors. Many positions advanced within the reports are critical of the status quo. Carrying on the work of the Equality Authority, the Commission published a significant report in 2017, which analyses data on the experience of inequality derived from the equality module of the 2014 Quarterly National Household Survey, carried out by the Central Statistics Office.[536] IHREC further built on that data in 2018 by co-producing reports with the Economic and Social Research Institute, on *Ethnicity and Nationality in the Irish Labour Market,*[537] *Disability and Discrimination in Ireland*[538] and *Discrimination and Inequality in Housing in Ireland*.[539] A 2019 report maps and analyses data on attitudes to equality and human rights derived from 125 European surveys conducted between 2000 and 2018.[540] The Commission has also sponsored several research projects conducted by universities and by civil society bodies through its human rights and equality grants scheme (see further Chapter 7(f)(iv)).

iii) Recommendations

IHREC has the competence to make recommendations on discrimination issues. Statutory provisions empower the Commission to: keep under review the adequacy and effectiveness of equality law and practice in the state;[541] examine any legislative proposal and report its views on any implications for equality;[542] and make recommendations to the Government

[533] See further: Pegram, T. (2013), *Bridging the Divide: The Merger of the Irish Equality Authority and Human Rights Commission*, https://www.tcd.ie/policy-institute/assets/pdf/Studies_Policy_29_web.pdf; Free Legal Advice Centres (2014), *Our Voice, Our Rights: A Parallel Report in response to Ireland's Third Report under the International Covenant on Economic, Social and Cultural Rights*, at pp. 19-22, https://www.ourvoiceourrights.ie/download/pdf/our_voice_our_rights.pdf.

[534] Section 10(2)(j) IHRECA.

[535] Section 10(2)(p) IHRECA.

[536] McGinnity, F., Grotti, R., Kenny, O. and Russell, H. (2017), *Who experiences discrimination in Ireland?: Evidence from the QNHS Equality Modules*, available at: https://www.ihrec.ie/documents/who-experiences-discrimination-in-ireland-evidence-from-the-qnhs-equality-modules/.

[537] McGinnity, F., Grotti, R., Groake, S. and Coughlan, S. (2018), *Ethnicity and Nationality in the Irish Labour Market,* available at: https://www.ihrec.ie/app/uploads/2018/12/Ethnicity-and-Nationality-in-the-labout-market-20122018.pdf.

[538] Banks, J., Grotti, R., Fahey, E. and Watson, D. (2018), *Disability and Discrimination in Ireland*, available at: https://www.ihrec.ie/app/uploads/2018/09/Disability-and-Discrimination.pdf.

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

[540] Fahey, E., O'Brien, D., Russell, H. and McGinnity, F. (2019), *European Survey Data on Attitudes to Equality and Human Rights: Technical Paper*, available at: https://www.ihrec.ie/app/uploads/2019/12/IHREC-Technical-Report-FINAL-amended-Jan-2020.pdf.

[541] Sections 10(2)(b) and 30 IHRECA: http://www.irishstatutebook.ie/eli/2014/act/25/section/10/enacted/en/html#sec10; http://www.irishstatutebook.ie/eli/2014/act/25/section/30/enacted/en/html#sec30.

[542] Section 10(2)(c) IHRECA: http://www.irishstatutebook.ie/eli/2014/act/25/section/10/enacted/en/html#sec10.

on measures which should be taken to strengthen, protect and uphold equality in the state.[543] These powers may be exercised on the Commission's own initiative or triggered by Government ministers.

IHREC has deployed its function to keep under review the adequacy and effectiveness of equality law and practice, through various channels including in submissions made to international treaty monitoring bodies. In 2019, it made a submission to the Department of Justice and Equality's public consultation on a review of the Prohibition of Incitement to Hatred Act 1989.[544] On occasion, the Commission has issued recommendations stemming from its legal assistance work. For instance, it highlighted the need to amend ESA, following an unsuccessful challenge to the exclusion from maternity benefits of a woman who had a child by means of a surrogacy arrangement.[545]

In the author's assessment, this competence is effectively exercised in an independent manner in practice. Many of the recommendations put forward by the Commission to date have been openly critical of Government. Written submissions draw on an extensive range of sources, including empirical studies and international best practice. IHREC has examined 12 legislative proposals since its establishment in November 2014; four of these pertain to discrimination law.[546] It is difficult to assess the impact of its discrimination law submissions since, at the conclusion of 2019, three of the legislative proposals had yet to be fully debated before Parliament. The Commission's submission on the Education (Admission to Schools) Bill 2016[547] highlighted its conformity with the Racial Equality Directive.[548] Two of the Commission's observations concern the Disability (Miscellaneous Provisions) Bill 2016, which purports to amend Irish law to secure compliance with the UNCRPD and to add a gender identity and expression ground to anti-discrimination law more generally.[549] The other legislative observation, issued in December 2017, welcomes the publication of a private member's bill that seeks to add 'disadvantaged socio-economic status' as a ground under national discrimination law.[550]

To date, the Commission has largely exercised its powers in a reactive manner. It has not conducted a review of the principal anti-discrimination statutes. However, in 2019 it began consultations for the purpose of conducting a review of section 19 of the Intoxicating Liquor Act 2003.[551]

iv) Other competences

[543] Section 10(2)(d) IHRECA: http://www.irishstatutebook.ie/eli/2014/act/25/section/10/enacted/en/html#sec10.

[544] IHREC (2019), Review of the Prohibition of Incitement to Hatred Act 1989: Irish Human Rights and Equality Commission submission to the Department of Justice and Equality public consultation, available at: https://www.ihrec.ie/app/uploads/2019/12/Review-of-the-Prohibition-of-Incitement-to-Hatred-Act-1989.pdf.

[545] See https://www.ihrec.ie/ihrec-recommends-changes-to-equal-status-acts-following-high-court-decision-on-maternity-benefit-claim/.

[546] The Commission's legislative observations are available at: https://www.ihrec.ie/legislative-observations/.

[547] https://www.oireachtas.ie/viewdoc.asp?DocID=33318&&CatID=59.

[548] IHREC (2016), *Observations on the Education (Admission to Schools) Bill 2016*, at p. 5, available at: https://www.ihrec.ie/app/uploads/2016/11/Observations-on-Education-Admission-to-Schools-Bill-2016.pdf.

[549] See https://www.oireachtas.ie/viewdoc.asp?DocID=34322; IHREC (2016), *Observations on the General Scheme of the Equality /Disability (Miscellaneous Provisions) Bill*, https://www.ihrec.ie/app/uploads/2016/11/Observations-on-the-General-Scheme-Equality-Disability-Miscellaneous-Provisions-Bill.pdf; IHREC (2017), *Supplementary Observations on the Disability (Miscellaneous Provisions) Bill 2016*, https://www.ihrec.ie/app/uploads/2017/01/Supplementary-Observations-on-Disability-Miscellaneous-Provisions-Bill-2016.pdf.

[550] IHREC (2017), *Observations on the Equality (Miscellaneous Provisions) Bill 2017,* https://www.ihrec.ie/documents/observations-equality-miscellaneous-provisions-bill-2017/.

[551] Under section 30(5) IHRECA, the Commission 'shall consult such persons, groups and organisations … as it considers appropriate' for the purposes of assisting it in carrying out a review of legislation. See http://www.irishstatutebook.ie/eli/2014/act/25/section/30/enacted/en/html#sec30.

IHREC is empowered to prepare draft codes of practice in furtherance of, *inter alia*, the elimination of discrimination and the promotion of equality of opportunity.[552] It is obliged to do so if requested by the Minister for Justice and Equality. In drafting codes of practice, IHREC is mandated to consult with such other Minister of the Government or such other person or body as the Commission considers appropriate, or as the Minister may recommend. If the Minister approves a code of practice, it becomes admissible in evidence in legal proceedings. In 2018, IHREC consulted with stakeholders on a draft code of practice on equal pay, which was referred to the Minister for his approval.[553] As at the end of December 2019, the code of practice was under consideration, as was a revised version of the Code of Practice on Sexual Harassment and Harassment at Work.[554] In October 2019, IHREC announced that it is to prepare a code of practice to promote greater employment of people with disabilities.[555]

IHREC may conduct equality reviews and prepare equality action plans or invite others to do so.[556] An equality review comprises an audit of the level of equal opportunity within an organisation or organisations and an examination of its/their practices, procedures and other relevant factors (including the working environment).[557] An equality action plan is a programme of actions to be implemented to further the promotion of equality of opportunity.[558] A review or plan may relate to equality of opportunity generally or to a particular aspect of discrimination. The Commission has the power to invite a particular undertaking, group of undertakings or the undertakings making up a particular industry or sector thereof to conduct a review or prepare and implement an action plan, or both. In the case of firms with more than 50 employees, the Commission may instigate a review or prepare an action without any such invitation. An 'undertaking' for these purposes includes 'an activity giving rise to employment, whether or not in the industrial or commercial sector and whether or not with a view to profit', as well as providers of goods and services regulated by ESA, which includes educational establishments, accommodation providers and public sector bodies.[559] IHREC may require an undertaking with 50 or more employees to supply information for the purpose of an equality review or equality action plan. It may also serve a substantive notice on an undertaking, seeking compliance with the terms of an equality action plan.[560] This is a valuable mechanism in securing compliance with equality law that was employed for the first time in 2018.[561] Following the 2018 reviews, IHREC issued six requests to prepare and implement equality action plans aimed at securing the cessation of less favourable treatment on the race ground in access to homeless and social housing services, the extension of the practice of non-supervision of urine samples to addiction treatment services nationwide, and the provision of interpreting services for people accessing primary healthcare. These measures were ongoing as at the end of December 2019. In 2019, the Commission requested all 31 local authorities to undertake an equality review on the provision of Traveller-specific accommodation.[562] It also requested two retail banks to conduct equality reviews in relation to the provision of bank accounts to refugees and asylum seekers.[563] The outcome of those reviews will be outlined in the Commission's 2020 annual report.

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[552] Section 31 IHRECA, http://www.irishstatutebook.ie/eli/2014/act/25/enacted/en/print#sec31.
[553] IHREC (2019), *Annual Report 2018*, p. 30.
[554] IHREC (2020), *Annual Report 2019*, p. 45. A code of practice concerning sexual harassment and harassment at work was produced by the Equality Authority and is referred to extensively in legal proceedings: Ireland, S.I. No. 208/2012 - Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2012, available at: http://www.irishstatutebook.ie/eli/2012/si/208/made/en/print.
[555] See https://www.ihrec.ie/discrimination-against-people-with-disabilities-in-employment-a-persistent-and-pernicious-roadblock-to-workers-dignity-and-inclusion/.
[556] Section 32 IHRECA, http://www.irishstatutebook.ie/eli/2014/act/25/enacted/en/print#sec32.
[557] Section 29 IHRECA, http://www.irishstatutebook.ie/eli/2014/act/25/enacted/en/print#sec29.
[558] Section 29 IHRECA.
[559] Section 29 IHRECA. Matters concerning members and access to membership of registered clubs are exempt from equality reviews: Section 69(7) EEA.
[560] Section 33 IHRECA.
[561] IHREC (2019), *Annual Report 2018*, pp. 27-29.
[562] See https://www.ihrec.ie/human-rights-and-equality-commission-launches-national-review-into-council-traveller-accommodation-provision/.
[563] IHREC (2020), *Annual Report 2019*, pp. 44-45.

The Commission oversees the implementation of the positive duty placed on public bodies under Section 42 of the Irish Human Rights and Equality Commission Act 2014. In exercising their functions, public bodies must have due regard to the need to: '(a) eliminate discrimination, (b) promote equality of opportunity and treatment of its staff and the persons to whom it provides services, and (c) protect the human rights of its members, staff and the persons to whom it provides services'.[564] IHREC is charged with assisting public bodies to comply with the positive duty, which may include producing guidelines and preparing codes of practice.[565] It published guidelines in 2019,[566] informed by a range of pilot measures conducted in previous years.[567] Where the Commission considers that there has been evidence of a failure by a public body to perform its functions in a manner consistent with the duty and that it is appropriate in all the circumstances to do so, it may invite the public body to carry out a review or draw up an action plan, or both. The review or action plan may relate to equality of opportunity or human rights generally, or to a particular aspect of human rights or discrimination.[568] The body must accept the Commission's invitation to trigger the review/action plan. There are no powers to compel engagement or ultimately to secure compliance with an action plan, however, and failure to comply with the duty is not otherwise actionable.[569] The Commission may – and, if requested by the Minister, must – carry out a review of the operation of duty.[570]

IHREC is conferred with a number of statutory powers with respect to awareness raising, training and education. It is empowered to undertake, sponsor, commission or provide financial or other assistance for educational activities[571] and to provide or assist in the provision of education and training on equality issues.[572] Further, whether of its own volition or at the request of the Minister, it may undertake, sponsor, commission, or provide financial or other assistance for programmes of activities and projects to promote the integration of migrants and other minorities, equality (including gender equality) and respect for diversity and cultural difference.[573] The human rights and equality grants scheme, initiated in 2016, is one of the vehicles through which the Commission exercises these interrelated functions. 28 organisations were awarded funding for projects under the Commission's 2019 scheme; the projects address the advancement of social and economic rights in the fields of housing, health, and work.[574] In 2016, the Commission established a Professional Diploma in Human Rights and Equality, which was developed in collaboration with the Institute of Public Administration.[575] IHREC has also sought to increase awareness of equality issues in schools. The main tool for this 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.[576] In 2018, the Commission published guidelines on retirement and fixed-term contracts aimed at employers and employees.[577]

Section 35 IHRECA equips IHREC with the power to conduct inquiries.[578] The threshold is relatively high: The Commission may conduct an inquiry if it considers that—

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564 Section 42(1) IHRECA, http://www.irishstatutebook.ie/eli/2014/act/25/enacted/en/print#sec42.
565 Sections 10(2)(n) and 42(3)-(4) IHRECA.
566 IHREC (2019), *Implementing the Public Sector Equality and Human Rights Duty*, available at: https://www.ihrec.ie/app/uploads/2019/03/IHREC_Public_Sector_Duty_Final_Eng_WEB.pdf.
567 See further: https://www.ihrec.ie/our-work/public-sector-duty/.
568 Section 42(5)-(6) IHRECA.
569 Section 42(11) IHRECA.
570 Section 42(7)-(10) IHRECA.
571 Section 10(2)(j) IHRECA.
572 Section 10(2)(k) IHRECA.
573 Section 10(2)(l), IHRECA.
574 See further: https://www.ihrec.ie/human-rights-and-equality-grants-2019-announced/.
575 See further: https://www.ihrec.ie/inaugural-human-rights-equality-professional-diploma-underpins-role-public-sector-duty/.
576 See further: IHREC (2016), *Annual Report 2015*, p. 38.
577 IHREC (2018), *Retirement and Fixed Term Contracts: Guidelines*, available at: https://www.ihrec.ie/app/uploads/2018/04/Retirement-and-Fixed-Term-Contracts-Guidelines.pdf.
578 http://www.irishstatutebook.ie/eli/2014/act/25/enacted/en/print#sec35.

'(a) there is, in any body (whether public or otherwise) institution, sector of society, or geographical area, evidence of—
(i) a serious violation of human rights or equality of treatment obligations in respect of a person or a class of persons, or
(ii) a systemic failure to comply with human rights or equality of treatment obligations,
and
(b) the matter is of grave public concern, and
(c) it is in the circumstances necessary and appropriate so to do.'[579]

IHRECA sets out in detail the procedures that must be followed prior to and during an inquiry. At the conclusion of an inquiry, the Commission must prepare a report containing the facts it has established and its recommendations. The report is furnished to the Minister for Justice and Equality, and its findings are subsequently published.[580] This power has not been deployed to date. IHREC took decisions with respect to 23 requests to conduct an inquiry in 2015 and 2016, declining each one. According to its 2016 annual report, the 'majority of requests did not meet the threshold for intervention by the Irish Human Rights and Equality Commission as set out in section 35'.[581] In 2016, the Commission adopted a resolution on requests for inquiries, which underscores that only the Minister has the statutory right to seek an inquiry and that it will not in general conduct an assessment of the merits or otherwise of requests that it conduct an inquiry made by persons other than the Minister.[582] IHREC's most recent annual report, which covers 2019, does not reference the inquiry power. However, its strategy statement, issued in February 2019, includes use of the power as one of the Commission's objectives for 2019-2021.[583]

The Commission is empowered to consult with such national, European Union or international bodies or agencies having a knowledge or expertise in the field of human rights or equality as it sees fit.[584]

Finally, a residual provision under IHRECA provides that the Commission shall have all such powers as are necessary or expedient for the performance of its functions.[585] IHREC has invoked that provision in issuing resolutions on its approach to its statutory functions.[586]

g) Legal standing of the designated body/bodies

IHREC has legal standing to:

- bring discrimination complaints on behalf of identified victims to court;
- bring discrimination complaints on behalf of non-identified victims to court;
- bring discrimination complaints *ex officio* to court;
- intervene in legal cases concerning discrimination, for example as amicus curiae.

Section 85 EEA empowers IHREC to refer certain cases to the WRC, which are dealt with as if they had been referred by an individual complainant. IHREC may instigate complaints

[579] Section 35(1) IHRECA.
[580] Schedule 2, IHRECA, http://www.irishstatutebook.ie/eli/2014/act/25/enacted/en/print.
[581] IHREC (2017), *Annual Report 2016*, p. 16. Inclusion Ireland, a national rights-based advocacy organisation that works to promote the rights of people with an intellectual disability, has criticised IHREC's failure to conduct an inquiry into the ongoing institutionalisation of thousands of persons with an intellectual disability, as well as the process by which the Commission dealt with its request for an inquiry. See Inclusion Ireland (2018), *Deinstitutionalisation in Ireland; a failure to act*, http://www.inclusionireland.ie/sites/default/files/attach/basic-page/1655/deinstitutionalisation-ireland-failure-act.pdf.
[582] See https://www.ihrec.ie/app/uploads/2016/12/IHREC-Policy-on-Requests-for-Inquiries.pdf.
[583] IHREC (2019), *Strategy Statement 2019-2021*, https://www.ihrec.ie/app/uploads/2019/02/Final-Strategy-Statement-ENG-VERSION.pdf.
[584] Section 10(2)(h) IHRECA.
[585] Section 10(5) IHRECA, http://www.irishstatutebook.ie/eli/2014/act/25/section/10/enacted/en/html#sec10.
[586] See, for example, https://www.ihrec.ie/app/uploads/2016/12/IHREC-Policy-on-Requests-for-Inquiries.pdf.

with respect to discriminatory advertising or the procurement of victimisation or discrimination (Section 85(d)-(f)). In such cases, there may be no actual victim. IHREC is also empowered, under Section 85 (a)-(c), to refer a complaint to the WRC where it appears to the Commission:

- that discrimination or victimisation is being generally practised against persons or that an employer has applied or operated discriminatory rules or instructions;
- that discrimination or victimisation has occurred in relation to a particular person who has not made a reference to the WRC and that it is not reasonable to expect that person to make such a reference;
- that there is a failure to comply with an equal remuneration term or an equality clause either generally in a business or in relation to a particular person who has not made a reference and it is not reasonable to expect them to make such a reference.

Under Section 86 EEA, IHREC may refer a collective agreement to the WRC where it is considered that any provision of the agreement is discriminatory. The legislation does not specify whether the consent of persons affected by the purported discrimination must be obtained by IHREC.

Similar provisions enable IHREC to refer cases under ESA to the WRC (Section 23 ESA). IHREC may also apply to the District Court for a determination as to whether a club is a discriminating club under Section 8(3) ESA.

To date, the Commission has referred two cases to the WRC. Both involve discriminatory advertising complaints taken against companies under Section 23 ESA on the housing assistance, family status and age grounds. One case was settled prior to hearing,[587] and the other resulted in a successful determination before the WRC in 2019.[588]

Section 100(3) EEA and Section 41(1) ESA empower IHREC to institute summary proceedings for an offence under any provision of that legislation. It seems that this power has not been deployed to date.

Section 41(1) IHRECA empowers the Commission to 'institute proceedings in any court of competent jurisdiction for the purpose of obtaining relief of a declaratory or other nature in respect of any matter concerning the human rights of any person or class of persons.' Declarations of unconstitutionality are expressly envisaged under Section 42(2). The reference to relief of another nature should allow a court to award a range of remedies such as damages and injunctions, depending on the legal basis of the proceedings. 'Human rights' are defined for this purpose as those guaranteed under the Irish Constitution, the European Convention on Human Rights Act 2003 or under 'any agreement, treaty or convention to which the State is a party and which has been given the force of law in the State' (Section 29 IHRECA). This definition should be broad enough to enable IHREC to litigate on compliance with EU equality provisions. However, because Section 41 has not been invoked to date, its parameters are unclear. In particular, it remains to be seen whether the reference to a 'class of persons' enables IHREC to bring an *actio popularis* or whether a court will require identifiable victims. A provision in the Heads of Bill had clarified that it would not 'be necessary for the Commission to name or identify the class of persons individually and a class of persons shall be constituted by more than one person in relation to whom the same relief is sought.'[589] However, this provision was omitted from the legislation passed by the Oireachtas.

[587] IHREC (2018), *Annual Report 2017*, p. 41.
[588] Workplace Relations Commission, *Irish Human Rights and Equality Commission v Daft Media Limited t/a Daft.ie*, ADJ-00005960, 6 August 2019, https://www.workplacerelations.ie/en/cases/2019/august/adj-00005960.html.
[589] Department of Justice (2012), *Heads of Irish Human Rights and Equality Commission Bill 2012*, p. 57, http://www.justice.ie/en/JELR/20120605HeadsOfIHRECBill.pdf/Files/20120605HeadsOfIHRECBill.pdf.

IHREC can intervene in legal cases concerning discrimination, but its express power to apply for liberty to appear as amicus curiae is confined to proceedings before the Superior Courts (the High Court, the Supreme Court and the Court of Appeal).[590] The vast bulk of discrimination cases are litigated at the Workplace Relations Commission and the Labour Court, while several significant cases come before courts of local and limited jurisdiction. The express power to intervene in those forums would, therefore, be useful and would enable IHREC to contribute to the development of discrimination law principles without having to instigate or fund litigation. In 2006, the Supreme Court held that the Equality Authority had an implied power to apply to court to act as amicus in proceedings relating to its statutory functions.[591] It would seem, therefore, that IHREC could seek to assert a similar power with respect to legal proceedings before any tribunal or court. With respect to WRC proceedings, IHREC may be able to intervene by way of a generic provision under Irish anti-discrimination law, which stipulates that, in the course of an investigation, if the Director of the WRC considers it appropriate, they may 'hear persons appearing to the Director to be interested'.[592] The provision has been used, albeit rarely, to introduce third party expert testimony in first instance discrimination law proceedings, but it seems that it has never been invoked by IHREC or by its predecessor equality body.[593] In order to ensure that the provision could be activated by IHREC in practice, a procedure for notifying it of discrimination law proceedings should be put in place.[594]

Drawing on its express statutory power, IHREC has acted as amicus curiae before the Superior Courts in numerous cases since its establishment.[595] Liberty to appear is at the discretion of the court. IHREC published revised guidelines on the exercise of its amicus curiae function in 2016.[596] The bulk of the Commission's amicus curiae work falls under the rubric of its human rights mandate. Over 2018 and 2019, it intervened in one case concerning discrimination, *Daly v Nano Nagle School*, in which the Court of Appeal and the Supreme Court assessed the parameters of the duty to provide reasonable accommodation to disabled employees.[597] The case is discussed in Chapter 12.2.

It is difficult to appraise the Commission's exercise of its competence to initiate litigation at this juncture. Several of its powers in this regard have yet to be invoked, and the Commission has not publicly explained why this is the case. Notably, IHREC exercised two sets of other statutory powers for the first time in 2018 (pertaining to equality reviews and codes of practices). It may well be that increased use of litigation powers will follow as the Commission has moved out of its development phase and into the second cycle of strategic planning.

h) Quasi-judicial competences

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590 Under Section 10(2)(e) IHRECA, IHREC may apply to the High Court or the Supreme Court for liberty to appear before that court as amicus curiae in proceedings that involve or are concerned with the human rights or equality rights of any person. IHREC may also apply to the Court of Appeal for liberty to appear before it as amicus curiae: Section 44(1) IHRECA transferred the power set out under Section 8(h) of the Human Rights Commission Act 2000 to IHREC.

590 See https://www.ihrec.ie/app/uploads/2016/12/IHREC-Amicus-Curiae-Guidelines.pdf.

591 Supreme Court, *Doherty v South Dublin County Council* [2006] IESC 57, 31 October 2006, http://www.courts.ie/Judgments.nsf/WebJudgmentsByYearAll/8D5ED1E371F88CBE80257219004955BD?opendocument.

592 Section 25(1) ESA; Section 79(1) EEA. It should also be noted that, under IHRECA, the Commission 'shall have all such powers as are necessary or expedient for the performance of its functions': Section 10(5) IHRECA, http://www.irishstatutebook.ie/eli/2014/act/25/section/10/enacted/en/html#sec10.

593 See further: Walsh, J. (2012), *Equal Status Acts 2000-2011: Discrimination in the Provision of Goods and Services*, Dublin, Blackhall Press, at Ch. 10.4.

594 IHREC is given notice of proceedings in which a declaration of incompatibility is sought pursuant to Section 6 of the European Convention on Human Rights Acts 2003 and 2014, http://www.irishstatutebook.ie/eli/2003/act/20/section/6/enacted/en/html.

595 See further: https://www.ihrec.ie/our-work/legal-activity/amicus-curiae-power/.

596 See https://www.ihrec.ie/app/uploads/2016/12/IHREC-Amicus-Curiae-Guidelines.pdf.

597 The Commission's submissions are available at: https://www.ihrec.ie/documents/marie-daly-v-nano-nagle-school/.

IHREC is not a quasi-judicial institution.

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

IHREC does not register the number of complaints of discrimination made, nor decisions (by ground, field, type of discrimination, etc.). The Commission does not process discrimination complaints. Complaints are referred to a quasi-judicial tribunal, the Workplace Relations Commission (see Chapter 6.1). IHREC reports on complaints and decisions in which it has acted. These data are published in its annual report and are available to the public; the Commission's annual reports are available on its website.

j) Stakeholder engagement

In Ireland, the designated body engages with stakeholders as part of implementing its mandate.

IHREC engages with a broad range of stakeholders in implementing its mandate, including civil society associations, business, employer and service provider networks and organisations, public bodies, local government entities, trade unions and the general public. Engagement is underpinned by several statutory provisions that direct or enable IHREC to consult with 'relevant agencies and civil society.'[598] An overarching obligation to engage with stakeholders is set out under Section 18(1) IHRECA, which provides:

> 'The Commission shall, for the purpose of establishing and maintaining effective co-operation with representatives of relevant agencies and civil society—
> (a) appoint such and so many advisory committees as it thinks fit to assist and advise it on matters relating to its functions, and
> (b) support, establish or participate in such networks, public consultation processes or public forums, as it sees appropriate.'[599]

To date, the Commission has undertaken extensive public consultations with NGOs and the general public on various facets of its work,[600] including the formulation of its strategic plans.[601]

A high level of engagement with public bodies and local government entities has been maintained in the context of assisting them to comply with the public sector equality and human rights duty set out under Section 42 IHRECA. A number of such stakeholders acted as pilot sites for testing implementation of the duty in practice, which informed the Commission's guidance document published in 2019.[602]

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[598] Section 2(2) IHRECA defines 'relevant agencies and civil society' as including '(a) non-governmental organisations concerned with the promotion or protection of human rights or equality, including organisations specialising in the promotion of economic and social development, (b) trade unions and other business, professional and social organisations, (c) third level institutions and other experts in education, (d) religious bodies, secular bodies (within the meaning of the Civil Registration (Amendment) Act 2012) or other groups that are representative of religious thought and beliefs or philosophical beliefs, and (e) public bodies.'

[599] See http://www.irishstatutebook.ie/eli/2014/act/25/section/18/enacted/en/html.

[600] In March 2019, IHREC collaborated with the National Youth Council of Ireland in holding a consultation event with young people, which informed the Commission's submission on Ireland's record under the UN Convention on the Elimination of Racial Discrimination: https://www.ihrec.ie/eliminating-racial-discrimination-in-ireland-the-focus-for-young-peoples-consultation-event/.

[601] IHREC is obliged to consult stakeholders on the formulation of its strategic plan in accordance with Section 25(3) IHRECA, http://www.irishstatutebook.ie/eli/2014/act/25/enacted/en/print#sec25. See further: IHREC (2016), *Feedback report on the public consultation process 2015,* https://www.ihrec.ie/download/pdf/ihrec_consultation_full_feedback_report.pdf.

[602] IHREC (2019), *Implementing the Public Sector Equality and Human Rights Duty*, available at: https://www.ihrec.ie/app/uploads/2019/03/IHREC_Public_Sector_Duty_Final_Eng_WEB.pdf. See further: https://www.ihrec.ie/our-work/public-sector-duty/.

Establishing advisory committees, in accordance with Section 18(1)(a) IHRECA, is one of the primary formal mechanisms for securing stakeholder engagement. Two advisory committees convened in 2019.[603] The Worker and Employer Advisory Committee comprises representatives nominated by the Irish Congress of Trade Unions (ICTU) and by the Irish Business and Employers' Confederation (IBEC), as well as Commission members. The Committee advises IHREC on employment equality and workplace issues; equal status in service provision; human rights in the workplace and service provision; diversity and interculturalism; and such other matters as are referred to it by the Commission.[604] A Disability Advisory Committee was set up in January 2019.[605] It advises the Commission on law and practice relating to the protection of people with disabilities and on monitoring compliance with the UN Convention on the Rights of Persons with Disabilities.[606]

k) Roma and Travellers

IHREC does not treat Roma and Travellers as a priority issue.[607] To date, the Commission has adopted a holistic approach to the discriminatory grounds.

[603] IHREC (2020), *Annual Report 2019*, pp. 52-53.
[604] See https://www.ihrec.ie/worker-employer-advisory-committee-hold-inaugural-meeting/.
[605] See https://www.ihrec.ie/new-departure-on-rights-of-persons-with-disabilities-as-formal-committee-begins-work-in-monitoring-irelands-obligations/.
[606] Under the Disability (Miscellaneous Provisions) Bill 2016, IHREC will be formally designated as the independent monitoring mechanism required under Article 33 of the Convention on the Rights of Persons with Disabilities: https://www.oireachtas.ie/en/bills/bill/2016/119/. As at 31 December 2019, the bill had passed committee stage before Dáil Éireann.
[607] IHREC (2019), *Strategy Statement 2019-2021*.

8 IMPLEMENTATION ISSUES

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

The Irish Human Rights and Equality Commission is the primary vehicle through which Ireland implements non-discrimination law. IHREC has several statutory powers and functions pertaining to dissemination of information about legal protection against discrimination, and relating to dialogue between the social partners and with NGOs.

a) Dissemination of legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)

IHREC is required to 'provide information to the public' and to keep under review the effectiveness of the working of the Employment Equality Acts 1998-2015, the Equal Status Acts 2000-2018, and Section 19 of the Intoxicating Liquor Act 2003.[608] On its website, IHREC provides an accessible overview of those laws aimed at the general public[609] as well as organisations and businesses.[610] It published detailed guides to EEA and ESA in 2015.[611] Its predecessor equality body, the Equality Authority, did not have a statutory duty to provide information to the public on Section 19, which relates to discrimination in licensed premises. The Commission provides some basic information on the operation of discrimination law in that context but gives little information on the operation of the District Court.[612] 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.[613] It processed 1 175 such queries in 2019, 672 of which concerned ESA, with 29 relating to discrimination in licensed premises and the remaining 474 queries pertaining to EEA.[614]

b) Measures to encourage dialogue with NGOs with a view to promoting the principle of equal treatment (Article 12 Directive 2000/43 and Article 14 Directive 2000/78)

IHREC fosters dialogue with NGOs in implementing its mandate, which is underpinned by several statutory provisions that direct or enable the Commission to consult with 'relevant agencies and civil society' (see further Chapter 7(j)). An overarching obligation to engage with stakeholders is set out under Section 18(1) IHRECA, which provides:

> 'The Commission shall, for the purpose of establishing and maintaining effective co-operation with representatives of relevant agencies and civil society—
> (a) appoint such and so many advisory committees as it thinks fit to assist and advise it on matters relating to its functions, and
> (b) support, establish or participate in such networks, public consultation processes or public forums, as it sees appropriate.'[615]

The Government, principally through the Department of Justice and Equality, frequently establishes consultation mechanisms to receive input from civil society organisations on major law reform initiatives in the field of equality.

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608 Section 30 IHRECA: http://www.irishstatutebook.ie/eli/2014/act/25/section/18/enacted/en/html.
609 See https://www.ihrec.ie/your-rights/.
610 See https://www.ihrec.ie/guides-and-tools/.
611 Available at: https://www.ihrec.ie/documents/ihrec-employment-equality-rights-explained/; https://www.ihrec.ie/documents/ihrec-equal-status-rights-explained/.
612 See https://www.ihrec.ie/your-rights/i-have-an-issue-with-a-service/i-have-an-issue-about-a-pub-nightclub-or-other-place-which-sells-alcohol/.
613 See https://www.ihrec.ie/your-rights#.
614 IHREC (2020), *Annual Report 2019*, p. 14.
615 See http://www.irishstatutebook.ie/eli/2014/act/25/section/18/enacted/en/html.

c) Measures to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice and workforce monitoring (Article 11 Directive 2000/43 and Article 13 Directive 2000/78)

Pursuant to Section 18 IHRECA, the Commission established an advisory committee comprising social partners in 2017 (see Chapter 7(j)).

IHREC is empowered to prepare codes of practice in furtherance of the elimination of discrimination and the promotion of equality of opportunity (see further Chapter 7(f)(iv)). In drafting codes of practice, IHREC is mandated to consult with such other persons or bodies as it considers appropriate.[616] To date, the only approved code of practice produced by an Irish equality body is that concerning sexual harassment and harassment at work.[617] It was generated after consultation with IBEC, ICTU and other relevant organisations representing equality interests. IHREC updated this code in 2019. It and a draft code of practice on equal pay await approval by the Minister for Justice and Equality (see Chapter 7(f)(iv)).

d) Addressing the situation of Roma and Travellers

A revised *National Traveller and Roma Inclusion Strategy* (NTRIS) was published in 2017,[618] and an NTRIS Steering Group is tasked with the development and oversight of the implementation of the actions outlined in the Strategy. The group is chaired by the Minister of State at the Department of Justice and Equality with special responsibility for Equality, Immigration and Integration, and includes officials from relevant Government departments, as well as Traveller and Roma civil society organisations. Secretariat support is provided by the Civil Justice and Equality Pillar of the Department. The second Civil Society Monitoring Report was published in 2019.[619] It focuses on the domains of employment, education, accommodation, and health. According to the report, there has been no tangible improvement in the situation and experience of Roma and Travellers, while accommodation circumstances have deteriorated within the wider context of a national housing crisis. It underscores that the Strategy lacks a rigorous monitoring and evaluation framework. These concerns are shared by UN Committee on the Elimination of Racial Discrimination. In December 2019, it called on the Government to fully implement the NTRIS 'including by developing concrete actions plans with clear targets, indicators, outcomes, time frames and a budget line for the implementation and putting in place a mechanism to coordinate and monitor the implementation.'[620] An action plan aimed at increasing Traveller participation in higher education was launched in November 2019.[621]

8.2 Measures to ensure compliance with the principle of equal treatment (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

a) Compliance of national legislation (Articles 14(a) and 16(a))

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[616] Section 31 IHRECA, http://www.irishstatutebook.ie/eli/2014/act/25/section/18/enacted/en/html.

[617] 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.

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

[619] Pavee Point Traveller and Roma Centre (2019), *Civil Society Monitoring Report on Implementation of the National Roma Integration Strategy in Ireland: Assessing the progress in four key policy areas of the strategy*, https://cps.ceu.edu/sites/cps.ceu.edu/files/attachment/basicpage/3034/rcm-civil-society-monitoring-report-2-ireland-2018-eprint-fin-2.pdf.

[620] Committee on the Elimination of Racial Discrimination (2019), *Concluding observations on the combined fifth to ninth reports of Ireland*, CERD/C/IRL/CO/5-9, para. 32.

[621] Government of Ireland (2019), *Action Plan for Increasing Traveller Participation in Higher Education 2019-2021*, https://assets.gov.ie/41923/f4cd00e21a4346bc97671a72ab41f12f.pdf.

In general, Ireland has taken the necessary measures to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished (Article 14(a) of Directive 2000/43 and Article 16(a) of Directive 2000/78).

This has largely occurred in the process of transposing the directives and amending legislation subsequently to align domestic law with the directives. No provision of Irish anti-discrimination law has the effect of striking out or disapplying primary or secondary legislation. However, IHREC is obliged to keep the effectiveness of anti-discrimination law under review and, whenever it thinks necessary, to make proposals to the Minister for amending that legislation (see further Chapter 7(f)(iii)).[622]

b) Compliance of other rules/clauses (Articles 14(b) and 16(b))

Under Section 30 EEA, all employment contracts are deemed to have an equality clause that transforms any provisions of the contracts that would otherwise give rise to unlawful discrimination.[623] 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.[624] IHREC or a person who is affected by a collective agreement may refer it to the WRC.[625]

While it is the case that discriminatory clauses are not valid, the reality is that this fact may only be established through litigation. Where an adjudicator determines that the clause in question is contrary to the legislation, that part of the collective agreement or contract cannot be enforced and must be modified.[626]

IHREC may conduct equality reviews and prepare equality action plans. This is a valuable mechanism in securing compliance with EEA and ESA, which was employed by IHREC in 2018 and 2019.[627]

[622] Sections 10(2)(b) and 30 IHRECA: http://www.irishstatutebook.ie/eli/2014/act/25/section/10/enacted/en/html#sec10; http://www.irishstatutebook.ie/eli/2014/act/25/section/30/enacted/en/html#sec30.
[623] With respect to occupational pensions and benefit schemes, the equivalent provision is Section 81 of the Pensions Acts 1990-2018.
[624] Section 9 EEA.
[625] Sections 86-87 EEA.
[626] See, for example, Workplace Relations Commission, *A Customer Assistant v A Grocery Retailer*, ADJ-00005316, 21 July 2017, https://www.workplacerelations.ie/en/Cases/2017/July/%20ADJ-00005316.html.
[627] See further Chapter 7(f)(iv).

9 COORDINATION AT NATIONAL LEVEL

The Department of Justice and Equality coordinates issues regarding anti-discrimination on the grounds covered. The Civil Justice and Equality Pillar of the Department provides secretariat support to several committees charged with overseeing implementation of given strategies and policies.

There is currently no national action plan or strategy against racism or discrimination. The *National Action Plan against Racism 2005-2008*[628] has not been renewed since its expiry, contrary to the recommendations of several international human rights bodies. Reports on Ireland's record under three international human rights conventions were published in 2019. Each monitoring body called for the adoption of a new national strategy against racism.[629] There are, however, several national plans that deal with discrete groups who experience discrimination, such as the *Migrant Integration Strategy 2017-2020*,[630] the *National Traveller and Roma Inclusion Strategy 2017–2021,*[631] the *National Disability Inclusion Strategy 2017 – 2021,*[632] and the *National LGBTI+ Inclusion Strategy 2019 – 2021*.[633]

[628] Department of Justice, Equality and Law Reform (2008), *Planning for Diversity: The National Action Plan Against Racism 2005-2008*, available at: http://www.justice.ie/en/JELR/NPARen.pdf/Files/NPARen.pdf.

[629] European Commission against Racism and Intolerance (2019), *ECRI report on Ireland (fifth monitoring cycle)*, CRI(2019)18; Committee of Ministers (2019), *Resolution CM/ResCMN(2019)14 on the implementation of the Framework Convention for the Protection of National Minorities by Ireland*; Committee on the Elimination of Racial Discrimination (2019), *Concluding observations on the combined fifth to ninth reports of Ireland*, CERD/C/IRL/CO/5-9.

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

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

[632] Department of Justice and Equality (2017), *National Disability Inclusion Strategy 2017 – 2021*, available at: http://www.justice.ie/en/JELR/dept-justice-ndi-inclusion-stratgey-booklet.pdf/Files/dept-justice-ndi-inclusion-stratgey-booklet.pdf.

[633] Government of Ireland (2019), *National LGBTI+ Inclusion Strategy 2019 – 2021*, available at: http://www.justice.ie/en/JELR/LGBTI+Inclusion_Strategy_2019-2021.pdf/Files/LGBTI+Inclusion_Strategy_2019-2021.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 is charged with assisting public bodies to comply with the duty, and to that end has produced guidelines and other resources for duty bearers.[634]

- IHREC operates a human rights and equality grants scheme, which provides opportunities for funded research, education and training projects to be conducted by civil society organisations and universities.[635]

- The WRC and the Labour Court have interpreted the prohibition of direct discrimination on the race ground as requiring different treatment to take account of linguistic and cultural barriers experienced by potentially vulnerable migrant workers.[636]

- No fees are payable by complainants before the first instance forum for discrimination law cases under ESA and EEA.[637]

- 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.[638]

[634] See further: Chapter 7(f)(iv).
[635] See further: Chapter 7(f)(iv).
[636] See Chapter 2.6(f): Duties to provide reasonable accommodation in respect of other grounds.
[637] See Chapter 6.1(a): Available procedures for enforcing the principle of equal treatment.
[638] See Chapter 6.5: Sanctions and remedies.

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives at the national level

Both acts:

- In a 2015 judgment, the Supreme Court considered the interpretation of indirect discrimination under ESA for the first time, and held that statistical analysis is required in order to establish that a person belonging to a protected group is at a 'particular disadvantage' compared with others.[639] This evidential requirement appears to be more restrictive than the provisions on the burden of proof provided for in the directives.[640] (Article 8, Directive 2000/43; Article 10, Directive 2000/78)
- The setting of maximum levels of compensation and the failure to provide for the payment of interest mean that the acts are arguably not in compliance with the directives.[641] (Article 15, Directive 2000/43; Article 17, Directive 2000/78)

Employment Equality Acts 1998-2015

- The provisions of the acts may not adequately prohibit discrimination on the grounds of religion *or* belief, since only religious beliefs appear to be covered.[642] (Articles 1 and 2, Directive 2000/78)
- '[P]ersons employed in another person's home for the provision of personal services' are excluded from protection against discrimination in regard to access to employment.[643] (Article 3, Directive 2000/43; Article 3, Directive 2000/78)
- The definition of 'vocational training' may be too restrictive.[644] (Article 3, Directive 2000/43; Article 3, Directive 2000/78)
- It is not discriminatory to pay a disabled person a lesser rate of remuneration.[645] (Articles 2 and 3, Directive 2000/78)

Equal Status Acts 2000-2018

- It is not certain that the scope of ESA fully covers social protection and social advantages.[646] (Article 3, Directive 2000/43)
- Putative discriminatory treatment required by law cannot be challenged under ESA.[647] (Article 3, Directive 2000/43)
  ESA complaints must be instigated within two months of the discriminatory act by sending a written notification to the alleged discriminator. A substantial number of cases are dismissed annually for failure to comply with that requirement, raising potential compliance issues with the Racial Equality Directive provisions on defence of rights.[648] (Article 7, Directive 2000/43)
- The transfer of jurisdiction regarding discrimination in access to premises licensed for the sale of alcohol from the Equality Tribunal to the District Court under the Intoxicating Liquor Act 2003 raises issues of compliance with the non-regression provisions of Article 15 of the Racial Equality Directive, due to the prohibitive cost and relative complexity of court proceedings.[649]

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[639] Supreme Court, *Stokes v Christian Brothers High School, Clonmel*, [2015] IESC 13, 24 February 2015, http://www.courts.ie/Judgments.nsf/597645521f07ac9a80256ef30048ca52/a09897a48211897980257df6005a3c31?OpenDocument.
[640] See Chapter 3.2.8: Education; 3.2.1(b): Statistical evidence.
[641] See Chapter 6.5: Sanctions and remedies.
[642] See Chapter 2.2.1: Definitions.
[643] See Chapter 3.2.2: Material scope, Conditions for access to employment.
[644] See Chapter 3.2.4: Access to vocational training.
[645] See Chapter 4.9: Any other exceptions.
[646] See Chapter 3.2.6: Social Protection.
[647] See Chapter 3.2.6: Social Protection.
[648] See Chapter 6.1(b): Remedies and Enforcement, Barriers and other deterrents faced by litigants seeking redress.
[649] See Chapter 6.1(b): Barriers and other deterrents faced by litigants seeking redress.

- Where a registered club is set up to cater for the needs of members of a particular group, it can exclude persons who do not fall under the relevant ground from membership.[650] (Article 3, Directive 2000/43)

11.2 Other issues of concern

It appears that persons with irregular or undocumented migration status are not afforded protection against discrimination under EEA.[651]

The National Action Plan Against Racism, which had provided strategic direction to combating racism and to promoting a more inclusive, intercultural society in Ireland, was not renewed.[652]

Research on people's experiences of discrimination suggests that high levels of discrimination are experienced by certain sectors of Irish society. For instance, it was reported that Travellers were over 22 times more likely to encounter discrimination in access to private services than those who identified as 'White Irish'. Skin colour, rather than nationality, appears to increase the likelihood of adverse treatment in the workplace and in accessing services, with black respondents reporting significantly higher levels of discrimination than their white counterparts of any nationality. People with disabilities are twice as likely as non-disabled people to experience discrimination in all domains. These data were drawn from the responses of 15 000 adults collected for the equality module of the 2014 Quarterly National Household Survey, carried out by the Central Statistics Office. Survey participants were asked whether, in the previous two years, they had experienced discrimination in the workplace, while seeking work or in accessing services from public or private sector providers.[653]

A *National Roma Needs Assessment*, commissioned by the Department of Justice and Equality, was published in 2018.[654] The report was based on qualitative data derived from interviews with 108 Roma respondents, eight focus groups involving Roma representatives from a wide range of civil society organisations and statutory agencies, and 30 in-depth interviews with policy-makers, practitioners, service providers and civil society representatives working with Roma. It found that members of the Roma community face high levels of discrimination, marginalisation, extreme poverty and social exclusion. Discrimination was a core issue in the research:

> 'Respondents reported feeling discriminated against at both an institutional and individual level. The highest rates of perceived discrimination were reported in accessing accommodation (93 %) and social protection (84.3 %). 81.1 % of respondents also reported experiencing racism and verbal abuse in public spaces with women being identified as particularly vulnerable. A high rate of respondents (77.5 %) said that they were stopped by the Gardaí for ID checks; focus group discussions uncovered a fear of and lack of trust in the Gardaí.'[655]

[650] See Chapter 3.2.9: Access to and supply of goods and services.
[651] See Chapter 3.1.1: EU and Non-EU Nationals.
[652] See Chapter 9.
[653] McGinnity, F., Grotti, R., Kenny, O. and Russell, H. (2017), *Who experiences discrimination in Ireland? Evidence from the CSO Equality Modules*, Dublin, ESRI, available at: https://www.ihrec.ie/app/uploads/2017/11/Who-experiences-discrimination-in-Ireland-Report.pdf.
[654] Pavee Point and Department of Justice and Equality (2018), *Roma in Ireland: A National Needs Assessment,* Dublin, Pavee Point, available at: https://www.paveepoint.ie/wp-content/uploads/2015/04/RNA-PDF.pdf.
[655] Pavee Point and Department of Justice and Equality (2018), *Roma in Ireland: A National Needs Assessment*, pp. 12-13.

12 LATEST DEVELOPMENTS IN 2019

12.1 Legislative amendments

There were no amendments to Irish anti-discrimination legislation in 2019.

12.2 Case law

Age

Name of the court: Labour Court
Date of decision: 22 May 2019
Name of the parties: *Health Service Executive v Fitzgerald*
Reference number: EDA1915
Link: https://www.workplacerelations.ie/en/cases/2019/may/eda1915.html
Brief summary: In this case, the Labour Court overturned a finding of indirect discrimination on the age ground. The complainant argued that she was discriminated against when the respondent deemed her ineligible to compete for the post of Director of Nursing on the basis that she did not meet the new educational eligibility criteria for posts at that level. She argued that the requirement to hold a postgraduate qualification gave rise to a particular disadvantage since fewer people of her age could comply with it. At the relevant time, the complainant was 59 years old. She adduced the following statistics from the 2011 Census on the age profile of people educated to a postgraduate diploma or degree level: 'Age group - 30-34 - 45,801 (20.40 %); Age group - 35-39 - 39,356 (17.51 %); Age group - 55-59 - 12,998 (5.78 %)'. At first instance, the WRC was satisfied that these statistics demonstrated that the impugned requirement would disproportionately impact on persons in the 55-59 age group. While the respondent's aim of increasing the education level of its workforce was legitimate, it did not demonstrate that the means of achieving that aim were appropriate and necessary. It undermined its own position as to the necessity of the requirement by applying a derogation to the eligibility requirement in another recruitment campaign and omitted to consider other, non-discriminatory alternatives. The complainant was awarded EUR 75 500 in compensation.[656]

On appeal, the Labour Court found that the impugned criterion was saved by Section 36(4) EEA, which provides:

> 'Nothing in this Part or Part II shall make it unlawful to require, in relation to a particular post --
> (a) the holding of a specified educational, technical or professional qualification which is a generally accepted qualification in the State for posts of that description, or
> (b) the production and evaluation of information about any qualification other than such a specified qualification.'

The respondent was empowered by statute to set the eligibility criteria for the post in question. Consultation had taken place with the relevant trade unions and no objection was raised to the educational qualification requirement. Accordingly, the Court was satisfied that the requirement was a 'generally accepted qualification in the State' for the post of Director of Nursing and the respondent was entitled to rely upon Section 36(4) as a 'full defence' to the indirect discrimination complaint.

For 'the sake of completeness', the Court proceeded to consider whether the complainant had established a prima facie case of unlawful discrimination. Essentially, it disagreed with the pool of comparison formulated before the WRC. The Court cited a number of precedents to the effect that the pool must be one which suitably tests the particular discrimination

[656] Workplace Relations Commission, *A Nurse v A Hospital,* ADJ-00008073, 23 April 2018, https://www.workplacerelations.ie/en/Cases/2018/April/ADJ-00008073.html.

complained of. It concluded that the only relevant pool in this instance would be one comprising nurses who might qualify for the post in question, broken down by reference to those who hold the requisite qualification in the same age bracket as the complainant compared to those holding that qualification in a younger age bracket. The statistical evidence adduced related to educational attainments amongst the population as a whole and the Court did not accept that this evidence could be used to infer that the impugned requirement placed nurses in the same age bracket as the complainant at a particular disadvantage.

Name of the court: Workplace Relations Commission
Date of decision: 18 December 2019
Name of the parties: *Roper v Raidió Teilifís Éireann*
Reference number: ADJ-00019084
Link: https://www.workplacerelations.ie/en/cases/2019/december/adj-00019084.html
Brief summary: This case concerned objective justification of a compulsory retirement age. The complainant was employed as an executive producer by RTÉ, the national public service media company, and she was compelled to retire at 65. The respondent sought to justify the mandatory retirement age on the basis that it was necessary to ensure intergenerational fairness. It argued that retaining older people would prevent younger people from progressing in the organisation, which in turn would impact on 'the ability of the broadcaster to produce programmes that are of interest and relevance to a younger audience.'

Having assessed extensive submissions by both parties, the WRC concluded that the dismissal was not objectively justified under the terms of Section 34(4) EEA. Following the complainant's retirement her role was filled internally, and one further person was recruited externally. While the WRC recognised the positive impact this may have had, it was confined to one department and fell 'considerably short' of achieving intergenerational fairness in the organisation as a whole. The compulsory retirement was not appropriate and necessary. With the complainant's 'co-operation and the creative input of management', a more appropriate means could have been identified, such as assigning her to a new, temporary assignment for a fixed term. The forced retirement had a disproportionately negative effect on the complainant 'compared to the dubious positive impact on her employer'. She had been removed from a job she enjoyed with consequent emotional and lifestyle challenges, and the financial impact was also significant. The retirement adjusted the age profile in the organisation to such a 'miniscule degree' that it could not be said to have impacted in any meaningful way on the respondent's ability to make programmes for younger people.

The complainant was awarded EUR 100 000 in compensation, the equivalent of one year's salary.

Disability

Name of the court: Labour Court
Date of decision: 11 June 2019
Name of the parties: *Houses of the Oireachtas v Hickey*
Reference number: EDA1918
Link: https://www.workplacerelations.ie/en/cases/2019/june/eda1918.html
Brief summary: At first instance, the WRC found that the respondent had failed to provide reasonable accommodation in refusing to delay the complainant's interview for a promotion competition.[657] He had contracted pleurisy and submitted a series of illness certificates to that effect over a three-month period. The respondent facilitated the complainant by deferring the interview twice, but it ultimately re-scheduled and held the interview when

[657] Workplace Relations Commission, *A Deputy Head Services Officer v A Government Department,* DEC-E2018-023, 13 November 2018, https://www.workplacerelations.ie/en/cases/2019/november/dec-e2018-023.html.

the complainant was on illness leave. In so doing, the WRC held, it had failed to provide the complainant with reasonable accommodation.

On appeal, the Labour Court determined that the complainant had failed to establish that he was covered by the definition of disability under Section 2 EEA. The Court stated that it was 'bound by the judgment of the Court of Justice' in *HK Danmark (Ring and Skouboe Werge*).[658] It found that 'a relatively short illness, such as that experienced by the Complainant in this case, does not amount to a disability that hinders "the full and effective participation of the person concerned in professional life on an equal basis with other workers".' Unfortunately, the Court did not consider the 'non-regression' or minimum requirements provisions of Directive 2000/78. The directive provides, at Article 8(2), that its implementation shall not constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States. Recital 28 stipulates that the Directive 'lays down minimum requirements, thus giving the Member States the option of introducing or maintaining more favourable provisions.' The Court's decision is at odds with previous case law, which emphasised that the definition of disability under EEA is more extensive than that provided for under EU law[659] and found that persons on sick leave for relatively short periods of time were disabled.[660]

Name of the court: Supreme Court of Ireland
Date of decision: 31 July 2019
Name of the parties: *Nano Nagle School v Daly*
Reference number: [2019] IESC 63
Link:
http://courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/0036387fa70d0e74802584480046ab2b?OpenDocument
Brief summary: This case was the culmination of lengthy proceedings that addressed the interpretation of the reasonable accommodation duty under Section 16 EEA. The complainant had been employed by the respondent school as a special needs assistant (SNA). She was paralysed following a road accident and, as a consequence, she needed to use a wheelchair. When she sought to return to work in January 2011, the school contracted occupational therapists to carry out assessments of the complainant's role. The complainant was ultimately dismissed on the basis that she was unable to perform a significant number of the duties associated with the position of a SNA and was thus unfit to return to work. In 2013, the Equality Tribunal found in the employer's favour. The complainant appealed to the Labour Court, which held that the school had failed to provide reasonable accommodation. The High Court upheld that determination, but it was reversed by the Court of Appeal. Leave to appeal the Court of Appeal's judgment was granted by the Supreme Court in July 2018 on the basis that divergent decisions had issued from various decision makers on a matter of public importance.[661]

The Supreme Court disagreed with the Court of Appeal's interpretation of the reasonable accommodation provision. The Court of Appeal found that, where an employee cannot carry out an essential function connected with their post, an employer was not obliged to consider the possibility of redistributing the tasks attached to that function. However, the Supreme Court held that the lower court had erred in law, since no distinction is drawn between the 'essential' functions or duties of a job and any non-essential 'tasks' an

[658] Joined Cases C-335/11 and C-337/11.
[659] Labour Court, *Cregg Labour Solutions v Cahill*, EDA1634, 1 December 2016, http://www.workplacerelations.ie/en/Cases/2016/December/EDA1634.html.
[660] See, for example, Labour Court, *Customer Perception Limited v Leydon*, EED0317, 12 December 2003, https://www.workplacerelations.ie/en/cases/2003/december/eed0317.html (a temporary injury arising from a car accident constitutes a disability); Equality Tribunal, *Fernandez v Cable & Wireless,* DEC-E2002-052, 11 December 2002, https://www.workplacerelations.ie/en/cases/2002/december/dec-e2002-052.html (temporary illness that resulted in sick leave absence for approximately one month amounted to a disability).
[661] Supreme Court, *Nano Nagle School v Daly* [2018] IESCDET 103, 6 July 2018, http://www.courts.ie/Judgments.nsf/0/9B6F6823C0EF9E34802582C50047C8CD.

employee must undertake. On a proper construction of Section 16, employers are obliged to consider all appropriate measures that could be undertaken to provide reasonable accommodation, even where these include removing or redistributing an employee's duties or essential functions. Such measures need not be undertaken where they would impose a disproportionate burden. The Supreme Court underlined that 'the test is one of reasonableness and proportionality: an employer cannot be under a duty entirely to re-designate or create a different job to facilitate an employee' (at para. 89). The Court also considered whether, in discharging its obligation, an employer is obliged to consult with the disabled employee. It found that such consultation is not mandatory 'in each and every case', but 'a wise employer will provide meaningful participation in vindication of his or her duty under the Act' (at para. 105).

The Supreme Court upheld the complainant's appeal but it did not issue a remedial order. It determined that the Labour Court had not adequately evaluated all of the evidence presented and therefore remitted the case to that forum.

Race/ ethnic origin (Traveller community ground)

Name of the court: Workplace Relations Commission
Date of decision: 7 August 2019
Name of the parties: *Ward v Auld Triangle B & B*
Reference number: ADJ-00015156
Link: https://www.workplacerelations.ie/en/cases/2019/august/adj-00015156.html
Brief summary: A complaint of direct discrimination on the Traveller community ground was upheld in this case concerning overnight accommodation. The complainant and her sister booked a room in the respondent's bed and breakfast establishment through an online booking facility. When they arrived at the premises the entrances were locked. They phoned the owner and he advised that he would admit them shortly, but he did not show up and did not answer numerous subsequent phone calls. Having waited for approximately one and a half hours, the complainant left and had to find alternative accommodation. The respondent did not attend the WRC hearing, nor did it make a written submission. In response to the complaint notification, it stated that An Garda Síochána (the police) had issued directions to close the premises on the date in question. However, at the hearing the complainant submitted in evidence a letter from the Superintendent's Office (An Garda Síochána – Loughrea Division), which confirmed that no such instruction had been issued. The adjudication officer was satisfied, on the balance of probabilities, that the complainant had been denied access to the premises on the basis that she was a member of the Traveller community. He directed the respondent to pay EUR 2 500 in compensation for the effects of the less favourable treatment.

Race/ ethnic origin

Name of the court: Workplace Relations Commission
Date of decision: 20 March 2019
Name of the parties: *A Syrian Refugee v A Bank*
Reference number: ADJ-00013897
Link: https://www.workplacerelations.ie/en/Cases/2019/March/ADJ-00013897.html
Brief summary: The complainant was a Syrian national who was granted refugee status in 2017. When he sought to open a bank account, a staff member refused to do so because of his nationality. The respondent conceded that the bank official had erroneously applied a policy that restricts transactions with residents of countries included on a UN sanctions list. Since the complainant was lawfully resident in Ireland, the policy was inapplicable. A regional manager apologised to the complainant for the error and offered compensation of EUR 250. However, the complainant was dissatisfied with the manner in which the respondent had replied to his requests for further information, including assurances sought about staff training and anti-discrimination policies. The Irish Human Rights and Equality

Commission (IHREC) provided legal assistance to the complainant in referring a direct discrimination complaint on the race ground.
Before the WRC, the complainant submitted that, where a service provider has an explicit policy to refuse a service based on nationality, there must be an extensive duty to ensure that that the policy is precisely and carefully applied so as to avoid what occurred in this case. The WRC agreed, noting that, while the bank had policies on equality and on the criteria for opening a bank account, on the day of the impugned incident two front-line staff 'appeared to be oblivious to any policy that may have been in place to cover such a situation.' It ordered the respondent to pay compensation of EUR 4 000. It also directed the bank to engage directly with IHREC to minimise the possibility of reoccurrence of the type of incident that arose in the case, and asked both parties to report back on the progress made within six months.

Name of the court: Workplace Relations Commission
Date of decision: 20 November 2019
Name of the parties: *An Asylum Seeker v A Government Agency*
Reference number: ADJ-00017832
Link: https://www.workplacerelations.ie/en/cases/2019/november/adj-00017832.html
Brief summary: At issue was the respondent's refusal to process a driving licence application for an asylum seeker who had lived in Ireland since 2015. The complainant, a Pakistani national, obtained a self-employment permit and was working as a delivery man. He applied for a learner driver licence so that he could use a car for work. The respondent Government agency refused his application on the grounds that he had failed to provide valid proof of residency. When applying for the permit, the complainant submitted his temporary residence certificate, a public services card, a copy of his passport and his permission from the Minister for Justice to access the labour market (which included his address). The respondent refused to accept those documents and advised the complainant that he was obliged to produce either a Garda National Immigration Bureau (GNIB) card or a current EU/EEA/Swiss passport to establish that he was 'normally resident' in Ireland.

Assisted by IHREC, the complainant challenged the decision, arguing that the respondent had engaged in direct and indirect discrimination on the nationality and/or national origins elements of the race ground. Specifically, the complainant maintained that the respondent had interpreted the Road Traffic (Licencing of Drivers) Regulations 2006 so as to exclude international protection applicants from securing a licence. The regulations require applicants to prove 'normal residency' in the State and do not prescribe the documents which must be accepted for that purpose. Yet the respondent's 'Guidance Notes' insisted on the production of documentation which discriminated as between Irish and EU/EEA/Swiss citizens, on the one hand, and nationals of third countries on the other hand. Although the complainant had furnished multiple documents as proof of residency, any one of which would be acceptable from applicants of other nationalities, his application was refused. The complainant further submitted that the manner in which the respondents applied the apparently neutral provision of establishing normal residence 'puts non-Irish/EU/EEA/Swiss nationals - and, in particular, that cohort of such foreign nationals who are in the international protection system - at a particular disadvantage'. The respondent advanced several counterarguments in support of its position, which it asserted was adopted to ensure that 'the integrity of the process of issuing and renewing driving licences is safeguarded by a robust verification process, particularly given the continuously evolving nature of threats to the security and integrity of the common driving licence, such as theft and forgery and other associated security concerns.'

The WRC found that the respondent had engaged in indirect discrimination on the race ground by obliging the complainant 'to produce documentation that it was impossible for him to obtain'. It considered that the objective justification argument advanced by the respondent was 'weak', since the complainant had proved his identity beyond any degree of doubt. The respondent was directed to pay the complainant EUR 2 500 in compensation and was instructed to process his application for a learner permit.

Sexual orientation

Name of the court: Workplace Relations Commission
Date of decision: 29 May 2019
Name of the parties: *A Manager v A Restaurant*
Reference number: ADJ-00015191
Link: https://www.workplacerelations.ie/en/cases/2019/may/adj-00015191.html
Brief summary: This case dealt with complaints of harassment and discriminatory dismissal on the sexual orientation ground. The complainant worked as a bar manager. He established to the WRC's satisfaction that two company directors repeatedly made derogatory comments about his sexual orientation during the course of his employment. The respondent asserted that any remarks made were in jest and that the employee had not made a formal complaint about the alleged harassment. The complainant explained that he did not make a written complaint to management as both perpetrators were senior managers. He tried to address the behaviour by asking one of the perpetrators to desist from calling him offensive names on numerous occasions.

The WRC examined the company handbook in considering whether the respondent could rely on the defence set out under Section 14(A)(2) EEA. While it contained references to equality and discrimination, the handbook did not include any policy or procedures in relation to the prevention of harassment. The general grievance procedure was not appropriate and had not been designed to deal with serious allegations of harassment and sexual harassment. The WRC concluded that the statutory defence was inapplicable because the respondent had no harassment policy in place and the perpetrators were in a position of power over the complainant.

Further complaints of victimisation and discriminatory dismissal were not sustained. The complainant's employment was terminated because of a genuine redundancy situation and was not connected to his sexual orientation or to the discrimination complaint.

The WRC awarded the complainant EUR 20 000 in compensation. It further ordered the respondent to draw up a harassment policy, communicate the policy to all staff and provide training on its contents.

12.3 Cases brought by Roma and Travellers

There are no accurate figures available on cases brought by Roma and Travellers in 2019. To the author's knowledge, there were no such complaints under EEA, while 39 ESA complaints on the Traveller community ground were determined by the WRC's adjudication service (discounting those in which the complaint was dismissed for want of prosecution because the complainant did not attend the scheduled WRC hearing). It appears that just one ESA case was referred by a Roma person, but the substance of the complaint was not dealt with because the complainant had not complied with the notification requirements imposed by that statute.[662] The only complaint referred by a Roma person in 2018 was dismissed for the same reason.[663]

As in previous years, a significant proportion of the ESA complaints (35) concerned direct discrimination in accessing goods and services in the hospitality and retail sectors. Of these, 22 concerned three incidents, involving the ejection of children from a play centre,[664]

[662] See further: Chapter 6.1(b); Workplace Relations Commission, *Brooks v The Commissioner of An Garda Síochána*, ADJ-00012145, 30 September 2019, https://www.workplacerelations.ie/en/cases/2019/september/adj-00012145.html.
[663] Workplace Relations Commission, *Borsca v Bank of Ireland*, ADJ-00010452, 4 September 2018, https://www.workplacerelations.ie/en/Cases/2018/September/ADJ-00010452.html (re failure to notify respondent of intention to seek redress before the WRC).
[664] See, for example, Workplace Relations Commission, *Mr. and Mrs. A and their 7 children v A Playcentre*, ADJ-00018450, 11 June 2019, https://www.workplacerelations.ie/en/cases/2019/june/adj-00018450.html (treatment not related to the ground but based on complainants' conduct).

hotel accommodation[665] and access to a concert[666] respectively (none of these cases was successful). The five successful cases in this category were referred against hotels. Two entailed the cancellation of overnight accommodation (see discussion of *Ward v Auld Triangle B & B* in Chapter 12.2).[667] The other three cases stemmed from the same set of facts. At issue was the cancellation of a function to celebrate a religious ceremony for two children. The respondent maintained that the room was double-booked in error, but the WRC did not find the evidence presented credible.

The four complaints referred against public sector bodies concerned the treatment of one family in applying for social protection payments. In each case, the WRC determined that the applications had been processed by the respondent's staff in a manner that did not amount to less favourable treatment or harassment.[668]

[665] See, for example, Workplace Relations Commission, *Ellen Cleary v Dott Treasa Holdings Ltd The Rose Hotel* ADJ-00018262, 3 May 2019, https://www.workplacerelations.ie/en/cases/2019/may/adj-00018262%20.html (failure to fully comply with notification requirement under section 21(2) ESA).

[666] See, for example, Workplace Relations Commission, *Cawley (Deceased) v Guestford Limited*, ADJ-00011335, 11 February 2019, https://www.workplacerelations.ie/en/Cases/2019/February/ADJ-00011335.html (complaint lodged against incorrect respondent).

[667] See also Workplace Relations Commission, *Ward v The Meadow Court Hotel*, ADJ00015163, 7 August 2019, https://www.workplacerelations.ie/en/cases/2019/august/adj-00015163.html.

[668] See, for example, Workplace Relations Commission, *Mrs. S v The Minister for Employment Affairs and Employment Affairs and Social Protection*, DEC-S2019-001, 1 February 2019, https://www.workplacerelations.ie/en/Cases/2019/February/DEC-S2019-001.html.

ANNEX 1: MAIN TRANSPOSITION AND ANTI-DISCRIMINATION LEGISLATION

Country: **Ireland**
Date: **31 December 2019**

Title of the law: Employment Equality Acts 1998-2015 Abbreviation: EEA Date of adoption: 18.06.1998 Latest relevant amendment: 10.12.2015 Entry into force: 18.10.1999 Web link: http://revisedacts.lawreform.ie/eli/1998/act/21/revised/en/html. Grounds covered: age, civil status, disability, family status, gender, race, religion, sexual orientation, Traveller community Civil law Material scope: public employment, private employment, vocational education Principal content: prohibitions of direct and indirect discrimination, harassment, and victimisation; provision of reasonable accommodation on disability ground
Title of the law: Equal Status Acts 2000-2018 Abbreviation: ESA Date of adoption: 26.4.2000 Latest relevant amendment: 18.07.2018 Entry into force: 10.12.2015 Web link: http://revisedacts.lawreform.ie/eli/2000/act/8/revised/en/html. Grounds covered: age, civil status, disability, family status, gender, race, religion, sexual orientation, Traveller community, housing assistance Civil law Material scope: access to goods or services (including housing), social protection, social advantages, education Principal content: prohibitions of direct and indirect discrimination, harassment, and victimisation; provision of reasonable accommodation on disability ground
Title of the law: Pensions Acts 1990-2018 Abbreviation: PA Date of adoption: 24.07.1990 Latest relevant amendment: 24.12.2018 Entry into force: 21.12.1990 Web link: http://www.irishstatutebook.ie/eli/1990/act/25/enacted/en/print.html; http://www.irishstatutebook.ie/eli/2004/act/9/section/22/enacted/en/html#sec22; http://www.irishstatutebook.ie/eli/2018/act/37/enacted/en/pdf. Grounds covered: age, civil status, disability, family status, gender, race, religion, sexual orientation, Traveller community Civil law Material scope: Pensions including occupational pensions Principal content: Prohibitions of direct and indirect discrimination in relation to occupational pensions
Title of the law: Irish Human Rights and Equality Commission Act 2014 Abbreviation: IHRECA Date of adoption: 27.07.2014 Latest relevant amendment: N/a Entry into force: 08.10.2014 Web link: http://www.irishstatutebook.ie/eli/2014/act/25/enacted/en/html Grounds covered: age, civil status, disability, family status, gender, race, religion, sexual orientation, Traveller community, housing assistance Civil law Material scope: All fields covered by the equality directives

Principal content: Establishment of Irish Human Rights and Equality Commission (IHREC) as national equality body; powers and functions of IHREC; positive equality and human rights duty of public sector bodies
Title of the law: Workplace Relations Act 2015 Abbreviation: WRA Date of adoption: 20.05.2015 Latest relevant amendment: N/a Entry into force: Web link: http://www.irishstatutebook.ie/eli/2015/act/16/enacted/en/print.html. Grounds covered: age, civil status, disability, family status, gender, race, religion, sexual orientation, Traveller community, housing assistance Administrative law Material scope: All fields covered by the equality directives bar discrimination on or at point of entry to licensed premises Principal content: Establishment of Workplace Relations Commission (WRC) as primary forum for hearing anti-discrimination complaints; powers and functions of WRC

ANNEX 2: INTERNATIONAL INSTRUMENTS

Country: Ireland
Date: 31 December 2019

Instrument	Date of signature	Date of ratification	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	04.11.1950	25.02.1953	No	Yes	Yes, in an interpretative sense, under the European Convention on Human Rights Act 2003
Protocol 12, ECHR	04.11.2000		No	No	No
Revised European Social Charter	04.11.2000	04.11.2000	Article 8(3), Article 21, Article 31(1), (2) and (3).	Yes (international NGOs only)	No
International Covenant on Civil and Political Rights	01.10.1973	08.12.1989	Article 10(2)	Yes	No
Framework Convention for the Protection of National Minorities	01.02.1995	07.05.1999	No	N/A	No
International Covenant on Economic, Social and Cultural Rights	01.10.1973	08.12.1989	A reservation applies with respect to article 2(2). In order to promote use of the Irish language knowledge of Irish may be required or given favourable consideration for certain occupations.	No	No

Instrument	Date of signature	Date of ratification	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
Convention on the Elimination of All Forms of Racial Discrimination	21.03.1968	29.12.2000	No	Yes	No
ILO Convention No. 111 on Discrimination	Signed (no dates available)	22.04.1999	No	No	No
Convention on the Rights of the Child	30.09.1990	28.09.1992	No	Yes	No
Convention on the Rights of Persons with Disabilities	30.03.2007	20.03.2018	Articles 12, 14, 27(1)	No	No

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