

REPORT ON MEASURES TO COMBAT DISCRIMINATION
Directives 2000/43/EC and 2000/78/EC

COUNTRY REPORT

Ireland

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State of affairs up to 08 January 2007

This report has been drafted for the **European Network of Legal Experts in the non-discrimination field** (on the grounds of Race or Ethnic origin, Age, Disability, Religion or belief and Sexual Orientation), established and managed by:

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INTRODUCTION

0.1 The national legal system

Explain briefly the key aspects of the national legal system that are essential to understanding the legal framework on discrimination. For example, in federal systems, it would be necessary to outline how legal competence for anti-discrimination law is distributed between different levels of government.

The basic law of Ireland is the Constitution, Bunreacht na hÉireann, 1937. The Constitution takes precedence over all other sources of law, with the exception of European Law. European supremacy relates to its sphere of competency. Within that sphere Europe enjoys unquestioned supremacy. Bunreacht na hÉireann, 1937, the Constitution establishes the State and its institutions and sets out the fundamental principles guiding the governance of the State. The Constitution is the basis by which the Irish legal system is run, and as such it is amenable to interpretation, by the courts.

Inferior sources of law depend on the Constitution for their validity. A common law or a legislative rule that conflicts with a provision of the Constitution is invalid. The Constitution states that the sole law making body in the State is the Oireachtas.¹ Legislation must be passed by both houses of the Oireachtas and is then signed into law by the President. Legislation is specifically created to deal with specific areas of concern, such as anti-discrimination. The common law consists of decisions that have been delivered by judges in the courts over the centuries. The common law adopts the doctrine of precedent that ensures that the decisions have a binding force of law. The sheer quantity of decisions throughout the centuries has allowed the common law to develop into an understandable body of law. Employment law is an amalgamation of both common law and legislation. Employee's rights can be derived from a variety of sources: the Constitution, legislation, case law, contracts of employment both express and implied terms and in some instances through the terms of collective agreements. Legislation is of increasing importance particularly in the context of non-discrimination measures.²

Ireland is a dualist state: so on ratification of a Treaty it does not become part of the internal legal system. This has the effect of externalising our international human rights obligations, it is only on incorporation that an international Treaty be relied upon directly in the Irish Courts; see for example European Convention on Human Rights Act, 2003.³ No other Convention has been incorporated into the national legal order, it is contended that we comply with our international legal obligations by means of national legislation.

0.2 State of implementation

List below the points where national law is in breach of the Directives. This paragraph should provide a concise summary, which may take the form of a bullet point list. Further explanation of the reasons supporting your analysis can be provided later in the report.

Has the Member State taken advantage of the option to defer implementation of Directive 2000/78 to 2 December 2006 in relation to age and disability?

¹ The Oireachtas is the National Parliament, we have a bicameral system which means that there are two houses of the Oireachtas. The first chamber is Dáil Éireann and the second chamber consists of Seanad Éireann. Legislative powers are granted to the two houses by virtue of Article 15.2 of the Constitution.

² Byrne, Kennedy, Ni Longain and Shannon, *Employment Law*, Dublin 2003, at 1.

³ www.irlgov.ie

The Equality Act 2004⁴ amended the Equal Status Act 2000⁵ and the Employment Equality Act 1998⁶ in order to give effect to the following EU Council Directives: Council Directive 2000/43 EC – The Race Directive; Council Directive 2000/78/EC – The General Framework Directive; Council Directive 2002/73/EC – The Equal Treatment Directive. The amended Acts are entitled the Equal Status Act 2000-2004 and the Employment Equality Act 1998-2004. The Social Welfare (Miscellaneous Provisions Act 2004⁷ was enacted to amend the Pensions Act 1990, now entitled The Pensions Act 1990-2004.

- Section 77(11), Employment Equality Act 1998-2004 permits a party to proceedings under the Act before the Equality Tribunal and the Labour Court to nominate a person or body to represent them. The legislation does not specify the nature of the body that may represent that individual. This is arguably not in compliance with Articles 9 and 7 of the Framework Employment Directive and Race Directive for failing to allow such a body or individual represent a party before either the District Court or the Circuit Court.
- Section 21(1) of the Equal Status Act provides that a complainant must instigate proceedings within two months of the discriminatory act, and send a written notification to the alleged discriminator this system has proved problematic for a number of protected groups.⁸ This is a serious bar to litigation and may therefore not be in compliance with Articles 9 and 7 of the Framework Employment Directive and the Race Directive.
- Section 82, Employment Equality Act 1998-2004 imposes maximum levels of compensation. Based on the European Court of Justice decision in *Marshall No. 2* the imposition of a maximum limit is arguably not in compliance with Articles 17 and Article 15 of the Framework Employment Directive and the Race Directive.⁹
- The exclusion of ‘persons employed in another person’s home for the provision of personal services’¹⁰ is arguably too broad an exemption to be in compliance with both the Framework Employment Directive and the Race Directive.
- The scope of the Equal Status Act 2000-2004 as governed by section 3(1)(e), (f) and (g) of that Act, is arguably too narrow to cover all the elements of Article 3 of the Race Directive, this is further impacted upon by the inclusion of section 14 of the Equal Status Act 2000-2004.
- Not all provisions containing discriminatory measures have been abolished; see for example the Organisation of Working Time Act, 1997.¹¹ This is a potential problem for compliance with Article 16 of the Framework Employment Directive.¹²

⁴ <http://www.oireachtas.ie/documents/bills28/acts/2004/A2404.pdf>

⁵ <http://www.oireachtas.ie/documents/bills28/acts/2000/a800.pdf>

⁶ <http://www.gov.ie/bills28/acts/1998/a2198.pdf>

⁷ <http://www.oireachtas.ie/documents/bills28/acts/2004/A0904.pdf> Section 22 and 23 of the Social Welfare (Miscellaneous Provisions) Act 2004 give effect to the following EU Council Directives: Council Directive 2000/43 EC – The Race Directive; Council Directive 2000/78/EC – The General Framework Directive, as they relate to occupational pensions.

⁸ Equality Authority, ‘Overview of the Employment Equality Act 1998 and the Equal Status Act 2000 in light of the Transposition of the European Union ‘Race’ Directive (Race Directive), Framework Employment Directive (FED and the Gender Equal Treatment Directive (GETD)’ at 20.

⁹ Case C-271/91

¹⁰ Section 3 Equality Act 2004.

¹¹ The Organisation of Working Time Act, 1997 ‘contains an entitlement to leave in respect of public holidays. The Second Schedule to the Act provides that an employer may, “for the purpose of fulfilling any relevant obligation imposed on him or her by this Act, treat as a public holiday, in lieu of a public holiday aforesaid, either (a) the Church holiday falling in the same year immediately before the public holiday, or (b) the Church holiday falling in the same year immediately after the public holiday.....” The Schedule goes on to list the applicable Church holidays, which are all Christian, and in the main

- Section 35 of the Employment Equality Act 1998-2004 provides that it is permissible to pay less favourable rates of pay for disabled workers and is not in compliance with the Framework Employment Directive.
- Harassment is not defined as discrimination in Equal Status Act 2000-2004.
- The use of a hypothetical comparator is not permitted when claiming equal pay discrimination, Article 2 of both the Framework Employment Directive and the Race Directive do permit the use of a hypothetical comparator.
- The denial of a remedy for an unfair dismissal under the Unfair Dismissals Act 1977-1993, for those who have reached retirement age, is arguably not in compliance with the provisions of the Framework Employment Directive.
- Section 19 of the Intoxicating Liquor Act 2003 governs the prohibition of discrimination in licensed premises. No body has been charged with disseminating information about the legal protection against discrimination contained in this Act. This does not appear to comply with either Article 10 of Directive 2000/43, or Article 12 of Directive 2000/78.
- Compliance with article 3(1)(e) of the Race Directive is dependent on future judicial interpretation. The Equal Status Act 2000-2004 prohibits discrimination in relation to goods and services, on all nine grounds. In *Donovan v. Donnellan*¹³ it was suggested that this could cover State services such as health care, but the matter has to be finally determined. The impact of section 14 of the Equal Status Act may prove difficult in this regard this provides a broad statutory exemption to the Act where an act or action is required by virtue of another piece of legislation then the Equal Status Act 2000-2004 does not apply.
- The Equal Status Act prohibits clubs from discriminating, on all nine grounds, at section 8, and permits certain exceptions to this rule in section 9. Those exceptions are where a club is set up to cater for the needs of a particular ground, such as gender, race or religion. In *Equality Authority v Portmarnock Golf Club*¹⁴ the High Court in assessing whether a male only golf club was a discriminatory club, held that section 9 of the Act permitted male only clubs, as the principal purpose of Portmarnock Golf Club is to cater only for the needs of men. The interpretation in the context of gender can apply across all nine grounds and is potentially not in compliance with the Race Directive.

0.3 Case-law

Provide a list of any important case-law within the national legal system relating to the application and interpretation of the Directives. This should take the following format:

- a. Name of the court
- b. Date of decision and reference number (or place where the case is reported). If the decision is available electronically, provide the address of the webpage.
- c. Name of the parties
- d. Brief summary of the key points of law (no more than several sentences)

Roman Catholic. The question is whether the entitlement of an employer to substitute a public holiday for a church holiday is contrary to the principle of equal treatment.’ Religion report of May 2003 by Dave Ellis.

¹² Religion report of May 2003 by Dave Ellis.

¹³ DEC-S2001-011

¹⁴ [2005] IEHC 235, this case is on appeal to the Supreme Court.

The Labour Court in the case of the *Department of Health and Children v Gillen*,¹⁵ set out the tests considered by the Labour Court and the Equality Tribunal when considering whether to deduce that age discrimination has occurred. The Labour Court stated that the “factors which figured most strongly to date are:

- (i) A marked statistical difference in success rates for different age groups in apparently similar circumstances¹⁶
- (ii) Evidence of a policy to prefer a particular age group¹⁷
- (iii) Lack of transparency, or unexplained procedural unfairness, may create an inference of discrimination¹⁸
- (iv) A mismatch between formal selection criteria and those apparently applied in practice may also create an inference of discrimination¹⁹
- (v) A pattern of significant inconsistency with older candidates previous assessments²⁰

Other factors, which can be persuasive, are:

- (a) Discriminatory questions asked at interview.
- (b) The presence of a single successful appointee who was in the same age group as the complainants does not disprove age discrimination, notwithstanding that the appointee is of exceptional ability compared to other successful appointees.

Conversely, the following elements have weighed against an inference or a conclusion of age discrimination:

- (i) The selection criteria appear objective and seen to have been honestly applied in practice²¹
- (ii) Statistics suggested that success rates are broadly similar for different age groups, in apparently similar circumstances²²
- (iii) The employer tried to ensure that the Interview Board included a mix of gender and ages²³
- (iv) Finally, the fact that the respondent’s overall policy is not discriminatory has been given limited weight in several decisions²⁴”

These guidelines give a clear and accurate view on how both the Equality Tribunal and Labour Court address the issue of age discrimination. This assessment recognises the difficulty in discharging the burden of proof that complainant’s face, particularly when facing institutional discrimination.

In *Moriarity v. Dúchas*²⁵, a case where the complainant claimed direct discrimination on the age ground, the Equality Tribunal referred to the European Court of Justice statement in the *Schumacker* and *Gillespie* cases,²⁶ stating that ‘It is well settled that discrimination involves the application of different rules to comparable situations, or the application of the same rules to different situations.’ This approach has been applied across the nine protected grounds. This means that in practice the Equality Tribunal require that where different rules are applied the comparator and the complainant must be in similar relevant circumstances. Under both the Employment Equality Act²⁷ and the Equal Status Act²⁸ it has been held that there is no

¹⁵ EDA041; All labour court decisions are available at www.labourcourt.ie; All equality tribunal decisions are available at www.equalitytribunal.ie

¹⁶ *O’Mahony v Revenue Commisioners*, DEC-E2002-018.

¹⁷ *O’Byrne v. Department of Public Enterprise*, DEC-E2002-040.

¹⁸ *O’Byrne v. Department of Public Enterprise*, DEC-E2002-040, *Madden v Aer Lingus* DEC-E2002-006.

¹⁹ *O’Mahony v Revenue Commisioners*, DEC-E2002-018.

²⁰ *O’Mahony v Revenue Commisioners*, DEC-E2002-018.

²¹ *Employee v. Department of Foreign Affairs*, DEC-E2002-038.

²² *Byrne v. FÁS* DEC-E2002-045.

²³ *O’Mahony v Revenue Commisioners*, DEC-E2002-018.

²⁴ *Sheehan v. D.P.P.* DEC-E2002-047.

²⁵ DEC-E2003-013.

²⁶ Cases no. C-279/93 and C-342/93 respectively.

²⁷ *St James’ Hospital v Eng*, EDA023.

necessity for there to be an intention to discriminate, it will suffice that in fact there is discrimination. Both Acts also provide for the use of hypothetical comparators when seeking to prove direct discrimination.²⁹ The Equality Acts contained several different definitions of indirect discrimination, which have since been amended.

In *Ogunlade and Oyefeso v. Guineys*,³⁰ a race discrimination case under the Equal Status Act, the department store refused access to one of the two complainants because staff recognised her as having been abusive to staff members on a previous occasion. This was a case of mistaken identity and the complainants contended that white people confused faces of black people more easily than those of other white people. The Equality Officer was not convinced that this was an issue of indirect discrimination as the issue of identification or non-identification may not be equated with a requirement or practice. Ultimately she held that the burden of proof was on the complainant to produce evidence that white people could distinguish more easily between white than between black faces and that information had not been provided.

Two Complainants v. The Department of Education and Science,³¹ a race discrimination case taken to the Equality Tribunal. The Tribunal had to assess what is a service within the meaning of the Equal Status Act. The Department of Education provide maintenance grants which are payable to adults on further education courses. The two complainants were refused such grants, and one question to be addressed by the Tribunal was whether the provisions of the Equal Status Act covered maintenance grants. Section 2 of that Act defines ‘service’ as “a service or facility of any nature which is available to the public generally or a section of the public.” The Equality Officer firstly relied on the decision in *Donovan v. Garda Donnellan*,³² to establish that the Act covered services provided by the State. The second element of this decision was to establish what was meant by the term ‘facility’ a term not defined in the Act. The Equality Officer noted that the same term was used in the UK discrimination acts, and then stated:

“I note that Butterworths on Discrimination Law suggests the following ‘a facility is usually a manner, method or opportunity for the easy or easier performance of anything. It might enable a member of the public to have easier access to a service; a cash machine facilitates the withdrawal of money from a bank. It may present a method of obtaining goods; a collection point in a department store facilitates the purchase of heavy or bulky commodities. The term should cover most instances where a person is not actually providing goods or a service himself, but providing a means to obtain access to those goods or that service.’ On the basis of the above, I have formed the opinion that the provision of a maintenance grant is a ‘facility’ covered by the provisions of the Equal Status Act.”

O’Brien v. ComputerScope,³³ provided the Equality Tribunal the opportunity to assess the new provisions of equal pay indirect discrimination. The complainant alleged both direct and indirect discrimination on the age and gender ground, as well as alleging victimisation. The complainant was appointed to the position of Assistant Editor, she was 23 years of age: her comparators were both male and over 30 year’s of age. One comparator, her predecessor, as

²⁸ *McDonagh and others v. Davitts Public Bar*, DEC-S2003-021-022-023 – this case relates to discrimination in respect of membership of the Traveller community.

²⁹ *Minaguchi v. Wineport Lakeshore Restaurant*, DEC-E2002/020 - this case relates to discrimination on the grounds of age, marital status and family status under the Employment Equality Act. *O’Brien v. Canada House*, DEC-S2002-002/003, cases related to discrimination on the ground of membership of the Traveller Community.

³⁰ DEC-S2003-016/017.

³¹ DEC-S2003-042-043.

³² DEC-S2001-011.

³³ DEC-E2006-030 – See also section 0.2 above.

Assistant Editor was paid more than the complainant when working in that role; this was deemed *prima facie* evidence of discrimination on the gender and age ground. The Equality Officer in assessing whether indirect discrimination occurred did not address the issue of age and gender discrimination separately. The respondent did not dispute that the complainant was paid less than her comparator, but stated that there were grounds other than gender and age for the difference in pay. The respondent in this case submitted a market forces argument stating: “*severely deteriorating market conditions dictated that the remuneration for the role of Assistant Editor had changed, primarily due to the difficult trading conditions within the technology media sector, and the resulting financial constraints on ComputerScope Ltd.*” The Tribunal relied on a Labour Court decision³⁴ that stated:

“An employer, seeking to rely on this defence, must prove that the difference in pay is genuinely attributable to a ‘ground other than sex’ (see *Irish Crown Cork Co. v. Desmond and Ors.* [1983] ELR 1780). This requires that the respondent must establish to the Court’s satisfaction that the reasons for paying the comparator the particular rate of pay are genuine, and that they do not apply in the case of the claimants. The Court must also be satisfied that there is objective justification for the difference in pay, and that the justification is not just historical but is also relevant at the date of the determination (see *Flynn v. Primark* [1977] ELR 218.”³⁵

The Tribunal had to determine whether this reason was objective, and unrelated to the complainant’s gender and/or age. The Tribunal established that the complainants’ salary was frozen due to the difficult market conditions, but at the same time the comparator’s salary on promotion was not frozen. This was attributed to “*his different level of skill and ability*” and in respect of the promotional post he was *doing* “*a completely different job with a different salary attached.*”³⁶ Relying on the European Court of Justice decision in *Jamstalldhetsombudsmannen v. Orebro lans landsting*,³⁷ the Equality Tribunal stated of the level of skill required that:

“It follows that genuine transparency, permitting an effective review is assured only if the principle of equal pay applies to each of the elements of remuneration granted to men or women.”³⁸

Further the Tribunal relied on *Brunnhofner v. Bank der Osterreichischen Postsparkasse AG*,³⁹ which addressed the issue of effectiveness of an employee’s work relative to that of another worker, and on the question of objective justification in a pay related case it stated:

“... it follows from the foregoing that circumstances linked to the person of the employee which cannot be determined objectively at the time of the person’s appointment but come to light only during the actual performance of the employee’s activities, such as personal capacity or the effectiveness or quality of the work actually done by the employee, cannot be relied upon by the employer to justify the fixing, right from the start of the employment relationship, of pay different from that paid to a colleague of the other sex performing identical or comparable work.”⁴⁰

This ensured that the complainant could only be assessed after commencement of work, and difference in skill or capacity cannot be determined as a basis for a starting salary. It was further noted that in this instance the complainant’s capacity was not in issue. The respondent did not succeed in establishing that the difference in pay was objectively justified. No reference was made in the Tribunal to the issue of whether the action was appropriate and necessary. The complainant was awarded compensation for discrimination as well as the correct rate of remuneration for the period complained of.

³⁴ *Roches Stores v. Mandate*, DEP013

³⁵ *Roches Stores v. Mandate*, DEP013

³⁶ DEC-E2006-030 at paragraph 7.

³⁷ Case C-236/98.

³⁸ Case C-236/98 paragraph 54.

³⁹ Case C-381/99.

⁴⁰ Case C-381/99 paragraph 76.

Noonan v. Accountancy Connections,⁴¹ an age discrimination case taken to the Equality Tribunal, addressed the issue of rejecting the ‘overqualified’ candidate, and whether this amounts to indirect discrimination.⁴² The respondent, an employment agency, advertised two posts requiring at least 2-3 years post-qualification experience. The complainant, in his 50’s, had 20 years experience as a qualified accountant. The complainant did not succeed in getting either position, and the respondent stated that 2-3 years was in fact the maximum experience sought, and that the complainant was too senior for the post. The complainant contended that the imposition of a maximum limit would in this instance exclude most candidates over the age of 30; no statistics were introduced to support this argument. The Equality Officer in addressing this lack of proof referred to the Labour Court decision of *NBK Designs Ltd. v. Marie Inoue*,⁴³ and quoted:

‘On the one hand, the burden is on the complainant to prove his case and, viewed in isolation, the statistics produced do not prove it. On the other hand it is most undesirable that, in all cases of indirect discriminate, elaborate statistical evidence should be required before the case can be found proved. The time and expense involved in [p]reparing [sic] and proving statistical evidence can be enormous, as experience in the United States had demonstrated. It is not good policy to require such evidence to be put forward unless it is clear that there is an issue as to whether the requirements of Section 1(1)(b) are satisfied.’⁴⁴

The Equality Officer accepting that statistical proof is not always necessary, accepted that the maximum limit of 2-3 years would in practice ensure that the provision could be complied with by a “*substantially smaller proportion of prospective employees*”⁴⁵ who are in the over 30 age group. There was a *prima facie* case of indirect discrimination; the question that remained for the Equality Tribunal was whether the respondent’s action was capable of objective justification. The respondent referred to candidates with too much post qualification being potentially poor performers as they are more than qualified for the job, or that the job satisfaction of the employee will be reduced. The respondent also referenced the fact that a person with 2-3 years experience would be at the right level of experience for the job, and would have a career path in the organisation. The Equality Tribunal relied on a European Court of Justice decision that stated:

“Mere generalisations concerning the capacity of a specific measure to encourage recruitment are not enough to show that the aim of the disputed provisions is unrelated to any discrimination on grounds of sex or to provide evidence on the basis of which it could reasonably be considered that the means chosen are or could be suitable for achieving that aim.”⁴⁶

The respondent was held not to have shown that the imposition of the maximum requirement of 2-3 years post qualification experience was unrelated to any discrimination based on age, neither had the respondent established that the requirement could be considered as a suitable means of achieving the aim of providing the appropriate skill base. Therefore the respondent failed to rebut the complainants claim of age indirect discrimination.

⁴¹ DEC-E2004-042.

⁴² This case was taken under the Employment Equality Act 1998 prior to amendment, the provision on indirect discrimination is now broader, and arguably easier to prove.

⁴³ ED-02-34, the Labour Court in reaching its decision relied on a number of UK and Northern Ireland decisions, namely: *Price v Civil Service Commission*, [1977] IRLR 291, *Perera v. Civil Service Commission*, [1982] IRLR 147, *Clymo v. Wainsword London Borough Council*, [1989] IRLR 241 and *Briggs v. North Eastern Education Library Board*, [1990] IRLR 181.

⁴⁴ DEC-E2004-042 at paragraph 5.10, This quote is taken from *Perera v. Civil Service Commission*, [1982] IRLR 147 which was repeated verbatim in the Labour Court decision of *NBK Designs Ltd. v. Marie Inoue*, ED-02-34.

⁴⁵ Section 28 of the Employment Equality Act 1998, this was the wording used in the pre-amended Act.

⁴⁶ DEC-E2004-042 at paragraph 5.15 quoting from *Erica Steinicke v Bundesanstalt fur Arbeit* Case C77/02 11 at paragraph 64.

Investigations of harassment cases were considered in some detail in the decision of *Hazra v. Waterford Regional Hospital*,⁴⁷ the Equality Tribunal accepted that there is rarely tangible evidence in respect of harassment cases. The Tribunal relied on authorities from the United Kingdom to the effect that the ‘outcome of the complaint depends on what inferences can be drawn from the facts established by the Tribunal.’⁴⁸ In determining what inferences were appropriate the approach taken in *Qureshi v. Victoria University of Manchester*,⁴⁹ which was upheld by the United Kingdom’s Court of Appeal in *Anya v. University of Oxford*,⁵⁰ and held that the role of the Tribunal was to establish ‘all the facts surrounding the allegations and to decide on balance whether individually or collectively they constitute harassment or discriminatory treatment contrary to the Employment Equality Act 1998, or [whether] such inferences can be drawn from those findings.’ In the case of *Maguire v. North Eastern Health Board*,⁵¹ it was held that an office Christmas party could be considered an activity within the worker’s employment. Therefore the subsequent failure to investigate and act appropriately in respect of the incident meant that the employer was vicariously liable for the harassment. The full extent of the employer’s vicarious liability has been addressed in a number of decisions relating to both harassment and sexual harassment. For an employer to avoid liability for harassment both the Equality Tribunal and the Labour Court consider that it is necessary to have in place procedures which would enable the appellant to avail of working conditions free from harassment.⁵² In 2002 the Equality Authority introduced a ‘Code of Practice on Sexual Harassment and Harassment at Work under the Employment Equality Act 1998.’ This was given statutory effect by the passage of Statutory Instrument number 78 of 2002.⁵³ A number of cases have referred to the statutory Code of Practice in relation to the steps which should be taken by employers.⁵⁴

The Equality Tribunal held that ‘the victimisation of a person for in good faith having taken a claim under the equality legislation is very serious, as it could have the impact of undermining the effectiveness of the legislation’ in *McCarthy v. Dublin Corporation*.⁵⁵ This statement has been reflected in the awards granted for victimisation cases. In *Collins v. Champion’s Public House*,⁵⁶ the Equality Tribunal set out what criteria must be established to establish a prima facie case of victimisation under the Equal Status Act. The complainant must show:

- a) that s/he applied in good faith for redress under the Act, indicated an intention to do so or otherwise satisfied s. 3(2)(j),
- b) that s/he was subjected to specific acts of treatment by the respondent after s/he did so and
- c) that this treatment was less favourable than would have been afforded to a person in similar circumstances who had not taken the action at (a) above.

In *Campbell Catering Ltd., v. Rasaq*⁵⁷ the Labour Court highlighted the difficulties faced by migrant workers, and stated:

⁴⁷ DEC-E2003-044.

⁴⁸ Equality Tribunal, Annual Review, 2004. The rule of precedent in Irish law is that where a superior court has ruled on a particular issue, that court and lower courts are bound by that decision, this is known as binding precedent. Where there has been no previous ruling, Irish Courts may use persuasive precedent. Persuasive precedent can include decisions on a point of law by a foreign court. In practice Irish courts have relied on decisions from a variety of common law jurisdictions.

⁴⁹ UK, EAT 484/98.

⁵⁰ UK, Court of Appeal, (2001) IRLR 377.

⁵¹ DEC-E2002-039.

⁵² *A Hospital v. an Appellant* DEE029 – sexual harassment case in the Labour Court. See also Equality Tribunal’s Annual Legal Review 2003.

⁵³ The Equality 56 Employment Equality Act 1998, as amended by section 39 of the Equal Status Act 2000 which means that the code can be considered in deciding legal proceedings under either Act.

⁵⁴ *A Complainant v. A Financial Institution* DEC-E2003/053 and *A Complainant v. A Health Board*, DEC-E2003-055.

⁵⁵ DEC-E2001-015.

⁵⁶ DEC-S2003-071.

⁵⁷ EED 048.

It is clear that many non-national workers encounter special difficulties in employment arising from a lack of knowledge concerning statutory and contractual employment rights together with difficulties of language and culture. In the case of disciplinary proceedings, employers 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 ... Special measures may be necessary in the case of non-national workers to ensure that this obligation is fulfilled and that the accused worker fully appreciates the gravity of the situation and is given appropriate facilities and guidance in making a defence.

Here the Labour Court clearly suggest a positive duty in respect of non-national workers.

In *17 Complainants v. Eamonn Murray t/a Kilnaleck Mushrooms*,⁵⁸ this case was taken under the Unfair Dismissals Act 1977-1993, to the Employment Appeals Tribunal. The employees were employed as mushroom pickers. In January 2006 the employees left their employment due to a dispute and contacted their local SIPTU office.⁵⁹ The Union official contacted the employer who stated: "they're not with me now, they're with SIPTU." He later denied this, and denied that they were dismissed, or that they were dismissed because they had joined a trade union. The Employment Appeals Tribunal determined that the employees were unfairly dismissed because they had joined a trade union. The dismissals were held to be blatantly unfair due to the employees being non-nationals with limited English and having being brought to Ireland specifically to pick mushrooms. The Tribunal awarded the maximum award of 2 years salary, €26,000, in addition to varying amounts of compensation for lack of notice and annual leave/holiday pay to the 13 employees that proceeded with their claims. The total award was €355,850. This is one of the highest awards made by the Employment Appeals Tribunal, and suggests that the Employment Appeals Tribunal will not tolerate exploitation of non-national workers.

Prior to the transposition of the Race Directive, the Labour Court were determining a race discrimination case, that of *Citibank v. Massinde Ntoko*⁶⁰ and determined that the court was satisfied that it was obliged to interpret and apply the relevant provisions of the Act and the rules of evidence in line with the wording and purpose of the provisions on the burden of proof under Article 8 of the Race Directive. The Race Directive was transposed with the introduction of the Equality Act 2004.

The Equality Tribunal in the case of a *Health Service Employee v. The Health Service Executive*,⁶¹ held that in this instance obesity could be considered an imputed disability. The employee had been offered the post of Staff Nurse, subject to a medical examination; medical clearance was not provided because of the complainant's weight, which it was alleged would not permit her to do the job. She was informed that her appointment was deferred subject to her satisfying the standards necessary for health clearance, and she would be reviewed in six months. Throughout the period where the respondent refused to make her permanent the complainant was deployed as a Staff Nurse when the respondent needed her. The complainant claimed that the employer in their actions imputed a disability to her, and whether obesity amounted to a disability was not in itself an issue. The respondents argued that obesity was not a disability. The Equality Officer referring to a letter from the respondent which stated about her weight that: "None-the-less this condition does pose significant risk to [Ms. A's] health and is an independent predictor of work related disability." A different letter stated: "you have a serious weight problem which has been raised with you

⁵⁸ UD155/200.

⁵⁹ SIPTU; The Services, Industrial, Professional and Technical Union is one of the largest trade unions in Ireland.

⁶⁰ EED 045.

⁶¹ DEC-E2006-013.

in order that you might address the significant risk to your own health and also the fact that this problem is predictive of work related impairment." The Equality Officer ultimately held that she was not going to determine whether obesity was a disability but found that the respondent had imputed a disability to the complainant as a result of her weight.

Section 34 of the Employment Equality Act 1998-2004 contains several exemptions related to the age ground. Some of these exemptions have been invoked by employers, for example in *Leahy v. Limerick City Council*,⁶² the employer sought to rely on section 34(4) relating to mandatory retirement ages. The complainant in this action was a fire-fighter who was obliged to retire from his position at the age of 55. He claimed age discrimination, as different retirement ages were applied to fire officers. Equally the complainant was able to show that extensions of service beyond the age of 55 had been granted to fire-fighters in his district, and other local authorities had fire-fighters in service who were over 55 years of age. The respondent relied on section 34(4) and contended that as employers they were permitted to set different retirement ages for employees of different categories, and that fire-fighters formed a distinct category of employee from fire officers. Fire officers were required to have appropriate third level qualification for the post, there was a managerial function to the post, and they attended fires only in a supervisory role. The respondent also contended that the terms and conditions of the complainant's employment stated that there was a mandatory retirement age of 55. There had been extensions to this in the past but these were exceptional cases and only sanctioned for operational reasons when the respondent was experiencing staff shortages. The respondent set out the rationale underpinning the introduction and operation of the mandatory retirement age. The Equality Officer held that the respondent had consistently applied the retirement age of 55 for fire-fighters since 1974; those that stayed in service beyond that age did so as a result of a Labour Court Recommendation, or because exceptional circumstances existed, and further these extensions occurred at a time when age discrimination was not unlawful. The Equality Officer also accepted that fire-fighters and fire officers were different categories of employee and consequently, she held that it was not unlawful for the respondent to set different mandatory retirement ages for the two groups.

1. GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

- a) *Briefly specify the grounds covered (explicitly and implicitly) and the material scope of the relevant provisions. Do they apply to all areas covered by the Directives? Are they broader than the material scope of the Directives?*
- b) *Are constitutional anti-discrimination provisions directly applicable?*
- c) *In particular, where a constitutional equality clause exists, can it (also) be enforced against private actors (as opposed to the State)?*

The Constitution, Bunreacht na hEireann, 1937 contains an equality clause, which states:

40.1 All citizens shall, as human persons, be held equal before the law.

This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.

To date the Irish Supreme Court have been disinclined to rigorously enforce the equality provision.⁶³ This provision has been interpreted by the Irish Supreme Court as not requiring identical treatment of all persons without recognition of differences in relevant

⁶² DEC-E2003-038.

⁶³ Casey, *Constitutional Law in Ireland*, 3rd Ed Dublin 2000.

circumstances.⁶⁴ The provision forbids arbitrary discrimination. The difficulty with the provision is reflected in the broad discretion the Irish Supreme Court has in respect of justifying discrimination. In *Draper v. Attorney General* [1984] IR 277 the Supreme Court held that the failure of the legislature to make it possible for disabled people physically to vote in general elections did not infringe Article 40.1. In *Norris v. Attorney General* [1984] IR 36 the Supreme Court rejected a challenge to legislation which criminalized consensual homosexual conduct between adult males, but did not criminalise similar conduct between females. The Supreme Court upheld the legislation and in respect of the distinction between male and female conduct the court held that the legislature was ‘perfectly entitled to have regard to the difference between the sexes and to treat sexual conduct or gross indecency between males as requiring prohibition because of the social problem which it creates, while at the same time looking at sexual conduct between females as not only different but as posing no such social problems.’⁶⁵ In *Murphy v. Attorney General*, [1982] IR 241 the Supreme Court reviewed a taxation law which ensured that married couples were worse off than if they were an unmarried couple living together. This law was deemed unconstitutional but not because of the equality ground, in that regard the Court stated that the inequality was ‘justified by the particular social function under the Constitution of married couples living together.’⁶⁶ The Constitution Review Group have stated, the provision ‘has too frequently been used by the courts as a means of upholding legislation by reference to questionable stereotypes, thereby justifying discrimination.’⁶⁷ It is not clear whether the equality guarantee may be enforced in actions between private parties.⁶⁸

In *Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321 the Supreme Court stated ‘the forms of discrimination which are, presumptively at least, prescribed by Article 40.1 are not particularised: manifestly, they would extend to classifications based on sex, race, language, religious or political opinions.’⁶⁹ It should be noted that it was this case that determined that a requirement on employers to provide reasonable accommodation to disabled workers, providing that accommodation did not give rise to an undue burden was in fact unconstitutional. It seems therefore that the equality provision is far from satisfactory.

The Preamble of the Constitution reflects a religious theme to the Constitution, it states:

In the name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred,

We, the people of Eire,

Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial, ...

Do hereby adopt, enact, and give to ourselves this Constitution.

The preamble has been referred to in several important Constitutional cases,⁷⁰ it has been referred to in an interpretative context. The preamble has never formed the sole basis for any Constitutional case. Article 44 of the Irish Constitution specifically addresses religion and the free practice of religion. This provision states:

44.1 The State acknowledges that the homage of public worship is due to Almighty God. It shall hold his name in reverence, and shall respect and honour religion.

44.2.1 Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.

⁶⁴ *de Búrca and Anderson v. A.G.* [1976] IR 38 and *O’Brien v. Keogh* [1972] IR 144.

⁶⁵ *Norris v. Attorney General*, [1984] IR 36 at 59

⁶⁶ *Murphy v. Attorney General*, [1982] IR 241 at 284.

⁶⁷ Government of Ireland, (1996) *Report of the Constitution Review Group*, at 228

⁶⁸ Casey, *Constitutional Law in Ireland*, 3rd Ed Dublin 2000.

⁶⁹ *Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321 at 347.

⁷⁰ *Attorney General v. Southern Industrial Trust*, (1960) 94 ILTR 161; *McGee v. A.G.*, [1974] IR 284

- 44.2.2 The State guarantees not to endow any religion.
- 44.2.3 The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status.
- 44.2.4 Legislation providing 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.
- 44.2.5 Every religious denomination shall have the right to manage its own affairs, own acquire and administer property, movable and immovable, and maintain institutions for religious or charitable purposes.
- 44.2.6 The property of any religious denomination or any educational institution shall not be diverted save for necessary works of public utility and on payment of compensation.

Article 44 is focused on the free practice of religion. Prior to the fifth amendment the Irish Constitution did grant special privilege to particular religious denominations.⁷¹ The Constitution Review Group stated of this provision that:

Broadly speaking, the existing provisions of Article 44 are satisfactory and have worked well. The key aspects of Article 44 – the guarantees of free practice of religion and the twin prohibitions of non-endowment and non-discrimination – are far-reaching and comprehensive. The Review Group is of course, aware that it has been frequently suggested that the State has a confessional ethos which tends to favour the majority religion at the expense of religious minorities. If this is so the fault lies elsewhere than with these provisions.⁷²

2. THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination

Which grounds of discrimination are explicitly prohibited in national law? All grounds covered by national law should be listed, including those not covered by the Directives.

The Employment Equality Act 1998-2004 and Equal Status Act 2000-2004 both prohibit discrimination on nine grounds: Marital Status, Family Status, Sexual Orientation, Religious Belief, Age, Disability, Gender, Race and Membership of the Traveller Community.⁷³ It is possible to take cases on the basis of multiple/double discrimination, under both of the anti-discrimination statutes: *A Named Female v. A Named Company*,⁷⁴ in this case it was held that the complainant was discriminated against on the grounds of both gender and age; and *Maughan v. Glimmerman*,⁷⁵ where the complainant claimed discrimination on the grounds of membership of the Traveller community, disability, family status. The Equality Officer found discrimination on the basis of his family status only.

Protection from discriminatory dismissal is also guaranteed by the Unfair Dismissals Acts 1977 and 1993. This protection is governed by section 6(2) and prohibits discrimination in respect of union membership, religious or political opinions, for taking an action against the employer, race, colour sexual orientation, age or membership of the Traveller community. These terms are not defined within the legislation.⁷⁶ The Prohibition of Incitement to Hatred

⁷¹ Government of Ireland, (1996) *Report of the Constitution Review Group* at 368

⁷² Government of Ireland, (1996) *Report of the Constitution Review Group* at 369

⁷³ Section 3(2)(a-j) Equal Status Act 2000-2004 and section 6(2)(a-i) Employment Equality Act 1998-2004.

⁷⁴ DEC-E2002-014

⁷⁵ DEC-S2001-020

⁷⁶ The Unfair Dismissal Act does not apply to most civil servants and to some members of the public sector: Gardai and the Defence Forces.

Act of 1989 prohibits incitement to hatred on account of a person's race, colour, nationality, religion, ethnic or national origins, membership of the Traveller community or sexual orientation. These terms are not defined within the legislation.

2.1.1 Definition of the grounds of unlawful discrimination within the Directives

a) *How does national law on discrimination define the following terms: racial or ethnic origin, religion or belief, disability, age, sexual orientation?*

Is there a definition of disability on national level and how does it compare with the concept adopted by the European Court of Justice in case C-13/05, Chacón Navas, Paragraph 43, according to which "the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life"?

b) *Where national law on discrimination does not define these grounds, how far have equivalent terms been used and interpreted elsewhere in national law (e.g. the interpretation of what is a 'religion')?*

c) *Are there any restrictions related to the scope of 'age' as a protected ground (e.g. a minimum age below which the anti-discrimination law does not apply)?*

d) *Please describe any legal rules (or plans for the adoption of rules) or case-law (and its outcome) in the field of anti-discrimination which deal with situations of multiple discrimination.*

Both the Employment Equality Act 1998-2004 and the Equal Status Act 2000-2004 in broadly similar terms:

Racial or ethnic origin - The ground of race relates to people who are of a different race, colour, nationality or ethnic or national origin.⁷⁷ Also relevant here is the definition of the Membership of the Traveller Community which is defined in Section 2(1) of the Employment Equality Act, 1998 as amended by the Equal Status Act “ ‘Traveller community’ means 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. Neither the legislation nor case law has determined whether members of the Traveller community are a racial or ethnic minority.”⁷⁸

Religion - Section 2(1) defines religion as “‘religious belief,’ includes religious background or outlook.” This is further defined at section 6(2)(e) as prohibiting discrimination with respect to people of different religious beliefs and includes discrimination where someone has no religious belief.

Disability - Section 2(1) defines disability 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,

⁷⁷ Section 6(2)(h) Employment Equality Act 1998-2004

⁷⁸ It has been contended by a number of groups that we, in Ireland, recognise Traveller's as members of a distinct ethnic group. If so recognised they would be covered within the terms of the Race Directive; – see particularly <http://www.nceri.ie/submissions/04MarTravellerEthnicity.pdf>. The Equality Tribunal have accepted a person's self-identification as a Member of the Traveller Community as evidence of such membership. Membership of the Traveller community is both individual and communal in nature, and membership does not cease on a person ceasing to have a nomadic way of life.

- d) a condition or malfunction which results in a person learning differently from a person without the condition or malfunction, or
 - e) a condition, illness or disease which affects a person's thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour,
- and shall be taken to include a disability which exists at present, or which previously existed but no longer exists, or which may exist in the future or which is imputed to a person;

The Irish definition is broader than that set out by the European Court of Justice in the *Chacón Navas*⁷⁹ case. The Irish definition does cover those who could have a “limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life.”⁸⁰ The *Chacón Navas* case also holds that for a limitation to be regarded as a disability it must be probable that it will last for a long time,⁸¹ in addition a disability is deemed to be different from a sickness.⁸² The Irish definition of disability does not contain such distinctions requiring neither the necessity for a condition lasting a long time, or making the distinction between disability and sickness/illness. The Irish definition includes those that come within the *Chacón Navas*, and also covers those that have a disability at present, a history of a disability, a future disability or an imputed disability.⁸³ The Labour Court in *Customer Perception Ltd. v. Leydon*,⁸⁴ held that a temporary injury constituted a disability within the meaning of the Employment Equality Act 1998. The injury in question resulted from a road traffic accident and the complainant sustained injuries that resulted in pain and reduced movement in her shoulder, back and neck. The Labour Court held that this came under subsection (c) above, stating: ‘Taking the ordinary and natural meaning of the term malfunction (connoting a failure to function in a normal manner), the condition from which the complainant suffered in consequences of her accident amounted to a malfunction of parts of her body. It thus constituted a disability within the meaning of the Act. Moreover, in providing that the term comprehends a disability which existed but no longer exists, it is clear that a temporary malfunction comes within the statutory definition.’ In *A Civil Servant v. The Office of the Civil Service and Local Appointments Commissioners*,⁸⁵ the Equality Tribunal accepted that illness could amount to a disability within the terms of the Employment Equality Act 1998-2004. The complainant alleged disability discrimination, the respondent to the action challenged whether the conditions of the complainant amounted to a disability within the meaning of the Act. The Tribunal was therefore required to determine whether the complainant's illnesses amounted to a disability. The complainant suffered from asthma and irritable bowel syndrome. The Tribunal held that having regard to paragraph (c) of the definition of disability, “both asthma and irritable bowel syndrome are malfunctions of the airways of the lungs and the intestinal tract respectively ... I therefore accept that both conditions amount to disabilities within the meaning of the Act.”⁸⁶ The Irish courts have interpreted the definition of disability in an inclusive manner, with most people who claim to have a disability being found to be within the protected group. Disability as defined and interpreted in Irish law has ensured that the purpose of the equality legislation has not been undermined by using the ground of disability as a gate-keeper preventing access to the Equality Tribunal.

⁷⁹ Case C-13/05

⁸⁰ Case C-13/05 paragraph 43

⁸¹ Case C-13/05 paragraph 45

⁸² Case C-13/05 paragraph 44

⁸³ See *Health Service Employee v The Health Service Executive*, DEC-E2006-013 discussed at 0.3 above.

⁸⁴ ED/02/1

⁸⁵ DEC-E2004-029

⁸⁶ DEC-E2004-029 at para 5.10: See also *Roche v. Alabastor*, DEC-S2002-086 and *A Complainant v. Café Kylemore*, DEC-S2003-024 where the Tribunal accepted that chronic conditions could amount to a disability within the terms of the Equality legislation.

Age - The age ground as set out in section 6(f) refers to people of different ages.

Sexual Orientation - Section 2(1) states that ‘sexual orientation’ means heterosexual, homosexual or bisexual orientation.

Neither the Unfair Dismissals Act 1977 and 1993, nor the Prohibition on the Incitement to Hatred Act 1989 defines the terms set out within the parameters of those Acts.

Multiple Discrimination – There are currently no rules that deal with the situation of multiple-discrimination. There are an abundant number of cases taken on multiple grounds. The figures produced by the Equality Tribunal for 2005⁸⁷ show that under the Employment Equality Act 1998-2004 almost one in four claimants allege multiple-discrimination, and under the Equal Status Act 2000-2004 more than one in four claimants allege multiple-discrimination. In a recent case *O’Brien v. ComputerScope Limited*,⁸⁸ the complainant alleged age and gender discrimination, the Equality Tribunal in finding discrimination dealt with the grounds of discrimination as a collective issue and did not identify separately how the complainant was discriminated against on each ground. In the Labour Court in *Superquinn v. Freeman*⁸⁹ the appellant challenged the Equality Officers decision to treat the alleged discriminatory grounds (age, marital status and family status) as a collective issue. The Labour Court while finding for the appellant did not address this point.

2.1.2 Assumed and associated discrimination

a) *Does national law prohibit discrimination based on assumed characteristics? e.g. where a woman is discriminated against because another person assumes that she is a Muslim, even though that turns out to be an incorrect assumption.*

b) *Does national law or case law prohibit discrimination based on association with persons with particular characteristics (e.g. association with persons of a particular ethnic group)? If so, how?*

When referring to the term Employment Equality Act in paragraphs 2.1-2.7 below covers the entire scope of the Employment Equality Act 1998-2004 as set out in paragraphs 3.2.1, 3.2.2, 3.2.3, 3.2.4, and 3.2.5 below unless stated otherwise. When referring to the Equal Status Act in paragraphs 2.2-2.7 below this covers the entire scope of the Equal Status Act 2000-2004 as set out in paragraphs 3.2.6, 3.2.7, 3.2.8, 3.2.9, and 3.2.10 below unless stated otherwise.

Both the Employment Equality Act and the Equal Status Act prohibit discrimination on the basis of a discriminatory ground that is imputed to an individual.⁹⁰ Both Acts also prohibit discrimination by association,⁹¹ and discrimination which exists now, existed but no longer exists, which may exist in the future.⁹² Equally section 8(4) of the Employment Equality Act prohibits ‘rules or instructions which would result in discrimination against an employee or class of employees.’ The Equal Status Act has covered discrimination by association since the inception of the Act. In the case of *Six Complainants v. a Public House*,⁹³ a group of six were refused admittance to a premises because of one individual’s disability. The premises failed to give reasons for their refusal of admittance and this amounted to a failure to reasonably accommodate that individual, and by association all six complainants, who were

⁸⁷ <http://www.equalitytribunal.ie/index.asp?locID=80&docID=1281>

⁸⁸ DEC-E2006-030; see section 2.3 below for a further discussion of this case.

⁸⁹ DEE0211; see section 2.2 below for a further discussion of this case.

⁹⁰ Section 6(1) Employment Equality Act 1998-2004 and section 3(1) of the Equal Status Act 2000-2004.

⁹¹ Section 3(1)(b) Equal Status Act 2000-2004, section 6(1)(b) Employment Equality Act 2000-2004.

⁹² Section 6(1)(a) Employment Equality Act 1998-2004, Section 3(1)(a) Equal Status Act 2000-2004.

⁹³ DEC-S2004-009-014

also refused admittance. A similar outcome was found in *Kiernan v. The Newbury Hotel*,⁹⁴ where the hotel refused to serve a group on a work night out as some of the members of the group were members of the Traveller Community, the tribunal found discrimination by association. In *McDonnell v. Dolan's Bar*,⁹⁵ a doorman refused a member of the settled community, who was married to a member of the Traveller Community, access to a public house. When questioned about the reasons for refusal, the doorman pointed to his wife and stated that the problem was his 'excess baggage.' The husband succeeded in proving discrimination by association; the association was with his wife who was a member of the Traveller community.

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

a) *How is direct discrimination defined in national law?*

b) *Does the law permit justification of direct discrimination generally, or in relation to particular grounds? If so, what test must be satisfied to justify direct discrimination? (See also 4.7.1 below).*

c) *In relation to age discrimination, if the definition is based on 'less favourable treatment' does the law specify how a comparison is to be made?*

Section 6 of the Employment Equality Act 1998-2004 prohibits direct discrimination in employment. This section prohibits actions, which treat one person 'less favourably than another is, has been or would be treated.' The definition of direct discrimination relates to all nine discriminatory grounds. The legislation does not specify how a comparison is to be made in the context of any of the nine grounds. The provision has been interpreted as incorporating the ECJ decision of *Finanzamt Koeln-Alstadt v. Roland Schumacker*,⁹⁶ and *Gillespie & ors v. Northern Health and Social Services Board*.⁹⁷ These decisions initially related to discrimination based on nationality, and gender respectively, the Equality Courts have extended them to cover all nine protected grounds covered by the Irish Acts. There is no necessity for a complainant to show that there was an intention to discriminate, it is sufficient if the actions do in fact discriminate against a person on any of the discriminatory grounds.⁹⁸

The legislation is silent on how a comparison is made in respect of age discrimination. In *Perry v. Garda Commissioner*⁹⁹ the case was whether the voluntary retirement scheme benefited those under 60 and therefore discriminated on the basis of age. The complainant in this case was 64 and her comparator was 59. The respondent contended that the differences were designed to compensate the comparator for missing more years' paid employment. With the use of a hypothetical comparator, one being 60 and a day, and the other being 59 years old and three hundred and sixty four days old, in effect a difference of two days. The difference financially was that the person who was two days younger would gain almost IR£6,000 more. Therefore in this instance two days of a difference in age was sufficient difference for a comparator, and discrimination on the ground of age was found. In a second case that of *Superquinn v. Freeman*¹⁰⁰ the Labour Court held that a difference in age between a 28 year old and a 31 year old was not enough to suggest age discrimination had occurred. In *Reynolds v. Limerick Country Council*,¹⁰¹ it was held that a difference of 8 years between the complainant and the comparator was sufficient to maintain a claim of age discrimination. See

⁹⁴ DEC-S2006-080

⁹⁵ DEC-S2006-058

⁹⁶ Case C-279/93 [1995] ECR-I-225

⁹⁷ [1996] ECJ C342/93 See section 0.3 above.

⁹⁸ *St. James Hospital v. Eng* EDA023, July 2002.

⁹⁹ *Perry v. Garda Commissioner*, DEC-E2001-029

¹⁰⁰ *Superquinn v. Freeman*, DEE0211, November 2002.

¹⁰¹ *Reynolds v. Limerick County Council*, DEC-E2003-032

also the Labour Court decision *Department of Health and Children v. Gillen*, discussed in detail in section 0.3 above.

Direct Discrimination under the Equal Status Act 2000-2004 defines direct discrimination as treating a person 'less favourably than another person is, has been or would be treated in a comparable situation.'¹⁰² The prohibition on less favourable treatment applies equally to all nine discriminatory grounds.¹⁰³ The legislation does not specify how a comparison is to be made in the context of any of the nine grounds.

2.2.1 Situation Testing

- a) *Does national law permit the use of 'situational testing'? If so, how is this defined and what are the procedural conditions for admissibility of such evidence in court.*
- b) *Is there any reluctance to use situational testing as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law (European strategic litigation issue)?*
- c) *Outline important case-law within the national legal system on this issue.*
- d) *Outline how situation-testing is used in practice and by whom (e.g. NGOs)*

There are no procedural or other rules prohibiting the use of 'situational testing.' Situational testing does not occur with any regularity in the Irish context. Anecdotal evidence suggests that Judges from the Irish superior courts would be hostile to this form of evidence, seeing it as a form of entrapment.¹⁰⁴ There is therefore a reluctance to use situational testing. Thus it would appear, that for the present developments in other jurisdictions are not impacting on the position at present.

That being stated there are some cases where it may be inferred from the facts that a form of situational testing is taking place. In *Delaney v. The Harp Bar*,¹⁰⁵ the complainants were members of the Traveller community and were refused entry to the respondent's premises. During the case the Equality Officer referred to the events of the night in question where the respondents actually visited eight different pubs only one of which was willing to serve them. The complainants litigated against all of the other seven pubs, including the pub subject to the case at hand.¹⁰⁶

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

- a) *How is indirect discrimination defined in national law?*
- b) *What test must be satisfied to justify indirect discrimination?*
- c) *Is this compatible with the Directives?*
- d) *In relation to age discrimination, does the law specify how a comparison is to be made?*

Equal Pay indirect discrimination is governed by section 19(4) of the Employment Equality Act 1998-2004. The Equality Tribunal reviewed this section of the legislation in *O'Brien v. ComputerScope*,¹⁰⁷ see section 0.3 above where it is discussed in detail. Indirect

¹⁰² Section 3(1)(a) Equal Status Act 2000-2004

¹⁰³ See section 2.1 above; and *Department of Health and Children v. Gillen* EDA041 at 0.3 above which sets out in detail the tests considered by the Labour Court and the Equality Tribunal when considering whether deduce that age discrimination has occurred.

¹⁰⁴ This issue has yet to be addressed in a court action.

¹⁰⁵ DEC-S2002-53/56

¹⁰⁶ *Delaney v. Kilford arms*, DEC-S2002-033/36, *Delaney v. Shems Bar*, DEC-S2002-037/40, *Delaney v. Bidly Earlyls*, DEC-S2002-041/044, *Delaney v. Quays Bar (River Court Hotel)*, DEC-S2002-045/048, *Delaney v. Matt the Millars*, DEC-S2002-049/052), *Delaney v. The Harp*, DEC-S2002-053/056, *Delaney v. Paris Texax*, DEC-S2002-057/060.

¹⁰⁷ DEC-E2006-030 – See also section 0.2 above.

discrimination is deemed to occur where an apparently neutral provision puts a person belonging to a "protected group" at a 'particular disadvantage' in respect of remuneration compared with other employees of their employer. The test to justify indirect discrimination is that the discriminatory provision must be objectively 'justified by a legitimate aim and the means of achieving the aim are appropriate and necessary.'¹⁰⁸ Statistical evidence may be used to prove indirect discrimination. Importantly the provision also ensures that where it can be shown that there has been unequal treatment with regard to remuneration, compliance requires the complainant should be given the higher remuneration. Article 2(2)(b) of Directives 2000/43/EC and 2000/78/EC permit the use of a hypothetical comparator; the Employment Equality Act 1998-2004 does not in the context of equal pay indirect discrimination. The Irish provision is not fully compatible with the Directives.

Section 22 of the Employment Equality Act 1998-2004 prohibits indirect discrimination in the non-pay context. Indirect discrimination is deemed to occur where an apparently neutral provision puts a person of belonging to a particular protected group at a 'particular disadvantage' in respect of an employment matter as compared with other employees of their employer.¹⁰⁹ The test to justify indirect discrimination is that the discriminatory provision must be objectively 'justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.'¹¹⁰ It is possible to use statistics in determining whether or not indirect discrimination has occurred.¹¹¹ These provisions do not permit the use of hypothetical comparator and are therefore not in compliance with Article 2(2)(b) of both Directives.

The legislation does not specify how a comparison is to be made, but guidance can be gleaned from two cases decided under the pre-amended provisions. In *Martin v. Concern*,¹¹² the claimant alleged both gender and age discrimination. There were 148 applications for the job, 13 of whom were interviewed. To determine the comparator group the Equality Officer referred to those that were short-listed for the position and those that were not. The group of 148 people were considered by the reference to age groups, that is how many were aged between 20-29, how many between 30-39, how many between 40-49 and how many were over 50. In *O'Connor v. Lidl Ireland*,¹¹³ the claimant alleged indirect age discrimination. The claimant had responded to an advertisement for the position of District Manager. The advertisement stated that the ideal candidate should be a graduate with 2 – 3 years experience. The complainant had 31 years experience but was not called for interview. The Equality Officer in this case sought to rely on the applications for the job in question and make the relevant comparisons and rely on the relevant statistics from the case in question. That information had been destroyed. As a result the Equality Officer sought the same information for a different time period with a view to reviewing the general if not the specific practice of the company. The Equality Officer when reviewing the statistics that were available referred to the comparison between those called for interview that were under 40 and those that were over 40 and over 50.

The Equality Act of 2004 also amended the definition of indirect discrimination in the provision of goods and services. Indirect discrimination in the Equal Status Act 2000-2004 is now defined in an identical manner to the Employment Equality Act. Indirect discrimination is deemed to occur where an apparently neutral provision puts a person belonging to one of

¹⁰⁸ Section 19 (4) b) Employment Equality Act 1998-2004

¹⁰⁹ Section 31(1)(a) states that section 22 (1) and 22 (1A) of the Employment Equality Act 1998-2004 now govern this issue of indirect discrimination.

¹¹⁰ Section 22 (1)(b) Employment Equality Act 1998-2004.

¹¹¹ Section 22(1A) Employment Equality Act 1998-2004.

¹¹² DEC-E2005/029, this decision was overturned in the Labour Court, EDA0518 but not on this point.

¹¹³ DEC-E2005/012

the protected grounds at a “particular disadvantage compared with other persons, unless the provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.”¹¹⁴ This provision has yet to be litigated. In relation to age discrimination, the legislation does not specify how a comparison is to be made. The cases of *Perry v. Garda Commissioner*,¹¹⁵ *Superquinn v. Freeman*¹¹⁶ and *Reynolds v. Limerick Country Council*,¹¹⁷ discussed in section 2.2 above would be instructive as to how comparisons on the age ground will be determined.

2.3.1 Statistical Evidence

- a) *Does national law permit the use of statistical evidence to establish indirect discrimination? If so, what are the conditions for it to be admissible in court.*
- b) *Is the use of such evidence commonly used? Is there any reluctance to use statistical data as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law?*
- c) *Please illustrate the most important case law in this area.*
- d) *Are there national rules which permit data collection? Please answer in respect of all 5 grounds.*

National law does permit the use of statistical evidence to establish indirect discrimination in respect of all five grounds.¹¹⁸ Where statistical evidence is available its use is common, and the Equality Tribunal have shown no reluctance to use such evidence. The biggest issue in respect of the use of statistics is that there are no clear rules on their use. Equality Officers tend to rely on statistics relating to a specific case,¹¹⁹ where they were not available then reliance was placed on an employer’s statistics.¹²⁰ In *Sweeney v. Saehan Media*¹²¹ a case in relation to discrimination on the basis of membership of the Traveller Community the complainant sought to rely on Government statistics, from the Census and the Central Statistics Office to highlight the fact that members of the Traveller Community were seven times less likely to achieve the Leaving Certificate when compared with the settled community. The Equality Officer stated that it is for the complainant to show, in the first instance that the requirement (in this instance the Leaving Certificate) operated to the disadvantage of one person over another and that in practice can be complied with by a substantially smaller number of people who are members of the Traveller community than those who are not. The Equality Officer noted that the complainant had submitted data from a number of sources,¹²² and stated ‘I note that there is a serious lack of data on Travellers and their lifestyle in general and that the complainant has sought to use a range of research from a number of sources which, when combined, yields the aforementioned results. In light of the absence of any clearer data I am inclined to accept the scenario set out by the complainant represents as accurate a picture of the situation as is possible in the circumstances.’¹²³ The Equality Officer did not find for the complainant because she could show that the employer had in fact interviewed a number of people, including the complainant, who did not have the Leaving Certificate, and in fact hired people who had not attained that educational standard,

¹¹⁴ Section 3(1)(c) Equal Status Act 2000-2004

¹¹⁵ *Perry v. Garda Commissioner*, DEC-E2001-029

¹¹⁶ *Superquinn v. Freeman*, DEE0211, November 2002.

¹¹⁷ *Reynolds v. Limerick County Council*, DEC-E2003-032

¹¹⁸ Section 19(4)(c) and 22(1A) Employment Equality Act 1998-2004. See particularly *Department of Health and Children v Gillen*, EDA041.

¹¹⁹ *Martin v. Concern*, DEC-E2005/029,

¹²⁰ *O’Connor v. Lidl Ireland* DEC-E2005/012, the Equality Officer did express her concern in relation to the value of such statistics.

¹²¹ DEC-E2003/017.

¹²² The complainant relied on information from a variety of sources to establish a statistical difference in treatment, they included: Traveller Health and National Strategy 2002-2005, CSO, Department of Education.

¹²³ Para 6.15, DEC-E2003/017.

therefore the complainant could not show that the requirement operated to their disadvantage. The Equality Officer did suggest that the company review their job specifications for each post, and stated: 'it might also take steps to ensure that newspaper advertisements do not contain references to educational requirements that a category of individuals covered by the Act is substantially less likely to have attained, unless that level of education can be objectively justified or reasonable in the circumstances, as the case requires.'¹²⁴ The Equality Tribunal reviewed this section of the legislation in *Noonan v. Accountancy Connections*,¹²⁵ see section 0.3 above where it is discussed in detail.

The Data Protection Act 1988-2003 permits employers, education providers, health authorities and other public bodies to keep records of their workforce in respect of their ethnic or racial origin, disability, religion or belief or sexual orientation of their workers. Data relating to these grounds would be classified as sensitive data, and certain criteria apply in the processing of this form of personal data.¹²⁶ The primary purpose of amending the Data Protection Act of 1988 by means of the Data Protection (amendment) Act 2003 was to give effect to the Provisions of Directive 95/46/EC of the European Parliament and of the Council. Therefore European provisions clearly influence the content of the Data Protection Laws. On a national level, there is a periodic census of population gathered every five years. The last census took place in 2002, and the next census is due in 2006.¹²⁷ The census of 2002 collected data on Nationality, membership of the Irish Traveller Community, Religion, Age, and a question on disability.¹²⁸ The 2006 census plans to ask questions in respect of Religion, Age, a question on Disability with a new wording,¹²⁹ and a new question on Ethnic Origin, which will include membership of the Irish Traveller Community as one of the groups specified. There are no questions on the issue of sexual orientation.¹³⁰ These questions require the individual to self-identify their characteristics.¹³¹

2.4 Harassment (Article 2(3))

a) How is harassment defined in national law? Include reference to criminal offences of harassment insofar as these could be used to tackle discrimination falling within the scope of the Directives.

b) Is harassment prohibited as a form of discrimination?

c) Are there any additional sources on the concept of harassment (e.g. an official Code of Practice)?

The Employment Equality Act 1998-2004 prohibits harassment by means of section 14A. The legislative provision states that harassment can occur at the place of employment or otherwise in the course of employment. The provision prohibits harassment by an employer, a colleague, a client, customer or other business contact of the employer.¹³² The employer may be held vicariously liable for the harassment of the victim, if the harassment is by a person

¹²⁴ Para 6.17, DEC-E2003/017.

¹²⁵ DEC-E2004-042

¹²⁶ Section 2(b) Data Protection Act 1988-2003.

¹²⁷ The 2002 census was held a year later than scheduled due to the Foot and Mouth Crisis.

¹²⁸ The definition of disability contained in the census document refers to the necessity for conditions to be long-lasting, and for the condition to substantially limit certain physical activities, this does not correlate with the definition of disability used in the Equality Acts.

¹²⁹ The new wording, expands the definition of disability, but it is still considerably different from that contained within the Equality Acts.

¹³⁰ This reflects the case law under the Irish Equality Acts to date, sexual orientation is one of the least litigated grounds under the Acts, whereas membership of the Traveller community, Disability, Age and the other grounds are freely litigated.

¹³¹ The legislation currently governing the work of the Central Statistics Office is the Statistics Act of 1993, there is nothing in this Act to suggest that it is or is not guided by developments in other jurisdictions.

¹³² Section 14A(1)(a) Employment Equality Act 1998-2004.

other than the employer.¹³³ There is a statutory defence for the employer and that is that he or she took such steps as are reasonably practicable to prevent the harassment in question, or the person being treated differently as a result of harassment. Harassment is defined as ‘any unwanted conduct’ relating to a discriminatory ground, ‘being conduct 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.’¹³⁴ This conduct can include acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material.¹³⁵ Harassment constitutes discrimination within the terms of the Act. A Code of Practice was also developed; this is the Employment Equality Act, 1998 (Code of Practice) (Harassment) Order, 2002 (S.I. no. 78 of 2002).

The Equal Status Act 2000-2004 also prohibits harassment by means of section 11. The legislative provision relates to the provision of goods and services, including the provision of accommodation and education.¹³⁶ The person responsible for the provision of education, goods, services or accommodation may be vicariously responsible for the harassment by another person in the provision of such service.¹³⁷ There is a statutory defence available for such a person, which is that he or she took such steps as are reasonably practicable to prevent harassment.¹³⁸ Harassment is defined as ‘unwanted conduct’ relating to any discriminatory grounds and that conduct has the purpose or effect of violating a person’s dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person.’¹³⁹ This conduct can include acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material.¹⁴⁰ Harassment is not defined as discrimination within the terms of the Equal Status Act 2000-2004.

The Prohibition on the Incitement to Hatred Act, 1989 was introduced to prohibit hate speech on the basis of a persons’ race, religion, nationality or sexual orientation. Hatred is defined in the Act as hatred against a group on account of their race, colour, nationality, religion, ethnic or national origins, membership of the Traveller community or sexual orientation. This legislation creates a criminal offence incitement to hatred, that involves publishing, distributing, displaying material or behaviour that is threatening, abusive or insulting and is intended or is likely to stir up hatred. The difficulty with this provision relates to the fact that it requires an intention to stir hatred. This has proven to be an exceptionally difficult evidential barrier to overcome.

2.5 Instructions to discriminate (Article 2(4))

Does national law prohibit instructions to discriminate?

Section 14 of the Employment Equality Act, 1998-2004 prohibits what is termed the procuring of discrimination or victimisation. The provision criminalises the conduct of anyone who ‘procures or attempts to procure’ another person to discriminate or victimise within the terms of the provision. Section 2(a) of the Employment Equality Act, 1998-2004 states that “‘discrimination’ includes the issue of an instruction to discriminate and, in Parts V and VI, includes prohibited conduct within the meaning of the Equal Status Act 2000, and cognate words shall be construed accordingly.’ This implies that an instruction to

¹³³ Section 15 Employment Equality Act 1998-2004

¹³⁴ Section 14A(7)(a) Employment Equality Act 1998-2004

¹³⁵ Section 14A(7)(b) Employment Equality Act 1998-2004

¹³⁶ Section 11(1)(a)-(c) Equal Status Act 2000-2004

¹³⁷ Section 42 Equal Status Act 2000-2004

¹³⁸ Section 11 (3) Equal Status Act 2000-2004

¹³⁹ Section 11 (5)(a) Equal Status Act 2000-2004

¹⁴⁰ Section 11 (5)(b) Equal Status Act 2000-2004

discriminate is also prohibited under the terms of the Equal Status Act, although the Act itself contains no specific provision on this point. The Equal Status Act, 2000-2004 prohibits the procurement of another person to engage in prohibited discriminatory conduct under the Act. This is a criminal offence.¹⁴¹

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

- a) How does national law implement the duty to provide reasonable accommodation for disabled people? In particular, specify when the duty applies, the criteria for assessing the extent of the duty and any definition of 'reasonable'. e.g. does national law define what would be a "disproportionate burden" for employers or is the availability of financial assistance from the State taken into account in assessing whether there is a disproportionate burden?*
- b) Does failure to meet the duty count as discrimination? Is there a justification defence? How does this relate to the prohibition of direct and indirect discrimination?*
- c) Has national law implemented the duty to provide reasonable accommodation in respect of any of the other grounds?*
- d) Does national law require buildings and infrastructure to be designed and built in a disability-accessible way? If so, could and has a failure to comply with such legislation be relied upon in a discrimination case based on the legislation transposing Directive 2000/78?*

Both the Employment Equality Act 1998-2004 and the Equal Status Act 2000-2004 impose the obligation to provide reasonable accommodation, this obligation only applies in the context of people with disabilities, it does not apply to any of the other protected grounds. In 1996 the Irish Supreme Court held that the requirement to provide reasonable accommodation as set out in the Employment Equality Bill 1996 and the Equal Status Bill 1996 was unconstitutional.¹⁴² As a consequence, the Employment Equality Act 1998 and the Equal Status Act 2000 were finally introduced the legislature had little choice but to introduce a restrictive provision on reasonable accommodation.¹⁴³ The introduction of the Framework Employment Directive allowed the Irish legislature to overcome the restrictive Supreme Court decision and amend section 16 of the Employment Equality Act 1998 by means of the Equality Act 2004. The definition of reasonable accommodation provided within the Equal Status Act 2000 remains unchanged, as the Framework Employment Directive does not relate to the provision of goods and services.

Section 16 of the Employment Equality Act 1998-2004 provides a new definition of reasonable accommodation. The position with regard to reasonable accommodation is that where a person who has a disability can perform the duties of the post with or without the

¹⁴¹ Section 13 Equal Status Act 2000-2004

¹⁴² The core definition of reasonable accommodation provision under the 1996 Bills was contained in Section 16(3) states: "subject to *Section 35(4)* an employer shall do all that is reasonable to accommodate the person's needs, in particular, by allowing or, as the case may require, making provision for, such treatment or facilities, or by providing such treatment or facilities." This obligation was bounded by section 35(4) which stated: "Section 35(4) Nothing in this Part or Part II applies to discrimination against a person on the disability ground if; (a) that person needs treatment or facilities in order satisfactorily to take part in a selection process or to undertake that employment, and (b) the employer does all that is reasonable to accommodate the needs of that person." The defence contained in the act was that the obligation should not give rise to an 'undue hardship.'

¹⁴³ Section 16 Employment Equality Act, 1998 and Section 4 Equal Status Act 2000. The core section of the Employment Equality Act 1998, was contained in section 16(3) which stated: "(a) For the purposes of this Act, a person who has a disability shall not be regarded as other than fully competent to undertake, and fully capable of undertaking, any duties if, with the assistance of special treatment or facilities, such person would be fully competent to undertake, and fully capable of undertaking, those duties. (b) An employer shall do all that is reasonable to accommodate the needs of a person who has a disability by providing special treatment or facilities to which paragraph (a) relates. (c) A refusal or failure to provide for special treatment or facilities to which paragraph (a) relates shall not be deemed reasonable unless such provision would give rise to a cost, other than a nominal cost, to the employer." The limiting factor in this provision was that the obligation should not give rise to more than a 'nominal cost.'

assistance of ‘appropriate measures’ they will be deemed competent under the Act. The employer has an obligation to take ‘appropriate measures’ to enable a person with a disability to have access to employment, to participate or advance in employment, to undergo training unless such measures would impose a ‘disproportionate burden’¹⁴⁴ on the employer. To determine what amounts to a disproportionate burden, the legislation specifies that, account must be taken of the costs of the measure in question, the scale and financial resources of the employer in question, the possibility of obtaining public funding or other assistance.¹⁴⁵ There are no published cases on this new provision.

Both the Equality Tribunal and the Labour Court interpreted the provision contained in the Employment Equality Act 1998. Some of those cases are instructive. The Labour Court in *A Worker v. An Employer*¹⁴⁶ said of this provision, that the ‘proscription of discrimination on the grounds of disability is not absolute. If a person is, by reason of a disability, unable to fully undertake the duties of a position they may, in accordance with section 16(1) of the Act, be lawfully refused employment or promotion into that position. The applicability of that qualification is itself restricted by the provision of Section 16(3) of the Act.’ The Labour Court went on to state that Section 16 of the Act imposes a duty on employers to accommodate the needs of an employee with a disability. This provision means that special treatment or facilities are not an end in itself, but a means to an end. The end is achieved when the person with a disability is placed in a position where they can have access to, or as the case may be, participate in or advance in employment. The effect of an employer’s failure to fulfil the duty imposed by Section 16(3)(b) of the Act is to negate any defence they might otherwise have under Section 16(1) in a claim of discrimination on the disability ground.

The Labour Court and Tribunal clearly provided that the duty to provide special treatment or facilities is proactive in nature. It includes an obligation to carry out a full assessment of the needs of the person with a disability and of the measures necessary to accommodate that person’s disability. The fullest explanation of the duty to provide reasonable accommodation under the 1998 Act was set out by the Labour Court in *A Health and Fitness Club v. A Worker*.¹⁴⁷ The Labour Court held that the burden was on the employer to ensure that an employee is not fully capable of performing the duties for which they are employed by making ‘adequate enquiries so as to establish fully the factual position in relation to the employee’s capacity.’ The Labour Court held that ‘in practical terms this will normally require a two-stage enquiry, which looks firstly at the factual position concerning the employee’s capability including the degree of impairment arising from the disability and its likely duration. This would involve looking at the medical evidence available to the employer either from the employee’s doctors or obtained independently. Secondly, if it is apparent that the employee is not fully capable Section 16(3) of the Act requires the employer to consider what if any special treatment or facilities may be available by which the employee can become fully capable. ... Finally, such an enquiry could only be regarded as adequate if the employee concerned is allowed a full opportunity to participate at each level and is allowed to present relevant medical evidence and submissions.’

The Employment Equality Act 1998 held that there was a requirement to provide reasonable accommodation as long as it did not give rise to more than a nominal cost. In *An Employee v. A Local Authority*,¹⁴⁸ the Equality Officer had to determine the meaning of ‘nominal cost’ and gave an expansive interpretation of the term. The decision reached by the Equality Officer

¹⁴⁴ Section 16 (3)(b) Employment Equality Act 1998-2004.

¹⁴⁵ Section 16 (3)(c)(i),(ii) and (iii) Employment Equality Act 1998-2004.

¹⁴⁶ 16 [2005] ELR 159

¹⁴⁷ EED037

¹⁴⁸ DEC-E2002-004, this case was not referring to the concept of ‘disproportionate burden’ but the limiting concept of ‘nominal cost’ contained in the Employment Equality Act 1998, prior to amendment in 2004.

held that the reasonable accommodation did not give rise to more than a ‘nominal cost.’ In reaching that decision he considered the size and resources of the employer, whether it was public or private sector employment and also noted the availability of state financial aid available under the Employment Support Scheme. Based on these criteria the Equality Officer held that the ‘nominal cost’ threshold had not been reached.

The Employment Equality Act 1998-2004 defines an appropriate measure as an effective and practical measure that is needed in a specific case to adapt a place of business, provide equipment, alter patterns of working, training, distribution of tasks or the integration of resources. An appropriate measure does not include ‘any treatment, facility or thing that the person might ordinarily or reasonably provide for himself or herself.’¹⁴⁹ The legislation does not state that a failure to meet the duty to reasonably accommodate amounts to discrimination, however, case law under the previous provision held that a failure to provide reasonable accommodation amounted to discrimination.¹⁵⁰ The case law does not state whether it is a form of direct or indirect discrimination. There has been no litigation to date on the new provision. The Employment Equality Act 1998-2004 does not distinguish between the major or essential functions and the marginal or ancillary functions of a job. A person is qualified for a position where they are in a position to undertake ‘any duties’ of the job. It is questionable whether this element of the definition of reasonable accommodation is in compliance with the Directive.¹⁵¹ While neither the amended version of reasonable accommodation, nor the older version of reasonable accommodation distinguished between ‘essential functions’ and ancillary functions the Labour Court have made that distinction. In *A Computer Component Company v. A Worker*,¹⁵² the Labour Court held that the operation of some machinery was a minor part of the production system and as such it appeared to the court that arrangements could have been put in place to ensure that she would not be required to operate it. This effectively endorses the view of it being the essential functions of the job as opposed to the ancillary functions that are relevant. The new section 16 does not refer to the term essential functions a phrase used in paragraph 17 of the preamble of the Framework Directive, compliance with the Directive is dependent on future interpretation by the courts. However, the interpretation here suggests that the courts will incorporate the concept of ‘essential functions’ into the obligation to reasonably accommodate.

The Equal Status Act 2000-2004 specifies that the failure to provide reasonable accommodation is a form of discrimination; in contrast the Employment Equality Act 1998-2004 does not define the failure to provide reasonable accommodation as discrimination. In the Equal Status Act reasonable accommodation is defined as the provision of a special treatment or facility, where without such special treatment or facility it would be impossible or unduly difficult for the person to avail of the service. A refusal to provide such a treatment or facility will not amount to discrimination where it gives rise to more than a nominal cost. In *Roche v. Alabaster Associates Limited t/a Madigans*,¹⁵³ it was held that refusing access to premises to a person accompanied by a guide dog amounted to discrimination for a failure to provide reasonable accommodation. In *Forrestal v. Hearns Hotel, Clonmel*,¹⁵⁴ it was held to be discrimination not to allow a wheelchair user access to a nightclub. In *Six Complainants v. a Public House*,¹⁵⁵ only one of the six complainants was disabled, the other five complainants claimed discrimination by association. The six complainants were successful in raising a case of *prima facie* discrimination arguing and that the respondent failed to reasonably

¹⁴⁹ Section 16 (4)(c) Employment Equality Act 1998-2004.

¹⁵⁰ *A Complainant v. Bus Éireann* DEC E2003-04

¹⁵¹ www.ihrc.ie Irish Human Rights Commission, ‘Observations on the Equality Bill 2004’

¹⁵² ED/00/8

¹⁵³ DEC-S2002-086

¹⁵⁴ DEC-S2001-018

¹⁵⁵ DEC-S2004-009-014

accommodate all six complainants. Another noteworthy case is that of *Hennessy v. Dublin Bus*,¹⁵⁶ here the complainant alleged direct discrimination, victimisation and a failure to provide reasonable accommodation.¹⁵⁷ On the reasonable accommodation element, he claimed that the bus service failed to reasonably accommodate him by ensuring that a functioning accessible bus was provided on the route.¹⁵⁸ The limiting factor within the reasonable accommodation provisions are that the accommodation in question does not give rise to more than a 'nominal cost;' or that the refusal of such treatment does not constitute discrimination, if that failure is by virtue of another requirement of the Equal Status Act. The Equality Officer held that the failure to provide reasonable accommodation did not amount to discrimination in this context, as there was 'no statutory/legal requirement that the buses be wheelchair accessible.'¹⁵⁹ The Equality Officer went on to hold that the issue of road passenger services is regarded as something that requires separate and specific treatment under the Act. The Equality Officer also reviewed the 'nominal cost' threshold, and held that the making of public buses accessible gave rise to more than a nominal cost. It was shown in the case in question that each wheelchair accessible bus cost in the region of €150,000 and that this could not be regarded as nominal.

In *McMahon and five others v. McGowan's Pub*¹⁶⁰ the complainant alleged that he was directly discriminated against and that there had been a failure to reasonably accommodate him. The complainant has an intellectual disability which can affect his balance, speech and communication. He went with five members of his family to the respondent's premises to celebrate his mother's 50th birthday. The doorman refused the complainant having determined that he was under the influence of alcohol and refused the entire group access because of this. The complainant was upset and distressed as he believed he spoiled a family night out, equally the family were upset at the embarrassment caused to him and the effect this even had on his self-confidence. The Tribunal accepted that he raised a *prima facie* case of direct discrimination and found that the complainant had been discriminated against on the grounds of his disability and the remainder of the family had been discriminated against based on their association with the complainant. The Tribunal further found that the service provider had failed to provide a reasonable accommodation. The accommodation required by the Tribunal was that a licensed premises should be aware of the possibility for reasons other than drunkenness that may affect a person's demeanour. The Tribunal held that the complainant group were refused admission to the premises without the provision of the normal accommodation afforded to patrons, which was for the doorman to engage in conversation with the patrons to ascertain whether they were intoxicated, he did not do so with the complainant. Had the doorman engaged the complainant in such a conversation it would have been apparent that he was not in fact intoxicated. This decision was appealed to the Circuit Court, the respondent sought to have this case heard in private but was not successful. Judge Delahunty of the Circuit Court¹⁶¹ held that the appellant had acted in good faith and was not guilty of discrimination. The Judge held that where a person seeks reasonable accommodation under the Equal Status Act 2000 he must first prove that the

¹⁵⁶ DEC-S2003 – 046.

¹⁵⁷ The complainant successfully raised a *prima facie* case of direct discrimination: the Equality Officer held that there were specific statutory considerations under section 17(1) of the Equal Status Act which established that there was no general requirement that public buses should be accessible. He therefore failed to establish direct discrimination.

¹⁵⁸ Evidence produced showed that the bus did have a ramp, but the ramp was not working that day, and when the bus driver manually opened the ramp the complainant refused to get on the bus. Evidence was also produced about the abuse the bus driver was subjected to in the context of this case.

¹⁵⁹ See also Equality Tribunal, Annual Review, 2003.

¹⁶⁰ DEC-S2004-009/014, appealed to the Circuit Court a discussion of the Circuit Court decision is available in the Equality Authorities, Annual Review 2005.

¹⁶¹ June 23, 2005 report available in the Equality Authority's Annual Review, 2005.

‘service provider had actual or implied knowledge of the disability and disregarded such knowledge either intentionally or unintentionally in order to succeed in a claim.’¹⁶²

The Equality legislation does not require buildings and infrastructure to be designed and built in a disability-accessible way. There are two relevant provisions dealing with Access. First, Part M of the Building Regulations 1997 – 2005¹⁶³ requires that as regards public buildings adequate provision shall be made to enable people with disabilities to safely and independently access and use a building. If sanitary conveniences are provided in a building, adequate provision shall be made for people with disabilities. If a building contains fixed seating for audience or spectators, adequate provision shall be made for people with disabilities. As regards dwellings, or residential buildings, new dwellings come within Part M of the building regulations. The regulations address issue relating to the approach to new dwellings, circulations within new dwellings and sanitary provision within new dwellings. ‘People with disabilities’ are defined as people who have an impairment of hearing or sight or an impairment which limits their ability to walk, or which restricts them to a wheelchair. Part M applies to new buildings only it does not apply to works in connection with extensions to and the material alteration of existing dwellings.¹⁶⁴ The primary responsibility for compliance rests with the designers, builders and owners. Building control authorities have powers to inspect design documents and buildings,¹⁶⁵ and powers of enforcement and prosecution where breaches of the regulations occur.¹⁶⁵

The second provision that is applicable in this context is the Disability Act 2005,¹⁶⁶ which at Part 3 requires access to buildings and services. The Act refers only to public buildings and public services. The Disability Act 2005 introduces a requirement to ensure that public buildings are made compliant with the relevant building regulations: Part M 1997-2005, by 2015. The commitments contained within the Act are enforced via a complaints mechanism set out in the Act and enforced by the Ombudsman.¹⁶⁷

2.7 Sheltered or semi-sheltered accommodation/employment

- a) *To what extent does national law make provision for sheltered or semi-sheltered accommodation/employment for disabled workers?*
- b) *Would such activities be considered to constitute employment under national law?*

The definition of employment, employee, employer and vocational training all lend themselves to the contention that sheltered and semi-sheltered employment is regarded as employment under the Employment Equality Act 1998-2004. To that end a draft Code of Practice in respect of sheltered and semi-sheltered employment was drafted by the Equality Authority, who clearly see such employment as coming within their ambit. This draft Code of Practice requires the assent of the Minister for Justice, Equality and Law Reform to sign confirm it as a legal code, an action the Minister has chosen not to take. There has been no

¹⁶² Equality Authority, Annual Review, 2005.

¹⁶³ Available at Department of the Environment website www.environ.ie

¹⁶⁴ The Minister for the Environment, Heritage and Local Government has announced the commencement of a comprehensive review of Part M of the Building Regulations. A Public consultation period has commenced – <http://www.nda.ie/CntMgmtNew.nsf/0/A18D4DF727F1F8F5802570DF00438C45?OpenDocument>

¹⁶⁵ Prosecutions are rare for more information, see

[http://www.environ.ie/DOEI/doeipub.nsf/0/17407b65c95d10d280256f0f003db979/\\$FILE/PL11%20Guide%20to%20Buildin g%20Control%20SystemCOPY.pdf](http://www.environ.ie/DOEI/doeipub.nsf/0/17407b65c95d10d280256f0f003db979/$FILE/PL11%20Guide%20to%20Buildin g%20Control%20SystemCOPY.pdf)

¹⁶⁶ <http://www.oireachtas.ie/ViewDoc.asp?DocId=-1&CatID=87&m=1>

¹⁶⁷ ‘O’Reilly warns of Flaws in Disability Legislation’ *Irish Times*, 30 November 2005. This article refers to statements made by the Ombudsman charged with the enforcement of the Act, she stated that the wording of the Act may not be robust enough to ensure public bodies take sufficient steps to improve access for disabled people to buildings and services.

litigation in this area to date, but there have been a number of out of court settlements under the Equality legislation.

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)

Are there residence or citizenship/nationality requirements for protection under the relevant national laws transposing the Directives?

There are two distinctions made on the basis of nationality in the Equal Status Act 2000-2004. The first relates to educational establishments in section 7 of that Act and a new subsection has been added by virtue of the Equality Act 2004. That subsection permits the Minister for Education and Science to differentiate between nationals, and members of the European Union and others in relation to the provision of educational grants.¹⁶⁸ A further distinction is made in section 14 of the amended Equal Status Act 2000-2004 permitting distinctions based on nationality in relation to the enforcement of the Immigration Act, or in respect of other residency requirements. In these sections a non-national has the same meaning as that used in the Immigration Act of 1999. This exception comes within the provisions contained in the Race Directive.

The Employment Equality Act 1998-2004 provides at section 36 that it is permissible to impose requirements in relation to residence, citizenship and proficiency in the Irish language, for public service jobs. The positions that can impose those requirements are officer holders in the service of the State, including the Garda Síochána, the Defence Forces, Civil Servants, Officers of local authorities, harbour authorities, health boards or vocational education committees. While it is permitted under Irish law to impose requirements in respect of residency, citizenship and proficiency in the Irish language, not all of the above mentioned positions impose such restrictions. An Garda Síochána recently removed the requirement for proficiency in the Irish language, instead requiring proficiency in two languages at least one of which is Irish or English. Equally an Garda Síochána allow applications from a number of nationalities: EU nationals; EEA nationals; Swiss confederation; refugees under the Refugee Act, 1996; or those with a period of one year's continuous legal residence in the State prior to an appointed date, and in the preceding eight years have a total legal residence that amount to four years (the asylum process does not count towards the qualifying five year period). The Public Service Management (Recruitment and Appointments) Act 2004¹⁶⁹ is also relevant it governs how appointments are made to the civil and public service. Section 24 of that Act refers to the requirements for appointment. Section 24(12) states that 'nothing in this section shall be read as affecting the application of the Employment Equality Act 1998 in circumstances where the Act applies.'

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

Does national law distinguish between natural persons and legal persons, either for purposes of protection against discrimination or liability for discrimination?

¹⁶⁸ Section 7(5)(b) Equal Status Act 2000-2004

¹⁶⁹ <http://www.oireachtas.ie/documents/bills28/acts/2004/a3304.pdf> This Act governs how appointments are made to the civil and public service.

Section 8(1) of the Employment Equality Act 1998-2004 prohibits discrimination by employers and employment agencies. Most of the prohibitions contained within the legislation are aimed at the employer and no clear provision is made to enable actions against the person(s) who actually discriminated. There are a few exceptions to this provision, section 14 of the Act refers to liability being imposed on the person responsible for procuring or attempting to procure discrimination. Equally section 10 refers to liability being imposed on the person who displays discriminatory advertising.

The Equal Status Act 2000-2004 is much clearer on this point it defines the term person at section 2(1) of that Act as including ‘an organisation, public body or other entity.’ The terms of this Act clearly prohibit discrimination by both natural persons and legal persons.

3.1.3 Scope of liability

What is the scope of liability for discrimination (including harassment and instruction to discriminate)? Specifically, can employers or (in the case of racial or ethnic origin) service-providers (e.g. landlords, schools, hospitals) be held liable for the actions of employees? Can they be held liable for actions of third parties (e.g. tenants, clients or customers)? Can the individual harasser or discriminator (e.g. co-worker or client) be held liable? Can trade unions or other trade/professional associations be held liable for actions of their members?

Both the Employment Equality Act 1998-2004¹⁷⁰ and the Equal Status Act 2000-2004¹⁷¹ contain identical provisions on vicarious liability. These provisions set out that the employer/service provider is the addressee of the prohibition of discrimination. No distinctions are made on the basis of the size of the employer/service provider. Effectively these provisions ensure that the employer/service provider is liable for the actions of the employee and that the person with authority is liable for the actions of their agents for anything done in the course of employment. A statutory defence is available and that is that the employer/authority took such steps as were reasonably practicable to prevent the employee from doing that act. In practice this defence can be availed of where an employer has a work place policy on harassment/equality within the work place.

As well as the provisions on vicarious liability consideration must be given to the provisions on harassment.¹⁷² Section 14A of the Employment Equality Act 1998-2004 prohibits harassment by the employer, it also provides that the employer may be responsible for harassment by fellow workers, clients, customers and others that a person may reasonably be expected to come into contact with. Again there is a statutory defence available to the employer and that is that they took such steps as were necessary to prevent the harassment in question. The Employment Equality Act 1998-2004 is silent on the issue of whether a trade union or other professional association may be held liable for the actions of their members. The provision does state that the reference to ‘other business contact’ in the provision refers to any person with whom the employer might reasonably expect the victim to come into contact in the workplace or otherwise in the course of his or her employment. Based on this provision it seems possible to infer a potential liability for the employer in respect of members of the trade union or professional associations. The provisions in relation to harassment do make it clear that the term ‘employee’ does cover agency workers, and anyone seeking a service from an agency, as well as anyone in vocational training. Equally it is clear that where the employer is a trade union or professional association then that union, or association may be liable for the actions of their employees.

¹⁷⁰ Section 15, Employment Equality Act 1998-2004

¹⁷¹ Section 42, Equal Status Act 2000-2004

¹⁷² See section 2.4 above.

Section 11 of the Equal Status Act 2000-2004 also prohibits harassment. The responsibility for harassment remains with what is deemed to be the ‘responsible person.’ This person may avoid liability if they can come within the statutory defence, which is that they took such steps as were necessary to prevent the harassment in question. As regards the individual harasser being held liable this position is not entirely clear under the Employment Equality Act 1998-2004.¹⁷³ The Equal Status Act 2000-2004 clearly provides that an individual may be liable for acts of discrimination or harassment.¹⁷⁴

3.2 Material Scope

3.2.1 Employment, self-employment and occupation

Does national legislation apply to all sectors of public and private employment and occupation, including contract work, self-employment, military service, holding statutory office?

The Employment Equality Act 1998-2004 does not distinguish between public and private sector employees, equally full-time, part-time and temporary employees are covered. Section 2(1) of that Act defines a ‘contract of employment’ and includes within its remit contract of service or apprenticeship, agency workers, and self-employed workers.¹⁷⁵ Section 13A of the Employment Equality Act 1998-2004 ensures that business partnerships come within the terms of the legislation. A second relevant definition is that of ‘employee’ which covers persons who have ‘entered into or works under ... a contract of employment’ and includes members of a regulatory body, but does not include the provision of personal services in a private home.¹⁷⁶ The term ‘personal service’ is further defined and means services ‘provided in a person’s home, includes but is not limited to services that are in the nature of services in *loco parentis* or involve caring for those residing in the home.’¹⁷⁷ There is no equivalent exception within the terms of the Framework Directive or the Race Directive it is questionable whether this provision is in compliance.

The legislation specifies different rules in respect of some forms of employment and also includes a category of employees that are excluded from the ambit of the provisions.¹⁷⁸ Section 37 of the Employment Equality Act 1998-2004 sets out rules in relation to organisations that promote certain religious values, and permission is given for more favourable treatment on the religion ground in certain circumstances and also to prevent the undermining of that religious ethos.¹⁷⁹ The legislation does apply to the Garda Síochána, the prison services, and the emergency services, however, the employee must be fully competent and fully capable of undertaking ‘the range of functions that they may be called upon to perform so that the operational capacity of the Garda Síochána or the service concerned may be preserved.’ As Irish legislation does not mention the term ‘essential functions’ this provision implies that unless a person with a disability is fully competent (with or without a reasonable accommodation) to perform all the duties of the post, then the Garda Síochána are

¹⁷³ See section 3.1.2 above.

¹⁷⁴ Section 2(1) Equal Status Act 2000-2004

¹⁷⁵ The term self-employed is not used in the Act, and there is no case law on this issue. The Employment Equality Act 1998 was amended by the Equality Act 2004 to include the self-employed and it does so by means of the definition of a contract of employment, contained in section 2(1) which includes ‘any ... contract whereby – an individual agrees with another person personally to execute any work or service for that person.’

¹⁷⁶ Section 2(1) Employment Equality Act 1998-2004

¹⁷⁷ Section 2(1) Employment Equality Act 1998-2004

¹⁷⁸ There are different rules in respect of religious organisations, organisations of certain religious values, emergency services, the Garda Síochána and the Defence Forces.

¹⁷⁹ Section 37(1) Employment Equality Act 1998-2004

not obliged to hire that individual. There are also specific derogations from the prohibition on age discrimination within the Garda Síochána or other emergency service where the Minister is of the opinion that the age profile of that service is likely to adversely affect the service in question. The Minister may declare that the age ground shall not apply in relation to recruitment competitions for such services. The obligation not to discriminate on the grounds of age or disability does not apply to the Defence Forces.

In paragraphs 3.2.2 - 3.2.5, you should specify if each of the following areas is fully and expressly covered by national law for each of the grounds covered by the Directives.

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))

Is the public sector dealt with differently to the private sector?

Section 8(1) Employment Equality Act 1998-2004 prohibits discrimination in relation to access to employment, conditions of employment, training or experience for or in relation to employment, promotion or re-grading or classification of posts. In short the Act applies to full-time, part-time and temporary employees, public and private sector employment, vocational training bodies, employment agencies, trade unions, professional and trade bodies, the self employed, partnerships and people employed in another person's home.

Employee has been redefined to ensure that it is a broader definition, the new definition of employee contains one specific exception in respect of access to employment and that relates to a person employed in another person's home to provide personal services.¹⁸⁰ This limitation applies to access to employment, this would impact on those seeking employment as childcare workers, or other forms of domestic work. The Irish National Organisation for the Unemployed criticises this amendment as failing to meet the requirements of the Framework Employment Directive because it denies individuals accessing employment in a private residence protection under equality legislation.¹⁸¹ The Irish Council for Civil Liberties states that by excluding domestic workers from protection against discrimination, the Irish government is persisting in a failure to comply with EU law and regulations.¹⁸² A contract of employment includes: contract of service, or apprenticeship, or any other contract where an individual agrees with another person personally to execute any work or service for that person.¹⁸³ This should under Irish law cover many forms of work that would otherwise be classified as self-employment.¹⁸⁴

Discrimination in access to employment includes 'any arrangements the employer makes for the purpose of deciding to whom employment should be offered,'¹⁸⁵ or by 'specifying, in respect of one person or class of persons, entry requirements for employment which are not specified in respect of other persons or classes of persons, where the circumstances in which both such persons or classes would be employed are not materially different.'¹⁸⁶ Section 8(8) prohibits discrimination in respect of opportunities of access for promotion. Section 13(c) prohibits discrimination in relation to a body that controls entry to or the carrying on of, 'a profession, vocation or occupation.' Section 16(5) Employment Equality Act 1998-2004 contains an exception in respect of access to employment. The section states that 'nothing in

¹⁸⁰ Section 2(1) Employment Equality Act 1998-2004

¹⁸¹ <http://www.inou.ie/press/index.tml?secid=20030311152957&eqRIDdatarq=20040505101625>

¹⁸² http://www.iccl.ie/minorities/bill/04_equalitybill.html

¹⁸³ Section 2(1) Employment Equality Act 1998-2004

¹⁸⁴ Sexual orientation Summary of 29 September 2004 by Mark Bell

¹⁸⁵ Section 8(5)(a) Employment Equality Act 1998-2004

¹⁸⁶ Section 8(5)(b) Employment Equality act 1998-2004

this Act shall be construed as requiring an employer to recruit, retain in employment or promote an individual if the employer is aware, on the basis of a criminal conviction of the individual or other reliable information, that the individual engages, or has a propensity to engage, in any form of sexual behaviour which is unlawful.’ This provision has yet to be litigated, but was referred to by the Supreme Court in *Re Article 26, Employment Equality Bill 1996*.¹⁸⁷ The Supreme Court held that it reflected a concern on the part of Parliament relating to ‘the addictive character of certain sexual offences involving minors’.¹⁸⁸

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

a) Note that this can include contractual conditions of employment as well as the conditions in which work is, or is expected to be, carried out.

b) In respect of occupational pensions, how does national law ensure the prohibition of discrimination on all the grounds covered by Directive 2000/78 ?

Section 8(1) Employment Equality Act 1998-2004 prohibits discrimination in relation to access to employment, conditions of employment, training or experience for or in relation to employment, promotion or re-grading or classification of posts. This section relates to employers and employees as well as to agencies and agency workers. Section 8(6) states that the employer is prohibited from discriminating against employees or prospective employees in relation to conditions of employment. This relates to terms of employment, working conditions, treatment in relation to overtime, shift work, transfers, lay-offs, short time, redundancies, dismissals and disciplinary measures.

Equal remuneration must be paid for equal work or work of equal value.¹⁸⁹ Section 29 contains an entitlement to equal pay, for equal work. Like work is defined as: where two employees both perform the same work under similar conditions, or where their work is interchangeable, or where the work performed by one is of a similar nature to that performed by the other, or the work performed by one is equal in value to the work performed by the other.¹⁹⁰ Where two people are doing like work then they are entitled to equal remuneration. Remuneration is defined as including ‘any consideration, whether in cash or in kind, which the employee receives, directly or indirectly from the employer.’¹⁹¹ This definition specifically excludes pensions from its ambit.

The Pensions Act 1990-2004 prohibits discrimination in respect of occupational pensions schemes and other occupational benefits. Section 22 of the Social Welfare (Miscellaneous Provisions) Act 2004 amended the Pensions Act 1990. This amendment prohibits discrimination on the grounds of race, religious belief, gender, age, sexual orientation, marital status, family status, disability and membership of the Traveller community. The Act prohibits direct, indirect, instruction and a procurement to discriminate, as well as harassment, and victimisation and requires reasonable accommodation in respect of occupational benefit schemes, occupational benefits and occupational pensions.¹⁹²

Section 35 of the Employment Equality Act 1998-2004 is a cause of concern as it permits employers to pay employees with disabilities different rates of pay if they are restricted in

¹⁸⁷ [1997] 2 IR 321

¹⁸⁸ *Re Article 26, Employment Equality Bill 1996* [1997] 2 IR 321 at 376, see also Sexual orientation report of 29 September 2004 by Mark Bell

¹⁸⁹ Section 7 Employment Equality Act 1998-2004 defines the concept of like work.

¹⁹⁰ Section 7 Employment Equality Act 1998-2004.

¹⁹¹ Section 2(1) Employment Equality Act 1998-2004

¹⁹² Pensions Act 1990-2004 as amended by the Social Welfare (Miscellaneous Provisions) Act 2004 available at: www.irlegov.ie

their capacity to do the same amount of work, or the same hours as a person who does not have a disability. This section contains only one limitation and that is that the employee should not be remunerated at a rate below the level required by the National Minimum Wage Act 2000. The difficulty with this section relates to the fact that there is nothing to suggest that the work should be remunerated at a proportionate level to that of the employee without the disability. The Equality Act 2004 that aimed to ensure compliance with the directive did not alter this provision, and so less favourable rates of pay may be paid to the disabled worker. See comments of the Irish Human Rights Commission on this point.¹⁹³

The Unfair Dismissals Act 1977-1993 prohibits discrimination in respect of union membership, religious or political opinions, for taking an action against the employer, the race, colour sexual orientation, age or membership of the Traveller community. The protection also extends to cover a number of statutory protections, interestingly however, disability is not among the protected groups under this statute.¹⁹⁴ A person claiming an unfair dismissal on the basis of their disability may take a case under the Employment Equality Act 1998-2004.¹⁹⁵

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

Note that there is an overlap between ‘vocational training’ and ‘education’. For example, university courses have been treated as vocational training in the past by the Court of Justice. Other courses, especially those taken after leaving school, may fall into this category. Does the national Anti-discrimination law apply to vocational training outside the employment relationship, such as that provided by technical schools or universities ?

There is a prohibition on discrimination in relation to access to employment, by virtue of section 8(1). Section 8(7) prohibits discrimination in relation to training or experience for 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. Vocational is broadly defined and includes any system of instruction defined as:

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

This definition ensures that where a course is one that is exclusively concerned with training for a particular activity then it is covered by the provisions of the Act. It is accepted that the provisions of the Act cover many University and third level courses; the Act also reiterates this point by stressing that a vocational training body is one who offers a course of vocational training and can include an educational or training body.

There are certain exceptions contained within this provision. The first relates to the age ground, this provision only relates to vocational training courses offered to persons over the maximum age at which those persons are statutorily obliged to attend school. A second exception relates to the religion ground. The Act provides an exception for hospitals and

¹⁹³ www.ihrc.ie Irish Human Rights Commission, ‘Observations on the Equality Bill 2004’

¹⁹⁴ The Unfair Dismissal Act does not apply to most civil servants and to some members of the public sector: Gardai and the Defence Forces.

¹⁹⁵ See section 4.7.4 below.

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, the prohibition of discrimination in *subsection (1)*, in so far as it relates to discrimination on the religion ground, shall not apply.’¹⁹⁶ Certain hospitals or places of vocational training may protect their religious ethos where the relevant Government Minister certifies that it is necessary then the provisions in respect of religious discrimination will not apply. This provision is not limited by the necessity for this exception to be related to a genuine occupational requirement, nor is there a requirement for legitimacy or proportionality. 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.¹⁹⁷

The Equal Status Act 2000-2004 also prohibits discrimination on all nine grounds within educational services, in respect of access to courses or facilities as well as the terms and conditions of how that course is provided. This provision is broadly defined and should cover vocational training.¹⁹⁸

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))

Section 13(c) Employment Equality Act 1998-2004 prohibits discrimination in relation to a body that controls entry to or the carrying on of, ‘a profession, vocation or occupation.’ This provision relates both to membership of the body in question as well as to any benefits provided by that body, with the exception of pension rights. Section 13A introduces a prohibition on discrimination in respect of business partnerships.

The Unfair Dismissals Act 1977-1993 prohibits discrimination in respect of union membership, religious or political opinions, for taking an action against the employer, the race, colour, sexual orientation, age or membership of the Traveller community.

In relation to paragraphs 3.2.6 – 3.2.10 you should focus on how discrimination based on racial or ethnic origin is covered by national law, but you should also mention if the law extends to other grounds.

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

In relation to religion or belief, age, disability and sexual orientation, does national law seek to rely on the exception in Article 3(3), Directive 2000/78?

There is no express prohibition on discrimination in relation to religion or belief, age, disability or sexual orientation in respect of social protection. The Equal Status Act 2000-2004 does prohibit discrimination in relation to goods and services, on all nine grounds. It is not entirely clear whether that prohibition would apply to State services: including social security and healthcare. The interpretation of the Equal Status Act 2000-2004 will be crucial

¹⁹⁶ Section 12(4) Employment Equality Act 1998-2004

¹⁹⁷ Section 12(1) Employment Equality Act 1998-2004

¹⁹⁸ See section 3.2.8 below for more on this provision.

in determining whether Ireland is in compliance with this element of the Directive.¹⁹⁹ In *Donovan v. Donnellan*²⁰⁰ the Equality Officer interpreted the term service and concluded that ‘while State services are not specifically mentioned as being covered they are not specifically excluded either and I believe that certain services provided by the State are available to the public and are covered by the Act, e.g. social welfare services, health services, etc.’

Compliance with the Race Directive is dependent on future judicial interpretation.²⁰¹ This situation is further impacted by section 14 of the Equal Status Act. This section provides a statutory exemption to the Equal Status Act 2000-2004, where an act or action is required by virtue of another piece of legislation then the Equal Status Act 2000-2004 does not apply. This is an extremely broad exemption to the terms of the Equal Status Act 2000-2004. Pending further judicial interpretation of the various provisions, it is not possible to say definitively whether Ireland is or is not in compliance with the Race Directive. According to Dave Ellis, in the Race Report of November 2002, Ireland may comply if the Equal Status Act 2000-2004, the Ombudsman Act 1980²⁰² and the Constitutional guarantee²⁰³ are read together.

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

This covers a broad category of benefits that may be provided by either public or private actors granted to people because of their employment or residence status, for example, e.g. reduced rate train travel for large families, child birth grants, funeral grants and discounts on access to municipal leisure facilities. It may be difficult to give an exhaustive analysis of whether this category is fully covered in national law, but you should indicate whether national law explicitly addresses the category of ‘social advantages’ or if discrimination in this area is likely to be unlawful.

The term ‘social advantage’ is not expressly referred to in any of the Equality legislation. Commentators have contended that the prohibitions on discrimination in relation to ‘social protection’ would apply to ‘social advantages.’²⁰⁴

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

This covers all aspects of education, including all types of schools. Please also consider cases of segregation in schools, affecting notably the Roma community. If these cases exist, please refer also to relevant legal/political discussions that may exist in your country on the issue.

The Equal Status Act, 2000 refers to educational establishments at section 7. ‘Educational establishment’ is broadly defined covering pre-school services through to higher-level institutions, whether or not they are supported by public funds. If a *body is in the business of education be they public or private they are covered by the Act*. Discrimination on *all 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.

¹⁹⁹ Race Report of November 2002 by Dave Ellis

²⁰⁰ DEC-S2001-011

²⁰¹ See section 0.3

²⁰² Section 4(2), Ombudsman Act 1980

²⁰³ Article 40.1 Irish Constitution

²⁰⁴ Race Report of November 2002 by Dave Ellis

The Education system provides a complaints procedure by virtue of the Education Act 1998. This system addresses issues such as enrolment, suspension or removal of children from a school. Therefore the use of anti-discrimination legislation is not a first option for those who find discrimination in the education system. There are a number of cases that are of relevance. In *Two Complainants v. A Primary School*,²⁰⁵ the complainants are a mother and son who alleged discrimination on two grounds those of disability and membership of the Traveller community by the Primary School.²⁰⁶ The complaint is founded on the Equal Status Act, claiming both discrimination and harassment contrary to the Act. The mother claimed her son was bullied and called names and that the management of the school failed to deal with the issue, he was constantly blamed for anything that happened in the school and ultimately suspended. She was regularly called to the school to discuss her son's behavioural problems and on one occasion a member of the Garda (police) entered the room with the intention of attending the meeting without her prior knowledge or consent. She requested the Resource Teacher for Travellers teach her son but he was transferred back to his mainstream class where he was unhappy and the problems continued. The complainants also alleged victimisation, claiming her son was denied his Confirmation because he had instigated proceedings under the Equal Status Act. The respondent denied discrimination, harassment or victimisation. They accepted they knew the complainants were Travellers but that the school welcomed Travellers and had appointed a Resource Teacher for Travellers. They claimed the complainant was subject to the normal disciplinary procedures and they had consulted his parents to that effect, the involvement of the Garda was to offer friendly advice in relation to the complainant's behaviour. He was denied Confirmation because of his absenteeism. The Equality Officer concluded that the mother had been directly discriminated against on the Traveller community ground, as a non-Traveller would have been treated more favourably in similar circumstances. It was not school practice to invite members of the Garda to parent teacher meetings. The Equality Officer also held that the mother was harassed on the Traveller community ground in respect of this incident as it was an unwelcome act and it was reasonable for her to have found the situation intimidating and for her to feel humiliated. The Equality Officer further found that the mother did not have a disability within the meaning of the Equal Status Act. As regards the son's action, the Equality Officer held he failed to establish a prima facie case on the Traveller community ground; he did succeed on the disability ground as he established a failure to provide him with reasonable accommodation, and proved victimisation. The son had Attention Deficit Disorder, which was accepted by the Equality Tribunal to be a disability within the terms of the Act. The question for the school was did they do all that was reasonable to accommodate his needs by providing special treatment or facilities. The school had notified the National Educational Psychologists Service (NEPS) about 77 students, with a view to having them assessed. The school prioritised two students, neither of whom was the child the subject of this action. The school in the defence of their case stressed how difficult he was and all the various trouble he had been in, the Equality Officer held that if he was that difficult she could not see why he was not prioritised to see the educational psychologist so that his educational needs could be met. The school had placed the boy in question down the queue to see the educational psychologist, but the equality officer felt that if the school had so much difficulty with him he should have been prioritised, and this amounted to a failure to reasonably accommodate.

In *Ward and Kavanagh v. Sacred Heart Secondary School*,²⁰⁷ the complainants claimed discrimination on the ground of their membership of the Traveller Community when the Sacred Heart Secondary school declined to enrol their children for the academic year 2001-2002. The complainants had applied for admission to the school on behalf of their daughters

²⁰⁵ DEC-S2006-028

²⁰⁶ Only the issue surrounding membership of the Traveller Community will be addressed here.

²⁰⁷ DEC-S2005-019

on separate occasions during the year, both applications were late. The Visiting Teacher for Traveller Education was informed that the students would not be accepted into the school as they did not meet the entry criteria of the school. The school had enrolled a total of twenty Traveller pupils for the academic year 2001-2002. The Department of Education intervened on behalf of the two pupils by letter, the parents took an action under section 29 of the Education Act, the case was sent to arbitration and the two girls were enrolled in the school from the 21st of November 2001 and at the time of the action were still in school. The action relates to the discrimination they alleged for the two month period that their daughters were not at school. The issue was whether the parents were treated less favourably than non-Traveller parents in similar circumstances. The Equality Officer held that they were not treated less favourably; there were issues for the school in considering the resources necessary to take on two extra students, the school was also able to show that there were two other late applications that year that did not involve members of the Traveller community and in those cases neither student started in the school until November 2001.

In a third case that of a *Mother and Son v. A Secondary School*,²⁰⁸ it was alleged that the complainants were discriminated against on the Traveller community ground contrary to the Equal Status Act 2000 by the management of a secondary school. The complainants to this action are a mother and son, who state that the mother was asked on a number of occasions to remove her child from school for disciplinary reasons. In effect the mother was required to remove her son from the school when a disciplinary matter arose rather than a formal suspension, or other formal sanctions. All formal sanctions are capable of being challenged. In all the son missed considerable periods of schooling, and at one point the Principal suggested the mother consider other schools. It was further claimed that the Principal of the School did not follow Department of Education guidelines in relation to such matters when dealing with this case. They claim less favourable treatment by virtue of their membership of the Traveller community. The school claim that the complainants were treated in the same manner as the school treats all parents and children where the child has breached the school's disciplinary rules. The Principal claimed that where a student is facing suspension or expulsion the Principal recommends to parents that they voluntarily withdraw the child from the school for a short period in an attempt to defuse the situation; this also ensures that the child's record remains unblemished in that no sanction is recorded. The Principal showed that in his 12 years in that position he dealt with 12 incidents of serious misbehaviour by individual students, apart from the complainant all others were non-Traveller children. The complainant to this action has three other siblings who were in the school or who had attended the school including a brother who had completed the Leaving Certificate in the school. The Equality Officer contended that there was not sufficient evidence to indicate that the mother and son were treated less favourably than non-members of the Traveller community had been treated by the school over the years when in similar circumstances.

The Traveller community has and still experiences social exclusion and discrimination throughout society: the field of education is no exception. The concern in respect of education is the lack of recognition of diverse cultures within the curriculum.²⁰⁹ As mentioned in the case of *Sweeney v. Saehan Media*,²¹⁰ above members of the traveller community are significantly less likely to complete secondary education than members of the dominant population in Ireland. The Census of Population 2002 shows that the issue of concern is retention within the education system, with significant numbers of students either leaving or not completing the junior cycle of the education system. Since the 1970's in Ireland there has

²⁰⁸ DEC-S2004-028

²⁰⁹ Summary of June 2004 by Dave Ellis and Sue Gogan, see also section 41(3)(b) of the Education Act and the Guidelines on Traveller Education in Primary Schools, Department of Education and Science (2002) at 34.

²¹⁰ DEC-E2003/017.

been a growing awareness of the need to encourage greater participation and inclusion by Travellers in education. As a result a number of resources were provided to increase participation and support Traveller's children's learning. These include:

- Pre-school provision for Travellers.
- Resource Teachers for Travellers (RTT). The role of the RTT is to support and optimise teaching and learning opportunities for Traveller students and to provide learning support for those identified with low achievement or learning difficulties.²¹¹
- Visiting teacher for Travellers. These teachers aim to promote education among the Traveller community.²¹²
- National Education Officer for Traveller Education. The National Education Officer works in conjunction with the Visiting teachers and the national Inspectorate and advise the Department of Education and Science on particular needs in this area.
- Enhanced capitation for Traveller students. Schools receive a capitation sum for all children enrolled.
- Senior Traveller training centres. This service provides education, work experience, guidance and counselling for members of the Traveller community.
- Youth reach. Youth reach provides an alternative to the formal school structure, and is aimed at early school leavers, it is estimated that over 300 members of the Traveller community participate in youth reach programmes annually.
- Access programmes to third level education.
- In-service education for primary teachers on Traveller education. The delivery of any reform aimed at social inclusion depends on the capacity of the teacher to promote such principles.

The Department of Education are in the process of developing a 'Traveller Education Strategy',²¹³ the main objective of which is to ensure equality of outcomes for Travellers from education.²¹⁴ Among the topics prioritised for the development of this strategy are: teacher training; curricular change and interculturalism in curriculum; ethnic identifier, data collection re access (at all levels of education), outcomes; traveller parental role and involvement; school enrolment policies and traveller proofing system for the Department of Education and Science and school policies generally; school retention issues;²¹⁵ nomadism and education.²¹⁶

The Employment Equality Act 1998-2004 also has relevance by virtue of section 12 in relation to vocational training.²¹⁷ There are a number of exceptions to the general prohibition of discrimination, those exceptions permit the existence of single sex schools,²¹⁸ the provision of training for religious purposes to one gender only or to a particular belief,²¹⁹ the promotion

²¹¹ Traveller organisations have expressed some concerns with how the RTT works, including: not requesting parental consent prior to sending children to the RTT; children being removed from class for what should be intensive tuition but being assigned 'low level tasks,' such as drawing; due to removal from class, missing out on portions of the curriculum; children who do not require additional learning supports being sent to the RTT because of their ethnic identity.

²¹² There are only 40 such teachers in the school.

²¹³ www.education.ie/servlet/blobServlet/edc_traveller_ed_strategy.doc See also the Irish Government's Joint Education Committee on Education and Science produced *The Provision of Educational Services in a Multi-Ethnic/Multi-Cultural Society* and the National Council for Curriculum Assessment in May 2005 published guidelines on *Intercultural Education in Primary School*.

²¹⁴ see also <http://www.pavepoint.ie/EducationStrategy.html>

²¹⁵ There is a low retention rate in the education system for members of the Traveller Community. See http://www.education.ie/servlet/blobServlet/pp_traveller_education.pdf

²¹⁶ The NCCRI have estimated that there are approximately 1,700 members of the Roma Community in Ireland, an accurate figure is not possible as the census asks questions in relation to nationality and membership of the Roma community is not referenced. See <http://www.nccri.ie/cdsu-travellers.html>

²¹⁷ See section 3.2.4 above.

²¹⁸ Section 7(3)(a) Equal Status Act 2000-2004

²¹⁹ Section 7(3)(b) Equal Status Act 2000-2004

of a religious ethos,²²⁰ different fee arrangements for EU members and nationals,²²¹ different access arrangements to third level institutions for mature students,²²² and also it permits distinctions to be made in relation to the organisation of sporting events.²²³ A specific exception in relation to students with disabilities exists. It is permissible to discriminate where the provision of education to a student with a disability would make it impossible or have a seriously detrimental effect on the provision of education to other students.²²⁴ The Employment Equality Act 1998-2004 permits religious institutions such as schools to discriminate in order to protect their religious ethos. This position is reinforced by the Education Act 1998 which requires the school management board to uphold the 'characteristic spirit' of the school as established by its 'cultural educational, moral, religious, social, linguistic and spiritual values and traditions.'²²⁵

The position in Ireland is that all children resident in the state have a constitutional entitlement to free primary education, with due regard to parental rights.²²⁶ The state does also provide free post-primary and third level education. All children are required to remain in school until they are 16 years of age. The Constitution of Ireland provides that a child has the right to attend a school receiving public money without attending religious instruction at that school.²²⁷ The vast majority of Irish schools are denominational in nature, the bulk of those being Roman Catholic.²²⁸ Children of different faiths to the majority faith in Ireland will not be required to attend religion class, but will invariably have to attend a school of a different religious ethos to that they profess themselves.²²⁹

Other educational concerns relate to the exception, contained in the Equality Legislation, on the promotion of a 'religious ethos,' the safeguards included within the Framework Employment Directive do not cover the extent of this provision. The provision allows for differential treatment by hospitals and schools in the promotion of their specific religious ethos, this is not guided by the requirements to be legitimate, proportionate, nor is it linked to a genuine occupational requirement. The Education for Persons with Special Educational Needs Act 2004 relates to education needs for children with disabilities. The purpose of this Act is to provide for the education of people with disabilities and to provide that people with disabilities shall have the same right to avail of, and benefit from, appropriate education. This principle reflects the Constitutional reality; the Constitutional Courts have already stated that children with disabilities are entitled to benefit from the same education as all other children of the state.²³⁰

²²⁰ Section 7(3)(c) Equal Status Act 2000-2004

²²¹ Section 7(3)(d) Equal Status Act 2000-2004

²²² Section 7(3)(e) Equal Status Act 2000-2004

²²³ Section 7(4)(a) Equal Status Act 2000-2004

²²⁴ Section 7(4)(b) Equal Status Act 2000-2004

²²⁵ Summary of June 2004 by Dave Ellis and Sue Gogan

²²⁶ Article 42.4 Bunreacht na hÉireann.

²²⁷ Article 44.2.4 Bunreacht na hÉireann.

²²⁸ The schools are owned by the churches whose ethos they profess.

²²⁹ The evidence available is that schools do accept pupils from a wide variety of religions into schools with a particular ethos. It is not clear whether it could be deemed to amount to discrimination not to be able to attend a school reflecting a particular religious faith, or a non-denominational school.

²³⁰ *O'Donoghue v. Minister for Health* [1996] 2 IR 20. This position was reiterated in the Supreme Court case *Sinnott v. Minister for Education*, [2001] 2 IR 505, which held that the Constitutional right to education for children with profound disabilities continued until they were eighteen years of age. The *O'Donoghue case* stated that all children of the state were entitled to benefit from education, this would include children belonging to the various protected grounds.

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

Does the law distinguish between goods and services available to the public (e.g. in shops, restaurants, banks) and those only available privately (e.g. limited to members of a private association)? If so, explain the content of this distinction.

The Equal Status Act 2000-2004 provides that a person shall not discriminate in disposing of goods, or in the provision of services, whether that disposal or provision 'is for consideration or otherwise and whether the service provided can be availed of only by a section of the public.'²³¹ In *Two Complainants v. Department of Education and Science*²³² the Equality Officer considered what was covered by the definition of service provision. This related to the provision of maintenance grants payable to adults on further education courses. The then non-statutory rules provided that these grants were only available to EU nationals or persons with official refugee status. The Department had refused the complainants' applications for the grants. The question before the Tribunal was whether a maintenance grant was covered by the Act. Section 2 of the Act defines a service as 'a service or facility of any nature which is available to the public generally or a section of the public. To determine what was meant by 'facility' the Equality officer referred to comparable provisions in the United Kingdom equality legislation and referred to a definition of 'facility' as 'a manner, method opportunity for the easy or easier performance of anything ... The term should cover most instances where a person is not actually providing goods or a service himself, but is providing a means to obtain access to those goods or that service.' The Equality Officer held that a maintenance grant was a 'facility' covered by the Act.²³³

Section 15(1) of the Equal Status Act 2000-2004 provides that the Act will not require a person who provides goods or services to deal with a customer where it may be reasonably believed that '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 are sought or the premises or accommodation are located.'²³⁴ The Equality Tribunal has extensively considered this section.²³⁵ This provision was amended in 2003 by the Intoxicating Liquor Act 2003, which provided that cases involving discrimination in respect of licensed premises should be heard in the District Court as opposed to at the Equality Tribunal. This has a significant impact on the cost of such litigation for both the complainant and the respondent. A second point to note is that the Equality Authority is not afforded a statutory function to provide information to the public on the operation of Section 19 of the Intoxicating Liquor Act, 2003. This means that no body has been charged with disseminating information about the legal protection against discrimination contained in this Act, such dissemination is required by both Article 10 of Directive 2000/43, and Article 12 of Directive 2000/78. The Intoxicating Liquor Act is not therefore in compliance with the Directives. The statistics for the end of year for 2003 establish that members of the Traveller community took 52% less cases post the introduction of the Intoxicating Liquor Act 2003. This provision applies to all the protected grounds, but would appear to have had a disproportionate impact

²³¹ Section 5(1) Equal Status Act 2000-2004

²³² DEC-S2003-042/043

²³³ This provision was amended in 2004, now section 12 Employment Equality Act 1998-2004, see also *Donovan v. Garda Donnellan* DEC-S2001-011 which supports the contention that the Equal Status Act covers services and now facilities provided by public authorities.

²³⁴ Section 15(1) Equal Status Act 2000-2004

²³⁵ See statistics for 2001, 2002 and 2003 http://www.equalitytribunal.ie/htm/about_us/statistics.htm which show that the majority of cases under the Equal Status Act related to the provision of services in Pubs/Hotels and Night Clubs. See as example *Collins v. Owner Club Sarah* DEC-S2002-014 and *Ward v. The Boathouse Pub*, DEC-S2001-01.

on members of the Traveller community.²³⁶ Section 15(2) also provides another broad exception to the non-discrimination provisions. This exception is for owners of licensed premises, which permits actions taken in ‘good faith’ for the purpose of complying with the Licensing Acts, those actions will not constitute discrimination. This exception has been relied on in numerous cases.²³⁷ The position taken by the Equality Tribunal in respect of this provision is that the meaning of ‘in good faith’ means the actions must be done honestly and without prejudice.²³⁸ 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.’²³⁹ Any action taken should be for the sole purpose of ensuring compliance with the provisions of the Licensing Acts.²⁴⁰ The Licensing laws require publicans to run orderly houses, avoiding drunkenness, violent or riotous behaviour, and impose various legal obligations on publicans in respect of health and safety law.

The Equal Status Act prohibits clubs from discriminating at section 8, and permits certain exceptions to this rule in section 9. Where a club is set up to cater for the needs of a particular gender, marital status, family status, sexual orientation, religious belief, age, disability, nationality or ethnic or national origin or membership of the Traveller Community. The Equality Authority challenged the actions of Portmarnock Golf Club, which is a male only club.²⁴¹ The case went at first instance to the District Court who made a declaration, that Portmarnock was a discriminating club, and ordered the suspension of the certificate of registration and alcohol license of the club. This finding was suspended pending an appeal to the High Court. The High Court interpreted section 9 of the Equal Status Act as permitting male only golf clubs, and holding that the principal purpose of Portmarnock Golf Club is to cater only for the needs of men. This is a very broad interpretation of the section. The implications of this decision are most obvious in the context of the Race Directive. Does the Race Directive cover membership of a private club, albeit a club in receipt of State benefits; e.g. a license to sell intoxicating liquor. Should the Supreme Court uphold the High Court interpretation of section 9, to the effect that a male only golf club is not discriminatory, it seems conceivable that a white only tennis club is equally not discriminatory under the Act, thereby ensuring that by virtue of judicial interpretation the Equal Status Act is not in compliance with the Race Equality Directive. Further, pending the Supreme Court decision the High Court decision is the correct legal interpretation and so it is arguable that we are currently not in compliance with the Race Equality Directive.

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

To which aspects of housing does the law apply? Are there any exceptions?

The Equal Status Act 2000-2004 prohibits discrimination in the disposing of any estate or interest in premises, in respect of terminating any tenancy or other interest in the property, or in the provision of accommodation, or amenities related to such accommodation.²⁴² The provision does contain a number of exceptions, the first relates to accommodation that is being provided in a person’s home, that is that the ‘provision of accommodation affects the

²³⁶ Please see sections 0.2 above and 6.1 and 6.5 below for a discussion on effective sanctions, and section 7 below on the functions of the equality body.

²³⁷ *Delaney v. The Harp Bar*, DEC-S2002-53/56, *Mongan and Ors v. The Waterside Hotel* DEC-S2003-008/014, *Moorehouse v. Ayleswood* DEC-S2001-009, *Maughan v. The Glimmer Man* DEC-S2001-020, *Conroy v. Costello* DEC-S2001-014, *McDonagh v. The Castle Inn* DEC-S2001-022 to name but some of the cases.

²³⁸ *Delaney v. The Harp Bar*, DEC-S2002-53/56

²³⁹ DEC-S2001-014

²⁴⁰ *Mongan and Ors v. The Waterside Hotel* DEC-S2003-008/014

²⁴¹ *The Equality Authority v. Portmarnock Golf Club and Ors*, unreported, High Court, 10th June, 2005, this decision is being appealed by the Equality Authority to the Supreme Court.

²⁴² Section 6(1) Equal Status Act 2000-2004

person's private or family life or that of any other person residing in the home.'²⁴³ Another such exception relates to accommodation that is reserved for a particular category of people, and this may relate to one of the discriminatory grounds, such as a residential centre for people with disabilities, or a nursing home for the elderly.²⁴⁴

The Equal Status Act 2000-2004 at section 6(6) provides that, nothing in the Act can be construed as prohibiting housing authorities, pursuant to their functions under both the Housing Acts, 1966-1998 or the Housing (Miscellaneous Provisions) Act, 1992 from providing in respect of housing accommodation, different treatment to persons based on family size, family status, marital status, disability, age or membership of the Traveller community. While permitting the difference in treatment, there is no clarification as to how they may be treated differently.²⁴⁵ See *Doherty and Anor v. South Dublin County Council, the Minister for the Environment, Heritage and Local Government, Ireland and the Attorney General*, below for a further discussion of this point.²⁴⁶ The Equal Status Act 2000-2004 at section 6(7) provides that nothing in the Act shall be construed as prohibiting, in relation to housing accommodation provided by the Minister, different treatment to persons on the basis of their nationality, gender, family size, family status, marital status, disability, age or membership of the Traveller community.²⁴⁷ This exception is tempered by virtue of the fact that any difference in treatment is not permitted to amount to a derogation from any of the obligations of the State under the treaties governing the European Communities or any Act adopted by an institution of those Communities. This ensures that the differences of treatment permitted under section 6(7) should be in compliance with the Race Directive, no such statement is made in respect of section 6(6).

The Housing (Traveller Accommodation) Act 1998 provides that each major housing authority to prepare and adopt a five-year programme for the provision of Traveller accommodation in their area. The Act permits those housing authorities to provide loans to members of the Traveller community to support them in obtaining caravans or sites for same.²⁴⁸ A further provision relevant in this context is the Housing (Miscellaneous Provisions) Act, 2002. Section 24 of the 2002 Act, amends the Criminal Justice (Public Order) Act 1994 and criminalizes trespass on public and private land. While this provision applies equally to all persons it has a disproportionate impact on members of the Traveller community.²⁴⁹ The Act permits the Gardaí to move Travellers with no notice on the basis of a complaint by the local authority. Equally it means that 'Travellers will be unable to move from place to place to exercise their right to be nomadic due to the fear of committing a criminal offence.'²⁵⁰ The Equality Authority annual reports stated:

The impact of the Race Directive is beginning to become evident in the case files of the Equality Authority particularly for those claims in relation to accommodation under the Equal Status Acts 2000 to 2004. The involvement of the Equality Authority led to three significant settlements being reached involving the provision of accommodation. In addition after correspondence with Wicklow County Council from the Equality Authority, a proposed resolution was withdrawn which would have barred any accommodation within a 3 kilometer radius of any area zoned or designated a national park or an area of outstanding beauty within the county and

²⁴³ Section 6(2)(d) Equal Status Act 2000-2004

²⁴⁴ Section 6(5) Equal Status Act 2000-2004

²⁴⁵ Flash report race and religion 02-02-2004

²⁴⁶ Reported in the Irish Times, January 12th 2006.

²⁴⁷ No reference is made in this section to the ground of race or sexual orientation.

²⁴⁸ Race Report of November 2002 by Dave Ellis

²⁴⁹ The Irish Traveller Movement Traveller Legal Unit, Strategic Plan of 2003-2006 suggests that some 1,000 families are currently susceptible to criminal prosecution. Also where a family do not move immediately their caravans may be seized, this may have the effect of making them homeless.

²⁵⁰ The Irish Traveller Movement Traveller Legal Unit, Strategic Plan of 2003-2006.

blocked a compulsory purchase order in respect of a dwelling. Media reports stated that this resolution was in effect a ban to apply only in respect of Travellers.²⁵¹

During 2005 the Equality Authority applied to be appointed as an amicus curiae in relation to High Court proceedings brought by a Traveller family concerning the provision of accommodation and the criminal trespass legislation. The Equality Authority was granted the right to appear as a ‘friend of the court’ in two cases relating to Traveller accommodation.²⁵² An amicus curiae brief (friend of the court) is an intervention by a disinterested third party, that is not a party to the action, and this third party seeks to use the court as a platform to amplify a point of law that might not otherwise be considered within the factual confines of the court. The procedure adopted is that the third party provide a written brief for the information of the court, in the context of this particular case the Equality Authority are seeking to raise arguments that the provisions of the Race Directive should be considered when determining the outcome of this case. The Court retains discretion and may or may not take on board the arguments raised.²⁵³ The Irish courts require a body seeking to enter an amicus curiae brief to establish proof of a legitimate interest in the case. In the *Lawrence case* the Equality Authority sought to do this by highlighting that they were a specialised body within the meaning of Article 13 of the Race Directive, and as such they were charged with promoting equality in Ireland. The arguments also referred to Article 7(2), that as a specialised body within the meaning of the Directive they should be in a position to provide assistance or go in and support the case in question, and that the Equality Authority does have a ‘legitimate interest in ensuring that the provisions of the Directive are complied with.’ The Equality Authority also referred to the powers and functions conferred on them by national law, including their right to take actions, assist litigants, and promote equality. The Equality Authority in their role as amicus curiae to this case have been “given leave to appear as amicus curiae in relation to the application and interpretation of the Race Directive should it arise as part of the case.” As the case has to come to hearing it has yet to be determined. This combination of arguments ensured that the court was willing to exercise its discretion and permit them to act as an amicus curiae to the court in this case.²⁵⁴ In the *Lawrence case* the family are challenging the constitutionality of The Housing (Traveller Accommodation) Act 1998 on the grounds that it has a discriminatory impact on Traveller families.²⁵⁵ Should the Act be deemed unconstitutional it ceases to have legal effect. In a second case, that of *Doherty v. South Dublin County Council and Ors.*, the High Court granted the Equality Authority the right to act as an amicus curiae to the court. A number of the respondents to the action challenged the Equality Authorities right to appear as an amicus curiae to the court in this action, the Irish Supreme Court held that the Equality Authority do have the right to appear as an amicus curiae to the Court.²⁵⁶

²⁵¹ Settlements are not reported, information available in the Equality Authorities Annual Report 2005 available at www.equality.ie

²⁵² *Doherty and Anor v. South Dublin County Council, the Minister for the Environment, Heritage and Local Government, Ireland and the Attorney General and Lawrence v. Mayo Country Council and Ors.*

²⁵³ The use of amicus curiae briefs are relatively new in the Irish context, in this particular case both the Irish Human Rights Commission and the Equality Authority are providing such briefs. Prior to this there have been two other occasions where such briefs have been entered, one by the UNHCR and again by the Irish Human Rights Commission. It should be noted that unlike the Irish Human Rights Commission the Equality Authority do not have a statutory right to intervene, but relied on the inherent discretion of the court and sought and received permission to intervene in this case.

²⁵⁴ This case is unreported, and as such there is no judgement available, the information provided in relation to the arguments used is provided by the Equality Authority.

²⁵⁵ *Doherty and Anor v. South Dublin County Council, the Minister for the Environment, Heritage and Local Government, Ireland and the Attorney General*, Reported in the Irish Times, January 12th 2006, the purpose of the Equality Authorities intervention is to challenge the compliance of this provision with the Race Directive.

²⁵⁶ *Doherty and ors v. South Dublin County Council*, [2006] IESC 57

In *Doherty v South Dublin County Council and Ors*,²⁵⁷ the claimants are two elderly members of the Traveller community who are in poor health and who seek habitable accommodation from the local housing authority. The case made by the Applicants in their pleadings is that they are discriminated against because, in providing accommodation under the Housing Acts, 1966-2004, the housing authority, merely provide a site but no habitable accommodation (namely a caravan or mobile home) to Travellers in contrast with their treatment of members of the settled community who are accommodated in houses. The Doherty's were offered an apartment, but made it clear on a number of occasions that they had lived their entire lives among the Traveller Community in caravan style accommodation, and did not want at this stage of their life to adjust to a new way of living amongst people they did not know. They were requesting habitable accommodation, adequate to their needs as elderly Travellers. The Doherty's lost their action.

In the pleading on behalf of the Applicants, reliance was placed both on the provisions of the Equal Status Acts 2000-2004 and on the provisions of Directive 2000/43/EC and it is contended that discrimination in the provision of accommodation to members of the Traveller Community is contrary to the requirements of both Irish law and directly effective EC law. Charleton J., makes no reference to the Directive 2000/43/EC or any specific provision thereof during the course of his judgement: nor does he refer specifically to the intervention by the Equality Authority. As regards the Equal Status Act 2000-2004 the High Court held that that Act did "not create new legal norms which are justiciable outside the framework of compliance established by those Acts."²⁵⁸ Charleton J., further concluded "if I were to analyse the case of the applicants under the Equal Status Acts, 2000-2004, I do not feel that I could hold that their treatment has been discriminatory."²⁵⁹ The rationale for this was that the definition of homelessness as set out in the Housing Acts does not distinguish between members of the Irish Traveller Community and members of the settled community. There is not therefore:

"an untrammelled statutory right vested only in members of the Irish Traveller Community to opt in all and any circumstances for caravan accommodation and to reject bricks and mortar. Such an interpretation would mean that those who are very elderly, very infirm or very ill and who would be unsuited, for that reason alone, to caravan accommodation would be entitled to caravans adapted to their needs; and adapted ever more extremely as their disability grew. Such a right would be in contradistinction to the ordinary adaptations which every member of the community must make as they are stricken by age, infirmity or illness. People, in the ordinary course of life, often leave the homes which they occupied with their family for flat accommodation, for single storey accommodation, for a retirement village or for a nursing home. Often, this is a traumatic transition. If the statutory scheme required me to make a distinction conferring a special right on Travellers always to be housed in a caravan, I would do so but the definition of a homeless person, as set out in s. 2 of the Housing Act, 1988, apart from any other provision, requires that I should not."²⁶⁰

It was further contended that the housing authority are under a legal duty having regard to the principles laid down in the European Convention on Human Rights Act, 2003 and the provisions of the Housing Acts to provide the Applicants with a caravan that will allow them to lead a normal family life together. The High Court referred to a number of English

²⁵⁷ [2007] IEHC 4

²⁵⁸ *Doherty and ors v. South Dublin County Council*, [2007] IEHC 4 at paragraph 12.

²⁵⁹ *Doherty and ors v. South Dublin County Council*, [2007] IEHC 4 at paragraph 18.

²⁶⁰ *Doherty and ors v. South Dublin County Council*, [2007] IEHC 4 at paragraph 24.

decisions, particularly the Court of Appeal decision of *Anufrijeva and Anor v. Southwark London Borough Council*,²⁶¹ where Lord Woolf CJ stated:

“Strasbourg provides little guidance in this area, for we are not aware of any case where the Court of Human Rights has held a state in breach of the Convention for failure to provide housing to a certain standard, or for failure to provide welfare support. ...”²⁶²

Charleton J went on to hold that the actions of the County Council, to provide bricks and mortar accommodation, pending re-development of the site in question are not unreasonable. He also held:

“A duty to take into account the sensitivities of members of the Roma communities, whether Gypsies from the neighbouring kingdom, members of the Sinti from Central Europe, or members of our own Irish Traveller Community, can arise when interpreting administrative measures. These obligations are not, however, unlimited.”²⁶³

4. EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

Does national law provide an exception for genuine and determining occupational requirements? If so, does this comply with Article 4 of Directive 2000/43 and Article 4(1) of Directive 2000/78?

There is an exception to the Employment Equality Act 1998-2004 when person’s characteristic constitutes a genuine and determining occupational requirement, where the objective is legitimate and the requirement proportionate.²⁶⁴ This necessity for legitimacy and proportionality is in line with Article 4 of both the Race Directive and the Framework Employment Directive. A previous exception was removed as a result of the Equality Act 2004. That exception permitted distinctions on the grounds of gender, race and religion, where the employment duties were performed outside the State, and the relevant characteristic was an occupational qualification having regard to the laws and or customs of that State.

4.2 Employers with an ethos based on religion or belief

a) Does national law provide an exception for employers with an ethos based on religion or belief? If so, does this comply with Article 4(2) of Directive 2000/78?

b) Are there any specific provisions or case-law in this area relating to conflicts between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination?

Section 37(1) of the Employment Equality Act 1998-2004 permits discrimination for the purposes of maintaining, or the reasonable prevention of, any undermining of the religious ethos of an institution. The Act does not refer to the term ‘legitimate’ or ‘proportionate.’ It could be argued that Irish case law would ensure that these notions apply, for example, in the Supreme Court decision of *Re Article 26 and the Employment Equality Bill, 1996*,²⁶⁵ the court held that it would ‘appear that it is constitutionally permissible to make distinctions or

²⁶¹ [2004] 1 QB 1124

²⁶² [2004] 1 QB 1124

²⁶³ *Doherty and ors v. South Dublin County Council*, [2007] IEHC 4 at paragraph 43, he relied in *Chapman v. United Kingdom* (2001) 33 EHRR 18 and *Codona v. The United Kingdom*, 7th February, 2006 in support of this proposition.

²⁶⁴ Section 37(2) Employment Equality Act 1998- 2004.

²⁶⁵ [1997] 2 I.R. 321

discrimination on grounds of religious profession belief or status insofar but only insofar as this may be necessary to give life and reality to the guarantee of the free profession and practice of religion contained in the Constitution...²⁶⁶ Equally it can be contended that the concept of legitimacy is also contained in Irish law.²⁶⁷ It would be preferable if the language of the Act expressly required all actions to be ‘legitimate’ and ‘proportionate.’ A second point is that the terms of the exception contained in section 37(1) of the Employment Equality Act 1998-2004 are phrased in broader terms than those found in the Directive. The Directive refers to employment in a religious organisation ‘where, by reason of the nature of these activities or of the context in which they are carried out, a person’s religion or belief constitute a genuine, legitimate and justified occupational requirement.’ This suggests that employers should show that a person’s religion or belief is relevant to the individual post in question. Whilst this is implicit in the Irish Act it is not express. The Directive also explicitly limits this exception to discrimination based on the grounds of religion or belief and it cannot be used to justify discrimination on another ground. However, there is no similar restriction found within section 37(1).²⁶⁸ Section 12(4) of the Employment Equality Act 1998-2004 which relates to the provision of vocational training, reflects the exception contained in section 37(1) of that Act. It permits difference in treatment with regard to access to training or vocational courses under the direction of a body established for religious purposes, and in order to maintain the religious ethos of educational or medical institutes.

4.3 Armed forces and other specific occupations

- a) *Does national law provide for an exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78)?*
- b) *Are there any provisions or exceptions relating to employment in the police, prison or emergency services (Recital 18, Directive 2000/78)?*

Section 37(5) of the Employment Equality Act 1998-2004 contains such an exception. The section states in ‘relation to discrimination on the age ground or disability ground, nothing in this Part or Part II applies in relation to employment in the Defence Forces.’ While there are no longer any blanket exceptions to employment in the police, prison or emergency services the Act does contain some restrictions. Section 37(3) provides that it is an occupational requirement that those employed in the Garda Síochána, prison services or emergency services are competent and capable to undertake the ‘range of functions’ associated with this position. A further exemption from age discrimination is included at section 37(4) which provides that if the Minister is of the opinion that the age profile of members of the Garda Síochána, prison service or other emergency services is such that the occupational capacity is likely to be adversely affected, the age ground shall not apply in relation to recruitment to those services.

4.4 Nationality discrimination

Both the Race Directive and the Framework Employment Directive include exceptions relating to difference of treatment based on nationality (Art 3(2) in both Directives).

- a) *How does national law treat nationality discrimination?*
- b) *Are there exceptions in anti-discrimination law that seek to rely on Art 3(2)?*

²⁶⁶ Religion report of May 2003 by Dave Ellis

²⁶⁷ *Flynn v. Sr. Power and the Sisters of the Holy Faith*, [1985] ILRM 336, see Ellis Religion Report May 2003.

²⁶⁸ Sexual orientation report of 29 September 2004 by Mark Bell

The Equality legislation (both the Employment Equality Act, 1998-2004 and the Equal Status Act 2000-2004) defines race as including nationality, or ethnic or national origin.²⁶⁹ Equally the Constitutional Courts have held that the some of the protections of the Constitution can be extended to non-citizens.²⁷⁰ The Unfair Dismissals Acts 1973-1993 provides that dismissal of an employee on the ground of race shall be deemed to be an unfair dismissal the term is not defined so it is unclear whether this would include nationality. The Prohibition of Incitement to Hatred Act 1989 prohibits incitement to hatred on various grounds including race, colour, religion, nationality or ethnic or national origins / membership of the Traveller community.

Section 12(7) of the Employment Equality Act 1998-2004 provides for different treatment on the basis of nationality. The exception relates to difference in treatment in relation to fees for admission, or attendance at any vocational or training course, different treatment is permitted for citizens of Ireland or nationals of another Member States of the European Union. It also provides that it is not discrimination to offer assistance to particular categories of persons by way of sponsorships, scholarships, bursaries or other awards, which assistance is reasonably justifiable, having regard to traditional or historical considerations. This exception would appear to comply with the provisions of Article 3(2) of the Race Directive. Section 17(2) of the Employment Equality Act 1998-2004 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 Act 2003.

The Equal Status Act 2000-2004 also contains some exceptions in relation to nationality, by excluding from the provisions of the legislation differential treatment of persons, on the ground of nationality in relation to housing or accommodation provided by or on behalf of the Minister. Section 5(2)(f) continues to permit 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 final distinction made in this area relates to section 9 of the Equal Status Act which provides that a club will not be a discriminating club if it excludes membership by reason only that its principal purpose is to cater for the needs of a particular nationality.

4.5 Work-related family benefits

Some employers, both public and private, provide benefits to employees in respect of their partners. For example, an employer might provide employees with free or subsidised private health insurance, covering both the employee and their partner. Certain employers limit these benefits to the married partners or unmarried opposite-sex partners of employees. This question aims to establish how national law treats such practices. Please note this question is focused on benefits provided by the employer. We are not looking for information on state social security arrangements.

(a) Does national law permit an employer to provide benefits that are limited to those employees who are married?

(b) Does national law permit an employer to provide benefits that are limited to those employees with opposite-sex partners?

²⁶⁹ Section 6(2)(h) Employment Equality Act 1998-2004

²⁷⁰ *The State (Nicolaou) v. An Bord Uchtála*, [1966] IR 567, Hogan and Whyte, *JM Kelly The Irish Constitution*, 4th Edition, at 1260 contend that there are situations where non-citizens may not be in a position to invoke a particular Constitutional right. See section 3 above.

The Employment Equality Act 1998-2004 does provide some specific exceptions in relation to ‘family benefits.’ These benefits are limited to families based on marriage. Section 34(1) provides an exception from the ban on discrimination where an employer provides: a benefit to an employee in respect of events related to members of the employee’s family or any description of those members; a benefit to or in respect of a person as a member of an employee’s family; a benefit to an employee on or by reference to an event occasioning a change in the marital status of the employee. The term ‘member of the family’ is defined as in relation to any person means their spouse, brother, sister, uncle, aunt, nephew, niece, lineal ancestor, or lineal descendant of that person or that person’s spouse.²⁷¹ This definition clearly excludes same-sex partnerships. There are legislative benefits which do not extend to same-sex couples. The Parental Leave Act 1998 provides a statutory entitlement to unpaid parental leave for men and women. This leave is in respect of each child of which that person is the natural or adoptive parent. This leave is available separately to both parents.²⁷² Parental leave involves an employee who is the natural or adoptive parent of a child being entitled to ‘leave from his or her employment’ for a period of 14 weeks to enable him or her to take care of the child.²⁷³ This leave is confined to natural or adoptive parents, and partners in a same sex relationship would not be so entitled. Same sex couples may not jointly adopt a child, unlike married couples. Single people regardless of sexuality may adopt, and that person is entitled to leave under the legislation, but their partner will not be. A second issue in respect of the Parental Leave Act relates to *force majeure* leave. This is paid leave for urgent family reasons that relates to an injury or illness of one of the persons specified in the Parental Leave Act 1998. Section 13 states that leave applies to the following categories of persons: a person of whom the employee is the parent or adoptive parent; the spouse of the employee or a person with whom the employee is living as husband or wife, a person to whom the employee is in *loco parentis*, a brother or sister of the employer, a parent or grandparent of the employee, and persons of such other class or classes as may be prescribed.

The Pensions Act 1990-2004²⁷⁴ contains an exception to the principle of non-discrimination on the grounds of sexual orientation. Section 72(3) states that it won’t be a breach of the principle of equal pension treatment on the marital status or sexual orientation ground to provide more favourable occupational benefits to a deceased member’s widow or widower. Equally the social welfare survivor’s pensions are payable only to spouses of the deceased contributor.²⁷⁵ Same sex couples are also be treated differently by the taxation system. Marriage as recognised by Irish law benefits from a number of tax advantages. Same-sex relationships, as well as non-marital relationships do not have legal standing as regards the tax system.²⁷⁶ This position was challenged in the recent High Court case of *Zappone and Gilligan v. Revenue Commissioners & Ors.*²⁷⁷ In this action a same-sex couple were married in Canada and sought among other issues to challenge the taxation system that would not permit them to file as a married couple, rather than as two single people.²⁷⁸ The plaintiffs claimed a constitutional right to marry, and also sought to rely on the European Convention of Human Rights. The Court held that the plaintiffs were not married in Irish law, and were

²⁷¹ Section 2(1) Employment Equality Act 1998-2004

²⁷² Section 6 Parental Leave Act 1998.

²⁷³ Section 6(1) Parental Leave Act 1998

²⁷⁴ This Act relates to occupational pensions, personal retirement savings accounts, and other occupational benefits.

²⁷⁵ http://www.equality.ie/stored-files/PDF/Partnership_Rights_of_Same_Sex_Couples.pdf - See this publication for more detailed information about pension rights.

²⁷⁶ The advantages of belonging to the Constitutional Family are set out in the following report:

http://www.equality.ie/stored-files/PDF/Partnership_Rights_of_Same_Sex_Couples.pdf

²⁷⁷ *Zappone and Gilligan v Revenue Commissioners & Ors*, Unreported High Court Decision of Mrs Justice Dunne, 14 December 2006 - http://www.kalcase.org/KAL%20Zappone_v_Rev_Commrs_Judgement.doc

²⁷⁸ <http://www.irishexaminer.com/text/story.asp?j=287804893034&p=z878x4893963&n=287804894017>

<http://www.queermarriage.com/index.php?content=showNews&nID=96>

http://www.emergence.qc.ca/mariage_articles/20041109_1.htm for some examples of the coverage of this case.

and
and

prohibited from so marrying and that this prohibition was not in contravention of the Constitution, or the European Convention on Human Rights Act.²⁷⁹ This case has been appealed to the Supreme Court.

4.6 Health and safety

Are there exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78)?

Are there exceptions relating to health and safety law in relation to other grounds, for example, ethnic origin or religion where there may be issues of dress or personal appearance (turbans, hair, beards, jewellery etc)?

In Ireland the main legislative provision in this area is the Safety, Health and Welfare at Work Act 2005.²⁸⁰ This Act imposes a duty on an employer to provide a safe place of work as far as is reasonably practicable a failure to do so may result in criminal liability. The Safety, Health and Welfare at Work (General Application) Regulations²⁸¹ impose civil *and* criminal liability for failure to provide a safe place of work. The standard imposed by the regulations is at issue but there is an argument that they may impose an absolute standard of care. These regulations cover nine areas of employment: general provisions; workplace regulations, work equipment; personal protective equipment; manual handling of loads; display screen equipment; electricity; first aid; notification of accidents and dangerous occurrences.

Irish legislation doesn't contain specific exemptions in relation to disability and health and safety however provisions in certain Acts can be interpreted by employers as exempting them from liability in some situations. The Health and Safety Welfare at Work (General Application) Regulations state that although employers should ergonomically adapt workplaces to the individual, they are entitled to give collective protective measures priority over individual protective measures. Equally there are no specific exemptions in relation to any of the other protected grounds, but issues such as dress code 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, no case law has arisen from such practices to date.

There are a number of exceptions to the principle of equality on the basis of health and safety concerns. The Equal Status Act 2000-2004 provides that where a person has a disability that, in the circumstances, could cause harm to the person or to others, treating the person differently to the extent reasonably necessary to prevent such harm does not constitute discrimination.²⁸² Section 7(4)(b) of the same Act excludes the provisions of the Act in respect of the provision of education where compliance with the non-discrimination provisions would make it impossible or have a seriously detrimental effect on the provision of education to other students. What is unclear in respect of both provisions relates to who makes the decision as to whether a person is a harm to themselves or others, will it be professionals or lay people and what is the standard to be imposed in such a decision.

²⁷⁹ The case while instigated as a tax case, became a case about the definition of marriage, and whether the term marriage as understood in Irish law should encompass same sex marriage. The High Court did not find for the plaintiffs in this action.

²⁸⁰ <http://www.oireachtas.ie/documents/bills28/acts/2005/a1005.pdf>

²⁸¹ The Safety Health and Welfare at Work (General Application) Regulations 1993 S.I. 44/93; The Safety Health and Welfare at Work (General Application) (Amendment) Regulations 2001 S.I. 188/2001; The Safety Health and Welfare at Work (General Application) (Amendment No. 2) Regulations 2003 S.I. 53 /2003; The Safety Health and Welfare at Work (General Application) (Revocation) Regulations 2005 S.I. 392/2005 – collectively known as the Safety Health and Welfare at Work (General Application) Regulations.

²⁸² Section 4(4) Equal Status Act 2000-2004

The Employment Equality Act 1998-2004 at section 33 provides that nothing will render unlawful measures that have been adopted with a view to ensuring equality in practice between employees to protect the health and safety at work of persons with a disability, or to create or maintain facilities for safeguarding or promoting the integration of such persons into the working environment. This provision is new, has yet to be litigated, but the emphasis of the provision is towards integration as opposed towards segregation which is positive.

4.7 Exceptions related to discrimination on the ground of age

4.7.1 Direct discrimination

- a) Is it possible, generally, or in specified circumstances, to justify direct discrimination on the ground of age? If so, is the test compliant with the test in Article 6, Directive 2000/78, account being taken of the European Court of Justice in the Case C-144/04, Mangold ?*
- b) Does national law permit differences of treatment based on age for any activities within the material scope of Directive 2000/78?*
- c) Does national legislation allow occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits under it taking up the possibility provided for by article 6(2) ?*

There are a number of exemptions contained in the Employment Equality Act 1998-2004 to the age ground. Section 34 refers to an occupational benefits scheme, and provides that it does not amount to discrimination on the age ground for an employer to fix ages for admission to such a scheme or for entitlement to benefits under it; to fix different ages for all employees or a category of employees; to use, in the context of such a scheme, age criteria in actuarial calculations; to provide different rates for severance payment for different employees these rates being based on or taking into account the period between the age of an employee on leaving employment and his or her compulsory retirement age – provided that none of these measures constitute discrimination on the gender ground.²⁸³ Occupational benefit schemes are defined as schemes which provide for benefits to employees or categories of employees on their becoming ‘ill, incapacitated or redundant but does not include any occupational pension scheme providing for pensions, gratuities or other allowances payable on retirement or death.’²⁸⁴ It is permissible for employers to fix different ages for the retirement of employees whether voluntary or compulsory.²⁸⁵ It is also permissible for employers to set a maximum age for recruitment, as long as that considers the cost or period of time involved in training a recruit to a standard at which the recruit will be effective in that job, and the need for there to be a reasonable period of time prior to retirement age during which the recruit will be effective in that job.²⁸⁶ These exceptions do appear to come within Article 6 of Directive 2000/78. Section 34(7) also permits employers to provide for different rates of remuneration or different terms and conditions of employment, on the age ground, where that difference is based on their seniority or length of service within the post.

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

Are there any special conditions set by law for older or younger workers in order to promote their vocational integration, or for persons with caring responsibilities to ensure their protection? If so, please describe these.

²⁸³ Section 34 Employment Equality Act 1998-2004

²⁸⁴ Section 34(3A) Employment Equality Act 1998-2004

²⁸⁵ Section 34(4) Employment Equality Act 1998-2004

²⁸⁶ Section 34(5) Employment Equality Act 1998-2004

The Protection of Young Persons (Employment) Act 1996²⁸⁷ limits the employment of young persons, young persons are over sixteen but not yet eighteen. This Act also restricts the employment of children; children are under sixteen. The Act prohibits children under the age of 13 from working, unless they have received a licence from the Minister for State at the Department of Trade Enterprise and Employment. The Minister may not grant a licence without first considering the education and the safety and health of the child. The employer must also have written permission from the parent or guardian before the child is permitted to work. If an employer hires young workers then they must keep a register of young workers, this register should set out the hours worked, the rate of pay and the total amount in wages paid. A second provision aimed at protecting young workers is the Safety, Health and Welfare at Work (Children and Young Persons) Regulations, 1998. Under these regulations an employer must carry out a risk assessment, assessing the risks to the child or young person by the type of employment required. This assessment should consider the safety and health of the child or young person and also consideration should be given to the physical and mental growth. Where the assessment shows that the employment could cause harm to the child or young person then they may not be employed in that employment. Where the assessment shows a risk to the mental and physical growth of the child then the employer must make health surveillance available to them. Parents or guardians should be informed of the outcome of the assessments, and the precautions and preventative measures being put in place to protect the child or young person. The Employment Equality Act 1998-2004 prohibits discrimination on the grounds of age for everyone above 16, that being said, employers are still allowed to set minimum recruitment ages of 18.

The Employment Equality Act 1998-2004 prohibits discrimination on the grounds of a person's family status. This includes a parent or a person in loco parentis to a person who has yet to attain the age of 18, it also includes a resident primary carer to a person who has a disability which is of such a nature as to give rise to the need for care or support on a continuing, regular or frequent basis. This is a somewhat narrow definition and will cover some but not all carer's in Irish society. All the protections granted by the Employment Equality Act are provided for those with a family status as defined by the Act.

The introduction of the Carer's Leave Act, 2001 entitles employees to unpaid leave to provide full time care for a dependant. The maximum leave entitlement is 65 weeks and the minimum is 13 weeks. The Carer's Benefit is payable for up to 65 weeks for a carer who gives up work under the Act. The national agreement Sustaining Progress established the National Framework committee for Work-Life Balance and the Special Initiative on Care. The Work Life Balance Committee is convened by the Department of Enterprise, Trade and Employment. The committee advises on work life balance practices, organises information seminars, offers financial assistance to firms to develop work-life balance initiatives.²⁸⁸ The Special Initiative on Care includes issues such as childcare, care for the people with disabilities and the elderly. The Equality Authority have published a number of documents in respect of carers see particularly: Implementing Equality for Carer's which highlights the difficulties for carers in Irish society and makes a number of recommendations for change.²⁸⁹

4.7.3 Minimum and maximum age requirements

Are there exceptions permitting minimum and/or maximum age requirements in relation to access to employment (notably in the public sector) and training?

²⁸⁷ <http://acts.oireachtas.ie/zza16y1996.1.html>

²⁸⁸ For more information <http://www.worklifebalance.ie/>

²⁸⁹ Available at www.equality.ie

The Employment Equality Act 1998-2004 prohibits age discrimination for everyone over the age of 16. Employers are still permitted to set a minimum recruitment age of 18 or under and to set retirement ages in employment contracts. If the age of retirement is not specified in the employment contract then it may be implied by practice, this means that if the practice in the particular employment is for people to retire at 65 then it may be assumed that employees, will in the normal course of events retire at this age. If a person is employed after their 65th birthday and no retirement age is specified then the employer cannot impose a retirement age unless they can show that the employee is no longer capable of doing the job or is a danger to either themselves or other employees.²⁹⁰ There are maximum age requirements for access to certain types of training, particularly access to the Garda Síochána and the defence forces. Among those upper age limits are the following:

- Army and Air Corps under the age of twenty five at the time of enlistment
- Naval Service under the age of twenty seven at the time of enlistment
- Air Corp Apprenticeship under the age of nineteen at the time of apprenticeship
- An Garda Síochána under the age of thirty five to commence training

4.7.4 Retirement

In this question it is important to distinguish between pensionable age (the age set by the state, or by employers or by collective agreements, at which individuals become entitled to a state pension, as distinct from the age at which individuals retire from work), and mandatory retirement ages (which can be state-imposed, employer-imposed, imposed by an employee's employment contract or imposed by a collective agreement).

a) Is there a state pension age, at which individuals must begin to collect their state pensions? Can this be deferred if an individual wishes to work for longer, or can an individual collect a pension and still work?

b) Is there a normal age when individuals can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements? Can payments from such occupational pension schemes be deferred if an individual wishes to work for longer, or can an individual collect a pension and still work?

c) Is there a state-imposed mandatory retirement age(s)? Please state whether this is generally applicable or only in respect of certain sectors, if so please state which. Have there been recent changes in this respect or are any planned in the near future?

d) Does national law permit employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract, collective bargaining or unilaterally?

e) Does the law on protection against dismissal and other laws protecting employment rights apply to all workers irrespective of age, if they remain in employment or are these rights lost on attaining pensionable age or another age (please specify)?

For these above questions, please indicate whether the ages are different for women and men.'

²⁹⁰ [Information provided by Age Action Ireland.](#)

Ireland does not have a single fixed retirement age. In general the retirement age is provided for in the contract of employment. Some contracts of employment have a mandatory retirement age but make provision for earlier retirement, generally on the grounds of illness. It is permissible for employers to fix different ages for the retirement of employees whether voluntary or compulsory, within the terms of the contract of employment.²⁹¹ Most people in Ireland retire at age 65. There is no set retirement age for the self-employed. At 65 the Retirement Pension is payable by the State to both men and women who have enough social insurance contributions. This is not means tested, in general a person must have been an employee and paying full-rate social insurance contributions, a small number of self-employed people also qualify. While in receipt of the Retirement Pension, working is not permissible. At 66 the Old Age Contributory Pension becomes payable; to both men and women. There are two types of Old Age Pension, contributory and non-contributory. On receipt of the Old Age Pension, working is permissible. Where a person is in receipt of a contributory pension there is no limit on what may be earned. There is no potential to increase the contributory state pension after the age of 65 therefore there is no benefit to deferring that payment. Those in receipt of the non-contributory pension may only earn up to €100 per week prior to deductions being made from the actual pension. The state pension age applies equally to men and women. Occupational pension schemes are private agreements and they are completely dependent on the individual agreement.

Some jobs existing under a statutory framework set a maximum age of staff. The mandatory retirement age for those in the public sector who joined before April 2004 is 65 years. Those who joined after April 2004 have a minimum retirement age of 65, this means they can continue to work subject to health requirements. There are different age periods for certain occupations such as the Gardaí, fire-fighters and the Defence Forces. The Gardaí and Fire Service have a minimum retirement age of 55 and the compulsory retirement age for Gardaí is 60. Members of the judiciary have a statutory retirement age of 70, however, some judges may remain in office until the age of 72. Medical general practitioners must retire at the age of 70.

To be covered by the Unfair Dismissals Act 1977-1993 a number of basic requirements must be satisfied, they include: the necessity to have one year's continuous service with the employer; and employees must not have reached the normal retirement age for the employment in question.²⁹² The legislation defines unfair dismissals as dismissals relating to:

- membership of a trade union, or
- union activity,
- by reason of a persons religious or political opinions,
- by reason of race,
- colour,
- sexual orientation,
- age,
- membership of the Traveller community

Unfair dismissals also occur where a person is dismissed for seeking to enforce their rights under the:

- Parental leave Act,
- Maternity Protection Act,
- Adoptive Leave Act,

²⁹¹ Section 34(4) Employment Equality Act 1998-2004, this permits employers to choose whatever age they please for the retirement of employees, whether voluntary or compulsory.

²⁹² Section 2(1) Unfair Dismissals Act 1977-1993

- instigating or proposing to take either civil or criminal proceedings against the employer,
- or acting as a witness,
- or being party to such proceedings.

Unfair dismissals may also occur where there was not a substantial ground to justify the dismissal. This scope of the Unfair Dismissals Act 1977-1993 is broader than that of the Employment Equality Act 1998-2004. The Employment Equality Act 1998-2004 has no equivalent to issues such as trade union membership, political opinion among other grounds. As stated above the Unfair Dismissals Act 1977-1993 does not apply to persons who have reached the retirement age, even if they are still in employment. This means that where there are two employees one who has not reached the retirement age and one who has, and both are unfairly dismissed for their political opinion, only the individual who has not reached the retirement age will possess a remedy for that dismissal. In effect where a person who has passed the normal retirement age and is dismissed in an unfair manner, not amounting to a discriminatory dismissal, there is no legal remedy available. This is arguably not in conformity with the provisions of the Framework Employment Directive.

4.7.5 Redundancy

a) Does national law permit age or seniority to be taken into account in selecting workers for redundancy?

b) If national law provides compensation for redundancy, is this affected by the age of the worker?

In Ireland redundancy occurs where you lose your job as a result of the closure of the business or a reduction in the number of staff. The Redundancy Acts 1967-2003 governs this area of law. The law sets down minimum entitlements to redundancy payments; the employer and employee may agree redundancy payments in excess of the statutory minimum. To be eligible for a payment under the Redundancy Acts, you must satisfy a number of criteria. The employee must be aged between 16 and 66 years of age, they must be in insurable employment under the Social Welfare Acts, the employee must have worked continuously for the employer for at least 104 weeks. Where there is a redundancy, the employer must use fair criteria for selecting employees. A number of different approaches are taken. They can include: 'Last in First Out;' use of a selection process or process which have been used before; the custom in the particular trade or occupation; the contract of employment sets out a selection process; the employer wants another employee to do the work of the employee being made redundant, and that employee is not trained or qualified to do both types of work. As a result of the Employment Equality Act 1998-2004 the employer may not select a person for redundancy on any of the discriminatory grounds prohibited by the Act including age.²⁹³ If an employee over 66 loses their job and their employer owes them money for arrears of pay, holidays and other items they may claim this from the Redundancy and Employer's Fund. However, the over 66 employee may not claim the redundancy lump sum from this fund, as anyone over 66 is not eligible for statutory redundancy payments.

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

Does national law include any exceptions that seek to rely on Article 2(5) of the Framework Employment Directive?

²⁹³ <http://www.redcalc.entemp.ie/> Online redundancy calculator

Section 15 of the Equal Status Act 2000-2004 does not require a person who provides goods or services 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.’²⁹⁴ This section then provides that any action taken in ‘good faith’ by or on behalf of a ‘publican/hotel’²⁹⁵ for the purpose of complying with the Licensing Acts ‘shall not constitute discrimination.’²⁹⁶

4.9 Any other exceptions

Please mention any other exceptions to the prohibition of discrimination (on any ground) provided in national law.

In this section, the exceptions referred to are those not already mentioned in the report. The Employment Equality Act 1998-2004 at section 36 permits the use of certain requirements in the context of certain posts, such as holding officer under, or in the service of the State, this includes the Defence Forces, Gada Síochána, and civil servants, or officers of a local authority, a health board, or a vocational education committee. The requirements relate to residence, citizenship and proficiency in the Irish language. As regards proficiency in the Irish language it is also permissible under the Act to require such proficiency in the context of teachers in both primary and post primary schools. Finally this section permits the imposition of certain educational requirements for certain posts, professions, or vocations.

The Equal Status Act 2000-2004 also contains a number of exceptions and exemptions to the non-discrimination rule. The principal and most problematic exception is contained in section 14 of that Act which provides that nothing in the Act can be construed as prohibiting the taking of any action required by order of a court, enactments, any measure adopted by the European Union, or any international convention. In effect this ensures that the Equal Status Act 2000-2004 is subordinate to those enactments set out in this section. For, example the introduction of the Social Welfare (Miscellaneous Provisions) Act 2004 and the Residential Tenancies Act 2004 both introduced provisions that discriminated against cohabiting same sex couples by limiting the definition of cohabitation to heterosexual couples. Section 14 of the Equal Status Act 2000-2004 denies co-habiting couples in this context to challenge the provisions under that Act. These provisions may, however, be in breach of the European Convention on Human Rights Act 2003. The amendments to the Equal Status Act in 2004 added a further exclusion, that being any action taken by a public authority in relation to non-nationals, who are unlawfully within the State or outside the State when the action was taken. Equally the provisions of the Equal Status Act do not apply to any statutory or non-statutory schemes covering persons who are not nationals and their entry to and residence in the State.

The Equal Status Act 2000-2004 contains a general prohibition on discrimination in the disposing of goods to the public, there are a number of exceptions to that general rule where it will not amount to discrimination, including:

- Differences in treatment are permitted in relation to ‘annuities, pensions, insurance policies’ or other matters related to the assessment of risk. The difference in treatment

²⁹⁴ Section 15(1) Equal Status Act 2000-2004

²⁹⁵ The term used in the legislation is the ‘holder of a licence or other authorisation which permits the sale of intoxicating liquor.’

²⁹⁶ Section 15(2) Equal Status Act 2000-2004

should relate to actuarial or statistical data or other relevant underwriting or commercial factor and should be reasonable.²⁹⁷

- Difference in the treatment of persons on the religion ground in relation to goods or services provided for a religious purpose.²⁹⁸
- 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.²⁹⁹
- Difference in treatment on the gender, age, disability or race ground that is required for reasons of ‘authenticity, aesthetics, tradition or custom in connection with a dramatic performance or other entertainment.’³⁰⁰
- Having an age requirement for persons to be either an adoptive or foster parent.³⁰¹
- Differences in the treatment not otherwise specifically provided for in the treatment, which can reasonably be regarded as goods or a service suitable only to the needs of certain persons.³⁰²

Section 46 provides that the provisions of this Act do apply in respect of ships and aircraft registered in the State. Actions done in respect of such a ship or aircraft while subject to the jurisdiction of a country outside of the State and that is required by the law of that State shall not constitute discrimination under the Equal Status Act 2000-2004. Section 7 refers to education and there is one further exception that is not mentioned in the section above on education and that is that it will not amount to age discrimination to allocate places at third level institutes for ‘mature students’ within the meaning of Local Authorities (Higher Education Grants) Acts, 1968 to 1992).³⁰³

Section 16 of the Equal Status Act 2000-2004 permits the imposition or maintenance of preferential fee charges in respect of goods or services being offered in respect of persons with their 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.’³⁰⁴

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

a) What scope does national law provide for taking positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation? Please refer to any important case-law or relevant legal/political discussions on this topic.

b) Do measures of positive action exist in your country? Which are the most important? Refer to measures taken in respect of all 5 grounds, in particular refer to the measures related to disability and any quotas for access of disabled persons to the labour market and any related to Roma.

Section 33 of the Employment Equality Act 1998-2004 states that nothing in the Act shall render unlawful measures that are maintained or adopted with a view to ensuring full equality in practice between employees. Those measures should aim: to prevent or compensate for disadvantages linked to any of the discriminatory grounds; to protect the health and safety at

²⁹⁷ Section 5(2)(d) Equal Status Act 2000-2004

²⁹⁸ Section 5(2)(e) Equal Status Act 2000-2004

²⁹⁹ Section 5(2)(f) Equal Status Act 2000-2004

³⁰⁰ Section 5(2)(i) Equal Status Act 2000-2004

³⁰¹ Section 5(2)(k) Equal Status Act 2000-2004

³⁰² Section 5(2)(j) Equal Status Act 2000-2004

³⁰³ Section 7(3)(e) Equal Status Act 2000-2004 – Mature students refers to students that are over the age of 23.

³⁰⁴ Section 16(2)(a) and (b) Equal Status Act 2000-2004

work of a person with a disability; to create or maintain facilities for safeguarding or promoting the integration of such persons into the working environment. This provision has yet to be litigated. The pre-amended Employment Equality Act was litigated and contained the following provision: nothing in the Act prevented the taking of measures to facilitate the integration into employment, either generally or in particular areas or a particular workplace, of: persons who have attained the age of 50 years; persons with a disability or any class or description of such persons; or members of the traveller community. Any measures taken under this section must have been intended to reduce or eliminate the effects of discrimination against any of the persons protected by this section.

In *Gillen v. Department of Health*,³⁰⁵ the complainant attempted to rely on the provision which permitted positive action to facilitate the integration into employment of persons aged over 50. He contended that the failure of the respondent to take such positive action was suggestive that it discriminated on the age ground. The Equality Officer held that this was not the position, section 33 was permissive of positive action but did not oblige the respondent to take such action. Therefore a failure to do so was not discriminatory. The Equality Officer also noted that section 33 referred to measures to integrate persons into employment, while the complainant's case was about access for existing employment, and the complainant's case referred to promotion. Equally the Equality Officer stated that 'as section 33 is an exception to the 1998 Act, it must be strictly construed.'

The Equal Status Act 2000-2004 also permits positive actions. Section 14 provides that nothing within the Act shall prohibit preferential treatment or the taking of positive measures which are bona fide intended to: promote equality of opportunity for persons who are, in relation to other persons, disadvantaged or who have been or are likely to be unable to avail themselves of the same opportunities as those other persons; 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. The Equal Status Act also permits different treatment by housing authorities and voluntary housing associations in the provision of accommodation on the basis of 'family size, family status, marital status, disability, age or membership of the Traveller community.'³⁰⁶ The Equal Status Act, 2000-2004 also provides that in respect of educational establishments differences of treatment are permitted on the grounds of religion³⁰⁷ and age.³⁰⁸ Section 16 also permits preferential fee charges in respect of goods and services in respect of persons with a disability or in specific age groups.

The attainment of a 3% quota for the employment of people with disabilities has been a government policy in respect of both the civil and public service.³⁰⁹ This policy regards it as desirable that the civil and public service aim to ensure that 3% of its work force are people with disabilities.³¹⁰ The National Disability Authority by virtue of Part V of the Disability Act 2005 is the monitoring body for ensuring that the civil and public sector comply with this

³⁰⁵ DEC-E2003/035, this was appealed to the Labour Court, decision EDA0412, this decision did not address this element of the case. See also *Glennon v. St. Clare's Comprehensive School*, DEC-E2003/03 which related to positive action in respect of gender, here the Equality Officer held that the ECJ decision of *Abrahamsson & Andersson v. Fogelqvist*, ECJ, C-407/98.

³⁰⁶ Section 6(6) Equal Status Act 2000-2004, race and ethnicity are not mentioned in this section.

³⁰⁷ Section 7 (3)(b) and (c) Equal Status Act 2000-2004.

³⁰⁸ Section 7 (3)(e) Equal Status Act 2000-2004.

³⁰⁹ In 1973 a draft Bill on the Employment of People with Disabilities was proposed there was widespread opposition to the Bill and as a result it never proceeded. The Government at that time set up a working group to research the issue and in 1977 they reported. One of their recommendations was a 3% quota in the civil and public service and in March of that year the then Government introduced the policy, this policy is not on a statutory footing.

³¹⁰ The Civil Service has achieved a 2.78% quota as of the 31st of December, 2001. The figures for the Public service relate to January 1st 2001, and while some sectors such as Finance and Social, Community and Family Affairs have achieved and exceeded the 3% target, other areas such as Tourism or Agriculture have barely achieved over the 1.5% mark, the overall statistic for the public sector is 2.12%

requirement.³¹¹ Prior to the introduction of this Act the Department of Finance monitored the 3% quota/target in the Civil Service and the Department of Justice Equality and Law Reform monitored compliance in the Public Service. The Partnership 2000 agreement also contained a commitment that the quota/target will be met in the Public Service during the lifetime of the Partnership.³¹² This was followed by two further agreements: the Programme for Prosperity and Fairness, and Sustaining Progress.³¹³ The most recent partnership agreement ‘Towards 2016 – Ten-Year Framework Social Partnership Agreement’ further provides that:

‘Policies and procedures will be reviewed to ensure that they support appropriate steps for improvement in the delivery of more accessible services, and that the provision of services and facilities are disability-proofed. Procedures will remain in place to monitor, record and report compliance with the 3% target for the employment of people with disabilities. Effective implementation of the strategy will depend upon meaningful consultation and liaison arrangements with other relevant bodies and representative organisations to facilitate access by people with disabilities.’³¹⁴

6. REMEDIES AND ENFORCEMENT

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

- a) *What procedures exist for enforcing the principle of equal treatment (judicial/administrative/alternative dispute resolution such as mediation)?*
- b) *Are these binding or non-binding?*
- c) *Can a person bring a case after the employment relationship has ended?*

In relation to each, please note whether there are different procedures for employment in the private and public sectors.

In relation to the procedures described, please indicate any costs or other barriers litigants will face (e.g. necessity to instruct a lawyer?) and any other factors that may act as deterrents to seeking redress (e.g. strict time limits, complex procedures, location of court or other relevant body)?

The Employment Equality Act 1998-2004 provides for a range of remedies, combining compensation awards with orders for employers to take specific actions and includes the possibility of mediation. The enforcement mechanisms apply equally to most public and private sector employees; there is an exception in respect of the Defence Forces.³¹⁵ The Employment Equality Act 1998-2004 provides a different redress process for members of the Defence Forces, which excludes direct access to the Equality Tribunal or Labour Court.³¹⁶ The government has indicated that it intends to amend the Act in order to allow access for the Defence Forces to the general redress procedures on all grounds (except age and disability).³¹⁷ A second exception relates to section 77(7) of the Employment Equality Act 1998-2004 which requires certain public sector employees to exhaust internal complaints procedures prior to taking a case to the Equality Tribunal. Complaints under either the Employment

³¹¹ This part of the Act was given force of law on the 31st of December 2005.

³¹² See para 5.21 of ‘Partnership 2000’ which ended in 2000, available at: <http://www.taoiseach.gov.ie/index.asp?locID=231&docID=217>

³¹³ Available at: <http://www.taoiseach.gov.ie/index.asp?ACTIVEGROUP=2&locID=231&docID=-1>

³¹⁴ See para 32.16 in ‘Towards 2016 – Ten-Year Framework Social Partnership Agreement 2006-2015’ available at: <http://www.taoiseach.gov.ie/index.asp?locID=181&docID=2755>

³¹⁵ Section 77(9) and 104 of the Employment Equality Act 2000-2004.

³¹⁶ Section 104, Employment Equality Act 1998-2004

³¹⁷ Department of Justice, Equality and Law Reform, 2003.

Equality Act 1998-2004 or the Equal Status Act 2000-2004 may be brought before the Equality Tribunal.³¹⁸ The Equality Tribunal assumes an investigative role in the hearing of complaints, complainants may represent themselves, costs may not be awarded against either the complainant or the respondent, and the procedure is informal. In 2004 the jurisdiction for dismissal cases was transferred to the Equality Tribunal, who now have the power to award remedies including the specific power to order a reinstatement.³¹⁹ Prior to this the Labour Court dealt with dismissal cases. The option of mediation is provided for in section 78 of the Employment Equality Act 1998-2004. A mediated settlement agreed by the parties becomes legally binding and its terms can be enforced at the Circuit Court,³²⁰ the Equality Authority may provide assistance in the enforcement procedures.³²¹

The Labour Court³²² is an industrial relations tribunal operating on a tripartite basis, consisting of a panel, having a full-time chair and one representative each of employers and workers. The Labour Court is empowered to hear appeals from the Equality Tribunal.³²³ Recommendations from the Labour Court are binding on the parties. Where it is acting as an appellate body in cases from the Equality Tribunal, its determinations can be appealed on a point of law to the High Court.³²⁴

The District Court is a court of local and limited jurisdiction,³²⁵ with jurisdiction over a range of criminal and civil matters. The Intoxicating Liquor Act 2003 transferred jurisdiction for cases alleging discrimination against a licensed premises to the District Court. The Circuit Court is a court of local and limited jurisdiction,³²⁶ with jurisdiction over a range of criminal and civil matters.³²⁷ Gender discrimination cases falling under the Employment Equality Act 1998-2004 may be brought directly to the Circuit Court and this forum offers superior remedies for complainants. The Circuit Court has an unlimited financial jurisdiction when dealing with gender discrimination cases under the Employment Equality Act. Appeals on a point of law lie to the High Court.³²⁸ Final decisions of the Equality Tribunal and the Labour Court can be enforced through the Circuit Court.³²⁹

Complaints of dismissal due to discrimination³³⁰ may also be brought under the Unfair Dismissals Acts 1977 and 1993. These complaints are considered first by a Rights Commissioner, whose recommendations are not legally binding. The Employment Appeals Tribunal makes legally binding determinations, with the possibility of appeal to the Circuit Court, and subsequently the High Court.

Claims are brought before the relevant body by way of application using standard forms. Hearings are in private before the Equality Tribunal and Labour Court and are normally in public before the Employment Appeals Tribunal. The decisions of each of the bodies are available for public inspection, with both the Equality Tribunal and the Labour Court publishing their decisions on their respective websites. Both District and Circuit Court Cases are heard in public; it is rare for decisions of either court to be published.

³¹⁸ http://www.equalitytribunal.ie/php/database_previous_cases.php Equality Tribunal cases database.

³¹⁹ Section 46 Equality Act 2004.

³²⁰ Section 91(2), Employment Equality Act 1998-2004

³²¹ Section 67(1)(b)(iii) Employment Equality Act 1998-2004.

³²² <http://www.labourcourt.ie/labour/labour.nsf/lookuppagelink/HomeRecommendations> Labour Court database.

³²³ Section 83(1), Employment Equality Act 1998-2004

³²⁴ Section 90(3), Employment Equality Act 1998-2004

³²⁵ Article 34.4.3, Bunreacht na hÉireann, Constitution of Ireland, 1937.

³²⁶ Article 34.4.3, Bunreacht na hÉireann, Constitution of Ireland, 1937.

³²⁷ Hogan and Whyte, *JM Kelly: The Irish Constitution*, 4th Edition, 2003 at 921

³²⁸ S. 90(2) Employment Equality Act, 1998-2004

³²⁹ S. 91 Employment Equality Act, 1998-2004

³³⁰ Not all the grounds are covered, see section 2.1 above.

Both the Employment Equality Act 1998 – 2004 and the Equal Status Act 2000-2004 impose time limits for bringing complaints to the appropriate body. These time limits are quite strict, the Equal Status Act 2000-2004 requires a complainant to initiate his/her complaint by notifying, in writing, the respondent within two months of the date of the occurrence (or the date of the last occurrence if relevant) of the nature of the complaint and the intention to pursue the matter to the Equality Tribunal if there is not a satisfactory response. This may present difficulties for complainants, for example, a complainant who has been the victim of harassment may be extremely concerned about commencing his/her complaint with an initial notice to the alleged perpetrator of the harassment. There are also very real concerns in respect of people with literacy difficulties, and individuals who may not have an adequate command of the English language. The Director of Equality Investigations may extend this period for a further two months, if satisfied that reasonable cause³³¹ prevented the complainant from sending the notification within the normal time period.

An amendment to the Equal Status Act 2000-2004 requires complaints under that Act involving licensed premises to be brought to the District Court. The District Court may provide for an order for compensation, an order that the holder of the licence specified take a course of action, or an order for temporary closure of the licensed premises. The major impact of this amendment is the cost implications for complainants. Under the previous system it was possible to represent oneself at the Equality Tribunal, costs cannot be awarded against either complainant or respondent, this is not the case at the District Court.³³² This amendment was controversial and was strongly opposed by the Equality Authority and the Human Rights Commission.³³³ A further and significant concern relates to the fact that the Equality Authority was not granted a function to provide information to the public in relation to the operation of section 19 of the Intoxicating Liquor Act 2003. In practice this means that no body disseminates information about the legal protection against discrimination contained within this Act. This does not appear to comply with either Article 10 of Directive 2000/43, or Article 12 of Directive 2000/78.

The Employment Equality Act 1998-2004 requires cases to be brought within six months of the matter complained of occurring, or as the case may be the last occurrence. The Employment Equality Act 1998-2004 now provides for an extension of time where there is 'reasonable cause' rather than exceptional circumstances.³³⁴ Litigating is fraught with difficulties, and the Equality Authority through their case work and work with the public has highlighted a number of relevant concerns.³³⁵ These concerns include the cost of litigation, while there is no potential for awards of costs against either party in the Equality Tribunal or the Labour Court: this is not the position with regard to the District Court,³³⁶ or the Circuit Court.³³⁷

A second issue relates to concerns about the right to privacy, cases in the Equality Tribunal and the Labour Court are private, whereas hearings in the District and Circuit Court are in public this is of particular importance for the grounds of sexual orientation and disability.

A third issue raised relates to delay. The current backlog of cases in the Equality Tribunal means parties are experiencing considerable delay prior to cases being heard, up to three years

³³¹ Section 54, Equal Status Act 2000-2004

³³² Intoxicating Liquor Act 2003.

³³³ Irish Times, 28th May 2003.

³³⁴ Section 77, Employment Equality Act 1998-2004

³³⁵ Equality Authority, Annual Report 2005, <http://www.equality.ie/index.asp?locID=136&docID=380>

³³⁶ Equal Status Cases under the Intoxicating Liquor Act, 2003 go to the District Court at first instance.

³³⁷ Appeals from the Labour Court, Gender Cases and enforcement orders may be heard in the Circuit Court.

in respect of Equal Status cases. It is estimated that it can take up to one year for an Equality Officer to be appointed to a case, there are delays in scheduling, hearing and further delays in the delivery of the recommendation of the Equality Officer. This delay impacts on the potential remedies that can be granted. Where a case takes three or more years from filing to hearing it is improbable that the remedy of reinstatement will be ordered.

Another issue relates to the size of awards, the financial ceilings on compensation awards impact negatively on the size of awards granted. The level of potential award is so low that this acts as a disincentive for people taking actions. There have been difficulties in getting awards enforced.

Section 21 of the Equal Status Act 2000-2004 requires potential claimants to notify the potential respondent within two months of the incident of the nature of the allegation and also the claimant's intention to seek redress under the Act. The short time frame involved means that in practice the first contact with the respondent involves a threat of litigation and is unhelpful and decreases the potential for matters to be resolved by means other than litigation.

The Equality Authority claim that their experience has been that agreeing to mediation is often used as a delaying tactic; they suggest a process be introduced to tackle this. Section 79(4) permits the Minister to specify procedures to be followed in carrying out investigations by Equality Officers, currently different procedures are operated by different Equality Officers and there is a necessity to harmonise practice.

A final concern relates to the Equality Authority's ability to assist in the bringing of proceedings, or to represent claimants. The Equality Authority provides assistance in a limited number of cases. For the Equality legislation to be truly effective, employers and service providers need to believe that cases will be taken against them. There is therefore a necessity for the Equality Authority to be in a position to take more than just the exceptional case, but to have a steady run of cases and there is currently no capacity for the Authority to deal with the workload they have, let alone take on more cases. There is no provision under the legislation for a body to instigate procedures on their own behalf, there must always be an individual plaintiff, this does limit the potential of the Equality legislation.

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

Please list the ways in which associations may engage in judicial or other procedures

- a) in support of a complainant*
- b) on behalf of one or more complaints (please indicate if class actions are possible)*

The Equality Authority may take actions on their own behalf, in certain circumstances, and on behalf of an individual. This is governed by section 67 of the Employment Equality Act 1998-2004, which provides that a person who considers that he or she has been discriminated against in the terms of the Equality Acts³³⁸ may request assistance from the Equality Authority. The Equality Authority have set out criteria to assist them in determining who will receive assistance from them. Those criteria include: whether the case is of strategic importance, the capacity of the complainant to represent themselves or get representation be it via lawyers or trade unions, the complexity of the case, the nature of the claim (here the focus is on the actual complainant and the impact of the case on that individual), finally the resources available to the Equality Authority are relevant. As regards the issue of resources,

³³⁸ The enforcement provisions contained in the Employment Equality Act 1998-2004 also include within their scope the Equal Status Act 2000-2004, which covers the provision of goods and services as well as education and housing.

the Authority will review their workload, the backlog of cases, the resources available to them the cost of the proceedings, the duration of the proceedings and the likely award or order.³³⁹

Section 77(4) of the Employment Equality Act 1998-2004 sets out who may be a complainant to an action, and that refers to the person who is impacted by the alleged discrimination, or where they lack capacity (by reason of an intellectual or a psychological disability) their parent or guardian or other person acting in that role may instigate the action on their behalf. Section 77(11) of that Act provides that ‘A party to any proceedings under this Act before the Director or Labour Court may be represented by an individual or body authorised by the party in that behalf.’ This permits associations to represent complainants where the complainants agree to this representation. There is no reference to these bodies being permitted to take a case before either the District or Circuit Court. There is no provision for class actions, nor is there provision for an association (other than the Equality Authority) to instigate actions in their own right. In practice it is common for both trade unions and employers organisations to represent parties to an action.³⁴⁰

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

Does national law require or permit a shift of the burden of proof from the complainant to the respondent? Identify the criteria applicable in the full range of existing procedures and concerning the different types of discrimination, as defined by the Directives (including harassment).

The Employment Equality Act 1998 initially only explicitly provided for a shift in the burden of proof in respect of gender discrimination cases. The principle of the shifting of the burden of proof was confirmed with the enactment of the European Communities (Burden of Proof in Gender Discrimination Cases) Regulations, 2001, S.I. 337 of 2001, in respect of gender discrimination.

While not explicitly provided for the Equality Tribunal and the Labour Court applied the principle of the shifting of the burden of proof in non-gender cases under both the Employment Equality Act and the Equal Status Act.³⁴¹ As noted in *Ross v. Sun Alliance* ‘A shift in the burden of proof was applied as a matter of law in Irish discrimination cases long before European Community law developed the idea, so this practice is not dependent on EC discrimination law applying in the context of the Equal Status Act.’ How this was applied was clarified in the decision of *Crawford v. Bootlegger Bar*, ‘the burden of proof lies with the complainants, who are required to demonstrate that a *prima facie* case of discrimination exists. If established, the burden of proof shifts to the respondent who, in order to successfully defend their case, must show that their actions were driven by factors which were non-discriminatory.’³⁴² A similar approach was applied in the context of Employment Equality cases, the Labour Court in *Flexco Computer Stationary v. Coulter*, the Labour Court held that ‘it is now established in the jurisprudence of this court that in all cases of alleged discrimination a procedural rule for the shifting of the probative burden similar to that contained in the ... [Burden of Proof Regulations] should be applied.’³⁴³

³³⁹ Guidelines are available at: <http://www.equality.ie/index.asp?locID=14&docID=9>

³⁴⁰ For example see: *McGrane* (represented by PSEU (the Public Services Executive Union)) v. The Department of Finance & the Department of Foreign Affairs (represented by the Chief State Solicitor’s Office) - DEC-E2005/011; *Murray* (represented by INTO (Irish National Teachers Organisation) v. *Scoil Mhuire* (legally represented) & *The Department of Education and Science*, DEC-E2005/015; *Devereux* (represented by SIPTU (Services, Industrial, Professional and Technical Union)) v. *Bausch & Lomb* (represented by IBEC (Irish Business and Employer’s Confederation), DEC-E2005/020.

³⁴¹ See *Flexco Computer Stationary Ltd., v. Coulter*, ED/03/10 as an example of an employment case and *O’Brien v. Scruffy’s Bar* DEC-S2001-027 as an example of an Equal Status case.

³⁴² DEC-S2003-146/147

³⁴³ ED/03/10

The shift in the burden of proof is now explicitly provided for in the Employment Equality Act 1998-2004 with the insertion of a new section; section 85(A).³⁴⁴ Which 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.’ This also applies in cases brought by the Equality Authority, and expressly includes proceedings relating to indirect discrimination, victimisation and harassment. The section is silent as to its applicability in the context of reasonable accommodation.

The Pensions Acts 1990 and 2004 also provide for a shifting of the burden of proof, this section provides: ‘Where in any proceedings facts are established by or on behalf of a complainant from which it may be reasonably inferred that there has been a breach of the principle of equal pension treatment in relation to him, it is for the respondent to prove the contrary.’ Under the Unfair Dismissal Act 1977 section 6(1) a dismissal is deemed to be unfair unless, having regard to all the circumstances, there were substantial grounds justifying the dismissal. Section 6(2) states specifically that a dismissal arising wholly or mainly from an employee’s race, colour, sexual orientation, age, religious opinions, or membership of the Traveller community shall be deemed unfair.

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

What protection exists against victimisation? Does the protection against victimisation extend to persons other than the complainant? (e.g. witnesses, or person that help the victim of discrimination to present a complaint)

The Employment Equality Act 1998-2004 prohibits victimisation, which is deemed to occur where a person is dismissed or any other adverse treatment occurs because they have involved themselves in any of the following activities: made a complaint of discrimination, been involved in proceedings by a complainant, been an employee having represented or otherwise supported a complainant, been a comparator in an equality action, been a witness under either Equality Acts, having opposed by lawful means a discriminatory act, or stated an intention to take any of the preceding activities. Sanctions of compensation, the taking of a course of action, re-instatement, reengagement, are all available for victimisation cases. There are two instances where victimisation may amount to a criminal offence: where a person procures another to do anything that could be considered victimisation or discrimination³⁴⁵ or where the victimisation amounts to dismissal then it is an offence.³⁴⁶ There are no financial limits on compensation awards for victimisation. This signifies how seriously the legislature take the issue of victimisation and this is also reflected in the Equality Tribunal’s attitude. The successful victimisation cases have resulted in significant compensation awards.³⁴⁷ In *A Complainant v A Department Store*³⁴⁸ victimisation was found to have occurred. In this instance the complainant had contacted the Equality Authority alleging disability discrimination against the employer, these allegations were not substantiated by the Equality Officer. After failing to gain employment the employer wrote to the complainant stating: ‘in view of the untrue and unfounded allegations you have made to the Employment Equality Authority [sic] we are not for the foreseeable future going to accept any application from you for employment in our store, or indeed any other branch.’ It was held that the letter amounted

³⁴⁴ The enforcement provisions in the Employment Equality Act 1998-2004 also govern the enforcement of the Equal Status Act 2000-2004, therefore there is now an explicit shifting of the burden of proof in these cases also.

³⁴⁵ Section 14 Employment Equality Act 1998-2004

³⁴⁶ Section 98 Employment Equality Act 1998-2004

³⁴⁷ See *Dublin City Council v McCarthy*, EDS022

³⁴⁸ DEC-E2002-017

to victimisation in this instance, and the complainant was awarded €12,700 in compensation. Complaints of discrimination or victimisation must be brought within six months of the most recent occurrence of the act.³⁴⁹ This may be extended to a maximum of twelve months in certain circumstances.³⁵⁰

Victimisation is also prohibited in the Equal Status Act 2000-2004, section 3(2)(j) hold that 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. This provision has been litigated and in a 2004 case on victimisation on the grounds of disability discrimination, that of *Salmon v. Para Equestrian Ireland*³⁵¹ the Equality Officer set out what was necessary to show that victimisation had occurred. The Equality Officer stated

- (a) that the complainant has in good faith taken any of the actions listed in section 3(2)(j) (i) to (v)
- (b) that the respondent has treated the complainant in a particular way as a result of that action
- (c) that the treatment is less favourable than the way the respondent treats or would treat a person who had not opposed the alleged discriminatory conduct in the manner the complainant did or the way the respondent would treat the complainant herself, had she not done so.

If and when those elements are established, the burden of proof shifts ...

This case was appealed all the way to the Circuit Court with the assistance of the Equality Authority, and the complainant succeeded in establishing victimisation. The statement of the Equality Officer provides useful guidance as to how the Equality Tribunal determines when victimisation has occurred.³⁵² See also *Collins v. Champion's Public House*,³⁵³ referred to in section 0.3 above.

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

a) What are the sanctions applicable where unlawful discrimination has occurred? Consider the different sanctions that may apply where the discrimination occurs in private or public employment, or in a field outside employment.

b) Is there any ceiling on the maximum amount of compensation that can be awarded?

c) Is there any information available concerning:

- the average amount of compensation available to victims
- the extent to which the available sanctions have been shown to be - or are likely to be - effective, proportionate and dissuasive, as is required by the Directives?

The Employment Equality Act 1998-2004 provides for a broad range of remedies: compensation awards, orders for employers to take specific courses of action, re-instatement and re-engagement. All employment contracts are deemed to have an equality clause that transforms any provisions of the contract that would otherwise give rise to unlawful discrimination.³⁵⁴ All discriminatory provisions in collective agreements are deemed null and void if it is not possible to contract out of the terms of the equality legislation.³⁵⁵ There are

³⁴⁹ Section 77(5), Employment Equality Act 1998 - 2004.

³⁵⁰ Section 77(6)(a), Employment Equality Act 1998-2004.

³⁵¹ DEC-S2004-002

³⁵² Circuit Court decisions are not published, information is available on this decision from the Equality Authority's annual report for 2004 - <http://www.equality.ie/index.asp?locID=136&docID=-1>

³⁵³ DEC-S2003-071.

³⁵⁴ Section 30 Employment Equality Act 1998-2004

³⁵⁵ Section 9 Employment Equality Act 1998-2004

maximum limits on financial awards by the Equality Tribunal and also by the Labour Court. Those limits in the context of employment are a maximum of two years' pay, this is calculated on the basis of the complainant's weekly pay at the time the case was referred.³⁵⁶ Where the complainant was not an employee (discriminatory interview for example) then the maximum award is €12,697.³⁵⁷ In unequal pay cases, the Equality Tribunal can award compensation in the mode of arrears of pay, where this pay loss is a result of discrimination. This can cover a period of a maximum of three years prior to the referral of the case.³⁵⁸ There is no provision for the payment of interest in cases like this. The situation with respect of gender discrimination is interesting in comparison. Gender cases may be brought to the Circuit Court and here there is no monetary limit on the amount of compensation that can be awarded.³⁵⁹ In the Circuit Court compensation for unequal pay may cover a period of a maximum of six years,³⁶⁰ and interest may be paid on compensation in gender discrimination cases.³⁶¹ The more dissuasive sanctions that are available in the context of gender discrimination appear to reflect previous case law of the European Court of Justice.³⁶² It is questionable whether the remedies available in the context of non-gender discrimination could be described as 'effective, proportionate and dissuasive' sanctions.³⁶³ The Employment Equality Act 1998-2004 also provides for non-financial sanctions. Section 82(1)(e) provides for the Equality Tribunal or the Labour Court to make 'an order that a person or persons specified in the order take a course of action which is so specified.'³⁶⁴ The potential of this remedy should not be underestimated it has been used as a means of ensuring employers create an equal opportunities policy,³⁶⁵ re-training of staff,³⁶⁶ reviewing recruitment procedures.³⁶⁷

As regards dismissal cases, the Labour Court,³⁶⁸ and now the Equality Tribunal can make orders for re-instatement or re-engagement of the employee that can occur with or without compensation.³⁶⁹ Unfair dismissal legislation also provides for a maximum of two years salary or re-instatement / re-engagement. The Employment Equality Act 1998-2004 is not a criminal statute, and does not in general provide for penal sanctions for unlawful discrimination, there are a number of situations that can give rise to criminal offences. Where a person procures another to do anything that could be considered victimisation or discrimination,³⁷⁰ or where the victimisation amounts to dismissal, or the giving of a false statement in response to an Equality Authority inquiry,³⁷¹ these actions can amount to a criminal offence. The Equality Authority is the only independent body permitted to instigate litigation under the Acts,³⁷² however section 82(6)(7) provides that compensation orders may not be made in favour of the Authority. The Equality Authority is dependent on the State for funding, this unwillingness to permit the Equality Authority to receive compensation would appear to stifle its ability to litigate.

³⁵⁶ Section 82(4) Employment Equality Act 1998-2004

³⁵⁷ Section 82(4) Employment Equality Act 1998-2004

³⁵⁸ Section 82(1)(a) Employment Equality Act 1998-2004

³⁵⁹ Section 82(3) Employment Equality Act 1998-2004

³⁶⁰ Section 82(3)(a) Employment Equality Act 1998-2004

³⁶¹ Section 82(5) Employment Equality Act 1998-2004

³⁶² Case C-271/91 *Marshall No. 2*, ECJ.

³⁶³ Article 17 General Framework Directive.

³⁶⁴ Section 82(1)(e) Employment Equality Act 1998-2004

³⁶⁵ *Nevin v. Plaza Hotel*, DEC-E2001-033

³⁶⁶ *Mr. O v. A Named Company* DEC-E2003-052

³⁶⁷ *Equality Authority v. Ryanair*, DEC-E2000-014

³⁶⁸ Prior to the amendments of jurisdiction.

³⁶⁹ Section 82(2)(b) Employment Equality Act 1998-2004

³⁷⁰ Section 14 Employment Equality Act 1998-2004

³⁷¹ Section 60(3) Employment Equality Act 1998-2004

³⁷² Section 85, Employment Equality Act 1998-2004.

The Equal Status Act 2000-2004 also has maximum award limits, which are linked to limits set on the jurisdiction of the District Court and the current limit is €6,348.69.³⁷³ The Equality Tribunal may also order a course of action to be taken where discrimination has been found this remedy has been used extensively under this Act. The Equality Authority in their annual report for 2004 stated that: 'It was expected that the implementation of the Race Directive and the Framework Employment Directive would bring about the removal of the financial ceilings that exist in relation to the maximum compensation that can be paid under the Employment Equality Act 1998 and the Equal Status Act 2000. This removal of ceilings was not provided for in the Equality Act 2004. Low awards can serve as a barrier to pursuing a case ... Concern has already been expressed about the low levels of award in cases involving licensed premises. This is the second year where the Equality Officers have stated that they have felt constrained by the maximum compensation that they can be awarded under the Employment Equality Act 1998. The level of potential award that may be available if a claimant is on low wages often means that it is not an effective and dissuasive remedy.'³⁷⁴

The figures for cases heard before the Equality Tribunal for the first nine months of 2005 in employment case that the average award was €12,798 euro, as compared with €8,200 for the same period last year. In the context of Equal Status cases the average award was €94, as compared with €88 for the same period last year. The level of award is low, but in the context of the Equal Status cases they are staggeringly low. These awards also suggest that in practice discrimination in the non-employment context is not regarded as serious. The level of award and the fact that it takes an estimated three years for Equal Status cases to be heard, can hardly be regarded as an effective or dissuasive remedy.

7. SPECIALISED BODIES

Body for the promotion of equal treatment (Article 13 Directive 2000/43)

When answering this question if there is any data regarding the activities of the body (or bodies), include reference to this (keeping in mind the need to examine whether the race equality body is functioning properly). For example, annual reports, statistics on the number of complaints received in each year or the number of complainants assisted in bringing legal proceedings.

- a) Does a 'specialised body' or 'bodies' exist for the promotion of equal treatment irrespective of racial or ethnic origin?*
- b) Describe briefly the status of this body (or bodies) including how its governing body is selected, its sources of funding and to whom it is accountable.*
- c) Describe the competences of this body (or bodies), including a reference to whether it deals with other grounds of discrimination and/or wider human rights issues.*
- d) Does it / do they have the competence to provide assistance to victims, conduct surveys and publish reports and issue recommendations on discrimination issues?*
- e) Does the body (or bodies) have legal standing to bring discrimination complaints or to intervene in legal cases concerning discrimination?*
- f) Is the work undertaken independently?*

The Employment Equality Act 1998-2004 established two permanent national institutions with enforcement functions under the Equality legislation: The Equality Authority and The Equality Tribunal. Both of these bodies are involved in the promotion of equal treatment irrespective or racial or ethnic origin (including membership of the Traveller Community),

³⁷³ The Courts and Courts Officers Act of 2002 suggested this limit would be raised, but has not been enacted.

³⁷⁴ The Equality Authority Annual Report 2004, p. 54 www.equality.ie

they also have functions with regard to gender, disability, age, sexual orientation, religion, marital status and family status. The Equality Authority is an independent statutory body charged with working towards the elimination of discrimination, the promotion of equality, the provision of information to the public, and assisting litigants.³⁷⁵ The Equality Authority has a Board of Directors; the Board is appointed by the Minister for Justice, Equality and Law Reform and comprises 12 members. Board members come from employer organisations, employee organisations and organisations and groups who have a knowledge or, or experience in, equality issues relating to any of the nine protected grounds. Board members serve a four-year term. The Equality Authority has approximately 50 permanent staff members, headed up by the Chief Executive Officer. As staff are a part of the civil service they may apply for any promotional post throughout the civil service. In practice this means that when the staff have been trained up and are performing well within their job they move on to another sector of the civil service. Equally it is not within the competence of the Chief Executive Officer to promote staff within the Authority, thus retaining a corporate memory is very difficult. The Chief Executive Officer of the Equality Authority, on receipt of the agreement of the Board, submits estimates of income and expenditure to the Minister for Justice Equality and Law Reform on an annual basis. The Budget of the Department of Justice Equality and Law Reform is determined annually by the Finance Act of the particular year, this comes from the national exchequer, the Minister as part of that budget puts in the estimate for the Body in question. The estimated budget for 2005 was €5,451,000, the estimated budget for 2006 is €5,531,000, and the estimated budget for 2007 is €5,600,000 an increase of 1%.

The Equality Authority also has the power to instigate litigation on its own behalf or to assist a litigant.³⁷⁶ The Equality Authority's in-house legal service may, at its discretion, where the case has strategic importance, provide free legal assistance to those making complaints of discrimination under the Equality Acts.³⁷⁷ The Equality Authority provides assistance only in a small percentage of cases based on criteria set down by the Board of the Authority. These criteria include: whether the case is of strategic importance, the capacity of the complainant to represent themselves or get representation be it via lawyers or trade unions, the complexity of the case, the nature of the claimant (this is a focus on the actual complainant and the impact of the case on that individual), finally the issue of resources is relevant. To that end the Authority will review their workload, the backlog of cases, the resources available to them the cost of the proceedings, the duration of the proceedings and the likely award or order.³⁷⁸

The Equality Authority seeks to fulfil its other functions by means of research and awareness-raising,³⁷⁹ review of the legislation³⁸⁰ and the drafting of statutory Codes of Practice.³⁸¹ The Equality Authority does not carry out systematic reviews of discrimination in Ireland, but does carry out independent reports on thematic issues and makes recommendations in respect of those issues. The Equality Authority does liaise with the Central Statistics Office and other relevant bodies on a range of equality data issues. In August 2005 the CSO published the results of survey on Equality. As part of the Quarterly National Household Survey people were asked about their experience of discrimination in the workplace. For the population aged 18 and over it was found that:

- 12.5% (382,000) had experienced discrimination within the previous two years.

³⁷⁵ The introduction of the Equal Status Act in 2000 extended the Equality Authorities remit to encompass the provisions of the Equal Status Act.

³⁷⁶ Section 67 Employment Equality Act 1998-2004.

³⁷⁷ Section 67 Employment Equality Act 1998-2004.

³⁷⁸ www.equality.ie

³⁷⁹ Section 57 Employment Equality Act 1998-2004.

³⁸⁰ Sections 39 and 73 Employment Equality Act 1998-2004.

³⁸¹ Section 56 Employment Equality Act 1998-2004.

- 8.9% (271,000) had experienced discrimination more than once in that period.
- 5.1% (157,000) had experienced work related discrimination.
- 9% (277,000) had experienced discrimination in accessing services.
- 60% of those who experienced discrimination took no action.
- 29.9% of those who experienced discrimination took verbal action.
- 7.2% of those who experienced discrimination took written action.
- 9.2% of those who experienced discrimination made an official complaint or undertook legal action.³⁸²
- 27.6% said they had a good understanding of their rights under equality legislation. 19.8% said they had no understanding of their rights.
- 52.7% said that they had a little understanding of their rights.³⁸³

The Equality Authority hosted an information seminar on the results of this survey; the focus of the seminar was to create a broader awareness of the survey and its findings.

The Equality Authority may conduct inquiries. On completion of an inquiry where the Equality Authority is satisfied that ‘any person’ is involved in discrimination the Authority may serve a ‘non-discrimination notice.’³⁸⁴ This notice may set out the conduct that gave rise to the notice and what steps should be taken in order to prevent further discrimination. It will be a criminal offence not to comply with a notice for a period of 5 years after its issue.³⁸⁵ The Authority is also empowered to seek an injunction from the High Court or the Circuit Court during this 5 year period to restrain any further contravention or failure to comply with a notice.³⁸⁶

The Equality Authority may carry out equality reviews. These are in effect an audit of the level of equality that exists in a particular business or industry.³⁸⁷ Based on this audit that will examine practices, procedures and other relevant factors an equality plan will be developed. The plan consists of a programme of actions to be undertaken in employment or business to further the promotion of equality of opportunity.³⁸⁸ Where there are more than 50 employees, the Authority may instigate the review itself and prepare an action plan. If there is a failure then to implement the action plan, the Equality Authority may issue a notice detailing what steps are required for its implementation.³⁸⁹ Non-compliance with this notice may result in an order from either the High Court or Circuit Court requiring compliance.³⁹⁰

The Equality Authority must prepare annual reports; these reports must be presented to the Minister for Justice Equality and Law Reform who will cause a copy of every report to be laid before each House of the Oireachtas (Parliament).³⁹¹ These reports are also made available to the public.

The figures set out below relate to the case files of the Equality Authority.³⁹² The figures reflect the priority cases set by the Equality Authority.³⁹³ There were 754 case files in total,

³⁸² Some people responded to discrimination in more than one way.

³⁸³ Figures available from www.cso.ie and also in the Equality Authorities Annual Report 2005. These figures relate to what people believe their experiences to be and are not an official record of illegal discrimination.

³⁸⁴ Section 62 Employment Equality Act 1998-2004.

³⁸⁵ Section 66 Employment Equality Act 1998-2004

³⁸⁶ Section 65 Employment Equality Act 1998-2004

³⁸⁷ Section 69 Employment Equality Act 1998-2004.

³⁸⁸ Section 69 Employment Equality Act 1998-2004.

³⁸⁹ Section 70 Employment Equality Act 1998-2004.

³⁹⁰ Section 72 Employment Equality Act 1998-2004.

³⁹¹ Section 54 Employment Equality Act 1998-2004.

³⁹² The Equality Authority state of these figures: ‘As in 2004, the 2005 figures are neither a measure of the extent of discrimination or the level of demand on the Equality Authority’s services. The number and type of casefiles reflect the priorities that have been set down by the Board of the Equality Authority, including in particular the decision to reduce the

359 of those (48%) were taken under the Employment Equality Act 1998-2004, 358 (47%) under the Equal Status Act 2000-2004 and 37 (5%) under the Intoxicating Liquor Act, 2003.³⁹⁴

Employment Equality Act 1998-2004

Ground	No.
Race	115
Gender	70
Disability	54
Age	45
Multiple	38
Sexual Orientation	7
Traveller	4
Religion	3
Marital Status	2
Family Status	2

Equal Status Act 2000-2004

Ground	No.
Traveller	104
Disability	94
Race	49
Gender	36
Age	24
Religious belief	8
Marital Status	7
Sexual Orientation	2
Family Status	2

Intoxicating Liquor Act 2003

Ground	No.
Age	2
Disability	17
Race	2
Sexual Orientation	6
Traveller Community	11

The Equality Authority recorded an increase in 2005 in the total number of information queries.³⁹⁵ They received 11,474 requests for information in total, there were 279,660 visits

backlog in cases.' Equality Authority, Annual Report 2005, available at: <http://www.equality.ie/index.asp?locID=136&docID=-1>

³⁹⁵ All figures and information provided by the Equality Authority: see particularly the Annual Report 2005, at: <http://www.equality.ie/index.asp?locID=136&docID=-1>

³⁹⁴ The Equality Authority note that this figure of 37 is not indicative of the level of interest and demand for information in respect of claims under this Act. The Authority are not given a statutory function to provide information to the public on the operation of Section 19 of the Intoxicating Liquor Act and does not, nor can not, provide information to the public through its information centre, leaflets, talks, seminars and so on. It can only provide information in the context of an application for assistance.

³⁹⁵ Among the functions of the Equality Authority is to give information on the working of the Employment Equality Act 1998-2004; The Equal Status Act 2000-2004; The Maternity Protection Acts 1994-2004; The Adoptive Leave Acts 1995-2005 and the Parental Leave Act 1998. They are not granted the function to provide information on the Intoxicating Liquor Act 2003.

to the Equality Authorities website, and 108,600 publications were downloaded. The information booklets on the Employment Equality Act 1998-2004 and the Equal Status Act 2000-2004 were translated into a number of languages.³⁹⁶

The Equality Tribunal is the second body established under the Employment Equality Act 1998-2004.³⁹⁷ The Equality Tribunal is a quasi-judicial body established for the purpose of investigating complaints under the Employment Equality Act 1998-2004 and the Equal Status Act 2000-2004, on all nine grounds. The Director is charged with the enforcement of the Employment Equality Act, and the Equal Status Act. The Director may delegate her quasi-judicial functions to Equality Officers and Equality Mediation Officers. As the staff are civil servants it means that they can apply for any promotional post throughout the civil service. In practice this means that Equality Officers may change jobs while dealing with cases. It is not within the competence of the Director of Equality Investigations to promote staff within the Tribunal, which makes retaining a corporate memory very difficult. The Equality Officers investigate complaints and issue a legally reasoned and public decision, this decision is binding. Discrimination complaints, including dismissal cases are brought at first instance to the Equality Tribunal. Cases may only be sent to mediation where both parties agree to the process.³⁹⁸ A mediated settlement agreed by the parties is binding and is enforceable by the Circuit Court.³⁹⁹ The Tribunal has had its legal mandate extended and it now has jurisdiction to deal with discriminatory dismissals and the Pensions Acts as they deal with equality issues. The Equality Tribunal may in the employment context provide for the following sanctions: compensation awards, arrears of payment (not including interest awards), orders for employers to take specific courses of action, re-instatement and re-engagement. In the context of the provision of goods and services the Equality Tribunal may order a course of action to be taken where discrimination has been found, and they may order compensation. The Equality Tribunal is a statutory body, and an independent and impartial forum to hear or to mediate alleged discrimination. The Minister for Finance determines the budget of the Department of Justice Equality and Law Reform annually, which comes from the national exchequer, the Minister for Justice Equality and Law Reform as part of that budget puts in the estimate for the Equality Tribunal. The budget based on the estimates for the past number of years is as follows: the 2005 estimates were €1,970,000, the 2006 estimates were €2,046,000 and the 2007 estimates are €2,140,000, this reflects a 5% increase in budget between 2006 and 2007. There is a clear concern about the funding of the Equality Tribunal, these concerns relate to the extension of their mandate, the increase in their workload, the significant backlog of cases without any significant extension in their budget.

The Equality Tribunal have reported for four years running a substantial increase in the number of Decisions before the Tribunal: in 2001 the number was 67, in 2002 it was 120, in 2003 it was 145 and in 2004 it was 187, only 150 decisions were handed down in 2005. This figure of 150 should be put in perspective. In 2004 there were 653 referrals to the Equality Tribunal under section 77 of the Employment Equality Act 1998-2004; compare this with 899 referrals for 2005.⁴⁰⁰ The figures for the first nine months only are available for 2006: the table below sets out the section 77 referrals for the first nine months of 2005 as compared with the same period for 2006. The second table refers to Equal Status Referrals for the first nine months of 2005 as compared with the first nine months of 2006.⁴⁰¹

³⁹⁶ Arabic, Chinese, Croatian, Czech, French, Irish, Lithuanian, Polish, Portuguese, Romanian, Russian, Serbian and Spanish. Video guides are available in Irish Sign Language. For further information see Equality Authority, Annual Report 2005.

³⁹⁷ Section 75 Employment Equality Act 1998-2004.

³⁹⁸ Section 78 Employment Equality Act 1998-2004.

³⁹⁹ Section 91(2) Employment Equality Act 1998-2004

⁴⁰⁰ www.equalitytribunal.ie

⁴⁰¹ Figures and information provided by the Equality Tribunal.

Employment Equality Act 1998-2004: Section 77 Referrals

Grounds	Jan-Sep 2005	Jan-Sep 2006
Gender	125	6063
Marital Status	2	1
Family Status	2	3
Sexual Orientation	3	6
Religious Belief	2	1
Age	32	59
Disability	57	42
Race	71	149
Traveller Community	1	1
Multiple Ground	80	78
No Grounds Listed	35	13

Equal Status Act 2000-2004: Cases referred

Grounds	Jan-Sep 2006	Jan-Sep 2007
Gender	11	4
Marital Status	1	7
Family Status	1	0
Sexual Orientation	2	2
Religious Belief	2	1
Age	28	8
Disability	33	36
Race	12	15
Traveller Community	156	93
Multiple Ground	471	226
No Ground Listed	4	5

The Tribunal is statutorily required to provide in writing the reasons for its decisions all of which are made available to the public. The increase in workload is significant, and has in turn resulted in a significant backlog of cases. The Equality Tribunal publish an annual report, an annual legal review, an annual mediation review and statistics on their work.⁴⁰² The Equality Tribunal have provided extensive legal reviews on an annual basis as a result of the rapid increase in the number of cases, the extension of their mandate and their attempts to reduce the backlog of cases and the scarce resources the annual review for 2004 was considerably shorter and less comprehensive, resulting in a situation where it is more difficult to follow the trends in the equality cases. The Legal Review for 2004 stated: ‘This year, the Review is shorter and less comprehensive than in previous years. This is due to the rapid increase in the number of Decisions produced, and to the Tribunal’s heavy overall workload, which has meant that scarce resources had to be concentrated primarily on reducing the backlog of cases awaiting hearing.’ Please refer to section below entitled Overview for further concerns in respect of both the Equality Authority and the Equality Tribunal.

⁴⁰² Section 75 Employment Equality Act 1998-2004 requires the Equality Tribunal to report on their activities to the Minister for Justice, Equality and Law Reform, these reports are also available to the public at: http://www.equalitytribunal.ie/hm/about_us/stats_annual_report.htm

8. IMPLEMENTATION ISSUES

8.1 Dissemination of information, dialogue with NGOs and between social partners

Describe briefly the action taken by the Member State

a) to disseminate information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)

b) 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) and

c) to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice, workforce monitoring (Article 11 Directive 2000/43 and Article 13 Directive 2000/78)

The Equality Authority is required to ‘provide information to the public’ on the workings of both the Employment Equality Act 1998-2004 and the Equal Status Act 2000-2004.⁴⁰³ The Equality Authority does not have a statutory duty to provide information to the public on Section 19 of the Intoxicating Liquor Act, 2003. Therefore the Equality Authority does not provide a service on this Act through the medium of its Public Information Centre, leaflets, videos, website or seminars. The impact of this is that no body disseminates information about the legal protection against discrimination in licensed premises. This does not appear to be in compliance with Article 10 Directive 2000/43, or Article 12 Directive 2000/78.

As regards the Equality Authority’s statutory duty to provide information, it has published extensively in respect of all nine grounds.⁴⁰⁴ The Equality Authority may prepare codes of practice in furtherance of the elimination of discrimination and the promotion of equality of opportunity.⁴⁰⁵ Once the Minister approves a code of practice it shall be admissible in evidence for the purposes of proceedings. In drafting the codes of practice the Equality Authority may consult with such person or persons as they consider appropriate. The Equality Authority have built up partnerships and joint ventures with the Department of Education and Science, Congress of Trade Unions and IBEC⁴⁰⁶ continuing its work in the Equal Opportunities Framework Committee, the Framework Committee and the Work-Life Balance Framework Committee and Anti-Racist Workplace. The Authority is also working with the Department of Enterprise Trade and Employment in seeking to mainstream policy and practice learning from the EQUAL projects. These partnerships include anti-racist training. A number of publications have also been produced.⁴⁰⁷ The Irish Congress of Trade Unions have also published a pack entitled ‘Lesbian, Gay and Bisexual Rights in the Workplace.’⁴⁰⁸ The Authority also host regular meetings with the Trade Union movement, and quarterly meetings with the National Disability Authority and Disability Organisations, which focus on issues relating to reasonable accommodation. The requirement to provide reasonable accommodation only applies to the disability ground. The Equality Authority has conducted regional consultations throughout the year. Members of the Authority, including the CEO and the Chair of the Equality Authority meet with representatives from the Business Sector, Trade Unions, and Government services as well as organisations representing the nine protected grounds. The proceedings of these regional meetings alongside submissions from

⁴⁰³ Section 39 Employment Equality Act 1998-2004: they also provide information on The Maternity Protection Acts 1994-2004, The Adoptive Leave Acts 1995-2005 and the Parental Leave Act 1998. They are not granted the function to provide information on the Intoxicating Liquor Act 2003.

⁴⁰⁴ <http://www.equality.ie/php/workflow.php?queryType=1>

⁴⁰⁵ Section 56 Employment Equality Act 1998-2004

⁴⁰⁶ Irish Business and Employer’s Confederation.

⁴⁰⁷ http://www.coe.int/T/E/human_rights/Ecri/1-ECRI/3-General_themes/2-Examples_of_good_practices/1-Specialised_Bodies/SB_Ireland_Equality.asp

⁴⁰⁸ <http://www.ictu.ie/html/publications/ictu/Gay%20&%20Lesbian%20Leaflet.pdf>

numerous organisations assist the Authority in drafting their strategic plan.⁴⁰⁹ The Equality Authority have also published its second strategic plan, for the years 2003 to 2005⁴¹⁰ which establishes its central themes in implementing their objective of promoting and defending the rights created under the equality legislation. Those themes are:

- Building equality in service provision that impact on the quality of people's lives.
- Contributing to a more accessible workplace and labour market.
- Developing initiatives specific to the disability ground, to the issues of carers under the family status ground, and to the issue of racism.
- Supporting the development of effective equality strategies at national and local level.
- Addressing the specific situation and experience of those within the nine grounds faced with additional barriers of poverty and exclusion.
- Maintaining and developing the internal structures and systems of the Equality Authority.

In addition to this the government, in January 2005, launched the National Action Plan Against Racism, this aims to provide strategic direction to combat racism and to promote the development of a more inclusive, intercultural society in Ireland. This plan highlights five key points to this end, they are: Protection, Inclusion, Provision, Participation, and Recognition.⁴¹¹ This action plan is intended to follow on from the 'Know Racism' campaign. This aim of this scheme is to enable organisations to raise awareness about racism and to highlight cultural diversity in Ireland. This grant scheme was organised in association with the National Consultative Committee on Racism and Interculturalism.⁴¹² The Irish government also launched a National Disability Strategy which comprises four elements: The Disability Bill 2004; the Comhairle (Amendment) Bill 2004;⁴¹³ Six Outline Sectoral Plans published by six Government Departments as provided in the Disability Bill 2004; and a multi-annual Investment Programme for high priority disability support services, the details of which were announced in Budget 2005. It should be noted that the disability sector have expressed some concern about the provisions of the Disability Bill 2004.⁴¹⁴ The Department of Justice, Equality & Law Reform also produced a discussion document on the employment issues that arose from the Directives and invited submissions from other Government Departments, the social partners, the Equality Tribunal and the Equality Authority.⁴¹⁵

⁴⁰⁹ Submissions were received from some 40 organisations, including: Age and Opportunity, Pavee Point, Irish Refugee Council, Catholic Youth Care, PAUL Partnership, Muscular Dystrophy Ireland, Senator Norris, St., Anne's Service, Sunbeam House Services, Dublin City Council, Citizens Information Centre, Threshold, Social and Resource Centre, Bantry Integrated Development Group, Retired Teachers Association, Summerhill Active Retirement Group, Alzheimer's Society of Ireland, Diane Richards-Huges, New Moon Project, Meitheal Mhaigheo Teo to name some of the organisations.

⁴¹⁰ http://www.equality.ie/cgi-local/search/doc_search.cgi?step=details&docid=58

⁴¹¹ <http://www.justice.ie/80256DFD00637EE0/vWeb/pcSSTY5UBER3-en> It should also be noted that some concern has been expressed about this project. See http://www.irishrefugeecouncil.ie/press05/action_plan.html as an example.

⁴¹² This committee was established by the Department of Justice, Equality and Law Reform in 1998, the committee consists of members of government departments, agencies and non-governmental organisations.

⁴¹³ The purpose of the Bill is to amend the Comhairle Act 2000 so as to confer enhanced and additional functions on Comhairle involving, *inter alia*, the introduction of a personal advocacy service specifically aimed at people with disabilities. This advocacy service proposed is quite limited in its remit, in that it relates only to people who may come within the restrictive definition of disability given, and having regard to the resources of the organisation Comhairle. It was intended that the Bill would also provide for the introduction of a sign language interpretation service, but that did not occur and it is now proposed that a sign language interpretation service would be provided by way of an administrative scheme.

⁴¹⁴ The web sites following highlight some of the responses from a variety of disability organisations. A public meeting has been called by the disability community to highlight problems and concerns with the national disability strategy, and particularly with the Disability Bill 2004. <http://www.irishhealth.com/?level=4&id=6539>
<http://www.namhi.ie/legislation/documents/ResponseofnamhitoDisabilityBill2004-Final.doc>
<http://www.ihrc.ie/home/wnarticle.asp?NID=105&T=N&Print=>

⁴¹⁵ Race Summary of June 2004 by Dave Ellis

8.2 Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

a) *Are there mechanisms to ensure that contracts, collective agreements, internal rules of undertakings and the rules governing independent occupations, professions, workers' associations or employers' associations do not conflict with the principle of equal treatment? These may include general principles of the national system, such as, for example, "lex specialis derogat legi generali (special rules prevail over general rules) and lex posteriori derogat legi priori (more recent rules prevail over less recent rules).*

b) *Are any laws, regulations or rules contrary to the principle of equality still in force?*

The Employment Equality Act 1998-2004 provides that 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.⁴¹⁶ 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.⁴¹⁷ While it is the case that discriminatory clauses are not valid, the reality is that this fact may only be established through litigation. Were the Equality Tribunal to determine that the clause in question is contrary to the legislation, then that part of the collective agreement/contract cannot be enforced and must be modified. The legislation does not contain a mechanism aimed at a review of collective agreements, or other rules.

Section 13 of the Employment Equality Act 1998-2004 prohibits discrimination by professional or trade organisations. There are no specific laws or regulations in force that are contrary to the Directives there are however, a number of provisions of the Equality legislation that may not be in compliance with the Directives.⁴¹⁸ The major concern remains section 14(a)(i) of the Equal Status Act 2000-2004 as this provides that nothing in that Act will prohibit any action taken under any enactment. Therefore this provision ensures that the Equal Status Act 2000-2004 remains subordinate to other legislative enactments.

Section 28 of the Disability Act 2005 is about access to information. This provides that where a public body communicates with one or more persons then as far as is practicable the contents of the communication should be made in an accessible format. This relates to oral, written and electronic communication. The public body is also required, as far as is practicable, to ensure that information published which contains information relevant to persons with intellectual disabilities, is in clear language that is easily understood.

9. OVERVIEW

The most pressing concern in respect of both the Equality Authority and The Equality Tribunal relates to their budgets and the issue of decentralisation. The Government has announced its intention to de-centralise much of the civil service. As members of the Equality Authority and the Equality Tribunal are civil servants they may be decentralised. Currently the Equality Authority is housed in Dublin, and while it is not ideal that the Authority is only situated in Dublin, Dublin is the most accessible venue in Ireland. It is proposed to move the Equality Authority to Roscrea. Roscrea is not serviced by a train service; the nearest Airport (Shannon) is 96km away, which is not serviced by a train link. There is a daily bus service from Dublin. This inaccessibility is a serious concern, but will have a disproportionate impact on certain groups, such as asylum seekers and people with disabilities. It is clear from conversations with staff of the Equality Authority that very few

⁴¹⁶ Section 30 Employment Equality Act 1998-2004

⁴¹⁷ Section 9 Employment Equality Act 1998-2004

⁴¹⁸ See section 0.2 above.

members intend to transfer to Roscrea, there is therefore likely to be a loss of corporate memory, but of more concern relates to the loss of key personnel. The board of the Equality Authority are politically appointed and while to date this has not negatively impacted on the independence of the Equality Authority, this independence may be largely down to certain personnel within the Equality Authority. The Equality Act 2004 also altered how the Chief Executive Officer is appointed, the Minister having a much greater involvement than had previously been the case.⁴¹⁹ There are general concerns in respect of the Budget. There is a general increase in the number of people taking cases and in seeking assistance from the Equality Authority they have a considerable backlog of case files. All of these increases in the Equality Authority's workload have not been accompanied by a parallel increase in budget.

The Equality Authority has for a number of years raised a number of concerns that act as disincentives to claimants. These include:

- The risk of incurring costs in the Circuit Court acts as a disincentive to claimants to either pursue or defend appeals under the Equal Status Act 2000-2004.
- The risk of incurring costs in the District Court acts as a disincentive to claimants to pursue a claim in respect of licensed premises under the Intoxicating Liquor Act 2003.
- The failure of public bodies to respond to complaints reduces the chances of the matter being resolved amicably.
- Section 21 of the Equal Status Act 2000-2004 obliges potential claimants to notify a potential respondent within two months of the nature of the allegation and the claimant's intention to seek redress under the Act, this means that first contact is a threat of litigation and reduces the chances of the matter being resolved amicably.
- The imposition of a ceiling on compensation ensures that compensation awards are low. This coupled with delays, and in some instances the risk of incurring costs act, and low level awards all act as a disincentive for potential claimants.
- In the Equality Tribunal parties to the action may protect their anonymity. But claimants are reluctant to initiate cases or process appeals because of the potential publicity. This is particularly a concern in respect of sexual orientation discrimination and disability discrimination (particularly mental health and learning disability).

The Equality Tribunal also has specific concerns in respect of its budget, many of these issues are mentioned in section 7 above. Briefly they include a significant extension of the mandate of the Tribunal, a large increase in workload, and these changes have not been reflected by significant increases in their budget. The transfer of dismissal claims to the Equality Tribunal means that inevitably with the current delays, the remedy of reinstatement is far less likely.

There are also concerns in respect of de-centralisation. It is proposed to move the Equality Tribunal to Portarlinton⁴²⁰ a town poorly serviced by public transport. The concerns in respect of de-centralisation relate to the backlog of cases, which is significant. As a result of decentralisation it is estimated that there will be a significant turnover in equality officers and support staff therefore the difficulty in dealing with the current backlog is increased. The Tribunal estimate that it takes 18 months at a minimum for an equality officer to be able to handle a case load therefore with a significant number of new staff this will impact negatively on both employment cases and mediation cases. This is further compounded by the fact that

⁴¹⁹ Section 51 Employment Equality Act 1998-2004

⁴²⁰ The Tribunal conducts hearings throughout the country, so the move itself is less concerning than that of the Equality Authorities.

there is no provision for an interim hearing and interlocutory orders pending full hearing of the case.

The Tribunal state on this issue ‘a substantial turnover of equality officers is virtually certain and, accordingly, this risk, in the absence of an appropriate response, is equally so.’⁴²¹ A loss of significant numbers of staff signifies a serious loss of expertise, as many of the Equality Officers have been working in such a role since the introduction of the Equal Pay Act 1974. As all in-house training was delivered by the legal advisor this is a particularly important function in light of decentralisation. There has been a failure to fill the position of Legal Advisor since it was vacated. Another issue relates to staff training: being situated in Dublin has meant that employees have been in a position to participate in relevant courses. The Tribunal state that staff have participated in Diplomas in Legal Studies, Diplomas in European Law, professional qualifications in the area of mediation and conflict resolution and 4 of the 10 Equality Officers are currently pursuing third-level legal qualifications, with one of the Mediation Officers pursuing a Masters Degree in Conflict Resolution. This becomes impossible when staff are situated so far from a city providing such education courses.

10. CO-ORDINATION AT NATIONAL LEVEL

Which government department/ other authority is/ are responsible for dealing with or co-ordinating issues regarding anti-discrimination on the grounds covered by this report?

The Department of Justice, Equality and Law Reform are responsible for co-ordinating issues regarding anti-discrimination.⁴²² This department is responsible for developing policy and a legal framework to advance equal opportunities in the area of employment, access to goods, facilities and services. It acts in liaison with both the Office of the Director of the Equality Tribunal and also the Equality Authority. This department is also the focal point for disability equality policy and legislative development. This section administers the funding for the National Disability Authority, a statutory body established to advise and assist with disability equality policy development. There is also a section with responsibility for gender equality and a childcare directorate.

Annex

1. Table of key national anti-discrimination legislation

The key national anti-discrimination legislation includes: Employment Equality Act 1998;⁴²³ Equal Status Act 2000;⁴²⁴ Equality Act 2004;⁴²⁵ Pensions Act 1990-2004;⁴²⁶ Prohibition on the Incitement to Hatred Act 1989;⁴²⁷ Unfair Dismissals Act 1977 – 1993;⁴²⁸ Intoxicating Liquor Act 2003;⁴²⁹ European Convention of Human Rights Act 2003.⁴³⁰ Other relevant legislation includes: Housing (Miscellaneous Provisions) Act 2002;⁴³¹ Housing (Traveller Accommodation) Act 1998;⁴³² Redundancy Payments Act 2003;⁴³³ Safety, Health and

⁴²¹ www.equalitytribunal.ie

⁴²² <http://www.justice.ie/80256E01003A21A5/vWeb/pcNPOK5UHLCJ-en>

⁴²³ <http://www.gov.ie/bills28/acts/1998/a2198.pdf>

⁴²⁴ <http://www.oireachtas.ie/documents/bills28/acts/2000/a800.pdf>

⁴²⁵ <http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2004/0104/default.htm>

⁴²⁶ <http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2004/0704/default.htm> and

<http://acts.oireachtas.ie/zza25y1990.1.html>

⁴²⁷ <http://acts.oireachtas.ie/zza19y1989.1.html>

⁴²⁸ <http://acts.oireachtas.ie/zza10y1977.1.html> and <http://acts.oireachtas.ie/zza22y1993.1.html>

⁴²⁹ <http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/acts/2003/a3103.pdf>

⁴³⁰ <http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/acts/2003/a2003.pdf>

⁴³¹ <http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/acts/2002/a902.pdf>

⁴³² <http://www.gov.ie/bills28/acts/1998/a3398.pdf>

⁴³³ <http://www.oireachtas.ie/documents/bills28/acts/2003/a1403.pdf>

Welfare at Work Act 1989;⁴³⁴ Education Act 1998;⁴³⁵ Education for Persons with Special Educational Needs Act 2004;⁴³⁶ and the Disability Act 2005.⁴³⁷

2. Table of international instruments

Ireland have ratified the following United Nations instruments: Charter of the United Nations; Universal Declaration of Human Rights; International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; Convention on the Rights of the Child; International Convention on Elimination of All Forms of Discrimination Against Women; Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Prevention and Punishment of the Crime of Genocide; Slavery Convention of 1926 and related instruments; Convention relating to the status of Stateless Persons; Convention relating to the Status of Refugees; convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment; Rome Statute of the International Criminal Court; Geneva Conventions on Humanitarian Law.

At the Council of Europe Level Ireland is a signatory to the following: Statute of the Council of Europe; European Convention for the Protection of Human Rights and Fundamental Freedoms; European Social Charter; European Social Charter (revised); European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; Framework Convention for the Protection of National Minorities; European Convention on the Exercise of Children's Rights.

⁴³⁴ <http://acts.oireachtas.ie/zza7y1989.1.html>

⁴³⁵ <http://www.gov.ie/bills28/acts/1998/a5198.pdf>

⁴³⁶ <http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/acts/2004/A3004.pdf>

⁴³⁷ <http://www.oireachtas.ie/viewdoc.asp?DocID=4338&CatID=87>

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Name of Country: Ireland

Date: 08-01-07

Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrative/ Criminal Law	Material Scope	Principal content
This table concerns only key national legislation; please list the main anti-discrimination laws (which may be included as parts of laws with wider scope). Where the legislation is available electronically, provide the webpage address.	Please give month / year			e.g. public employment, private employment, access to goods or services	e.g. prohibition of direct and indirect discrimination or creation of a specialised body
Employment Equality Act 1998	October 1999	Gender, Age, Race, Religion, Family Status, Disability, Marital Status, Sexual Orientation, membership of the Traveller Community	Civil Law	Public and Private employment with certain exceptions	Prohibits direct and indirect discrimination the procurement of discrimination as well as harassment and victimisation. The law also requires the provision of reasonable accommodation for people with disabilities and establishes the Equality Tribunal and the Equality Authority.

Equal Status Act 2000	2000	Gender, Age, Race, Religion, Family Status, Disability, Marital Status, Sexual Orientation, membership of the Traveller Community	Civil Law	Access to goods and services	Prohibits direct and indirect discrimination the procurement of discrimination, discrimination by association as well as harassment and victimisation. The law also requires the provision of reasonable accommodation for people with disabilities.
Equality Act 2004	July 2004	Gender, Age, Race, Religion, Family Status, Disability, Marital Status, Sexual Orientation, membership of the Traveller Community	Civil Law	Amends both the Employment Equality Act 1998 and the Equal Status Act 2000 with a view to ensuring compliance with the two Directives	Amends the definition of harassment, indirect discrimination in both the Equal Status Act and the Employment Equality Act. Amends the definition of reasonable accommodation and introduces the concept of discrimination by association into the Employment Equality Act 1998.

Pensions Act 1990-2004	2004	Gender, Age, Race, Religion, Family Status, Disability, Marital Status, Sexual Orientation, membership of the Traveller Community	Civil Law	Pensions including occupational pensions	Prohibits direct and indirect discrimination the procurement of discrimination as well as harassment and victimisation. The law also requires the provision of reasonable accommodation for people with disabilities.
Unfair Dismissals Act 1977-1993	1993	Race, colour, sexual orientation, age, membership of the Traveller community.	Civil Law	Unfair dismissals from employment	Provides remedies for dismissals that are deemed to be unfair.
Intoxicating Liquor Act 2003	2003	Gender, Age, Race, Religion, Family Status, Disability, Marital Status, Sexual Orientation, membership of the Traveller Community	Civil Law	Discrimination complaints relating to licensed premises, the provision of a service.	Relates primarily to opening hours of premises, however, it provides a jurisdictional change for the enforcement of discrimination law in the context of licensed premises
Prohibition on the Incitement to Hatred Act 1989	1989	Race, colour, nationality, religion, ethnic, or national origins, membership	Criminal Law	Criminal legislation relating to the incitement to hatred	Prohibits hate speech

		of the Traveller community or sexual orientation			
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ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Name of country: Ireland

Date: 08-01-07

Instrument	Signed (yes/no)	Ratified (yes/no)	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)	Yes	Yes		Yes	Yes in an interpretative sense, as a result of the passage of the European Convention on Human Rights Act 2003
Protocol 12, ECHR	No	No		No	No
Revised European Social Charter	Yes	Yes	Article 8(3), Article 21, Article 31(1), (2) and (3).	Ratified collective complaints protocol? Yes	No
International Covenant on Civil and Political Rights	Yes	Yes	Article 10 paragraph 2, Article 14, Article 19 paragraph 2, Article 20 paragraph 1, Article 23 paragraph 4.	Yes	No
Framework Convention for the Protection of National Minorities	Yes	Yes			No
International Convention on Economic, Social and Cultural Rights	Yes	Yes	Article 2, paragraph 2, Article 13 paragraph 2(a)	N/A	No
Convention on the Elimination of All Forms of Racial Discrimination	Yes	Yes		Yes	No
Convention on the Elimination of Discrimination Against Women	Yes	Yes			No
ILO Convention No. 111 on Discrimination	Yes	Yes		N/A	No
Convention on the Rights of the Child	Yes	Yes			No